The Award of Attorneys' Fees Under the Equal Access to Justice Act

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I. INTRODUCTION

The Equal Access to Justice Act (EAJA or the “Act”) enacted October 1, 1981, provides for the award of attorney’s fees in certain suits involving the United States government. The EAJA was passed in response to a congressional finding that certain parties, particularly small businesses and individual businessmen, were deterred from pursuing their rights in opposition to unreasonable government action because of the expense involved.

The Act has two profound impacts on present law. First, it establishes a general statutory authorization for the award of attorney’s fees in actions against the federal government where the government’s position is not substantially justified.

Although many statutes have previously penetrated the veil of government immunity, the EAJA provides for the award of “fees and other expenses.” As defined in the Act this phrase includes “reasonable expenses of expert witnesses, the reasonable cost of any study necessary for the case, and reasonable attorney or agent fees.” The limit on attorney’s fees is $75.00 per hour unless the agency or court determines that an increase in the cost of living or a special factor justifies a higher fee.

2. Id. § 208, 94 Stat. 2325, 2330 (1980).
4. EAJA, Pub. L. No. 96-481 § 202(a), 94 Stat. 2325 (1980); see H.R. REP. No. 1418, 96th Cong., 2d Sess. 10, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4984, 4988 (The award of attorney’s fees was created primarily for “those individuals for whom cost may be a deterrent to vindicating their rights.”).
nity, none has done so on such a grand scale. Second, the Act allows courts to award attorney’s fees against the government to the same degree that it may grant fees against other parties. Thus, the government becomes liable under the bad faith, common fund, and common benefit exceptions to the general American rule of nonrecovery.

This note briefly discusses the background of the EAJA and examines the debates prior to its passage, The Model Rules of the Administrative Conference of the United States ("Model Rules"), and case law in order to pinpoint and resolve problems in the Act’s interpretation. Because the Act is bifurcated and applies to both civil and administrative cases, the discussion of eligible proceedings examines the civil and administrative contexts separately; the section discussing eligible parties, however, looks at both contexts simultaneously. The Model Rules, promulgated to provide guidelines for agency implementation of the Act, are frequently relied on in these two sections. The note proceeds with a definition of a “prevailing party,” using standards established under other fee award statutes that contain a similar requirement. Finally, the note concludes with an analysis of the “substantially justified” standard based upon case law and the Act’s legislative history. The goal of this endeavor is to


10. Id.

11. Id.

12. See infra notes 15-18 and accompanying text.


establish guidelines for both practitioners and courts to determine which proceedings and parties are eligible as well as the appropriate standard for making an award under the EAJA.

II. BACKGROUND

Under the American rule, litigants in American courts generally are not awarded attorney's fees as part of their relief. The common law, however, recognized two exceptions to this general prohibition against fee shifting: the bad faith exclusion and the common fund or common benefit exclusion. Where a party's position in litigation can be characterized as vexatious, wanton or oppressive, the opposing party may recover fees under the bad faith exception. The common benefit or common fund exception applies where a prevailing litigant has conferred a benefit upon a class of persons. A common example of this is the benefit received by all shareholders in a corporation when an individual shareholder successfully pursues an action in the name of that corporation. When such a benefit is conferred, the court can award the successful litigant its attorney's fees and deduct the amount, pro rata, from the damage awards made to the benefitting parties. The fee-shifting operates to spread the costs proportionally among the beneficiaries.

These common law exceptions did not apply to the federal government prior to the enactment of the EAJA. Many courts, however, awarded fees against the government in accordance with the

15. This is in contrast to the English or European Rule where attorney's fees are awarded to the winning party. The rationale underlying the English rule is that fees are an expense of litigation and should be borne by the losing party. See generally Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-71 (1975); Derfner, The True "American Rule": Drafting Fee Legislation in the Public Interest, 2 West. New Eng. L. Rev. 251 (1979); Note, Attorney Fees: Exceptions to the American Rule, 25 Drake L. Rev. 717 (1976).

16. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975); Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962). For an example of the bad faith exception to the award of attorney's fees see Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963). The defendant refused, evaded and obstructed the plaintiff's desire to transfer and thereby desegregate the defendant's school. The defendant based its position on the plaintiff's alleged failure to complete the transfer forms correctly. The court characterized this position as specious and without merit. Id. at 498.


"private attorney general theory," which allowed plaintiffs to recover attorney's fees when litigation resulted in the enforcement of an important societal right. In *Alyeska Pipeline Services Co. v. Wilderness Society,* however, the Supreme Court struck down the private attorney general theory as a violation of the rule that attorney's fees could not be awarded against the government absent specific statutory authorization.

In response, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, allowing a prevailing party to recover fees from the government in a civil rights suit.

The EAJA represents the next major step in the erosion of the federal government's immunity from the payment of the opposing party's attorney's fees. The Act amends the United States Code, codifies the common law exceptions, and supplies a general authorization to award attorney's fees against the government in civil cases. While the codification of the common law exceptions is permanent, the broader general authorization is, in effect, an experiment, since it is subject to automatic repeal. The Act also adds a new section to the Code that provides for potential governmental liability for fees in administrative proceedings.

