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COSTS IN LITIGATION WHEN THE UNITED STATES IS A PARTY: A MODEST PROPOSAL*

ARTHUR M. SCHILLER†

INTRODUCTION

UNDER EXISTING LAW, the United States is not liable for paying costs whether successful in litigation or not, but it is entitled to recover its costs from an unsuccessful party-litigant. In this article, various federal statutory provisions and rules will be examined and applicable cases will be analyzed in an endeavor to determine whether this one-sided treatment of costs is based upon sound principles of law.

HISTORY AND DEVELOPMENT

At English common law, costs were never awarded unless some statutory authorization existed.1 It was believed that defendant was sufficiently punished and plaintiff adequately rewarded, by payment of damages, or performance of the act, ordered by the court. The first English statute to be passed on the subject, authorized the award of costs to a successful plaintiff; a later enactment resulted in authorization of an award for the successful party, whether he be plaintiff or defendant.2 Finally, the common law rule was modified so that it coincided with the then prevailing equity rule, that determination of who should be entitled to costs was a matter which was to be determined by the court in the exercise of sound discretion.3

The basic rules requiring statutory authorization exist in the United States today and, absent legislative expression on the subject of costs, there exists no inherent power in state courts to award costs, even to a successful party.4 Prior to the enactment of our present federal statutes and rules, however, the power of federal

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2. 1607, 4 Jac. 1, c. 3.
3. Goodhart, supra note 1 at 854.
courts to award costs was derived, not from enabling legislation, but from "usage long continued and confirmed by implication from provisions in many statutes." Thus, the federal courts followed the pattern set by the English statutes, awarding costs as a matter of course to the prevailing party in an action at law, and in its discretion, in actions which were equitable in nature. Even today, this basic and traditional practice is continued, except where such action is prohibited by the terms of a specific statute.

There are numerous statutory provisions relating to costs and fees but, as previously noted, this article is concerned solely with those provisions which bear on litigation involving the United States as a party. The basic statutory provision which deals with costs in actions brought by or against the United States is section 2412(a) of title 28 of the United States Code which provides: "The United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress." This section must be read in conjunction with rule 54(d) of the Federal Rules of Civil Procedure (hereinafter referred to as FRCP) which provides:

Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law.

It has been held that the enactment of these provisions did not result in a change in the common law principles relating to costs; rather

5. In re Peterson, 253 U.S. 300, 316 (1920). The Court's reference to "many statutes" was descriptive of the vast body of precedent established under English legislative enactments and not federal legislation. See also Newton v. Consolidated Gas Co., 265 U.S. 78 (1924).


7. Fees and costs are covered in chapter 123 of title 28 of the United States Code, §§ 1911-1929, which broadly cover the Supreme Court, § 1911; circuit courts of appeal, § 1913; and the Court of Custom and Patent Appeals, § 1926. In addition, there are some provisions in the chapter devoted to the district courts, particularly §§ 1914, 1917-1919, which complement the Federal Rules of Civil Procedure.

8. See also section 2408 which provides that "security for damages or costs shall not be required of the United States..." An exception to the general rule of subsection (a) of section 2412 occurs in subsection (b) of that section, which provides that when "the United States puts in issue the plaintiff's right to recover" in a suit brought under subsection (a) of 28 U.S.C. § 1346 (Tucker Act suits in the District Courts) or § 1491 (Tucker Act suits in the Court of Claims), costs may be allowed to the prevailing party, but limited to only those costs expended on witnesses and fees paid to the clerk. Another exception may be found in section 2412(c), which provides that in suits brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1315, 1346(b), costs are to be allowed "in all courts to the successful claimant, but such costs shall not include attorney's fees."
these provisions were merely declaratory of what had been common custom and practice.⁹

As is clear from the title, the FRCP are applicable only to the United States District Courts. 28 U.S.C. § 1914(c) provides that "each district court by rule or standing order may require advance payment of fees."¹⁰ And FRCP, rule 83, which authorizes the district courts to make and amend rules, provides that even where the courts have not provided a local rule, the practice of the courts is to be locally regulated in a manner not inconsistent with the FRCP.

Section 1913 of title 28 provides that the fees and costs in the circuit courts of appeal are to be set by the Judicial Conference of the United States, and that "such fees and costs shall be reasonable and uniform in all the circuits." Accordingly, each of the eleven circuit courts has a rule respecting costs which, although varying in language from circuit to circuit, basically provides that costs may not be taxed either for or against the United States.¹¹

Finally, the Supreme Court, in its local rule 57-7, adopted on April 12, 1954, provided: "No costs shall be allowed in this court either for or against the United States or an officer or agency thereof, except where specially authorized by statute and directed by the court." Thus, pursuant to explicit statutory principles, as expressed in 28 U.S.C. § 2412, all federal courts have followed the pre-existing practice of affording to the sovereign, immunity from costs, except where Congress directs otherwise.

Now it may be stated that the rationale underlying 28 U.S.C. § 2412, is of a twofold character. The traditional basis relates to the old English view of the "king's prerogative" and the immunity of the sovereign. Under that doctrine, it is contended that it is solely within the sovereign's power to decide whether or not to consent to suit, and that when the sovereign does so consent, it may do so on

⁹ Reconstruction Finance Corp. v. Menihan Corp., 111 F.2d 940 (2d Cir. 1941), aff'd, 312 U.S. 81 (1941). See 3A OHLINGER, FEDERAL PRACTICE 260 (1954), where the Advisory Committee's notes are set forth. See also In re Peterson, 253 U.S. 300 (1920), for discussion of common law rules relating to costs.
¹⁰ See e.g., D. Mass. R. 13, as to security for costs. Obviously no local rule relating to costs where the United States is a party is required under district court practice since rule 54(d) of the Federal Rules of Civil Procedure governs all practice in those courts.
¹¹ D.C. Civ. R. 20 (e) (no costs for or against the United States except where authorized by statute and directed by court); 1st Civ. R. 33(5) (same, except where specifically authorized by statute and then only when directed by court); 2d Civ. R. 27(b) (same, except where otherwise provided by statute or specially directed by this court); 3d Civ. R. 35(5) (same, except that where the United States or officer is a party, where a joint appendix is included, the party designating its inclusion in the record — appellee or respondent — will be taxed for the actual cost to petitioner or appellant); 4th Civ. R. 21(5) (same, except where authorized by statute and directed by the court); 5th Civ. R. 31(4) (same);
whatever terms and conditions it deems fitting. Thus, under the English common law, in suits brought for or against the sovereign, the king neither paid nor collected costs.\(^\text{12}\) Although there is currently a trend away from this strict doctrine, there is no question that it still haunts the courts and exists as the basic rationale for giving the government its preferred position in litigation. An expression of what might be termed the more modern view, or second basis, was enunciated in *Walling v. Norfolk & So. Ry.*,\(^\text{13}\) where Judge Parker said,

