

The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)

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Repository Citation

Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 La. L. Rev. (1994)
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The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*

Gregory C. Sisk**

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* This is part one of a two-part article providing a survey and critical commentary on the provisions of and case law interpreting Subsection 2412(d) of the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). Part two of this article, which will be published in a future issue of the *Louisiana Law Review*, will address the standards for entitlement to a fee award under the EAJA, the measurement of a fee award, and the procedures for applying for a fee award. Hereinafter, citations to sections within part two of this article will be styled: *See generally infra* section ___, forthcoming.

** Associate Professor of Law, Drake University. I wish to thank those who generously contributed their time and expertise in reviewing an earlier draft of this article, including my Drake colleagues Martin Begleiter, Matthew Doré, and Daniel Bogart, Harold Krent at Chicago-Kent, and Jay Bybee at Louisiana State. Although the piece has profited from their thoughtful comments, the views expressed are my own and I am responsible for any errors that remain. I also want to recognize my research assistants and students who participated in this comprehensive study, including Lisa Smith for her compilation of a summary of cases, Alex Galyon for his contribution of ideas through an independent study project, and Donald McArthur for editorial assistance. Finally, I gratefully acknowledge Dean David Walker and the Board of Governors of the Drake University Law School Endowment Trust for the award of a research stipend that supported the completion of this project.

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I. INTRODUCTION, BACKGROUND, AND OVERVIEW

A. Introduction

In 1980, Congress embarked upon an experiment in "curbing excessive regulation and the unreasonable exercise of Government authority" by directing that attorney's fees be awarded in favor of private parties who resist unjustifiable government conduct in litigation.¹ The Equal Access to Justice Act (EAJA)² expanded the federal government's liability for awards of attorney's fees beyond the traditional realms of civil rights laws³ and open government laws,⁴ and broadly waived the sovereign immunity of the United States with respect to payment of attorney's fees in any civil action in which the position of the federal government is found to be without substantial justification.⁵ While Congress had previously enacted attorney's fee award statutes to encourage private enforcement of important statutory policies, the EAJA blazed a new path by adopting fee-shifting as an instrument to monitor government regulation and to deter unjustifiable government policies and enforcement actions.⁶

1. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4991 (explaining under this legislation "fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority"); S. Rep. No. 253, 96th Cong., 1st Sess. 7 (1979) (same).

2. The original EAJA was enacted in 1980, Act of Oct. 21, 1980, Pub. L. No. 96-481, 94 Stat. 2325 (1980), as an experimental program with a "sun-set" provision, under which the statute lapsed on October 1, 1984. *Id.* § 203, 94 Stat. at 2327. Congress re-enacted the EAJA, with some clarifying amendments, as a permanent statute in 1985. Equal Access to Justice Act, 5 U.S.C. § 504 (1988 & Supp. V 1993), 28 U.S.C. § 2412 (1988 & Supp. V 1993).

3. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1988 & Supp. V 1993).

4. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1988).

5. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988).

6. *See* Risa L. Lieberwitz, *Attorneys' Fees, the NLRB, and the Equal Access to Justice Act: From Bad to Worse*, 2 Hofstra Lab. L.J. 1, 43 (1984) (arguing the EAJA effects "a complete upheaval of the historic theoretical justification for fee shifting legislation" because, while "Congress ha[s] previously authorized fee-shifting in order to encourage private enforcement of important statutory public policies," the EAJA "for the first time will be using fee shifting to deter governmental enforcement of public policies"); Susan G. Mezey & Susan M. Olson, *Fee Shifting and Public Policy: The Equal Access to Justice Act*, 77 Judicature 13, 13 (1993) (stating the EAJA "represents the intersection of two independent trends that developed during the late 1970s: the deregulation of business and the use of statutes shifting the costs of litigation to further public policy").

