X. Conclusion

Under the long-established standard which governs cases of this type, appellant has no valid basis to urge denial of costs to the Government. She has not substantially prevailed. The Government has proven its costs by affidavits. A cost award is authorized by statute, federal rule, and local rule. Appellant has made no showing of recalcitrance or obduracy by the government officials involved. Nor has she presented evidence of her own economic hardship or proof that paying the Government's bill will likely deter her or similar plaintiffs from filing meritorious suits in the future. I see no reason why the Government should not get its costs.

"substantially prevailed" and that all four discretionary factors, *see* note 163 *supra*, allowed an award to be made.

"Particu[l]ar[]ly in a time when our nation is seeking to stem wasteful Government spending," Judge Robinson concluded, "an order in this case requiring the Government to pay an excessive sum in attorneys' fees would be unseemly," mem. op. at 9.

HW: See Wilkey dissent, particularly fns. 171, 181 + 189 (pp. 61-65) fm

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1881

JOAN C. BAEZ, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL., APPELLEES

On Appellees' Bill of Costs

(D.C. Civil No. 76-1922)

Filed May 7, 1981

Douglas N. Letter, who was on the affidavit of costs by attorney.

Martin S. Echter, with whom *Ira M. Lowe* was on the motion in opposition to award of Appellees' bill of costs.

Before: BAZELON, *Senior Circuit Judge*, WILKEY and EDWARDS, *Circuit Judges*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Concurring opinion filed by *Senior Circuit Judge* BAZELON.

Dissenting opinion filed by *Circuit Judge* WILKEY.

EDWARDS, *Circuit Judge:* On August 25, 1980, this panel issued an opinion upholding a summary judgment of the District Court in favor of Appellees.[1] In the majority opinion, authored by Judge Wilkey, it was noted that:

> This case arises under the Freedom of Information Act (FOIA) [5 U.S.C. § 552 (1976)]. Appellant requested the Federal Bureau of Investigation (FBI or Bureau) to provide her with all information referring to her in files maintained under her name or under the names of other individuals or organizations. The Government released much of the information involved, but withheld certain materials pursuant to various exemptions to the FOIA. The district court granted summary judgment to the Government on the grounds that the materials at issue were exempt from disclosure under Exemptions 1, 3, 7(C), and 7(D) of the FOIA. On this appeal appellant contests the district court's rulings with respect to Exemptions 1, 7(C), and 7(D).

Id., slip op. at 2 (footnotes omitted).

On September 2, 1980, following the issuance of the panel decision in favor of Appellees, the Department of Justice filed an "Affidavit of Costs by Attorney" in the amount of $365.00. On September 8, 1980, Appellant filed a "Motion in Opposition To Award of Appellees' Bill of Costs," claiming that "awards of costs to the Government in FOIA cases are limited to instances where the lawsuit was 'frivolous and brought for harassment purposes.'" Appellant asserts that this is "not such a case" and, therefore, no costs should be awarded to the Government. *Id.*

[1] *Baez v. United States Dep't of Justice*, No. 79-1881 (D.C. Cir. Aug. 25, 1980).

In response, the Government simply contends that, under Rule 39(a) of the Federal Rules of Appellate Procedure, "Congress authorized recovery of reasonable costs and attorney fees by litigants who substantially prevail in actions to force release of information." Government's "Response to Appellant's Opposition to Award of Appellees' Bill of Costs," at 2. As the prevailing party on appeal, the Government claims that costs should be awarded in favor of Appellee.

The issue here posed is whether the Government, as the prevailing party on this appeal, should be granted an award of costs under Fed. R. App. P. 39 or under 5 U.S.C. § 552(a)(4)(E) of FOIA. On the record in this case, and for the reasons set forth below, we find that Appellant's original suit, seeking information pursuant to the FOIA, was not frivolous, unreasonable or without foundation. Therefore, we hold that the Government's bill of costs should be denied, and that the parties shall bear their own costs.

Since this case raises some important questions of first impression, we have set forth in detail the considerations underlying our decision.

I. BACKGROUND

Plaintiff-appellant, Joan Baez, submitted a request to the Federal Bureau of Investigation on April 27, 1976, seeking "[a]ll information or other references or materials, in whatever form or manner, referring to or directly or indirectly concerning Joan C. Baez whether filed under her name or obtainable by searching through other files or materials."[2] Having received no reply from

[2] Plaintiff's FOIA Request to Clarence Kelley, Director of the FBI (April 27, 1976), *reprinted in* Joint Appendix (J.A.) at 7. *See Baez v. United States Dep't of Justice*, No. 79-1881, slip op. at 2-3 (D.C. Cir. Aug. 25, 1980).

the Bureau other than an acknowledgment of her request,[3] Appellant filed suit in the United States District Court for the District of Columbia on October 18, 1976 to compel disclosure of the records. On February 18, 1977, the District Court granted the Government's motion to stay the proceedings pending the completion of the administrative processing of Appellant's request. By letter dated March 21, 1977, the FBI released to Appellant 365 documents from its main file, portions of which were withheld pursuant to Exemptions 1, 3, 7(C), 7(D), and 7(E).[4] Appellant appealed the nondisclosure of the withheld documents and the FBI released an additional 145 pages; however, the FBI continued to claim exemptions for the remaining documents. After searching its "see reference" files,[5] the FBI released 1,075 documents to Appellant on June 27, 1978, with portions withheld pursuant to Exemptions 1, 7(C), 7(D), and 7(E) of the Act.[6]

On November 7, 1978, after exhausting her administrative appeals, Appellant moved for summary judgment and partial *in camera* review of the documents. On December 1, 1978, the Government cross-motioned for summary judgment. At a June 25, 1979 hearing on the motions, the District Court ruled that Exemptions 1, 3, 7(C) and (D) were "properly and well-taken."[7] Appellant then appealed the judgment of the District Court, alleging error with respect to its rulings on Exemptions 1, 7(C) and 7(D). This court found no error in the District Court's rulings, and affirmed the District Court's judgment on August 25, 1980. *See Baez v. United States Department of Justice*, No. 79-1881 (D.C. Cir. Aug. 25, 1980).

The Government has now submitted to the court a bill of costs in the amount of $365.00. Appellant has opposed an award of costs on two grounds. First, Appellant argues that, under 5 U.S.C. § 552(a)(4)(E) of FOIA, an award of costs to the Government, as a prevailing party in a FOIA suit, should be limited to instances where the suit is found to be "frivolous and brought for harassment purposes."[8] Appellant contends that the present suit was not such a case. Second, Appellant argues that the amount of costs billed by the Government, $365.00 for 50 copies of its brief, is excessive when it is considered that this court only requires that fifteen copies of a brief be filed on appeal.

The Government argues in response that Rule 39 of the Federal Rules of Appellate Procedure is applicable in this case, and that that rule provides, with certain exceptions, that "costs shall be taxed against the appellant" when a judgment of the District Court is affirmed. As to the

[3] In its acknowledgement letter, the FBI indicated that, because of the "exceedingly heavy volume of FOIA requests" received in the preceding months, there would be "substantial delays in processing." Acknowledgement letter (May 14, 1976), *reprinted in* J.A. at 10.

[4] 5 U.S.C. §§ 552(b)(1), (b)(3), (b)(7)(C), (b)(7)(D), and (b)(7)(E).

[5] "See reference" files are files maintained on organizations and individuals other than the requester in which the requester's name might appear because of his or her association or contact at some time with them. *See* Second Affidavit of FBI Special Agent John C. Murphy (Sept. 12, 1978), *reprinted in* J.A. at 79.

[6] *See* Letter from Allen H. McCreight, Chief of FOI/Privacy Act Branch, FBI, to Ira M. Lowe, Attorney for Appellant (June 27, 1978), *reprinted in* J.A. at 67.

[7] Hearing Transcript, *reprinted in part in* J.A. at 170-71. This ruling from the bench was followed by a Statement of Reasons, issued July 5, 1979, in response to Appellant's "Motion for Clarification and A More Definite Statement of Reasons," *reprinted in* J.A. at 173-74.

[8] Appellant's "Motion in Opposition to Award of Appellees' Bill of Costs," filed Sept. 8, 1980, at 1.

amount of the costs claimed, the Government contends that, in light of the number of federal agencies involved, it was not unreasonable for the Government to make 50 copies of its brief. Further, the Government asserts that it has routinely claimed, and been awarded, reproduction costs for 50 copies of a brief.

II. Rule 39 of the Federal Rules of Appellate Procedure

In order to understand the interplay of Fed. R. App. P. 39 and section 552(a)(4)(E) of FOIA, an examination of the text of these two provisions is in order. Rule 39(a), which pertains to awards of costs on appeal, provides in pertinent part that:

> *Except as otherwise provided by law* . . . if a judgment is affirmed, costs shall be taxed against the appellant *unless otherwise ordered*; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered. . . .

(emphasis added). Rule 39(b), which pertains to "costs for and against the United States," states that:

> In cases involving the United States or any agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

Section 552(a)(4)(E) of FOIA, which was enacted in 1974, provides that:

> The court *may* assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(emphasis added).

Prior to the 1974 enactment of section 552(a)(4)(E) of FOIA, Rule 39(a), when read together with 28 U.S.C. § 2412 of the Judicial Code,[9] provided for the award of costs both in favor of and against Government defendants in FOIA cases. The Advisory Committee Notes to Rule 39 indicate that subsection (b), which bars cost awards for or against the United States except as allowance may be specifically made by statute, was written "at a time when the United States was generally invulnerable to an award of costs against it, and . . . [appears] to be based on the view that if the United States is not subject to costs if it loses, it ought not be entitled to recover costs if it wins."[10] However, the passage of 28 U.S.C. § 2412 in 1966 extinguished the general sovereign immunity to cost awards previously claimed by the Government, putting "the United States on the same footing as private parties with respect to the award of costs in civil cases."[11] Thus, even though section 2412 excepted from its general authorization of cost awards against the United States those cases which were "otherwise specifically provided [for] by statute," cost awards for and against the Government in FOIA cases were permitted under Rule 39(a) prior to the passage of section 552(a)(4)(E). *See, e.g., Rural Housing Alliance v. United States Department of Agriculture*, 511 F.2d 1347 (D.C. Cir. 1974).

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[9] 28 U.S.C. § 2412 provides, in pertinent part, that:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action.

[10] Advisory Committee Note to Rule 39.

[11] *Id.*

Rule 39(a) states that a prevailing party is entitled to costs "unless otherwise ordered"; it is therefore clear that the court has the discretion to order "otherwise," and deny costs to a prevailing party.[12] However, because costs are generally granted or denied summarily, without opinion, there is a dearth of judicial opinions discussing the relevant factors to be weighed in determining whether costs should be awarded in any given case. Indeed, in our examination of FOIA cases in particular, we have been able to unearth only one case decided pre-1975 with a reported opinion dealing with awards of costs under Rule 39(a).

This one case, involving a request for costs by the Government as prevailing party on appeal in a FOIA action, is *Rural Housing Alliance v. United States Department of Agriculture*, 511 F.2d 1347 (D.C. Cir. 1974). *Rural Housing* was decided prior to the passage of section 552(a)(4)(E) of FOIA. The majority in *Rural Housing* granted an award of costs to the Government, by Order and without opinion. However, then Chief Judge Bazelon wrote a separate concurring opinion to indicate "the precise grounds on which [his] concurrence rest[ed]." 511 F.2d at 1349.

In his concurrence in *Rural Housing*, Judge Bazelon highlighted two related concerns in assessing costs against a losing party. First, since taxation of costs works as a penalty, Judge Bazelon stated that such penalty should not be imposed if the action was brought in good faith—that is, unless the losing party fairly could have been expected to have known prior to instituting the

[12] "Rule 39(a) permits the court of appeals to order 'otherwise,' thus confirming the power of the court in its sound discretion to deny costs to the successful party. A like discretion is vested in the district courts under Rule 54(d) of the Rules of Civil Procedure." 9 MOORE'S FEDERAL PRACTICE ¶ 239.02[1], n.3 (1980).

litigation that his position lacked substance.[13] Thus, he opined that, to the extent that the law underlying the issues in litigation is uncertain, "it seems harsh to allow the burden of costs to fall on the party against which the uncertainties were finally resolved—at least without consideration of the interests at stake in the litigation and the effect which this burden is likely to have on the party taxed." 511 F.2d at 1350. Second, Judge Bazelon called for the court to exercise its discretion in a way that would not discourage representatives of the public good from pursuing their claims in court. He also urged that such representatives' roles in litigation—including test litigation of previously undecided legal issues—should be protected and fostered by the courts. *Id.* at 1351.

Although FOIA was passed in 1967, the concurring statement by Judge Bazelon stands as the sole pre-1975 judicial opinion dealing with awards of costs under Rule 39(a) in FOIA cases. Since there are no definitive judicial statements on the subject, it is impossible to know what measure of discretion was being exercised by the courts in granting or denying awards of costs under FOIA between 1967 and 1974. However, even though the case law is silent on this point, there can be little doubt that, pursuant to the literal language of Rule 39(a), the

[13] *Rural Housing*, 511 F.2d at 1349. Judge Bazelon cited *Chicago Sugar Co. v. American Sugar Co.*, 176 F.2d 1, 11 (7th Cir. 1949), *cert denied*, 338 U.S. 948 (1950):

> [W]here it is clear that the action was brought in good faith, *involving issues as to which the law is in doubt*, the court may in its discretion require each party to bear its own costs although the decision was adverse to plaintiff.

511 F.2d at 1349 (emphasis added by Judge Bazelon). For reasons that are hereafter made clear, we do not rely on either *Rural Housing* or *Chicago Sugar*. Both cases are noted here for background. The relevance of *Chicago Sugar* is discussed at section V. *infra*.

courts retained some discretion to determine under what circumstances an award of costs should be granted to a prevailing party.

In sum, when one considers the situation pre-1975, it is plain that there was nothing in the case law, or in any federal rule or statute, to suggest that a prevailing party in a FOIA action was entitled to an award of costs as a matter of course. It was not until the passage of the 1974 amendments to FOIA that some light was shed on the subject.

III. Section 552(a)(4)(E) of FOIA

1. *Some General Considerations*

Given the literal language of 5 U.S.C. § 552(a)(4)(E), and the related legislative history, it is clear that the passage of the attorneys fees and litigation costs amendment to the Freedom of Information Act in 1974 certainly did not reduce any equitable discretion previously exercised by the courts in awarding costs in FOIA cases. Rather, the primary change wrought by the enactment of section 552(a)(4)(E) was the adoption of a specific statutory provision ensuring that *prevailing complainants* could collect both costs and attorneys fees from the Government in FOIA actions.

There is no comparable provision in FOIA allowing for costs or attorneys fees in favor of the Government.[14] However, the legislative history indicates that Congress assumed that the courts retained the equitable power to

[14] *See generally* Freedom of Information Act And Amendments Of 1974 (P.L. 93-502), Source Book: Legislative History, Texts, And Other Documents (Source Book), House Comm. On Gov't Operations & Senate Comm. On The Judiciary, 94th Cong., 1st Sess. 153, 169-72 (1975). *See also Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704 (D.C. Cir. 1977); *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977).

award "costs to the [Government] defendant if a lawsuit is determined to be frivolous and brought for harassment purposes." *See* note 27 *infra*.

As noted above, section 552(a)(4)(E) of FOIA provides that:

> The court *may* assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(emphasis added). In enacting this provision, Congress sought to remove the potentially insurmountable barriers of court costs and attorneys fees for the average person inclined to pursue legitimate FOIA actions.[15] Furthermore, section 552(a)(4)(E) was designed to "remove the incentive for administrative resistance to disclosure requests based not on the merits of exemption claims, but on the knowledge that many FOIA plaintiffs do not have the financial resources or economic incentives to pursue their requests through expensive litigation."[16]

While the Act itself does not distinguish between attorneys fees and litigation costs, and no *specific* guidance is given for the exercise of the court's discretion in awarding litigation costs, it is not unreasonable to assume—at least at first blush—that some of the same factors affecting a court's decision on a claim for attorneys fees might also be relevant in connection with a claim for costs.[17] However, this question belies easy resolution. This is so because the usual rule in American courts is that attorneys fees will not be awarded except in specified

[15] S. Rep. No. 93-854, 93d Cong., 2d Sess. 17 (1974), *reprinted in* Source Book, *supra* note 14, 153 at 169-70.

[16] *Nationwide Bldg. Maintenance*, *supra*, 559 F.2d at 711.

[17] *See* discussion of possible factors affecting an award of attorneys fees in Source Book, *supra* note 14, at 171.

circumstances.[18] Furthermore, under section 552(a)(4)(E) of FOIA, attorneys fees run only in favor of prevailing plaintiffs (and against the Government); awards of costs, however, may be made to any prevailing party (including the Government) under Rule 39(a).[19]

Given these general considerations, we recognize that the factors to be considered with respect to a claim for an award of costs under FOIA will not always converge with the factors to be weighed in connection with a claim for attorneys fees. A prevailing plaintiff's right to attorneys fees under FOIA has been thoughtfully addressed in an opinion by Judge Tamm in *Nationwide Building Maintenance, Inc. v. Sampson*, 559 F.2d 704 (D.C. Cir. 1977). The question to be decided here pertains solely to a claim for costs.

2. *The Title VII Analogy*

While the case authority concerning awards of costs under section 552(a)(4)(E) of FOIA is still unsettled, similar language in an analogous provision of Title VII, 42 U.S.C. § 2000e(5)(k), has developed a more settled construction. Section 706(k) of the Civil Rights Act of 1964 provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

[18] *See generally Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). *See also Blue v. Bureau of Prisons*, 570 F.2d 529 (5th Cir. 1978); *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704 (D.C. Cir. 1977); *Cuneo v. Rumsfeld*, 558 F.2d 1360 (D.C. Cir. 1977).

[19] *See, e.g., Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527 (D.C. Cir. 1979) (costs awarded to Government, as prevailing party, in a FOIA action brought by Gulf & Western).

The case authority construing this provision has begun to establish a framework for analyzing claims made by different parties in Title VII litigation in light of the underlying policies and goals of the Act.

The Supreme Court's decision in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1977), was the first major opinion to note the very real distinction between prevailing plaintiffs and prevailing defendants in Title VII litigation. In *Christiansburg*, the EEOC brought an action in District Court against the defendant garment company and was defeated on the company's motion for summary judgment. The company then petitioned the court for the allowance of attorneys fees against the EEOC. The judgment of the District Court, which was affirmed by the Court of Appeals and the Supreme Court, indicated that such an award was not justified, in view of its finding that the Commission's action in bringing the suit was not "unreasonable or meritless" or "frivolous." In affirming this judgment, the Supreme Court stated:

> [T]here are at least two strong equitable considerations counseling an attorney's fee award to a prevailing Title VII plaintiff that are wholly absent in the case of a prevailing Title VII defendant.
>
> First . . . the plaintiff is the chosen instrument of Congress to vindicate "a policy that Congress considered of the highest priority." Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. As the Court of Appeals clearly perceived, "these policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant." A successful defendant seeking counsel fees under [the Act] must rely on quite different equitable considerations.

Christiansburg, 434 U.S. at 418-19 (citations omitted). From *Christiansburg* emerged the rule that while a prevailing plaintiff in a Title VII proceeding is ordinarily to be awarded attorney's fees in all but special circumstances, a prevailing defendant is to be awarded such fees only when the court, in the exercise of its discretion, has found that the plaintiff's action was "frivolous, unreasonable, or without foundation." *Christiansburg*, 434 U.S. at 421.

Although section 706(k) of Title VII appears to focus solely on awards of attorneys fees, not costs, the standards enunciated in *Christiansburg* have been carried over to guide the courts in determining cost awards in Title VII litigation. For example, in *Evans v. American Import Merchants Corp.*, 82 F.R.D. 710 (S.D.N.Y. 1979), the court disallowed the prevailing defendant's bill of costs upon a finding that the plaintiff had acted in good faith in prosecuting her claim.

In *Dual v. Cleland*, 79 F.R.D. 696 (D.D.C. 1978), after a trial on the merits, the District Court ruled in favor of the defendant and dismissed the plaintiff's claim in an action arising under Title VII. However, the court denied a motion "to amend the judgment to award costs to the defendant." 79 F.R.D. at 697. In so ruling, the District Court found that Rule 54(d) of the Federal Rules of Civil Procedure, which was relied upon by defendant, "invokes the Court's discretion" with respect to any claim for costs. *Id.* The court noted further that:

> Under Federal Rules of Civil Procedure 54(d), "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." In the Title VII area, the Court, in the exercise of its discretion, must take special considerations into account. Recently, the Supreme Court has characterized the Title VII plaintiff as "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Christiansburg*

> *Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 98 S.Ct. 694, 699, 54 L.Ed.2d 648 (1978) *quoting Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968). The Supreme Court in *Christiansburg* held that attorneys' fees should not be awarded in Title VII cases to successful defendant-employers unless the district court finds that the plaintiff's action was frivolous, unreasonable, or without foundation. *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 98 S.Ct. at 700. Similarly, the special qualities of the Title VII plaintiff shape the contours of the Court's discretion under Rule 54(d). Unless the plaintiff has brought an action that is frivolous, unreasonable, or without foundation, costs should not be imposed on an unsuccessful Title VII employee-plaintiff under Rule 54(d). In this case, the plaintiff had a good faith claim, and in the interests of justice, the plaintiff should not be forced to bear the defendant's costs.

Id.

The principle that costs may be denied to a prevailing defendant in a Title VII action is further demonstrated in *August v. Delta Air Lines, Inc.*, 600 F.2d 699 (7th Cir. 1979), *aff'd*, 49 U.S.L.W. 4241 (March 9, 1981). In *August*, an alleged victim of discrimination brought an action against her employer seeking reinstatement, back pay and benefits, attorneys fees, costs, and other equitable relief. Pursuant to Rule 68 of the Federal Rules of Civil Procedure,[20] defendant made an offer of

[20] Rule 68 provides that at any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for money or property or to the effect specified in the offer, with costs as then accrued. If the offer is refused and the judgment finally obtained is not more favorable than the offer, "the offeree must pay the costs incurred after the making of the offer." Fed. R. Civ. P. 68.

judgment in the amount of $450.00, including attorneys fees and costs. Plaintiff rejected the offer, and a 25-day bench trial followed. The trial judge ultimately found that plaintiff had failed to carry her burden of proving discrimination, and entered judgment for the defendant. The court also ordered, however, that each party should bear its own costs of litigation.

Pursuant to Rule 68, the defendant then filed a separate motion for costs incurred after the date of the Rule 68 offer of judgment. The trial court again denied the motion, and this decision was affirmed by the Seventh Circuit. Although the circuit court recognized the literal language of Rule 68 that "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree *must* pay the costs incurred after the making of the offer," 600 F.2d at 701 (emphasis added by the Seventh Circuit), the court concluded that "a liberal, not a technical, reading of Rule 68 is justified, at least in a Title VII case." *Id.* at 702. The court was unwilling to permit a technical interpertation of Rule 68 to chill the pursuit of the high objective embodied in Title VII that individuals believed to be injured by discrimination seek judicial relief.[21] In *August*, therefore, the Seventh Circuit affirmed a denial of a request for costs, made by prevailing defendant pursuant to a rule that by its terms vested *no* discretion in the court to deny costs.

On March 9, 1981, the judgment in *Delta* was affirmed by the Supreme Court. *Delta Air Lines, Inc. v. August*, 49 U.S.L.W. 4241 (1981). The Court held that Rule 68 does not apply to a case in which judgment is entered

[21] The court did not consider that defendant might have a right to costs simply because of its status as the prevailing party; the court solely considered whether the offer of judgment required the court to award costs, and concluded that even such an offer of judgment and the inflexible language of Rule 68 did not entitle the defendant to costs.

against the plaintiff-offeree and in favor of the defendant-offeror. In reaching this result, the majority opinion by Justice Stevens noted that it could not have been reasonably intended on the one hand affirmatively to grant a district judge *"discretion to deny costs to the prevailing party under Rule 54(d)"* and then on the other hand to give defendants alone the power to take away that discretion by performing a token act of making a nominal settlement offer. *Id.* at 4243 (emphasis added). Even the dissenting opinion of Justice Rehnquist acknowledges that district courts have a "traditional discretion under Rule 54 to disallow costs to the prevailing party. . . ." *Id.* at 4247. Although there are a number of additional references to Rule 54(d) in *Delta*, at the conclusion of the majority opinion, Justice Stevens makes it clear that: "although defendant's petition for certiorari presented the question of the district judge's abuse of discretion in denying defendants costs under Rule 54(d), that question was not raised in the Court of Appeals and is not properly before us." 49 U.S.L.W. 4245.

3. *Awards of Costs Under Other Federal Statutes*

The cases arising under Title VII highlight the point that, in public law litigation, a proper exercise of discretion by a court may militate against an award of costs to a prevailing defendant. As noted in *Evans v. American Import Merchants Corp.*, 82 F.R.D. 710 (S.D. N.Y. 1979):

> In *Christiansburg* the Court instructed us that while a mere finding of subjective good faith would not protect a plaintiff who had brought a groundless Title VII action, district courts should nonetheless be mindful of the congressional purpose of encouraging persons believing themselves victims of discrimination to bring their complaints to official attention. The Court therefore suggested that a good faith plaintiff might well—*although his or her com-*

plaint turned out to be groundless—be protected from the imposition of counsel fees if it could be shown that there had at some time been "an entirely reasonable ground for bringing suit." Id. at 421, 98 S.Ct. at 700.

