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Equal Access to Justice Act—Paving the Way for Legislative Change

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EQUAL ACCESS TO JUSTICE ACT—PAVING THE WAY FOR LEGISLATIVE CHANGE

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The Equal Access to Justice Act of 1980, providing attorneys' fees and expenses to eligible prevailing parties in suits against the United States, had a tumultuous, three-year life span. During that short time, numerous interpretive questions under the Act plagued the courts, including what constituted a "prevailing party," "substantial justification," "special circumstances," the "position of the United States," and a "final judgment" for purposes of the Act. As the courts grappled with these and related questions, Congress busily drafted 1984 amendments to clarify and extend the Act. After several attempts, the new legislation was finally passed by Congress, only to be vetoed by President Reagan. Both Congress and the President, however, remained committed to the Act's eventual reauthorization. Analysis of the defunct Act and its judicial interpretations, the proposed 1984 amendments, and the President's objections thereto provides the foundation for analyzing the 1985 legislation recently enacted.

INTRODUCTION

THE EQUAL ACCESS to Justice Act[1] (EAJA or the Act), promulgated in 1980, permitted parties prevailing against the United States in certain administrative proceedings and judicial actions to recover attorneys' fees and associated expenses.[2] The Act, effective October 1, 1981,[3] included a three-year sunset provision, thereby automatically terminating on October 1, 1984.[4] During that three-year period, a variety of courts and agencies considered numerous petitions for fee awards and expenses, striving to inter-

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1. Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified at 5 U.S.C. § 504 (1982) and 28 U.S.C. § 2412 (1982)) (repealed 1984).

2. The United States is normally immune from suit except as it consents to be sued. United States v. Sherwood, 312 U.S. 584, 586 (1941). In effect, EAJA serves as a partial waiver of sovereign immunity since, by enacting EAJA, the United States consented to be sued for attorneys' fees and expenses. To effect this partial waiver of sovereign immunity, Congress created 5 U.S.C. § 504, amended 28 U.S.C. § 2412, and repealed FED. R. CIV. P. 37(f). The latter prohibited an award of attorneys' fees against the United States in the absence of statutory authorization. *See* EAJA § 205(a), 94 Stat. at 2330.

3. EAJA, § 208, 94 Stat. at 2330.

4. EAJA, §§ 203(c), 204(c), 94 Stat. at 2327, 2329.

pret their Congressional mandate.[5] A review of the resulting court decisions reveals diverse interpretations of certain provisions of the Act.

In October of 1984, Congress passed legislation to modify EAJA, extending it on a permanent basis.[6] However, on November 8, 1984, President Reagan vetoed the new legislation, stating that certain changes in EAJA failed to further the basic principles of the Act and were inconsistent with principles of good government.[7] Although the President expressed a firm commitment to the policies underlying EAJA and stated he hoped to approve reauthorization in the future,[8] his veto had the immediate effect of terminating the Act in light of the October 1, 1984, sunset provision.[9]

Although the proposed 1984 amendments to EAJA were not enacted into law, they are instructive for two reasons. First, in drafting them, Congress explained many provisions of the Act, a number of which were those subject to disparate judicial interpretations. Since the original Act remains applicable to those cases com-

5. In general, a federal agency or department conducting an adversary adjudication is required, in certain circumstances, to award attorneys' fees and other expenses to a party prevailing against the United States. 5 U.S.C. § 504(a)(2). The prevailing party must submit an application for an award to the agency within thirty days of final judgment. *Id.* A party dissatisfied with the outcome of its award application may obtain judicial review of the unsatisfactory decision by filing a petition for leave to appeal with the federal court which would have jurisdiction to review the merits of the underlying agency decision. *Id.* § 504(c)(2). Certain prevailing parties against the United States in civil actions may also apply for an award of attorneys' fees and expenses within thirty days of final judgment by submitting an application to the court which entertained the action. 28 U.S.C. § 2412(d)(1)(B). For purposes of an EAJA award with respect to matters commenced in the United States Court of Claims prior to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, both the United States Claims Court and the United States Court of Appeals for the Federal Circuit have jurisdiction. *See, e.g.*, Morris Mechanical Enters. v. United States, 728 F.2d 497, 498 (Fed. Cir. 1984); Ellis v. United States, 711 F.2d 1571, 1574-75 (Fed. Cir. 1983).

6. *See* 130 CONG. REC. H12171-74 (daily ed. Oct. 11, 1984). Passed two weeks after the Act's automatic termination, the amendments applied retroactively to October 1, 1984. *Id.* at H12173. Although the initial version of the amendments as submitted by the Committee on the Judiciary was approved by the United States House of Representatives on September 11, 1984, H.R. 5479, 98th Cong., 2d Sess. (1984), extended debate surrounding certain provisions delayed full Congressional approval until October 11, 1984. *See* 130 CONG. REC. H11479-82 (daily ed. Oct. 4, 1984); 130 CONG. REC. H9297-02 (daily ed. Sept. 11, 1984); H.R. REP. NO. 992, 98th Cong., 2d Sess. (1984). It is interesting to note that the version of the bill ultimately approved by Congress constituted a "Senate amendment to the House amendment to the Senate amendments with an amendment." *See* 130 CONG. REC. H12171 (daily ed. Oct. 11, 1984).

7. *See* Memorandum of Disapproval of H.R. 5479, 20 WEEKLY COMP. PRES. DOC. 1814-15 (Nov. 8, 1984).

8. *Id.*

9. *See supra* note 4 and accompanying text.

menced prior to the October 1, 1984 repeal date,[10] the proposed amendments offer guidance to the judiciary in the Act's implementation. Second, the proposed amendments offer insight to the impetus behind the 1985 legislation passed by Congress on July 24, 1985,[11] and signed into law by the President on August 5.[12]

This Article first examines provisions of EAJA as originally enacted, highlighting the ambiguities subject to diverse judicial interpretation.[13] The Article will then compare the original Act with the proposed 1984 amendments, noting the effect the proposed legislation would have had on the resolution of those disputed interpretations. It examines the President's specific objections to the 1984 proposed legislation, as well as their resolution in the 1985 legislation. Finally, it discusses the continued ambiguities and problems inherent in this legislation.

I. THE EQUAL ACCESS TO JUSTICE ACT AS ENACTED IN 1981

A. *General Provisions*

The fundamental purpose of EAJA is to enable those who might otherwise be unable to afford it an opportunity to assert their rights against unreasonable government action. Because individuals and small businesses are often deterred from exercising their legal rights due to the expense involved, Congress established this general statutory authorization for the award of attorneys' fees and related expenses to eligible prevailing parties in actions involving the Federal government.[14] EAJA allows recovery of fees and expenses in almost all administrative and judicial civil proceedings involving the government,[15] creating a significant exception to the "American

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10. *Id.*

11. *See* 131 CONG. REC. S9991 (daily ed. July 24, 1985).

12. Extension of the Equal Access to Justice Act, 21 WEEKLY COMP. PRES. DOC. 966-67 (Aug. 12, 1985). The extension as enacted is Pub. L. 99-80 (1985).

13. This Article focuses upon judicial decisions relating to applications for attorneys' fees and expense awards in civil actions pursuant to 28 U.S.C. § 2412, rather than on awards sought under 5 U.S.C. § 504 of the Administrative Procedure Act. Although the Article refers to legislation dealing with administratively adjudicated matters, evaluation of agency adjudications is beyond the scope of this Article.

14. *See* H.R. REP. NO. 1418, 96th Cong., 2d Sess. 10 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4988.

15. Tort cases, with the exception of constitutionally based torts, were specifically excluded from coverage, 28 U.S.C. § 2412(d)(1)(A), since the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1982), provided adequate remedies. *See* H.R. REP. NO. 1418, *supra* note 14, at 18, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4997.

Proceedings subject to § 7430 of the Internal Revenue Code were also excluded under the Act. 28 U.S.C. § 2412(e). Section 7430, enacted as part of the Tax Equity and Fiscal Respon-

Rule" in which litigants are responsible for paying their own attorneys' fees and expenses irrespective of the litigation's outcome.[16]

EAJA contains two distinct attorneys' fees provisions applicable in judicial proceedings: sections 2412(b) and (d) of Title 28 of the United States Code. These sections, along with existing fee-shifting statutes, generally provide three avenues to pursue recovery of fees and other expenses in civil cases. First, if an action is litigated under a statute explicitly permitting fee awards against the United States, the prevailing party may seek fees under the specific provisions of that statute.[17] Second, if an action is litigated under a statute which permits fee awards against private parties, but is silent as against the United States, or if an action is litigated under a statute which does not permit fee recovery but the prevailing party can demonstrate a common law ground for such a recovery, the party

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sibility Act of 1982, provides that any private party in tax cases can recover up to $25,000 in attorneys' fees from the United States. 26 I.R.C. § 7430(b)(1) (1982).

16. The Supreme Court first enunciated the American Rule in Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). This rule is contrary to the "English Rule" under which attorneys' fees are awarded to the prevailing party since they are viewed as an expense of litigation which the losing party should bear. *See* Defner, *The True "American Rule": Drafting Fee Legislation in the Public Interest*, 2 W. NEW ENG. L. REV. 251 (1979). For a lengthy list of the statutory exceptions to the American Rule, see Cohen, *Awards of Attorneys' Fees Against the United States: The Sovereign Is Still Somewhat Immune*, 2 W. NEW ENG. L. REV. 177, 184-91 (1979).

In addition to statutory exceptions to the American Rule, courts have created a number of judicial exceptions. Among these are the "common fund" exception, the "bad faith" exception and the "private attorney general" exception. The "common fund" exception provides that a party whose litigation results in a monetary fund both for himself and others may require beneficiaries of that fund to contribute to compensation of the attorneys. *See, e.g.*, Trustees of the Internal Improvement Fund v. Greenough, 105 U.S. 527 (1881). The common fund theory was judicially expanded to include situations involving non-monetary benefit, where a prevailing party's efforts resulted in a "common benefit" to a particular group. *See, e.g.*, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). The "bad faith" exception provides that an award of attorneys' fees is appropriate where the non-prevailing party has disobeyed a court order and has "acted in bad faith, vexatiously, wantonly or for oppressive reasons." Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962). Finally, the "private attorney general" theory provides for the award of attorneys' fees in cases where a party undertakes an action that the courts consider "vindicating a policy that Congress considered of the highest priority." Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968). In Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), however, the Supreme Court proscribed the use of the private attorney general doctrine to permit recovery of attorneys' fees in the absence of legislation, but confirmed the bad faith and common fund or common benefit exceptions. *Id.* at 247-69.

For further discussion regarding exceptions to the American Rule, see Comment, *Attorney Fees: Slipping from the American Rule Strait Jacket*, 40 MONT. L. REV. 308 (1979); Note, *Attorney Fees: Exceptions to the American Rule*, 25 DRAKE L. REV. 717 (1976); Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733 (1973).

17. *See infra* note 26 and accompanying text.

may seek fees under section 2412(b).[18] Third, if an action is litigated under a statute containing no fee-shifting provision and no common law ground applies, the prevailing party may seek fees under section 2412(d).[19]

More specifically, section 2412(b) provides that courts may award reasonable fees and expenses to a prevailing party in a civil action against the United States[20] where either the common law or the express provision of a statute would permit an award of fees against any other party.[21] The principal common law grounds for recovery of attorneys' fees are the "bad faith" and "common fund" or "common benefit" theories.[22] The "bad faith" theory allows an award of fees where a party has willfully disobeyed a court order and has acted in bad faith, vexatiously, wantonly or for oppressive reasons.[23] Under the "common fund" or "common benefit" theory, a court may award attorneys' fees to a party whose legal action results in the creation or preservation of a fund of money, or a benefit, for others as well as for himself.[24] In addition to the common law theories, the United States may be liable for reasonable attorneys' fees to a prevailing party under section 2412(b) whenever a statute specifically authorizes such recoveries against non-Federal parties, unless recovery against the United States is expressly prohibited in the statute.[25]

Distinct from section 2412(b), section 2412(d) provides that in civil actions brought by or against the United States, except as otherwise provided by statute,[26] eligible prevailing parties shall be

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18. *See infra* notes 20-25 and accompanying text.

19. *See infra* notes 26-32 and accompanying text.

20. The civil action may be brought by or against the United States, an agency, or an official of the United States acting in his or her official capacity. 28 U.S.C. § 2412(b) (1982).

21. *Id.*

22. *See supra* note 16 for discussion of judicially created exceptions to the American Rule.

23. *Id.*

24. *Id.*

25. When an applicable statutory provision expressly prohibits awards of attorneys' fees against the United States, there can be no recovery. 28 U.S.C. § 2412(b) (1982).

26. The legislative history indicates that the "[e]xcept as otherwise provided by statute" clause of § 2412(d)(1)(A) was intended to preserve the standards established by case law under existing federal fee-shifting statutes and to insure the application of the Act "only to cases (other than tort cases) where fee awards against the government are not already authorized." H.R. REP. NO. 1418, *supra* note 14, at 18, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4997.