Over the decade leading up to the EAJA, the federal government had gradually lowered the shield of sovereign immunity and made itself increasingly amenable to awards of attorney's fees to those who succeed in specific types of litigation against the government.⁷ This "trend against immunity from fee awards reached its crescendo with the enactment of the Equal Access to Justice Act, which puts the government on equal footing with private defendants in terms of fee-shifting and further makes the government liable in fees whenever its position is not substantially justified."⁸ In 1985, Congress "institutionalized" the experiment⁹ by re-enacting the EAJA as a permanent statute.¹⁰

Fifteen years after its original enactment, the EAJA remains a constant focus of judicial attention, with new appellate decisions interpreting its provisions and applying its standards appearing in nearly every volume of the Federal Reporter. Although recent commentators have suggested the EAJA has had only qualified success in encouraging injured parties to seek redress against government wrongdoing and in deterring government misconduct,¹¹ the provision is likely to remain on the statute books for the foreseeable future. There is a powerful appeal to the principle that the government should be held responsible for all litigation costs, including attorney's fees, attributable to its wrongful conduct. The EAJA has become a bright star fixed in the firmament of fee-shifting statutes. As evidenced by its ubiquitous presence in the federal case reporters during the last decade, Section 2412 of Title 28 has become one of the most heavily and intensely litigated sections of the United States Code.

Several articles have addressed particular aspects of the EAJA, provided a general overview of the statute, or explored the practical consequences of its fee-shifting rules and limitations. This two-part article is a comprehensive and detailed survey of each significant operative provision of the statute concerning court awards of attorney's fees based upon unreasonable government conduct. This article provides a critique and synthesis of the burgeoning body of case law

7. See generally Gregory C. Sisk, *A Primer on Awards of Attorney's Fees Against the Federal Government*, 25 Ariz. St. L.J. 733, 735-36 (1993).

8. *Id.* at 735. See also Barry S. Rutcofsky, Note, *The Award of Attorney's Fees Under the Equal Access to Justice Act*, 11 Hofstra L. Rev. 307, 307-08 (1982) ("Although many statutes have previously penetrated the veil of government immunity, none has done so on such a grand scale.").

9. See Claire Elizabeth Winold, *Institutionalizing an Experiment: The Extension of the Equal Access to Justice Act—Questions Resolved, Questions Remaining*, 14 Fla. St. U. L. Rev. 925 (1987).

10. See *supra* note 2. See generally Louise L. Hill, *Equal Access to Justice Act—Paving the Way for Legislative Change*, 36 Case W. Res. L. Rev. 50 (1985) (discussing the "tumultuous" three-year trial period of the original EAJA and the evolution of the legislation to re-enact and clarify the EAJA in 1985).

11. See Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act—A Qualified Success*, 11 Yale L. & Pol'y Rev. 458 (1993) (concluding the EAJA has been of modest value in providing incentive for injured parties to challenge government action and in deterring government misconduct, and proposing the Act be revised to eliminate the substantial justification standard in favor of automatic fee-shifting at least in individual benefits cases); Mezey & Olson, *supra* note 6 (concluding the EAJA has been an ineffective way to encourage small businesses to challenge unreasonable government regulators and has been used mainly by Social Security disability plaintiffs).

that has grown up around the statute. In the tradition of the treatise, this article is designed as both a reference work on an important statute and a prescription for interpretation of the statute in a manner that comports with the purpose and language of the Equal Access to Justice Act.

B. Background on the Equal Access to Justice Act

1. Legislative History of the EAJA

The Equal Access to Justice Act was originally enacted as a rider to a small business assistance bill, reflecting the concern of Congress that small businesses were being subjected to arbitrary regulation by federal administrators and "that small business are the target of agency action precisely because they do not have the resources to fully litigate the issue."¹² However, although the statute imposed certain eligibility limits based upon net worth and employment size, Congress extended the benefits of the EAJA to nearly all citizens or entities contesting unreasonable exercises of government authority.¹³ The EAJA, as originally enacted, contained a sunset provision allowing a three-year trial period,¹⁴ and the Act expired by its own terms on October 1, 1984. Although Congress had passed various amendments to the Act in October of 1984,¹⁵ the bill was vetoed by President Reagan on November 8, 1984.¹⁶ In 1985, Congress passed new legislation, including changes responsive to the President's objections, that reinstated the EAJA retroactively to October 1, 1984.¹⁷ On August 5, 1985, President Reagan signed the bill.¹⁸ The EAJA, as amended, was re-enacted as a permanent statute.¹⁹

12. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4988; S. Rep. No. 253, 96th Cong., 1st Sess. 7 (1979).

13. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B) (1988) (defining "party" for purposes of EAJA Subsection (d)).

14. Act of Oct. 21, 1980, Pub. L. No. 96-481, § 204(c), 94 Stat. 2325, 2329 (lapsed).

15. 130 Cong. Rec. H12171-74 (daily ed. Oct. 11, 1984).

16. Memorandum of Disapproval of H.R. 5479, 20 Wkly. Comp. Pres. Doc. 1814-15 (Nov. 8, 1984). Although expressing general approval of the EAJA, the President objected to certain specific provisions of the bill. *Id.* Section IV of this article, forthcoming, will discuss the meaning of the "position of the United States," which must be substantially justified under the EAJA, and the definition of this term in the re-enactment legislation.

17. 131 Cong. Rec. S9991-98 (daily ed. July 24, 1985). See also H.R. Rep. No. 120, 99th Cong., 1st Sess. (1985), reprinted in 1985 U.S.C.C.A.N. 132. As discussed in section IV of this article, forthcoming, although Congress' revisions were only partially responsive to the President's objections, he signed the bill.

18. Extension of the Equal Access to Justice Act, 21 Wkly. Comp. Pres. Doc. 966-67 (Aug. 5, 1985).

19. Equal Access to Justice Act, Pub. L. No. 99-80, 99 Stat. 183 (codified as amended at 5 U.S.C. § 504 (1988 & Supp. V 1993) and 28 U.S.C. § 2412 (1988 & Supp. V 1993)).

2. Summary of the EAJA

The Equal Access to Justice Act actually contains three fee-shifting provisions; two provide for awards in court proceedings and one applies to certain administrative proceedings.

The first fee-shifting provision in the statute, Subsection 2412(b), subjects the United States to liability for attorney's fees "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."²⁰ Under the "American Rule" on attorney's fees, each party in litigation must bear its own legal expenses unless there is an express statutory authorization for shifting fees or one of the narrow common-law exceptions to the rule applies.²¹ Subsection (b) makes the federal government liable for attorney's fees under common-law and statutory fee-shifting exceptions to the American Rule on the same basis as any other party. In effect, the statute places the government on "equal footing" with private parties in terms of liability for attorney's fee awards.²² Subsection (b) waives the sovereign immunity of the federal government, but "does not create any new substantive rights to attorney's fee awards."²³ To collect a fee, the litigant must still identify another statute or common-law doctrine that provides an exception to the general bar on fee-shifting per the American Rule.²⁴

The second fee-shifting provision found in the EAJA, Subsection 2412(d),²⁵ is the focus of this article. Subsection (d) not only waives the sovereign immunity of the United States, but also creates a new basis for an award of attorney's fees beyond other common-law or statutory exceptions to the American Rule. Subsection (d) is broad in that it applies to most civil actions, but it is also limited in that it allows an attorney's fee award only when the government's position is found to be unreasonable.

Under Subsection (d), in addition to court costs,²⁶ the court must award attorney's fees to any party who meets specified eligibility qualifications

20. Equal Access to Justice Act, 28 U.S.C. § 2412(b) (1988).

21. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S. Ct. 1612, 1616 (1975). See generally Sisk, *supra* note 7, at 738-39.

22. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4987.

23. Sisk, *supra* note 7, at 784.

24. See generally *id.* at 783-88 (discussing EAJA Subsection (b)).

25. Equal Access to Justice Act, 28 U.S.C. § 2412(d) (1988 & Supp. V 1993).

26. In Subsection 2412(a), the EAJA provides court costs are available to the prevailing party in an action against the federal government, unless there is a statutory exception. Equal Access to Justice Act, 28 U.S.C. § 2412(a) (1988 & Supp. V 1993). In addition to attorney's fees, Subsection (d) of the EAJA provides for an award of "the reasonable expenses of expert witnesses" and "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." *Id.* § 2412(d)(2)(A) (1988). Although court costs are routinely available under Subsection (a), fees and other expenses may be awarded only if the position of the United States is found to be without substantial justification. *Id.* § 2412(d)(1)(A). The focus of this article is upon awards of attorney's fees.