The rule is based, not upon any antiquated theory of divine right of kings or governments, but upon the practical consideration that, since public moneys cannot be paid out except under an appropriation by Congress, the courts will not enter against the government a judgment for costs which would require the payment of moneys from the public treasury, unless they are expressly authorized by Congress to do so.\(^\text{14}\)

As previously noted, the doctrine of sovereign immunity is still being discussed and applied in determining whether the government will recognize a particular cause of action, or even if the cause of action is recognized, whether any forum will recognize it.\(^\text{15}\) But, is it not reasonable to conclude that once the government has consented to suit such consent should be construed as a waiver of its immunity from costs? While recognizing that in the usual situation waiver as to part should not be construed as waiver of the whole, should not an exception be made where an inequitable or unfair result would obtain? Should we impute to Congress, an intention not to waive the government’s immunity from costs where such non-waiver would operate to the detriment of one of its wards? The general principles of law relating to costs permit a court, in its discretion, to order the

\(^{6}\)TH CIR. R. 23(4) (same); 7TH CIR. R. 27(d) (same, except where specially authorized by statute and directed by the court); 8TH CIR. R. 17(c) (same; 9TH CIR. R. 25(4) (same); 10TH CIR. R. 26(4) (same).

\(^{12}\) See 3 BLACKSTONE, COMMENTARIES 400 (Lewis’ ed. 1897), cited in 6 Moore, FEDERAL PRACTICE 1339 (2d ed. 1953). However, the United States has not followed the fair application of sovereign immunity in all cases, as was the practice in England. The policy of the United States courts is to tax costs in favor of the United States but not against it; the exceptions being in the circuit courts where pursuant to local rules, supra note 11, each circuit provides that the United States, even if the prevailing party, shall not recover costs. See Pine River Logging Co. v. United States, 186 U.S. 279, 296 (1902); United States v. Verdier, 164 U.S. 213, 219 (1896); Locke v. United States, 1 F.R.D. 431 (W.D. Mich. 1940).

\(^{13}\) 162 F.2d 93, 96 (4th Cir. 1947); Cf. Reeside v. Walker, 52 U.S. (11. How.) 272, 290 (1850); Board of Public Utility Comm’rs v. Plainfield-Union Water Co., 30 F.d. 859 (3d Cir. 1929).

\(^{14}\) See also Aycrigg v. United States, 124 F. Supp. 416 (N.D. Cal. 1954).

unsuccesful party to reimburse the opposing party; where the government consents to suit, has it not placed itself in the same position as any other individual party-litigant? And if not, at least with respect to costs, which is one of the usual incidents of litigation, why not? Would not more individuals be encouraged to prosecute meritorious claims if they were assured that they would have an opportunity to recover their costs and disbursements if successful? Did the Congress desire to stifle the opportunity of its citizens to test the legality of governmental operations by tightening its purse strings? These are examples of considerations which Congress might reasonably have been expected to explore before enacting legislation which caused such inquiries to be made.

Returning to the quoted language of the Walling case, it is interesting to note that this rationale was relied upon to avoid taxing the government for costs since, although it initiated the proceedings, it failed to succeed in the litigation. The rationale upon which Judge Parker relied superficially makes sense. It recognizes that when the United States is unsuccessful it would have to have some authorization before it could reimburse the prevailing party. But what about when the United States is the prevailing party? Under rule 54(d), costs are allowed to the "prevailing party" as of course, and that provision has been construed to include the government. Judge Parker did not provide a more satisfactory explanation when he rejected sovereign immunity since it still appears that in all litigation involving the United States, the government has everything to gain if successful and nothing to lose if unsuccessful.

In sum, it appears that sovereign immunity is the underlying rationale of section 2412 and the rules enacted pursuant thereto. In Walling, Judge Parker seemingly rejected this theory and substituted what he deemed to be a more practical, more tenable basis for adhering to the mandate of Congress as expressed in the Code. It is submitted that whatever reasons may have existed to warrant the traditional recognition that the sovereign be given preference, such reasons lack merit today. Absent a statutory change, however, the

16. Asher v. United States, 28 F. Supp. 393 (S.D. Cal. 1939), aff'd, 111 F.2d 59 (9th Cir. 1940). In Locke v. United States, 1 F.R.D. 431 (W.D. Mich. 1940), the court said: "[P]rior to the adoption of the Federal Rules . . . 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) . . . , 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." See also Pine River Logging Co. v. United States, 186 U.S. 279 (1902); Love v. Royall, 179 F.2d 5 (8th Cir. 1950); Reynolds v. Wade, 140 F. Supp. 713, 716 (D.C. Alaska 1956), rev'd on other grounds, 249 F.2d 73 (9th Cir. 1957).
courts are powerless to effect a balance; any equalization will have to be the result of congressional manipulation. Accordingly, it is recommended that the following arguments be considered from the viewpoint of whether either the common law theory of sovereign immunity or Judge Parker's "appropriation from Congress" theory is sound, as a preliminary matter for determining whether a statutory amendment is warranted.