These statutory changes were enacted to encourage litigants to

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21. Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts,* 122 U. Pa. L. Rev. 636, 669 (1974). The effectuation of an important societal right was the preeminent factor in determining whether the private attorney general theory was applicable. See *id.* at 666-70.
23. 421 U.S. at 267-68.
28. The codification of the common law exceptions is contained in 28 U.S.C. § 2412(b) (Supp. IV 1980) and is unaffected by the repeal provision. Pub. L. No. 96-481 § 204(c), 94 Stat. 2325, 2329 (1980) (repealing subsection (d) of § 2412 in 1984). The permanency of this section reflects Congress' belief that, at a minimum, the federal government should be held to the same standards as other parties. It should be noted that there are no financial eligibility requirements under this section. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 17, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4996.
vindicate their rights, to make litigation between the government and business a fair fight, and to make agencies more accountable for their actions. The EAJA seeks to effectuate these goals by reimbursing prevailing parties for litigation costs with funds provided by the government.

III. PROCEEDINGS COVERED

The Administrative Context.—The EAJA applies to adversarial adjudications governed by section 554 of Title 5 of the United States Code, where the position of the United States is represented. Ratemaking and licensing procedures are explicitly excluded from the scope of the Act. Section 554 provides for procedural safeguards in certain hearings. It, and consequently the EAJA, applies to adjudications “required by statute to be determined on the record after opportunity for an agency hearing.”

The phrase “required by statute” has two meanings, both of which have been the subject of litigation. First, the phrase has been interpreted to mean those situations where constitutional, i.e., due process, requirements mandate a hearing on the record. The precise articulation of this threshold has been elusive, but it is well established that where an interest protected by due process is challenged, a trial-type hearing must be convened. Second, specific

34. The EAJA provides that the attorney's fees award should be made by the agency over which the successful party prevails, if an appropriation is made to the agency for this purpose. 5 U.S.C. § 504(d)(1) (Supp IV 1980); 28 U.S.C. § 2412(d)(4)(A) (Supp. IV 1980). If an appropriation has not been made, then payment will be made through the General Accounting Office as per 28 U.S.C. §§ 2414, 2517 (1976).
38. Id.
43. 2 K.C. Davis, supra note 42, § 12:2. The definition of what constitutes a sufficient interest to warrant due process protection is beyond the scope of this article. For examples of
statutes may require a formal hearing. Frequently, however, a statute will not indicate explicitly the type of hearing (formal or informal) required. As a result, the courts often make the determination regarding the applicability of section 554.44 This reliance on judicial decisions makes it difficult to predict which administrative proceedings will be eligible for the EAJA. To ease this task the Model Rules require each agency to list categories of cases to which the Act applies.46 If a particular proceeding is not classified, the Rules recommend that the agency determine eligibility before the proceeding begins and provide notice of this determination to the parties.46

In compliance with these suggestions, many agencies have published lists of proceedings covered by the EAJA.47 A party who disagrees with an agency's classification can either argue before the agency or appeal to a federal district court.48 Despite the categorization of specific proceedings by the agencies, there are still agency actions where the coverage of the EAJA is uncertain. For example, where eligible and ineligible actions are joined, the Model Rules state that only the fees and expenses of the covered actions should be awarded.49 If there is an overlap, the Rules suggest that the determination be left to the adjudicative officer, who is in the best position to calculate an appropriate disbursement.50

While the Act explicitly applies to those hearings required by statute it is unclear whether it applies to formal hearings to which an agency voluntarily submits. It is unwise to allow these discretionary

what has been held sufficient see, for example, Goss v. Lopez, 419 U.S. 565 (1975) (suspension from school for ten days invokes constitutional right to be heard); Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963) (denial of admission to the Bar is sufficient to invoke constitutional protections).

45. 46 Fed. Reg. 32,912 § 0.103(a) (1981).
46. Id. at § 0.103(b).
50. Id. at 32,901.
proceedings to fall within the scope of the Act, since this might discourage agencies from offering the formal proceedings. The Model Rules avoid this potential hardship by exempting such proceedings from the Act.\textsuperscript{51} This exception comports with the Act's purpose of enhancing the availability of review procedures to an aggrieved party.

There is a second requirement for an agency proceeding to be eligible under the EAJA—the position of the United States must be represented.\textsuperscript{52} The mere presence of government counsel is not enough—participation is required. The Model Rules define an eligible proceeding as one where an agency's position is "presented by an attorney . . . who enters an appearance \textit{and} participates in the proceeding."\textsuperscript{53} The government's position, therefore, must be \textit{advocated} for the proceeding to be eligible for the award of attorney's fees.\textsuperscript{54}

\textit{The Civil Context}—The EAJA applies to all civil actions except torts (although the Act does apply to constitutional torts)\textsuperscript{55} and actions that fall within other fee award statutes.\textsuperscript{56} The determination of the eligibility of a civil action, therefore, focuses on the nature of a plaintiff's cause of action. Accordingly, courts should use the same modes of analysis that are employed in other situations where characterization of the cause of action is important.\textsuperscript{57} Where the nature of a cause of action can be determined from the complaint,\textsuperscript{58} the court should inform the litigating party of its decision regarding the eligibility of the action at the outset. To characterize the cause of action the court may also consider the focus of the case as it develops during the litigation.\textsuperscript{59} In this situation, the court should inform the litigating parties of its eligibility decision at the earliest appropriate time.