(generally excluding wealthy individuals and large organizations)²⁷ and who prevails²⁸ in a non-tort civil action against the federal government,²⁹ “unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.”³⁰ In *Pierce v. Underwood*,³¹ the Supreme Court interpreted “substantially justified” to mean “justified in substance or in the main”—that is, justified to a degree that could satisfy a reasonable person.”³² Subsection (d) places a specific cap on the amount of permissible fee awards, directing that 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.”³³ An applicant for a fee under Subsection (d) must file an application for fees “within thirty days of final judgment in the action.”³⁴

Finally, a third fee-shifting provision created by the EAJA, which is separately codified,³⁵ authorizes a prevailing party in an “adversary adjudication” before an administrative agency to obtain an award for legal expenses in the administrative proceedings under the same terms as Subsection (d)—that is, when the government’s position is not substantially justified.³⁶ The statute defines an administrative proceeding as “adversarial” if it involves an adjudication under Section 554 of the Administrative Procedure Act in which the United States is represented by counsel or otherwise.³⁷ Although much of the discussion in this article is pertinent to the interpretation of EAJA Section 504,³⁸ this article is

27. *Id.* § 2412(d)(2)(B). *See generally infra* section III.B (discussing the nature of party eligibility).

28. *See generally infra* section III.A (discussing the prevailing party requirement for eligibility).

29. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988). *See generally infra* section II (discussing the scope of EAJA Subsection (d)).

30. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988). *See generally infra* section IV, forthcoming (discussing entitlement to an award, the substantial justification inquiry, and the special circumstances exception).

31. 487 U.S. 552, 108 S. Ct. 2541 (1988).

32. *Id.* at 565, 108 S. Ct. at 2550.

33. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A) (1988). *See generally infra* section V, forthcoming (discussing measurement of the fee award under EAJA Subsection (d), including cost-of-living increases and special factor enhancements).

34. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B) (1988). *See generally infra* section VI, forthcoming (discussing the procedures to petition for a fee award under EAJA Subsection (d)).

35. Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) (1988).

36. *Id.*

37. *Id.* § 504(b)(1)(C) (Supp. V 1993) (referring to 5 U.S.C. § 554 (1988)). *See generally* *Ardestani v. Immigration & Naturalization Serv.*, 502 U.S. 129, 112 S. Ct. 515, 519-21 (1991) (holding administrative deportation proceedings are not “adversary adjudications” for which fees may be awarded under EAJA Section 504 because such proceedings are not subject to or governed by the Administrative Procedure Act). *See also infra* section II.A.2 (discussing the general limitation of EAJA Subsection (d) to judicial proceedings and the limited exception for ancillary administrative proceedings).

38. Section 504 applies the same standard for awards of attorney’s fees at the administrative

limited in scope to an examination of Subsection (d) of EAJA Section 2412, which provides for attorney's fees in court proceedings.

3. Purposes of the EAJA

Through the Equal Access to Justice Act, "Congress presumably sought to achieve three inter-connected goals: to provide an incentive for private parties to contest government overreaching, to deter subsequent government wrongdoing, and to provide more complete compensation for citizens injured by government action."³⁹

First, Congress intended to "reduce[] the disparity in resources between individuals, small businesses, and other organizations with limited resources and the federal government,"⁴⁰ thereby "encourag[ing] relatively impecunious private parties to challenge unreasonable or oppressive government behavior by relieving such parties of the fear of incurring large litigation expenses."⁴¹ The preamble to the EAJA expresses this purpose "to diminish the deterrent effect of seeking review of, or defending against, governmental action."⁴² As one court colorfully put it, by "discourag[ing] the federal government from using its superior litigating resources unreasonably," the EAJA is "an 'anti-bully' law."⁴³

Second, Congress sought to deter wrongful behavior by federal officials and regulators, "anticipat[ing] that the prospect of paying sizable awards of attorneys' fees when they overstepped their authority and were challenged in court would induce administrators to behave more responsibly in the future."⁴⁴ By encouraging judicial challenges to administrative decisions, Congress also hoped to refine the administration of federal law and "help assure that administrative decisions reflect informed deliberation."⁴⁵ At the same time, however, Congress did not

level and contains a nearly identical definition of "party."

39. Krent, *supra* note 11, at 458. See also *Spencer v. NLRB*, 712 F.2d 539, 549-50 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936, 104 S. Ct. 1908 (1984) (outlining goals of the EAJA).