THE CASE FOR AMENDMENT

One of the first arguments indicating that abolition of the costs distinction is warranted is that the United States today is like the average business enterprise. Realistically viewed, the government has two motives and goals when it engages in litigation; it is interested in seeing that justice is done and that no one is disadvantaged by the preferred position occupied by the sovereign, and it is also interested in winning the suit in its own right, just as any other litigant. It is to be recognized that quite often the United States enters the courts to enforce some statute passed for the benefit of the public at large. For example, under the National Labor Relations Act, the government may be required to seek court enforcement of its administrative orders which were issued on behalf of an aggrieved member of society. But there are also other instances where the United States sues or defends in its own right because it has an interest in the outcome — an interest which is significantly of the type which does not directly benefit anyone other than the government, as for example, where the United States is sued directly to collect a refund on taxes paid under protest, or where an individual commences a partition action to divide property which is held jointly with the United States. (See 28 U.S.C. § 2409). Clearly the United States, in defending such actions, is acting out of self-interest, even though it may be argued that it had no choice since it was compelled to defend. Yet the rule that it is not to be liable for costs prevails. Since costs are taxed to make the successful party whole for the expenditures incurred in asserting or defending his rights, whether the individual successfully defends an action commenced by the United States or recovers judgment in a suit commenced by him to correct a wrong done by the United States, it would seem consistent with fair play that the government make him whole. Certainly where the United States has entered the sphere of commercial activity, for example, as a lessor,
insurer or creditor, and acquires benefits and rights which are exactly of the same quality which business men are often called upon to assert or defend, justice would seem to demand that the government be willing to accept the possible detriments which every other litigant is required to accept.

A second argument, somewhat related to the first, is that although many potential litigants do not pay any attention to the matter of costs when initially considering the possibility of suing the United States, to those who do consider the matter, the present law is likely to operate as a deterrent from such action. Perhaps this is good. If an individual is deterred by the financial burden of paying costs to the United States, should he lose, the claim very probably is not of sufficient importance to outweigh the threat of detriment. Yet, is this the kind of pressure which Congress felt was appropriate for the United States to bring to bear on its citizens? One would certainly hope that such was not the intent. But is it not the effect?

Further, it is not to be overlooked that as a matter of fact, costs may climb to a very substantial figure and in situations involving suit against the United States, this is a very real deterrent which significantly would not be present in the usual non-governmental type of litigation. Assuming that suit against the United States is commenced at the district court level, by the time statutory docket and filing fees are assessed and costs for printing or preparing briefs are paid, the outlay may be considerable. Further, there is always the possibility that the matter may advance to a court of appeals, and from there to

17. See Standard Oil Co. v. Apex Oil Corp., 35 Tenn. App. 225, 244 S.W.2d 176 (1951), where the United States filed a claim for taxes in a creditor's suit and lost. It was held that absent a statute authorizing costs against the United States, it could not be taxed.

18. To some extent Congress has attempted to balance the scales when the government engages in extra-governmental business activities (query whether really extra-governmental). See Reconstruction Finance Corp. v. Menihan Corp., 111 F.2d 940 (2d Cir. 1941), aff'd, 312 U.S. 31 (1941), where RFC, a corporate instrumentality endowed with many of the attributes of a private corporation, including the power to sue and the liability to be sued, was held liable for the payment of costs which were but an ordinary incident of the suit. The Court of Appeals for the Second Circuit said that as long as a money judgment against the corporation was expressly authorized by the statute (authority to sue and be sued), no immunity would be inferred "with respect to the additional sum that would normally be added to the judgment as costs." 111 F.2d at 942. Compare Federal Deposit Ins. Corp. v. Corson Realty Co., 21 N.J. Misc. 146, 32 A.2d 174 (Hudson Co. Cir. 1943), with Federal Deposit Ins. Corp. v. Casady, 106 F.2d 784 (10th Cir. 1939). Reconstruction Finance Corp. v. Menihan Corp., supra, was followed in Walling v. Crown Overall Mfg. Co., 149 F.2d 152 (6th Cir. 1945) and Walling v. McCracken County Peach Growers Ass'n, 50 F. Supp. 900 (W.D. Ky. 1943).

19. This textual discussion assumes that the individual does not proceed in forma pauperis under 28 U.S.C. § 1915.
the Supreme Court. In the Supreme Court alone, fees running well
over one hundred dollars would not be unusual.\textsuperscript{20}

It is also true that many potential law suits are avoided by
amicable settlement between the parties; this is often the case where
the issues are evenly balanced or the outcome would not necessarily
be clearly predictable. But, where novel or important issues, from
which grave consequences might follow, are presented, both parties
may be loath to settle. In situations of this sort, a potential litigant
might prefer to take his chances in court, knowing that if he wins
he will be reimbursed by the unsuccessful resisting party. Yet where
the situation involves the United States, because of the provision of
the Code, an individual might be considered well-advised to accept
settlement from the government on any terms it might make available.
If one of Congress' purposes was to discourage litigation and to en-
courage settlement, the provision of section 2412 may well be
achieving that goal. However, one can only speculate as to the num-
ber of meritorious causes which, although perhaps involving only
insignificant amounts of money, would have raised important legal
issues which have yet to be answered, and would have been presented
to the courts for judicial determination but for the deterrent effect of
the statute. Who knows how many claims against the United States
have been withdrawn or never presented at all because of reluctance
to invest sums which might be ten times greater than the amounts
sought to be recovered?

Another argument rests upon the language of rule 54(d) which
seems to be at variance with Judge Parker's policy argument, as ex-
pressed in \textit{Walling}. The rule states that "costs shall be allowed as
of course to the prevailing party \textit{unless the court otherwise directs}.
" (Emphasis supplied.) The italicized language is no more than a
recognition of the inherent power of equity courts to award costs, and
its presence in the rule is equivalent to an extension of that equitable
power to the district courts when sitting as courts of law.\textsuperscript{21}
Thus, although it is clear that so long as the United States is not the prevailing
party it may not be taxed for costs, there is nothing here which

\textsuperscript{20} See U.S. Sup. Cr. R. 52(a), which provides that a fee of $100 is to be
imposed for docketing a case on appeal. This figure is to be increased to $150 when
oral argument is permitted.