The legislative history referred to several existing fee-shifting statutes, including the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1982); Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2003a-3(2), 2000e-5(k) (1982); and the Voting Rights Act of 1975, 42 U.S.C. § 1973(l)(e) (1982). In addition to the legislative history, EAJA itself specifies that

awarded attorneys' fees and other expenses unless the court finds that the position of the United States was substantially justified or that special circumstances[27] make a fee award unjust.[28] Certain parties are precluded from recovery under section 2412(d). These initially included individuals with net worths of more than $1 million and sole proprietorships, partnerships, associations, corporations, and private organizations with either net worths exceeding $5 million or which had more than 500 employees.[29] Section 2412(d)

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nothing in § 2412(d) "alters, modifies, repeals, invalidates, or supersedes any other provision of federal law which authorizes an award of such fees and other expenses." EAJA § 206, 94 Stat. at 2330.

27. Unlike § 2412(d), § 2412(b) does not mention substantial justification or special circumstances as limiting factors in awarding attorneys' fees, although it authorizes recoveries against the United States only to the same extent a statutory provision would hold a private party liable. Since some fee provisions applicable to non-Federal parties authorize courts to decrease or deny attorneys' fees in special circumstances, it is possible that the special circumstances limitation may be considered by courts in making fee awards under § 2412(b) as well. For example, the Civil Rights Attorney's Fees Awards Act of 1976 has been interpreted to permit courts to deny recovery of attorneys' fees in special circumstances. *See, e.g.*, Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 421 (1978).

Not only can the underlying statute engraft the special circumstances limitation onto § 2412(b), it can also cause a § 2412(b) fee award to vary based upon whether the petitioning party is a plaintiff or a defendant. With respect to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), a prevailing plaintiff ordinarily is entitled to attorneys' fees unless special circumstances would render an award unjust. *See Christiansburg Garment*, 434 U.S. at 412. A prevailing defendant, however, is not routinely entitled to a fee award in a civil rights case and should receive it only upon a finding that a plaintiff's action was "unreasonable, frivolous, meritless or vexatious." *Id.* at 421 (quoting Carrion v. Yeshiva University, 535 F.2d 722, 727 (2d Cir. 1976)).

In other words, parties under § 2412(b) may receive disparate treatment because the applicable underlying fee provisions may discriminate between plaintiffs and defendants. This is in contrast to § 2412(d), which applies a uniform standard in awarding attorneys' fees to either eligible plaintiffs or defendants.

28. 28 U.S.C. § 2412(d)(1)(A).

29. *But see* 28 U.S.C. § 2412(d)(2)(B) (certain tax-exempt organizations and agricultural cooperatives are not subject to a net worth limitation). Unlike § 2412(d), § 2412(b) contains no financial eligibility or size requirements. *See infra* note 183 and accompanying text for the 1985 changes in the dollar limits.

The term "net worth" is not defined in the Act. The committee reports, however, state that net worth "is calculated by subtracting total liabilities from total assets. In determining the value of assets, the cost of acquisition rather than fair market value should be used." S. REP. NO. 253, 96th Cong., 1st Sess. 17 (1979); H.R. REP. NO. 1418, *supra* note 14, at 15, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4994. In United States v. Harper, 569 F. Supp. 602 (E.D. Pa. 1983), the successful defendant refused to reveal his assets and liabilities for the record. The court found the defendant was not a "party" within the meaning of the Act since there was no evidence on which the court could make a net worth eligibility finding. *Id.* at 604.

With respect to size, neither the Act nor its legislative history offers any further assistance in defining who constitutes an employee for purposes of the 500-employee limitation. Should the question arise, the common law definition of "employee" would likely control. Generally,

limits recoverable attorneys' fees to $75.00 per hour, unless the court determines that an increase in the cost of living or some special factor justifies a higher fee.[30] Reasonable expert witness fees and reasonable costs of necessary studies, analyses, reports, tests, or projects are also recoverable under section 2412(d).[31] These are all, however, subject to the proviso that a court may reduce or deny any award under section 2412(d) if the prevailing party engaged in conduct which unduly protracted the resolution of the litigation.[32]

While sections 2412(b) and 2412(d) differ markedly,[33] section 504 of Title 5 of the United States Code, addressing fee awards in agency adjudications,[34] is very similar to section 2412(d). Under section 504, a federal agency or department that conducts an adversary adjudication is required to award attorneys' fees and other expenses to a prevailing party against the United States, unless the adjudicative officer conducting the proceeding finds that the agency's position was substantially justified or that special circumstances make an award unjust.[35] Section 504 also contains financial eligibility requirements similar to those in section 2412(d), initially limiting its application to individuals with a net worth of less than $1 million and designated business entities with a net worth of less than $5 million and fewer than 500 employees.[36] Section 504 con-

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employees include persons who regularly perform services for remuneration for a party, under that party's direction and control. *See* Miller v. Municipal Theatre Ass'n, 540 S.W.2d 899, 904 (Mo. Ct. App. 1976).

30. 28 U.S.C. § 2412(d)(2)(A). In contrast, § 2412(b) speaks in terms of "reasonable fees and expenses," but contains no specific limitations regarding total costs or hourly compensation for attorneys.

31. *But see* 28 U.S.C. § 2412(d)(2)(A) (providing that no expert may be paid at a rate in excess of the highest rate paid to an expert witness retained by the United States).

32. 28 U.S.C. § 2412(d)(1)(C).

33. *See supra* notes 17-32 and accompanying text. The manner in which fee awards are paid also differs under § 2412(b) and (d), respectively. Any recoveries awarded under § 2412(b) are payable by the General Accounting Office from an appropriation fund commonly known as the general judgment fund. The only exception to this is when the court bases a fee award upon the "bad faith" exception, whereupon the fee award must be paid from the appropriation fund of the agency which acted in bad faith. 28 U.S.C. § 2412(c)(2). Conversely, under § 2412(d), the prevailing party must first look to the losing party-agency for payment of a fee or cost award. Only if the agency refuses to pay is the award payable from the general judgment fund. 28 U.S.C. § 2412(d)(4)(A).

34. Congress bifurcated the judicial and administrative processes by amending 28 U.S.C. § 2412 (preserving the former law of 28 U.S.C. § 2412 (1976) in new § 2412(a)), which dealt with judicial proceedings, and creating 5 U.S.C. § 504 which dealt with agency actions. EAJA, 94 Stat. at 2325.

35. 5 U.S.C. § 504(a)(1). The analogous substantial justification and special circumstances limitations on fee awards in the judicial context are found at 28 U.S.C. § 2412(d)(1)(A).

36. 5 U.S.C. § 504(b)(1)(B). *See infra* note 183 and accompanying text for the 1985

tains cost and fee limitations analogous to those found in section 2412(d), providing for reasonable costs and expenses and a $75.00 ceiling on attorneys' hourly fees, absent a cost of living increase or special circumstances justifying a higher fee.[37] A party dissatisfied with an attorneys' fee application filed pursuant to section 504 may appeal to the Federal court with jurisdiction to review the merits of the underlying agency adjudication.[38] Section 2412(d) controls any judicial review of decisions made by agencies in adversary adjudications.[39] In such cases, section 2412(d)(1)(B) directs the court to award fees and other expenses to the same extent as the agency involved would be required to award them under section 504(a).[40]

In drafting EAJA, Congress provided parties with three avenues for seeking fee awards in civil cases, as well as an avenue for seeking fee awards in administrative adjudications. Each of these avenues is mutually exclusive and contains varying provisions regarding application and content. Also varying are the judicial interpretations which relate to certain of these provisions, to which this Article now turns.

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changes in the dollar limits. For a discussion of the definition of "net worth," see *supra* note 29. Financial eligibility requirements for parties in the judicial context similar to the ones in § 504 are found at 28 U.S.C. § 2412(d)(2)(B). As under § 2412(d), tax-exempt charitable associations may recover fees under § 504 regardless of their net worth. There is, however, a distinction between the two sections in their respective definitions of "party," although this may be attributable to a drafting error. Section 504 fixes a net worth limitation in its "party" definition at $1 million for individuals and $5 million for businesses, and uses an "and" in limiting parties to no more than 500 employees. 5 U.S.C. § 504(b)(1)(B) (1982). Section 2412(d)(2)(B), on the other hand, fixes the same net worth limitations, but uses an "or" in limiting parties to no more than 500 employees. 28 U.S.C. § 2412(d)(2)(B) (1982). The result of this discrepancy is that under § 2412(d), the definition of "party" may be more broadly construed than under § 504, permitting a business with 500 or fewer employees to qualify as a "party" eligible for fees and expenses awards, even if its net worth totals more than $5 million.

A second drafting discrepancy between the two sections is of no substantive consequence. Section 2412(d)(2)(B) reads that a business entity "having not more than 500 employees" is eligible for fees, while § 504(b)(1)(B) reads that a business entity "having more than 500 employees" is excluded.

37. 5 U.S.C. § 504(b)(1)(A). Similar cost, expense, and fee limitations are found in the judicial context at 28 U.S.C. § 2412(d)(2)(A). Both sections also have analogous method-of-payment provisions. *See* 5 U.S.C. § 504(d)(1) and 28 U.S.C. § 2412(d)(4)(A). As under § 2412(d)(1)(C), the amount of any award under § 504 may be reduced or eliminated if the prevailing party engaged in conduct which unduly and unreasonably protracted the final resolution of the controversy. 5 U.S.C. § 504(a)(3).

38. 5 U.S.C. § 504(c)(2). If a court grants a petition for leave to appeal a fee determination, it may modify the award or denial only if the failure to make the award or the calculation of the amount of the award constituted an abuse of discretion by the agency. The denial of a petition for leave to appeal is not reviewable. *Id.*

39. 28 U.S.C. § 2412(d)(3).

40. *Id.*

B. *Interpretive Ambiguities*

During the three-year period that the original EAJA was in effect, the courts entertained numerous applications for fee and expense awards. As might be expected, various interpretations were proferred with respect to several of the Act's provisions.

1. *Prevailing Party.*

In order to be eligible for a fee award under EAJA, the party seeking the award must have prevailed against the United States[41] in a civil litigation[42] or in an agency adversary adjudication.[43] In reviewing fee award requests, courts have had difficulty in determining what constitutes a "prevailing party." The Act's legislative history makes clear that Congress intended the interpretation of "prevailing party" to be consistent with the interpretation of that term developed in case law under other fee-shifting statutes.[44] In fact, the legislative history specifically recites certain case law on this issue, stating that a prevailing party

> should not be limited to a victor only after entry of a final judgment following a full trial on the merits. A party may be deemed prevailing if he obtains a favorable settlement of his case; if the plaintiff has sought a voluntary dismissal of a groundless complaint; or even if he does not ultimately prevail on all issues.[45]

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41. To be eligible for a fee award, a party must prevail against the United States, any agency of the United States, or any United States official acting in his official capacity. 28 U.S.C. § 2412(b) and (d)(2)(C). In Saxner v. Benson, 727 F.2d 669 (7th Cir. 1984), the court disallowed a fee application because the defendant federal correctional officers, against whom the plaintiff former inmates prevailed, were named individually and not as United States officials acting in their official capacities. *Id.* at 673.

42. 28 U.S.C. § 2412(b) and (d)(1)(A). Habeas corpus petitions are not civil actions for purposes of EAJA. *See* Boudin v. Thomas, 732 F.2d 1107, 1112 (2d Cir. 1984).

43. 5 U.S.C. § 504(a)(1). The "adversary adjudication" referred to in § 504(a) is defined as an adjudication under 5 U.S.C. § 554 in which the United States' position is represented. 5 U.S.C. § 504(b)(1)(C). Specifically excluded are rate fixing and licensing proceedings. *Id.* Administrative proceedings under the Social Security Act are not adversary adjudications within the meaning of EAJA. Therefore, fee awards for time expended in Social Security cases at the administrative level are inappropriate. *See* Cornella v. Schweiker, 728 F.2d 978, 988, *reh'g denied*, 728 F.2d 978 (8th Cir. 1984); Guthrie v. Schweiker, 718 F.2d 104, 108 (4th Cir. 1983); Cole v. Secretary of Health & Human Servs., 577 F. Supp. 657, 663 (D. Del. 1983); Phillips v. Heckler, 574 F. Supp. 870, 872 (W.D.N.C. 1983); Jones v. Schweiker, 565 F. Supp. 52, 54 (W.D. Mich. 1983). EAJA fee awards are also inappropriate for time spent in labor certification review proceedings, since those proceedings are not deemed adjudications. *See* Smedberg Machine & Tool, Inc. v. Donovan, 730 F.2d 1089, 1092 (7th Cir. 1984).