40. H.R. Rep. No. 120, 99th Cong., 1st Sess. 4 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 133. See also *Commissioner v. Jean*, 496 U.S. 154, 163, 110 S. Ct. 2316, 2321 (1990) ("[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions.").

41. *Spencer*, 712 F.2d at 549 (citing statute and legislative history). See generally Krent, *supra* note 11, at 463-67 (analyzing whether the EAJA has encouraged private parties to challenge governmental action by equalizing litigation resources); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651, 663-65 (discussing as a general theory of fee-shifting the prospect that reimbursement of fees will strengthen the position of a weaker party opposing a party with superior resources).

42. Act of Oct. 21, 1980, Pub. L. No. 96-481, § 202(c)(1), 94 Stat. 2325, 2325 (lapsed).

43. *Battles Farm Co. v. Pierce*, 806 F.2d 1098, 1101 (D.C. Cir. 1986), *vacated*, 487 U.S. 1229, 108 S. Ct. 2890 (1988).

44. *Spencer*, 712 F.2d at 550.

45. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4991. See also *Commissioner v. Jean*, 496 U.S. 154, 165 n.14, 110 S. Ct. 2316, 2322 n.14 (1990) (quoting favorably from the committee report accompanying the 1980 EAJA legislation and stating

want the prospect of paying attorney's fees to "chill public officials charged with enforcing the law from vigorously discharging their responsibilities."⁴⁶ Accordingly, rather than prescribing mandatory fee awards against the government whenever it lost a case, the EAJA adopts the "middle ground" approach of authorizing a fee when the government's position is found to be without substantial justification.⁴⁷ The "substantial justification" standard "balances the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights."⁴⁸

Finally, although the legislative history focuses upon the first two purposes as primary, Congress also undoubtedly intended to compensate parties who had been wronged by the government, thus allowing "those injured by the government to receive complete compensation for their injuries, including litigation expense."⁴⁹ Thus, the EAJA serves "a salutary function in creating the appearance of fairness" by providing more complete compensation to those who have suffered a breach of the public trust through the arbitrary and unreasonable use of government power.⁵⁰

these reports "reflect the dual concerns of access for individuals and improvement of Government policies"). See generally Krent, *supra* note 11, at 467-76 (discussing the purpose of the EAJA in encouraging monitoring of administrative decisions and deterring governmental wrongdoing, but suggesting the EAJA has had little success in promoting this purpose); Rowe, *supra* note 41, at 660-61 (discussing the award of attorney's fees as "punishment for unjustified or undesirable behavior").

46. H.R. Rep. No. 120, 99th Cong., 1st Sess. 10 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 139.

47. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 14 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4993. See also Krent, *supra* note 11, at 507 (stating the EAJA "is the product of an uneasy compromise" between the desire "to encourage meritorious litigation against the government" and "deter government wrongdoing" and the wish "to prevent overdetering vigorous government policymaking and vigilant enforcement initiatives," a compromise reflected in the statute's "safeguards . . . most notably the substantial justification standard").

48. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4984-4989.

49. Krent, *supra* note 11, at 477 (criticizing the EAJA as a compensation mechanism because of its narrow reach). See also 131 Cong. Rec. S9998 (daily ed. July 24, 1985):

And there is not a Member of this body who has not found on his or her doorstep citizens who have been wronged by their own Government. At worst, a career or a life may be ruined; at best, the individual has been wrongly accused and has had to incur great expense to clear his name Equal access to justice made the promise of justice to these people who had gone to great expense to challenge agency wrong, or who had successfully defended themselves against wrongful agency action.

(statements of Sen. Bumpers). See also Rowe, *supra* note 41, at 657 ("A party subjected to a baseless suit, forced to run up legal fees to overcome a groundless defense, or subjected to unjustified tactics in litigation, has an appealing claim for recompense of legal fees he should not have had to spend . . ."). See generally Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 Va. L. Rev. 2039, 2069-75 (1993) (discussing the compensation rationale for fee-shifting statutes).