\textsuperscript{21} Except where some statute or rule provides otherwise, district courts are
given the discretionary power not to award costs to the prevailing party. United
States v. Bowden, 182 F.2d 251, 252 (10th Cir. 1950); Harris v. Twentieth Century-
Fox Film Corp., 139 F.2d 571 (2d Cir. 1943); Hansen v. Bradley, 114 F. Supp. 382
prevents a court from concluding that the United States, despite its success in the litigation, should not be reimbursed. 22

Judge Parker’s rationale, however, seems to smack of an assertion that there is an inherent lack of power in a court to tax the United States for costs; an assertion which flies in the face of the rule which recognizes and expressly authorizes a court to exercise discretion in the matter. The grant of power to exercise discretion must necessarily recognize that so long as not abused, the court’s lawful orders must be complied with. This, in addition, would recognize that in furtherance of the grant the court retains the corollary power to enforce its orders. Naturally, in the absence of a statute authorizing the court to tax the United States for costs, any order to that effect would be an abuse of discretion as well as an ultra vires action. But, if such a statute exists, then an award of costs against the United States is not only pursuant to a lawful mandate but within the scope of the court’s enforcing power. Judge Parker may have been aware of this but his statement in Walling did not reconcile the situation there presented with the situation posed here. Where the statute does permit an award of costs against the sovereign, did Judge Parker envision a separate congressional appropriation each time such an order was made? If he did, he was in error, for there is no evidence to support such a position.

As noted, the courts may, in their discretion, refuse to award costs to the United States even though it prevails. However, in actual practice, courts generally adhere to the general rule that costs shall be allowed to the prevailing party as a matter of course, unless there are sufficiently strong equitable considerations for denying reimbursement. 23 Thus, where the United States prevails, it gets its costs unless the opposing party is able to sustain his heavy burden of coming forth with compelling reasons for denying reimbursement. The courts could alleviate this one-sided situation, since such a burden is not placed on the United States when it loses the battle, by a concerted refusal to exercise their discretion in favor of the United States when it prevails, but they are apparently not inclined to reach such a balanced result. 24

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23. See note 16, supra.

24. As will be discussed under the heading “Attorney’s Fees as an Item of Costs”, infra, in some instances the courts do award costs for and against the government by considering the disbursements made as constituting “expenses” or “conditions.” In the cases commenced in the circuit courts, the decisions make no attempt to reconcile these awards with the courts’ rules against taxing costs either “for or against the United States.” Even in contempt matters, where the courts specifically permit the taxing of “costs” in favor of the United States, the courts do not, in any way, advert to the local rules which prohibit the award even in
It cannot be said that courts are not aware of these inequities; but awareness alone does not amount to solution. While sophisticated judges may reject one outmoded concept because no longer a virile implement for reaching a decision, hasty action often does no more than replace it with another equally unsatisfactory theory. In Walling, Judge Parker rejected sovereign immunity as the basis for the government’s non-liability for costs. Yet how much more satisfactory is his substituted assertion that a congressional appropriation is necessary to cover the matter of costs? When Congress decides on an amount which it believes will meet the budgetary needs of a federal agency or department, it does not, nor could it with any accuracy, deduct therefrom a projected figure which would constitute the amount of money which that particular governmental body will recover as costs. The best that Congress has been able to do to date is to estimate what the amount to be appropriated should come to, based on salary levels of attorneys and clericals presently employed — including recognition of normal attrition and replacement problems — the estimated caseloads, and a catch-all category known as operating expenses. Once Congress has appropriated monies to an agency, that agency is free, within the scope of its functional authority, to expend the monies in a manner consistent with the objectives for which it was established. If it exhausts its funds before the end of a fiscal year, it may seek a deficiency appropriation to permit it to continue functioning. The monies which make up the appropriation are obtained from the United States Treasury and, in the usual course of operations, any monies which the agency receives — damages, fines, collections on debts, etc. — are returned to that source. However, there is some basis for contending that under certain circumstances the monies immediately disbursed or received by an agency need not come from or be returned to the Treasury. Be that as it may, there does not appear to be any reason favor of the United States. Thus, even though the courts could, in their discretion, waive the operation of their local rules where the desired result warrants such action (with the reservation that such result is not inconsistent with the FRCP), the courts have consistently refrained from candidly expressing the reasons for their variation from their "self-imposed" rules.

25. See 28 U.S.C. § 2408, which provides that when, pursuant to Acts of Congress, the United States is taxed for costs, such sums are to be paid "out of the contingent fund of the department or agency which directed the proceedings to be instituted." (Emphasis supplied.) Conceivably then, when the United States is the recipient of such sums, they are likewise to be deposited in the appropriate agency or departmental fund. At least where the operative statute provides for the source from which such governmental sums are to be withdrawn, if the United States instituted the proceedings and is the losing party, it is not unreasonable to infer that Congress intended the fund to be replenished by sums recovered from individuals where the United States is the prevailing party. It is to be noted further, that by a strict reading of section 2408, if the government did not institute or "direct the proceedings to be instituted," costs would not be payable out of the contingent fund. Thus, perhaps Congress was attempting to deter the governmental agency from
why, as a practical matter, a governmental agency could not be required to reimburse a successful opponent without having a specific appropriation from Congress for that purpose.

For example, when a governmental agency incurs expenses in the taking of depositions, or in availing itself of recording services, or in paying the travelling expenses of its witnesses, these monies come out of the general funds appropriated by Congress and which the agency allocates for such purposes. If the United States is successful, these monies are recoverable. Thus the governmental agency has used public funds, the sums appropriated, to cover expenses incidental to litigation — costs; but it is being reimbursed by private funds, the costs taxed to the unsuccessful individual. If these monies are turned over to the Treasury, since it is said a governmental agency may not use monies received from private sources, and the agency runs short of funds during its fiscal year, any further appropriation might very well be the same monies received from the individual. Yet these same monies would now be properly allocable to the agency's use since their private character has been removed by the mere passage through the hands of the Treasury Department. Who said legal fictions are obsolete? If, in addition, there is a statute which would render the United States, through a particular agency, liable for costs if unsuccessful in litigation, it is quite possible that during any year in which that agency loses a considerable number of cases, it will have depleted its operating funds by virtue of court orders requiring it to reimburse the prevailing party. In such circumstances, the agency would be required to request additional appropriation from Congress. It is submitted that this cumbersome situation fails to recognize or account for the needs of a modern government which is constantly engaged in litigation. The need for an appropriation, if Judge Parker was correct, impairs what might otherwise be an efficient process for closing cases once the litigational phase is finished.