Applying the same reasoning to costs, we think the plaintiff in the instant case should be protected from their imposition.

Id. at 711 (emphasis added; footnote omitted).

In public law litigation, a number of factors may guide the exercise of judicial discretion in the grant or denial of costs. In *County of Suffolk v. Secretary of Interior*, 76 F.R.D. 469 (E.D.N.Y. 1977), plaintiffs sued the federal government on a question of "significant public importance involving protection of the environment"[22] and their complaint was dismissed. The court, however, disallowed the Government's request for costs. Noting that plaintiffs had brought the litigation in good faith and that it had resulted in substantial benefits to the public, the court stated: "It is not winners alone who contribute to society; this is an instance where the losing litigants are entitled to some consideration for their aid to the common weal."[23] In setting out the considerations informing its exercise of discretion, the court included: (1) whether the action was brought and carried forward in good faith; (2) whether the prosecution of the action provided direct or indirect benefits to the public; (3) whether the action resulted in direct or indirect benefit to the defendants; (4) whether novel and substantial issues of law or fact were resolved; (5) whether costs were required to reimburse needy defendants; (6) whether costs would unduly burden non-affluent plaintiffs; and (7) whether the imposition of costs would unduly inhibit future similar challenges.[24]

[22] 76 F.R.D. at 471. Plaintiffs challenged the adequacy of an Environmental Impact Statement prepared by the Secretary of the Interior.

[23] *Id.*

Although the decision in *County of Suffolk* is not controlling, it is noteworthy that the decision implicitly rejects the suggestion made in the dissenting opinion here that awards of costs should be given as a matter of course to prevailing Government defendants.

IV. Standards for Costs Under FOIA

In considering the appropriate standard to be applied with respect to cost awards under FOIA, we start with a point made by Judge Tamm, in *Nationwide Building Maintenance, Inc. v. Sampson*, 559 F.2d 704 (D.C. Cir. 1977), that the basic policy underlying the FOIA is

> to encourage the maximum feasible public access to government information and the fundamental purpose of section 552(a)(4)(E) [is] to facilitate citizen access to the courts to vindicate their statutory right.

Id. at 715.

We also note that the prevailing case authority in this Circuit suggests that, in those cases where a prevailing complainant has an adequate self-incentive, especially of a commercial nature, to pursue his rights under FOIA, no attorneys fees will be awarded to the plaintiff unless the Government engages in recalcitrant or obdurate behavior.[25] Thus, despite the fact that section 552(a)(4)(E) of FOIA expressly provides for awards of attorneys fees for prevailing complainants, the courts have seen fit

[24] 76 F.R.D. at 478.

[25] *See Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704 (D.C. Cir. 1977); *LaSalle Extension University v. Federal Trade Commission*, 627 F.2d 481 (D.C. Cir. 1980).

to exercise discretion to deny fees to prevailing parties in furtherance of legitimate public policy considerations.

While we need not decide the question here, we believe that a court should rarely deny a reasonable request for costs in those cases where the *prevailing plaintiff* has no "confessed commercial self-interest."[26] Where, for example, as in this case, an action is brought to obtain information pertaining to the personal or professional activities of the plaintiff, no good reason appears to deny an award of costs to a *prevailing* plaintiff. Likewise, where it is found that a prevailing plaintiff has pursued an action under FOIA that will benefit the public good, costs should normally be awarded. These cases should be distinguished from cases involving claims for attorneys fees, where other relevant considerations may be determinative. *See, e.g., Nationwide Building Maintenance, Inc. v. Sampson*, 559 F.2d 704 (D.C. Cir. 1977).

We also believe that, as a general matter, costs should be awarded to the Government as a *prevailing defendant* in those cases where the plaintiff has pursued an action under FOIA primarily in furtherance of strictly commercial ends. *See, e.g., Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527 (D.C. Cir. 1979).

In those cases where the *defendant has prevailed* in an action brought under FOIA not in furtherance of strictly commercial ends, different considerations come into play. As Judge Bazelon suggested in *Rural Housing, supra*, a rule should be followed that requires "the court to exercise its discretion in a way which will not discourage representatives of divergent aspects of the public

[26] *Cf. LaSalle Extension University v. Federal Trade Commission*, 627 F.2d 481 (D.C. Cir. 1980) (recognizing "commercial self-interest" as one of several factors to be weighed in a case involving a claim for attorneys fee under FOIA).

good from pursuing their claims in court." 511 F.2d at 1350. This suggestion is perfectly consistent with judicial decisions that have denied costs to prevailing defendants where plaintiffs have pursued public policy interests that Congress has sought to encourage. *See Evans v. American Import Merchants Corp.*, 82 F.R.D. 710 (S.D.N.Y. 1979); *Dual v. Cleland*, 79 F.R.D. 696 (D.D.C. 1978); *County of Suffolk v. Secretary of Interior*, 76 F.R.D. 469 (E.D.N.Y. 1977). What is particularly noteworthy about these cases is that they have involved claims for costs made by prevailing defendants *under the federal rules*. In rejecting these claims the courts have exercised discretion in such a manner as to avoid discouraging the prosecution of public interest litigation.

The significance of these decisions is that courts have recognized that, when issues of public importance may be at stake, it is reasonable to distinguish between prevailing plaintiffs and prevailing defendants in determinations of claims for costs. We think that this same policy should prevail under FOIA.[27] When plaintiffs have sued

[27] In a handful of opinions construing Fed. R. Civ. P. 54(d), it has been held that there is a "presumption that the prevailing party is entitled to costs," and that "the presumption . . . can only be overcome by the unsuccessful party's showing that the prevailing party should be penalized by a denial of costs." *Popeil Bros., Inc. v. Schick Electric, Inc.*, 516 F.2d 772, 776 (7th Cir. 1975) (action for patent infringement involving two private parties and no governmental litigant). However, in a case such as this, involving the enforcement of strong public interest considerations embodied in a specific congressional act, this "penalty" standard is plainly inappropriate. *See* discussion at part 2 of section V *infra*. As recognized in the legislative history to the 1974 FOIA amendments:

> the necessity to bear attorneys' fees and court costs can . . . present barriers to the effective implementa-

under FOIA, without "confessed commercial self-interest," in a suit that is not frivolous, unreasonable or without foundation, a court may properly require each party to bear its own costs. As was noted by Judge Bazelon in *Rural Housing*, *supra*:

> This approach is premised on the proposition that the taxation of costs works as a penalty, which should not be imposed unless the loser can fairly be expected to have known at the outset that his position lacked substance.

511 F.2d at 1349.

It is true that in *Rural Housing* costs were awarded to the Government as prevailing defendant. However, as noted above, *Rural Housing* was decided before the 1974 amendments to FOIA and the only opinion in that case is a concurring statement by Judge Bazelon. Since there is no definitive case law dealing with requests for costs during the period before the enactment of the 1974 amendments to FOIA, it is impossible to know what measure of discretion was being exercised by the courts in the pre-1974 FOIA cases. Nevertheless, it is clear that the 1974 amendments were designed to facilitate the receipt of costs by prevailing *complainants* in actions under FOIA against the Government. It is also clear from

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tion of national policies expressed by the Congress in legislation.

SOURCE BOOK, *supra* note 14, at 170. The legislative history does contemplate awards of costs to the Government, as prevailing defendants in FOIA actions, but only in limited circumstances:

> Courts have assumed inherent equitable powers to award fees and costs to the defendant *if a lawsuit is determined to be frivolous and brought for harassment purposes*; this principle would continue, as before, to apply to FOIA cases.

Id. at 172 (emphasis added).

the legislative history that Congress assumed that the courts retained the equitable power to award "costs to the [Government] defendant if a lawsuit is determined to be frivolous and brought for harassment purposes." *See* note 27 *supra*. There is nothing in the statute, however, to suggest that the Government, as a prevailing defendant, should receive costs as a matter of course. Nor is there anything in the federal rules to require such a result.

Therefore, since it would frustrate the purposes of the statute to award costs to Government defendants when a plaintiff has acted without confessed commercial self-interest, in a suit that is not frivolous, unreasonable or without foundation, we deny the request for costs in this case. In deciding this issue, we stress that we are focusing only on a limited situation involving a request for *costs* by a prevailing Government defendant under FOIA.

V. SOME OBSERVATIONS ABOUT THE DISSENTING OPINION

Given the length of the dissenting opinion, it will serve no useful purpose to offer a detailed response to the points therein raised. The majority and dissenting opinions plainly reflect fundamentally different views on the same issue; nothing more need be said to amplify these differences.

A few additional points may be in order, however, to comment on certain general suggestions made by the dissent and to highlight the limited reach of the holding of the majority.

1. Throughout the dissenting opinion, the suggestion is made that costs have been awarded routinely to the Government by appellate courts in FOIA cases in which the Government has been the prevailing party. This may or may not be true. However, only one pre-1975 case—

Rural Housing Alliance v. United States Department of Agriculture, 511 F.2d 1347 (D.C. Cir. 1974)—is cited by the dissent to support this contention. As we have noted, *Rural Housing* cannot be viewed as a definitive statement of the law because the sole judicial opinion in that case is a concurring statement by Judge Bazelon. More importantly, so far as we have been able to discover, there have been only three FOIA cases since 1974 in which there have been rulings on *contested* motions for costs made by Government defendants prevailing on appeal. In two such cases, *Weisberg v. Central Intelligence Agency*, No. 79-1729 (D.C. Cir. July 14, 1980) (order denying appellee's bill of costs) and *Lesar v. United States Department of Justice*, No. 17-2305 (D.C. Cir. Sept. 3, 1980) (order that no costs shall be awarded in favor of appellee) (panel consisting of Judges Bazelon, Wilkey and Edwards), the Government was denied costs despite the fact that it was the prevailing party; in the third case, *Hayden v. National Security Agency*, No. 78-1728 (D.C. Cir. July 8, 1980) (order denying appellant's motion for reconsideration of award of bill of costs), the Government was granted costs. Not surprisingly, the dissenting opinion attempts to distinguish *Lesar*; however, since there is no opinion for the court in *Lesar* on the issue of costs, no *post hoc* explanation of the decision is possible.

2. The dissent places great reliance on *Chicago Sugar v. American Sugar Co.*, 176 F.2d 1 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950) (involving a claim for costs under Rule 54(d)), for the proposition that costs should be denied to a prevailing party only as a penalty for bad faith, obduracy, or recalcitrance that has caused an unnecessary escalation of litigation costs. We take issue with the suggestion that *Chicago Sugar* supplies the standard that should be applied in the present case.

We do not believe that *Chicago Sugar* has established a universally applied standard governing awards of costs to prevailing parties. As the dissent itself makes clear, *Chicago Sugar* suggests at least two standards and has been relied on for varying propositions. In *Union Industrielle et Maritime v. Nimpex International, Inc.*, 459 F.2d 926 (7th Cir. 1972), the Seventh Circuit recognized the vitality of each of these standards:

> As the prevailing party in the in rem claim for enforcement of lien, which was the substantial part of this litigation, Nimpex was entitled to its costs, absent a finding of some fault on its part, Chicago Sugar Company v. American Sugar Refining Company, 7 Cir., 1949, 176 F.2d 1, 11, or a determination that the action was brought in good faith involving issues on which the law was in doubt, where the Court might leave each party to bear its own costs.

459 F.2d at 931. Three years after the decision in *Union Industrielle*, in *Popeil Brothers, Inc. v. Schick Electric, Inc.*, 516 F.2d 772 (7th Cir. 1975), the Seventh Circuit changed course and adopted the formulation proposed by the dissent. Thus the Seventh Circuit itself has vacillated in this area.[23]

[23] Other courts have considered awards of costs to a prevailing party without any discussion of the "penalty" standard of *Chicago Sugar*. In *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), the Supreme Court appeared to have a very different notion of awards of costs under Rule 54(d). In *Farmer*, the Supreme Court affirmed a decision of District Judge Weinfeld that had reduced an award of costs to a prevailing defendant from $11,900.12 to $831.60. While certain of the expenses incurred in that case were unusual, the Supreme Court affirmed the disallowance of such costs without any suggestion that the defendant had acted with bad faith, obduracy, or recalcitrance. Instead, the Court implied, in a tone very different from that in *Chicago Sugar*, that certain litigation expenses could be incurred by a party that nevertheless should not be imposed on a defeated opponent. 379 U.S. at 235.

We need not decide in this case, however, whether the "penalty" standard of *Chicago Sugar* should be adopted in this Circuit. All of the cases that have cited this standard have involved litigants engaged in traditional civil litigation. The critical point made in the majority opinion is that this is not a case of private litigants engaged in traditional civil litigation.

Moreover, it is far from clear that the Seventh Circuit itself would apply *Chicago Sugar* in the present context. As developed at length above, in *August v. Delta Air Lines, Inc.*, 600 F.2d 699 (7th Cir. 1979), *aff'd*, 49 U.S.L.W. 4241 (March 9, 1981), the Seventh Circuit affirmed a denial of costs to a prevailing defendant in a Title VII action, despite the fact that the request for costs was made pursuant to a rule that by its terms allowed the court no discretion to deny costs. The court in *August* made no mention of the "presumption" that costs should be awarded to the prevailing party unless to "penalize" that party, as suggested in *Chicago Sugar* and *Popeil Brothers, Inc. v. Schick Electric, Inc.*, 516 F.2d 772 (7th Cir. 1975). We think that the case is noteworthy because it suggests that the Seventh Circuit may consider different factors in awarding costs in situations involving strong public interest concerns, which is exactly the point we are making in this case.

We believe that the public interest incorporated in the Freedom of Information Act, in part demonstrated by the special attorneys fees and costs section of that statute, militates in favor of the standard that we have set forth in this case. Congress expressed in FOIA a strong concern that individuals have access to certain information contained in Government files. To facilitate this right of access, Congress incorporated certain incentives into the statute to encourage individuals to pursue statutorily-created rights. For example, an applicant is not blocked by an agency refusal to disclose information; Congress

provided for broad *de novo* review of agency action in District Court. In addition, Congress upset traditional rules governing awards of attorneys fees to allow successful litigants to receive such awards from the Government.

In denying the Government costs in actions in which it has prevailed on appeal, we seek to maintain the incentive for individuals to raise legitimate challenges to agency refusals to disclose information, while imposing only a minimal burden on the Government. As developed in our opinion, this result is consistent with the legislative history underlying the 1974 amendments to FOIA and other cases in which costs have been denied to a prevailing defendant because the plaintiff had pursued public policy interests that Congress sought to encourage. Courts have denied costs to prevailing defendants in Title VII actions, for no other reason than to promote the prosecution of such claims. *See Evans v. American Import Merchants Corp.*, 82 F.R.D. 710 (S.D.N.Y. 1979); *Dual v. Cleland*, 79 F.R.D. 696 (D.D.C. 1978). Similarly, in *County of Suffolk v. Secretary of Interior*, 76 F.R.D. 469 (E.D.N.Y. 1977), costs were denied to a prevailing defendant in litigation involving questions of significant public importance concerning the protection of the environment. In these cases, public and private parties have been forced to bear the modest burden resulting from the prosecution of legitimate claims in the public interest.

We believe that similar considerations govern the standard to be applied in awarding costs in FOIA actions. Thus, we believe that the "penalty" standard of *Chicago Sugar* should not be applied in FOIA actions in which the Government is the prevailing party;[29] rather,

[29] *See Schaulis v. CTB/McGraw-Hill, Inc.*, 496 F.Supp. 866 (N.D. Cal. 1980), wherein the court expressly rejects the "penalty" standard of *Popeil Bros.* and *Chicago Sugar* in denying costs to a prevailing defendant in a suit arising

costs should be denied to the Government if the plaintiff's claim has been pursued without confessed commercial self-interest, in a suit that is not frivolous, unreasonable, or without foundation.

VI. Conclusion

In the instant case the plaintiff brought an action to obtain all information referring to her in files maintained in her name or under the names of other individuals or organizations. There is no evidence to indicate that plaintiff's suit was frivolous, unreasonable or without foundation. *Indeed, it was only after she had filed her suit in District Court that she obtained over one-thousand pages of documents bearing her name.* In addition, as the original opinions of this panel indicate, numerous difficult and important issues were raised by plaintiff's challenges to the Government's claims that

under Title VII. Even the decision in *Maldonado v. Parasole*, 66 F.R.D. 388 (E.D.N.Y. 1975), which is heavily relied upon by the dissent, does not adopt the "penalty" standard of *Chicago Sugar*. In *Maldonado*, costs were awarded to a prevailing defendant in a "civil rights action" (for alleged illegal assault and arrest). The trial judge found that "the case was not a 'close' one;" both parties were indigent; there was some evidence to suggest that plaintiff's suit was "frivolous and malicious;" and "plaintiff rejected a settlement offer which would have provided him with a cash payment causing defendant's family severe hardship." *Id.* at 390-91. In addition, the trial judge expressed concern over the fact that plaintiff had had access to legal aid counsel, not available to defendant, thus giving plaintiff a "free ride" which may have "contributed to the failure of the parties to reach a settlement." *Id.* at 391. The court added that "in such a situation," legal aid "counsel, because they serve without fee, are in the unenviable position of being manipulated by possibly vindictive clients who they cannot in good conscience abandon and who feel no economic pressure to come to a reasonable settlement." *Id.* When *Maldonado* is read with these facts in mind, it can hardly be argued that the trial judge abused his discretion in awarding costs to the prevailing defendant.

certain documents could properly be withheld pursuant to various exemptions to the FOIA. The issues raised on appeal resulted in a 26-page slip opinion, including 78 footnotes, plus a separate concurring opinion, to dispose of Appellant's case. None of the many issues raised was deemed to be frivolous.

Since we find that Appellant's appeal was not frivolous, unreasonable or without foundation, we hereby deny the Government's request for costs in this case.[30] Each party shall bear his own costs.

So ordered.

[redacted]

[30] We would note, as did the Supreme Court in *Christiansburg, supra*, that "it is important that a . . . court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success." 434 U.S. at 421-22.

BAZELON, *Senior Circuit Judge, concurring*: I join fully in all aspects of the opinion of Judge Edwards. I write this statement merely to highlight what I believe to be of greatest significance.

Rule 39(a) of the Federal Rules of Appellate Procedure provides that costs should be awarded to a prevailing party on appeal "unless otherwise ordered." In my long tenure as a member of this court, Rule 39(a) consistently has been interpreted to afford appellate judges discretion to deny costs to a prevailing litigant. That interpretation should surprise no one; the Rule itself makes this plain.

In my opinion, that discretion properly may be exercised to deny costs to the Government in an action brought to vindicate rights established by Congress in the Freedom of Information Act, an Act designed to encourage the maximum feasible public access to Government information. Hence, I cannot accept the view of our dissenting brother that costs *must* be awarded to a prevailing defendant in a FOIA action, unless the court acts to "penalize" the defendant or the plaintiff demonstrates indigency. Such a rule would divest this court of virtually all discretion under Rule 39(a), and prevent it from giving effect to significant public policy interests embodied in the Freedom of Information Act.

Accordingly, I concur.

OUTLINE

WILKEY, *Circuit Judge*, dissenting: At first blush, this case involves only $365, the cost of printing fifty copies of the Government's appellate brief in *Baez* v. *United States Dep't of Justice*.[1] Before today, the Government would have been routinely entitled to that modest sum as partial reimbursement for costs it necessarily expended in defending against plaintiff's unsuccessful lawsuit and unsuccessful appeal. Treating this case as one of first impression, however, Judges Edwards and Bazelon today deny those costs to the Government by invoking our "traditional discretion" over costs and the "significant public policy interests embodied in the Freedom of Information Act."[2] Henceforth, they hold, so long as a plaintiff has "acted without confessed commercial self-interest, in a [FOIA] suit that is not frivolous, unreasonable or without foundation,"[3] the Government must bear *the litigation costs it has involuntarily incurred in successfully defending that suit, even when it has won summary judgment and had that judgment affirmed "in all respects"*[4] *on appeal.*

I must dissent. This is not a case of first impression. Since the earliest days of the common law, losing litigants have reimbursed prevailing parties for necessary and reasonable litigation costs.[5] Unlike judicial awards of *attorneys' fees*, courts have traditionally viewed assessment of *costs* against parties who have not substantially prevailed as part of the price of unsuccessful litigation.[6]

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[1] No. 79-1881 (D.C. Cir. 25 Aug. 1980).

[2] Majority opinion (maj. op.) at 17, 26-28; concurring opinion at 1.

[3] Maj. op. at 23.

[4] *Baez* v. *United States Dep't of Justice*, No. 79-1881, slip op. at 2 (D.C. Cir. 25 Aug. 1980).

[5] *See* PART II, *infra*.

[6] *Id.* For the Supreme Court's most recent reiteration of this view, *see Delta Air Lines, Inc.* v. *August*, 49 U.S.L.W. 4241, 4242 (9 Mar. 1981) ("Because costs are usually

When an unsuccessful party is capable of paying costs, "the presumption that the prevailing party is entitled to costs can only be overcome by the unsuccessful party's showing that the prevailing party should be *penalized* by a denial of costs." [7] In the absence of such a showing, courts properly exercise their discretion by awarding costs to the winner.[8]

This common-law principle, now formalized in Fed. R. App. P. 39(a), has governed all civil actions. Unless directed otherwise by statute, appellate judges have exercised their discretion under rule 39(a) in accordance with this principle.[9] Congress has expressed no intent to alter that practice in Freedom of Information Act (FOIA) cases.[10] When losing plaintiffs have made no showing that the Government has been recalcitrant or obdurate in resisting their FOIA claims, or that they cannot pay the costs of unsuccessful litigation they have voluntarily undertaken, federal taxpayers should not be required to bear those costs in their stead.[11]

There should be no mistake about what is happening today. I believe that the majority is changing the law in a manner recently denounced by the Supreme Court.[12] It replaces a well-settled rule for awarding costs with a new, unworkable, and expensive standard.[13] That stand-

assessed against the losing party, liability for costs is a normal incident of defeat.").

[7] *Popeil Bros.* v. *Schick Elec., Inc.*, 516 F.2d 772, 776 (7th Cir. 1975) (emphasis added).

[8] *See* Part III. *infra.*

[9] *See* Part IV. *infra.*

[10] *See* Part V. *infra.*

[11] *See* Parts VI.-VII. *infra.*

[12] *See* Part VIII. B. *infra.*

[13] *See* Part IX. *infra.*

ard is unauthorized by the FOIA, unnecessary to further that statute's purposes, and unjustified by any relevant statute, rule, or precedent. Yet neither Judge Edwards' majority opinion nor Judge Bazelon's brief concurrence systematically analyzes—or even acknowledges—the myriad historical, legal, and practical obstacles to their new rule.

In the opinion which follows, I attempt to give comprehensive treatment to the legal, historical, and practical concerns raised by today's decision. Until this case, such detailed and systematic treatment has not been necessary —established practice regarding costs has been so clear that cost awards have been handled routinely. As a result, few published opinions in this or any other circuit has elaborated on the proper source, scope, and standard for judicial exercises of discretion over cost awards.

The amount in controversy here is small, yet in this court the issues now disputed recur almost daily. The sum involved in any single case is never large, but in the aggregate—especially for the Government as prevailing defendant—the stakes are enormous. What the majority does here will cost and cost—and cost.

I. Analysis

I have no quarrel with the majority's recitation of the history of this case.[14] Nor do I challenge its uncontroversial statement of the issue to be resolved on this motion.[15] I do believe, however, that Judges Edwards and Bazelon have analyzed that issue in a way that predetermines their result.

[14] Maj. op. at 3-6.

[15] Judge Edwards correctly identifies the issue to be resolved as "whether the Government, as the prevailing party on this appeal should be granted an award of costs under Fed. R. App. P. 39 or under 5 U.S.C. § 552(a)(4)(E) of FOIA," *id.* at 3.

One premise lies at the heart of both the majority and the concurring opinions: that we can deny the Government its costs in this case simply because courts have traditionally possessed "discretion" over cost awards.[16] I believe that premise should have been the beginning, rather than the end, of analysis. *The issue here is not whether discretion exists, but whether it has limits, and if so, what those limits are.* The overwhelming weight of precedent indicates not only that limits exist, but that they are exceedingly well-defined. Those limits are best understood by distinguishing among three distinct aspects of "discretion"—the *source* of our discretion over costs, the *scope* of that discretion, and the *standard* by which that discretion is properly exercised.

I argue below that the *source* of our discretion in this case is not the *statutory* discretion to award fees and costs to substantially prevailing plaintiffs provided us by the FOIA,[17] but rather, the equitable discretion over costs which courts possessed at common law, now formalized in Fed. R. App. P. 39(a). Under rule 39(a) we have traditionally *refused* to exercise our discretion to deny costs to prevailing defendants *unless the losing plaintiff has overcome a heavy presumption favoring such an award.* By denying costs here despite plaintiff's failure to rebut that presumption, the majority has exceeded the narrow *scope* of our rule 39(a) discretion in this case. I further argue that, even if the majority had properly invoked our discretion here, it should not have exercised that discretion according to a totally new *standard* adopted just for FOIA cases. Rather, it should have applied the standard long governing such exercises in all civil actions.[18]

[16] *Id.* at 8 & n. 12; concurring opinion at 1.

