An Analysis and Explanation of the Equal Access to Justice Act

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Louise L. Hill*

I. INTRODUCTION

In July of 1985, Congress passed legislation to revive and permanently enact the Equal Access to Justice Act (the "EAJA" or the "Act"). The EAJA permits prevailing parties to obtain awards of attorneys' fees and other expenses against the United States in certain administrative proceedings and judicial actions. On October 1, 1984, after a three-year period, the EAJA expired pursuant to a sunset provision contained within the Act as originally promulgated. The 1985 amendments to the EAJA, passed by Congress on July 24, 1985 and approved by the President within two weeks, modify and reinstate the EAJA, retroactively applying it to cases commenced on or after the October 1, 1984 repeal date.7

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3. The sunset provision of the EAJA, providing for automatic repeal of the Act three years after its implementation, applied to 5 U.S.C. § 504 and 28 U.S.C. § 2412(d). EAJA § 203(c), 204(c). Congress permanently enacted 28 U.S.C. § 2412(b) (1982) at the inception of the EAJA, and thus it was not repealed upon the triggering of the Act's sunset provision.


This article examines the EAJA as amended and reinstated in 1985, highlighting the substantive areas of the Act that Congress changed. In examining the newly enacted EAJA, this article also addresses certain sections of the EAJA that Congress chose not to modify. When focusing on the unchanged provisions of the Act, both Congressional directions and various judicial interpretations of the sections will be noted.

II. THE EAJA—A HISTORICAL OVERVIEW

The fundamental purpose of the EAJA is to allow certain parties to challenge unreasonable federal government action. Recognizing that small businesses and individuals are often deterred from exercising their legal rights because of the expense involved, Congress, in 1980, established a general statutory scheme authorizing courts to award attorneys’ fees and other expenses to certain prevailing parties in actions involving the federal government. Because the United States consented to be sued for attorneys’ fees and expenses in almost all administrative and judicial proceedings involving the federal government, this statutory authoriza-

12. In including such cost and fee provisions in TEFRA, Congress established different standards for fee recovery in tax cases than in civil actions under the EAJA. Under TEFRA, taxpayers who prevail in civil tax actions in which the position of the United States is unreasonable may be awarded reasonable litigation costs, including attorneys’ fees, up to a $25,000 maximum. 26 U.S. C. § 7430(b)(1) (1982). Whether a taxpayer “prevails” in an action depends upon whether the taxpayer can establish
tion served as a partial waiver of sovereign immunity. In addition, the EAJA is a significant exception to the American Rule, which provides that litigants are responsible for the payment of their own attorneys' fees and expenses irrespective of the result of the litigation. While both Congress and the courts created numerous exceptions to the American

that the government's position was unreasonable, and whether he substantially prevailed with respect to the amount in controversy or with respect to the most significant issue or set of issues presented. 26 U.S.C. § 7430(c)(2)(A) (1982). The determination of "prevailing party," as well as the determination of whether the government's position was "unreasonable" is discretionary with the court hearing the case. 26 U.S.C. § 7430(c)(2)(B) (1982). "Reasonable litigation costs" are determined by the court hearing the case and encompass court costs, expert witness expenses, costs of studies, analyses, reports, tests or projects necessary for case preparation, as well as attorneys' fees or fees incurred by one authorized to practice before the Tax Court. 26 U.S.C. § 7430(c)(1) (1982).

As with the EAJA, the fee and cost provisions in TEFRA contained a specific termination clause. 26 U.S.C. § 7430(f) (1982). In 1985, when Congress reviewed such provisions in TEFRA with an eye toward extension and modification, there was support for the contention that the significantly more stringent TEFRA provisions should more closely resemble those in the EAJA. See Award of Attorney's Fees in Tax Cases, Hearing Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means, 99th Cong., 1st Sess. 36-60 (1985). However, the TEFRA fee and cost provisions were allowed to expire on December 31, 1985, and a four-year extension of these provisions without modification has been included in the Tax Reform Act of 1985 (H.R. 3838). See H.R. REP. No. 99-426, 99th Cong., 1st Sess. 839-41 (1985). For a complete analysis of the TEFRA fee and cost provisions as compared to the EAJA, see Hill, Attorney's Fees Under the Tax Equity and Fiscal Responsibility Act of 1982—A Reevaluation, TAX NOTES, Oct. 14, 1985, at 203.

12. In first enunciating the "American Rule," the United States Supreme Court denied an award of attorney's fees to a prevailing party, reasoning that the general practice of the United States was opposed to the awarding of such fees. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).
13. For a lengthy list of many 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).
14. Among the judicially created exceptions to the American Rule 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 for himself and others may require the beneficiaries of that created or preserved fund to contribute to compensation of the attorneys. See, e.g., Trustees of the Internal Improvement Fund v. Grenough, 105 U.S. 527 (1881). The common fund theory was judicially expanded to include situations involving non-monetary benefit when 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." Vaughn 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 Enter., Inc., 390 U.S. 400, 402 (1968). It must be noted, however, that in A1ueska Pipeline Service Co. v. Wilderness Soc., 411 U.S 240 (1975), 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 additional discussion regarding exceptions to the American Rule, see Comment, Attorneys' Fees: Slipping from the American Rule Strait Jacket, 49 MONT. L. REV. 308 (1979); Note, Attorneys' Fees: Exceptions to the American Rule, 25
Rule prior to enacting the EAJA, the EAJA brings general civil litigation with the federal government closer to the English Rule, which considers attorneys' fees as an expense of litigation that the losing party should bear.\(^{16}\)

In promulgating the original EAJA in 1980, Congress considered the fee and cost award scheme in civil actions separately from the scheme for such awards in administrative adjudications. Specifically, Congress created 5 U.S.C. § 504 to cover fee and cost awards in administrative matters and amended 28 U.S.C. § 2412 to cover fee and cost awards in civil lawsuits.\(^{16}\)

In structuring fee award eligibility in civil actions, Congress enacted 28 U.S.C. § 2412(b),\(^{17}\) which provides that courts may award reasonable fees and expenses to a prevailing party in a civil action against the United States\(^{18}\) whenever the common law\(^{19}\) or a statutory provision would permit an award of fees against any other party.\(^{20}\) Therefore, if an action is litigated either under a statute that permits fee awards against private parties, but does not specifically permit fees against the United States, or under a statute that does not permit recovery of fees, but the prevailing party can show a common law ground for an award of attorney fees, subsection 2412(b) is an available avenue for an award of reasonable fees against the United States.

Congress also created 28 U.S.C. § 2412(d)\(^{21}\) which provides that, ex-

\(^{17}\) See supra note 3. 28 U.S.C. § 2412(b) provides as follows:
(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.
\(^{18}\) The civil action may be brought by or against the United States, or an agency, or official of the United States acting in an official capacity. 28 U.S.C. § 2412(b) (1982).
\(^{19}\) See supra note 13.
\(^{20}\) Certain statutes expressly prohibit the awarding of attorneys' fees against the United States. When an applicable statutory provision prohibits an award of attorneys' fees against the United States, there can be no recovery. 28 U.S.C. § 2412(b) (1982).
\(^{21}\) 28 U.S. C. § 2412(d), as originally enacted provided as follows:
(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a
prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(b) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified:

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(2) For the purposes of this subsection -

(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) 'party' means (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed; and

(C) 'United States' includes any agency and any official of the United States acting in his or her official capacity.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of any adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4)(A) Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and
cept as otherwise provided by the statute, in civil actions other than tort actions brought by or against the United States, eligible prevailing parties shall be awarded attorneys' fees and other expenses unless the court finds that the position of the United States was substantially justified or that special circumstances make a fee award unjust. Unlike subsection 2412(b), subsection 2412(d) was enacted for a three-year trial period. Because Congress targeted the Act to small businesses and indi-

other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title.