Yet, it is to be recalled that if an appropriation is necessary at all, it is because Congress has enacted a statute which expressly makes the United States liable for costs, for in the absence of statute the problem of costs never arises since 28 U.S.C. § 2412, takes control. Therefore, even where the United States is liable for costs, con-instituting proceedings, initially and on appeal, where the likelihood of success was of a doubtful character. This argument could be applied to the opposing private litigant too, since if he institutes the proceedings, and wins, the government would not, by the underscored portion of section 2408, be liable for costs. See also 15 Decisions of the Comptroller General 82, 83 (1935) where in response to a letter from the Security and Exchange Commission, the Comptroller General authorized that agency to pay expenses incurred in a reference to a master, including the master's fee, out of its appropriated fund called "miscellaneous expenses."
gressional action is required to alleviate the delays in complying with a court order. It is further submitted however, that Congress has intimated the means by which such a change in the Code could be efficaciously worded so as to implement the provisions relating to costs by making funds available for the payment of such assessments. In 28 U.S.C. § 2408, Congress impliedly stated that no specific appropriation would be necessary for the United States to comply with a taxed order to pay costs. In that section, Congress apparently envisions costs as an ordinary incident of the litigation which, consistent with established common law principles, should be paid as promptly as any other order or judgment. Conceivably, Congress considered the fact that these agencies would have need for larger appropriations to cover this additional litigational expense, and so provided in its budgetary awards. Speculative as this may be, section 2408 does serve as ample illustration that where Congress does permit costs to be taxed against the government, no additional appropriation is required each time it is so taxed. Thus, if this argument is accepted and, in addition, it is generally agreed that the government’s present immunity from costs is not realistically to be considered sound, being premised as it were on the archaic concept of the “divine right of kings,” we are left with no explanation for continued adherence to the statutory provision which permits a disparity to exist between the United States and other litigants.

Since there is no persuasive conceptually tenable basis for according preferential treatment to the United States when engaged in litigation, it is suggested that the statute and the rules be amended to eliminate the authorization for such disparity. Congress has eroded the principle of sovereign immunity to a great extent by the passage of many statutes which, in the particular area of governmental operations involved, renders the United States liable for costs and fees; and in many instances, the liability also includes authority for the taxation of attorney’s fees. It could be argued that since Congress has waived the government’s immunity from costs in so many statutes that these exceptions have become tantamount to the rule itself, and therefore no amendment to section 2412 is necessary. Such an argument overlooks the basic point that there is no reason for retaining section 2412 in its present form; and to retain it at all is to recognize that in those situations, be they few or many, where Congress has

not specially acted to make the United States liable, the general immunity still prevails. However, in effecting a change in the provision, it is to be recognized that in this day and age when the possibility for much paternalistic legislation is quite strong, it would be just as easy for an over-zealous Congress to hold the United States liable for costs in all cases, even when it is the prevailing party, in order to encourage private parties to act as stopcocks on governmental action, i.e., to foster the commencement of judicial proceedings where the facts indicate a possible over-reaching by the governmental agency. However, it is believed that a middle-ground approach would be more reasonable, more likely to pass, and more in accord with fairly well established precedent.

At the very least, it is recommended that section 2412 be amended to remove the United States from the favorable position which it presently occupies, even though this result might not square with established legal precedent. Under this proposal, which is here recommended as a minimum and not as the optimum solution, neither the United States nor the individual would be entitled to reimbursement for costs, regardless of which party prevails. This solution would be at odds with the common law rule of allowing costs to the prevailing party as a matter of course, but it would at least not place the individual in a position inferior to that occupied by the United States. Thus, both the United States and the individual would incur their separate costs without any possibility of reimbursement. However, no inequality would exist and each litigant would be fully aware of the amounts which would have to be expended to resolve the legal question presented for the court's determination.

The preferred solution however, would be to amend section 2412 by excising the provision relating to governmental immunity from costs. Once this was accomplished, the United States would be in the same position as any other individual involved in litigation and the usual rule of allowing costs to the prevailing party would apply. Obviously, this would additionally require amendment of rule 54(d) and a similar change in the local rules of the Supreme and circuit courts so as not to be inconsistent with federal law.

Further, it is recommended that in order to overcome any appropriation problem similar to the one raised in Walling, the amendments should provide that receipts and disbursements be made to and from an agency or department fund. This would avoid the questionable arguments that a congressional appropriation is needed each time the United States is ordered to pay costs. In establishing this fund rule,
Congress should provide that each fund is intended to be self-sustaining and that it would be replenished by additional appropriations when there were insufficient amounts on hand to meet the current "costs" orders. Such a provision would also reduce, to a substantial extent, the delays which would inhere in a requirement for congressional appropriation prior to payment. Can there be any question that the successful party should be able to recover his costs in the same amount of time as it takes the government to comply with any other judicial order or judgment? There is no reason why the individual litigant should be obliged to wait for Congress to deliberate on whether to appropriate sums to pay specific judicially ordered costs. And even if the congressional action were nothing more than mere formality, it would still be less efficient than if the matter were handled exclusively by the agency involved in the proceeding.

Thus, the requirement that a fund be maintained would eliminate the collection and payment problems, and completely equalize the unbalanced situation. Further, this proposed legislation would not do violence to the doctrine of sovereign immunity, if defense of the proposition or preservation of the doctrine, is deemed necessary. The proposed rules would become operative only after the government consents to suit. The United States would still be immune from suit in all cases except where it expressly consents. However, once it does become involved in litigation, the usual incidents would become applicable to it, of which costs is but one.

27. If this fund is also to serve as a pool into which the agency may dip to meet its own expenses, costs, then additional appropriations, "deficiency appropriations," would be granted when an appropriate request was made. Although it is recognized that Congress often takes a niggardly approach to budgetary matters, it is highly unlikely that it would deny a request for additional funds where an actual need is shown to exist. Conceding the reasonableness of the proposed amendments, it could be argued that since one of the objects of the fund provision is to eliminate the need for seeking a congressional appropriation each time the United States is taxed for costs, that once the fund is depleted, the agency would still be required to go to Congress, and that therefore, the cumbersome procedure would still exist. Under this argument, the solution would be for Congress to provide that the successful party would have an enforceable right only as long as there is money in the fund, and that when the balance reaches zero, the agency is in effect, judgment-proof. Or, in the alternative, when the fund reaches zero, the individual must then wait until the agency is granted an additional appropriation. This basic argument can readily be eliminated on two grounds: (1) that such an amendment would be arbitrary and prejudicial to those individuals who prevailed in litigation toward the end of each fiscal year when the agency's budgetary fund would be at its lowest level; and (2) that since Congress would recognize the argument made here, Congress would insure that each agency was granted a substantial appropriation in the first instance, and provide a speedy channel for affording each individual relief where the agency's fund is depleted before the end of a fiscal year.