[17] 5 U.S.C. § 552(a)(4)(E) (1976). *See* Part V. *infra*.

[18] For further illustration of the interplay between the concepts of source, scope, and standard of discretion, *see* Part VIII. A. 2. *infra*.

I begin this opinion by challenging the majority's bold assertion that, prior to 1975, "there was nothing in the case law, or in any federal rule or statute, to suggest that a prevailing party in a FOIA action was entitled to an award of costs as a matter of course." [19] Parts II, III, and IV below review the massive weight of authority arrayed against that categorical assertion.[20] Parts V and VI then demonstrate that the 1974 fees and costs amendment to the FOIA effected absolutely *no change* in the law governing cost awards to prevailing FOIA appellees. The language and legislative history of the amendment itself, as well as appellate practice *after* the amendment passed, show Congress never intended either to broaden the *scope* of our discretion to deny FOIA costs or to change the traditional *standard* for such discretionary denials.[21]

The last three Parts of this opinion directly challenge the novel *standard* which the majority has erected to

[19] Maj. op. at 10.

[20] Part II. illustrates that the majority has unjustifiably dismissed the powerful common-law presumption, now formalized in Fed. R. App. P. 39(a), favoring awards of costs to prevailing litigants in civil actions. Part III. A. demonstrates how the powerful presumption favoring cost awards to the victors greatly narrows the *scope* of our discretion to deny such awards. Part III. B. describes the traditional *standard* by which we have exercised that narrow discretion. Part IV reveals that, before the 1974 FOIA amendments, courts *did not* exercise their narrow discretion by denying costs more liberally in FOIA cases, despite the fact that the Government was always the prevailing defendant in FOIA cases. Part IV. A. *infra*, and despite the fact that FOIA has always served a significant public interest in disclosure, Part IV. B. *infra*.

[21] Part V. proves that the plain language and legislative history of the 1974 amendment evidenced congressional intent only to grant courts discretion to award attorneys' fees and costs to *substantially prevailing FOIA plaintiffs*. Part VI. confirms that, even after 1974, courts continued to make routine awards of *costs to prevailing FOIA appellees*.

govern future exercises of judicial discretion in cases of this type. Lacking support from either FOIA case law or legislative history, the majority has resorted to general statements of public policy and inapposite analogies to other statutes to extract its rule. With all due respect, I submit that Judges Edwards and Bazelon have simply fashioned this new standard from whole cloth.

Part VII shows why a different standard for awarding costs is unnecessary to effectuate the goals of the FOIA. Under the traditional standard for awarding costs, courts would deny costs to the Government *in the only two circumstances in which an award would truly frustrate the purposes of that statute*—when unsuccessful plaintiffs have proven either (1) their inability to pay costs, or (2) undue Government recalcitrance or obduracy in defending a claim which unnecessarily escalates the costs of that lawsuit.

Part VIII argues that the majority's creation of a new judicial standard to govern FOIA costs flies in the face of the Supreme Court's ruling in *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*.[23] That case denies the lower courts power, absent express congressional authorization, to fashion "drastic new rules" governing fees and cost awards in public law litigation. Finally, Part IX proves that the majority's standard is not only novel, but also unworkable; the flaws inherent in it are evidenced by its summary application to the facts of this case. Unfortunately, federal taxpayers will bear the consequences of the majority's errors.[25]

[23] 421 U.S. 240 (1975).

[25] In his majority opinion, Judge Edwards offers an unusual section commenting on, rather than rebutting, the points made in this dissent. *See* maj. op. at 23-28. I address Judge Edwards' first observation, maj. op. at 23-24, in Part VI. *infra*, and Judge Edwards' second observation, maj. op. at 24-28, in Parts III.B. & VII.-VIII. *infra*.

II. The Presumption Favoring Cost Awards to Prevailing Parties

As early as 1487, English law had provided by statute "that if a judgment be affirmed on writ of error, . . . or if the party suing it be nonsuited then *the defendant in error was to have his costs*." [24] In actions at law prevailing parties were entitled to costs as of right;[25] in actions at equity, the Chancellor had the discretion to decide whether to allow costs to the victors.[26] American courts adopted English practice in the early part of the nineteenth century, typically giving total reimbursement, including attorneys' fees, to the prevailing litigant.[27]

[24] Goodhart, *Costs*, 38 YALE L.J. 849, 853 (1929), *citing* 3 HEN. VII, c. 10 (1487) (emphasis added). Other statutes were later enacted to the same effect. *See id.* at 853-54 n.26, *citing* 13 CAR. II, c. 2, *f.* 10 (1661); 8 & 9 W. III c. 11, *f.* 2 (1696); 4 ANNE c. 16, *f.* 25 (1705).

[25] The Statute of Gloucester, 6 EDW. I, c. 1 (1275), specified that on certain writs "it is provided, that the [victorious] Demandant may recover . . . the Costs of his Writ purchased." As Lord Coke noted, the terms "Costs of his Writ purchased" "extendeth to all the legall cost of the suit." COKE, 2d INSTITUTES 288.

[26] *Jones* v. *Cozeter*, 2 Atk. 400 (1742).

[27] 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE CIVIL § 2665, at 122 (1973 & Supp. 1978) [hereafter WRIGHT & MILLER]. As is well known, the English continue to preserve the principle of total reimbursement of both costs *and* fees to the winner. *See* Kaplan, *An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure*, 69 MICH. L. REV. 821, 835-38 (1971). Shifting of all fees and costs to the loser also remains the practice on the Continent. *See generally* Baeck, *Imposition of Fees of Attorney of Prevailing Party Upon the Losing Party Under the Laws of Austria*, [1962] PROC. A.B.A. SECTION INT'L & COMP. L. 119; Freed, *Payment of Court Costs by the Losing Party in France*, *id.* at 126; Dietz, *Payment of Court Costs by the Losing Party Under the Laws of Hungary*, *id.* at 131.

Over time, however, the American rule regarding awards of *attorneys' fees* began to deviate from the American rule regarding taxation of *costs*.[28] While judges came to hold "that attorney's fees are *not* ordinarily recoverable [by the victor] in the absence of a statute or enforceable contract providing therefor," [29] American courts steadfastly continued to recognize a strong presumption favoring cost awards to prevailing litigants.[30] Two factors called for a legal distinction between the

[28] By "costs" I am referring strictly to taxable costs of the type normally assessed by federal courts under 28 U.S.C. § 1920 (1976), which states:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

Attorneys' fees, by contrast, fall under the broader rubric of "total expenses" actually incurred by a litigant in connection with a lawsuit.

[29] *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717 (1967) (emphasis added); *Arcambel* v. *Wiseman*, 3 U.S. (3 Dall.) 306 (1796) *See also* note 232 *infra*.

[30] "[A] careful examination of the authorities leaves us no option but to follow the rule that the prevailing party shall recover of the unsuccessful one the legal costs which he has expended in obtaining his rights." *United States* v. *Schurz*, 102 U.S. (12 Otto) 407, 408 (1881). *See also* Ex parte *Peterson*, 253 U.S. 300 (1920); *Lichter Foundation, Inc.* v. *Welch*, 269 F.2d 142 (6th Cir. 1959); *Emerson* v. *National Cylinder*

presumptions regarding awards of costs and attorneys' fees: (1) the sharp disparity between the dollar amounts of the two awards,[31] and (2) "the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees." [32] Unlike attor-

Gas Co., 251 F.2d 152, 158 (1st Cir. 1958); In re *Northern Indiana Oil Co.*, 192 F.2d 139 (7th Cir. 1951); *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F.2d 1 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950).

[31] Because costs must be proven by affidavit and are restricted by statute to identifiable items, they are small, predictable, and usually require little court administration. *See generally* Peck, *Taxation of Costs in United States District Courts*, 37 F.R.D. 481 (1965) [hereafter Peck]; Comment, *Taxation of Costs in Federal Courts—A Proposal*, 25 AM. U. L. REV. 877 (1976) (discussing current federal court practice). Thus, the costs requested by the Government in FOIA cases rarely exceed several hundred dollars. *See, e.g.*, the motions to deny the Government costs filed in *Lesar* v. *United States Dep't of Justice*, 636 F.2d 472, No. 78-2305 (D.C. Cir. 15 July 1980) ($290); *Weisberg* v. *CIA*, No. 79-1729 (D.C. Cir. 30 June 1980) ($164); *Hayden* v. *National Security Agency/Central Security Serv.*, 608 F.2d 1381 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980) ($212).

Attorneys' fee awards, by contrast, may under some formulations exceed by a factor of five the amount actually in controversy in the suit. *See, e.g.*, *Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc) ($160,000 fee awarded in case where compensation of only $31,345 given to plaintiffs in the settlement). *See also* note 160 *infra*.

[32] *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967). *See also Oelrichs* v. *Spain*, 82 U.S. (15 Wall.) 211, 231 (1872).

For a recent reaffirmation of the time, expense, and difficulty involved in determining what constitutes a reasonable attorneys' fee, see the three opinions of this court in *Copeland*

neys' fees, whose magnitude and unpredictability have discouraged parties with otherwise meritorious claims from litigation,[23] the small and predictable costs of court fees, printing costs, and court reporters' fees have customarily been viewed as necessary and reasonable incidents of litigation properly reimbursable to the victors.[24]

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v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc). For a broader discussion of the difficulties and unpredictability involved in fee calculations, *see generally* Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281 (1977).

[23] *See Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

[24] *See* note 6 *supra*. *See also* 10 WRIGHT & MILLER, *supra* note 27, § 2666, at 126 ("Typically costs are allowed in favor of the winning party against the losing party to provide at least partial indemnification of the expenses incurred in establishing his claim or defense."); *id.* at §§ 2667-68.

The dissenting opinion in *Delta Air Lines, Inc.* v. *August*, 49 U.S.L.W. 4241, 4246 (9 Mar. 1981), recently decided by the Supreme Court, has confirmed the continuing vitality of the distinction between costs and fees:

> While traditional "costs" can never be known to a certainty at the [pretrial stage] . . . knowledgeable counsel for both defendant and plaintiff can assess at least their order of magnitude. *Attorney's fees, however, are a different breed of cat*, not only because they can be extraordinarily extensive compared to traditional items of costs, but because neither the plaintiff nor the defendant can know with any degree of certainty how much of the attorney's fees a prevailing plaintiff seeks will be allowed . . .

Id. at 4249-50 n.5 (Rehnquist, J., dissenting) (emphasis added).

Thus, while both attorneys' fee awards[25] and taxation of costs[26] in America have eventually come to be governed by statute, those statutes embody different notions: an award of attorneys' fees against the losers is a form of *penalty*, while taxation of costs represents the *fair price* of unsuccessful litigation.[27]

When law and equity merged in 1937, the Federal Rules of Civil Procedure adopted not only equity's discretionary standard for taxing costs,[28] but also the powerful common law presumption favoring the award of litigation costs to prevailing parties. Thus, Federal Rule of Civil Procedure 54(d) provides:

> Except when express provision therefor is made either in a statute of the United States or in these

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[25] *See* note 232 *infra* (listing federal statutes authorizing court-awarded fees).

[26] *See, e.g.*, 28 U.S.C. § 1914 (1976) (governing costs in habeas corpus); *id.* § 1920 (taxation of costs); *id.* § 1923 (docket fees); *id.* § 1927 (taxation of excess costs for abuse of judicial process). *See also* text and accompanying note 94 *infra*.

[27] *Compare Hall* v. *Cole*, 412 U.S. 1, 5 (1973) (attorneys' fees awarded against party who has acted vexatiously, wantonly, or in bad faith); *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399 (1923) (attorneys' fees awarded against party found guilty of contempt) *with Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70, 76 (1927); *Welsch* v. *Likins*, 68 F.R.D. 589, 596 (D. Minn.), *aff'd* 525 F.2d 987 (8th Cir. 1975); *Hygienic Chem. Co.* v. *Provident Chem. Works*, 176 F. 525, 528 (2d Cir. 1910) (all holding that costs, rather than being punitive in nature, are merely incident to the judgment). *See also* note 6 *supra*.

[28] 6 MOORE'S FEDERAL PRACTICE ¶ 54.70[2], at 1303 (2d ed. 1976); 10 WRIGHT & MILLER, *supra* note 27, § 2665.

rules, *costs shall be allowed as of course to the prevailing party* unless the court otherwise directs. . . .[39]

The presumption explicitly stated in rule 54(d)—that, unless otherwise ordered, the prevailing party is entitled to costs as a matter of course—has proven very powerful indeed. Every circuit court that has considered the question has not only *recognized* the presumption; all have held that a court may neither deny or reduce a prevailing party's request for costs without first articulating some good reason for doing so.[40] Accordingly, federal

[39] FED. R. CIV. P. 54(d) (emphasis added). The continuing force of the common-law presumption is illustrated by the fact that a number of states never adopted the discretionary language of federal rule 54(d). Under these state statutes recovery of costs by prevailing defendants remains mandatory, rather than at the trial judge's discretion. *See, e.g.*, 4 Mont. Rev. Code Ann. §§ 9787-88 (1935); 2 Minn. Stat. § 9471 (1927); N.Y.C.P.A. §§ 1470-75 (Thompson 1939).

[40] D.C. Circuit: *Shima* v. *Brown*, 140 F.2d 337 (D.C. Cir.), *cert. denied*, 318 U.S. 787 (1943).

Second Circuit: *Compania Pelineon de Navegacion, S.A.* v. *Texas Petroleum Co.*, 540 F.2d 53, 56 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Chemical Bank & Trust Co.* v. *Prudence-Bonds Corp.*, 207 F.2d 67, 77 (2d Cir. 1953), *cert. denied*, 347 U.S. 907 (1954).

Third Circuit: *Samuel* v. *University of Pittsburgh*, 538 F.2d 991, 999 (3d Cir. 1976); *ADM Corp.* v. *Speedmaster Packaging Corp.*, 525 F.2d 662, 664-65 (3d Cir. 1975).

Fourth Circuit: *Constantino* v. *American S/T Achilles*, 580 F.2d 121 (4th Cir. 1978).

Fifth Circuit: *Walters* v. *Roadway Express, Inc.*, 557 F.2d 522 (5th Cir. 1977).

Sixth Circuit: *Lichter Foundation, Inc.* v. *Welch*, 269 F.2d 142 (6th Cir. 1959).

Seventh Circuit: *Popeil Bros.* v. *Schick Elec., Inc.*, 516 F.2d 772 (7th Cir. 1975); *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F.2d 1 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950).

Ninth Circuit: *Subscription Television, Inc.* v. *Southern Cal. Theater Owners' Ass'n*, 576 F.2d 230 (9th Cir. 1978); *Pickering* v. *Holman*, 459 F.2d 403, 408 (9th Cir. 1972).

Tenth Circuit: *Serna* v. *Manzano*, 616 F.2d 1165, 1167-68 (10th Cir. 1980); *True Temper Corp.* v. *CF&I Steel Corp.*, 601 F.2d 495, 509-10 (10th Cir. 1979).

courts have required unsuccessful parties to show circumstances sufficient to overcome the presumption in favor of the prevailing party.[41] Furthermore, trial judges have rarely denied costs to a prevailing party when the losing party has been capable of paying.[42]

In this Circuit, we have recognized time and again that when costs are assessed by an appellate, rather than a district, court under Federal Rule of Appellate Procedure 39(a), the same powerful presumption applies.[43] Rule 39(a) simply states that "[e]xcept as otherwise provided

[41] *See, e.g.*, *Popeil Bros.* v. *Schick Elec., Inc.*, 516 F.2d 772, 776 (7th Cir. 1975); *Lewis* v. *Pennington*, 400 F.2d 806, 819 (6th Cir. 1968), *cert. denied*, 393 U.S. 983 (1968); *Lichter Foundation, Inc.* v. *Welch*, 269 F.2d 142, 146 (6th Cir. 1959); *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F.2d 1, 11 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950); *Maldonado* v. *Parasole*, 66 F.R.D. 388, 390 (E.D.N.Y. 1975); *Badger By-Products Co.* v. *Employers Mut. Cas. Co.*, 64 F.R.D. 4 (E.D. Wis. 1974), *aff'd*, 519 F.2d 1406 (7th Cir. 1975); *Esso Standard (Libya) Inc.* v. *SS Wisconsin*, 54 F.R.D. 26, 27 (S.D. Tex. 1971).

[42] *See, e.g.*, *Electronic Specialty Co.* v. *International Controls Corp.*, 47 F.R.D. 158 (S.D.N.Y. 1969).

[43] *Saunders* v. *Washington Metropolitan Area Transit Auth.*, 505 F.2d 331 (D.C. Cir. 1974); *Rural Housing Alliance* v. *United States Dep't of Agriculture*, 511 F.2d 1347 (D.C. Cir. 1974) (order and concurring opinion); *Shima* v. *Brown*, 140 F.2d 337 (D.C. Cir.), *cert. denied*, 318 U.S. 787 (1943). *See also* Parts III. A. 2., VI. *infra*.

by law . . . if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered. . . ." [44] In *Saunders* v. *Washington Metropolitan Area Transit Authority*,[45] while construing the section of rule 39(a) which favors awards to prevailing *appellants*, we noted that "appellants, as the prevailing parties, became entitled to an award of costs as a matter of course, save only to the extent that the court might direct otherwise. . . . Absent a contrary direction by this court, appellants were entitled, we have said, to their costs *as a matter of course*." [46]

In the face of this history, Judges Edwards and Bazelon seek to minimize the presumption favoring cost awards to prevailing appellees in three ways: first, by suggesting that few courts have recognized the presumption favoring cost awards to the prevailing party; second, by implying that such presumption is somehow weaker in Fed. R. App. P. 39(a) than in Fed. R. Civ. P. 54(d); and, third, by stressing that district and appellate courts have *discretion* to award or deny costs under both Fed. R. Civ. P. 54(d) and Fed. R. App. P. 39(a).[47] It is to these three contentions that I now turn.

[44] FED. R. APP. P. 39(a), governing allowance of costs in appellate proceedings, provides in full:

> Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

[45] 505 F.2d 331 (D.C. Cir. 1974) (per curiam) (reversing trial court).

[46] *Id.* at 333-34 (emphasis added).

[47] Maj. op. at 8; concurring opinion at 1.

III. WHEN HAVE COURTS TRADITIONALLY DENIED COSTS TO PREVAILING APPELLEES?

A. *The Narrow* Scope *of Judicial Discretion to Deny Costs*

1. *Fed. R. App. P. 39(a)*

In a footnote, the majority attempts to dismiss the powerful presumption favoring cost awards to prevailing parties as "confined to a handful of opinions construing Fed. R. Civ. P. 54(d)".[48] Yet as I have noted above, every circuit court which has considered the issue—including nine of the eleven circuits—has recognized that presumption.[49] The majority nowhere suggests that *this appellant* has made any showing to rebut the presumption. Thus our discretion over costs has not yet been properly invoked. Because we are not yet even operating within the *scope* of our discretion to deny costs in this case, the majority had no right to use this case as a vehicle to create a new *standard* to govern future exercises of that discretion.

Nor can I believe that the presumption favoring cost awards to prevailing parties is somehow weaker in cases involving Fed. R. App. P. 39(a) than in cases involving Fed. R. Civ. P. 54(d). Both Civil Rule 54(d) and Appellate Rule 39(a) embrace the same powerful presumption favoring cost awards to the prevailing party. Not only are the two provisions parallel in language and structure,[50] but, as Professor Moore has noted, "[a]bsent

[48] *Id.* at 21 n.27.

[49] *See* note 40 *supra*.

[50] *Compare* Fed. R. Civ. P. 54(d):

> Except when express provision therefor is made either in a statute . . . or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . .

[Continued]

statute, Rule 39(a) follows the principle of Rule 54[(d)] of the Rules of Civil Procedure that the prevailing party is entitled to costs *as a matter of course* unless the court orders otherwise." [51]

The Advisory Committee Notes to Appellate Rule 39 leave no doubt that the framers of rule 39(a) intended that rule 54(d)'s presumption apply as well at the appellate level.[52] The Advisory Committee unequivocally stated that an *appellate* court must exercise its equitable discretion under rule 39 in the area of costs subject to the same powerful presumption which guides trial courts:

> While only five circuits ([including the] D.C. Cir. . . .) presently tax the costs of printing [appellate] briefs, the proposed rule makes the cost taxable *in keeping with the principle of this rule that all cost*

[50] [Continued]
with Fed. R. App. P. 39(a):

> Except as otherwise provided by law . . . if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered . . .

[51] 9 MOORE'S FEDERAL PRACTICE ¶ 239.02.[1], at 39-6 (2d ed. 1976) (emphasis added).

[52] Judge Edwards cites Advisory Committee Note to Rule 39, *Subdivision (b)*, reprinted in *Moore's Federal Practice*, for the proposition that cost awards for and against the Government were permitted under rule 39(a) before FOIA was amended. Maj op. at 7 & nn.10-11, *citing* Advisory Committee Note to Rule 39, *Subdivision (b), reprinted in* 9 MOORE'S FEDERAL PRACTICE ¶ 239.01[2], at 39-3 (2d ed. 1976). Yet his opinion *nowhere mentions* the Advisory Committee discussion of *Subdivision (c)* of the same rule, which not only governs the costs of printing appellate briefs and appendices—*the very issue in this case—but also happens to be found on the very next page of Moore's text!* Advisory Committee Note to Rule 39, *Subdivision (c), reprinted in* 9 MOORE'S FEDERAL PRACTICE ¶ 239.01[2], at 39-4 (2d ed. 1976).

> *items expended in the prosecution of a proceeding should be borne by the unsuccessful party.*[53]

2. *Appellate Practice Under Rule 39(a)*

Given this principle, it is hardly surprising that appellate practice under rule 39(a) has been strictly guided by the presumption favoring cost awards to prevailing appellees. Our court's local rules direct us to apply rule 39(a)'s presumption to the very costs at issue here. General Rule 15 of this court, governing "Costs of Briefs and Appendices," states:

> Costs [of briefs] shall be taxable *in conformity with Rule 39 of the Federal Rules of Appellate Procedure.* Costs will be allowed for . . . the cost of printing of text of 50 copies of briefs and 25 copies of appendices, any charges for collating, binding, indices, covers, footnotes and tabular matter of briefs and appendices, and the sales tax, if any, for printing services.[54]

By incorporating the rule 39(a) presumption, the local rule effectively narrows the scope of our discretion to deny costs to prevailing appellees in two ways. First, there are very few civil cases—much less FOIA cases—in which this court is ever called upon to exercise *judicial* discretion with regard to costs.[55] Once a judgment has been affirmed upon appeal and the prevailing appellee has

[53] *Id.* (emphasis added).

[54] Rule 15, GENERAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT (1968) (emphasis added).

[55] *See* Part VI. *infra. See also Delta Air Lines, Inc.* v. *CAB*, 505 F.2d 386 (D.C. Cir. 1974) (Bazelon, Leventhal & Robinson, JJ.) (motion for disallowance of Bills of Costs) (*per curiam*):

> Generally, costs on appeal are taxed in accordance with Rule 39, Fed. R. App. P., as statutorily authorized by 28 U.S.C. § 1920 (1970). . . . Rule 39(a) . . . essentially

filed a verified bill of costs, our post-decision procedures explicitly set out what the clerk of this court is to do.[56] As long as the costs requested are statutorily authorized and not contested by the unsuccessful appellant, the *clerk of the court must issue costs* to the prevailing appellee.[57] Our

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> *implements the long established practices of taxing costs in favor of the prevailing party*, and conversely, against the losing party . . . .
> . . .
> Because taxation of costs generally is a matter *simply ordered by the Clerk of the Court in the absence of opposition by the parties*, it is seldom the subject of published court opinions.

Id. at 887-88 (emphasis added).

[56] The Post-Decision Procedures of the D.C. Circuit regarding costs read as follows:

> Costs are usually charged to the losing party. . . .
> The items allowed as costs are set forth in Rule 15 of the General Rules of the Court. . . .
> Counsel has 14 days after entry of judgment to submit the bill of costs with service on opposing counsel. Printing costs must be itemized and verified. . . . Opposing counsel may file objections. The Clerk reviews the bill for compliance with the rules and then prepares a statement for inclusion in the mandate. . . .

HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT 70-71 (March 1978) [hereinafter Handbook].

[57] District court practice regarding taxation of costs under Fed. R. Civ. P. 54(d) and appellate court practice under Fed. R. App. P. 39(a) are virtually identical. *Compare* our Circuit's post-decision taxation procedures, *cited in* note 56 *supra*, *with* the district court procedures described in Peck, *supra* note 31.