44. H.R. REP. NO. 1418, *supra* note 14, at 11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4989.

45. *Id.* It is undisputed that a party may be considered prevailing even if a case is settled or voluntarily dismissed. *See, e.g.*, Environmental Defense Fund v. Watt, 554 F. Supp. 36, 40 (E.D.N.Y. 1982), *aff'd*, 722 F.2d 1081 (2d Cir. 1983) (plaintiffs considered pre-

Courts have generally acknowledged this approach, borrowing from a well-accepted standard enunciated in another context by the First Circuit in *Nadeau v. Helgemoe*.[46] There, the Court stated that "plaintiffs may be considered 'prevailing parties' for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[47] Although courts generally followed the *Nadeau* precedent in evalu-

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vailing parties in stipulated settlement since basic objectives of lawsuit were furthered although specific relief requested was not achieved); Dubose v. Pierce, 579 F. Supp. 937, 946 (D. Conn. 1984) (plaintiffs considered prevailing parties by virtue of favorable settlement terms obtained, since eligible claimants would receive greater payment than would be available through ultimately successful litigation); Ward v. Schweiker, 562 F. Supp. 1173, 1176 (W.D. Mo. 1983) (plaintiffs considered prevailing parties following stipulated dismissal since they substantially achieved litigation objectives).

Courts must, however, closely scrutinize settlement agreements to ensure that the party seeking fees was indeed in an adversarial position against the United States. For purposes of EAJA, it is not enough that a party be nominally opposed to the United States in litigation. Rather the party must hold a truly adversarial position. *See, e.g.*, Omaha Tribe v. Swanson, 736 F.2d 1218 (8th Cir. 1984) (plaintiff not considered prevailing party for purposes of EAJA because not in an adversarial role against the United States with respect to claims settled in plaintiff's favor); Walls v. Mississippi State Dep't of Pub. Welfare, 730 F.2d 306, 326 (5th Cir. 1984) (fees improperly assessed against United States under EAJA since plaintiffs neither sought nor obtained relief against federal defendants); Citizens Coalition for Block Grant Compliance, Inc. v. City of Euclid, 537 F. Supp. 422, 425 (N.D. Ohio 1982), *aff'd*, 717 F.2d 964 (6th Cir. 1983) (plaintiff not considered prevailing party for purposes of EAJA since it had same goals as HUD and nothing in settlement agreement indicated plaintiff obtained relief from HUD).

46. 581 F.2d 275 (1978). In fact, some courts follow a two-part standard known as the *Nadeau* test, asking first whether the lawsuit was a necessary and important factor in achieving the relief desired. If the answer to that inquiry is negative, the party initiating the action has not prevailed. *Id.* at 281. If, on the other hand, the answer is affirmative, the court must then determine whether the relief obtained resulted from a gratuitous act on the part of the opposition, or whether the opposition's actions were mandated by law. Gratuitous concessions by one party do not elevate the other to the status of a prevailing party. *Id. See, e.g.*, Citizens Coalition for Block Grant Compliance, Inc. v. City of Euclid, 717 F.2d 964 (6th Cir. 1983) (plaintiffs failed on first prong of *Nadeau* test because of insufficient evidence of causal connection between suit and HUD's actions). *See generally* Sullivan, *Equal Access to Justice Act*, 84 COLUM. L. REV. 1089, 1096-1101 (1984) (discussing the *Nadeau* standard and its application under EAJA). Recently, the Supreme Court quoted *Nadeau* in identifying the standard for determining prevailing party status. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Although the *Hensley* case concerned the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), the Court stated that "[t]he standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" 461 U.S. at 433 n.7. Consequently, courts examining prevailing party status under EAJA since this 1983 decision have uniformly relied on the *Nadeau* standard as approved in *Hensley*. *See, e.g.*, Omaha Tribe v. Swanson, 736 F.2d 1218, 1221 (8th Cir. 1984); Environmental Defense Fund, Inc. v. EPA, 716 F.2d 915, 919 (D.C. Cir. 1983); McGill v. Secretary of Health & Human Servs., 712 F.2d 28, 31 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1420 (1984); Citizens for Responsible Resource Dev. v. Watt, 579 F. Supp. 431, 446 (M.D. Ala. 1983); Knox v. Schweiker, 567 F. Supp. 959, 961 (D. Del. 1983).

47. 581 F.2d at 278-79.

ating prevailing-party status, distinctions arose, and prevailing party status was denied in several cases where it seemed that the party did, indeed, succeed with respect to a significant issue which achieved some of the benefit sought. The Eastern District of Missouri, for example, denied prevailing party status to a plaintiff suing the U.S. Army who claimed that he did not receive all the benefits promised him upon enrollment in the Army Health Professions Scholarship Program.[48] The court found the plaintiff had not prevailed in the lawsuit even though it appeared that the government conceded to one of the plaintiff's three arguments prior to the trial in the matter.[49]

The Oregon District Court held that an illegal alien, who sued the U.S. Immigration and Naturalization Service to restrain deportation and extend his departure date, had not prevailed even though he was allowed to leave the country voluntarily and was not deported.[50] The court reasoned that while the plaintiff arguably may have been better off as a result of the lawsuit, practically, he merely preserved the status quo. To be entitled to attorneys' fees, a party must prevail on the merits of at least some of his claims.[51]

Other courts have been more generous in determining prevailing party status. The Third Circuit found plaintiffs had prevailed in *Spencer v. NLRB*,[52] since they were ultimately successful in obtaining the relief they sought, although they did not get a favorable

48. Allen v. Weinberger, 554 F. Supp. 108 (1982). The plaintiff claimed the Army failed to provide a tax-free stipend, entry into a postgraduate program, and entry into active duty at a rank of Major. *Id.* at 109.

49. Before trial, plaintiff's rank was upgraded from Captain to Major. *Id.* at 110. Plaintiff contended that, but for the lawsuit, he would not have received this benefit. *Id.* The court found that plaintiff's change of rank was insufficient to raise him to prevailing party status, since the action itself sought recission of plaintiff's contract and freedom from plaintiff's obligation to the Army, and plaintiff did not prevail on those causes of action. *Id.* The court further reasoned that plaintiff was not a prevailing party because he failed to prove that his lawsuit was necessary in order to have his rank changed, since both administrative remedies were available and adjustment of his rank to Major occurred before trial. *Id.*

50. Rico-Sorio v. United States Immigration and Naturalization Serv., 552 F. Supp. 965 (1982).

51. *Id.* at 968. The *Rico-Sorio* court firmly stated the necessity of prevailing on the merits in an action in order to be a prevailing party. *Id.* at 968-69. In a footnote at the very end of the opinion, however, the court hedged by noting that the plaintiff could be a prevailing party despite losing on the merits if his lawsuit precipitated compliance with some of the relief he sought. *Id.* at 969 n.5. The court nevertheless concluded the plaintiff's lawsuit did not play a "catalytic role" in prompting the Immigration and Naturalization Service to act on the merits of his request. *Id.*

52. 548 F. Supp. 256 (D.D.C. 1982), *aff'd*, 712 F.2d 539 (1983), *cert. denied*, 104 S. Ct. 1908 (1984).

decision on the merits.[53] Specifically, the plaintiffs in *Spencer*, a group of qualified engineers, sought a court ruling that the National Labor Relations Board violated the National Labor Relations Act by denying their decertification petition and including them in a mixed bargaining unit.[54] Plaintiffs, however, essentially dismissed their lawsuit prior to judicial action after the National Labor Relations Board found that they were professional employees entitled to a separate election.[55] The *Spencer* court followed "the trend in recent decisions toward an expansive and liberalized approach to the definition of a 'prevailing party,' "[56] finding plaintiffs were prevailing parties for purposes of EAJA "[e]ven if there were no causal nexus whatsoever between the actions of the Board and the prosecution of this lawsuit by the plaintiffs."[57] This position is contrary to the general consensus that a party must show that the litigation effort was a causal factor in achieving his objectives or improving his situation.[58]

In addition to this general variation in the courts' application of prevailing-party doctrine, two discrete issues have divided the courts into diametrically-opposed camps. The first concerns whether a plaintiff should be considered a prevailing party for purposes of EAJA upon successfully obtaining a remand by the district court after appealing a denial of Social Security benefits. The second concerns whether a party could prevail against the United States for purposes of EAJA in a condemnation proceeding.

As to the first question, the legislative history of the Act clearly

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53. *Id.* at 259-62.

54. *Id.* at 257.

55. *Id.* at 257-58.

56. *Id.* at 259.

57. *Id.*

58. *See, e.g.*, Martin v. Heckler, 733 F.2d 1499, 1501 (11th Cir. 1984) (plaintiff considered prevailing party even though lawsuit mooted by remedial action, since lawsuit brought about the change in policy); United States v. Citizens State Bank, 668 F.2d 444, 447 (8th Cir. 1982) (defendant considered prevailing party in IRS summons enforcement since defendant succeeded in limiting scope of summons even though court ordered compliance); Environmental Defense Fund v. Watt, 554 F. Supp. 36, 40 (E.D.N.Y. 1982), *aff'd*, 722 F.2d 1081 (2d Cir. 1983) (plaintiffs considered prevailing party even though specific relief requested was not received, since the basic objectives of the lawsuit were furthered); Ward v. Schweiker, 562 F. Supp. 1173, 1176 (W.D. Mo. 1983) (plaintiffs considered prevailing party since they substantially achieved objectives and case was catalyst for agreement favorable to plaintiff); Williamson v. Secretary of United States Dep't of Housing & Urban Dev., 553 F. Supp. 542, 544-45 (E.D.N.Y. 1982) (plaintiffs held not prevailing parties since there was no inference HUD amended certain regulations as direct result of litigation. While the plaintiffs need not prove that the lawsuit is the sole cause of the desired changes, plaintiffs must establish that the litigation efforts were a necessary and important factor in improving the situation.).

states that a fee award may be appropriate "where the party has prevailed on an interim order which was central to the case, or where an interlocutory appeal is 'sufficiently significant and discrete to be treated as a separate unit.' "[59] When a district court remands a Social Security case to the Secretary of Health and Human Services on procedural grounds following an initial denial of benefits, some courts have reasoned that a fee award is inappropriate since a decision on the merits is not involved, and benefits are not awarded.[60] Conversely, other courts have determined that fee awards are appropriate in Social Security case remands for reconsideration or for taking additional evidence, since a remand is sufficiently central to a case to justify a fee award.[61]

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59. H.R. REP. NO. 1418, *supra* note 14, at 11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4989.

60. *See, e.g.*, McGill v. Secretary of Health & Human Servs., 712 F.2d 28, 31 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1420 (1984) (plaintiff not considered prevailing party for purposes of EAJA on remand in Social Security case since she had not yet prevailed on merits, and the successful remand only moved her one step closer to final determination); Wade v. Heckler, 587 F. Supp. 492, 493-94 (D. Del. 1984) (concluding prior decision in Knox v. Schweiker, 567 F. Supp. 959 (D. Del. 1983), was wrongly decided, court held Social Security disability claimant was not prevailing party for purposes of EAJA unless and until benefits were awarded); Miller v. Schweiker, 560 F. Supp. 838, 840 (M.D. Ala. 1983) (remand for reconsideration in Social Security case did not elevate plaintiff to prevailing party since he did not receive any part of the benefits sought); Roman v. Schweiker, 559 F. Supp. 304, 305 (E.D.N.Y. 1983) (temporary success in having case remanded is insufficient to elevate plaintiff to prevailing party in Social Security case).

This same rationale has been employed by courts in considering other remand situations. For instance, in Austin v. Department of Commerce, 742 F.2d 1417 (Fed. Cir. 1984), the court ruled that a party who obtained a remand of an action to the Merit Systems Protection Board was not entitled to an EAJA award, since a procedural defect was merely being remedied and no opinion on the merits was expressed. *Id.* at 1421.

61. *See, e.g.*, Ceglia v. Schweiker, 566 F. Supp. 118, 122 (E.D.N.Y. 1983) (plaintiff considered prevailing party within meaning of EAJA since remand for new hearing was central to case); Gross v. Schweiker, 563 F. Supp. 260, 262 (N.D. Ind. 1983) (plaintiff was a prevailing party since he obtained the requested relief of a remand, the only relief which the court had authority to enter); Ocasio v. Schweiker, 540 F. Supp. 1320, 1321 (S.D.N.Y. 1982) (plaintiff considered prevailing party in stipulated remand for reconsideration).