22. The legislative history indicates that the "except as otherwise provided by statute" clause of 28 U.S.C. § 2412(d)(1)(A), was intended to preserve the standards and 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. 96-1418, supra note 8, at 18, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4997. In addition to the legislative history, the EAJA itself specifies that 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.

23. See supra note 9.

24. See infra notes 84-87 and accompanying text.

25. See infra notes 105-10 and accompanying text.

26. See infra notes 51-60 and accompanying text.

27. See infra notes 69-82 and accompanying text.

28. In addition to declining to award EAJA fees when the position taken by the United States in an action is substantially justified, the Act also provides that the government should not be held liable for fees where "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) and 5 U.S.C. § 504(a)(1). 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." See S. REP. No. 96-253, 96th Cong., 1st Sess. 7 (1979); H.R. REP. No. 96-1418, supra note 8, at 11, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4990. The "special circumstances" provision is also explained as one which would give courts "discretion to deny awards where equitable considerations dictate an award should not be made." Id. The 1985 amendments to the EAJA make no substantive change to the concept of special circumstances.

Unlike § 2412(d) of Title 28, § 2412(b) does not mention substantial justification or special circumstances as a limiting factor in making attorneys' fees awards. However, because § 2412(b) authorizes attorneys' fees against the United States to the same extent a statutory provision would hold a private party liable, (see supra note 19 and accompanying text), and because some fee provisions applicable to non-federal parties authorize courts to decrease or deny attorneys' fees in special circumstances, it is possible that special circumstances, either by express statement or judicial interpretation, may be considered by courts in making fee awards under § 2412(b).

29. See supra note 3.
individuals, under subsection 2412(d), a party must meet specifically delineated eligibility requirements and must include net worth and size information when seeking awards. Congress also set a limitation on hourly rates that attorneys may collect pursuant to a subsection 2412(d) award. The subsection does, however, give discretion to adjust an award in light of existing special factors.

In considering fee recovery in administrative actions, Congress essentially followed the same scheme as that enunciated in 28 U.S.C. § 2412(d). Congress, in creating 5 U.S.C. § 504 for a three-year trial period, required federal agencies conducting adversary adjudications to award attorneys' fees and other expenses to a prevailing party against the United States unless the adjudicative officer conducting the proceeding found that the agency's position was substantially justified or that special circumstances made an award unjust.

30. The original EAJA provides that an individual having a net worth of more than one million dollars is not an eligible party; nor is a sole owner of a proprietorship, a partnership, association, corporation or private organization eligible if its net worth exceeds five million dollars or if it has more than five hundred employees. 28 U.S.C. § 2412(d)(2)(B) (1982). (Certain tax-exempt organizations and agricultural cooperatives are not subject to a net worth limitation.) Id.

31. Section 2412(d) provides for reasonable costs and expenses and sets a limitation of an hourly rate of $75.00 for attorneys' fees unless the court determines that an increase in the cost of living or some special factor justifies a higher fee. 28 U.S.C. § 2412(d)(2)(A) (1982).

32. Under 5 U.S.C. § 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. 5 U.S.C. § 504(a)(1). As originally enacted, § 504 contained financial eligibility requirements for parties similar to those in subsection 2412(d), limiting individuals to a net worth maximum of one million dollars and designated business entities to a net worth maximum of five million dollars and five hundred employees. 5 U.S.C. § 504(b)(1)(B) (1982). Analogous cost and fee limitations to those in 28 U.S.C. § 2412(d)(2)(A) are also included in § 504, providing for reasonable costs and expenses and a ceiling on hourly attorneys' fees of $75.00, in the absence of an increase in the cost of living or a special factor which would justify a higher fee. 5 U.S.C. § 504(b)(1)(A). Additionally, as in § 2412(d)(1)(C), the amount of any award may be reduced, or eliminated, if the prevailing party engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. 5 U.S.C. § 504(a)(3).

33. See supra note 3.

34. The "adversary adjudication" referred to in § 504(a) is defined in 5 U.S.C. § 504(b)(1)(C) as an adjudication under 5 U.S.C. § 554 (1982) in which the United States' position is represented. This section specifically excludes rate fixing and licensing proceedings. 5 U.S.C. § 504(b)(1)(C). Administrative proceedings under the Social Security Act are not adversary adjudications within the meaning of the 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, 725 F.2d 978 (8th Cir. 1984); Guthrie v. Schweiker, 718 F.2d 104, 108 (4th Cir. 1983). See also infra notes 123-25 and accompanying text. Additionally, EAJA fee awards are inappropriate for time spent in labor certification review proceedings because labor certification review proceedings are not adjudications. See Smedberg Machine & Tool, Inc. v. Donovan, 730 F.2d 1089, 1092 (7th Cir. 1984).


36. Id.
The EAJA, as originally promulgated in 1980 and enacted in 1981, contained a sunset provision repealing 28 U.S.C. § 2412(d) and 5 U.S.C. § 504 after a three-year trial period. Between October 1, 1981 and September 30, 1984, while the original EAJA was in effect, courts entertained numerous applications for fee and expense awards, and interpreted the applicable provisions of the Act in evaluating the award requests. As might be expected, courts differed in their interpretations of the various sections of the EAJA. Congress, with an eye toward permanently enacting the EAJA, set about redrafting the EAJA in 1984, by redefining sections of the Act on which court interpretation was divided. Congress passed various amendments to the Act in October of 1984; however, the amendments were vetoed by the President of the United States on November 8, 1984. While President Reagan expressed a commitment to the underlying policies of the Act in 1984, he vetoed the proposed amendments because he felt some of the amendments did not further the purposes of the EAJA and were inconsistent with fundamental principles of good government. Specifically, the President objected to Congress’ definition of “position of the United States” with respect to the matter of substantial justification. In the proposed 1984 amendments, Congress interpreted the phrase “position of the United States” to be the actions and omissions of the government that led to the underlying conflict. The

37. See supra note 3.
38. See infra notes 52-53, 75-78, 95-86, 107-08, 133-34, 138-40 and accompanying text.
39. Following a September 6, 1984, report from the Committee on the Judiciary with respect to amending the EAJA, H.R. REP. NO. 98-992, 98th Cong., 2d Sess. (1984), Congress reviewed and revised the proposed modifications to the Act several times before arriving at an acceptable revision of the EAJA. Congress did not pass the proposed amendment to the EAJA until October 11, 1984 and thus the amendment was to be applied retroactively to October 1, 1984, because of the Act’s sunset provision. See 130 CONG. REC. H12172-74 (daily ed. Oct. 11, 1984). While the initial House 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, the final version of the amendments which were passed by Congress were not approved until October 11, 1984, because of the debate which surrounded certain provisions. Id. See also 130 CONG. REC. H11479-82 (daily ed. Oct. 4, 1984); 130 CONG. REC. H9297-02 (daily ed. Sept. 11, 1984).
42. Id. at 1814.
43. See infra note 42 and accompanying text.
44. See 20 WEEKLY COMP. PRES. DOC., supra note 38 at 1814.
45. See 130 CONG. REC., supra note 36, at H12172. The primary inquiry surrounding the issue of “position of the United States” was whether the United States was relieved from liability for fees and expenses to a prevailing party by showing that its position as a party to the action was substantially justified, or whether the United States had to show that its position which led to the underlying conflict was substantially justified in order to avoid liability for an EAJA award. See infra notes 52-53 and accompanying text. The President stated that such an extension of “position of the United
President also objected to including an interest payment provision that favored litigants under the EAJA over other litigants who had judgments against the United States. The effect of the President's veto was to terminate the EAJA on October 1, 1984.