Indeed, all costs, whether awarded by the district or the appellate court, "are actually recoverable in the District

judicial discretion over costs *is never even triggered* unless the losing counsel objects to the appellee's bill.[58]

Second, even in the rare case where the court is called upon to exercise its discretion regarding costs, the scope of that discretion is further narrowed by the common law presumption favoring cost awards to the prevailing party. The Supreme Court recently confirmed the continuing force of that presumption in its latest discussion of cost awards, *Delta Air Lines, Inc.* v. *August*.[59] In *Delta Air Lines*, Justice Stevens, writing for the Court, repeatedly recognized the "Rule 54(d) presumption in favor of the prevailing party." [60] "Because costs are usually assessed against the losing party," he noted, "liability for costs is a normal incident of defeat." [61] While Justice Stevens acknowledged that rule

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Court." Handbook, *supra* note 56, at 71. The only reason that the costs at issue here arose under rule 39(a) is that:

> [p]rinting costs are rarely involved in trial court proceedings except to the extent that the ultimate total of costs recoverable may be affected as the result of an appeal. *Any allowance of costs made to the prevailing party in the Court of Appeals usually arises primarily from printing charges* and the amount will be inserted in the mandate. The allowance so made may then be added to the costs recoverable in the trial court.

Peck, *supra* note 31, at 488 (emphasis added). It would thus be highly anomalous to allow appellate courts to award costs under rule 39(a) free from the presumption which so clearly governs *district* court discretion under rule 54(d).

[58] *See* Part VI. *infra*.

[59] 49 U.S.L.W. 4241 (9 Mar. 1981).

[60] *Id.* at 4242; *see also id.* (prevailing party "presumptively will obtain costs under Rule 54(d)"); note 64 *infra*.

[61] 49 U.S.L.W. at 4242.

54(d) affords trial courts some discretion over costs,[62] he ultimately resolved the central issue in the case—interpretation of Fed. R. Civ. P. 68[63]—by recognizing that courts traditionally exercise that discretion subject to the presumption that the victor will receive costs.[64]

[62] *Id.* at 4243. While Judge Edwards correctly recognizes that rule 54(d) was not itself at issue in *Delta Air Lines*, maj. op. at 17, he cites that case solely for its references to trial court *discretion* over costs under rule 54(d). *Id.*

[63] Fed. R. Civ. P. 68 seeks to encourage pretrial settlement by *requiring* plaintiffs who have rejected formal settlement offers, then "obtained" judgments "not more favorable than the offer" to "pay the costs incurred after the making of the offer."

[64] In *Delta Air Lines*, the Seventh Circuit refused to require a losing title VII plaintiff who had previously rejected defendant's rule 68 settlement offer to pay costs under the rule, despite the fact that rule 68 states: "[i]f the judgment finally obtained by the [plaintiff-]offeree is not more favorable than the offer, the offeree *must pay* the costs incurred after the making of the offer." Fed. R. Civ. P. 68 (emphasis added). The Seventh Circuit reasoned that, at least in title VII cases, the mandatory language of rule 68 should be read liberally, rather than literally. *August* v. *Delta Air Lines, Inc.*, 600 F.2d 699, 702 (7th Cir. 1979), *discussed in* maj. op. at 15-16.

The Supreme Court affirmed the Seventh Circuit's result, but not its reasoning. Writing for the majority, Justice Stevens found that the Seventh Circuit had improperly avoided the "threshold question" whether a plaintiff who *loses* after refusing settlement could be said to have "obtained" a judgment, and thus be required *by rule 68* to pay the defendant's costs. *Delta Air Lines, Inc.* v. *August*, 49 U.S.L.W. 4241, 4241-42 (9 Mar. 1981). Addressing that question, Justice Stevens noted that rule 68 mandates that plaintiffs pay costs in certain circumstances as a means of encouraging pretrial settlement. Recognizing that *losing* plaintiffs are *already* presumptively liable for costs under rule 54(d), Justice Stevens concluded that "Rule 68 would provide little, if any, additional incentive [to settle] if it were applied when the plaintiff loses." *Id.* at 4242. Thus, the Court held that Fed. R. Civ. P. 68 must apply only in a narrow class of cases—those in which a plaintiff rejects a formal settlement offer, prevails at trial, but wins a judgment amounting to less than the offer.

While deciding that *rule 68* did not require the *nonsettling* plaintiff to pay costs, the *Delta Air Lines* Court expressed no view as to whether the plaintiff was nevertheless properly liable for costs as a *nonprevailing* party under *rule 54(d)*. For further discussion of *Delta Air Lines*, *see* text and accompanying notes 83-87, 137-43 *infra*.

B. *The* Standard *by which Courts Have Traditionally Exercised their Rule 39(a) Discretion*

The recent opinion in *Delta Air Lines* not only reaffirmed the narrow *scope* of judicial discretion to deny costs to prevailing defendants, it lent new support to the traditional *standard* by which judges have exercised that narrow discretion. That standard was first set out in *Chicago Sugar Co.* v. *American Sugar Refining Co.*,[65] where the Seventh Circuit held that denial of costs to a prevailing party would be exacted *only as a penalty* against those who have needlessly brought or prolonged litigation:

> As we understand it, the denial of costs to the prevailing party or the assessment of partial costs against him *is in the nature of a penalty for some defection on his part in the course of the litigation* as, for example, by calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record, or by delaying in raising objection fatal to the plaintiff's case. . . . [W]e are of the opinion that, in the absence of some showing of bad faith [on the part of the prevailing party] or the deliberate adoption of a course of business dealings calculated to render litigation pertaining thereto unnecessarily prolix and expensive, the *penalty of denial or apportionment of costs . . . should be imposed only for*

[65] 176 F.2d 1 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950).

acts or omission on the part of the prevailing party in the actual course of the litigation . . .[66]

In light of my analysis above, the rationale behind the *Chicago Sugar* standard should be obvious. Because cost awards are viewed as part of the price of litigation,[67] prevailing parties should ordinarily receive costs unless the court finds good cause, on the facts of the individual case, why a victor does *not* deserve reimbursement.[68] Penalizing a prevailing party through denial or reduction of costs is justified only when the prevailing party has engaged in wasteful misconduct in the course of litigation which drives up the costs *of that lawsuit*. In a given case, such wasteful misbehavior may be evidenced by counsel's misconduct,[69] violations of court orders,[70] or unreasonably large or unnecessary litigation expenditures.[71]

[66] 176 F.2d at 11 (emphasis added).

[67] *See* notes 6, 28-37 *supra*.

[68] *See* notes 40-42 *supra*.

[69] *E.g., ADM Corp.* v. *Speedmaster Packaging Corp.*, 525 F.2d 662, 665 (3d Cir. 1975) (trial court has authority to deny costs when prevailing party unduly extended and complicated resolution of issues); *Association of W. Rys.* v. *Riss & Co.*, 320 F.2d 785, 790 (D.C. Cir. 1963) (neither side awarded costs when parties equally responsible for long and arduous trial); *Tashman* v. *Community Improvement Corp.*, 243 F.2d 96, 96 (3d Cir. 1957) ("scurrilous and scandalous" attacks made in appellate briefs justified discretionary denial of costs); *Jones* v. *Schellenberger*, 225 F.2d 784, 794 (7th Cir. 1955), *cert. denied*, 350 U.S. 989 (1956) (court denied victor costs because of reprehensible conduct prolonging and greatly increasing costs of suit).

[70] *E.g., United States* v. *Lee Way Motor Freight, Inc.*, 7 EMPL. PRAC. DEC. ¶ 9067, at 6507 (W.D. Okla. 1973) (court ordered both parties to pay own costs when one party disobeyed court order, leading other party to call unnecessary witnesses).

[71] *E.g., Farmer* v. *Arabian Am. Oil Co.*, 379 U.S. 227, 231-35 (1964) (appellate court deems excessive nonstatutory items in defendant's bill of costs, such as expense of transporting witnesses from Saudi Arabia and securing overnight transcripts of trial proceedings); *Euler* v. *Waller*, 295 F.2d 765, 766 (10th Cir. 1961) (trial court's award of excessive expert witness fees viewed as abuse of discretion); *Boas Box Co.* v. *Proper Folding Box Corp.*, 55 F.R.D. 79, 81 (E.D.N.Y. 1971) (disallowing costs of superfluous depositions and models).

In some cases, courts have properly exercised their discretion to reduce or deny costs to the prevailing party without evidence of misconduct. In particular, courts have reduced cost awards when the victor has claimed excessive costs[72] and denied cost awards altogether when the losing party has shown an *inability to pay* even modest sums.[73] Such exercises of discretion are, however, totally consistent with the purposes of the *Chicago Sugar* rule.

As I have explained, cost awards have traditionally been treated differently from attorneys' fee awards because of two assumptions: that costs are neither punitive in effect, nor large enough to chill meritorious litigation.[74] When courts assess *excessive* costs against a losing plaintiff, or when a plaintiff is so poor that he cannot pay the victor's costs, neither assumption still holds. Under such circumstances a court may properly exercise its equitable discretion to require each party to bear its own costs—not because the victor necessarily

[72] *See* cases cited in note 71 *supra*.

[73] *E.g., Bryan* v. *Liberty Mut. Ins. Co.*, 418 F.2d 486 (5th Cir. 1969), *cert. denied*, 397 U.S. 950 (1970) (court denies costs under rule 39(a) when loser unable to pay); *Maldonado* v. *Parasole*, 66 F.R.D. 388, 390 (E.D.N.Y. 1975) (indigency of losing party may be proper ground for denying costs if there is wide disparity of economic resources between parties); *Boas Box Co.* v. *Proper Folding Box Co.*, 55 F.R.D. 79, 81 (E.D.N.Y. 1971) (costs denied partly because award might prove disastrous to small business defendant).

[74] *See* text and accompanying notes 28-37 *supra*.

deserves to be penalized, but to ensure that cost assessments will not punish litigants or chill them from seeking vindication of meritorious claims. Mindful of this concern, the Supreme Court has recognized broader trial court discretion under rule 54(d) to disallow all but reasonable *nonstatutory* costs.[75] For similar reasons, courts have properly given weight to a losing party's *indigency* when denying costs.[76]

These valid exceptions to the *Chicago Sugar* rule should not, however, be confused with two sham "exceptions" which some judges have occasionally invoked. Those judges have erroneously denied costs to the victors based either on large disparities in the parties' ability to pay or on the losing plaintiff's subjective "good faith" in bringing the suit. A number of courts have now wisely recognized that giving the first factor dispositive weight would in-

[75] As the Supreme Court noted in *Farmer* v. *Arabian Am. Oil Co.*, 379 U.S. 227, 235 (1964):

> Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would . . . allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be. Therefore, the discretion given district judges to tax costs should be sparingly exercised *with reference to expenses not specifically allowed by statute.*

(emphasis added).

Because the costs requested here are specifically authorized by statute, *see* text accompanying note 95 *infra*, the type of judicial discretion discussed in *Farmer* is not at issue here. *Farmer* holds only that trial courts should, under rule 54(d), scrutinize proposed cost items in particular lawsuits and disallow excessive nonstatutory costs as unnecessary. *Farmer* in no way supports the majority's suggestion that courts have broad discretion *routinely to deny costs* to prevailing defendants even in the absence of bad faith, obduracy, or recalcitrance. *Cf.* maj. op. at 25 n.28.

[76] *See* cases cited in note 73 *supra*.

variably result in the richer party being denied costs.[77] Indeed, under a strict "relative ability to pay" test, the Government would *always* have to pay costs since its resources inevitably dwarf its opponents'.[78] Similarly, the notion that *Chicago Sugar*'s own language exempted losing plaintiffs from costs if they have sued in "good faith"—*i.e.*, brought suits "involving issues as to which the law is in doubt"[79]—has now been soundly laid to

[77] *See Welsch* v. *Likins*, 68 F.R.D. 589, 596 (D. Minn.), *aff'd*, 525 F.2d 987 (8th Cir. 1975) ("If . . . the financial need of the successful party were the sole criteria for the awarding of costs, actual awards would be uncommon. However, . . . costs are routinely taxed by the clerk against a losing party.").

[78] As I will point out below, such a theory would run counter to historical practice, for the Government has *always* had the right to collect costs when it wins. *See* Part IV.A. *infra*. It would not be inconsistent with the *Chicago Sugar* rule, however, to weigh disparity of resources between parties into the cost award when there is reason to believe that the more affluent party has *deliberately employed* its greater resources to outlast its opponents. *See, e.g., Boas Box Co.* v. *Proper Folding Box Co.*, 55 F.R.D. 79, 81 (E.D.N.Y. 1971) (poverty of losing defendant relevant when deposition and model costs excessive).

[79] Immediately following the language cited in text at note 66 *supra*, the *Chicago Sugar* opinion noted:

> [W]here it is clear that the action was brought in good faith, involving issues as to which the law is in doubt, the court may in its discretion require each party to bear its own costs although the decision is adverse to plaintiff.

176 F.2d at 11. This language has since been cited primarily in dictum. *See, e.g., Rural Housing Alliance* v. *United States Dep't of Agriculture*, 511 F.2d 1348, 1349 (D.C. Cir. 1974) (Bazelon, J., concurring) (prevailing party awarded costs); *Union Industrielle et Maritime* v. *Nimpex Int'l Inc.*, 459 F.2d 926 (7th Cir. 1972), *cited in* maj. op. at 25 (prevailing party awarded costs).

rest.[80] Recognizing that *all* cases and controversies to some extent involve issues as to which the law is in doubt, the Seventh Circuit itself has now repudiated its own "good faith" language in that case as dictum "at war with the theory . . . expressed in the remainder of the [*Chicago Sugar*] opinion, [based] only upon a 1909 district court opinion, and . . . immaterial to the result." [81]

To summarize, *Chicago Sugar* has long supplied the basic standard by which federal courts have exercised their discretion to deny costs to prevailing parties under Fed. R. Civ. P. 54(d) and Fed. R. App. P. 39(a). Un-

[80] *See, eg., Electronic Speciality Co.* v. *International Controls Corp.*, 47 F.R.D. 158, 160 (S.D.N.Y. 1969) (good faith of nonprevailing party will not alter general rule on costs, especially when nonprevailing party able to bear costs).

[81] *Popeil Bros.* v. *Schick Elec., Inc.*, 516 F.2d 772, 776 (7th Cir. 1975). As the Seventh Circuit noted:

> The mere fact that the unsuccessful party was an ordinary party acting in good faith and neither harassing its opponent nor abusing legal process is not sufficient to overcome the presumption that the prevailing party is entitled to costs. There exists another presumption, and that is that parties on both sides of a cause are acting honestly and ethically. *That the losing party is in fact what he is presumed to be and is in fact conducting himself as he is expected and required to conduct himself, does not create any equities defeating the presumption that the prevailing party collect the costs due to him "as of course."* If the awarding of costs could be thwarted every time the unsuccessful party is a normal, average party and not a knave, Rule 54(d) would have little substance remaining. . . . *Inasmuch as virtually every case brought in good faith in some respect involves issues as to which the law is in doubt, if only in regard to the ultimate outcome, a literal interpretation of the language would render Rule 54(d) meaningless.*

Id. (emphasis added). *Accord, Maldonado* v. *Parasole*, 66 F.R.D. 388 (E.D.N.Y. 1975) (Weinstein, J.). The majority here has wisely eschewed reliance on the "good faith" exception. *See* maj. op. at 9 n.18.

der that standard the prevailing party has been entitled to its costs *as a matter of course* unless the loser shows that the victor's misconduct in the course of the instant litigation would make such an award unjust. Courts have *properly* exercised their discretion under the rules to deny or reduce costs in two other circumstances: (1) when the losing party has proven either inability to pay costs or likelihood that the cost award will chill him or similarly situated litigants from future meritorious litigation, and (2) when the victor requests excessive nonstatutory costs. Courts have *improperly* exercised their discretion under the rules when they have denied costs for other reasons, for example, by considering the parties' relative ability to pay or the unsuccessful party's "good faith" in bringing the litigation.[82]

In *Delta Air Lines, Inc.* v. *August*,[83] the Supreme Court recently re-confirmed that there are "relatively

[82] Judge Weinstein's opinion in *Maldonado* v. *Parasole*, 66 F.R.D. 388 (E.D.N.Y. 1975), provides a paradigm case of a trial court's exercise of its rule 54(d) discretion. In *Maldonado*, costs of $621 were imposed on the unsuccessful civil rights plaintiff. On motion for rehearing of the trial court's denial of plaintiff's motion to vacate the award, Judge Weinstein found that the granting of costs to the defendant was proper.

Judge Weinstein began by placing the burden on the "unsuccessful plaintiff to show circumstances that are sufficient to overcome the presumption in favor of the prevailing party." Rejecting plaintiff's claim that his "good faith litigation" absolved him from paying costs, Judge Weinstein then held that plaintiff's indigency would have been relevant to the cost award had the defendant not also been poor. In the absence of a "wide disparity of economic resources between the parties" and given plaintiff's failure to show either "hardship created by the awarding of costs" or the likelihood that assessing costs would "inhibit the bringing of bona fide claims for civil rights violations in the future," Judge Weinstein saw "[n]o reason . . . why the taxpayers should be burdened . . . by being required to pay . . ." *Id.* at 390-92.

[83] 49 U.S.L.W. 4241 (9 March 1981). *See* text and accompanying notes 59-64 *supra*.

few cases in which *special circumstances* may persuade the district judge to exercise his discretion to deny costs to the prevailing party." [84] While explicitly refusing to decide whether, on the facts of the case, the trial judge had correctly exercised his rule 54(d) discretion,[85] Justice Stevens acknowledged that in cases where the plaintiff loses outright, "the prevailing defendant normally recovers costs." [86] Furthermore, the Court flatly rejected the assertion that district judges have increasingly exercised their discretion in recent years to deny costs to prevailing defendants:

> [T]here really is no reason to assume that district judges are repeatedly abusing their Rule 54(d) discretion. . . . [T]he more probable assumption [is] that they are denying costs to the prevailing party *only when there would be an element of injustice in a cost award* . . . .[87]

Despite the clarity of this statement, Judge Edwards says we should not apply the *Chicago Sugar* standard, but rather the standard he has just created,[88] for two reasons. First, he argues, *Chicago Sugar* never established "a universally applied standard governing awards of costs to prevailing parties"; [89] second, he contends, *Chicago Sugar*'s rule should apply only to "case[s] of private litigants engaged in traditional civil litigation," not to FOIA cases, where a private litigant sues the Government for disclosure of information.[90]

[84] *Delta Air Lines, Inc.* v. *August*, 49 U.S.L.W. 4241, 4243 n.12 (9 Mar. 1981) (emphasis added)

[85] *Id.* at 4245.

[86] *Id.* at 4243 n.12.

[87] *Id.* n.14 (emphasis added).

[88] *See* text and accompanying notes 3 & 4 *supra*.

[89] Maj. op. at 25.

[90] *Id.* at 26.

I find the first argument simply baffling. Judge Edwards avers that *Chicago Sugar* cannot "suppl[y] the standard to be applied here" because "it suggests at least two standards and has been relied upon for varying propositions." [91] But the fact that *Chicago Sugar* has been erroneously cited for its "good faith" dictum is no excuse for neglecting its central principle: that the prevailing party should receive costs unless the facts suggest that he should be penalized for escalating the costs of that suit.[92]

Judge Edwards' second contention—that the *Chicago Sugar* rule simply does not apply to FOIA cases—deserves more extensive analysis. In the federal courts, statutes govern the *nature and size* of cost awards.[93] Congress has intentionally standardized treatment of costs in all federal civil actions.[94] There is no dispute that a

[91] *Id.* at 25.

[92] As I have indicated above, *see* text and accompanying notes 79-81 *supra*, this "sham" exception was never part and parcel of the *Chicago Sugar* rule. Although Judge Edwards professes to have difficulty discerning what discretionary standard for denial of costs the Seventh Circuit currently endorses, maj. op. at 25-26, I do not believe that Seventh Circuit is similarly confused. *See Popeil Bros.* v. *Schick Elec., Inc.*, 516 F.2d 772, 776 (7th Cir. 1975):

> *Chicago Sugar Co.* makes it clear that *the presumption that the prevailing party is entitled to costs can only be overcome by the unsuccessful party's showing that the prevailing party should be penalized by a denial of costs.* The record in the present case, as well as the briefs and the district court's memorandum, are devoid of any indication of fault on the prevailing party's side which would call into play the penalty of losing its costs.

(Sprecher, J.) (emphasis added).

[93] *See* notes 28, 36 *supra*.

[94] In 1853 Congress approved a comprehensive measure, Act of 26 Feb. 1853, 10 Stat. 162, which included the original version of 28 U.S.C. § 1920, *cited in full* at note 28 *supra*.

statute expressly authorizes the particular costs at issue here.[95] Furthermore, the federal rules—both civil and appellate—clearly govern the *procedure* by which those costs are to be distributed.[96] Those rules also apply to all federal civil actions.[97] The *Chicago Sugar* standard in

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That statute was enacted to standardize treatment of costs in the federal courts for all civil actions. As Justice Powell recently noted, reviewing the history of this legislation in *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 761 (1980):

> Above all, Congress sought to standardize the treatment of costs in federal courts, to "make them uniform—make the law explicit and definite." H.R. Rep. No. 50 [32d Cong., 1st Sess., 6 (1852)]. The sponsor of the legislation spoke of the need for "uniform rule[s]," Cong. Globe, 32d Cong., 2d Sess., App. 207 (1853) (Sen. Bradbury), while other Senators agreed that the legislation was designed to impose uniformity," *id.*, at 584 (Sen. Bayard); see also *id.*, at 589 (Sen. Geyer).

See also Alyeska Pipeline Serv. Co. v. *Wilderness Soc'y*, 421 U.S. 240, 251-56 (1975) (reviewing legislative history).

[95] "A judge or clerk of any court of the United States may tax as costs the following:

. . .

(3) Fees and disbursements for printing . . ."

28 U.S.C. § 1920 (1976). *See also* note 28 *supra* (citing statute in full).

[96] Fed. R. Civ. P. 54(d); Fed. R. App. P. 39(a).

[97] Fed. R. Civ. P. 1:

"These rules govern the procedure in the United States district courts in all suits of a civil nature . . ."

Fed. R. App. P. 1:

"These rules govern procedure in appeals to United States courts of appeals from the United States district courts . . ."

turn governs trial and appellate court *discretion* to award or deny costs under those rules.

As civil actions, Freedom of Information Act cases cannot be exempt from the *Chicago Sugar* rule unless they are somehow excepted from the normal operation of rule 39(a). Rule 39(a)'s plain language, however, admits of only two exceptions: (1) when the court "otherwise order[s]," or (2) "[e]xcept as otherwise provided by law."[98] The first exception is a matter of *judicial discretion*; the second, a matter of *statutory preemption*. In civil cases, the scope of judicial discretion to deny costs is ordinarily narrow. Thus, I first ask whether the scope of that discretion grows broader simply because (1) the Government, rather than a private party, is the prevailing defendant, or (2) the underlying cause of action is the FOIA. I then ask whether the 1974 FOIA amendment permitting discretionary awards of attorneys' fees and costs to *substantially prevailing plaintiffs* either expanded our rule 39(a) discretion or preempted the entire operation of rule 39(a) in FOIA cases.

IV. The Scope of Judicial Discretion to Deny Cost Awards to the Government *Before* the 1974 FOIA Amendment

A. *Do Courts Have Broader Discretion to Deny Costs to Prevailing* Government *Defendants?*

Without citing any pre-1974 case where a court *denied* a Government appellee its FOIA costs, Judge Edwards simply asserts that before 1974, "cost awards for and against the Government in FOIA cases were permitted under Rule 39(a)."[99] He implies that, under rule 39, appellate courts may exercise broader discretion to deny

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[98] Fed. R. App. P. 39(a), *cited in full* at note 44 *supra*.

[99] Maj. op. at 7.

costs to prevailing *Government* defendants. But history provides no suport for this implication.

As Blackstone observed, at common law, sovereign immunity barred taxation of costs either for *or* against the king. Since it was the king's "prerogative not to pay [costs] to a subject, so it [was] beneath his dignity to receive them." [100] Professor Moore has wryly noted, however, that "[t]he United States seems never to have had any kingly dignity *preventing it from recovering costs*: although for many years it followed the kingly prerogative against *paying costs.*" [101] In *Pine River Logging Co. v. United States*,[102] the Supreme Court made the point explicit:

> While the rule is well settled that costs cannot be taxed against the United States, *the rule is believed to be universal*, in civil cases at least, that the United States recover the same costs *as if they were a private individual.*

Subsequent enactment of the federal rules created *no new bar* to the Government's recovery of costs. Fed. R. App. P. 39(b), which governs "Costs For and Against the United States," provides that "costs shall not be awarded *for or against* the United States" unless "an award of costs *against* the United States is authorized by law."[103] If such an award is authorized then courts must

[100] 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND * 400 (1768).

[101] 6 MOORE'S FEDERAL PRACTICE ¶ 54.75[2], at 1551 (2d ed. 1976) (emphasis added).

[102] 186 U.S. 279, 296 (1902) (emphasis added).

[103] Fed. R. App. P. 39(b) provides in full:

> In cases involving the United States or any agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); *otherwise, costs shall not be awarded for or against the United States.*

(emphasis added).

award costs "in accordance with rule 39(a)." [104] Here a law authorizing an award of costs *against* the United States *does exist*: 28 U.S.C. § 2412.[105] Thus, rule 39(a)'s presumption operates here, as in all other civil actions, notwithstanding the identity of the prevailing defendant.[106]

[104] *Id.*

[105] 28 U.S.C. § 2412 (1976) reads:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. . . .