When considering an EAJA application in a Social Security case, courts have often had to consider whether 42 U.S.C. § 406(b)(1) of the Social Security Act, providing for a maximum attorneys' fee of 25% of the total past due benefits, precluded a fee award under EAJA. The ultimate consensus of the courts has been that the Social Security Act does not specifically provide for an award of attorneys' fees to be paid by the United States to a party prevailing against it, and that, therefore, the Social Security Act does not preclude application of the EAJA fee-shifting provisions in Social Security cases. *See, e.g.*, Wolverton v. Heckler, 726 F.2d 580, 582 (9th Cir. 1984); Guthrie v. Schweiker, 718 F.2d 104, 107-08 (4th Cir. 1983); Watkins v. Harris, 566 F. Supp. 493, 496 (E.D. Pa. 1983); Vega v. Schweiker, 558 F. Supp. 52, 53 (S.D.N.Y. 1983); Hornal v. Schweiker, 551 F. Supp. 612, 615 (M.D. Tenn. 1982); McDonald v. Schweiker, 551 F. Supp. 327, 332 (N.D. Ind. 1982); Shumate v. Harris, 544 F. Supp. 779, 782 (W.D.N.C. 1982).

With respect to the question concerning condemnation cases, courts have also taken divergent positions. Some courts have found that EAJA is inapplicable to condemnation proceedings, reasoning that a landowner in a condemnation suit could not be classified as a prevailing party against the United States.[62] Other courts have reasoned that a landowner in a condemnation proceeding could qualify as a prevailing party if forced to litigate to secure payment of just compensation rather than accept an inadequate government offer.[63]

2. *Substantial Justification.*

Under both 28 U.S.C. § 2412(d) and 5 U.S.C. § 504, a prevailing party is entitled to attorney fees and expenses from the United States unless the court or the adjudicative officer reviewing the fee request "finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[64] This provision applies to all agency adjudications and to all civil actions except those sounding in tort, those already covered by existing fee-shifting statutes, and those that are regulated exclusively under 28 U.S.C. § 2412(b).[65]

In reviewing fee award requests, courts have frequently examined the boundaries of "substantial justification."[66] The legisla-

62. *See, e.g.*, United States v. 160 Acres of Land, 555 F. Supp. 84, 86 (D. Utah 1982) (section 2412(d) not applicable in condemnation proceeding); United States v. 341.45 Acres of Land, 542 F. Supp. 482, 487 (D. Minn. 1982) (each party pays own costs in condemnation proceedings and nothing in EAJA indicates that the policy of holding 28 U.S.C. § 2412 inapplicable has been reversed). The question of whether a party could ever prevail against the United States in an eminent domain proceeding was rooted in the threshold question whether or not EAJA was applicable in condemnation proceedings. Prior precedent established that 28 U.S.C. § 2412, as it existed prior to 1980, did not apply to condemnation cases. *See* United States v. Bodcaw Co., 440 U.S. 202, 203 n.3 (1979). Furthermore, 42 U.S.C. § 4654 (1982) already provided for the award of landowner litigation expenses in condemnation proceedings in defined situations. In light of EAJA's language that the Act was not intended to supersede any pre-existing fee-shifting statute, there was some question as to whether application of the Act would merely supplement 42 U.S.C. § 4654 or impermissibly supersede it. *See* 160 Acres of Land, 555 F. Supp. at 86.

63. *See, e.g.*, United States v. 329.73 Acres of Land, 704 F.2d 800, 809 (5th Cir. 1983) (en banc) (landowner may be a prevailing party when judgment results in a payment far exceeding the government's original offer); United States v. 101.80 Acres of Land, 716 F.2d 714, 726 (9th Cir. 1983) (party may prevail against the United States when the government tenders an inadequate deposit and the landowner must litigate).

64. 28 U.S.C. § 2412(d)(1)(A) and 5 U.S.C. § 504(a)(1), respectively.

65. *Supra* note 64.

66. The Act provides that a party seeking an award of fees is required to submit an application within 30 days of final judgment. 28 U.S.C. § 2412(d)(1)(B) and 5 U.S.C. § 504(a)(2). No request for an EAJA fee award will be entertained absent an application which complies with the statutory language. Rawlins v. United States, 686 F.2d 903, 914 (Ct. Cl. 1982). Among the items which must be asserted in the application is that the position of

tive history of the Act describes the standard for interpreting the meaning of substantial justification as one of reasonableness.[67] "Where the government can show[68] that its case had a reasonable basis both in law and fact, no award will be made."[69] The legislative history cites three examples of cases lacking substantial justification as being a judgment on the pleadings, a directed verdict, and a suit in which the same claim was dismissed in a prior suit.[70] It stresses, however, that the mere loss of a case by the government does not give rise to a presumption that substantial justification is lacking, and that the standard does not require the government to demonstrate that its decision to litigate was based on a substantial probability of prevailing.[71]

When confronting the issue of substantial justification, most courts have adhered to the reasonableness standard and the guidelines enunciated in the legislative history.[72] Some courts, however,

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the United States or its agency was not substantially justified. 28 U.S.C. § 2412(d)(1)(B) and 5 U.S.C. § 504(a)(2). Although the Act is silent in this respect, the legislative history indicates that, if the government does not oppose the fee application, Congress intends that the fee award should be granted. S. REP. NO. 253, *supra* note 29, at 21; H.R. REP. NO. 1418, *supra* note 14, at 18, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4990. *But see* FED. R. CIV. P. 55(e) ("No judgment by default shall be entered against the United States . . . unless the plaintiff establishes his claim . . . by evidence satisfactory to the court.").

67. S. REP. NO. 253, *supra* note 29, at 6; H.R. REP. NO. 1418, *supra* note 14, at 10, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4988. According to the legislative history of the Act, the "substantially justified" standard represents a compromise between the dual standards for fee awards which exist under the Civil Rights Acts. *Id.* That is, prevailing plaintiffs ordinarily recover their attorneys' fees, but prevailing defendants may recover fees only upon a showing that plaintiff's action was frivolous, unreasonable or without foundation. *Id.* The Senate rejected the former standard as inappropriate because it might have "a chilling effect on reasonable Government enforcement efforts." S. REP. NO. 253, *supra* note 29, at 7. The latter standard was rejected as inadequate because "it simply would not overcome the strong disincentives to the exercise of legal rights which now exist in litigation with the Government." *Id.*

68. The burden rests with the United States to show its position was substantially justified. H.R. REP. NO. 1418, *supra* note 14, at 10, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4989. *See, e.g.*, Nichols v. Pierce, 740 F.2d 1249, 1259 (D.C. Cir. 1984); United States v. First Nat'l Bank, 732 F.2d 1444, 1447 (9th Cir. 1984); Dougherty v. Lehman, 711 F.2d 555, 561 (3d Cir. 1983). The legislative history notes that with respect to those cases where a party must engage in lengthy administrative proceedings before finally prevailing in the courts, the United States should have to make a "strong showing" that its position was reasonable. H.R. REP. NO. 1418, *supra* note 14, at 18, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4997.

69. H.R. REP. NO. 1418, *supra* note 14, at 11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4989-90.

70. H.R. REP. NO. 1418, *supra* note 14, at 11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4990.

71. *Id.*

72. *E.g.*, Citizens Council v. Brinegan, 741 F.2d 584, 593 (3d Cir. 1984); Cornella v. Schweiker, 741 F.2d 170, 171 (8th Cir. 1984); White v. United States, 740 F.2d 836, 839

have appeared to either extend or contract the reasonableness standard. For instance, a more stringent standard was adopted by one court after noting that the Senate Judiciary Committee refused to adopt an amendment changing the fee award language from "substantially justified to reasonably justified."[73] Similarly, the *Spencer*[74] court stated that "an especially strong showing" of substantially justified legal arguments should be necessary to avoid EAJA liability when the government acts inconsistently and subsequently loses a civil action.[75] The Seventh Circuit contracted the reasonableness test by actually creating a modest presumption in favor of awarding fees to the prevailing party unless the position of the United States had a solid basis—i.e., more than not frivolous but less than meritorious.[76]

On the other hand, a relaxation of the reasonableness standard is apparent in the case of *Trustees for Alaska v. Watt*.[77] The court borrowed from the standard articulated in Rule 37 of the Federal Rules of Civil Procedure, focusing its substantial justification determination on whether or not the government's position could be characterized as "frivolous."[78] Demonstrating that a position is

(11th Cir. 1984); Houston Agricultural Credit Corp. v. United States, 736 F.2d 233, 235 (5th Cir. 1984); United States v. First Nat'l Bank, 732 F.2d 1444, 1447 (9th Cir. 1984); Amidon v. Lehman, 730 F.2d 949, 952 (4th Cir. 1984); Wyandotte Savings Bank v. NLRB, 682 F.2d 119, 120 (6th Cir. 1982).

73. Nunes-Correia v. Haig, 543 F. Supp. 812, 817 (D.D.C. 1982). *See also* Martin v. Lauer, 740 F.2d 36, 43 (D.C. Cir. 1984); Phillips v. Heckler, 574 F. Supp. 870, 872 (W.D.N.C. 1983); *See also* Natural Resources Defense Council, Inc. v. EPA, 703 F.2d 700, 721 n.7 (3d Cir. 1983). This slightly more rigid standard was also used in Wolverton v. Schweiker, 533 F. Supp. 420, 424 (D. Idaho 1982). The court of appeals partially reversed and partially remanded the case. Wolverton v. Heckler, 726 F.2d 580, 584 (9th Cir. 1984). The court, however, did not address whether the standard enunciated by the district court was incorrect. It simply recited that "[t]o establish substantial justification, the Government 'must show its case had a reasonable basis both in law and in fact.' " *Id.* at 583 (quoting Hoang Ha v. Schweiker, 707 F.2d 1104, 1106 (9th Cir. 1983)).

74. *See supra* note 52.

75. 712 F.2d at 561.

76. Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820, 830 (1984). Another contraction of the legislative history guidelines could arguably be found in Estate of Berg v. United States, 687 F.2d 377 (Ct. Cl. 1982), wherein the court did not address reasonableness as a standard, but rather weighed whether or not the government's conduct was "reprehensible" in determining the appropriateness of an EAJA award. *Id.* at 383. The court, however, while noting 28 U.S.C. § 2412 when discussing a potential EAJA fee award, failed to distinguish whether it was focusing on section (b) or section (d). *Id.* The court, therefore, may simply have been considering a fee award under a section 2412(b) common law theory, rather than evaluating whether the substantial justification requirement of section (d) was met.

77. 556 F. Supp. 171 (D. Alaska 1983).

78. *Id.* at 173. The court noted that the language "substantially justified" was adopted from FED. R. CIV. P. 37. *Id.* It further observed that the Act's legislative history, S. REP. NO. 253 at 20-21, refers to notes of the Advisory Committee on Civil Rules concerning the

merely not frivolous is easier than to demonstrate that it is, in fact, reasonable.

Since the substantial justification standard is applied to extremely diverse factual situations, it is difficult to comment upon any emerging pattern with respect to the standard's application. There are, however, two groups of cases which lend themselves well to such an analysis. In the first of these groups are those cases in which the position of the United States is based upon a new or distinct interpretation of existing law. In this context, the question becomes how new or distinct that legal interpretation may be and yet still be considered substantially justified.[79]

When a vague or ambiguous law or regulation is at issue, the courts generally have been willing to find the government's position reasonable.[80] For example, the Eighth Circuit denied an EAJA award to a prevailing plaintiff where the government was forced to interpret a group of facially conflicting regulations regarding proce-

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Rule 37 standard, and that those Committee notes suggested that courts focus their evaluation of substantial justification on whether the discovery dispute is genuine or frivolous. *Id.* It is questionable, however, whether Congress intended to equate the substantial justification standards of EAJA and FED. R. CIV. P. 37, since the Senate Report note to which the court refers appears to relate only to the Advisory Committee notes regarding Rule 37 and its adoption, not to EAJA. While the idea of a substantial justification requirement for EAJA may have been derived from FED. R. CIV. P. 37, no meaningful analogy can be drawn with respect to the boundaries of the EAJA standard. *Cf.* Robertson & Fowler, *Recovering Attorneys' Fees from the Government Under the Equal Access to Justice Act*, 56 TUL. L. REV. 903, 930-32 (1982) (Although the substantial justification standard of EAJA has its roots in FED. R. CIV. P. 37, the question is more complex under EAJA, rendering Rule 37 case law not very helpful.). This position is bolstered by the fact that Congress rejected a standard of liability whereby fees would be awarded only when government conduct was "arbitrary, frivolous, unreasonable or groundless." H.R. REP. NO. 1418, *supra* note 14, at 14, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4993; S. REP. NO. 253, *supra* note 29, at 15.

79. The government's new or distinct interpretation of existing law may also be a special circumstance which would make the award of EAJA fees unjust. *See infra* notes 97-99 and accompanying text. In fact, in light of the legislative history to the Act, innovative interpretations of existing laws appear to be more properly viewed as a question of special circumstance rather than a question of substantial justification. *See* H.R. REP. NO. 1418, *supra* note 14, at 11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4990; S. REP. NO. 253, *supra* note 29, at 7.