In response to the 1984 presidential veto and an underlying recognition of the importance of this type of fee award legislation, Congress set about drafting new fee legislation that would reinstate the EAJA and be acceptable to the Administration. On June 24, 1985, the House of Representatives passed proposed amendments to the EAJA reinstating the Act retroactively to October 1, 1984. The Senate passed this legislation on July 24, 1985. On August 5, 1985, the President signed the 1985 amendments to the EAJA into law. As a result, permanent statutory authorization now exists for prevailing parties to recover fees and expenses in most judicial and administrative proceedings in which the United States is a party unless the government’s position in the action was substantially justified or unless special circumstances exist which would make an award of fees unjust.

III. The EAJA—As Amended in 1985

A. Position of the United States

In amending the EAJA in 1985, one of the most significant tasks facing Congress was clarifying the phrase “position of the United States” within the context of the Act. The Act stated that the United States was liable for fee awards to eligible prevailing parties in civil matters unless the “position of the United States” was substantially justified or unless special circumstances would make an award of fees and expenses unjust. When addressing the issue of “position of the United States” in the judicial forums, courts differed as to whether “position” was the government’s liti-
gation position," or whether "position" referred to the government action or inaction which led to the underlying conflict. Congress was particularly sensitive about clarifying this provision because their interpretation of "position of the United States" was a matter to which the President objected in 1984. Congress solved this question

52. The EAJA, as originally enacted, provided that the United States was exempt from paying fees and other expenses to a qualifying prevailing party under the Act if its position in the matter was substantially justified. In reviewing the issue, some courts took the view that "position of the United States" constituted its litigation position, that is, its position as a party in prosecuting or defending the matter under review. See Russell v. National Mediation, 764 F.2d 341, 350 (5th Cir. 1985); Essex Electro Eng'rs, Inc. v. United States, 757 F.2d 247, 253 (Fed.Cir. 1985); White v. United States, 740 F.2d 836, 842 (11th Cir. 1984); Blitz v. Donovan, 740 F.2d 1241, 1244 (D.C.Cir. 1984); Amidon v. Lehman, 730 F.2d 949, 952 (4th Cir. 1984); Unites States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1487 (10th Cir. 1984); Tyler Business Servs., Inc. v. N.L.R.B., 695 F.2d 73, 75 (4th Cir. 1982).

A rationale for considering the litigation position of the government as the requisite "position of the United States" for purpose of the Act was that the EAJA limits fee awards to those fees and expenses "incurred" in civil actions. 28 U.S.C. § 2412(d)(1)(A) (1982). This being so, one can draw a reasonable inference that "the position referred to is that taken by the United States in the 'civil action' in which attorneys' fees were 'incurred'." See Broad Ave. Laundry & Tailoring v. United States, 693 F.2d 1387, 1390 (Fed. Cir. 1983). Another rationale for this "litigation position" posture was found in the language of the Act, that being, that because 5 U.S.C. § 504 focuses on the "position of the agency" as a party to the proceeding, 5 U.S.C. § 504(a)(1) (1982), the same standard should be applied in civil actions under 28 U.S.C. § 2412. See Tyler Business Servs., Inc. v. N.L.R.B., 697 F.2d at 75. One should note that the proposed 1984 amendments to the EAJA eliminated the language "as a party to the proceeding" found in 5 U.S.C. § 504(a)(1). See 130 CONG. REC. supra note 36, at H11479, as did the 1985 amendments to the Act. See 131 CONG. REC. supra note 4, at S9996.

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 the EAJA. Because parties do not "incur" fee liability when pro bono counsel are engaged, the government argued that this constituted a special circumstance (see supra note 26) that would make a fee award unjust, especially because the taxpayers are already funding most legal service organizations. The consensus among the courts, however, was that legal representation without charge, in and of itself, does not preclude an EAJA award. See Martin v. Heckler, 773 F.2d 1145, 1152 (11th Cir. 1985); Cornella v. Schweiker, 729 F.2d 978, 985-87 (8th Cir. 1984). Fees under the EAJA are not available, however, to pro se litigants who meet other criteria of eligibility. See Crooker v. Environmental Protection Agency, 763 F.2d 16, 17 (1st Cir. 1985).

53. In interpreting "position of the United States," some courts took the view that the position referred to was both the litigation position taken by the government and the pre-litigation conduct of the government which was the basis for the underlying civil or agency action. See Miller v. United States, 753 F.2d 270, 274 (3d Cir. 1985); Iowa Express Distribution, Inc. v. N.L.R.B., 739 F.2d 1305, 1309 (8th Cir. 1984); Rawlings v. Heckler, 725 F.2d 1192, 1195 (9th Cir. 1984).

One court justified this view because considering both the government's pre-litigation and litigation conduct furthered the Act's purpose of encouraging only government action which has a reasonable basis in law and fact. See Iowa Express Distribution, Inc. v. N.L.R.B., 739 F.2d at 1309. If only the litigation position of the United States was addressed, then the government had no accountability for agency conduct as long as trial counsel for the United States acted reasonably. Id., see also Rawlings v. Heckler, 725 F.2d at 1196. For a further discussion of judicial interpretation of "position of the United States" see, Equal Access to Justice Act, 84 COLUM. L. REV. 1089, 1102-11 (1984).

54. See 20 WEEKLY COMP. PRES. DOC., supra note 36, at 1814.
by amending the Act in 1985 to include clarifying language in subsection 2412(d) and section 504 specifically focusing on determinations of substantial justification, and by adding a definitional section containing definitions of "position of the United States" and "position of the agency." Specifically, the 1985 amendments add the following language to 28 U.S.C. § 2412(d)(1)(B):

Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.


"position of the United States" means, in addition 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; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

To further demonstrate that the government's position is not limited to its litigation stance, Congress, in a clarifying amendment, eliminated the language "as a party to the proceeding" in 5 U.S.C. § 504(a)(1), which addresses the matter of an agency's substantial justification.