For the text of section 1920 of the same title, referred to in the statute cited, *see* note 28 *supra*.

[106] The essential point of rule 39(b) is that the United States should not be awarded costs in situations where the opposing party is statutorily barred from *receiving* costs from the United States. In the interests of mutuality, a statute which authorizes awards of costs *against* the United States must exist before a court may fairly award costs *to* the United States under rule 39(a). Section 2412 is just such an authorizing statute.

It is true that section 2412's own language does not *require* that the Government receive costs when it wins. That fact does not in any way broaden the scope of our narrow rule 39(a) discretion to deny costs, however. As the majority correctly notes, maj. op. at 7, Congress enacted section 2412

The fact that courts retain "some discretion" under the rule to "order otherwise" [107] in no way diminishes the strength of the basic presumption favoring such an award.[108] To prove that a prevailing *Government* appellee should be denied costs, *the unsuccessful plaintiff must still overcome the presumption favoring such an award.*[109] Furthermore, whether or not a private party is the defendant, *Chicago Sugar* provides the standard by which a court decides when the presumption has been rebutted.

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solely to waive the sovereign immunity of the United States from cost assessments against it by the federal courts. Congress never intended that statute to alter the existing procedures for awarding costs *to* the United States when it is the prevailing party. As before, those procedures are found in Fed. R. App. P. 39(a).

[107] Maj. op. at 8, 9-10.

[108] *See* Part II. *supra.*

[109] One of the first federal cases interpreting the scope of trial court discretion is to deny costs to the United States under Civil rule 54(d) made this crystal clear:

> Prior to the adoption of the Federal Rules of Civil Procedure . . . the right of the United States, when it was the prevailing party in a law action, to recover costs was well established, even though costs could not be recovered against the United States in the reverse situation. . . .
>
> This principle has been modified by the provisions of Rule 54(d) of the Rules of Civil Procedure, which authorizes the court to direct to the contrary. *Such a direction should be made, however, only in those cases where there are equitable considerations sufficiently strong to overcome the general rule.*

Lochs v. *United States*, 1 F.R.D. 431, 431 (W.D. Mich. 1940) (emphasis added).

B. *Do Courts Have Broader Discretion to Deny Costs in* FOIA *Cases?*

The majority baldly asserts, based on the concurring opinion in a single case [110] that "it is impossible to know what measure of discretion was being exercised by the courts in granting or denying awards of costs under FOIA between 1967 and 1974." [111] Claiming "the case law is silent on this point," the majority insinuates that courts possessed *broad* discretion to deny costs to prevailing FOIA defendants simply because "pursuant to the literal language of Rule 39(a), the courts retained *some* discretion to determine under what circumstances an award of costs should be granted to a prevailing party." [112]

By now, however, it should be clear that, between 1967 and 1974, the measure of discretion being exercised by the courts over cost awards in FOIA cases was the same measure of discretion being exercised by federal courts in all other civil actions! The *scope* of that discretion was the narrow scope permitted by rule 39(a); [113] the *standard* by which that narrow discretion was exercised was the *Chicago Sugar* standard.[114] *In the vast majority of cases, the losing FOIA plaintiff did not contest costs and no judicial discretion was ever exercised.* In those cases the clerk of the court issued costs routinely upon the filing of defendant's verified bill of costs.[115]

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[110] *Rural Housing Alliance* v. *United States Dep't of Agriculture*, 511 F.2d 1348 (D.C. Cir. 1974) (Bazelon, C.J., concurring).

[111] Maj. op. at 9. *See also id.* at 22.

[112] *Id.* at 9-10.

[113] *See* Part III. A. *supra.*

[114] *See* Part III. B. *supra.*

[115] *See* Part III. A. 2. *supra.*

My exhaustive search has uncovered only one pre-1975 FOIA case in which the loser contested costs *and* an opinion issued: *Rural Housing Alliance* v. *United States Dep't of Agriculture*.[116] In that case a unanimous panel rejected an unsuccessful FOIA plaintiff's motion to deny costs to the United States. In accordance with custom, two panel members did not state their reasons for denying the motion.[117] In the only opinion which issued in the case Judge Bazelon concurred, noting:

> It is doubtful . . . that the $425.00 at issue here will appreciably affect [plaintiff's] decisions with regard to litigation. In any event, in the circumstances of this case, the amount is virtually de minimis.[118]

I wholeheartedly agree with the majority that Judge Bazelon's concurring opinion in *Rural Housing Alliance* is not the "definitive judicial statement" on the subject of FOIA costs.[119] In view of Judge Edwards' explicit renunciation of that opinion as precedent,[120]

[116] 511 F.2d 1347 (D.C. Cir. 1974) (Order on Bill of Costs). A nonprofit corporation [RHA], which assisted rural families in their efforts to gain better housing, unsuccessfully sued for disclosure under FOIA of a government report regarding discrimination in a federal loan program. RHA "operate[d] under a budget of approximately $380,000 plus reserves from previous years of approximately $130,000 for a total of $510,000." *Id.* at 1351. When the appeal was concluded in its favor, the Government filed a routine bill of costs on appeal of approximately $425, the printing costs for its briefs and an appendix. *Id.* at 1348 (Bazelon, C.J., concurring).

[117] Circuit Judges Robb and Wilkey also sat on the motion. *Id.* at 1348.

[118] *Rural Housing Alliance* v. *United States Dep't of Agriculture*, 511 F.2d 1347, 1351 (D.C. Cir. 1974) (concurring opinion).

[119] Maj. op. at 9 n.13, 22, 24.

[120] *See id.* at 9 n.13.

his frequent citation of Judge Bazelon's language[121] seems, at first blush, rather puzzling. This repeated citation becomes less surprising, however, when one realizes that, aside from Judge Edwards' own opinion herein, concurred in by Judge Bazelon, Judge Bazelon's statement in *Rural Housing Alliance* is the only reported opinion to claim that costs should be awarded differently in FOIA cases than in other civil actions. In all Anglo-American jurisprudence, Judges Bazelon and Edwards stand alone.

Judge Edwards' opinion today derives from Judge Bazelon's analysis in *Rural Housing Alliance* two crucial misconceptions about the proper scope of judicial discretion over FOIA costs. While agreeing that the Government deserved costs in that case, Judge Bazelon asserted that two considerations should affect a court's exercise of its rule 39(a) discretion. First, he posited, "taxation of costs works as a penalty"; thus, costs "should not be imposed" upon plaintiffs who have sued in good faith, that is, without knowledge at the outset that their positions lacked substance.[122] Second, he averred, under rule 39(a), "the nature of the litigation itself" may compel judges to exercise their discretion to deny costs.[123] When plaintiffs represent an important public interest, Judge Bazelon argued, courts not only wield broader equitable discretion to deny costs; they have a duty to exercise that discretion "in a way which will not discourage representatives of divergent aspects of the public good from pursuing their claims in court."[124]

[121] *See id.* at 8-9, 20, 21, 22, 24.

[122] *Rural Housing Alliance* v. *United States Dep't of Agriculture*, 511 F.2d 1348, 1349 (Bazelon, C.J., concurring).

[123] *Id.*

[124] *Id.* at 1350.

Judge Edwards uses both of these premises to support his novel judicial standard for awarding costs under FOIA.[125] *Yet neither premise finds any support in the law.* By arguing that "taxation of costs works as a penalty," Judge Bazelon *simply ignored* the long line of precedent indicating that cost awards are just the fair price of unsuccessful litigation.[126] To support his view that losing FOIA plaintiffs should not pay costs if unaware that their positions lack substance, Judge Bazelon cited only the "good faith" language from *Chicago Sugar*.[127] Yet as I have observed above, that language was *dictum* when written, *inconsistent* with the basic rule of the case, and has since been *expressly discredited* by the court which authored it.[128]

Judge Bazelon's second, and more disturbing, premise is virtually identical to the central proposition of today's majority opinion.[129] Following Judge Bazelon, Judge Edwards today argues that, when necessary, courts may exercise their rule 39(a) discretion over costs to avoid "discouraging prosecution of public interest litigation." In the exercise of that discretion, he asserts, judges may "consider different factors in awarding costs in situations involving strong public interest concerns."[130]

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[125] *See* maj. op. at 20; *id.* at 22.

[126] *See* text and accompanying notes 6, 28-37 *supra*.

[127] *Rural Housing Alliance* v. *United States Dep't of Agriculture*, 511 F.2d 1348, 1349 (Bazelon, C.J., concurring), *cited in* maj. op. at 9 n.18.

[128] *See* text and accompanying notes 79-81 *supra*.

[129] Indeed, today, Judge Bazelon reiterates that premise in his separate concurrence. *See* concurring opinion at 1. *Cf.* maj. op. at 20-21.

[130] Maj. op. at 26. *See also* concurring opinion at 1.

In short, Judges Bazelon and Edwards have agreed that judges properly exercise their rule 39(a) discretion in FOIA cases according to a standard totally distinct from that governing all other civil suits.

I challenge the wisdom of awarding costs by different standards in different types of civil actions.[131] In *Rural Housing Alliance* Judge Bazelon urged, and now Judge Edwards has created, a *blanket exception* to rule 39(a)'s normal operation for an entire class of cases—those brought under the Freedom of Information Act. This action both misunderstands the proper role of cost awards in our judicial system and disrupts the uniform operation of the Federal Rules.

Judicial discretion over cost awards is appropriately exercised on a case-by-case basis. Both judicial [132] and statutory [133] rules direct courts to exercise discretion over costs

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[131] I defer until later my critique of the standard itself, *see* Part IX. *infra*, its superfluity, *see* Part VII. *infra*, and the improper manner in which it was created, *see* Part VIII. *infra*.

[132] I have shown in Part III.B. *supra* that courts have properly exercised their discretion to deny costs to victorious defendants under *Chicago Sugar* only when the facts of a given case have suggested good cause to do so. When a losing plaintiff is poor, or the prevailing defendant unnecessarily escalates the costs of a suit, then the equitable principles embodied in rule 39(a) permit a court, in its discretion, to deny or reduce a cost award to mitigate that plaintiff's cost burden and to penalize the defendant for his "acts or omissions . . . in the actual course of the litigation." *See* text accompanying note 66 *supra*.

[133] As noted above, note 94 *supra*, in 1853 Congress approved a comprehensive and uniform system of cost statutes in 1854 '[t]o prevent abuses arising from ingenious constructions [of the cost statutes and] . . . to discourage unnecessary prolixity . . . and the multiplication of proceedings. . . ." H.R. Rep. No. 50, 32d Cong., 1st Sess. at 6 (1852). One of those cost statutes, 28 U.S.C. § 1927, expressly authorizes

as a case—specific sanction against those who abuse the judicial process *in the course of a given litigation*. Judges Bazelon and Edwards believe, however, that our discretion over costs is properly employed not only to curb specific abuses of the judicial process but also to vindicate the public interests served by a given statute.

By exempting an entire class of cases from *Chicago Sugar* to promote FOIA's goals, the majority is *legislating*, not merely exercising equitable discretion over costs in an isolated case. Because cost awards, unlike fee awards, have never been large enough to encourage citizens to sue as private attorneys-general, Congress has rarely awarded them in order to effectuate statutory policies. Instead, costs have been routinely awarded to the prevailing party *irrespective of the statute or issues involved*. As one commentator has noted, even when title VII is the underlying cause of action, "[t]he fundamental difference between awards of costs and attorneys' fees suggests that the purposes of title VII should *not* be considered by a trial judge in determining whether to award costs under Rule 54(d). *Cost awards should be reduced or denied only if the prevailing party has acted in bad faith or unnecessarily escalated the costs of the lawsuit.*" [154]

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courts to tax an *attorney* "who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously" for the excess costs resulting from his vexatious conduct. Like the *Chicago Sugar* rule—a judicially-created standard—§ 1927 punishes conduct which unnecessarily escalates the costs of a suit; unlike that rule, however, § 1927 assesses *excess* costs against the misbehaving *attorney* rather than denying ordinary costs to the misbehaving victorious party. *See also* text and accompanying note 194 *infra*.

[154] Note, *The United States as Prevailing Defendant in Title VII Actions: Attorneys' Fees And Costs*, 66 GEO L.J. 899, 926 (1978) (emphasis added).

The comentator went on to argue:

> When a court considers the purposes of title VII [in the cost award], it might deny or reduce cost awards to prevailing defendants as a means of inducing future suits under the statute. . . . Because the determination of what public interests need particular vindication *is the province of the legislature and not the judiciary*, and because there is no indication that Congress intended such an alteration in the law of cost allocation in title VII suits, courts should be reluctant to effectuate this result absent statutory mandate. . . . *There is no public interest to be served . . . in spreading the cost of unmeritorious suits among the taxpayers rather than imposing them upon the person who invoked the judicial process.* . . .
>
> In determining cost awards under title VII, therefore, a court should treat the United States like any other prevailing party. . . . In most circumstances . . . the prevailing United States should recover costs of litigation *as a matter of course*.

Id. at 926-28 (emphasis added)

I cannot accept the majority's broad approval of "discretionary" denials of costs to the Government, based on judges' assessment of the public interests served by the underlying statutes. That practice, I believe, will quickly degenerate into "virtually random application of [federal cost statutes] on the basis of other laws that do not address the problems of controlling abuses of judicial processes." [155]

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[155] *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761-62 (1980) (Powell, J.) (examining 28 U.S.C. § 1927).

Mindful of distinctions I have discussed, in the civil rights context the courts have been careful to observe the crucial distinction between cost and attorneys' fee awards. *See, e.g., Jones v. City of San Antonio*, 568 F.2d 1224 (5th Cir. 1978):

> Federal Rule of [Civil] Procedure 54(d) grants costs to the prevailing party as a matter of course in the absence of a countervailing rule or statute, unless the trial judge directs otherwise . . . . The cases cited by appellant

Creating a different standard for rule 39(a) cost awards in FOIA cases also violates the Supreme Court's repeated directive that federal rules be applied uniformly in all civil actions to preserve certainty and minimize litigant confusion.[136] The most recent statement emanating from the Court is *Delta Air Lines, Inc.* v. *August*,[137] cited by the majority primarily for the lower court's opinion.[138] In *Delta*, the Seventh Circuit read into Fed. R. Civ. P. 68, a mandatory cost-shifting provision, a discretionary exception for title VII cases. The "high objective" of title VII, the Seventh Circuit argued, required a "liberal, not a technical, reading" of the rule.[139] While affirming the Seventh Circuit's result, *the Supreme Court majority refused to adopt the lower court's reasoning and the dissent squarely rejected it.*[140] Justice Stevens, writing for the majority, refused to read the federal rule liberally in light of the statute being

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are inapposite; *they concern not costs, but attorneys' fees which are not at issue here.*

Id. at 1226 (emphasis added). *See also* Part VIII. A. *infra.*

In Parts VIII. and IX. below I dispute at greater length the majority's assumption that this court possesses both the power *and* the insight to vindicate the public interest by selectively creating blanket exemptions to the *Chicago Sugar* rule for suits brought under public interest statutes.

[136] *See, e.g., United States* v. *F.&M. Schaefer Brewing Co.*, 356 U.S. 227, 230-31 (1958); *City of Morgantown* v. *Royal Ins. Co.*, 337 U.S. 254, 258 (1949).

[137] 49 U.S.L.W. 4241 (9 Mar. 1981), discussed in text and accompanying notes 59-64 *supra.*

[138] Maj. op. at 15-17.

[139] *August* v. *Delta Air Lines, Inc.*, 600 F.2d 699, 702 (7th Cir. 1979).

[140] *See* note 64 *supra.*

sued upon; instead, he construed the rule by reading its language literally.[141]

The *Delta* dissent went even further, explicitly rejecting the very type of reasoning offered by the majority here.[142] The dissenters made clear that when a federal rule of procedure governs the costs decision at issue, an appellate court may *not* invoke the public interest served by the underlying statute to broaden its normal scope of discretion under the rule. Even when a plaintiff sues under a statute serving paramount public objectives, such as title VII,

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[141] Justice Stevens found it unnecessary to decide whether the Seventh Circuit had properly found a Title VII exception in Rule 68 since the lower court had improperly failed to "confront the threshold question whether Rule 68 has any application to a case in which judgment is entered against the plaintiff-offeree and in favor of the defendant-offeror." 49 U.S.L.W. at 4242.

After close textual analysis Justice Stevens concluded that the words of rule 68—"judgment obtained by the offeree"—should not be construed to encompass a judgment *against* the offeree. *Id. See also* 49 U.S.L.W. at 4247 (Rehnquist, J., dissenting) (Seventh Circuit's reasoning "squarely negated by the reasoning of the [majority's] opinion").

[142] Justice Rehnquist, writing for three dissenting Justices, trenchantly noted that

> save for the docket number and the name of the case, [the majority opinion here] bears virtually no resemblance to the judgment and opinion of the Court of Appeals for the Seventh Circuit which we granted certiorari to review.
>
> . . .
>
> Though the ultimate result reached by the Court is the same as that of the Court of Appeals, the difference in approach of the two opinions could not be more startling.

49 U.S.L.W. 4246 (Rehnquist, J., with whom Burger, C.J., and Stewart, J., joined, dissenting).

> [t]here is no intimation in the Federal Rules of Civil Procedure or Title VII that such lawsuit will not be conducted in accordance with the Federal Rules of Civil Procedure. . . . Presumably, the "plain language" of the Federal Rules . . . would bring the Court *to reject any special treatment with respect to costs for a Title VII lawsuit*. . . .[143]

The majority's new standard proposes just such "special treatment with respect to costs" for all FOIA suits.

In sum, the majority simply errs by asserting that "not until the passage of the 1974 amendments to FOIA [was] some light . . . shed on the subject" of how courts should award costs in FOIA suits.[144] Before 1974, the scope of the judicial discretion to deny costs to prevailing defendants in FOIA suits was no broader than in any other civil action. The majority opinion creates the illusion that Judge Bazelon's concurrence in *Rural Housing Alliance* was correctly reasoned—in fact, that concurrence represents a view about FOIA costs never endorsed, before or since, by anyone other than Judges Bazelon and Edwards. Indeed, when one compares the facts here with those in *Rural Housing Alliance*, one can hardly understand why Judge Bazelon joins in the denial of costs here when he *concurred* in the denial of costs to the losing plaintiff in that case![145] Judge Bazelon's concurrence today would be explicable only if Congress had created a new costs rule for FOIA cases when it added a fees and costs provision to the FOIA in 1974. I shall demonstrate below that Congress did no such thing.

[143] *Id.* at 4247 (emphasis added).

[144] Maj. op. at 10.

[145] In *Rural Housing Alliance*, Judge Bazelon explicitly rested his concurrence on the unsuccessful plaintiff's failure to show that "paying the Government's bill is likely to affect its role in this or future litigation." *Rural Housing Alliance v. United States Dep't of Agriculture*, 511 F.2d 1348, 1351 (D.C. Cir. 1974) (Bazelon, C.J., concurring). "In the absence of such a showing," Judge Bazelon noted, "I cannot say that the equities in [RHA's] favor are so compelling as to render the denial of its petition unreasonable." *Id.*

Assuming *arguendo* that Judge Bazelon applied the proper standard for denying costs in *Rural Housing Alliance*, I find the equities here even *less* compelling for appellant than they were in *Rural Housing Alliance*. The Government now requests only $365, as compared to $425. *See* note 116 *supra*. While in *Rural Housing Alliance*, Judge Bazelon believed that "the plaintiffs in this case validly represent an important public interest," namely, the "national policy of eliminating discrimination in housing," 511 F.2d at 1350, appellant here sought to obtain government information pertaining solely to her own personal or professional activities. Maj. op. at 20.

Furthermore, in *Rural Housing Alliance*, Judge Bazelon was influenced by RHA's failure to assert inability to pay. Here appellant makes only one concrete attempt to substantiate her inability to pay costs, which falls far short of proving serious lack of resources:

> While Ms. Baez would not plead poverty, to assume her resources are unlimited would be to ignore the enormous costs of staging concerts and transporting supporting personnel and supporting acts to locations throughout the world. Furthermore, the documents released in this case reveal many of the charities to which Ms. Baez contributes both time, work and money, and her continuing several years' effort on behalf of Cambodian refugees are well known.

Appellant's Motion in Opposition to Award of Appellees' Bill of Costs at 5 n.4.

In Judge Bazelon's own words, "in the absence of a showing by appellant that paying the Government's bill is likely to affect [her] role in this or future litigation," the equities in her favor are hardly so compelling as to render the denial of her petition unreasonable.

V. The Congressional Intent Underlying the 1974 FOIA Amendment

In 1974 Congress amended the FOIA to provide, *inter alia*, that:

> The court *may* assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section *in which the complainant has substantially prevailed.*[146]

Even before examining the legislative history of the Act, I should note three ways in which the majority overreads the language of that amendment.

A. *The Plain Language of § 552(a)(4)(E).*

The majority claims that

> [g]iven the literal language of [the amendment] and the related legislative history, it is clear that the passage of the attorneys fees and litigation costs amendment to the Freedom of Information Act in 1974 *certainly did not reduce* any equitable discretion previously exercised by the courts in awarding costs in FOIA cases.[147]

While this statement is no doubt literally correct, it proves absolutely nothing—my analysis to this point should make clear that the equitable discretion previously exercised by the courts in FOIA cases under rule 39(a) was already very strictly circumscribed. The only relevant question is whether plain language or legislative history evinced congressional intent to *expand* an appellate court's narrow discretion to deny costs to prevailing FOIA appellees.

Judge Edwards' second point is that "[t]here is no comparable provision in FOIA allowing for costs or attorneys fees *in favor of* the Government." [148] That omission also proves nothing. As *Rural Housing Alliance* exemplifies, *before 1974, when losing appellants made no showing of inability to pay, courts routinely awarded costs* to prevailing Government defendants in FOIA suits, in accordance with the rule 39(a) and common-law presumption in favor of the prevailing party.[149]

Finally, the statutory language evidences no congressional intent to *supplement* our equitable discretion over costs with additional *statutory* discretion to deny costs to FOIA *defendants*. The amendment provides that the statutory discretion bestowed on the courts shall not be triggered *until the court determines that the complainant has "substantially prevailed."* [150] In the case at hand, all parties agree that appellant has *not* substantially prevailed against the Government. We are therefore powerless to exercise the *statutory* discretion granted us by the 1974 amendment.

B. *Legislative History*

An examination of section 552(a)(4)(E)'s scanty legislative history clarifies that Congress never addressed,

[146] 5 U.S.C. § 552(a)(4)(E) (1976) (emphasis added).

[147] Maj. op. at 10 (emphasis in original).

[148] *Id.* (emphasis added).

[149] *See* Part III. A. 2. *supra;* Part VI., *infra.*

[150] As Judge Sirica noted in another case involving appellant here:

> Although Congress invested the courts with broad discretion to determine whether attorney fees should be awarded [to the plaintiff] in a particular case, . . . the statute imposes a *mandatory precondition* to the award: the plaintiff must have "substantially prevailed." . . . The Court must therefore determine [first] whether plaintiff has substantially prevailed within the meaning of the

Baez v. CIA, No. 76-1920, mem. op. at 1 (D.D.C. 31 July 1979), *aff'd mem.* (D.C. Cir. 23 Oct. 1980) (emphasis added).

must less modified, prevailing judicial practice regarding cost awards to *prevailing FOIA appellees*. As Judge Edwards acknowledges,[151] the primary concern of the legislators who proposed the amendment was to authorize awards of attorneys' fees and costs to *substantially prevailing FOIA plaintiffs*.

The historical context of the amendment shows why this was necessary. In 1966, Congress had enacted a general waiver of the Government's sovereign immunity against paying cost awards: 28 U.S.C. § 2412.[152] Congress had not however, waived the Government's sovereign immunity against paying *attorneys' fees*, except on a statute-by-statute basis.[153] 5 U.S.C. § 552(a)(4)(E), like other attorneys' fee provisions contemporaneously enacted in other statutes [154] represented a specific congressional waiver of the Government's sovereign immunity against paying attorneys' fees in FOIA suits.[155]

Over the years Congress had enacted three basic types of attorneys' fee statutes: those *mandating* courts to pay fees and costs to *all prevailing litigants*,[156] those *permitting* courts to award fees and costs, but only to *prevailing plaintiffs*,[157] and those "authorizing the award of attorney's fees *to either plaintiffs or defendants*, and entrusting the effectuation of the statutory policy to the discretion of the district courts." [158] By its own terms the third type of provision grants courts broad statutory discretion to award fees and costs so as to further the goals of the underlying statute; the first type grants none. In 1974, however, Congress chose to incorporate neither of these types of provisions, but rather the *second* type, into the FOIA.[159]

[151] Maj. op. at 10.

[152] *See* Part IV. A. *supra*.

[153] In 28 U.S.C. § 2412, *cited* in note 105 *supra*, Congress provided only that "a judgment for costs . . . *not including the fees and expenses of attorneys* may be awarded to the prevailing party in any civil action brought by or against the United States." (emphasis added).

[154] *See, e.g.*, Privacy Act of 1974, 88 Stat. 1897, 5 U.S.C. § 552a(g)(3)(B) (1976); Fair Housing Act of 1968, 82 Stat. 88, 42 U.S.C. § 3612(c) (1976).