28. See the statement of the Court of Appeals for the Second Circuit in Reconstruction Finance Corp. v. Menihan Corp., 111 F.2d 940 (2d Cir. 1941), aff'd, 312 U.S. 31 (1941).
ATTORNEY'S FEES AS AN ITEM OF COSTS

Professor Moore has defined costs as "an allowance, which the law awards, usually but not always to the prevailing party and against the losing party as an incident of the judgment, to reimburse a party for certain expenses which he has incurred in the maintenance of the action or the vindication of a defense."\(^29\) This definition fairly well coincides with what the preceding discussion has disclosed — that under rule 54(d), since the court has discretion as to an award of costs, they are "usually but not always" awarded and when awarded, they go to the "prevailing party" whether such party be plaintiff or defendant.

Although there are instances where exceptions may be found, generally a federal court is empowered to tax a particular item as included in costs only if such authority is found in a federal statute or rule of court.\(^80\) There are four general statutory provisions which should be noted in this regard:\(^81\) (1) 28 U.S.C. § 1912, "where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs." (Emphasis added); (2) 28 U.S.C. § 1927, "Any attorney . . . who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs." (Emphasis added); (3) 28 U.S.C. § 1923, provides that attorney's and proctor's docket fees may be taxed as costs, and contains specific amounts which may be assessed; (4) 28 U.S.C. § 1920 provides that a judge or clerk may tax the following as costs:

(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 examplification 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. (Emphasis added.)

\(^{29}\) 6 Moore Federal Practice 1301 (2d ed. 1953).
\(^{30}\) Newton v. Consolidated Gas Co., 265 U.S. 78 (1924); In re Peterson, 253 U.S. 300 (1920); Swalley v. Addressograph-Multigraph Corp., 168 F.2d 585 (7th Cir. 1948), cert. denied, 335 U.S. 911 (1949); Stallo v. Wagner, 245 Fed. 636 (2d Cir. 1917); Anderson v. General Motors Corp., 161 F. Supp. 688 (W.D. Wash. 1958).

\(^{31}\) For other statutory provisions dealing with costs, see 6 Moore, Federal Practice 1317-1322 (2d ed. 1953).
These provisions are framed in permissive terms, it will be noted, and a court may allow as costs all or part or none of the items provided for in these sections.\textsuperscript{32}

Although "the allowance of taxable costs in the federal courts is basically dependent upon the federal statutes supplemented . . . by the Federal Rules of Civil Procedure,"\textsuperscript{33} there are items which the courts allow even though no specific authorization is contained in the statutes or rules. The following discussion will deal with attorneys' fees insofar as they have been treated as an item of costs. Obviously, it would be impossible to attempt statistically to dissect the means by which courts have handled all of the incidents of litigation which we generally place under the heading of costs. An attorney's fee, however, is probably the greatest single disbursement which a litigant will be called upon to make and, while it is usually not included in a judicial award of costs, it demonstrates, perhaps better than any other single item, how courts, in various contexts, have created exceptions to the general common law rules of costs and even to Congress' mandate in section 2412.

In Standard Acc. Ins. Co. v. Hull,\textsuperscript{34} the court stated, "Attorney's fees can ordinarily be obtained by a prevailing party against an adverse party only by virtue of: — 1. A statute or rule of court, or 2. The provisions of a written agreement or contract." Ample authority exists to support the first point set out by the court. There are numerous statutes which specifically provide for the allowance of attorneys' fees\textsuperscript{35} and, pursuant to the authorization of 28 U.S.C. § 1912, supra, the Supreme Court in its rule 57-7, provides that "in appropriate instances, the court may adjudge double costs." As to the court's second point, there are many cases in which courts have recognized and respected contractual provisions providing for the allowance of reasonable attorneys' fees.\textsuperscript{36} Thus, the Hull case ac-


\textsuperscript{33} Hansen v. Bradley, supra note 32.

\textsuperscript{34} 91 F. Supp. 65, 66 (S.D. Cal. 1950). See also Oelrichs v. Spain, 82 U.S. (15 Wall.) 211 (1872); Day v. Woodworth, 54 U.S. (13 How.) 363 (1851); Gordon v. Woods, 202 F.2d 476, 480 (1st Cir. 1953); Maryland Cas. Co., v. United States, 108 F.2d 784, 786 (4th Cir. 1940).


\textsuperscript{36} United States v. Standard Oil Co., 156 F.2d 312, 315 (9th Cir. 1946); Mercantile Commerce Bank & Trust Co. v. Southeast Arkansas Levee Dist., 106 F.2d 966 (8th Cir. 1939); Standard Acc. Ins. Co. v. Hull, 91 F. Supp. 65 (S.D. Cal. 1950). Cf. Gordon v. Woods, 202 F.2d 476 (1st Cir. 1953); United Pacific
curately sets forth two bases upon which an allowance of attorneys’ fees is predicated. But a third basis, which the court there failed to recognize and which is often relied upon, is the “original authority of the chancellor to do equity in the particular situation.” 37 Although the equitable basis is generally restricted to situations where a fund is involved — creditor’s suits, 38 trust funds, 39 and funds of a decedent’s estate 40 — it has been extended to other situations as well, as where “an unfounded action or defense is brought or maintained in bad faith, vexatiously, wantonly, or for oppressive reasons.” 41 An award of costs, including attorney’s fee, is quite common in contempt proceedings. As stated by the second circuit in Gordon v. Turco-Halvah Co., 42 “[T]his is a proceeding for contempt, and . . . we do have the power to make the plaintiff whole for all reasonable expense to which he may have been put, including a counsel fee.” In this respect, it is of interest to note that although costs are generally treated as an incident of litigation and ancillary to recovery of damages, in civil contempt proceedings, insofar as the successful petitioner is concerned, attorney’s fees are treated as part of the substantive remedy. 43 However, as to the respondent, attorney’s fees and other expenses are treated as conventional costs, and recovery is allowed only where reimbursement would have been recognized, as where the proceedings were commenced in bad faith or vexatiously. 44