The purported effect of the above changes is to clarify the Congressional intent that "position of the United States" is broader than the government's position as a party in the litigation, and includes government actions and omissions that form the basis of the civil action or adversary adjudication. The former assertion — that "position" means litigation

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55. See 131 Cong. Rec., supra note 4, at S9996.
56. Id.
57. The 1985 amendments to the Act included the following language at 5 U.S.C. § 504(a)(1):
Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.
See 131 Cong. Rec., supra note 4, at S9996.
58. Id.
59. Id. See supra note 52.
position — weakened the incentive for careful agency action because no matter what the agency conduct, the government could avoid any fee liability simply by adopting a reasonable position at trial.\textsuperscript{61} Congress felt that focusing on the government activity that formed the basis for the litigation was more consistent with the underlying purpose of the Act.\textsuperscript{62} Congress specifically stated, however, that the government is not liable for fees and costs that are caused by a party that unreasonably protracts proceedings.\textsuperscript{63}

While Congress intended to broaden the court’s inquiry, for EAJA purposes, beyond mere litigation arguments when evaluating the “position of the United States,” it carefully sought to define “position” in a way that would not require the court or adjudicative officer to engage in evidentiary or discovery proceedings.\textsuperscript{64} Congress was aware that the President was opposed to any kind of a fee and expense award scheme that would involve extensive discovery which would lengthen proceedings.\textsuperscript{65} Mindful of this, Congress specifically sought to clarify that courts should evaluate “position of the United States” based on facts the parties would necessarily air during the course of litigation or agency adjudication.\textsuperscript{66} When a proceeding is not litigated to a final decision by a court or adjudication officer, such as instances of settlement or dismissal, Congress envisioned that courts would look to the record\textsuperscript{67} to determine if the position of the United States was substantially justified.\textsuperscript{68}

Congress’ clarification of “position of the United States” proved acceptable to the President. The Act now strictly limits the court or agency fee inquiry to conduct at issue in the substantive proceedings and does not permit the court or agency to examine other governmental conduct not at issue in the principal litigation.\textsuperscript{69} Thus, Congress resolved the often litigated question of which position of the United States must be substan-

\begin{itemize}
\item \textsuperscript{62} The legislative history further notes that these clarifying amendments are not meant to preclude the government from asserting technical or jurisdictional defenses. See H.R. Rep. No. 99-120 supra note 44, at 11, reprinted in 1985 U.S. Code Cong. & Admin. News 132, 134.
\item \textsuperscript{63} See supra note 58 and accompanying text.
\item \textsuperscript{65} See supra note 38.
\item \textsuperscript{67} The record to which the courts would refer in such matters encompasses pleadings, affidavits and other supporting documents filed by the parties in both the case on the merits and the fact application. \textit{Id.}
\item \textsuperscript{68} \textit{Id.}
\item \textsuperscript{69} See 21 Weekly Comp. Pres. Doc., supra note 5, at 967.
\end{itemize}
tially justified before the government can avoid liability for fees. The ap­
propriate "position" to be evaluated is the position taken by the United States in the civil action, and the government's action or inaction that formed the basis of the civil action. A court or agency, in determining whether that position was substantially justified, however, must look only at the record made in the civil or administrative action for which a fee and expense award is sought.

B. Substantial Justification

The position of the United States taken in a matter must be substan­
tially justified for the government to avoid liability for fees under the Act. As noted above, the Act provides that the United States is liable for fee awards to eligible prevailing parties in civil matters unless the position of the United States was substantially justified or unless special circumstances would make an award of fees and expenses unjust.

Following the inception of the original EAJA, courts looked to the legis­lative history of the 1980 Act to interpret the meaning of substantial justification. The legislative history of the original Act stated that the "substantially justified" standard could be characterized as one of reasonableness. "Where the government can show that its case had a reason­
able basis both in law and fact, no award will be made." Most courts, when faced with interpreting and implementing the substantial justification standard, have applied the standard of reasonableness taken from the legislative history of the EAJA. Some courts, however, varied from this reasonableness standard. A few courts concluded that substantial justification required slightly more than reasonable justification because the Senate Judiciary Committee, when establishing the standard, refused to adopt an amendment to the EAJA changing the fee award language from "substantially justified" to "reasonably justified." Still other courts, apparently looking to the standard enunciated in Federal Rule of Civil Procedure 37, based their substantial justification decisions on whether or not the government's conduct was frivolous.

In amending the Act in 1985, Congress made no substantive changes relating to substantial justification. When evaluating governmental conduct for purposes of a fee award, Congress primarily focused attention on defining the government's "position." However, the legislative history of the 1985 amendment to the Act does discuss the issue of substantial justi-

that the following types of cases may indicate a lack of substantial justification: a judgment on the pleadings; a directed verdict; or dismissal on the same claim in a prior suit. H.R. Rep. No. 96-1418 supra note 8, at 11, reprinted in 1980 U.S. Code Cong. & Admin. News 4984, 4989-90. The legislative history goes on to stress, however, that the loss of a case by the government does not give rise to a presumption that substantial justification is lacking, nor does the standard require that the government demonstrate its decision to litigate was based on a substantial probability of prevailing. H.R. Rep. No. 96-1418 supra note 8, at 18, reprinted in 1980 U.S. Code Cong. & Admin. News 4984, 4990.

75. H.R. Rep. No. 96-1418 supra note 8, at 10, reprinted in 1980 U.S. Code Cong. & Admin. News 4984, 4989. The legislative history notes that in adversary adjudications 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. 96-1418 supra note 8, at 18, reprinted in 1980 U.S. Code Cong. & Admin. News 4984, 4997.

76. See e.g., Bazaldwa v. United States Immigration & Naturalization Serv., 776 F.2d 1266, 1269 (5th Cir. 1985); United States v. Yoffe, 775 F.2d 447, 450 (1st Cir. 1985); United States v. Community Bank & Trust Co., 768 F.2d 311, 314 (10th Cir. 1985); Cardwell v. Kurtz, 765 F.2d 776, 781 (9th Cir. 1985); Citizens Council v. Brinegan, 741 F.2d 584, 593 (3d Cir. 1984); Cornelia v. Schweiker, 741 F.2d 170, 171 (8th Cir. 1984); White v. United States, 740 F.2d 836, 839 (11th Cir. 1984); Amidon v. Lehman, 730 F.2d 949, 952 (4th Cir. 1984); Gava v. United States 669 F.2d 1367, 1370 (Fed. Cir. 1983); Wyandotte Savings Bank v. N.L.R.B., 682 F.2d 119, 120 (6th Cir. 1982).

77. See infra notes 77-78 and accompanying text.


80. See supra notes 55-68 and accompanying text.
EQUAL ACCESS TO JUSTICE

fication. The Act’s legislative history indicates that arbitrary and capri­
cious agency action or action that is not supported by substantive evi­
dence will only be substantially justified in extraordinary special
circumstances. Furthermore, the legislative history states that the sev­
eral courts that found substantial justification to mean “more than merely
reasonable” were correct. The legislative history to the 1985 EAJA
states that “[b]ecause in 1980 Congress rejected a standard of ‘reasona­
bly justified’ in favor of ‘substantially justified,’ the test must be more
than mere reasonableness.”

While the precise language of the 1985 amendments to the EAJA does
not guide courts regarding the standard to be used when evaluating sub­
stantial justification, the legislative history to the Act clearly indicates
that reasonableness is no longer the standard. Congress does not indicate,
however, how much more than reasonableness the government must show.
The legislative history gives no further guidance except to echo the previ­
ously followed premise that determinations of substantial justification
must be made on a case-by-case basis. While Congress has not estab­
lished precise standards, it is nevertheless clear that the actions of the
United States must rise above the level of reasonable conduct to avoid
liability for fees.