80. *See, e.g.*, Cinciarelli v. Reagan, 729 F.2d 801, 806 (D.C. Cir. 1984) (Marine Corps interpretation of phrase in written agreement substantially justified, since governing statute lacked clarity and definitive construction). However, what one court may consider to be vague or lacking in clarity may not be so considered by another court. For example, in Southern Or. Citizens Against Toxic Sprays v. Clark, 720 F.2d 1475 (9th Cir. 1983), the court found that an environmental "worst case analysis" regulation which was the focus of the action was not difficult to interpret. *Id.* at 1481. Conversely, the district court had reasoned that the government's position was substantially justified since interpretation of the regulation was in fact difficult. *Id.*

dural matters in a Small Business Administration solicitation.[81] The Fifth Circuit denied fees to a prevailing party, finding that the government's new interpretation of an existing regulation which cured possible due process defects was substantially justified, since it had a reasonable basis in law.[82] The Seventh Circuit denied an EAJA award to a Cuban national who was granted a writ of habeas corpus after having been held by the Immigration and Naturalization Service for over fifteen months without a hearing.[83] The government argued that it could indefinitely detain aliens awaiting exclusion hearings, since the applicable law did not limit the time in which the Service must complete an investigation.[84] While the court declined to express a definitive opinion on the correctness of the government's position, it denied EAJA fees since it could not label the United States' interpretation of the law as unreasonable.[85]

When the government attempts to argue a new interpretation of law contrary to established precedent, however, the courts have been less willing to find the position reasonable.[86] For instance, the Third Circuit ruled that the government's postponement of the effectiveness of amendments to certain regulations without a notice and comment period was without substantial justification, since the law is settled that notice and comment are necessary in rulemaking.[87] A Wisconsin district court ruled the government's position

81. Foley Construction Co. v. United States Army Corps of Eng'rs, 716 F.2d 1202, 1206 (1983), *cert. denied*, 104 S. Ct. 1908 (1984). The plaintiff, an unsuccessful bidder in the solicitation, challenged the size of the contract's lowest bidder and was subsequently awarded the contract. *Id.* at 1203.

82. S&H Riggers & Erectors v. Occupational Safety & Health Comm'n, 672 F.2d 426, 431 (1982). The court viewed the Commission's interpretation of the existing regulations as " 'a novel but credible extension or interpretation of the law' that has substantial justification." *Id.* (quoting H.R. REP. NO. 1418, *supra* note 14, at 11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4990). While courts have used the "novel but credible extensions and interpretations of the law" rationale in evaluating whether the government position is substantially justified, the Act's legislative history discusses this standard with respect to determining whether "special circumstances would make an award unjust," rather than determining substantial justification. 672 F.2d at 431. *See infra* notes 97-111 and accompanying text.

83. Ramos v. Haig, 716 F.2d 471, 472 (1983).

84. *Id.* at 474.

85. *Id.*

86. An extreme example is that of Southern Or. Citizens Against Toxic Sprays v. Clark, 720 F.2d 1475 (9th Cir. 1983). The court found that the United States' position lacked substantial justification, since the case on which the government relied to support its position in the district court subsequently was reversed by another United States Court of Appeals. *Id.* at 1481. Substantial justification was found lacking even though the only reported case interpreting the regulation supported the government's position. *Id.*

87. Natural Resources Defense Council v. EPA, 703 F.2d 700, 712 (3d Cir. 1983).

that Comprehensive Employment and Training Act (CETA) funds could be used for parochial school personnel not substantially justified, since the United States Supreme Court had ruled that the use of CETA funds for sectarian employment positions violated the establishment clause.[88] In the case of *Hoang Ha v. Schweiker*,[89] a California district court deemed the United States' position not substantially justified, since the Secretary of Health and Human Services' contention regarding the publication of a regulation was inconsistent with both his own agency's practice and clearly established precedent.[90] The *Hoang Ha* court noted that, not only did no regulations or court decisions support the position of the United States, virtually every issue in the case had been decided against the Secretary before another district court.[91] The Sixth Circuit, on the other hand, appears to have assumed a less rigid stance. It found substantial justification in the government's position, which was directly contrary to prior Sixth Circuit precedent, when the United States attempted to reopen a "closed question" regarding bargaining unit determination.[92]

The second group of cases reflecting interesting distinctions in the substantial justification standard's implementation comprises the Social Security disability actions. In a Social Security disability case, the reviewing court must affirm the administrative findings of the Secretary of Health and Human Services if the final agency determination is based upon "substantial evidence."[93] While the con-

88. Decker v. Department of Labor, 564 F. Supp. 1273, 1279 (E.D. Wis. 1983).

89. 541 F. Supp. 711 (N.D. Cal. 1982), *rev'd*, 707 F.2d 1104 (9th Cir. 1983).

90. 541 F. Supp. at 713.

91. *Id.* The same defendant was charged by another district court with ignoring controlling precedent regarding his burden of proof as to certain evidence when he took a position "manifestly contrary" to the Ninth Circuit. Chee v. Schweiker, 563 F. Supp. 1362, 1365 (D. Ariz. 1983).

92. Wyandotte Savings Bank v. NLRB, 682 F.2d 119, 120 (6th Cir. 1982). One reason for this holding appears to have been the fact that there was support for the government's position in two other United States Courts of Appeals. *Id.* Compare the Sixth Circuit's approach to challenging established precedent with that taken in Citizens Bank v. United States, 558 F. Supp. 1301 (N.D. Ala. 1983), where the court stated that "while it is entirely conceivable that there is such a thing as a legitimate case for Uncle Sam's lawyers to use for the purpose of challenging existing unliked precedent directly on point . . . EAJA was intended to prevent the government from initiating or defending a 'sure loser.' " *Id.* at 1304.

93. 42 U.S.C. § 4059(g) (1982). The United States Supreme Court defined "substantial evidence" in NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1938).

> Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

Id. at 300 (citations omitted).

sensus among the courts is that one can find lack of substantial evidence and still have substantial justification for purposes of a fee award under EAJA,[94] courts differ as to what quantum of evidence is necessary for the government's position to be substantially justified. Some courts have held that if there is some evidence to support the final decision of the Secretary, then the government's position is substantially justified.[95] Other courts have interpreted the substantial justification standard more stringently, weighing the evidence considered and making an independent evaluation of its sufficiency to determine if the government's position was substantially justified.[96]

3. *Special Circumstances.*

In addition to denying EAJA fees when the United States' position is substantially justified, the Act also provides that the government should not be held liable for fees where "special circumstances make an award unjust."[97] The legislative history describes the "special circumstances" provision of the Act as a "safety valve" to help "insure that the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts."[98] The special circumstances provision is also explained as one which

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94. *See, e.g.*, Cole v. Secretary of Health & Human Servs., 577 F. Supp. 657, 661 (D. Del. 1983); Hornal v. Schweiker, 551 F. Supp. 612, 617-18 (M.D. Tenn. 1982); Ulrich v. Schweiker, 548 F. Supp. 63, 65 (D. Idaho 1982); Bennett v. Schweiker, 543 F. Supp. 897, 898 (D.D.C. 1982). *But see* Moholland v. Schweiker, 546 F. Supp. 383, 386 (D.N.H. 1982) (court's ruling that Secretary's decision was not based upon substantial evidence automatically establishes that the government's position was unjustified).

95. *See, e.g.*, Wolverton v. Schweiker, 533 F. Supp. 420, 425 n.14 (D. Idaho 1982), *rev'd in part on other grounds sub nom.* Wolverton v. Heckler, 726 F.2d 580 (9th Cir. 1984) (since Secretary's decision rarely completely unsupported by evidence, few cases will arise where Secretary's position is not substantially justified); Jones v. Schweiker, 565 F. Supp. 52, 56 (W.D. Mich. 1983) (some support found for ALJ's position so cannot conclude position of Secretary not substantially justified).

96. *See, e.g.*, Lonning v. Schweiker, 568 F. Supp. 1079, 1083-85 (E.D. Pa. 1983) (government's position not substantially justified since psychologist on which it relied contradicted other evidence of disability); Ceglia v. Schweiker, 566 F. Supp. 118, 124-25 (E.D.N.Y. 1983) (government's position not substantially justified since it relied on an expert physician who did not examine the plaintiff); Kauffman v. Schweiker, 559 F. Supp. 372, 375-76 (M.D. Pa. 1983) (government's position not substantially justified since medical evidence relied on was from physician who examined plaintiff once and the other medical evidence was overwhelmingly contradictory).

97. 28 U.S.C. § 2412(d)(1)(A) and 5 U.S.C. § 504(a)(1). As with the matter of substantial justification, this provision is inapplicable to cases arising under 28 U.S.C. § 2412(b).

98. H.R. REP. NO. 1418, *supra* note 14, at 11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4990; S. REP. NO. 253, *supra* note 29, at 7.

would give courts "discretion to deny awards where equitable considerations dictate an award should not be made."[99]

As with the substantial justification issue, it is difficult to discern meaningful distinctions in court interpretations applying the special circumstances standard, since each case is unique and turns on its own particular facts. In fact, this difficulty is even more pronounced in situations involving discretionary matters, where equitable considerations are weighed, as under the special circumstances provision. However, two groups of cases where courts have determined that special circumstances make an EAJA fee award unjust merit discussion.

The first of these entails prevailing parties who come before the court without clean hands. For example, the Second Circuit determined that the prevailing party on a writ of habeas corpus petition was not entitled to EAJA fees since, but for his own repeated immigration law violations, he would not have been improperly held by the government at all.[100] Similarly, the Connecticut District Court invoked its discretion based on equitable considerations and denied an award of EAJA fees to a legal services lawyer who changed agencies and attempted to be privately compensated for a case he had taken with him.[101] The court determined that those involved never intended that the legal services lawyer handle the matter in his personal capacity.[102] Furthermore, the court determined that the lawyer's representations of his professional affiliations were either confusing or misleading.[103]

The second group of cases entails new interpretations of existing law. As noted in the preceding section,[104] some courts view this issue as one of substantial justification rather than one of special circumstances. Whereas courts subscribing to the substantial justification perspective on this issue look to the reasonableness of the government's position,[105] courts subscribing to the special circumstances perspective look to whether the government's position,

99. *Id.* Based on the language of the legislative history, it appears that Congress intended the concept of "special circumstances" to be broader under EAJA than under the civil rights statutes. While the latter are concerned with equitable considerations only as to the factual context of the case, the former includes equitable considerations as to both the legal position of the government and matters relating to the factual context of the case.

100. Oguachuba v. Immigration and Naturalization Serv., 706 F.2d 93, 98-99 (1983).

101. Dubose v. Pierce, 579 F. Supp. 937 (1984).

102. *Id.* at 962-64.

103. *Id.* at 964-65.

104. *See supra* notes 79-92 and accompanying text.

105. *See supra* notes 67-69 and accompanying text; Timms v. United States, 742 F.2d 489, 492 (9th Cir. 1984).

while novel, is in fact credible. For instance, in *Nunes-Correia v. Haig*,[106] in response to a Constitutional challenge of the alien-spouse regulations, the government contended that the regulations were rationally related to a legitimate governmental interest. The *Nunes-Correia* court found special circumstances precluding a fee award did not exist, since the government's argument, while untested, was neither novel nor credible.[107] In *Midwest Research Institute v. United States*,[108] however, the court found that the government's position that certain income from a private not-for-profit corporation was taxable as unrelated business income was novel, making an EAJA award unjust.[109]

The language of the Act's legislative history seems to place the consideration of a new interpretation of existing law squarely within the purview of special circumstances rather than substantial justification.[110] A novel but credible extension or interpretation of the law is specifically addressed as a special circumstance which would make an EAJA award unjust.[111] Any attempt at drawing a definitive distinction in this matter, however, is conceivably academic, for one could equate a "reasonable" interpretation for purposes of substantial justification with a "credible" interpretation for purposes of special circumstances.

4. *Position of the United States.*

The United States is exempt from paying fees and other expenses to a qualifying prevailing party under the Act if its "position" in the matter is substantially justified.[112] An issue on which court opinion is divided is what constitutes a "position" of the United States within this context. Some courts have taken the view that "position of the United States" is comprised only of its litigation position, i.e., its position as a party in prosecuting or defending the matter under review.[113] A rationale for considering the litiga-

106. 543 F. Supp. at 812.

107. *Id.* at 820.

108. 554 F. Supp. 1379 (W.D. Mo. 1983), *aff'd*, 744 F.2d 635 (8th Cir. 1984).

109. 554 F. Supp. at 1392.

110. *See* H.R. REP. NO. 1418, *supra* note 14, at 11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4990; S. REP. NO. 253, *supra* note 29, at 7.

111. *See supra* note 110.

112. *See, e.g.*, White v. United States, 740 F.2d 836, 842 (11th Cir. 1984); Amidon v. Lehman, 730 F.2d 949, 952 (4th Cir. 1984).