[155] *See Blue* v. *Bureau of Prisons*, 570 F.2d 529, 532-33 (5th Cir. 1978); *Nationwide Bldg. Maintenance, Inc.* v. *Sampson*, 559 F.2d 704, 710-16 (D.C. Cir. 1977).

[156] *See, e.g.*, Antitrust Laws, 15 U.S.C. § 15 (1976); Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970); Truth in Lending Act, 15 U.S.C. § 1640(a) (1976); Merchant Marine Act, 46 U.S.C. § 1227 (1970).

[157] *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1976); Privacy Act, 5 U.S.C. § 552a(g)(3)(B) (1976); Fair Housing Act of 1968, 42 U.S.C. § 3612(c) (1976).

[158] *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 416 & n.7 (1978) (emphasis added) (describing civil rights fees and costs provision and *citing* Trust Indenture Act of 1939, 15 U.S.C. § 77*ooo*(e); Securities Exchange Act of 1934, 15 U.S.C. §§ 78*i*(e), 78*r*(a); Federal Water Pollution Control Act, 33 U.S.C. § 1365(d); Clean Air Act, 42 U.S.C. § 1857*h*-2(d); Noise Control Act of 1972, 42 U.S.C. § 4911(d)).

[159] In *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 415-16 & nn.5-7 (1978), the case which provided the language for the majority's new FOIA standard, *compare* maj. op. at 13-14, *with id.* at 23, Justice Stewart clarified the difference between the statutory discretion provided by the second and third types of fee provisions. As an example of the second type of statute, Justice Stewart cited the fees provision of the Privacy Act, whose language is identical to the fees and costs provisions of the FOIA. *Compare* text accompanying note 146 *supra*, *with* 5 U.S.C. § 552a(g)(3)(B) (1976) (Privacy Act).

Justice Stewart then went on to say:

> But many [fees] statutes are *more flexible*, authorizing the award of attorney's fees to *either plaintiffs or defendants*, and entrusting the effectuation of the statutory policy to the discretion of the district courts. Section 706(k) of Title VII of the Civil Rights Act of 1964

That decision was significant. By 1974, large and unpredictable attorneys' fee awards had become as common in the FOIA context as elsewhere.[160] By enacting the FOIA fees and costs provision, Congress sought to encourage those with reasonable grounds to litigate regardless of the potential barriers posed by fees and costs. Yet awareness of the increasingly large and variable nature of FOIA attorneys' fees convinced Congress not to punish the Government by *mandating* routine and automatic awards of such fees.[161] Nor did Congress consider FOIA's goals well-served by authorizing every court hearing FOIA cases to exercise unbridled discretion over fees and costs. As a compromise, Congress approved FOIA fee and cost awards, but expressly restricted judicial discretion to make such awards in two ways: first, by authorizing courts to award fees and costs only to the class of substantially prevailing plaintiffs,[162] and second, by

falls into this last category, providing as it does at a district court may in its discretion allow an attorney's fee *to the prevailing party*.

434 U.S. at 416 (emphasis added).

[160] In *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), for example, the Government paid fees of close to $34,000. At about the same time, one witness at the Senate Hearings on Amendments to the Freedom of Information Act testified that the attorneys' fees in the FOIA cases he had already litigated would run "in the neighborhood of $60,000 or $70,000" if calculated at the going rates for a leading Washington law firm. *See* 1 *Hearings on S. 858*, etc., Senate Comm. on Gov't Operations & Senate Comm. on the Judiciary, 93d Cong., 1st Sess. at 115 (1973) (Statement of William Dobrovir).

[161] FOIA SOURCEBOOK, note 162 *infra*, at 118.

[162] When the 1974 fees provision was being debated on the floor of the House, Congressman Rousselot expressed concern that the provision might be applied too broadly by the courts. Both Congressman Moorhead, the floor manager for the amendments package, and Congressman Moss reassured him,

directing courts to exercise their discretion to award fees and costs to members of that class according to four decisional criteria: (1) the public benefit, if any, to be derived from plaintiff's case; (2) the commercial benefit to the plaintiff; (3) the nature of plaintiff's interest in the records sought; and (4) whether the Government's

however, that the threshold barrier to recovery of fees and costs posed by the "substantially prevailing" requirement would minimize the burden of the provision on the taxpayers.

> Mr. MOORHEAD of Pennsylvania: Of course, it is conceivable [that courts will award fees too generously]; but *first the plaintiff has to prevail*, and *even if he prevailed, the courts will grant* [fees] *only at their discretion*.
>
> Mr. ROUSSELOT: But it is clearly possible the way the courts are today, they are *very lenient with our money*. I wondered if this is *not a possible flaw in this legislation*.
>
> . . .
>
> Mr. MOORHEAD of Pennsylvania: Mr. Chairman, I might point out to the gentleman that in this kind of litigation, the plaintiff gets no monetary award from winning the case. He is serving all of the people by making Government more open *if he prevails*.
>
> Mr. ROUSSELOT: Except that he may keep it in court by trying to persuade the judge or the court itself to pay his fees.
>
> Mr. MOORHEAD of Pennsylvania: *Only*, I say to the gentleman, *if the court finds the Government has improperly withheld material*.
>
> . . .
>
> Mr. MOSS: Mr. Chairman, I was merely going to make the point that in order *for such a person to prevail, the original withholding would have had to have been an improper act*, or otherwise he could not prevail.

120 CONG. REC. 6806 (1974), *reprinted in* FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-502). SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS AND OTHER DOCUMENTS, House Comm. on Gov't Operations & Senate Comm. on the Judiciary (March 1975), at 242 (emphasis added) [FOIA SOURCEBOOK].

withholding of the records had a reasonable basis in law.[163]

[163] FOIA SOURCEBOOK, *supra* note 162, at 171.

Thus, an award of FOIA fees and costs is anything but automatic. As subsequent case law in this Circuit has clarified, to obtain fees and costs under § 552(a)(4)(E), a plaintiff must independently establish both *eligibility* for fees—i.e., that he (1) "substantially prevailed" (2) "in a case under this section"—and *entitlement* to fees. *See, e.g., Church of Scientology* v. *Harris*, No. 80-1189 (D.C. Cir. 17 April 1981).

To "substantially prevail," plaintiffs need not necessarily win a judgment. *See, e.g., Cuneo* v. *Rumsfeld*, 553 F.2d 1360, 1364-65 (D.C. Cir. 1977). Plaintiffs must, however, first show that the agency released information after their suit was filed and then "assert something more than *post hoc, ergo propter hoc.*" *Cox* v. *United States Dep't of Justice*, 601 F.2d 1, 6 (D.C. Cir. 1979) (per curiam). This latter requirement itself breaks into two halves: plaintiff must show (1) "that prosecution of the action could reasonably be regarded as necessary to obtain that information;" and (2) "that a causal nexus exists between that action and the agency's surrender of the information." *Id.*

To prove that their case was in fact a case cognizable under the FOIA, plaintiffs must show that the agency "improperly", *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375 (1980), "withheld", *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980), "agency records", *Forsham* v. *Harris*, 445 U.S. 169 (1980).

Once established, "[e]ligibility [for fees] . . . does not mean entitlement," however. *Cox* v. *United States Dep't of Justice*, 601 F.2d at 6 (D.C. Cir. 1979); *Church of Scientology* v. *Harris*, No. 80-1189, slip op. at 13-15 (D.C. Cir. 17 April 1981). The trial court must then balance *all four* decisional criteria listed in the Senate Report to decide whether the "substantially prevailing plaintiff is entitled to fees. *See, e.g., Fenster* v. *Brown*, 617 F.2d 740, 742 (D.C. Cir. 1979); *Cox.* v. *United States Dep't of Justice*, 601 F.2d 1, 6 (D.C. Cir. 1979) (per curiam); *Goland* v. *CIA*, 607 F.2d 339, 356 n.103 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980); *Nationwide Bldg. Maintenance, Inc.* v. *Sampson*, 559 F.2d 704, 710-16 (D.C. Cir. 1977); *Cuneo* v. *Rumsfeld*, 553 F.2d 1360, 1364 & 1367 (D.C. Cir. 1977). Some guidance as to how the four factors are to be balanced is provided in the Senate Report itself, which describes a number of situations in which FOIA plaintiffs, *even though successful*, have not brought suit with an eye toward vindicating the public interest and thus do not deserve fee awards from the courts: when, for example, a business uses FOIA for discovery purposes; when complainant is a large corporate interest; when plaintiff's interest in disclosure is purely commercial or frivolous; and when the government's withholding had a colorable basis in law. FOIA SOURCEBOOK, *supra* note 162, at 171; *see also Nationwide Bldg. Maintenance, Inc.* v. *Sampson*, 559 F.2d 704, 712-16 (D.C. Cir. 1977).

Even when a plaintiff has established entitlement to fees by *all* of the above criteria, the trial judge still has discretion to deny fees and costs if, for example, plaintiff's fee claim is poorly documented or brought in bad faith. *See, e.g., Jordan* v. *U.S. Dep't of Justice*, No. 76-0276 (D.D.C. 26 Feb. 1981), *discussed in* note 256 *infra*.

Today the majority argues that the 1974 amendment somehow broadened the scope of our discretion over fees and costs in FOIA cases. Yet in cases like this one, involving not a substantially prevailing plaintiff, but a substantially prevailing defendant, *Congress left the traditionally narrow scope of our rule 39(a) discretion over costs totally undisturbed.* The majority then contends that, because the legislative history of the FOIA amendment provided "no *specific* guidance . . . for the exercise of the court's discretion in awarding litigation costs," [164] a new standard for awarding costs to prevailing FOIA defendants is warranted. Yet the majority ignores the most obvious reason why Congress gave no specific guidance to courts as to the proper exercise of judicial discretion over litigation costs: before 1974 such a standard *already existed*, namely, the *Chicago Sugar* rule.

[164] Maj. op. at 11.

C. *Preemption*

When Congress enacted section 552(a)(4)(E), it clearly could have explicitly *preempted* the normal operation of rule 39(a) in FOIA cases by a provision satisfying rule 39(a)'s "except as otherwise provided by law" clause. The majority implies that Congress enacted § 552(a)(4)(E) with such an intent. Citing language from the only paragraph in the 1974 amendment's legislative history discussing cost awards to the Government, Judge Edwards avers that Congress did "contemplate awards of costs to the Government, as prevailing defendants in FOIA actions, *but only in limited circumstances*":[165]

> Court have assumed inherent equitable powers to award fees and costs to the defendant *if a lawsuit is determined to be frivolous and brought for harassment purposes*; this principle will continue, as before, to apply to FOIA cases.[166]

Once again Judge Edwards overreads plain language. In the paragraph cited, Congress was addressing only the circumstances under which courts might award both fees *and* costs *against* unsuccessful FOIA plaintiffs. Under one of two well-settled exceptions to the general American rule disfavoring fee awards, courts traditionally possessed equitable discretion to award attorneys' fees against plaintiffs who have sued in bad faith—that is, frivolously and for harassment purposes.[167] The language cited indicates only Congress' clear intent in passing the 1974 fees and costs provision *not to preempt that equitable discretion*. It indicates no intent to preempt the normal operation of rule 39 in FOIA cases.

[165] *Id.* at 22 n.27 (emphasis added).

[166] *Id.* (citing FOIA SOURCEBOOK, *supra* note 162, at 172) (emphasis added by Judge Edwards).

Appellant has contended that, by this language, Congress intended to deny the Government costs in *every* FOIA case in which it has substantially prevailed *unless* it can prove that the losing plaintiff's suit was "frivolous *and* brought for harassment purposes." Appellant's Motion in Opposition to Award of Appellees' Bill of Costs at 3; *see also* maj. op. at 2, 5. As I note below, however, *see* Part VII. *infra*, Judge Edwards implicitly rejects this interpretation by importing from the realm of *title VII attorneys' fee awards* a "non-frivolousness" standard to govern *denial of FOIA costs*.

Indeed, the cited language itself specifies Congress' desire to preserve, not disrupt, the continuity of judicial practice regarding fee and cost awards to the Government.[168] By that language Congress gave prospective FOIA plaintiffs fair warning that they continued to assume the risk that a court might award both fees and costs *against* them if they sued frivolously and for harassment purposes. Congress never told FOIA plaintiffs that henceforth they would be free from liability for the Government's costs if they sued and lost.

The preceding page of the legislative history makes this plain:

> Generally, if a complainant has been successful in proving that a government official has *wrongfully withheld information*, he has acted as a private at-

[167] *F. D. Rich Co.* v. *United States*, 417 U.S. 116, 129 (1974); *Hall* v. *Cole*, 412 U.S. 1, 15 (1973). The Supreme Court had also recognized equitable power in the federal courts, even without express statutory authorization, to award attorneys' fees to successful litigants who confer a "common benefit" on an ascertainable class of persons when a fee award would serve to spread the litigation costs proportionately among them. *See, e.g., Hall* v. *Cole*, 412 U.S. 1, 5, (1973); *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161 (1939). The Court reaffirmed the equitable power of the federal courts to award fees in these two narrow situations in *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975), *discussed in* Part VIII.B. *infra*.

[168] FOIA SOURCEBOOK, *supra* note 162, at 172 ("This principle *would continue, as before*, to apply in FOIA cases.") (emphasis added).

torney general in vindicating an important public policy. *In such cases it would seem tantamount to a penalty to require the wronged citizen to pay his attorneys' fee* to make the government comply with the law.[169]

Clearly, Congress' principal goal in enacting the fees provision was to avoid penalizing an individual who has forced the Government to comply with the law for his public service. Serving that goal does not require that courts free citizens who have not proved wrongful Government action from reimbursing the necessary expenses of vindicating lawful nondisclosure decisions.[170]

The majority must acknowledge that *the legislature never even mentioned rule 39 in its discussion of the 1974 FOIA fees and costs amendment.* Our authority to tax the costs at issue here against losing appellants derives from 28 U.S.C. § 1920, which Congress first enacted in 1853 as part of a uniform statutory scheme for judicial cost awards.[171] When Congress approved Fed. R. App. P.

[169] *Id.* at 171.

[170] Even when courts have withheld the bonanza of attorneys' fees from a substantially prevailing plaintiff, they have still reimbursed plaintiff's litigation *costs* necessarily incurred in pressing the successful claim. *See, e.g., Maxwell Broadcasting Corp.* v. *FBI*, 490 F. Supp. 254 (N.D. Tex. 1980) (prevailing *pro se* FOIA plaintiff denied fees but awarded some costs against the Government). Until now, no court has concluded that Congress enacted the 1974 amendments *with intent to nullify the traditional notion that the unsuccessful party bears all necessary expenses of using the judicial system.* Today Judge Edwards reads the same statutory language as overriding the traditional costs rule whenever the *Government* wins a FOIA case, even though the losing plaintiff has made no showing of inability to pay.

[171] *See* note 94 *supra.*

39(a), it confirmed as well the presumption contained in that rule.[172] I cannot believe that a single line from the Senate Report on § 552(a)(4)(E), removed from textual and historical context, evinces congressional intent *sub silentio* to disrupt the way courts have consistently exercised their discretion under that rule.

VI. Appellate Practice *After* the 1974 Amendment

I have noted above that, before *Rural Housing Alliance*, courts routinely awarded costs to the Government when it prevailed in FOIA suits.[173] Because § 552(a)(4)(E) effected no change in the law of costs it would hardly be surprising if judicial practice regarding FOIA costs remained unchanged after 1974.

Admitting only that appellate courts "may or may not" have routinely awarded costs to winning FOIA defendants, Judge Edwards infers from two motions contested in the last year that past judicial practice is irrelevant.[174] From these two cases Judge Edwards further infers that judges now wield broad rule 39(a) discretion to deny the Government costs in FOIA cases. Research reveals that both inferences are simply wrong.

Since *Rural Housing Alliance* was decided, no fewer than nineteen FOIA cases have been decided in this

[172] *See* text and accompanying notes 93-96 *supra.*

[173] *See* text and accompanying notes 54-58, 113-15, 149 *supra.*

[174] *See* maj. op. at 24, *citing Weisberg* v. *CIA*, No. 79-1729 (D.C. Cir. 14 July 1980) (order denying appellee's bill of costs); *Lesar* v. *United States Dep't of Justice*, No. 78-2305 (D.C. Cir. 3 Sept. 1980) (order that no costs shall be awarded in favor of appellee). *But see* text and accompanying notes 179, 189 *infra* (discussing *Lesar*).

Circuit in which the Government prevailed in the district court, had the district court's judgment affirmed in all respects on appeal and then filed a motion here requesting costs.[176] *In every single one of them, without exception, costs were routinely taxed against the appellant.* It takes only a moment's reflection to understand why this is so. As noted above, our court's rules and post-decision procedures are governed by rule 39(a). Thus they *require* that costs be awarded to the prevailing appellee upon proper request, in the absence of objection

[176] *Common Cause* v. *IRS*, No. 80-1097 (D.C. Cir. 9 Mar. 1981); *Church of Scientology* v. *Turner*, No. 80-1172 (D.C. Cir. 18 Dec. 1980); *Exxon Corp.* v. *FTC*, No. 79-1995 (D.C. Cir. 3 Oct. 1980); *Halperin* v. *CIA*, No. 79-1849, 629 F.2d 144 (D.C. Cir. 1980); *Schuler* v. *Department of State*, No. 78-1797, 628 F.2d 199 (D.C. Cir. 1980); *LaSalle Extension Univ.* v. *FTC*, No. 79-1270, 627 F.2d 481 (D.C. Cir. 1980); *Fenster* v. *Brown*, No. 78-2169, 617 F.2d 740 (D.C. Cir. 1979); *Gulf & Western Indus., Inc.* v. *United States*, 615 F.2d 527, 534 (D.C. Cir. 1979) (costs taxed against appellant by court without a motion for costs); *Hayden* v. *NSA/CSS*, Nos. 78-1728 & 29, 608 F.2d 1381 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *Goland* v. *CIA*, No. 76-1800, 607 F.2d 339 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980); *Forsham* v. *Califano*, No. 76-1808, 587 F.2d 1128 (D.C. Cir. 1978), *aff'd sub. nom. Forsham* v. *Harris*, 445 U.S. 169 (1980); *Consumers Union* v. *Heimann*, No. 77-2115, 589 F.2d 531 (D.C. Cir. 1978); *Baker* v. *CIA*, No. 77-1228, 580 F.2d 664 (D.C. Cir. 1978); *Mead Data Central, Inc.* v. *U.S. Dep't of Air Force*, No. 76-2184, 575 F.2d 932 (D.C. Cir. 1978); *Ginsburg, Feldman & Bress* v. *Federal Energy Administration*, No. 76-1759, 591 F.2d 717 (D.C. Cir. 1978) *cert. denied*, 441 U.S. 906 (1979); *Association for Women in Science* v. *Califano*, No. 75-2139, 566 F.2d 339 (D.C. Cir. 1977); *Seymour* v. *Barabba*, No. 76-1867, 559 F.2d 806 (D.C. Cir. 1977); *Vaughn* v. *Rosen*, No. 75-1081, 523 F.2d 1136 (D.C. Cir. 1975); *Wolf* v. *Froehlke*, No. 73-1913, 510 F.2d 654 (D.C. Cir. 1974).

by opposing counsel.[178] Costs are *automatically* taxed against appellant with only two exceptions: (1) when the Government chooses not to file for costs[177] or (2) when the losing plaintiff contests the motion.[178] Only in the latter category, which includes the two very recent cases cited by the majority, is *judicial*, as opposed to *clerical*, discretion even invoked!

One of the two cases cited by the majority involved a pro se plaintiff who made a showing of indigency.[179]

[178] *See* text and accompanying notes 56-58 *supra*.

[177] In the following post-*Rural Housing Alliance* FOIA cases, the district court's judgment was affirmed, but the Government did not file a motion requesting costs, and thus costs were *not* taxed against the appellant. *Carlisle Tire & Rubber Co.* v. *United States Customs Serv.*, No. 80-1149 (D.C. Cir. 17 Dec. 1980); *Duffin* v. *Carlson*, 636 F.2d 709 (D.C. Cir. 1980); *Carson* v. *U.S. Dep't of Justice*, No. 79-1871 (D.C. Cir. 27 Aug. 1980); *Crooker* v. *U.S. State Dep't*, No. 79-2441, 628 F.2d 9 (D.C. Cir. 1980); *Krohn* v. *Department of Justice*, No. 79-1957, 628 F.2d 195 (D.C. Cir. 1980); *Murphy* v. *Department of Army*, No. 78-1258, 613 F.2d 1151 (D.C. Cir. 1979); *Irons & Sears* v. *Dann*, No. 78-1200, 606 F.2d 1215 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075 (1980); *National Retired Teachers Ass'n* v. *United States Postal Serv.*, No. 77-1590, 593 F.2d 1360 (D.C. Cir. 1979); *Mervin* v. *FTC*, No. 77-1204, 591 F.2d 821 (D.C. Cir. 1978); *Saffron* v. *Department of Navy*, No. 75-1794, 561 F.2d 938 (D.C. Cir. 1977) *cert. denied*, 434 U.S. 1033 (1978); *Parker* v. *EEOC*, No. 75-1828, 534 F.2d 977 (D.C. Cir. 1976); *Ditlow* v. *Shultz*, No. 74-1975, 517 F.2d 166 (D.C. Cir. 1975).

[178] *See* notes 55-58 *supra*. The majority has unearthed the only three post-1974 FOIA cases which fall into this category. *See* maj. op. at 24.

[179] In *Lesar* v. *United States Dep't of Justice*, 636 F.2d 472 (D.C. Cir. 1980) (motion to deny costs granted, 29 Aug. 1980), a panel comprised of Senior Judge Bazelon, Judge Edwards, and myself unanimously voted to deny the Government its costs of $290. In that case, however, unlike this one, the *pro se* plaintiff had alleged a lack of financial

Under *Chicago Sugar* we properly exercised our rule 39(a) discretion by denying costs in that case.[180] In the other case, the panel simply denied the Government its costs without opinion, over the dissent of then-Chief Judge Wright, on a judgment affirmed without opinion or memorandum.[181] Today, we divide 2-1 on an identical motion, and deny the Government costs despite appellant's failure to show inability to pay. To my mind, these recent discretionary denials of FOIA cost awards indicate not the need for a *new* standard to guide our discretion, but the lack of Circuit-wide recognition of what the appropriate standard has been.

VII. The Appropriate Standard for Denial of Costs in FOIA Actions

Arguing that "it is impossible to know what measure of discretion was being exercised by the courts . . . between 1967 and 1974," the majority blithely assumes that no standard has ever governed rule 39(a) discretion in FOIA cases.[182] Implying that the 1974 amendment changed the

resources and attempted a showing that the routine cost award would chill similarly situated indigent FOIA litigants. *See* note 189 *infra*.

[180] *See* text accompanying notes 73-76 *infra*.

[181] On 8 July 1980, in *Hayden* v. *NSA/CSS*, Nos. 78-1728 & 29, 608 F.2d 1381 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980), visiting Judge Gordon and I had voted, in accordance with time-honored practice, to award the Government its $212 bill over Judge MacKinnon's dissent. On 9 July 1980, however, in *Weisberg* v. *CIA*, No. 79-1729, Judges MacKinnon and Penn simply denied the Government a $164 award over Chief Judge Wright's dissent. In *Weisberg*, appellant made no showing that his case was "without confessed commercial self-interest and not frivolous, unreasonable, or without foundation."

[182] Maj. op. at 9; *see also id.* at 22.

law in this area, the majority then proposes a new standard, derived from neither the language or the legislative history of the amendment which allegedly caused the change, but rather, partially conjured and partially imported from *Title VII attorneys' fee cases*. Henceforth, the majority declares, costs should be denied to prevailing FOIA defendants "when a plaintiff has acted without confessed commercial self-interest, in a suit that is not frivolous, unreasonable or without foundation." [183]

Judge Edwards finds the *Chicago Sugar* rule simply inappropriate here since "it would frustrate the purposes" of the FOIA to award costs in FOIA cases under the standard governing all other civil actions.[184] Judge Bazelon's concurring opinion similarly contends that application of the *Chicago Sugar* rule in FOIA cases would prevent this court "from giving effect to significant public policy interests embodied in the Freedom of Information Act cases." [185] Yet neither opinion shows why we *need* an entirely new rule for awarding FOIA costs.

Courts can easily apply the *Chicago Sugar* rule in FOIA cases, thus preserving uniform treatment of cost awards in civil actions, without sacrificing any of the public purposes promoted by the FOIA. Under *Chicago Sugar*, the prevailing Government defendant would receive its costs as a matter of course unless the unsuccessful FOIA plaintiff could show that the Government had engaged in misconduct in the course of the litigation which unnecessarily escalated the costs of the lawsuit. We would properly exercise our rule 39(a)

[183] Id. at 23, 28.

[184] Id. at 23.

[185] Concurring opinion at 1.

discretion to deny or reduce costs if the FOIA plaintiff either proved her inability to pay costs or the likelihood that she or similarly situated plaintiffs would be chilled from future meritorious litigation under the Act by the cost award. We would also properly exercise that discretion by disallowing excessive Government requests for costs not specifically authorized by statute.