C. Party Eligibility

The underlying purpose of the EAJA is to allow individuals and small
businesses to vindicate their rights against unjustified governmental action
by removing overburdensome litigation expenses. As such, the EAJA, as
originally promulgated, established net worth and size limitations before a
party would be eligible for an EAJA award. Congress, in amending the

ADMIN. NEWS 132, 138. See also infra notes 137-42 and accompanying text.
NEWS 132, 138. See also supra note 77 and accompanying text.
83. Id. See Riddle v. Secretary of Health & Human Services, 817 F.2d 1238, 1244 (6th Cir.
1987) (upon review of statute and legislative history, government’s position must have more than
reasonable basis in law and fact to be substantially justified, it must be firmly grounded or solidly
based in law or fact).
NEWS 132, 138. It is reasoned that “the wide variety of factual contexts and legal issues
which make up government disputes” necessitate that substantial justification determinations be made
on a case-by-case basis. Id.
NEWS 4984.
and accompanying text.

The term “net worth” is not defined in the EAJA. However, the Committee Reports to the legisla-
Act in 1985, retained net worth and size eligibility requirements, but, with an apparent eye toward future economic realities, raised the net worth amount for party qualification from $1,000,000 to $2,000,000 for individuals, and from $5,000,000 to $7,000,000 for business entities. Congress did not modify the business size requirements, however, and retained the proviso that to be eligible under the Act, a business entity must have less than 500 employees at the time the action was commenced.

In addition to increasing the dollar net worth amount for defining party eligibility, Congress also modified and expanded its definition of an eligible business entity by including a unit of local government in the definition of party. Congress did so because it felt that small governmental units face the same problems and deterrents as small businesses when involved in disputes with the federal government. Congress intended the term "unit of local government" to be broadly construed, and to include entities such as cities, counties, villages, parishes, towns, townships, and any general or special purpose district organized under state law. However, such a unit of local government must have a net worth of less than $7,000,000 and have less than 500 employees before it can qualify for a fee award.


87. 28 U.S.C. § 2412(d)(2)(B) was amended to read: "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed . . . or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) may be a party regardless of the net worth of such organization or cooperative association. . . .

EAJA § 2, 99 Stat. 185. 5 U.S.C. § 504(b)(I)(B) was amended with substantially similar language. EAJA § 1, 99 Stat. 184.

88. Id.

89. Id.


1. Judicial Actions

In order for a litigant to receive fees and costs under the Act, he must apply for those fees and costs within thirty days of final judgment. A litigant's failure to file a timely fee application within thirty days of final judgment deprives a court of subject matter jurisdiction to make an award under the EAJA. In amending and clarifying the Act, Congress sought to resolve a judicial dispute as to whether the thirty-day time period commences upon the district court judgment or upon a terminating action by the court of last resort. In acknowledging the latter, Congress

ADMIN. NEWS 132, 143.

93. In applying for a fee award under the EAJA, the party 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). 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). The amount sought must be stated, along with an itemized statement setting forth the actual time expended and the rate at which fees and expenses are computed. 28 U.S.C. § 2412(d)(1)(B) and U.S.C. § 504(a)(2). The fact that the position of the United States was not substantially justified must also be alleged for an application to be complete. Id. The right created under the Act lies in the prevailing party, not the prevailing party's lawyer and thus the applicant for fees must be the requisite party for the court to have jurisdiction. See Prettyman v. Heckler, 577 F. Supp. 997, 999 (D. Mont. 1984). In civil actions, prevailing parties against the United States who meet certain eligibility requirements may apply for attorneys' fees and expenses by submitting an application to the court which entertained the action. 28 U.S.C. § 2412(d)(1)(B). A prevailing party seeking an award of fees and other expenses in an adversary adjudication must submit an application for an award to the agency. 5 U.S.C. § 504(a)(2). However, a party dissatisfied with the outcome of its application may obtain judicial review of the unsatisfactory award or denial of award 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. 5 U.S.C. § 504(c)(2). While the Act itself does not address the question of government opposition to a fee application, the legislative history indicates that if the government does not oppose the application for fees, Congress intends that the fee award should be granted. See S. REP. NO. 96-253 supra note 26, at 21; H.R. REP. NO. 96-1418 supra note 8, at 18, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4984, 4990. But see FED. R. CIV. P. 55(3). See also infra notes 156-58 and accompanying text.


95. The thirty-day time limitation is not a statute of limitations, but rather, a jurisdictional prerequisite to government liability for fees. See Clifton v. Heckler, 755 F.2d 1138, 1144 (5th Cir. 1985); Action on Smoking and Health v. Civil Aeronautics, 724 F.2d 211, 225 (D.C. Cir. 1984).

96. See McQuistion v. Marsh, 707 F.2d 1082, 1085 (9th Cir. 1983) (EAJA application untimely if filed more than thirty days after district court judgment); Massachusetts Union of Pub. Hous. Tenants v. Pierce, 577 F. Supp. 1499, 1502 (D.D.C. 1984) (EAJA application untimely since filed 86 days after entry of district court judgment).

97. The primary view taken by the courts when considering the point of final judgment that triggers the thirty-day fee application period was "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." McDonald v. Schweiker, 726 F.2d 311, 314-15 (7th Cir. 1983). See Russell v. National Mediation Bd., 764 F.2d 341, 346 (5th Cir. 1985); Feldpausch v. Heckler, 763 F.2d 229, 232 (6th Cir. 1985); Massachusetts Union of Pub. Hous. Tenants v. Pierce, 755 F.2d 177, 179
created 28 U.S.C. § 2412 (d) (2) (G), which states that “‘final judgment’ means a judgment that is final and not appealable, and includes an order of settlement.” The legislative history of subsection 2412(d)(2)(G) notes that the thirty-day time limitation contained within the Act “should not be used as a trap for the unwary resulting in the unwarranted denial of fees.”

If a settlement is reached that does not contain a fee award, the thirty days begins to run either on the date the proceeding was dismissed (by order or consent) or on the date the settlement was approved by an adjudicative officer. When the government does not appeal an adverse decision or dismisses a pending appeal, the thirty-day period commences upon either the expiration of the time for filing a notice of appeal or on the requisite date of the dismissal of the appeal.

The legislative history to the Act, as promulgated in 1980, noted that an EAJA award may be appropriate when a party has prevailed on an interim order that was central to the case. Congress appears to reinstate this position in the 1985 amendments. The legislative history to the amendments notes that in such instances fee petitions may be filed before “final judgment,” and, if a court determines that an award of interim fees is appropriate, the petition should be treated as if it were filed within the requisite thirty-day period.

2. Administrative Proceedings

Congress amended 5 U.S.C. § 504(a)(2) to specifically state that when the United States appeals an administrative decision on the merits, any fee determination with respect to the matter must await the outcome of the appeal. Congress further amended subsection 504(a)(3) to high-

(D.C. Cir. 1985).
98. EAJA §2, 99 Stat. 185
100. Id.
101. Id. The contolling date for purposes of an EAJA “final judgment” is the date a judgment is recorded, not the date a judgment is issued. See Berman v. Schweiker, 531 F. Supp. 1149, 1151-52 (N.D. Ill. 1982), aff’d, 713 F.2d 1290 (7th Cir. 1983).
104. The following language was added to 5 U.S.C. § 504(a)(2):
When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case
light that the agency makes the final decision in the award of fees in administrative proceedings. Congress added the following to the end of 5 U.S.C. § 504(a)(3): "The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section." Thus, administrative proceedings decisions are not final until they have been adopted by the agency.