113. *See, e.g.*, Cinciarelli v. Reagan, 729 F.2d 801, 806 (D.C. Cir. 1984); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1487 (10th Cir. 1984); Gava v. United States, 699 F.2d 1367, 1371 (Fed. Cir. 1983); Tyler Business Services, Inc. v. NLRB, 695 F.2d 73, 75 (4th Cir. 1982).

tion position of the government as the requisite "position of the United States" is that EAJA limits fee awards to those fees and expenses "incurred" in civil actions.[114] A reasonable inference can be drawn, therefore, that "the position referred to is that taken by the United States in the 'civil action' in which attorneys' fees were 'incurred.' "[115] Another rationale for this "litigation position" posture is also found in the language of the Act. Since 5 U.S.C. § 504 focuses on the "position of the agency" as a *party* to the (administrative) proceeding,[116] the same standard should be applied in civil actions under 28 U.S.C. § 2412.[117]

Other courts, however, have taken the view that "position of the United States" contemplates both its litigation position and its prelitigation conduct which was the basis for the underlying civil or agency action.[118] A rationale for considering both the government's prelitigation and litigation conduct for purposes of defining "position of the United States" is to further the Act's purpose of encouraging only government action having a reasonable basis in law and fact.[119] If only the litigation position of the United States is addressed, the government has no accountability for agency conduct as long as the United States' trial counsel acts reasonably.[120] Some courts, however, note that the distinction is of little functional difference, since the government's litigation position is usually an affir-

114. 28 U.S.C. § 2412(d)(1)(A). The language regarding fees "incurred" in civil actions also generated a question as to whether services rendered by pro bono counsel could be compensated under EAJA. Since parties do not "incur" fee liability when pro bono counsel are engaged, it has been argued that this constituted a special circumstance which would make a fee award unjust, especially since the taxpayers are already funding most legal service organizations. This argument has not garnered support, however, and the consensus is that legal representation without charge does not preclude an EAJA award to an otherwise eligible prevailing party. *See, e.g.*, Cornella v. Schweiker, 741 F.2d 107, 172 n.2 (8th Cir. 1984); Ceglia v. Schweiker, 566 F. Supp. 118, 122-23 (E.D.N.Y. 1983); Dubose v. Pierce, 579 F. Supp. 937, 947 (D. Conn. 1984); Watkins v. Harris, 566 F. Supp. 493, 499 (E.D. Pa. 1983); Jones v. Schweiker, 565 F. Supp. 52, 54-55 (W.D. Mich. 1983); San Filippo v. Secretary of Health & Human Servs., 564 F. Supp. 173, 176 (E.D.N.Y. 1983); Kauffman v. Schweiker, 559 F. Supp. 372, 373-75 (M.D. Pa. 1983); Ward v. Schweiker, 562 F. Supp. 1173, 1175-76 (W.D. Mo. 1983); Hornal v. Schweiker, 551 F. Supp. 612, 616-17 (M.D. Tenn. 1982).

115. Broad Ave. Laundry & Tailoring v. United States, 693 F.2d 1387, 1390 (Fed. Cir. 1982).

116. 5 U.S.C. § 504(a)(1) (emphasis added).

117. *See* Tyler Business Servs. v. NLRB, 695 F.2d 73, 75 (4th Cir. 1982).

118. *E.g.*, Citizens Council v. Brinegan, 741 F.2d 584, 592-93 (3d Cir. 1984); Iowa Express Distribution, Inc. v. NLRB, 739 F.2d 1305, 1309 (8th Cir. 1984); Rawlings v. Heckler, 725 F.2d 1192, 1195 (9th Cir. 1984).

119. *See* Iowa Express Distribution, Inc. v. NLRB, 739 F.2d 1305, 1309 (8th Cir. 1984).

120. *Id.*; Rawlings v. Heckler, 725 F.2d 1192, 1196 (9th Cir. 1984).

mation that its prelitigation conduct was legally justifiable.[121]

5. *Final Judgment.*

The Act provides that within thirty days of final judgment in an action, an eligible prevailing party must apply[122] for fees and other expenses in order to qualify for an EAJA award.[123] This thirty-day time limitation is not a statute of limitations, but rather a jurisdictional prerequisite to government liability. Failure to file a timely fee application deprives the court of subject matter jurisdiction to award fees under the Act.[124] Because of the significance of making a fee request within thirty days of final judgment, the question of exactly what constitutes a "final judgment" came before the courts many times. Not surprisingly, however, the responses were not uniform.

The Ninth Circuit determined that an EAJA application was untimely if filed more than thirty days after a district court judgment.[125] Stating that it was relying on "common usage" in making this determination, the court rejected the contention that the provision only required filing within thirty days of the expiration of appeal time or thirty days of the terminating action of the court of last resort.[126] The Seventh Circuit took the contrary position, reasoning that requiring a fee application within thirty days of district court judgment would require a party to file multiple fee applications.[127] Alternatively, it would discourage fee award filings, since such ac-

121. *See, e.g.*, Foley Constr. Co. v. United States Army Corps of Eng'rs, 716 F.2d 1202, 1204 (8th Cir. 1983) (quoting Spencer v. NLRB, 712 F.2d 539, 551-52 (D.C. Cir. 1983)).

122. In applying for a fee award under the Act, the applicant must show that it is a prevailing party who is eligible to receive fees and other expenses under the Act. 28 U.S.C. § 2412(d)(1)(B) and 5 U.S.C. § 504(a)(2). The total amount sought must be included, along with a statement itemizing the actual time expended and the rate at which fees and expenses were computed. *Id.* The party must also allege that the United States' position was not substantially justified. *Id.* The right created under the Act lies in the prevailing party, not the prevailing party's lawyer. Thus, the fee applicant must be the party himself for the court to have jurisdiction. *See* Prettyman v. Heckler, 577 F. Supp. 997, 999 (D. Mont. 1984).

123. 28 U.S.C. § 2412(d)(1)(B) and 5 U.S.C. § 504(a)(2); H.R. REP. NO. 1434, 96th Cong., 2d Sess. 26 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 5003, 5015.

124. *See* Action on Smoking and Health v. Civil Aeronautics Bd., 724 F.2d 211, 225 (D.C. Cir. 1984).

125. *See* McQuiston v. Marsh, 707 F.2d 1082, 1085 (1983).

126. *Id.* The District of Columbia District Court followed the Ninth Circuit by finding untimely an EAJA application filed eighty-six days after the district court's judgment entry. Massachusetts Union of Pub. Hous. Tenants v. Pierce, 577 F. Supp. 1499, 1502 (1984). The court noted, however, that the thirty-day time limitation did not apply to applications filed under 28 U.S.C. § 2412(b). *Id.* at 1501.

127. McDonald v. Schweiker, 726 F.2d 311, 314-15 (7th Cir. 1983).

tion within the appeal period might prompt a government appeal.[128] The court concluded that "within thirty days of final judgment" was more appropriately "within thirty days after the judgment in the district court has become final and unappealable, or after the court of appeals or the Supreme Court has entered a final judgment."[129]

A related timing question deals with the pendency of cases. Since an action had to be "pending" on October 1, 1981, in order for an otherwise eligible party to come within the purview of the Act,[130] courts also considered the issue of final judgment in this context. In *Berman v. Schweiker*,[131] the court determined that the case was pending on October 1, 1981, for the purposes of EAJA, since the losing party's right to appeal had not yet expired as of that date, although judgment had been recorded.[132] While courts generally followed *Berman* when the time to appeal an action had not yet run,[133] courts disagreed on whether an action was "pending" when the only matter under consideration on October 1, 1981, involved the awarding of attorneys' fees.[134] Similarly, some courts also differed on the question of whether fees in a pending case were to be

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128. *Id.*

129. *Id.* at 315. *Accord* United States v. 329.73 Acres of Land, 704 F.2d 800, 810-11 (5th Cir. 1983); Knights of the Ku Klux Klan Realm v. East Baton Rouge Parish School Bd., 679 F.2d 64, 66-68 (5th Cir.), *reh'g denied* 691 F.2d 502 (1982); American Academy of Pediatrics v. Heckler, 580 F. Supp. 436 (D.D.C. 1984). In *American Academy of Pediatrics*, the court determined that "final judgment in the action" referred to the final resolution of the case, that being the dismissal of the appeal by the Secretary rather than the decision of the district court. *Id.* at 437. The court reasoned that to award fees prior to the appeal might result in the eventually successful party's "having subsidized a large segment of the losing party's suit against him." *Id.* This rationale, however, is rather tenuous, since the General Accounting Office will not approve payment of a claim under EAJA until all appellate proceedings are completed. *See* McDonald v. Schweiker, 726 F.2d 311, 315 (7th Cir. 1983).

130. EAJA § 203(c), 94 Stat. 2325, 2327 (1980).

131. 531 F. Supp. 1149 (N.D. Ill. 1982), *aff'd*, 713 F.2d 1290 (7th Cir. 1983).

132. 531 F. Supp. at 1151. The court also *sua sponte* considered the final judgment issue with respect to whether the prevailing party had applied for EAJA fees within the requisite thirty-day period. *Id.* The court determined that the fee application was timely, since the controlling date for purposes of an EAJA "final judgment" is the date a judgment is recorded, not the date a judgment is issued. *Id.* at 1151-52.

133. *See, e.g.*, United States for Heydt v. Citizens State Bank, 668 F.2d 444, 446 (8th Cir. 1982); Photo Data, Inc. v. Sawyer, 553 F. Supp. 348, 350-51 (D.D.C. 1982).

134. *Compare* Commissioners of Highways v. United States, 684 F.2d 443, 444 (7th Cir. 1982) *and* Nichols v. Pierce, 740 F.2d 1249, 1255-58 (D.D.C. 1984) (cases not pending for purposes of EAJA when only unresolved issue as of October 1, 1981, is an appeal from a denial of an attorney's fee award) *with* Knights of the Ku Klux Klan Realm v. East Baton Rouge Parish School Bd., 679 F.2d 64, 68 (5th Cir. 1982) (action considered pending even though only outstanding matter on October 1, 1981, was an appeal from a denial of attorneys' fees).

allowed retroactively for work performed prior to the inception of the Act.[135] These interpretive difficulties, as well as the approaching termination of the Act under its sunset provision, prompted Congress to draft the 1984 EAJA amendments.

II. THE 1984 PROPOSED AMENDMENTS

In October of 1984, the United States Congress voted to repeal the sunset provision of EAJA and to extend a modified version of the Act on a permanent basis.[136] Although President Reagan ultimately vetoed the proposed amendments to the Act,[137] he expressed a commitment both to the underlying policies of the Act and its reauthorization, contingent upon satisfactory revision of the amendments.[138] The proposed 1984 amendments, while not enacted into law, resolved a few of the ambiguities in EAJA as implemented in 1981. More important, they indicated that Congress was prepared to broaden, rather than narrow, government liability for the payment of attorneys' fees.

One of the interpretive ambiguities clarified in the 1984 amendments was whether "position of the United States,"[139] which must be substantially justified to avoid fee liability, referred only to its litigation posture or included also its prelitigation conduct. The amendments made clear that the "position" of the United States referred to in the matter of substantial justification was the latter.[140]

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135. Most courts held that work performed prior to October 1, 1981, was entitled to compensation under EAJA. *See, e.g.*, Berman v. Schweiker, 713 F.2d 1290, 1303 (7th Cir. 1983); National Resources Defense Council v. EPA, 703 F.2d 700, 712-13 (3d Cir. 1983); Kay Mfg. Co. v. United States, 699 F.2d 1376, 1378-79 (Fed. Cir. 1983); Tyler Business Servs. v. NLRB, 695 F.2d 73, 77 (4th Cir. 1983). *Contra* Allen v. United States, 547 F. Supp. 357, 361 (N.D. Ill. 1982). *Cf.* Commodity Futures Trading Comm'n v. Rosenthal & Co., 545 F. Supp. 1017, 1019 (N.D. Ill. 1982) (EAJA may apply only to fees incurred after October 1, 1981, but judgment reserved on matter).

136. *See* 130 CONG. REC. H12171-74 (daily ed. Oct. 11, 1984). Following a September 6, 1984 report from the Committee on the Judiciary regarding amendment of EAJA, H.R. REP. NO. 992, 98th Cong., 2d Sess. (1984), Congress reviewed and revised the proposed modifications several times before arriving at an acceptable version. *See supra* note 6.

137. *See supra* note 7 and accompanying text.

138. Specifically, the President objected to the proposed definition of "position of the United States" and to the proposed interest provision. *Id. See also infra* notes 167-73 and accompanying text.

139. See *supra* notes 112-21 and accompanying text for a discussion of the divergent views regarding what constitutes the "position of the United States."