Such application of the *Chicago Sugar* rule in FOIA cases is perfectly consistent with the legislative purpose underlying the 1974 FOIA amendment. As Judge Tamm noted in *Nationwide Bldg. Maintenance* v. *Sampson*,[186] that purpose was not "to provide a reward for any litigant who successfully forces the government to disclose the information it wished to withhold. [Section 552(a) (4) (E)] had a more limited purpose—*to remove the incentive for administrative resistance to disclosure requests based* not on the merits of the exemption claims, *but on the knowledge that many FOIA plaintiffs do not have the financial resources or economic incentives to pursue their requests through expensive litigation*".[187]

In ordinary cases the concerns addressed by the amendment are real only when *attorneys' fees* are at stake. A bureaucrat's awareness that a FOIA requester could not compel disclosure of agency records without also footing a hefty lawyer's bill[188] might easily contaminate his decision to resist a FOIA request. Similarly, a prospective FOIA plaintiff's zeal for litigation might well be dampened by knowledge that he could never get the documents he wanted without also paying lawyer's fees.

[186] 559 F.2d 704 (D.C. Cir. 1977).

[187] *Id.* at 711 (emphasis added).

[188] *See* note 160 *supra*.

When courts award excessive costs, or when FOIA plaintiffs are indigent, the same concerns recur. An agency's incentive to resist a plaintiff's legitimate disclosure request might well be enhanced if it knew either that it could receive costs as large as attorneys' fees or that statutorily authorized litigation costs would shift to a *pro se* plaintiff if he lost. By the same token, huge cost bills might well deter ordinary FOIA plaintiffs and statutory cost bills might well deter indigent plaintiffs from seeking disclosure by court order.[189]

Aside from these two well-defined cases, however, it is difficult to imagine any case where an agency's incentive to resist a disclosure request—which both a trial court and an appellate court would later deem unmeritorious—would be enhanced by its perception that it would thereby avoid the costs of printing its appellate briefs. Nor can I imagine the small and predictable costs incident to a losing appeal chilling plaintiffs of any financial means from pursuing even marginally colorable claims.

Application of the *Chicago Sugar* rule in FOIA cases would accord with that portion of section 552(a) (4) (E)'s legislative history approving fee awards "when government officials have been recalcitrant in their opposition to a valid claim or have *otherwise been engaged in ob-*

[189] *Lesar* v. *United States Dep't of Justice*, 636 F.2d 472 (D.C. Cir. 1980), in which we denied a cost award of $290 to the Government, seems to me just such a case. In that case the plaintiff contended that for five years he had spent most of his time as a *pro se* lawyer in FOIA suits; that his clients paid him little in the way of fees; that his income was low; and that an award of costs to the Government would have a chilling effect on similarly situated FOIA litigants. *See* Appellant's Opposition to Appellee's Affidavit of Costs, *Lesar* v. *United States Dep't of Justice*, No. 78-2305 (D.C. Cir., filed 28 July 1980).

durate behavior." [160] It seems perfectly consistent with the equitable considerations embodied in rule 39(a) for courts to award costs against victorious Government defendants who have been unduly recalcitrant or obdurate in litigating FOIA claims; in such cases, a discretionary denial of costs would both properly penalize the agency for failing to minimize litigation costs and partially equalize the cost burden between the unsuccessful plaintiff and the obdurate defendant.[161]

FOIA's goals would thus continue to be well-protected if we exercise our discretion over FOIA costs as follows: If we determine that the FOIA plaintiff has "substantially prevailed" under the standards of the numerous cases defining those statutory terms,[162] then we should exercise our *statutory* discretion under section 552(a)(4)(E) to award or deny attorneys' fees *and* costs to prevailing plaintiff, applying all *four* discretionary factors found in the Senate Report.

[160] [T]here will seldom be an award of attorneys' fees when . . . there is . . . no need to award attorneys' fees to insure that the action will be brought. The private self-interest motive of, and often pecuniary benefit to, the complainant will be sufficient to insure the vindication of the rights given in the FOIA. The court should not ordinarily award fees under this situation *unless the government officials have been recalcitrant in their opposition to a valid claim or have been otherwise engaged in obdurate behavior.*

FOIA SOURCEBOOK, *supra*, note 162, at 171 (emphasis added). Determinations that the agency has or has not been "recalcitrant in its opposition to a valid claim or have been otherwise engaged in obdurate behavior" have frequently guided discretionary awards or denials of fees to FOIA plaintiffs. *See, e.g., Goland* v. *CIA*, 607 F.2d 339, 356 n.103 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980); *Cuneo* v. *Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977).

[161] *Cf.* note 132 *supra*. *See also* Part III. B. *supra*.

[162] *See* note 163 *supra*.

If we should determine that a FOIA plaintiff has *not* substantially prevailed, however, we may not invoke our statutory discretion under § 552(a)(4)(E). Once the Government has properly moved for costs and proven its costs by affidavits, the necessary costs of litigation enumerated in 28 U.S.C. § 1920 [163] should be routinely assessed against plaintiff unless she chooses to contest the motion. Only when a motion has been contested would our rule 39(a) equitable discretion come into play. If the plaintiff avers obduracy or recalcitrance on the part of the government officials resulting in *unnecessary escalation* of litigation costs and the Government does not successfully rebut that showing, then the rule 39(a) presumption favoring an award of costs to the Government is overcome. The court should then either deny the cost award or allocate costs between the parties, based upon consideration of such factors as the novelty of the issues at stake, the plaintiff's commercial self-interest in the information sought, and any direct or indirect public benefit which may have resulted from the attempted disclosure.[164]

Should the plaintiff present convincing evidence of severe economic hardship, or proof that paying the Government's bill would likely deter her or similar plaintiffs from filing meritorious suits in the future, then the court

[163] *See* note 28 *supra*.

[164] *Cf. Delta Air Lines* v. *CAB*, 505 F.2d 386, 388 (D.C. Cir. 1974) (per curiam) (suggesting relevant factors).

In some extreme cases, taxation of *excess* costs against the prevailing *attorney* may even be appropriate under 28 U.S.C. § 1927 if that attorney has multiplied the proceedings so "as to increase costs unreasonably and vexatiously." *See* note 133 *supra*. The court might also appropriately impose other sanctions under Fed. R. Civ. P. 37 or its inherent contempt power. *See generally* Note, *Sanctions Imposed by Courts on Attorneys who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619 (1977).

may deny the Government's request outright.[195] Furthermore, following the Supreme Court's directive in *Farmer* v. *Arabian Am. Oil Co.*[196] the appellate court should, as a matter of course, carefully scrutinize all of the Government's proposed cost items and require justification of any claimed expenses not specifically authorized by statute.[197] Absent justification, nonstatutory costs should simply be disallowed.

VIII. Public Interest Concerns Underlying FOIA

In his search for precedent for his new standard, Judge Edwards finally settles upon analogies to cases involving attorneys' fee awards under title VII and other federal statutes. Indeed, as part of his FOIA standard, Judge Edwards adopts the Supreme Court's standard for awarding *attorneys' fees to prevailing title VII defendants*, found in *Christiansburg Garment Co.* v. *EEOC*:[198] Judge Edwards follows the odyssey of the *Christiansburg* standard, first into the area of title VII *costs*, then into the realm of cost awards under "other federal statutes."[199] By the time he is done, we are told that *"in public law litigation,"* a proper exercise of discretion by a court may militate against an award of costs to a prevailing defendant.[200]

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[195] *See, e.g., Lesar* v. *United States Dep't of Justice*, 636 F.2d 472 (D.C. Cir. 1980), *discussed* in notes 179, 189 *supra*.

[196] 379 U.S. 227 (1964).

[197] *See* text and accompanying notes 71-72 *supra*.

[198] "[A] district court may in its discretion award attorney's fees to prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. 412, 421 (1978).

[199] Maj. op. at 17-19.

[200] *Id.* at 18 (emphasis added).

This analysis is drastically defective for two reasons. First, Judge Edwards draws a host of improper analogies between FOIA and other federal statutes, blurring dramatic differences between the fees and cost provisions found in the FOIA and in those statutes. Second and more important, Judge Edwards ignores the leading Supreme Court precedent in the area of attorneys' fees and costs, which severely limits the discretion of lower courts, *particularly in public law litigation suits*, to fashion "drastic new rules" when awarding or denying costs and fees.[201]

A. *Improper Analogies to Title VII and Other Federal Statutes*

1. *The False Analogy to the Civil Rights Fee Statutes*

In the civil rights context, federal judges possess broad discretion to create new rules regarding fees and costs.[202] That discretion, however, derives from the unusually broad grant of *statutory* discretion bestowed on the courts by the civil rights statutes.[203] In civil rights cases Congress chose to replace the common-law scope of judicial discretion over fees and costs with two types of broad statutory discretion: to allow fees and costs to prevailing plaintiffs *and* to allow fees and costs to prevailing defendants.[204] In FOIA cases, by contrast, Congress chose to

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[201] *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 269 (1975).

[202] *See* text and accompanying notes 156-59 *supra*.

[203] *See* notes 158-59 *supra*.

[204] Before 1976, titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1976), permitted courts "in [their] discretion, [to] allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Even without express statutory authorization, courts also awarded fees and costs to litigants suing under other civil rights laws,

grant judges only the first type of statutory discretion.[206]

Within the scope of their statutory discretion, as defined by the respective statutes, courts have remained free to formulate judicial rules of decision regarding fees in order to best effectuate the policies of the underlying statutes; *outside* that scope, however, they have been powerless to articulate judicial rules in such a manner. Thus, in an array of cases brought under the civil rights statutes, courts have acted within the scope of their statutory discretion by creating rules for awarding fees and costs to defendants and plaintiffs alike.[208] Under FOIA, by

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on the notion that the litigants had acted as "private attorneys general."

The Supreme Court invalidated the latter practice in *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975), *discussed in* Part VIII. B *infra*, prompting Congress to enact the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. In language identical to that found in the fee provisions of titles II and VII, that Act allows courts to grant fees and costs in actions brought under a variety of civil rights statutes which do not contain fee-shifting provisions. *See generally* Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346 (1980). I use the term "civil rights fee provisions" to describe all fee-shifting provisions currently found in the civil rights statutes.

[206] *See* text and accompanying notes 160-63 *supra*.

[208] They have determined when a party has "prevailed." *See, e.g., Smith* v. *Sec'y of the Navy*, No. 79-1877 (D.C. Cir. 30 Jan. 1981); *Foster* v. *Boorstin*, 561 F.2d 340 (D.C. Cir. 1977); *Parker* v. *Califano*, 561 F.2d 320 (D.C. Cir. 1977); *Grubbs* v. *Butz*, 548 F.2d 973 (D.C. Cir. 1976). They have created a bifurcated standard for awarding fees to prevailing plaintiffs and prevailing defendants. *Compare Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968) (per curiam), *with Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 422 (1978), *discussed in* Part VIII. A. 2. *infra*. They have clari-

contrast, courts have possessed, and accordingly have exercised, statutory discretion only to create judicial rules of decision regarding fees and cost awards to substantially prevailing plaintiffs.[207] By laying down a rule today governing cost allocation between unsuccessful plaintiffs and prevailing defendants, the majority plainly exceeds the scope of our statutory discretion under § 552(a)(4)(E).

Furthermore, most observers of federal litigation are well aware that even when courts have laid down *judicial* rules of decision regarding fees and costs *within* the scope of their statutory discretion, those rules have been more favorable to civil rights plaintiffs than to FOIA plaintiffs, even when the statutory language under which those rules have developed has been virtually identical. In civil rights cases prevailing plaintiffs receive fees and costs almost automatically; in FOIA cases they do not.[208]

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fied when prevailing parties may obtain interim attorneys' fees and costs prior to the close of litigation, *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980) (per curiam); *Smith* v. *Univ. of No. Carolina*, 632 F.2d 316 (4th Cir. 1980), defined what types of civil rights claims are eligible for fees, *Maher* v. *Gagne*, 48 U.S.L.W. 4891 (25 June 1980); *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600 (1979), and delineated the types of "action or proceeding" for which fee requests would be cognizable under the civil rights laws. *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980); *Foster* v. *Boorstin*, 561 F.2d 340 (D.C. Cir. 1977); *Parker* v. *Califano*, 561 F.2d 320 (D.C. Cir. 1977).

[207] *See* note 163 *supra* (discussing judicial rules of decision governing FOIA fees).

[208] *Compare Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968) (prevailing civil rights plaintiffs automatically recover fees "absent special circumstances"), *with Blue* v. *Bureau of Prisons*, 570 F.2d 529, 535 (5th Cir. 1978) ("attorneys' fees under the FOIA were not to be awarded as a matter of course, as in civil rights cases").

Civil rights claims become "eligible" for a fee award more easily than do FOIA claims.[209] Civil rights plaintiffs can "prevail" with weaker showings of causation than plaintiffs who "substantially prevail" for FOIA purposes.[210] *Pro se* civil rights plaintiffs are entitled to fees and costs just like all other plaintiffs; with FOIA plaintiffs we are not sure.[211]

This court has expressly recognized that judicial rules for awarding costs and fees in civil rights litigation should be more liberal than those laid down in FOIA litigation.

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[209] Courts have awarded fees under the Civil Rights Attorney's fees Awards Act even for claims resolved through settlement, *Maher* v. *Gagne*, 48 U.S.L.W. 4891 (25 June 1980), and based upon extraordinary jurisdiction, *Tongol* v. *Usery*, 601 F.2d 1091 (9th Cir. 1979). By contrast, courts have carefully restricted fee awards in FOIA cases to those claims which meet the threshold requirements of section 552(a)(4)(E). *See* cases cited in note 163 *supra*.

[210] *Compare Smith* v. *Sec'y of Navy*, No. 79-1877 (D.C. Cir. 30 Jan. 1981) (Title VII plaintiff who succeeds in purging discriminatory job-performance evaluation from personnel files "prevails" even without demonstrating causal nexus between evaluation and denial of job or promotion), *with Cox* v. *United States Dep't of Justice*, 601 F.2d 1, 6 (D.C. Cir. 1979) (to substantially prevail, plaintiff must establish causal nexus between his suit and agency's disclosure decision). *See also* note 163 *supra*.

[211] The circuits are currently split as to whether a *pro se* FOIA plaintiff who substantially prevails is eligible for attorneys' fees. *Compare Crooker* v. *United States Dep't of the Treasury*, 634 F.2d 48 (2d Cir. 1980) (*pro se* FOIA plaintiff who makes no showing that prosecuting suit diverted him from income-producing activity not entitled to fee award); *Crooker* v. *Department of Justice*, 632 F.2d 916 (1st Cir. 1980), *with Crooker* v. *U.S. Dep't of the Treasury*, No. 80-1412 (D.C. Cir. 23 Oct. 1980); *Blue* v. *Bureau of Prisons*, 570 F.2d 529 (5th Cir. 1978) (*pro se* FOIA plaintiff eligible for fee award).

In *Nationwide Bldg. Maintenance* v. *Sampson*[212], *Judge* Tamm flatly rejected wholesale appropriation of fee standards developed under the civil rights statutes into the FOIA context:

> Inherent in the [Supreme] Court's conclusion [that Congress intended private suits to be an important part of civil rights enforcement] is the assumption that the potential personal benefit resulting from a successful Title II or Title VII suit is an *insufficient incentive* to encourage private plaintiffs to bear the expense of litigation, notwithstanding the benefits which such suits produce for the public generally.
>
> The FOIA relies on private suits for enforcement as well, *but it is not as easily assumed that the benefits of disclosure for individual FOIA plaintiffs will almost always be insufficient to overcome the economic disincentives* to seek judicial review.[213]

In short, many FOIA suits, unlike civil rights actions, are brought for *private* purposes, whether commercial or otherwise; thus individuals who unsuccessfully pursue FOIA disclosure for self-interested reasons do not invariably vindicate the public interest and do not deserve the same solicitude as civil rights plaintiffs.[214] Numerous additional factors militate *against* use of liberal civil rights fee standards in the FOIA costs setting.[215]

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[212] 559 F.2d 704 (D.C. Cir. 1977), *cited in* maj. op. at 12, 19, 20.

[213] *Id.* at 714 (emphasis added).

[214] *See* FOIA SOURCEBOOK, note 162, *supra*, at 171; *see also* note 190 *supra*.

[215] In civil rights litigation, the cause of action upon which the plaintiff sues often arises from societal forces; in FOIA cases, by contrast, the plaintiff *himself* creates the cause of action by filing his request. Justiciability thresholds such as standing, interest, and injury allow courts to screen out many unmeritorious civil rights claims before suit; under FOIA, fewer such thresholds exist. *See* Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741, 767 n.124 (1975).

Parallel concerns argue against transplanting into FOIA cost standards created to serve other federal statutes.[216] Taken together, all of these considerations suggest, as Judge Tamm cautioned in *Nationwide Bldg. Maintenance*, that "we should rely on . . . expressed legislative intent [underlying FOIA] rather than a judicial rule developed under a different statutory provision." [217]

2. *The False Analogy to* Christiansburg

The majority's misunderstanding of *Christiansburg* arises directly from its failure to distinguish among source, scope, and standard of discretion in the costs area. In *Christiansburg* the narrow issue addressed was under what circumstances a "reasonable attorney's fee as part of the costs" should be allowed to a prevailing *private party* defendant under Title VII's attorney's fees pro-

[216] Judge Edwards devotes one section of his analysis, maj. op. at 17-19, to *County of Suffolk* v. *Secretary of Interior*, 76 F.R.D. 469 (E.D.N.Y. 1977). That opinion suggests seven factors for trial judges to weigh when deciding whether to deny prevailing Government defendants costs in environmental cases: (1) plaintiff's good faith; (2) public benefit of the suit; (3) benefit of the suit to the defendant; (4) resolution of novel or substantial issues of law or fact; (5) defendant's need to be reimbursed costs; (6) undue burden of costs on a needy plaintiff; and (7) the likelihood that awarding costs against the losing plaintiff will deter future environmental suits.

I have already explained above why factor (1), *see* text and accompanying notes 79-82, 127-28 *supra*, and factor (5), *see* text and accompanying notes 77-78 *supra*, are irrelevant to a cost award determination, and why factor (4) should only be considered *after* plaintiff has rebutted the presumption favoring a cost award to the Government, *see* text accompanying note 194 *supra*. The remaining *County of Suffolk* factors are not inconsistent with the standard I have stated in Part VII. *supra*. Factors (2) and (3) amount to "public benefit", a factor which Judge Edwards inexplicably ignores in his standard for awarding costs. *See* Part IX. *infra*. Factors (6) and (7) are already taken into consideration in the *Chicago Sugar* rule. *See* Part III. B. *supra*.

[217] 559 F.2d at 714.

vision.[218] Unlike the case before us, the losing plaintiff there was the Government, and the prevailing defendant a private garment manufacturer charged with a title VII violation.[219] Writing for the *Christiansburg* Court, Justice Stewart sought to define a standard for awarding fees to prevailing private defendants which would adequately protect their interests, without unnecessarily chilling bona fide title VII plaintiffs.

Justice Stewart began by expressly recognizing that the *source* of the court's discretion to award fees and costs was *statutory*—section 706(k) gave courts power, "in [their] discretion" to award or deny fees and costs in title VII cases. Because that statutory discretion extended equally to prevailing defendants *and* prevailing plaintiffs, the *scope* of that discretion was very broad. The Court then chose, however, to lay down different *standards* for discretionary fee awards to title VII plaintiffs and defendants because of peculiar *equitable* considerations present for prevailing plaintiffs but absent for prevailing defendants.[220]

Here, by contrast, the *source* of our discretion is a federal rule, Fed. R. App. P. 39(a). The *scope* of our discretion to deny costs under that rule is very narrow. We have no power *under the rule* to lay down different

[218] 434 U.S. at 414. Section 706(k) of Title VII provides in full:

> In any action or proceeding under this title the court, *in its discretion, may allow the prevailing party*, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

78 Stat. 261, 42 U.S.C. § 2000e-5(k) (1976). (emphasis added) The same fee provision now applies to virtually all of the civil rights statutes. *See* note 204 *supra*.

[219] 434 U.S. at 414.

[220] *See Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418-19 (1978), *cited in* maj. op. at 13.

standards for prevailing plaintiffs and prevailing defendants because the rule itself makes no distinctions between them. Nor do we possess *statutory* discretion to lay down different standards for plaintiffs and defendants because the FOIA fees provision only gives us discretion to award fees and costs to substantially prevailing *plaintiffs*.[221]

Thus, while the *Christiansburg* Court properly invoked its statutory discretion under title VII to lay down a judicial rule distinguishing between prevailing plaintiffs and prevailing defendants in the context of title VII *fee awards*,[222] it never addressed the *only issue truly parallel to the one before us*—do courts possess broader rule 39(a) discretion to deny costs to prevailing Government defendants simply because the underlying action is brought under title VII? I have already proved above that the answer to that question is no.[223]

B. *The Majority's Rule Violates* ALYESKA

To my mind the most troubling statement in Judge Edwards' opinion is that the "point we are making in this case" is that an appellate court "may consider different factors in awarding costs in situations involving strong public interest concerns." [224] Finding that "the public interest incorporated in the Freedom of Information Act, in part demonstrated by the special attorneys fees and costs section of that statute, militates in favor" of his novel standard, Judge Edwards develops a broad theory that "when issues of public importance may be at stake, it is reasonable to distinguish between prevailing plaintiffs and prevailing defendants in determinations of claims for costs." [225] By bringing the suit in question and raising novel issues of law, the majority tells us, the unsuccessful appellant has vindicated the public interest. Thus, we can, *sua sponte*, lay down a new rule of law expanding the scope of our equitable discretion over costs whenever an unsuccessful appellant raises the public interest banner.

[221] *See* text and accompanying notes 202-07 *supra*.

[222] *See* note 206 *infra*.

[223] *See* Part IV *supra*.

[224] Maj. op. at 26.

[225] *Id.* at 21, 26.

As of today, the majority has put us back in the business of doing something the Supreme Court specifically told us not to do six years ago, in *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*.[226] The Supreme Court's holding in that case radically limited judicial discretion in the general area of fees and costs. Prior to 1975, courts had utilized the so-called "private attorney general" exception to award attorneys' fees liberally in public law litigation; they reasoned, as the majority does here, that a plaintiff who has vindicated important statutory rights for all citizens should be awarded attorneys' fees to encourage others to bring similarly meritorious actions.[227] In *Alyeska*, however, the Court ended that practice, holding that the federal courts do *not* enjoy a general discretionary power to award attorneys' fees to public interest litigants solely because the litigation has advanced some important statutory purpose.[228] That discretionary power, the Court held, must either be granted by statute or, when federal courts sit in diversity jurisdiction, by the relevant

[226] 421 U.S. 240 (1975).

[227] *See, e.g., Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 401-02 (1968).

[228] Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fee . . . those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation *or to pick and choose among plaintiffs and the statutes under which they sue who to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases.*

421 U.S. 240, 269 (1975) (emphasis added).

state law.[229] Lower courts applying existing attorneys' fees provisions ought not, the Court warned, take the initiative to fashion "drastic new rules" with respect to "a policy matter that Congress has reserved for itself." [230]

By fashioning just such a drastic new rule here, the majority has created a number of stunning possibilities. Other courts may decide, based on the language of Judge Edwards' opinion, to deny costs to prevailing Government defendants in other cases in which plaintiffs, though clearly unsuccessful, have "pursued public policy interests that Congress sought to encourage." [231] If we abrogate the *Chicago Sugar* standard in this case, how can we justify maintaining it in suits brought under other "public interest" statutes? There are now some ninety federal statutes which contain some sort of specific authorization for attorneys' fees and costs awards.[232]

[229] [I]t is apparent that the circumstances under which attorneys' fees are to be awarded and *the range of discretion of the courts in making those awards are matters for Congress to determine.*

Id. at 262 (emphasis added). *See also id.* at 259 n.31.

[230] *Id.* at 269.

[231] Maj. op. at 27.