50. Krent, *supra* note 11, at 478. See also *Berman v. Schweiker*, 713 F.2d 1290, 1295 (7th Cir. 1983) ("[I]t has been suggested that the EAJA was intended to compensate parties for expenses incurred in defending against unreasonable government action—a purpose which arguably is distinct

C. Overview

Although the Supreme Court has wishfully admonished that attorney's fee requests should "not result in a second major litigation" overshadowing the merits of the case,⁵¹ neither should the courts give "short shrift" to fee calculations given the important legal rights and the substantial financial stakes at issue in fee-shifting proceedings.⁵² Especially in the EAJA context, because of the weighty role Congress envisioned for this statute in encouraging citizen resistance to unreasonable governmental actions and deterring government officials from administrative wrongdoing, the courts have a significant responsibility in faithfully applying the provisions of the statute in accordance with those legislative purposes. Moreover, the complexity of the EAJA, with its limitations on scope, specific definitions of eligible parties, and special standards for entitlement to and measurement of a fee award—all designed to implement the particular legislative purposes behind the statute—demands and requires careful legal analysis.

Precisely because of the significant policy and financial issues lurking behind every EAJA dispute, this statute has been the situs of closely fought litigation battles. The economic lure of a fee award has caused litigants to test every limitation and exception in the statute, from the statutory rules on eligibility of parties⁵³ to the \$75-per-hour cap on attorney rates.⁵⁴ On the other side, the government, wishing to avoid a judicial determination that its position was not substantially justified, has insisted upon a narrow scope for the act and vigorously opposed nearly every significant EAJA application.⁵⁵ As a consequence, virtually every paragraph and phrase in the statute has been the subject of litigation and nearly every word has been parsed by the courts in reported decisions. In this respect, the EAJA and its accompanying case law present a fascinating model of statutory interpretation in action.

from mitigating the deterrent effect of litigating.”).

51. Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 1941 (1983).

52. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 57 (1991) (“There is no immediately obvious reason why the courts should give short shrift to fee calculations as compared with other judicial responsibilities. At issue in the fee calculation are legal rights no less important than other rights stemming from the disposition of the case on the merits or from the damages calculation.”).

53. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B) (1988) (defining “party” as individuals and entities with limited net worth and employment size).

54. See *id.* § 2412(d)(2)(A) (providing “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”).

55. See *id.* § 2412(d)(1)(A) (directing the court to award fees “unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust”).

Although the discussion that follows may serve as background information for those who wish to conduct a case study of principles of statutory interpretation, most readers are expected to use this article as a comprehensive reference work on Subsection (d) of the Equal Access to Justice Act. Moreover, while complexity is inherent in the provisions of the statute and inevitable in its application to specific fact scenarios, this commentary is dedicated toward simplifying the process and sharpening the legal debate by identifying patterns in the case law and suggesting approaches toward issues of continuing controversy. The primary value of a commentary on an area of statutory law lies in the sifting of decisions and the synthesis of case law, the suggestion of systematic approaches to resolve persistent problems, and the constant reminder to return to first principles found in the text and purpose of the statute. In the tradition of the treatise style of scholarly writing, this article provides both a survey of the provisions in the statute and a critique of the case law, lingering on points of theoretical complexity or litigative intensity and giving special attention to unsettled areas of dispute or those in which a structured analysis has not yet emerged from the court decisions.

Part one, presented here, considers the scope of EAJA Subsection (d) in terms of the kinds of claims to which it applies (section II) and the eligibility requirements laid down in the statute as prerequisites to seeking a fee award (section III). Section II examines the scope of Subsection (d), including the general application of the provision to "any civil action" (and its limitation to judicial proceedings),⁵⁶ the types of courts that have authority to consider EAJA awards,⁵⁷ the exclusion of cases sounding in tort⁵⁸ and tax proceedings,⁵⁹ and the prohibition on superseding or displacing any other fee-shifting statute.⁶⁰ Section III addresses the standards of eligibility for a fee award, including the classic requirement that a party prevail in the litigation,⁶¹ the definition of "party" in the statute to include only individuals with a net worth that does not exceed \$2 million and other listed entities with a net worth that does not exceed \$7 million and that employ no more than 500 people,⁶² and the requirement that a party incur an obligation for legal expenses to be eligible for a fee award.⁶³