E. Prevailing Party Status

To be eligible for a fee award under the EAJA, the party seeking the award must have prevailed against the United States in the civil litigation or in the agency adversary adjudication. After the Act's inception in 1981, courts expended considerable time and effort in determining what constituted a "prevailing" party. While judicial interpretation differed, courts generally followed the standard enunciated by the United States Supreme Court.

105. Id.
106. To be eligible for a fee award in a civil action under the EAJA, the party against whom one prevails must be the United States or any agency of the United States or any official of the United States acting in his official capacity. 28 U.S.C. § 2412(b) and (d)(2)(C). Fees will be denied under the Act if the party prevailed against is named individually rather than as an official of the United States acting in his official capacity. See Saxner v. Benson, 727 F.2d 669, 673 (7th Cir. 1984). Case law and legislative history support the premise that a party may be a prevailing party even if a case is settled or voluntarily dismissed. See Environmental Defense Fund v. Watt, 557 F. Supp. 36, 40 (E.D.N.Y. 1982) (plaintiffs prevailing parties in stipulated settlement because basic objectives of lawsuit were furthered even though specific relief requested was not achieved), aff'd, 722 F.2d 1081 (2nd Cir. 1983); H.R. REP. NO. 96-1418 supra note 8, at 11, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4989. However, courts must review settlement agreements to make sure that the party seeking fees was indeed in an adversarial position to the United States. For purposes of the EAJA, it is not enough that a party be opposite the United States in litigation, rather, they must hold adversarial roles. See Omaha Tribe v. Swanson, 736 F.2d 1218, 1221 (8th Cir. 1984) (plaintiff not prevailing party for purposes of EAJA because not in adversarial role to United States on 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 suggested nor obtained relief against federal defendants).

108. The EAJA'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. See H.R. REP. NO. 96-1418 supra note 8, at 11, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4989. 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.

Id. (citations omitted).
109. In Citizens for Responsible Resource Dev. v. Matt, 716 F.2d 915 (D.C. Cir. 1983), the court...
States Supreme Court in *Hensley v. Eckerhart*, and found that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Both the 1985 amendments to the EAJA and the legislative history thereof are silent as to the general definition of prevailing party, thus one can assume that Congress adopted the *Hensley* standard.

While not explicitly stating a general definition of prevailing party, the
1985 amendments to the Act do specifically address whether a party can prevail against the United States, for purposes of an EAJA award, in a condemnation action. In evaluating fee applications, some courts held that the original Act was inapplicable to eminent domain proceedings because a landowner in a condemnation suit was not a prevailing party against the United States. Other courts took the opposite view, finding that a party to an eminent domain proceeding could prevail against the United States if he litigated to secure payment of just compensation against an inadequate government offer.

In amending the EAJA, Congress resolved the dispute over condemnation actions by creating 28 U.S.C. § 2412(d)(2)(H), which provides:

"prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.

Congress made clear that litigated condemnation cases are covered by the EAJA and provided a standard for making prevailing party determinations: the party whose testimony in court is closest to the actual award prevails. In the event that the amount awarded is exactly between the asserted values of the parties, the benefit is given to the property owner.

112. In addition to the question of whether a party could prevail against the United States when the government is taking land in an eminent domain proceeding, courts also had to initially consider whether or not the EAJA was applicable to condemnation actions. This question stemmed from two origins. The first was the established precedent that prior to 1980, 28 U.S.C. § 2412 did not apply to condemnation cases. United States v. Bodcaw Co., 440 U.S. 202, 203 n.3 (1979). The second concerned the EAJA language that the Act was not intended to supersede any pre-existing fee-shifting statutes. Because 42 U.S.C. § 4654 provided for the award of landowner litigation expenses in condemnation proceedings in certain situations, there was some question as to whether application of the Act would supplement 28 U.S.C. § 4654 or whether it would impermissibly supersede it.


114. See United States v. 640 Acres of Land, 756 F.2d 842, 848 (11th Cir. 1985) (landowner prevails in condemnation case when government's pre-litigation offer is enhanced by more than trivial or inconsequential amount); United States v. 329.73 Acres of Land, 704 F.2d 800, 809 (5th Cir. 1983) (en banc) (land owner may be prevailing party when judgment is far more than government offered); United States v. 101.80 Acres of Land, 716 F.2d 714, 726 (9th Cir. 1983) (party may prevail against United States when government makes inadequate deposit and landowner must litigate).

115. EAJA § 2, 99 Stat. 185.

F. Social Security Cases

1. Applicability to Social Security cases

During the three-year period that the original EAJA was in effect, a number of questions arose regarding the applicability of the Act to Social Security cases. Initially, courts were faced with the question of whether a prevailing party in a case arising under the Social Security Act (SSA) was eligible for an EAJA fee award in light of the provision in the SSA that an attorney may be awarded a fee of up to 25% of the total past due benefits.\footnote{\textsuperscript{117}}

The EAJA provided that except as otherwise provided by statute, eligible prevailing parties are entitled to fee awards in certain circumstances. The legislative history to the EAJA indicates that the "[e]xcept as otherwise provided by statute" clause of 28 U.S.C. \textsection 2412 was intended to preserve the standards and 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".\footnote{\textsuperscript{118}} Thus, there was some question as to whether the fee language of the SSA precluded a fee award under the EAJA. The ultimate consensus of the courts was that the Social Security Act did not specifically provide for an award of attorneys' fees from the United States to a prevailing adverse party and therefore, the SSA did not preclude a court from applying the EAJA fee-shifting provisions in Social Security cases.\footnote{\textsuperscript{119}} Courts noted, however, that the EAJA only applied to "adver-

\textsuperscript{117} 42 U.S.C. \textsection 406(b) (1982) provides:

(1) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.


\textsuperscript{119} See Clifton v. Heckler, 755 F.2d 1138, 1144 n.9 (5th Cir. 1985); Woverton v. Heckler, 726 F.2d 580, 582 (9th Cir. 1984); Guthrie v. Schweiker, 718 F.2d 104, 107-08 (4th Cir. 1983); Watkins...
sary adjudications," that is, adjudications in which the United States is represented by counsel. Therefore, while the fee provision under the SSA was interpreted not to preclude an EAJA fee award, courts reasoned that EAJA fee awards in Social Security cases at the administrative level were inappropriate because administrative proceedings under the SSA are not adversary adjudications.

While addressing the 1985 amendments to the EAJA, Congress amended section 206 of the SSA and affirmed the above-stated interpretations of the courts. The amendments to the EAJA specifically provide that the fee language in the SSA does not prevent an award of fees and other expenses under 28 U.S.C. § 2412(d). Congress also affirmed, through legislative history, that fees are not available for matters associated with an administrative proceeding when the United States is not represented by counsel. Moreover, the legislative history explicitly provides that when the Secretary of Health and Human Services is represented by counsel before an administrative law judge, such proceedings fall within the scope of the EAJA.


Section 206 of the Social Security Act was amended to read:
(a) Except as provided in subsection (b), nothing in section 2412(d) of title 28, United States Code, as added by section 204(a) of this title, alters, modifies, repeals, invalidates, or supersedes any other provision of Federal law which authorizes an award of such fees and other expenses to any party other than the United States that prevails in any civil action brought by or against the United States.
(b) Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code, the claimant's attorney refunds to the claimant the amount of the smaller fee.