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item 46 Fed. Reg. 32,912 § 0.103(a) (1981) (emphasis added).
\item For example, in an administrative proceeding before the Social Security Administration (SSA) where a representative of the United States is present but remains neutral, the EAJA is inapplicable. \textit{See} H.R. Rep. No. 1418, 96th Cong., 2d Sess. 12, \textit{reprinted in} 1980 U.S. Code Cong. & Ad. News 4984, 4991.
\item For example, a court may need to determine whether a cause of action is in contract or tort for purposes of a statute of limitations or conflicts of law.
\item \textit{See}, e.g., General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1215-16 (8th Cir.), \textit{cert. denied}, 414 U.S. 1162 (1974); Stewart v. Shanahan, 277 F.2d 233, 236 (8th Cir. 1960).
\item \textit{Cf.} Wolfe v. Continental Cas. Co., 647 F.2d 705, 709 (6th Cir. 1981) (This mode of analysis may be useful when there are multiple causes of action).
\end{enumerate}
\end{footnotesize}
ate juncture.

The applicability of the EAJA to tax cases presents some interesting problems. The statute's failure to explicitly authorize coverage of tax actions fosters an arbitrary rule: Tax cases tried before a federal district or appellate court are eligible for the award of attorney's fees, while actions tried in Tax Court are not. This disparate treatment results from the legislators' failure to explicitly authorize the inclusion of the Tax Court in the coverage of the EAJA.

The Tax Court is not eligible under the Act as an administrative body, nor is it eligible in the civil context. In McQuiston v. Commissioner, the Tax Court concluded that it is not covered by the EAJA as a civil proceeding because it does not fit under the rubric of a "court" as defined by that Act. This result is contradicted by the legislative history of the EAJA, which expressly states that the internal revenue laws are intended to be covered. Nonetheless, the position of the McQuiston court is well supported and only legislative action could rectify the incongruity. Congress has recognized this disparity and there have been numerous at-

61. See McQuiston v. Commissioner, 78 T.C. 807 (1982).
62. The legislative history, however, clearly states that cases involving the internal revenue laws are intended to be covered. H.R. REP. NO. 1418, 96th Cong., 2d Sess. 19, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4984, 4998.
64. 78 T.C. 807 (1982).
65. Id. at 811. According to the court in McQuiston the controlling definition of an eligible court is provided by 28 U.S.C. § 451 (Supp. IV 1980). The McQuiston court relied on Sharon v. Commissioner, 66 T.C. 515 (1976), aff'd, 591 F.2d 1273 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979), where the Tax Court held that it was not statutorily authorized to award costs. The Sharon holding was based on the language of 28 U.S.C. § 2412 (1976) which authorized the taxing of costs against the government pursuant to 28 U.S.C. § 1920 (1976). § 1920 provides that "[a] judge or clerk of any court of the United States may tax costs." Id. The definition of "court of the United States" is, in turn, supplied by 28 U.S.C. § 451 (1976):

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts . . . including the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the judges of which are entitled to hold office during good behavior. Id. The Tax Court in Sharon held that it was not included in this definition. Sharon v. Commissioner, 66 T.C. at 533-34. Using this decision as precedent, the Court in McQuiston has excluded Tax Courts from the EAJA.
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tempts to expand the coverage of the EAJA to encompass the Tax Court. As of this writing none of these efforts has reached fruition.

IV. PARTIES COVERED

If the proceeding is covered, the EAJA employs a three-tier analysis—using the same criteria for both civil and administrative suits—to determine whether a litigant is eligible for an award. First, any business, organization, or association must have less than 500 employees. Second, the party’s net worth must be less than $1,000,000 if the party is an individual, or less than $5,000,000 if the party is a business. Tax exempt organizations and cooperative associations are not subject to the net worth requirement. These two criteria must be satisfied as of the time the action is initiated. Third, a litigant must be the prevailing party to be eligible for an award of attorney’s fees.

These criteria are intended to limit the application of the EAJA to those parties who otherwise might be deterred from pursuing review because of the high cost of litigation. The net worth parameters were the subject of much controversy during the enactment of the bill, because critics considered them to be too broad.