140. Congress effected this clarification by striking the language "as a party to the proceeding" found at 5 U.S.C. § 504(a)(1) and substituting new definitions relating to position in 5 U.S.C. § 504(b) and 28 U.S.C. § 2412(d)(2). The new definition recommended for § 504(b)(4)(E) stated that " 'position of the agency' includes the underlying action which led to the adversary adjudication," while the new definition recommended for § 2412(d)(2)(B)

Much broader than the government's mere litigation position, it included government or governmental agency actions and omissions which led to the adversary adjudication or civil action.[141] Congress made this evident by including the "underlying" action which led to the adversary adjudication or civil litigation within the definition of the government's "position."[142]

A second ambiguity clarified by the amendments was the issue of what constitutes a "final judgment" for purposes of an EAJA application.[143] Courts were divided on the question of what point in time triggered the commencement of the thirty-day period after "final judgment" in which a fee application must be filed.[144] In the 1984 amendments, Congress specifically stated that no application for a fee award may be made until a final and unreviewable, or not appealable, decision is rendered in a matter.[145] Thus, a district court judgment would not cause the thirty-day period to begin to run.

The third area Congress addressed was prevailing party status. One aspect of this issue upon which the courts disagreed was whether there could be a prevailing party for purposes of EAJA within the context of condemnation proceedings.[146] The proposed amendments to the Act not only made clear that condemnation actions are subject to EAJA, they also provided a standard for deter-

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stated that " 'position of the United States' includes the underlying agency action which led to the litigation." 130 CONG. REC. H12172 (daily ed. Oct. 11, 1984). In both new definitional sections, the amendments provided an exception to the award of fees and expenses when the prevailing party has "unreasonably protracted the proceedings." *Id.* at H12172-73.

141. *See* H.R. REP. NO. 992, *supra* note 6, at 3.

142. *See* 130 CONG. REC. H12172 (daily ed. Oct. 11, 1984) (proposed amendments to 5 U.S.C. § 504(b) and 28 U.S.C. § 2412(d)(2)).

143. See *supra* notes 122-29 and accompanying text for a discussion of the divergent views regarding what constitutes a "final judgment."

144. *Id.*

145. Congress effected this clarification by proposing the addition of § 2412(d)(2)(G) to Title 28. It states that " 'final judgment' means a judgment that is final and not applicable [sic]." *See* 130 CONG. REC. H12173 (daily ed. Oct. 11, 1984). Congress also proposed to clarify in the amendments that fee award decisions of adjudication officers are final. The following additional language was to be added to 5 U.S.C. § 504(a)(1): "The decision of the adjudicative officer on the application for fees and other expenses shall be the final administrative decision under this section." 130 CONG. REC. H12172 (daily ed. Oct. 11, 1984). Moreover, language was also to be added to 5 U.S.C. § 504(a)(2) to clarify that no fee award could be made in connection with an agency adjudication until a final and unreviewable decision by the appeals court is rendered, or appeal rights have expired. *Id.* Lastly, § 504 (c)(2) was designed to expand the ability of either party to appeal agency fee award decisions, while reducing the standard of judicial review from abuse of discretion to that of substantial evidence. *Id.*

146. See *supra* notes 62-63 and accompanying text for a discussion of the divergent views regarding condemnation proceedings.

mining who the prevailing party would be in such actions.[147]

While Congress specifically addressed the prevailing party issue in condemnation cases, it declined to take a stand on the prevailing party issue in Social Security remand cases. The courts were divided on whether there could be a prevailing party for purposes of EAJA in instances when a Social Security case was remanded by the court on procedural grounds for further proceedings.[148] While the House of Representatives proposed language explicitly including in the definition of a prevailing party one who has won an order of remand in a Social Security case,[149] the Senate and the House of Representatives were unable to agree on its scope.[150] Thus, the proposed amendments to the Act, as approved by Congress, were silent with respect to prevailing party status in Social Security remand cases.

The 1984 amendments to the Act did, however, address the award of attorneys' fees in Social Security cases in general by affirming the consensus of the judiciary[151] that EAJA is applicable to a party who substantively prevails in a Social Security case.[152] The proposed amendments specifically stated that the attorneys' fees provision in the Social Security Act, which awards attorneys' fees

147. The amendments proposed that language be added at 28 U.S.C. § 2412(d)(2)(H) which would specifically delineate certain parties in eminent domain proceedings as prevailing parties. Essentially, the "prevailing party" in a condemnation action involving the United States would be the party whose testimony in court was closest to the prevailing valuation. *See* 130 CONG. REC. H12173 (daily ed. Oct. 11, 1984).

148. See *supra* notes 59-61 and accompanying text for a discussion of the divergent views regarding Social Security remand cases.

149. *See* H.R. REP. NO. 992, *supra* note 6, at 3. On September 11, 1984, when H.R. 5479 originally passed in the House of Representatives, the amendments contained the following language: " 'prevailing party in a civil action' includes a party who, pursuant to § 205(g) or § 1631(c)(3) of the Social Security Act (42 U.S.C. § 405(g) or § 1383(c)(3)), has won an order remanding the cause for further hearing." 130 CONG. REC. H9298 (daily ed. Sept. 11, 1984).

150. The Senate modified the language proposed by the House of Representatives to contain three exceptions where the provision would not apply, those being:

> (i) to cases to the extent that the remand was based on section 2(d) of the Social Security Disability Benefits Reform Act of 1984;
> (ii) to cases to the extent the remand is requested by the claimant in order to introduce new evidence which the claimant had not introduced or attempted to introduce at the administrative agency level; or
> (iii) to cases in which, after the remand, the claimant has not prevailed with respect to the underlying issue.

130 CONG. REC. H11480 (daily ed. Oct. 4, 1984). Since only the first of the three exceptions was acceptable to the House, *see id.*, and the Senate rejected the compromise language, *see* 130 CONG. REC. H12171 (daily ed. Oct. 11, 1984), the House returned the bill deleting all language referring to remands in Social Security actions. *See* 130 CONG. REC. H12173 (daily ed. Oct. 11, 1984).

151. *See supra* discussion in note 61.

152. *See* 130 CONG. REC. H12173 (daily ed. Oct. 11, 1984).

from the past due benefits of successful litigants,[153] would not preclude an award to prevailing parties under EAJA.[154] The amendments did assert, however, that attorneys' fees collected under the Social Security Act must be given directly to the prevailing party rather than counsel, insofar as the fees relate to the same work for which an EAJA award is made.[155] The rationale for this provision lies in the fact that attorneys' fees awarded under the Social Security Act come from, and therefore reduce, the accrued past due benefits of the petitioner. In effect, when an EAJA award is made, the past due benefits of the prevailing party would not be reduced by an attorneys' fee award, provided the EAJA award was related to the same work for which the Social Security Act fees would be collected.

In addition to clarifying past ambiguities, Congress redefined the scope of an eligible "party" under the Act. The amendments expanded the net worth limitation from $1 million to $2 million for an individual and from $5 million to $7 million for a business or organization.[156] Congress also included a "unit of local government" within its party definition, rendering small cities, counties, villages and the like eligible for EAJA awards if they otherwise qualify.[157]

Congress also broke new ground by including a provision in the amendments to serve as an incentive to the United States to meet its obligation to promptly pay fee awards. Specifically, Congress provided that if a fee award is not paid by the United States within a sixty-day period, the government would be liable for the payment of interest on the amount of the award from that time forward.[158]

Finally, Congress addressed several procedural details. It affirmed the general judicial consensus that fee awards could be collected for legal work performed prior to October 1, 1981, provided the underlying action was pending on that date.[159] Congress also

153. The Social Security Act allows a court to authorize up to 25% of the total of past-due benefits as attorneys' fees. 42 U.S.C. § 406(b)(1) (1982). It also provides for a misdemeanor fine for persons seeking an amount in excess of the requisite 25% fee award. *Id.* § 406(b)(2).

154. *See* 130 CONG. REC. H12173 (daily ed. Oct. 11, 1984).

155. *Id.* It follows that an attorney collecting attorneys' fees under EAJA must use such fees to reduce the total fee liability of his client based upon the portion of past-due benefits which might be outstanding. *See supra* note 153.

156. *See* 130 CONG. REC. H12172 (daily ed. Oct. 11, 1984). See *supra* notes 29 and 36 and accompanying text for a discussion of the Act's original net worth requirements.

157. *See* 130 CONG. REC. H12172 (daily ed. Oct. 11, 1984).

158. *See* 130 CONG. REC. H12172-73 (daily ed. Oct. 11, 1984).

159. *See supra* note 135. The proposed amendments were to contain a provision that

confirmed that both the United States Claims Court[160] and agency boards of contract appeals[161] have jurisdiction to make fee awards under the Act. As a final caveat, Congress advocated reconsideration of some dismissed fee petitions. Congress provided that certain amendment provisions would be applicable to timely filed cases pending on or commenced after October 1, 1981, which had been previously dismissed for lack of jurisdiction.[162]

Although the proposed amendments to EAJA were not enacted into law because of a Presidential veto, they serve to help interpret ambiguous provisions of the original Act on which court decisions have been divided. Since any matter which was pending on October 1, 1984, may be eligible for an EAJA fee award under the original Act, courts will continue to be faced with these issues for some time. Furthermore, the 1984 proposed amendments served as a basis for the recently enacted 1985 legislation.

III. PRESIDENTIAL VETO OF THE 1984 PROPOSED AMENDMENTS

On November 8, 1984, President Reagan vetoed the 1984 proposed amendments to EAJA.[163] Although committed to the under-

"[a]wards may be made for fees incurred before October 1, 1981, in any such adversary adjudication or civil action." 130 CONG. REC. H12173 (daily ed. Oct. 11, 1984).

160. In a new definitional section, the proposed amendments were to include the United States Claims Court within the definition of "court" at 28 U.S.C. § 2412(d)(2)(F). *See* 130 CONG. REC. H12173 (daily ed. Oct. 11, 1984). Since the Act was enacted prior to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982), Congress attempted to clarify that the United States Claims Court, which assumed the trial court function of the Court of Claims, had jurisdiction to make fee and expense awards under EAJA.

161. New language was to be contained in the proposed amendments at 5 U.S.C. § 504(b)(1)(C), expressly bringing proceedings before agency boards of contract appeals within the Act. *See* 130 CONG. REC. H12172 (daily ed. Oct. 11, 1984). In addition, the definition of "civil action brought by or against the United States" was to include the following at 28 U.S.C. § 2412(d)(2)(E): "an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978." 130 CONG. REC. H12173 (daily ed. Oct. 11, 1984). These proposed changes were to enable prevailing contractors to receive fees and expenses before agency boards or the United States Claims Court, since a contractor may bring a contract dispute before either entity. *See generally* Contract Disputes Act of 1978, 41 U.S.C. §§ 601-13 (1982).

162. *See* 130 CONG. REC. H12173 (daily ed. Oct. 11, 1984). The proposed amendments to the Act also included several technical alterations to improve the Act. In 28 U.S.C. § 2412(a) and (b), the phrase "or any agency and any official of the United States" was to be substituted with "or any agency *or* any official of the United States." 130 CONG. REC. H12172 (daily ed. Oct. 11, 1984) (emphasis added). Added to the definition of a "civil action" under 28 U.S.C. § 2412(d)(1)(A) were the words "including proceedings for judicial review of agency action." *Id.*

163. *See* 20 WEEKLY COMP. PRES. DOC., *supra* note 7, at 1814.

lying policies of the Act, he felt certain changes embodied in the proposed amendments to EAJA did not further the purposes of the Act and were inconsistent with fundamental principles of good government.[164] The President stated that he would make "the permanent and retroactive reauthorization of the Act a high legislative priority."[165] He also made it clear, however, that he was referring to an "acceptable reauthorization," having noted several specific objections to the proposed amendments.[166]

Specifically, although not exclusively, the President noted two proposed changes to EAJA which he found objectionable. The President's strongest objection concerned the proposal to alter the definition of "position of the United States" for purposes of substantial justification.[167] As previously discussed, EAJA provides that an otherwise prevailing party may recover attorneys' fees and other expenses unless the position of the United States was substantially justified or unless special circumstances would make a fee award unjust.[168] The proposed amendments would have resolved the judicial dispute concerning whether "position" refers merely to the government's litigation position, or also includes the underlying governmental action which led to the dispute, in favor of the latter.[169] The President believed this to be an unwarranted extension of the "position of the United States" definition, which would result in wasteful litigation over a subsidiary issue and "undermine the free exchange of ideas and positions within each agency that is essential for good government."[170]

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164. *Id.*

165. *Id.*

166. *Id.* at 1815.

167. *Id.* at 1814.

168. *See supra* note 64 and accompanying text.

169. *See supra* notes 139-42 and accompanying text.