EAJA § 3, 99 Stat. 186.

123. Id.


125. Id. The legislative history notes that in certain geographic areas, the Secretary of Health & Human Services has implemented an experiment wherein the Secretary is represented by counsel at the hearing before the administrative law judge. Id. In such instances, the adjudication would be
Thus, Congress made clear that fee recovery may be sought under both the EAJA and the SSA. The amendments state, however, that should an attorney receive fees for the same work under both the EAJA and the SSA, the attorney must refund to his client the amount of the smaller fee. Congress did not intend for any attorney to receive both SSA and EAJA fees in such situations. Indeed, the EAJA award is intended to be used as a set-off to reduce the fee a claimant would otherwise owe his counsel. While fees may be sought under both authorizations, double payment would be inappropriate because it would deprive the party of the benefits intended by the EAJA.

2. Prevailing Party

The party seeking an EAJA award must be a prevailing party against the United States in civil litigation or in an adversary agency adjudication. Courts were divided under the original EAJA as to the status of parties when, following the denial of benefits, a district court remands a Social Security case to the Secretary for Health and Human Services for a designated reason. The legislative history to the 1980 Act clearly states, however, that an award of fees may be appropriate on interim orders that are central to the case.

Some courts took the position that a fee award was inappropriate in remand instances because a claim on the merits was not involved and benefits were not being awarded. Conversely, other courts determined deemed to be adversary for purposes of the EAJA. The legislative history further notes that a matter can become adversary during the adjudicative process whereupon it would become subject to the provisions of the Act.

126. See supra note 121.
127. Id. The legislative history reflects an awareness of the important function served by counsel in Social Security matters and allows the attorney to keep the larger fee. See H.R. REP. No. 99-120 supra note 44, at 20, reprinted in 1985 U.S. CODE CONG. & ADMIN. NEWS 132, 148-49.
128. Id.
129. Id.
130. See supra notes 105-10 and accompanying text.
131. See infra notes 133-34 and accompanying text.
132. See supra note 101 and accompanying text.
133. See McGill v. Secretary of Health & Human Servs., 712 F.2d 28, 31 (2d Cir. 1983)(plaintiff not prevailing party for purposes of EAJA on remand in social security case because she has not yet prevailed in claim on merits and successful remand only moved her one step closer to final determination); Childress v. Heckler, 616 F. Supp. 563, 565 (E.D. La. 1985) (plaintiff who obtains only an order of remand for further evidence has not succeeded on merits so as to be prevailing party); Wade v. Heckler, 587 F. Supp. 492, 493-94 (D. Del. 1984) (social security disability claimant is not prevailing party for purposes of EAJA unless and until benefits are 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 because he did not receive any part of benefits sought); Roman v. Schweiker, 559 F. Supp. 304, 305 (E.D.N.Y. 1983) (temporary success in having case remanded is
that fee awards were appropriate in these situations because such an order is sufficiently central to a case to justify a fee award.\textsuperscript{134} The legislative history to the 1985 amendment to the Act, while not absolutely precluding awards, indicates that courts will usually find an award of EAJA fees inappropriate upon a remand decision because the applicant is not yet a prevailing party, and therefore, is ineligible.\textsuperscript{135}

3. Substantial Justification

Another aspect of the amended EAJA that has significant impact on Social Security cases is interpreting the substantial justification of the government’s position.\textsuperscript{136} Upon review of a Social Security disability case, the court must affirm the administrative findings of the Secretary of Health and Human Services if it finds that the final agency determination

\begin{itemize}
\item[(i)] to cases to the extent that the remand was based on § 2(d) of the Social Security Disability Benefits Reform Act of 1984;
\item[(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
\item[(iii)] to cases in which, after the remand, the claimant has not prevailed with respect to the underlying issue.
\end{itemize}
is based upon substantial evidence. The consensus among the courts in making fee determinations under the original Act was that the government could lack substantial evidence and still have substantial justification for purposes of an EAJA fee award.

Courts, however, differed as to what quantum of evidence in support of the Secretary's position in a Social Security disability case was necessary for the government's position to be substantially justified. Some courts took the view that if there was some evidence to support the final decision of the Secretary, then the government's position was substantially justified. Other courts interpreted the substantial justification standard more stringently, weighing the evidence that was administratively considered and making an independent evaluation of its sufficiency to determine if the government's position met the test of substantial justification.

The legislative history to the EAJA amendments addresses the matter of substantial evidence directly, although briefly. In discussing substantial justification, the EAJA's legislative history notes that agency action found to be unsupported by substantial evidence "is virtually certain not to have been substantially justified under the Act. Only the most extraordinary

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137. 42 U.S.C. § 405(g). The United States Supreme Court defined substantial evidence in N.L.R.B. v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939) as follows:

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.

306 U.S. at 300 (citations omitted).


139. See Albrecht v. Heckler, 765 F.2d 914, 916 (9th Cir. 1985) (instance of some evidence supporting Secretary precluded finding Secretary's position was substantially unjustified); 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) (unusual for Secretary's decision to be supported by no evidence, therefore, 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 for ALJ's position precludes conclusion that position of Secretary not substantially justified).

140. See 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 because it relied on expert of consultative physician who did not examine 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 other medical evidence was overwhelmingly contradictory). See also Anderson v. Heckler, 756 F.2d 1011, 1013 (4th Cir. 1985) (standard for determining substantial justification for purposes of EAJA award is whether arguably substantial evidence supported Secretary's position, not whether there was some evidence in support).
special circumstances could permit such an action to be found to be substantially justified under the Act." Thus, the threshold for determining substantial justification when substantial evidence is lacking in a Social Security matter appears to be higher than previously interpreted by the courts. Extraordinary special circumstances must be revealed to prove substantial justification when the agency's determination under review is not based on substantial evidence.

G. United States Claims Court

The amendments to the EAJA defines "court" to include the United States Claims Court. Congress did so to clarify that the United States Claims Court has jurisdiction to make awards under the EAJA. Because the EAJA was enacted prior to the Federal Courts Improvement Act of 1982, courts questioned whether the United States Claims Court had jurisdiction under the EAJA. Under the Federal Courts Improvement Act of 1982, the trial court function of the Court of Claims was assumed by the United States Claims Court. The amendments to the EAJA establish that the United States Claims Court may make EAJA fee awards, as did its predecessor, the Court of Claims.

H. Agency Boards of Contract Appeals

Prior to the 1985 amendment to the Act, courts questioned whether Agency Boards of Contract Appeals had jurisdiction to award fees in otherwise appropriate matters against the government. The general consensus among the courts was that such boards did not have jurisdiction to make fee awards. Because the Contracts Dispute Act of 1978 pro-

142. See supra notes 138-40 and accompanying text.
146. Appellate courts contended that matters commenced in the United States Court of Claims prior to the Federal courts Improvement Act of 1982 were properly considered by the United States Claims Court and the United States Court of Appeals of the Federal Circuit for purposes of an EAJA award. See Morris Mechanical Enters., Inc. v. United States, 728 F. 2d 497, 498 (Fed. Cir. 1984); Bailey v. United States, 721 F.2d 357, 359 (Fed. Cir. 1983); Ellis v. United States, 711 F.2d 1571, 1574-75 (Fed. Cir. 1983).
147. See supra note 145, 96 Stat. 57-58.
148. See supra note 144 and accompanying text.
149. In Fidelity Const. Co. v. United States, 700 F.2d 1379 (Fed.Cir. 1983), the court determined that the EAJA did not authorize Boards of Contract Appeals to award fees and expenses against the
vided that a government contractor could bring a contract dispute before either an Agency Board or the Court of Claims (now United States Claims Court), the availability of EAJA fees in one forum and not the other served as a disincentive to pursue the remedies available before the Agency Boards.