75. The bill was criticized because some thought that the financial parameters would make non-needy parties eligible. See Hearings on the Equal Access to Justice Act, supra note 13, at 79 (statement of Mary Frances Derfner); id. at 91 (statement of Nancy Drabble). But see id. at 36 (statement of Sen. Sawyer). See also Equal Access to Courts: Hearings on S.2354 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 32-33 (1978) (statement of Paul Nejelski, Department of Justice) (the Equal Access to Courts Act employed the same financial parameters as the EAJA).
Net Worth.—Net worth of a party is calculated by subtracting total liabilities from total assets.\textsuperscript{78} The House Report suggests that assets be valued at the cost of acquisition rather than replacement value.\textsuperscript{79} The Model Rules interpreted this as a manifestation of congressional intent to permit low valuation, and accordingly provide for the use of the lower of either fair market (replacement) value or acquisition cost.\textsuperscript{80} This choice contemplates a situation where an asset has decreased in value and fair market value remains lower than acquisition cost.\textsuperscript{81} The Model Rules point out that where a party obviously is eligible the means of evaluation will be inapposite, but in a close case agencies, and presumably the courts as well,\textsuperscript{82} should take into account the reference to acquisition cost, found in the EAJA’s legislative history.\textsuperscript{83}

The valuation of a business with affiliates calls for special treatment. The net worth of all affiliates—defined as any entity in which the applicant has a majority interest\textsuperscript{84}—is added to that of the applicant to determine eligibility\textsuperscript{85} unless the adjudicative officer concludes that the aggregation would be unjust or contrary to the purposes of the Act.\textsuperscript{86}

The eligibility of a sole owner of an unincorporated business is determined by the nature of the issues on which the litigant prevails.\textsuperscript{87} If the issues arise out of his personal business, the litigant will be subject to the $1,000,000 threshold; if they arise from his commercial dealings, the $5,000,000 net worth interface will apply.\textsuperscript{88} In the latter case, both personal and business assets will be cumulated to determine his eligibility.\textsuperscript{89}

Participation by representative parties increases the difficulty of

\textsuperscript{79} See id.
\textsuperscript{81} Id.
\textsuperscript{82} No counterpart of the Model Rules, which apply only to administrative proceedings, has been promulgated for the civil context. This note suggests that the guidelines for net worth and employee quantitation contained in the Model Rules be utilized in the civil context.
\textsuperscript{83} H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15, reprinted in 1980 U.S. Code Cong. & Ad. News 4984, 4994 ("In determining the value of assets, the cost of acquisition rather than fair market value should be used.").
\textsuperscript{84} 46 Fed. Reg. 32,912 § 0.104(f) (1981).
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. § 0.104(d).
\textsuperscript{88} See id.
\textsuperscript{89} See id. § 0.104(b)(2).
implementing the financial criteria. The treatment of trade associations raises some interesting questions. The Model Rules state that "[a]n applicant that participates in a proceeding primarily on behalf of one or more persons or entities that would be ineligible is not itself eligible for an award."\footnote{90} Rather than aggregating the net worth of all members, the Rules advocate individual consideration of each member;\footnote{91} associations with ineligible members are not eligible for the Act.\footnote{92} If the association represents a discrete group of members, as would be the case, for example, where only a few members of the National Jewelers Association were affected by an OSHA regulation, then only those businesses' net worth should be aggregated.\footnote{93} Whether this methodology applies to groups such as lobbying organizations or merchant's associations is unanswered. Naturally, trade associations or any other representative group may act on their own behalf—for example, as employers. If so, their eligibility should be measured irrespective of their membership.\footnote{94}

The documentation required of an applicant may be submitted in any manner that fully discloses net worth,\footnote{95} including a tax or loan form. The adjudicative officer or judge may also require additional information if an initial application is incomplete.\footnote{96}

Employees.—The second tier of the eligibility test excludes any business, organization, or cooperative that has more than 500 employees.\footnote{97} The Model Rules define employees as "all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis."\footnote{98} This definition, which incorporates the concept of control, may include employees of contractors.\footnote{99} Bec-
cause temporary or seasonal workers are excluded,\textsuperscript{100} businesses that consistently hire temporary or seasonal workers, such as farms, seemingly are given an unfair unadvantage. A better rule would include these workers on a pro-rated basis.\textsuperscript{101}

As in the calculation of net worth, the amount of control that an applicant exerts over a subsidiary determines whether the employees of the applicant and the subsidiary will be aggregated. If the related business is an affiliate—again defined as an organization in which the applicant has greater than 50\% control—all of its employees are included.\textsuperscript{102} If an applicant has a non-majority holding, none of the affiliate’s employees are counted.\textsuperscript{103}

To assist parties confronted with the application of these difficult criteria, the Model Rules request agencies that frequently deal with problematic situations to issue guidelines that clarify the manner in which the total number of employees is calculated.\textsuperscript{104} Similar guidelines are not available in the civil context, and courts might be wise to utilize the relevant agency guidelines to aid in their determination regarding civil proceedings.