[232] *See, e.g.*, Federal Contested Elections Act § 17, 2 U.S.C. § 396 (1970); Act of Nov. 21, 1974 (Freedom of Information Act amendments) § 1(b)(2), 5 U.S.C. § 552(a)(4)(E) (Supp. V 1975); Privacy Act of 1974 § 3, 5 U.S.C. § 552a(g)(2)(B) (Supp. V 1975); Government in the Sunshine Act § 3, 5 U.S.C. § 552b(i) (Supp. 1977); Workmen's Compensation Acts § 208, 5 U.S.C. § 8127(b) (1970); Commodity Futures Trading Commission Act of 1974 § 106, 7 U.S.C. §§ 18(f), (g) (Supp. V 1975); Packers and Stockyards Act of 1921 § 309, 7 U.S.C. § 210(f) (1970); Perishable Agricultural Commodities Act of 1930 § 7, 7 U.S.C. §§ 499g(b), (c) (1970 & Supp. IV 1973); Agricultural Fair Practices Act of 1967, § 6, 7 U.S.C. §§ 2305(a), (c) (1970); Plant Variety Protection Act § 125, 7 U.S.C. § 2565 (1970); Bankruptcy Act § 1, 11 U.S.C. §§ 205, 641, 643, 644 (1970); Home Owners Loan Act of 1933, 12 U.S.C. § 1464(d)(8) (1970), *as amended by* Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 102(a), 80 Stat. 1036 (1966); National Housing Act, 12 U.S.C. § 1730(m), *as amended by* Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 102(a), 80 Stat. 1036 (1966); Federal Credit Union Act, 12 U.S.C. § 1786(*o*) (1970), *as amended by* Act of 19 Oct. 1970, Pub. L. No. 91-468, § 1(3), 84 Stat. 1010 (1970); Federal Deposit Insurance Act, 12 U.S.C. § 1818(n) (1970), *as amended by* Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 202, 80 Stat. 1036 (1966); Bank Holding Company Act Amendments of 1970 § 106(e), 12 U.S.C. § 2607(d) (Supp. V 1975); Clayton Act § 4, 15 U.S.C. § 15 (1970); Clayton Act § 4C, 15 U.S.C., § 15c (1977), *as amended by* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1394; Clayton Act § 16, 15 U.S.C. § 26 (1976), *as amended by* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 302(3), 90 Stat. 1396, Federal Trade Commission Act, 1975 Amendments § 202(a), 15 U.S.C. § 57a(h) (Supp. V 1975); Unfair Competition Act § 801, 15 U.S.C. § 72 (1970); Securities Act of 1933 § 11, 15 U.S.C. § 77k(e) (1970); Trust Indenture Act of 1939 § 323, 15 U.S.C. § 77www(a) (1970); Securities Exchange Act of 1934 §§ 9, 18, 15 U.S.C. §§ 78i(e), 78r(a) (1970); Jewelers' Liability Act (Gold and Silver Articles) § 1(b), 15 U.S.C. § 298(b), (c), (d) (1970); National Traffic and Motor Vehicle Safety Act of 1966 § 111, 15 U.S.C. § 1400 (1970); Truth in Lending Act § 408(a), 15 U.S.C. § 1640(a) (Supp. V 1975); Consumer Leasing Act of 1976 § 3, 15 U.S.C. § 1667b (1977); Fair Credit Reporting Act § 601, 15 U.S.C. §§ 1681n, 1681o (1970); Equal Credit Opportunity Act 503, 15 U.S.C. § 1691(e) (Supp. V 1975), *redesignated as* § 1691e(d) *and amended by* Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, § 6, 90 Stat. 253 (1976); Motor Vehicle Information and Cost Savings Act §§ 109, 409, 15 U.S.C. §§ 1918, 1989(a)(2) (Supp. V 1975); Consumer Product Safety Commission Improvements Act of 1976 §§ 10(a), (b), 15 U.S.C.A. §§ 2059(e), 2060(c) (Supp. 1977); Consumer Product Safety Act §§ 23, 24,

15 U.S.C. §§ 2072, 2073 (Supp. V 1975), *as amended by* Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, §§ 10(c), (d), 90 Stat. 503 (1976); Hobby Protection Act § 3, 15 U.S.C. § 2102 (Supp. V 1975); Magnuson-Moss Warranty—Federal Trade Improvement Act § 110(a)(5), 15 U.S.C. § 2310 (d) (Supp. V 1975); Copyrights Act § 1, 17 U.S.C. § 116 (1970), *redesignated as* § 505 *and amended by* Pub. L. No. 94-553, § 101, 90 Stat. 2541 (1976); Organized Crime Control Act of 1970 § 901(a), 18 U.S.C. § 1964 (c) (1970); Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. § 2520 (1970); Emergency School Aid Act § 718, 20 U.S.C. § 1617 (Supp. V 1975); American-Mexican Chamizal Convention Act of 1964 § 5, 22 U.S.C. § 277d-21 (1970); International Claims Settlement Act of 1949 § 4, 64 Stat. 13 (1950) (current version at 22 U.S.C. § 1623(f) (1970)); Act of 25 June 1948 (Federal Tort Claims), ch. 646, 62 Stat. 984 (1948) (current version at 28 U.S.C. § 2678 (1970)); Norris-LaGuardia Act § 7, 29 U.S.C. § 107(e) (1970); Fair Labor Standards Amendments of 1974, § 6(d)(1), 29 U.S.C. § 216(b) (Supp. V 1975); Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C. § 1132 (g) (Supp. V 1975); State and Local Fiscal Assistance Amendments of 1976 § 7(b), 31 U.S.C. § 1244(e) (1977); Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 §§ 13, 15, 33 U.S.C. §§ 928, 933 (Supp. V 1975); Federal Water Pollution Control Act Amendments of 1972 §§ 505, 507, 33 U.S.C. §§ 1365(d), 1367(c) (Supp. V 1975); Marine Protection, Research, and Sanctuaries Act of 1972 § 105, 33 U.S.C. § 1415(g)(4) (Supp. V 1975); Deepwater Port Act of 1974 § 16(d), 33 U.S.C. § 1515(d) (Supp. V 1975); Patent Infringement Act § 1, 35 U.S.C. § 285 (1970); Safe Drinking Water Act § 1449(d), 42 U.S.C. § 300j-8 (Supp. V 1975); Social Security Act § 206, 42 U.S.C. § 406 (1970); Clean Air Act § 12a, 42 U.S.C. § 1857h-2(d) (1970); Voting Rights Act Amendments of 1975 § 402, 42 U.S.C. § 1973*l*(e) (Supp. V 1975); Civil Rights Attorney's Fees Awards Act of 1976 § 2, 42 U.S.C. § 1988 (1976); Civil Rights Act of 1964 §§ 204, 706, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1970); Atomic Energy Act of 1954 § 1, 42 U.S.C. § 2184 (1970); Fair Housing Act of 1968 § 812, 42 U.S.C. § 3612(c)

How does the majority propose that courts pick and choose from among these statutes to decide which ones serve public interests sufficiently important to justify awarding costs differently to prevailing plaintiffs and prevailing defendants? How will the majority know which statutes embody public interest concerns strong enough to justify creation of a blanket exception to the *Chicago Sugar* rule for that *class* of cases? If plaintiffs need not pay the costs of their nonfrivolous suits because of the high public objectives served by FOIA, why should *any* plaintiff who brings an unsuccessful, but nonfrivolous, *constitutional* claim ever pay costs? [223]

Furthermore, on the facts of any given case, how is a court to judge whether the losing plaintiff has so fur-

(1970); Crime Control Act of 1976 § 122(b), 42 U.S.C. § 3766(c)(4)(B) (1976); Noise Control Act of 1972 § 12, 42 U.S.C. § 4911(d) (Supp. V 1975); National Mobile Home Construction and Safety Standards Act of 1974 § 613, 42 U.S.C. § 5412(b) (Supp. V 1975); Railway Labor Act § 3, 45 U.S.C. § 153(p) (1970); Shipping Act of 1916 § 30, 46 U.S.C. § 829 (1970); Communications Act of 1934 §§ 206, 407, 47 U.S.C. §§ 206 407 (1970); Act of 3 Mar. 1887 (aliens holding land) 6, 48 U.S.C. § 1506 (1970); Interstate Commerce Act §§ 8, 15, 16, 222, 308, 417, 49 U.S.C. §§ 8, 15(9), 16(2), 322(b), 908(b), 1017(b) (1970); Natural Gas Pipeline Safety Act Amendments of 1976 § 8, 49 U.S.C. § 1686 (e) (1976).

For an authoritative compilation, *see* SOURCEBOOK: LEGISLATIVE HISTORY, TEXTS AND OTHER DOCUMENTS CONCERNING THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (Pub. L. No. 94-559, S. 2278), Subcomm. on Constitutional Rights, U.S. Senate Comm. on the Judiciary, 94th Cong. 2d Sess. 303-13 (Comm. Print 1976).

[223] *Cf. Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 264 ("if *any* statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a court deny attorneys' fees to private litigants in actions . . . seeking to vindicate *constitutional* rights?) (emphasis in original).

thered the public interest as to warrant denying the Government costs? As Judge Bazelon once clearly recognized, when the Government has triumphed in a FOIA suit, it is by no means clear that one party or the other has specifically furthered the public interest.[234] Indeed, we need look no further than our three opinions in *Wilderness Soc'y* v. *Morton*,[235]—the case which led to the Supreme Court's unequivocal statement in *Alyeska*—for evidence of the conflict likely to arise within a single circuit court when judges attempt to award fees and costs based on subjective determinations of plaintiff's service to the public interest.

[234] It is clear, on the one hand, that the plaintiffs in this case validly represent an important "public interest." The national policy of eliminating discrimination in housing is of highest priority . . . On the other hand, *the Government claims to represent the "public interest"* in "protecting the intimate personal details of the private lives of a number of minority and low-income persons," *and we have found support for its position on appeal.*

Rural Housing Alliance v. *United States Dep't of Agriculture*, 511 F.2d 1348, 1350 (D.C. Cir. 1974) (Bazelon, C.J., concurring) (emphasis added and citations omitted).

[235] 495 F.2d 1026 (1974) (en banc). In that case, a majority of our court held, over two dissents, that a group of environmental protection litigants deserved attorneys' fees under the "private attorney general theory" because they had acted "to vindicate important statutory rights of all citizens." *Id.* at 1032. In *Alyeska*, the Supreme Court reversed, noting the inherently subjective nature of the determination being made:

> [A]s in any instance of conflicting public-policy views, there is room for doubt on each side. The opinions below are evidence of that fact. See . . . 495 F.2d, at 1032-36 (majority opinion); *id.* . . . at 1039-1041 (MacKinnon, J., dissenting); *id.* . . . at 1042-1044 (Wilkey, J., dissenting). It is that unavoidable doubt which calls for specific authority from Congress before courts apply a private-attorney-general rule in awarding attorneys' fees.

Alyeska Pipeline Serv. Co. v. *Wilderness Soc'y*, 421 U.S. at 267 n.39 (1975).

It was precisely to get us out of the business of making such determinations that the Court ruled as it did in *Alyeska*. To quote Justice White: "[I] need labor the matter no further. It appears to [me] that the rule suggested here and adopted by the Court of Appeals would make major inroads on a policy matter that Congress has reserved for itself." [236]

IX. Flaws in the Majority's Standard

Under Judge Edwards' new rule, an unsuccessful FOIA plaintiff need not pay costs if the court finds: (1) that she sued "without 'confessed commercial self-interest," and (2) that her suit was "not frivolous, unreasonable or without foundation." The first part of the standard is unjustifiable; the second part, unworkable.

A. *"Confessed Commercial Self-Interest"*

Citing *LaSalle Extension Univ.* v. *FTC*,[237] Judge Edwards concludes that the presence or absence of plaintiff's "confessed commercial self-interest" should henceforth be nearly dispositive in FOIA cost determinations. Yet the legislative history of the FOIA suggested, and we have since expressly held, that judicial discretion over awards of FOIA fees and costs should be guided by *four* decisional criteria, not one. Indeed, in *LaSalle*, we ex-

[236] *Id.* at 269. For proof that the type of conflict supposedly put to rest by *Alyeska* is once again rearing its ugly head, *see* Part VI. *supra*. The recent trend reviewed there is particularly surprising given that we recently refused to modify our practice regarding costs in a case where one party had alleged vague public interest concerns. *See American Pub. Gas Ass'n* v. *FERC*, 587 F.2d 1089, 1098 (D.C. Cir. 1978) (per curiam): "The fact that petitioners represent strands of public interest would not warrant denying the party respondent the modest sums required for a duplication of briefs."

[237] 627 F.2d 481 (D.C. Cir. 1980) (per curiam).

plicitly held that a district judge's *failure* to balance all four factors constitutes an abuse of discretion.[238]

Judge Edwards inexplicably eliminates three of those factors from our consideration in cost disputes. He implies that we need not consider the first of the four factors—the "public benefit" resulting from disclosure—because that factor is permanently weighted in favor of FOIA plaintiffs. Yet why is this necessarily so? Congress specified in 1974 that the "public benefit" factor should only weigh in the plaintiff's favor when his lawsuit has served the *public's* interest in the documents sought. As Judge Gee pointed out in *Blue* v. *Bureau of Prisons*:[239]

> [T]he Senate Report's discussion of [the public benefit] criterion referred repeatedly to disclosure to the press and to public interest organizations, thus strongly suggesting that in weighing this factor *a court should take into account the degree of dissemination and likely public impact that might be expected from a particular disclosure. . . . Thus the factor of "public benefit" does not particularly favor attorneys' fees where the award would merely subsidize a matter of private concern.*[240]

I do not believe that appellant has disserved the public interest by seeking disclosure. But she sued primarily for her *own* private and professional purposes. Wasn't there equally a public interest in each of the *exemptions* under which the government agency lawfully *withheld* the documents which appellant sought?[241] On balance,

[redacted]

[238] *Id.* at 484. *See also Blue* v. *Bureau of Prisons*, 570 F.2d 529 (5th Cir. 1978) (reversing district court for abusing its discretion under § 552(a)(4)(E) when district judge considered only one of the four criteria in its attorneys' fee decision). *See also* note 163 *supra*.

[239] 570 F.2d 529 (5th Cir. 1978).

[240] *Id.* at 533-34 (emphasis added).

[241] *Cf.* note 234 *supra*.

doesn't our unanimous affirmance of the Government's position on appeal "in all respects" indicate that public benefit considerations militate in favor, *not against*, the Government's routine claim for costs?

The second factor which Judge Edwards ignores is the individual's interest in the records sought. While Judge Edwards requires unsuccessful plaintiffs who confess *commercial* interests in requested documents to pay costs, he inexplicably spares those plaintiffs, like appellant here, whose interest in certain documents is nonpecuniary, but *personal only*. The legislative history of the FOIA fee provision clarified, however, that when a successful complainant's "private self-interest motive" in information is sufficient to stimulate a suit, awarding fees to that plaintiff would be an unwarranted boon absent "recalcitrant" or "obdurate" behavior by the government officials involved.[242] With no allegation of such conduct by the officials involved here, a boon to this losing plaintiff with regard to costs seems equally unwarranted.[243]

Finally, Judge Edwards fails even to mention the fourth of Congress' four factors—"whether the government's withholding of the records sought had a reasonable basis in law." It goes without saying that, when a Government defendant prevails before both a trial and an appeals court, this factor should weigh heavily in the Government's favor in the appellate court's cost decision.

Having removed from its standard the three factors clearly *favoring* a cost award to the Government, the majority then exacerbates its error by placing an unexplained gloss on the only factor it does rely upon.

[242] FOIA SOURCEBOOK, *supra* note 162, at 171, *see also* note 190 *supra*.

[243] *See Baez* v. *United States Dep't of Justice*, No. 79-1881, slip op. at 2-5 (D.C. Cir. 25 Aug. 1980) (describing extent of Government's compliance with appellant's search requests).

Citing *LaSalle Extension Univ.* v. *FTC*[244] Judge Edwards avers that "confession" should henceforth be an integral element of the "commercial self-interest" factor. Yet *LaSalle* stands only for the proposition that, *together with the other three factors*, a plaintiff's confessed commercial self-interest in disclosure is an adequate basis for *denying* him attorneys' fees. The majority inexplicably adopts the negative pregnant of that proposition —that the *absence* of confessed commercial self-interest, *by itself*, is an adequate basis for denying the Government costs! How can the majority be sure that the plaintiff *in fact* has no commercial interests in the documents she seeks, especially when two courts have ruled that the most critical of the documents have been lawfully withheld from the public domain?

B. *"A Suit that is Not Frivolous, Unreasonable or Without Foundation"*

The majority lifts this phrase directly from *Christiansburg*, then uses it repeatedly without giving us any guidance as to what it means in the FOIA context. The only clues are provided by Judge Edwards' conclusion, which summarily finds appellant's suit to satisfy the standard.[245] Judge Edwards gives only three reasons why this suit was "not frivolous, unreasonable, or without foundation": because over one-thousand pages of documents containing appellant's name were released after suit was filed; because numerous difficult and important issues of law were raised; and because the slip opinion disposing of the case was 26 pages long and included 78 footnotes.

I am hard-pressed to decide which of these elements ultimately convinced the majority that appellant's case was not frivolous. In future cases should nonfrivolousness be measured by the number of *pages* containing appellant's name appearing in the public domain after suit is filed?[246] Is the plaintiff required to establish a causal nexus between her suit and the release of the documents?[247] If not, then the majority's "nonfrivolousness" standard simply validates in the context of FOIA costs the type of *"post hoc, ergo propter hoc"* reasoning we rejected long ago in the context of FOIA fees.[248]

Similarly, I remain unguided as to how important and difficult the issues raised must be for a suit to be deemed "nonfrivolous or reasonable." Who should have appraised the difficulty and importance of the legal and factual issues in this case—the district judge who granted summary judgment against the plaintiff or the circuit court panel which affirmed in all respects? Suppose that we had known we were supposed to apply such a test[249] and had concluded that some, but not all, of the issues raised were frivolous? When would the plaintiff's suit, taken as a whole, have crossed the threshold into the category of "not frivolous, unreasonable, or without foundation"?[250]

[244] 627 F.2d 481 (D.C. Cir. 1980).

[245] Maj. op. at 28-29.

[246] Why isn't the number of *documents*, rather than the number of *pages* in the documents, a more accurate measure of the nonfrivolousness of appellant's effort? *Cf. Church of Scientology* v. *Harris*, No. 80-1189 (D.C. Cir. 17 April 1981). Or better yet, the number of documents disclosed *relative* to the total number requested?

[247] *Cf. Cox* v. *United States Dep't of Justice*, 601 F.2d 1, 6 (D.C. Cir. 1979) (per curiam), *discussed in* note 168 *supra*.

[248] *Cf.* note 168 *supra*.

[249] Judge Edwards finds it significant that "[n]one of the many issues raised [in *Baez*] was deemed to be frivolous", maj. op. at 29. When I wrote the *Baez* opinion, however, I had no reason to believe that we were deciding the costs issue, and so never evaluated the frivolousness of the issues raised.

[250] As to Judge Edwards' third rationale, I am curious as to whether he was finally persuaded that the appeal here was nonfrivolous by the number of *pages* or the number of *footnotes* in the original majority opinion. Would an affirmance

The majority has approved and applied to the facts of this case a classic "I know it when I see it" inquiry. By so doing, it has left totally unclear how that inquiry is to be performed in future cases. I offer here no personal view as to the nonfrivolousness of appellant's case-in-chief. Suffice it to say I believe the majority's standard to be simply unworkable; the majority opinion leaves me totally uninstructed as to its proper application.

C. *Practical Considerations*

Now that the majority has adopted a new standard for awarding FOIA costs, *every* FOIA costs decision in this Circuit will become a matter of *judicial* discretion. Even if an unsuccessful FOIA plaintiff would not suffer from paying costs and therefore chooses not to contest the Government's bill of costs, the merits panel in each case must now appraise both the absence of the losing plaintiff's "confessed commercial self-interest" and the "nonfrivolousness" of her case-in-chief.

If the majority means for the rest of the court to take these duties seriously, it is imposing upon us a significant burden. Our post-decision taxation procedures would have to be drastically modified for FOIA cases only. On both issues—confessed commercial self-interest and nonfrivolousness—votes would have to be taken among the members of the merits panels and when inevitable disagreement arose, majority opinions, dissents, and opinions concurring and dissenting in part would have to be filed. If the "commercial self-interest factor" were to have any bite, we would presumably be required to inspect *in camera* documents lawfully withheld to determine the credibility of a plaintiff's "confession." Pre-

by order necessarily have implied that the losing plaintiff's case was frivolous? Would a memorandum opinion, if sufficiently long, have indicated that the case was not?

sumably we would also have to develop, over time, a standard which we all could agree upon for appraising nonfrivolousness. In short, in every FOIA case we would be required, after the fact, to recapitulate the merits of a plenary decision for the purposes of awarding or denying trivial sums. It was exactly to avoid such waste of judicial resources that the courts established the present appellate practice![251] When the clerk handles routine requests for costs, judicial time and energy are properly reserved for matters of greater moment.

If, as seems more likely, the majority does *not* in fact intend for us to take these new duties seriously, we will amend our procedures so that the burden for administering the new standard again falls on the clerk. In that case, future unsuccessful FOIA appeals will merely be rubber-stamped "free of commercial self-interest and nonfrivolous", and unsuccessful FOIA plaintiffs will simply stop paying the costs of their losing appeals. We can shortly expect numerous motions requesting equal treatment from losing plaintiffs suing under other public interest statutes. Given the reasoning of today's majority opinion, we would have no basis for distinguishing those cases from this one.[252] In effect, we would have created a new rule which totally reverses the powerful rule 39(a) presumption for so-called "public law litigation." I believe, in Judge Bazelon's own words, that "[s]uch a rule would divest this court of virtually all discretion under Rule 39(a)."[253]

D. *Cost Considerations*

Since the close of 1979, this Circuit has decided some thirty cases interpreting various provisions of the Free-

[251] *See* Parts III. A. 2., VI. *supra*.

[252] *See* Part VIII. B. *supra*.

[253] Concurring opinion at 1.

dom of Information Act.[254] In many of these cases, complainants have not substantially prevailed, although issues of first impression have been resolved through the litigation. Even when an unsuccessful FOIA complainant poses some issues which no court has previously decided, the Government is still generally entitled to assume, absent special circumstances, that it will recover the sums it must expend to vindicate its lawful nondisclosure. The Government processes thousands of FOIA requests per year, many of them nonfrivolous but ultimately nonmeritorious. The effect of shifting all of the costs now currently borne by losing plaintiffs to the Government may be small in each individual case; amalgamated over the total number of cases litigated, however, the additional burden to the Government will become significant.

Taken together, the fees and costs statutes currently in force effect a sizable impact on the federal budget; that impact in turn imposes an extraordinary burden on the federal taxpayer.[255] Some courts, sensitive to that

[254] For just a smattering of the most recent, *see, e.g., Carlisle Tire & Rubber Co.* v. *United States Customs Serv.*, No. 80-1149 (D.C. Cir. 17 Dec. 1980); *Baez* v. *United States Dep't. of Justice*, No. 79-1881 (D.C. Cir. 25 Aug. 1980); *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 635 F.2d 887 (D.C. Cir. 1980); *Gardels* v. *CIA*, No. 80-1253 (D.C. Cir. 30 Oct. 1980); *Crooker* v. *U.S. Dep't of Treasury*, No. 80-1412 (D.C. Cir. 23 Oct. 1980); *Sims* v. *CIA*, Nos. 79-2203 & 79-2554 (D.C. Cir. 29 Sept. 1980); *Simpson* v. *Vance*, No. 79-1889 (D.C. Cir. 25 Sept. 1980); *Coastal States Gas Corp.* v. *Dep't of Energy*, No. 79-2181 (D.C. Cir. 15 Feb. 1980); *Board of Trade of the City of Chicago* v. *Commodity Futures Trading Comm'n*, 627 F.2d 392 (D.C. Cir. 1980); *Weisberg* v. *United States Dep't of Justice*, 627 F.2d 365 (D.C. Cir. 1980).

[255] The Justice Department has estimated that in 1977 the Government paid an average award of nearly $16,000 in each title VII, Privacy Act, and FOIA suit in which the court required an award. Statement of Paul Nejelski, Deputy Asst. Atty. General, Office for Improvements in the Administration of Justice, Before the Senate Committee on the Judiciary, Subcommittee on Improvements in Judicial Machinery at 12 (13 Mar. 1978) (concerning S. 2354, the Equal Access to Courts Act of 1977). At that time the Department further estimated that the price tag for a *general* fee-shifting statute "could very well reach a total of one half billion dollars annually." *Id.* at 9.

Congress has now enacted such a statute, the Equal Access to Justice Act, tit. II, Pub. L. No. 96-481, 94 Stat. 2325 (effective 1 Oct. 1981). That statute adds a new section to 5 U.S.C. § 504 and substantially amends 28 U.S.C. § 2412 (*discussed in* text and accompanying notes 105-06 *supra*) so that eligible parties who prevail in certain adversary adjudications or civil actions by or against the United States are entitled to attorneys' fees and related expenses unless the Government can demonstrate either that its position was "substantially justified" or that other special circumstances make the award unjust. The Government's position is deemed "substantially justified" if it has "a reasonable basis in law and fact." The new statute went to Congress with an official cost estimate of $69 million in Fiscal Year 1982, Congressional Budget Office Cost Estimate for Bill S. 265 at 1 (26 Sept. 1980), and with an unofficial price tag of up to $200 million in the first year alone, "Attorney Fee Law Could Alter Litigation Policy" Nat'l L.J., 30 Mar. 1981, at 7, col. 2.

Draft model rules to implement the Act have now been promulgated, 46 Fed. Reg. 15,895 (10 Mar. 1981), but astonishingly enough, neither the statute nor the rules as yet indicate where the funds to finance the Act will come from. "Equal Access Act: Fees to Be Paid, but By Whom?", Legal Times of Washington, 9 Mar. 1981, at 2, col. 1.

burden, have carefully interpreted their discretion over claims for fees and costs in the FOIA context.[256] I submit that this court should have done the same.

[256] In *Jordan* v. *U.S. Dep't of Justice*, No. 76-0276 (D.D.C. 26 Feb. 1981), Judge Aubrey E. Robinson, Jr. refused to award attorneys' fees and costs to a FOIA plaintiff despite his express finding that plaintiff had