In amending the EAJA in 1985, Congress explicitly subjected proceedings before Agency Boards of Contract Appeals to the Act. The Amendment defined "civil action brought by or against the United States" to include appeals from contract dispute clause decisions. In addition, the amendments incorporate appeals from decisions before Agency Boards of Contract Appeals within the definition of "adversary adjudication." Thus the amendments to the Act strive to maintain the balance of alternative remedies that are presently available to aggrieved government contractors found in the Contract Disputes Act of 1978.

I. Appeals of Fee Determinations

The 1985 amendments to the EAJA enunciate broader standards for the appeal of administrative level fee award determinations. Under the EAJA as promulgated in 1980, non-government parties faced "abuse of discretion" as the standard of review when bringing an appeal of an EAJA fee determination. The amended Act, however, eases this considerably by setting the standard of review in fee appeals as that which is not supported by "substantial evidence," based upon the record of the agency.

United States because such awards were not expressly authorized by Congress with specific statutory language. Id. at 1387.

153. Id.
156. See supra notes 152-55 and accompanying text.
157. See infra note 158 and accompanying text.
158. As originally promulgated, 5 U.S.C. § 504(c)(2) provided:
    A party dissatisfied with the fee determination made under subsection (a) may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, it may modify the determination only if it finds that the failure to make an award, or the calculation of the amount of the award, was an abuse of discretion.
159. The amendments to the EAJA reflect the following change at 5 U.S.C. § 504
While the amendment to section 504(c)(2) substantially broadens the ability to appeal fee award decisions for parties opposing the federal government, the new legislation specifically precludes the United States from appealing the fee award decision of an adjudicative officer. Even though the government may not seek redress from a fee award made by an agency under the Act, the United States is not precluded from appealing a fee determination made in a civil action pursuant to 28 U.S.C. § 2412(d).

J. Interest

In vetoing the proposed amendments to the EAJA in 1984, the President specifically objected to the provisions dealing with the payment of interest. Because the interest payment provisions of the proposed 1984 amendments put lawyers who received EAJA fee awards in a more favorable position than other individuals awaiting payment from the government, the President was opposed to the proposed change. Mindful of the President's objections to the previous legislative proposal, Congress added 28 U.S.C. § 2412(f), which provides that when a fee award is affirmed after an appeal by the government, interest will run from the date of the award through the date proceeding affirmance, and shall be computed according to the general interest provision for money judgments in civil cases.
K. Pre-October 1, 1981 Services

Under the EAJA as originally promulgated, an action had to be pending on October 1, 1981 before an otherwise eligible party could come within the purview of the Act. In making fee determinations under the Act, courts were faced with the issue of whether fees could be applied retroactively for work performed prior to the inception of the Act. In reviewing this matter, most courts held that work performed prior to October 1, 1981 was entitled to compensation under the Act. The 1985 amendments to the EAJA explicitly confirmed this position.

L. Retroactivity

Both the President and Congress expressed strong commitments to the policies underlying fee legislation of the type embodied in the EAJA. Thus, in enacting the 1985 amendments to the Act, Congress included a retroactivity provision. Specifically, the 1985 amendments to the EAJA reauthorize the Act and are applicable to all cases pending on or commenced on or after August 5, 1985, the day the President signed the legislation into law. The amended version of the Act is also retroactively applicable to cases pending on or commenced on or after the date of the enactment of the Act.
applicable to any case commenced on or after October 1, 1984, the date the sunset provision to the original Act was triggered. However, for cases commenced on or after October 1, 1984 and resolved prior to August 5, 1985, the fee application for an EAJA award must have been filed by September 4, 1985.

IV. Conclusion

The amended EAJA enables individuals and small businesses to pursue their rights against unreasonable federal government action without being deterred by overburdensome legal expenses. In modifying, reinstating, and retroactively applying the EAJA, Congress made the recovery of fees and expenses available in almost all administrative and judicial proceedings involving the federal government to otherwise eligible prevailing parties. The new law appears to have broadened the scope of the EAJA by affirmatively enlarging the Act's coverage. Specifically, the 1985 amendments to the Act expand the definition of "position of the United States" by including within that definition the governmental act or omission on which the lawsuit is based. The premise of substantial justification is also broadened, in that under the new law the government must show that its position was more than merely reasonable for a finding of substantial justification to lie. Along with this expansion, however, the amendments limit the underlying determination of whether the government's position was substantially justified to the actual record of the lawsuit at hand.

The new amendments to the Act clarify and modify the EAJA in many ways. The amendments to the EAJA define final judgment as a judgment that is final and not appealable, and increase the net worth party eligibility ceiling for a fee award to $2,000,000 for individuals and $7,000,000 for business entities. The new law also explicitly states that both the United

170. The amendments to the Act provide as follows:

The amendments made by this Act shall apply to any case commenced on or after October 1, 1984, and finally disposed of before the date of the enactment of this Act, except that in any such case, the 30-day period referred to in section 504(a)(2) of Title 5, United States Code, or section 2412(d)(1)(B) of Title 28, United States Code, as the case may be, shall be deemed to commence on the date of the enactment of this Act.


171. Id. The amendments to the Act also contain language to the effect that the EAJA amendments that relate to matters before the Board of Contract Appeals are applicable to cases pending or commenced after October 1, 1981. See EAJA § 7, 99 Stat. 183, 186 (1985). The rationale for this type of provision was based on equitable concerns, in that such retroactivity was necessary because the original Act was improperly construed to exclude matters before the Board of Contract Appeals from the ambit of the EAJA. See H.R. Rep. No. 99-120, supra note 44, at 21, reprinted in 1985 U.S. CODE CONG. & ADMIN. NEWS 132, 150. See also supra notes 149-55 and accompanying text.
States Claims Court and Agency Boards of Contract Appeals have jurisdiction to make EAJA fee awards. Additionally, the amendments recognize certain parties in eminent domain proceedings as prevailing parties under the Act. The amended EAJA eases the standard of review for appeals of fee determinations in administrative matters to one of "substantial evidence" and, where a non-government party prevails on a fee appeal in a civil action, a provision for interim interest exists.

Social Security cases are also significantly impacted by the new Act. Parties in Social Security actions are eligible for fee awards notwithstanding the provisions for fees in the Social Security Act. Parties that successfully obtain remand in Social Security cases, however, generally are not prevailing parties. Furthermore, should a court determine that an administrative decision is not supported by substantial evidence, then extraordinary special circumstances must exist for the government's position to be considered substantially justified so as to avoid fee liability.

Through the 1985 amendments to the EAJA, the President and Congress have revealed a commitment to the policies that underlie this type of fee award legislation. Realizing the need to check government activity while providing individuals and small businesses access to the courts, the law makers have expanded rather than contracted the Act's coverage. The EAJA as amended is a significant piece of legislation which should help to deter unreasonable government conduct and provide the public with greater access to the judicial system.