\textit{Prevailing Parties.}—The third qualification requires the applicant to be the prevailing party.\textsuperscript{105} The House Report states that the interpretation of this phrase should follow case law established under other fee award statutes.\textsuperscript{106} Under the Civil Rights Attorney’s Fees Awards Act,\textsuperscript{107} for example, eligibility as a prevailing party does not require complete success.\textsuperscript{108} The test articulated by the First Circuit in \textit{Nadeau v. Helgemoe},\textsuperscript{109} and subsequently followed by most other

\begin{itemize}
\item \textsuperscript{100.} \textit{Id.}
\item \textsuperscript{101.} This suggested analysis may go beyond the statutory mandate of determining the number of employees at the time the suit is initiated. By excluding seasonal and temporary workers, the Model Rules allow for inequitable manipulation by applicants who may file a suit at a time when their employee total is deceptively low. One solution might be for a judge to deny recovery of fees to an otherwise eligible party under the special circumstances exception. \textit{See infra} text accompanying notes 179-85.
\item \textsuperscript{102.} 46 Fed. Reg. 32,902-03 (1981).
\item \textsuperscript{103.} \textit{Id.}
\item \textsuperscript{104.} \textit{Id.} at 32,902.
\item \textsuperscript{107.} 42 U.S.C. § 1988 (Supp. IV 1980).
\item \textsuperscript{109.} 581 F.2d 275 (1st Cir. 1978).
\end{itemize}
courts,\textsuperscript{110} defines a prevailing party as one who has succeeded on any significant issue in litigation, thus achieving some of the benefit it sought.\textsuperscript{111} For example, in \textit{Gagne v. Maher},\textsuperscript{112} the Supreme Court affirmed the prevailing party status of a litigant who, while not prevailing on every claim, had achieved substantially all the relief it had originally sought.\textsuperscript{113}

A party will be deemed prevailing, regardless of the procedural mechanism used to achieve victory, if he has vindicated some of his rights.\textsuperscript{114} Thus, a prevailing party is one who has obtained relief through a settlement,\textsuperscript{115} a consent decree,\textsuperscript{116} a preliminary injunction,\textsuperscript{117} or through state administrative proceedings.\textsuperscript{118}

Although the method of success is unimportant, the litigant's action must be causally related to the relief obtained. In \textit{Chicano Police Officer's Association v. Stover},\textsuperscript{119} the court held that "plaintiff's conduct, as a practical matter, must have played a significant role in achieving the objective."\textsuperscript{120} The litigation itself must be the catalyst for the change in the agency's action or position. Similarly, the causal relation between the litigation and the desired result must exist in a civil litigation. Unlike the Civil Rights Attorney's Fees Awards Act,\textsuperscript{121} which imposes a higher burden on defendants than plaintiffs,\textsuperscript{122} the EAJA does not differentiate between the two. There-

\textsuperscript{110} Almost every circuit has recognized the \textit{Nadeau} holding. See, e.g., \textit{Gagne v. Maher}, 594 F.2d 336 (2d Cir. 1979), \textit{aff'd}, 448 U.S. 122 (1980); Bagby v. Besl, 606 F.2d 411 (4th Cir. 1979); Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979); Ramos v. Koebig, 638 F.2d 838 (5th Cir. 1981); Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979), \textit{cert. denied}, 447 U.S. 911 (1980); Dawson v. Pastrick, 600 F.2d 70 (7th Cir. 1979); Kimbrough v. Arkansas Activities Ass'n, 574 F.2d 423 (8th Cir. 1978); Sethy v. Alameda County Water District, 602 F.2d 894 (9th Cir. 1979), \textit{cert. denied}, 444 U.S. 1046 (1980); Chicano Police Officer's Ass'n v. Stover, 624 F.2d 127 (10th Cir. 1980).

\textsuperscript{111} \textit{Nadeau} v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1979).

\textsuperscript{112} 448 U.S. 122 (1980).

\textsuperscript{113} \textit{Id.} at 130.

\textsuperscript{114} See Larson, \textit{supra} note 108, at 313.

\textsuperscript{115} \textit{Chicano Police Officer's Ass'n v. Stover}, 624 F.2d 127, 130-31 (10th Cir. 1980).


\textsuperscript{119} 624 F.2d 127 (10th Cir. 1980).

\textsuperscript{120} \textit{Id.} at 131.


\textsuperscript{122} The \textit{Civil Rights Attorney's Fees Awards Act of 1976} allows prevailing party-plaintiffs to recover fees as a matter of course. See, e.g., \textit{Newman v. Piggie Park Enter.}, 390 U.S. 400, 401-02 (1968) (\textit{Newman} dealt with the award of attorney's fees under the predecessor to the \textit{Civil Rights Attorney's Fees Awards Act}). Prevailing party-defendants, however, are required to show frivolous, unreasonable or groundless action on the plaintiff's part in order to
fore, any eligible party who has achieved some success is likely to be deemed prevailing.

V. Substantially Justified

If a party meets the economic criteria of the Act, attorney's fees will be awarded “unless the position of [the government] was substantially justified or that special circumstances make an award unjust.” This standard represents the burden of proof that the government must bear to avoid liability under the statute. The standard has three component parts: (1) “position of the government;” (2) “substantially justified;” and (3) “special circumstances.”