Part two, which will be published in a future issue of this review, will contain the remaining three sections of the article, together with a conclusion. Section IV will explain and analyze the entitlement standards for receiving an EAJA award, including the requirement that the position of the United States be

56. See *infra* section II.A.

57. See *infra* section II.B.

58. See *infra* section II.C.

59. See *infra* section II.D.

60. See *infra* section II.E.

61. See *infra* section III.A.

62. See *infra* section III.B.

63. See *infra* section III.C.

found to be without substantial justification.⁶⁴ The section will explore the nature of the government's position, the meaning of substantial justification, the relationship between the substantial justification inquiry and the decision on the merits, appellate review, and factors that weigh positively and negatively in the determination.⁶⁵ In addition, the section will address the provision that attorney's fees be withheld when special circumstances would make an award unjust.⁶⁶ Section V will describe the measurement of the fee award, including the \$75-per-hour cap on attorney's fees, together with a discussion of cost-of-living increases and a critical evaluation of when special factors justify an enhancement of the award above the rate ceiling.⁶⁷ Finally, section VI will outline the procedures for seeking an EAJA fee award, including the thirty-day time period for filing a petition after final judgment in the civil action.⁶⁸

II. THE SCOPE OF EAJA SUBSECTION (D)

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, 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. (EAJA § 2412(d)(1)(A))⁶⁹

A. Application to "Any Civil Action"

1. The Breadth of the "Civil Action" Provision

The Equal Access to Justice Act is unparalleled among fee-shifting statutes in its breadth of application. Other statutes authorizing the award of attorney's fees are invariably attached to an underlying statutory cause of action and have no application beyond cases brought pursuant to that substantive claim.⁷⁰ For example, in 1972, Congress amended the Civil Rights Act of 1964 to authorize awards of attorney's fees against the United States when a party prevailed against the federal government in a claim of discrimination within the purview of the

64. See *infra* section IV, forthcoming.

65. *Id.*

66. *Id.*

67. See *infra* section V, forthcoming.

68. See *infra* section VI, forthcoming.

69. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988) (emphasis added).

70. Mezey & Olson, *supra* note 6, at 13 (stating most fee-shifting statutes "are adjuncts to substantive legislation").

Civil Rights Act.⁷¹ Likewise, when Congress has created statutory causes of action unique to the federal government, such as the Freedom of Information Act, it frequently has attached a provision for the award of attorney's fees that attends the particular cause of action.⁷² The Equal Access to Justice Act, by contrast, "is a freestanding statute; its provision for fee awards is not attached to a particular statute creating a substantive cause of action."⁷³

The wide compass of EAJA Subsection (d) is shown by its provision for an award of attorney's fees "in any civil action" brought by or against the federal government.⁷⁴ Although there are certain limitations in the statute's application, as discussed below, the general availability of attorney's fees "in any civil action" confirms the EAJA's wide-ranging coverage. Indeed, the breadth of the statute implicit in the phrase "any civil action" was further clarified and extended by Congress when the EAJA was re-enacted in 1985 through the addition of the phrase "including proceedings for judicial review of agency action."⁷⁵ In sum, the EAJA encompasses nearly every claim or case that is civil, rather than criminal, in nature.⁷⁶

71. 42 U.S.C. § 2000e-5(k) (1988 & Supp. V 1993). See generally Sisk, *supra* note 7, at 769-70 (discussing awards of attorney's fees against the federal government under the Civil Rights Act of 1964).

72. 5 U.S.C. § 552(a)(4)(E) (1988). See generally Sisk, *supra* note 7, at 772-75 (discussing awards of attorney's fees against the federal government under the Freedom of Information Act).

73. Sisk, *supra* note 7, at 783. See also Mezey & Olson, *supra* note 6, at 13 ("EAJA . . . is a free-standing statute, not limited to business or deregulatory litigation.").

74. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988).

75. Equal Access to Justice Act, Pub. L. No. 99-80, § 2(a)(2), 99 Stat. 183, 184 (1985). See generally National Wildlife Fed'n v. Federal Energy Regulatory Comm'n, 870 F.2d 542, 543 (9th Cir. 1989) (discussing amendment and holding it allows EAJA fee awards in all actions for judicial review of agency decisions, even if recovery of costs is barred by statute).