42. 247 Fed. 487, 492 (2d Cir. 1917). See also NLRB v. Mastro Plastics, 43 L.R.R.M. 2177, 2179 (2d Cir. 1958); In re Federal Facilities Realty Co., 227 F.2d 657, 658 (7th Cir. 1955); Rivers v. Miller, 112 F.2d 439, 443 (5th Cir. 1940); Odell v. Bausch & Lomb Optical Co., 91 F.2d 359, 362 (7th Cir. 1937); Kreuter-Arnold Hinge Last Co. v. Leman, 50 F.2d 699, 707 (1st Cir. 1931), aff’d (on the issue of costs), 284 U.S. 449, 451 (1931); Schaufler v. Plumbers and Pipefitters, 148 F. Supp. 704 (E.D. Pa. 1956). See generally 17 C.J.S., Contempt § 127.
This judicial treatment of counsel fees as part of the substantive remedy in contempt proceedings appears warranted since, except in cases where criminal contempt is alleged, but for the imposition of costs the penalty in civil cases might have little deterrent value. Further, this treatment also appears to be consistent with the general interpretation given statutes which provide for an award of attorney’s fees to the prevailing party; when such a provision is expressly granted by the legislative body, it must be alleged in the pleadings. Yet, as to this latter point, it is not to be concluded that whenever a statute speaks in terms of allowing attorney’s fees that a right to receive such an award becomes vested. For example, sections 1920(5) and 1923 of title 28 of the United States Code speak about attorney’s docket fees, yet the authority to tax such an item as costs, being couched in permissive terms, may be granted or denied by the court without its being subject to attack for abuse of discretion.

There are several provisions in the FRCP which bear on the subject of attorney’s fees but none treats such fees as costs; they speak in terms of “reasonable expenses” and often provide that attorney's fees may additionally be assessed. However, even if any one rule does not specifically mention attorney’s fees, by the use of labels such as “reasonable expenses” the court may just as effectively tax attorney’s fees as one of the conditions upon which relief shall be granted, although the court would lack authority to tax such fees as “costs.”

45. In Prudential Ins. Co. v. Carlson, 126 F.2d 607, 611 (10th Cir. 1942), the court said:

"The fact that statutes providing for the assessment of attorney's fees designate them as costs does not make them such as that term is generally used and understood. Statutes providing for attorney's fees impose a liability which one may enforce as a matter of right. Such fees are put in controversy in the suit and are a part of the substantive right." Missouri State Insurance Co. v. Jones, 290 U.S. 199 (attorney's fees treated as part of the recovery for purposes of determining jurisdictional amount for removal to federal court.); People of Sioux County v. National Surety Co., 276 U.S. 238. (Emphasis supplied).

46. Cf. cases cited in note 22 supra.

47. Rule 41(d) (voluntary dismissal); rule 53(a) (compensation of master); rule 75(e) (for violation of mandate that record be abbreviated, "costs may be imposed upon offending attorneys or parties"); rule 30(d) (motion to terminate or direct examination of depositions); rule 30(g) (for failure to attend or to serve subpoena, and another party attends, court may order party to pay all reasonable expenses including reasonable attorney's fees); rule 37(a) (refusal to answer interrogatory, reasonable expenses and attorney's fees); rule 37(c) (refusal to admit genuineness of documents or truth of matters of fact, reasonable expenses and attorney's fees). Note that rule 37(f) states that, "Expenses and attorney's fees are not to be imposed upon the United States under this rule."

48. Cf. 6 Moore, FEDERAL PRACTICE 1356 (2d ed. 1953), where it is stated that "orders for the advancement of expenses do not constitute the taxing of costs, and are not conclusive as to who shall ultimately be taxed, if at all, with the expense involved."
Referring again to section 1912 of the Judicial Code, Congress gave wide discretion to the Supreme Court and the courts of appeal in awarding "damages" and "costs." There are numerous cases in which courts have exercised their discretion to award attorney's fees pursuant to that section, but query, are these awards to be construed as "damages" or as "costs"? It has been held that, under ordinary circumstances, just damages for delays in litigation are not to include attorney's fees, yet the Supreme Court has stated that attorney's fees may be included in an award of damages where the appeal was frivolous and taken merely to delay matters. Thus, although counsel fees are not to be construed as an element of costs, where courts are given latitude in the exercise of their sound discretion, the assessment of such sums may be rationalized under the Code by merely affixing the label, "damages."

Referring now to the label termed "expenses," it is beyond dispute that such term may include attorney's fees, and there is authority to demonstrate that under appropriate circumstances, such an award may be charged as an expense against the United States. In *North Atlantic & Gulf S.S. Co. v. United States*, the court directed the United States to pay the libellant's counsel fees as a "condition" to taking the deposition of a government witness. The court said:

> The payment by the applicant for the deposition, to his adversary of the fees and expenses of the adversary's attorney attending at the taking of the deposition, is neither a cost nor a disbursement, as those terms are commonly understood in the taxation thereof. . . . Under Rule 12 [local rule] the amount thus advanced is retrievable as a disbursement if the defendant [United States] ultimately recovers costs of the action. However, the sum does not become a taxable disbursement until such time as, and only in the event that, the right to tax costs accrues to the litigant advancing it. The prohibition of 28 U.S.C. 2412 is inapplicable thereto. (Emphasis added.)

The rationale of *North Atlantic* has been applied to many situations where the court believes that such items of costs should be taxed in favor of the prevailing party.

49. Gordon v. Woods, 202 F.2d 476 (1st Cir. 1953), where recovery on a supersedeas bond was disallowed.
51. 16 F.R. Serv. 306.41, case 2, aff'd 209 F.2d 487 (2d Cir. 1953).
52. Id. See also Ryan v. Arabian Oil Co., 18 F.R.D. 206 (E.D.N.Y. 1955), where Judge Bondy held that he was not foreclosed, by an order requiring "each party to bear his own expenses in connection with the taking of the deposition", from taxing such expenses as costs in favor of the prevailing party.
The subject of attorney’s fees is quite similar in principal to the payment of fee expenses where reference to a special master is ordered. Generally, where the court orders a reference to a master and the parties acquiesce to the order, the compensation which is paid to the master may be taxed against either or both parties. This follows from the discretion vested in the court under traditional equity principles, rule 54(d) and the express terms of rule 53(a). Under rule 53(a), the court is authorized to fix the compensation to be allowed a master, and the payment of his fee and other expenses are charged upon “such of the parties . . . as the court may direct.” The United States, when involved in litigation, is usually a party and accordingly, its immunity under rule 54(d) should apply. In addition, although it is generally conceded that the United States may not waive a lawful defense by consenting to liability for costs, it is common knowledge that in actual practice it often stipulates to share “expenses,” costs, when reference to a master is agreed upon among the parties or ordered by the court. However, even in the absence of stipulation or consent, the United States has been held liable for a proportionate share of the “costs” when reference to a master was ordered.