“Position of the Government.”—Neither the legislative history of the EAJA nor the statute itself articulates which position of the government must be justified. The House Report and Senate Hearings on the Act are rife with ambiguous references, some pointing to the conclusion that only the litigation position need be justified, and others indicating that the drafters intended that the government justify its underlying actions. As a result of the ambiguity, courts have been unable to agree on the subject. Some courts have concluded that only the government's position in litigation need be scrupulous to recover attorney's fees. See, e.g., Christianburg Garment Co. v. EEOC, 434 U.S. 412, 417-22 (1978) (Christianburg dealt with the award of attorney's fees under the predecessor to the Civil Rights Attorney's Fees Awards Act).

123. See supra text accompanying notes 73-104.
124. See supra text accompanying notes 105-21.
126. See, e.g., H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4984, 4989 (“Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made”) (emphasis added); id. at 11, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4984, 4989 (“certain types of case dispositions may indicate that the Government action was not substantially justified”) (emphasis added); id. at 22, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4984, 5011 (certain dispositions indicate that the “Government was not substantially justified in pursuing the litigation”).
127. See, e.g., H.R. Rep. No. 1418, 96th Cong., 2d Sess. 14, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4984, 4993 (the standard “presses the agency to address the problem of abusive and harassing regulatory practices.”); Hearings on the Equal Access to Justice Act, supra note 13, at 25 (“[M]any citizens today have no effective remedy against unreasonable government regulation.”) (statement of Sen. DeConcini); id. (“We must give citizens at least a fighting chance to challenge the unreasonable exercise of governmental power”) (statement of Sen. DeConcini); id. at 16 (“Individuals and small businesses are in far too many cases forced to knuckle under to regulations even though they have a direct and substantial impact because they cannot afford the adjudication process.”) (statement of Sen. Domenici).
tintized,\textsuperscript{128} while others have held that both the underlying actions and the litigation position must be examined.\textsuperscript{129} The contradictory results apparently are irreconcilable, with each camp able to muster support for its position. The underlying policy of the Act—to encourage litigants to pursue their rights and to discourage the government from pursuing unbased claims—supports the view that the government should justify both the litigation position and the underlying action. Otherwise the government could continue to promulgate and enforce arbitrary regulations only to capitate when served with a complaint. Under the interpretation that requires justification of only the litigation provision, this scenario would constitute justified behavior because the government did nothing unreasonable in the litigation. The beleaguered party would still be harassed but would be unable to collect attorney’s fees.\textsuperscript{131} Such a result would be clearly contrary to the spirit and purposes of the Act.\textsuperscript{132}

"\textit{Substantially Justified.}"—The phrase “substantially justified” was adopted\textsuperscript{133} from the language of Rule 37 of the Federal Rules of Civil Procedure\textsuperscript{134} and was chosen to place the burden of justifying its position on the government.\textsuperscript{135} It is a test of reasonableness in fact

\begin{thebibliography}{99}
\bibitem{128} See, e.g., \textit{S \& H Riggers \& Erectors, Inc. v. Occupational Safety \& Health Rev. Comm.}, 672 F.2d 426, 430 (5th Cir. 1982) (focusing on the government’s justification in litigation); \textit{Operating Eng’rs Local Union No. 3 v. Bohn}, 541 F. Supp. 486, 493-95 (D. Utah 1982) (relying on the purpose of the Act in determining that only the litigation position of the government need be justified); \textit{Alspach v. District Director of Internal Revenue}, 527 F. Supp. 225, 228 (D. Md. 1981) (stating that the “question is a close one”).


\bibitem{131} See, e.g., \textit{Operating Eng’rs Local Union No. 3 v. Bohn}, 541 F. Supp. 486, 495 (D. Utah 1982). The court held that the government did not have to pay attorney’s fees because its litigation position, capitulating nine days after the service of the complaint, was justified.

\bibitem{132} \textit{See supra} notes 31-33 and accompanying text.


\bibitem{134} \textit{Fed. R. Civ. P. 37(a)(4).}


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and law. While a clear definition of reasonableness is difficult, the endeavor is aided by examining the House Report, the Hearings prior to the passage of the EAJA, and cases decided under Rule 37. The cases that have interpreted the EAJA have employed these sources in their attempt to comprehend the meaning of "substantially justified."

The House Report, by way of example, states that certain case dispositions may indicate that the government's position was not substantially justified. These include a judgment on the pleadings, a directed verdict, or where a prior suit on the same claim had been dismissed. In addition, the House Conference Report suggests that where there is a significant difference between the government's original complaint and the amount or content of a negotiated settlement the government's position may not be substantially justified. Thus, the House Conference Report distinguishes between cases that go through a full trial and those that are ended by a facesaving agreement on behalf of the government. These examples, while useful, do not raise a presumption that the government acted unreasonably; nor does the mere loss of a suit raise a presumption against governmental reasonableness. The standard does not require the government to have had a "substantial probability of prevailing" although logically the government should demonstrate that it had some chance of prevailing.