170. *See* 20 WEEKLY COMP. PRES. DOC., *supra* note 7, at 1814-15. The interpretation of "position of the United States" supported by the President would enable the government to avoid fee and expense liability under EAJA for improper governmental conduct merely by ensuring that the Department of Justice or agency lawyers assume a reasonable position once a civil action or adversary adjudication is commenced. How one interprets "position" will significantly influence the number of fee awards made under the Act and, consequently, the amount of tax dollars expended. While there is no doubt that the Administration is concerned about government spending, it is interesting to note that awards made under the Act during its three years of operation did not even approach the 1980 projected costs. At the inception of the Act, the Congressional Budget Office projected that the legislation would cost $92 million in 1982, $109 million in 1983, and $129 million in 1984. *See* H.R. REP. NO. 1418, *supra* note 14, at 21 and 24, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS, 4984, 5000. In annual reports filed by the Director of the Administrative Office of the United States Courts, the following fee and expense awards were reported by federal courts:

$683,518 in 13 cases from October 1, 1981 - June 20, 1982; $1,717,094 in 52 cases

The President also objected to the new interest payment provision of the proposed legislation.[171] According to the President, imposing interest payments if an award is not paid within sixty days unfairly favors lawyers receiving EAJA awards over other individuals awaiting payment from the government.[172] The President opined that such favoritism is inappropriate and that interest should be paid to recipients of EAJA awards in the same manner as it is paid to any other group entitled to government interest payments on court judgments.[173]

Notwithstanding his objections to the 1984 legislation, President Reagan voiced a firm commitment to the Act's underlying policies and its eventual reauthorization. He so informed the heads of his executive departments and agencies, instructing them to review agency procedures to ensure substantial justification and to continue to accept and retain applications for fee awards, pending the reauthorization of EAJA in 1985.[174] This reauthorization has finally occurred.

IV. THE 1985 REBIRTH OF EAJA

Among the matters Congress addressed in drafting new fee legislation were the two 1984 amendments which the President specifically found objectionable—the interest payment provision and the

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from July 1, 1982 - June 30, 1983; and $1,270,682 in 157 cases from July 1, 1983 - June 30, 1984.

1983 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 80-85; 1984 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES 91-97. The Administrative Conference of the United States filed similar reports. Agency proceedings resulted in no awards of fees and expenses during the period from October 1, 1981, through September 30, 1982. 1982 REPORT OF THE CHAIRMAN OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES ON AGENCY ACTIVITIES UNDER THE EQUAL ACCESS TO JUSTICE ACT 2. During the period from October 1, 1982, through September 20, 1983, awards totalled $35,933.89 in eight proceedings. 1983 REPORT OF THE CHAIRMAN OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES ON AGENCY ACTIVITIES UNDER THE EQUAL ACCESS TO JUSTICE ACT 3. While it is evident that these figures fall far short of the projected estimates, the differential may be even greater than appears at first blush, for the above-noted figures reflect only initial awards and do not include the disposition of cases following appeal.

In projecting the costs of the 1984 proposed amendments, the Congressional Budget Office, while warning that costs could vary significantly, estimated that the number of fee awards would likely increase by 50 each year, since the number of awards grew from 20 in 1982 to 130 in 1984. *See* H.R. REP. NO. 992, *supra* note 6, at 17-18. Estimating an average award at $6,000, with a few unusually large awards each year, projected annual costs of $5,000,000 were anticipated by 1989. *Id.* at 18.

171. *See* 20 WEEKLY COMP. PRES. DOC., *supra* note 7, at 1815.

172. *Id.*

173. *Id.*

174. *Id.* at 1815-16.

clarification of the "position of the United States" as it relates to the substantial justification issue. With respect to the former, Congress did not insist on retaining the late-payment interest provision, since there appears to be no compelling reason justifying more favorable treatment for EAJA award recipients than for other groups entitled to fee payments from the government. It did, however, provide for interim interest if the United States appeals a fee award and the award is later affirmed.[175]

Congress was also able to resolve the question of what "position" of the United States must be substantially justified in order to avoid fee liability by interpreting "position" broadly while limiting the court's scope of review on the issue. In vetoing the proposed 1984 amendments to the Act, the President subscribed to the view that "position of the United States" focused on the "litigation position" assumed by the government in civil actions and agency adjudications.[176] That is, if the government's legal posture as an adversary in the civil or agency action is substantially justified, no fee liability attaches. Congress, on the other hand, was committed to the position that the definition of "position" includes the governmental activity which led to the dispute.[177] As between these two perspectives, the Administration's view was much more restrictive than Congress'. In fact, under the Administration's view the United States could escape liability by simply assuming a reasonable position during the litigation or adversary adjudication, no matter how improper its conduct was during initial contact with the ultimately prevailing party.

The issue of liability, however, did not appear to be the President's chief concern when he opposed the interpretation of "position of the United States" in 1984. Rather, his concern was that the provision "would lead to extensive discovery on how the Government's action was formulated" when addressing the fee award ques-

175. *See* 131 CONG. REC. S9996 (daily ed. July 24, 1985). An indepth analysis of the 1985 amendments to EAJA is beyond the scope of this article. Rather, the focus remains on the legislative evolution of the Act from its inception.

176. *See supra* notes 167-70 and accompanying text.

177. *See supra* notes 139-42 and accompanying text. At first glance, the Administration's position taken in 1984 seemed harsh and contrary to the affirmatively stated purposes underlying EAJA. Upon fuller consideration, however, it becomes clear that this approach protects the United States taxpayers from fee liability based upon conduct of low-level bureaucrats who act unadvisedly. While the Congressional interpretation of "position" appeared to better serve as a check on unreasonable government conduct, it may be criticized for imposing fee liability on the United States for unauthorized conduct of petty government employees.

tion.[178] The new legislation, while adhering to a broader interpretation of "position," that being, the government position taken in the action as well as the government action or failure to act upon which the lawsuit is based,[179] responds to the President's objections. Specifically, courts considering fee applications are directed to consider only the record developed on the merits of the case when evaluating whether the government's prelitigation position was substantially justified.[180] "No 'fishing expeditions' will be allowed, so as to turn the fees case into a second major litigation."[181]

The effect of the new definition of "position" of the United States, of course, remains to be seen. While not specifically addressed as an administrative concern, it is possible that a broadening of the definition of "position" could lead to extensive liability on the part of the government. Specifically, taxpayers could be held responsible for fee liability based upon conduct of low-level bureaucrats who act unadvisedly. If runaway liability becomes problematic, Congress should reevaluate the Act and consider the incorporation of a requirement analogous to an "exhaustion of remedies" provision. Under an exhaustion provision, the aggrieved individual or small business would shoulder the burden to take affirmative steps to notify the appropriate agency head or other responsible government official of its complaint. The governmental entity would thereby be given an opportunity to review the challenged conduct and rectify the situation if it deemed its actions were not substantially justified. Requiring the party to exhaust such avenues of inquiry forces the governmental entity to officially review the appropriateness of its conduct earlier than at the point of litigation. As a consequence, much litigation may actually be avoided if the introspection results in an adjustment of the improper governmental action. Thus, the imposition of an "exhaustion" requirement would protect the interests of both the non-governmental party and the United States.

In addition to resolving the President's concerns about the 1984 amendments, the legislators in 1985 also clarified other ambiguities

178. 131 CONG. REC. S9992 (daily ed. July 24, 1985) (remarks of Sen. Grassley).

179. 28 U.S.C. § 2412 (d)(2)(D) was created to include the following definition: " 'postion of the United States' means, in additon to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based. . . ." Substantially similar language is contained at 5 U.S.C. § 504(b)(1)(E).

180. 131 CONG. REC. S9992 (daily ed. July 24, 1985).

181. *Id.*

inherent in the original Act, using the proposed 1984 amendments as a foundation. Similar to the 1984 amendments, the 1985 legislation requires that no fee award determination be made until "a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal."[182] The 1985 legislation also parallels the 1984 amendments in that it makes EAJA explicitly applicable to appeals before an agency board of contract appeals, confirms the United States Claims Court's jurisdiction, makes the Act applicable to Social Security claimants in adversary proceedings, defines certain parties in condemnation actions as being "prevailing," affirms that fees can be collected for legal work performed prior to October 1, 1981, and expands the net worth limitations from $1 million to $2 million for individuals and from $5 million to $7 million for designated business entities, including units of local government.[183]

Several other ambiguities, however, remain unresolved and will continue to be problematic unless and until Congress chooses to reconsider the new Act. One somewhat latent ambiguity relates to the standard of reasonableness regarding substantial justification. The original legislative history of EAJA characterizes the substantial justification standard as one of reasonableness, stating that no fee liability attaches if the United States can demonstrate that the legal and factual basis for its position is reasonable.[184] Although no court openly challenges this standard, a number subtly vary from it,[185] usually in the direction of imposing a more stringent standard. Congress included no specific language within the 1985 legislation which addresses the applicable standard for substantial justification. In the legislative history to the amendments, however, Congress did address this matter but very briefly, and simply indicated that the test for substantial justification is "more than mere reasonableness."[186] While somewhat directive, such treatment by Congress does not amount to specific guidance. Congress should examine and restate the Act's position regarding the "reasonableness" requirement, expressly defining its boundaries.

Congress should also further explain the Act's position on pre-

182. 131 CONG. REC. S9996 (daily ed. July 24, 1985).

183. 131 CONG. REC. S9995 (daily ed. July 24, 1985) (remarks of Sen. Weicker).

184. *See supra* notes 67-71 and accompanying text.

185. *See supra* notes 72-78 and accompanying text.

186. H.R. REP. NO. 120, 99th Cong., 1st Sess. 9 (1985). The legislative history further notes, however, that agency action found to be arbitrary and capricious or unsupported by substantial evidence can be substantially justified in only the most extraordinary special circumstances.

vailing party status. EAJA's legislative history reveals that Congress intended the interpretation of prevailing party under EAJA to be consistent with its interpretation under other fee-shifting statutes.[187] In interpreting the Act, most courts relied on the accepted standard under which a party prevails in an action if it is successful on a significant issue which achieves some of the benefit sought through the litigation.[188] Some variations and interpretive distinctions, however, were apparent among the jurisdictions nominally following this precept. Congress should, therefore, consider endorsing specific tests and standards for making prevailing party determinations.

Congress should also consider specifying special classes of individuals as eligible for prevailing party status. In the 1985 legislation, as in the 1984 proposed amendments, Congress explicitly cited parties in condemnation proceedings as being eligible for prevailing party status under EAJA and included special guidelines for courts to use when weighing such determinations.[189] This is a helpful clarification of a litigated issue. Congress should consider expanding its list of special classes of individuals explicitly entitled to prevailing party status. It should make clear, however, that the list is not exclusive, but rather only indicative of the Act's breadth of scope.

Finally, three rather technical ambiguities could be clarified. The first concerns party eligibility of a business entity. Since eligibility depends in part on employing fewer than 500 employees,[190] a clear definition of "employee" would be helpful. The second concerns clarifying whether a case is considered "pending" for purposes of EAJA when the sole unresolved issue at the Act's inception related to an attorneys' fee award.[191] The third concerns an anticipated but yet unraised problem. Congress made clear in the 1985 legislation that cases falling within the Social Security Act, which has its own fee provision, may also be subject to EAJA.[192] Congress directed that attorneys may apply for fees under both statutes but that double payment of fees to counsel is not intended.[193] If fees are received for the same work under both statutes, the smaller

187. *See supra* note 44 and accompanying text.

188. *See supra* notes 46-47 and accompanying text.

189. *See* 131 CONG. REC. S9996 (daily ed. July 24, 1985); *supra* notes 146-47 and accompanying text.

190. *See supra* notes 29 and 36 and accompanying text.

191. *See supra* notes 130-34 and accompanying text.

192. *See* 131 CONG. REC. S9997 (daily ed. July 24, 1985); *supra* notes 151-55 and accompanying text.

193. H.R. REP. NO. 120, *supra* note 186, at 20.

amount must be given to the client.[194] Congress failed, however, to specifically address whether counsel may obtain a fee award under EAJA for time expended in the civil action and also collect fees under the Social Security Act for time expended during the administrative portion of the case.

VI. CONCLUSION

In 1981, Congress implemented EAJA in an effort to remove the deterrent of burdensome litigation expenses faced by individuals and small businesses seeking to redress wrongs they have suffered at the hand of the Federal government. Amendments, which would have clarified some of the Act's ambiguities as well as extend its life, were vetoed by the President in 1984. 1985 has produced new attorneys' fees legislation, placing liability on the United States for fee awards in certain circumstances. This Article has devoted much time and attention to the 1981 Act and its ambiguous provisions, since the basis for the new legislation was essentially a reauthorization of EAJA, encompassing much of the original Act and its proposed 1984 amendments.

Congress should have utilized this opportunity, however, to step beyond a mere synthesis of the original Act and its amendments, and translated what it has learned during the Act's lifetime into a more equitable and better-focused law. Specifically, an "exhaustion" requirement engrafted onto the "position of the United States" provision would address the concern for limitless liability while at the same time effectively deterring improper government conduct. Similarly, more precise definitions of the substantial justification standard of reasonableness and eligible prevailing parties should be incorporated into the new legislation. These and other clarifications of additional ambiguities would all serve to heighten the promise which this fee legislation can offer.

194. *See supra* note 192.