53. Bowen Motor Coaches v. New York Cas. Corp., 139 F.2d 332, 334 (5th Cir. 1944). In In re Peterson, 253 U.S. 300, 315 (1920), the Supreme Court indicated that master’s fees were like costs and that therefore the losing party should be liable for their payment. That this statement no longer represents the law is indicated in 6 Moore, Federal Practice 1358 (2d ed. 1953). Cf. Dyker Bldg. Co. v. United States, 132 F.2d 85 (D.C. Cir. 1950), where the court said that the costs of reference may properly be taxed and be considered as “costs” within the meaning of rule 54(d), and that costs shall therefore be allowed to the prevailing party as of course.


55. It is submitted that the decisions cited at note 56 infra, can be squared with 28 U.S.C. § 2412 and rule 54(d) if the word “costs” as used in the courts’ statements are construed as being synonymous with expenses. However, even if masters’ fees are considered as costs, the fact that they are paid to a third-party rather than to a party-litigant should be a sufficiently persuasive basis to justify their assessment as not being within the prohibition of the code. Cf. Associated Almond Growers v. Wymond, 69 F.2d 912, 914 (9th Cir. 1934).

56. See N.L.R.B. v. Remington Rand, 130 F.2d 919 (2d Cir. 1942), where the Board was successful in a contempt proceeding. However, the court said, “[T]he costs, including the Master’s compensation [set at $6000], witnesses’ and stenographer’s fees, are to be divided between the parties, two-thirds to be borne by respondent and one-third by the Board.” (Emphasis supplied.) N.L.R.B. v. Remington Rand, supra at 937. See also Polish Nat’l Alliance v. N.L.R.B., 159 F.2d 38 (7th Cir. 1946), where again, the findings of the master indicated that the respondent was in contempt of the Board’s order. This court said: “The Master is allowed $600 as his fee in the matter, and the Board and Alliance are each directed to pay one-half the costs of the reference, including the Master’s fees and expenses.” (Emphasis supplied.) Polish Nat’l Alliance v. N.L.R.B., supra at 39. Compare Ayerst v. United States, 124 F. Supp. 416 (D.C. Cal. 1954), where the United States was not held liable for sharing the expenses which the prevailing party unilaterally had advanced to the master.
These decisions dealing with master's fees should not be construed as being necessarily atypical or inconsistent with the tenor of the whole discussion of attorney's fees. After all, the requirement for a master's services is really more like expenses, which must be incurred to enable the court to render a decision, just as transcript and filing fees are necessary expenditures incidental to the presentation of the matter before the court. If the matters are so complex that a special master is required, apparently the court is poorly equipped to make the findings upon which a decision could be predicated; and without a final decision there can be no award of costs. Thus, these expenditures seem to be more than mere incidents of the suit, they are absolutely necessary. Consequently, if a master's fees, and the accompanying expenditures, are viewed as “expenses” rather than conventional costs, the label would seem to justify the result, as in other situations previously noted, where the award of attorney's fees was upheld despite the prohibitions of section 2412 and rule 54(d).

Conclusions

The foregoing discussion of attorney's fees should amply illustrate and point up the need which exists for affirmative legislation to correct the imbalance existing between the government and its opposing party-litigant. While in the Hull case, supra, the court noted that a written contract or statute or rule of court could justify the imposition of an award of attorney's fees against the unsuccessful party, and while numerous statutes do exist which provide for the allowance of an attorney's fee, the courts have been able to avoid following the express terms of the statute, where inclined to do so, by affixing a label to the services performed which lifts the subject from the permissible category and places it in situ under a prohibitory category. Even in those cases where courts are inclined favorably to the successful party, there may at times be experienced a sense of restraint, albeit self-imposed, lest the matter be considered by a reviewing court as falling within the statutory ban against awarding “costs” where the United States does not prevail. The aura of hesitancy which prevents a court from achieving justice through appropriate remedial power-granted orders is due, in large measure, to the inaction of Congress in eliminating the statutory provisions which the courts are bound to obey and enforce. No matter how gravely the needs and experiences of present day litigation cry out for a rejection of outmoded, unfair provisions, it would be a subversion
of the statute and an unseemly arrogation of ungranted power, for a court openly to deny the application of express statutory terms where they clearly should apply. It would be inappropriate for a court to aid one party one day without statutory reason lest it disable the same party the next day without statutory cause.

The state of imbalance presently existing between the United States and other parties litigant is the result of adherence to an archaic concept of sovereign immunity and any alternative which tends to equate the position of the individual with that of the government presents a salutary objective. Insofar as federal law prevents the United States from being taxed for costs, the law should be changed. The proposed change would remove costs from the field of sovereign immunity and place the United States on an equal footing with all other parties involved in litigation. Two alternatives are submitted:

(1) Congressional amendment to 28 U.S.C. § 2412 and Supreme Court approval of amendment of rule 54(d) of the Federal Rules of Civil Procedure, providing, in effect, that where the United States is a party, neither the individual nor the United States, whether either occupied the position of plaintiff or defendant, would be liable for paying, or benefit by receiving, an award of costs; that each party is to bear his own costs without reimbursement, regardless of the outcome of the litigation.

or

(2) By Congressional amendment to 28 U.S.C. § 2412 and amendment of rule 54(d), to provide that the United States will be liable for costs as any other unsuccessful litigant; that where costs are taxed against the government such sums are to be paid from a fund maintained by the particular agency or department involved in the litigation. (See 28 U.S.C. § 2408). Similarly, all sums received by the government, which are in the nature of costs, are to be deposited in this fund.

For the reasons already discussed, the second of these alternatives is the more satisfactory and preferable solution.

It is for Congress to clear the books and supply the "reason" to support the cause.