Another factor that clarifies the substantially justified standard

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136. Id. at 13, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4984, 4992.
141. Id.
142. Id.
145. Id. at 22, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 5003, 5011.
148. Id.
is the length of the proceeding.¹⁴⁹ The House Report specifically indicates that where a party has submitted to a lengthy administrative procedure and then additionally resorts to judicial review to vindicate his rights, the government must make a "strong showing" that its position was substantially justified.¹⁵⁰ This additional burden should apply to any lengthy administrative or judicial procedure regardless of whether appellate review of the procedure is sought. Implementing the "strong showing" requirement in any lengthy action aligns with one of the purposes of the Act, i.e., requiring the government to account for time and money spent on litigation. The more stringent showing apparently rests on the premise that the greater the expenditure of government funds, the greater the need to make agencies more accountable.

The House Report contains another formulation that is useful in ascertaining the meaning of substantially justified: "The standard and burden of proof adopted . . . represents an acceptable middle ground between an automatic award of fees and the restrictive standard [of requiring a showing of arbitrary and frivolous action]."¹⁵¹ This statement evolved from the various proposals that the House and Senate Committees considered and rejected. The Equal Access to Courts Act¹⁵² would have authorized an automatic award to prevailing parties¹⁵³ but this authorization was considered to be too lenient.¹⁵⁴ House Resolution 5342¹⁵⁵ applied a more stringent standard that would have required the government to show that its position was "clearly justified" to avoid an award of attorney's fees.¹⁵⁶ House Resolution 7208¹⁵⁷ advocated that awards be made only if a court or

¹⁵⁰ Id.
¹⁵⁴ Hearings on the Equal Access to Courts Act, supra note 138, at 31 (testimony of Paul Nejelski, Department of Justice).
¹⁵⁷ H.R. 7208, 96th Cong., 2d Sess. (1980), reprinted in Hearings on the Equal Ac-
agency found that the government's position was "arbitrary, frivolous, unreasonable or groundless, or that the [government] continued to proceed after its position clearly became so."\textsuperscript{158} In addition, the Senate Committee considered a proposal to adopt the language "reasonably justified."\textsuperscript{159} All of these proposals were discarded in favor of substantially justified, and the selection of this phrase becomes significant when one considers the large number of alternative standards available to the drafters of the EAJA. The definition that can be gleaned from the rejected proposals is that a substantially justified position lies somewhere between those that are reasonably justified and those that are clearly justified. The distinction between reasonably and substantially justified has frequently been utilized in the cases construing the EAJA.\textsuperscript{160} The use of such an abstract definition, however, is not very helpful in ascertaining the meaning of substantially justified and a more practical formulation can be derived from the cases decided under Rule 37(a)(4).\textsuperscript{161}

These cases enumerate examples of judicial application of an identically worded standard as that contained in the EAJA. Rule 37(a)(4) states that the court shall award attorney's fees for a motion compelling discovery unless the opposing party's position is substantially justified.\textsuperscript{162} The Committee Notes indicate that a party's position is substantially justified when there is a genuine dispute.\textsuperscript{163}

In \textit{Palma v. Lake Waukomis Development Co.},\textsuperscript{164} the defendant refused to answer certain questions at a deposition based on a claim of privilege involving intercorporate communication. The defendant cited two cases to support its proposition, which the court found to be inapplicable.\textsuperscript{165} Since no other support was mustered for the defendant's position the court held that the defendant was not substantially justified in refusing to answer the interrogatory.\textsuperscript{166} Accordingly, the court awarded the plaintiff the expenses, including attorney's fees, incurred in obtaining the motion to compel

\textsuperscript{159} \textit{See} \textit{Hearings on the Equal Access to Justice Act, supra} note 13, at 37-38.
\textsuperscript{160} \textit{See} cases cited \textit{supra} notes 128-29.
\textsuperscript{161} \textit{Fed. R. Civ. P. 37(a)(4)}.
\textsuperscript{162} \textit{Id}.
\textsuperscript{163} \textit{Id}.
\textsuperscript{164} 48 F.R.D. 366 (W.D. Mo. 1970).
\textsuperscript{165} \textit{Id. at} 368.
\textsuperscript{166} \textit{Id. at} 369.
In Equal Employment Opportunity Commission v. Los Alamos Constructors, Inc., the EEOC refused to answer interrogatories, claiming governmental immunity and informer's privilege. The court characterized the claim of informer's privilege as a "red herring." More significantly, the court held the EEOC's claim of governmental immunity to be contrary to a long line of authority. In dicta, the court indicated that, had it been able to do so, it would have awarded attorney's fees to Los Alamos. It would appear that under Rule 37(a)(4) a substantially justified position must at least be one that is consonant with prior case law.

Some of the cases construing the EAJA have adopted this guideline in determining whether the government's position was substantially justified. In United States for Heydt v. Citizens State Bank, the court indicated that the plaintiff's conformance with prior decisions in deciding to issue a summons constituted substantial justification. Alternatively, in Berman v. Schweiker, where the government's position was not based on prior case law, the court characterized its position as being "erroneous as a matter of law." While a great deal of attention and legislative effort went into selecting the standard for making an award of attorney's fees, the legislators' efforts are being undermined. Legislative history suggests that the determinative issue was meant to be the substantial justification of the government's position. The ambiguity of the statute, however, has allowed a different question to become dispositive: Must the government's underlying actions meet the criterion—or only its litigation position? It is the judicial answer to this question

167. Id.
169. Id. at 1383.
170. Id. For the discussion of the judicial precedents on the claim of governmental immunity see id. at 1375-83.
171. In 1974, Fed. R. Civ. P. 37(f) exempted the government from the award of attorney's fees; 37(f) has since been repealed by the EAJA. Pub. L. No. 96-481 § 25(a), 94 Stat. 2325, 2330 (1980).
172. 668 F.2d 444 (8th Cir. 1982).
173. Id. at 448. See Citizens Coalition for Block Grant Compliance v. City of Euclid, 537 F. Supp. 422, 426 (N.D. Ohio 1982) (court found that HUD's initial opposition to the suit based on a standing argument was based on case law that was good precedent at the time the suit was initiated. An intervening decision by the Supreme Court altered the law; consequently HUD entered into a settlement agreement. The court held that HUD's original reliance on good case law constituted substantial justification).
175. Id. at 1154.
that has come to control; the cases holding that only the government's litigation position need be justified do not make an award of attorney's fees, while those concentrating on the government's underlying actions impose the liability of the EAJA. Although Congress did not intend the award of attorney's fees to hinge on this determination, the effect has been inconsequential as there has been a near even split of the courts on this issue.

Even in the event the court finds that the government was not substantially justified the government may not have to pay attorney's fees if the court finds that there are "special circumstances [that would] make an award unjust." "Special Circumstances."—This phrase, in effect, is a "safety valve" and has at least two purposes. First, it functions as a limit on the "chilling effect" that the EAJA could have on government enforcement efforts since novel, creative and credible methods of prosecution were not intended to be drawn into the purview of the Act. Second, the phrase also adopts the equitable considerations present in other fee award statutes that prevent the payment of attorney's fees, where, for example, the award-seeking party has unnecessarily protracted the controversy or otherwise has acted unreasonably in the litigation. The special circumstances exception also might be used to deny the benefits of the Act to any party that has manipulated data in order to bring itself within the eligibility requirements.

This safety valve is likely to be the cynosure of litigation as it creates broad judicial discretion. It should be noted, however, that the Civil Rights Attorney's Fees Awards Act of 1976 has been interpreted to contain a similar exception, although it has been invoked only once. The explicit incorporation of this exception into the EAJA, however, assures that its scope will assume a more promi-

176. Id. The court referred to its original decision, No. 80 C 2737 (N.D. Ill. Aug. 14, 1981), where it held that the Social Security Administration's position was contrary to numerous case decisions. The court granted a summary judgment to the plaintiffs.
177. See sources cited supra note 137.
180. Id.
181. Id.
182. Id. at 13, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4984, 4992.
nent role in litigation.

In summary, the EAJA requires the government to show that its position is substantially justified. A number of factors, including the type of case disposition, or the quality of the settlement, or the length of the proceeding may indicate the reasonableness of the government's position. In addition, the various proposals that were rejected and the cases decided under Rule 37 and the EAJA aid further in the definition of the standard.

CONCLUSION

The EAJA, by providing for the award of attorney's fees against the government, represents an ambitious effort by Congress to balance the litigational resources between the government and small businesses and individuals. To encourage parties to pursue their rights, the Act has both liberal eligibility requirements and an anti-government bias for awarding of attorney's fees. The recovery of attorney's fees is by no means certain and, in this sense, litigation against the government is a gamble, with the odds in favor of the private party. While a statute making mandatory awards of attorney's fees to prevailing parties might have provided a greater incentive to litigants, the conditional award of the EAJA is an effective compromise. This compromise will minimize the incidence of barratry that any fee award provision may promote, and will not subject the government to an inequitable burden. It remains to be seen whether this bias will encourage litigants to fight rather than comply with an unreasonable regulation or other government action.186

The effectuation of the secondary goal of the EAJA—curbing abusive agency action—is also in question. The imposition of, in effect, a sanction on the agencies by making them liable for awards charged against them is a circuitous method of relaying the message that Congress is dissatisfied with their enforcement efforts. Although this may prove to be a successful technique, a more direct statement of Congressional discontent with agency regulatory practices may have been more efficacious in correcting the situation.

Perhaps the greatest shortcoming of the EAJA is the lack of

186. One of the more perplexing aspects of the Act is its relative anonymity. Despite the noteworthiness of the statute relatively few actions have been initiated under it. In fact, the original congressional estimate on the cost of the Act was $92,000,000, H.R. Rep. No. 1418, 96th Cong., 2d Sess. 21, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4984, 5000, while the actual costs of the bill during the first nine months of its enactment were less than $1,000,000. Nat'l Law Journal, Oct. 18, 1982, at 8, col.2.
guidelines for implementing the Act into civil litigation. This oversight is particularly egregious in light of the comprehensive guidelines established for administrative proceedings. A further inadequacy is the failure to explicitly define the standards for which an award should be made. Nonetheless, the EAJA represents a major step toward reducing the vulnerability of individuals and businesses to unreasonable government attack by providing these entities with the means to fight back.

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