76. Although habeas corpus actions brought under 28 U.S.C. § 2255 (1988) by prisoners challenging confinement resulting from criminal convictions are characterized as "civil," the subject matter is primarily criminal in nature and such cases are certainly related to the prior criminal proceeding. The courts have declined to extend the EAJA to habeas corpus proceedings challenging criminal confinement. *Ewing v. Rodgers*, 826 F.2d 967, 968-71 (10th Cir. 1987); *Boudin v. Thomas*, 732 F.2d 1107, 1112-15 (2d Cir. 1984). But see *In re Hill*, 775 F.2d 1037, 1040-41 (9th Cir. 1985) (holding habeas corpus petition by alien challenging exclusion from the country did not involve a criminal matter and thus constituted a civil action under the EAJA). See generally 1 Mary F. Derfner & Arthur D. Wolf, *Court Awarded Attorney Fees* ¶ 7.04[4], at 7-69 & n.84 (1994) (citing *Hill* court's inclusion of certain type of habeas corpus case under the EAJA as an example of "spotty" adherence by the courts to the rule that waivers of sovereign immunity are strictly construed). The courts have generally excluded from the EAJA other cases that raised matters directly related to criminal proceedings. See *In re Grand Jury Subpoena Duces Tecum*, 775 F.2d 499, 502-04 (2d Cir. 1985) (holding 28 U.S.C. § 2412(a) (1988 & Supp. V 1993), which provides for an award of costs "in any civil action" brought by or against the United States, does not apply to case involving collateral matters arising from criminal trials or grand jury investigations); *United States Navy-Marine Corps Court of Military Review v. Cheney*, 29 M.J. 98, 103-04 (C.M.A. 1989) (holding the EAJA did not apply to proceeding which was related to possible court-martial and thus was essentially criminal in nature or had substantial relationship to criminal proceedings). But see *Lee v. Johnson*, 799 F.2d 31, 36-37 (3d Cir. 1986) (holding by divided court that action to quash a criminal grand jury subpoena

Moreover, EAJA Subsection (d) does not discriminate on the basis of party status.⁷⁷ The statute applies to “civil actions brought by or against the United States,” thus covering suits initiated by the government against citizens and suits filed by citizens against the government. Therefore, both plaintiffs and defendants who prevail in litigation with the United States may recover attorney’s fees. As one commentator has explained:

[The one-way fee shifting provision of the EAJA] is not a distinction between plaintiff and defendant, but between government and citizen. The citizen who prevails can recover attorney fees, whether that citizen is a prevailing plaintiff or a prevailing defendant; the government, in contrast, can never recover attorney fees.⁷⁸

2. *Limitation to Judicial Proceedings*

The statute’s reference to “civil action” demarks its most significant limitation as well. Although the term “civil action” is not defined in the statute, the ordinary meaning of the term is that of a judicial proceeding.⁷⁹ Further reference in the statute to the forum of the “civil action” as being “in any court”⁸⁰ confirms the judicial nature of the proceedings to which the statute applies. Thus, EAJA Subsection (d) can be invoked only when “formal litigation with the government is involved.”⁸¹ Moreover, by reason of this restriction to judicial proceedings, a party who prevails in a covered civil action may not recover attorney’s fees or expenses incurred in earlier administrative proceedings or other activities.⁸² Attorney’s fees are allowable only for those “reasonable and necessary expenses of an attorney incurred or paid in preparation for trial of the specific case before the court, which expenses are those customarily charged to

was “civil action” under the EAJA because the relief sought was civil and the privacy and other interests raised were similar to those raised in civil proceedings).

77. Subsection (d) does, however, place an eligibility restriction on the nature of the parties that may seek fees, imposing limitations based on net worth and employment size. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B) (1988) (defining “party”). See generally *infra* section III.B (discussing the definition of “party” and the net worth and employment size limitations).

78. Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 Duke L.J. 435, 449 (1986). See also 1 Derfner & Wolf, *supra* note 76, ¶ 5.03[12][a], at 5-47 (stating the provisions of the EAJA are “*sui generis* primarily because they zeroed in on a particular litigant, rather than a particular cause or category of action”).

79. *LeVernier Constr. v. United States*, 947 F.2d 497, 503 (Fed. Cir. 1991). See also *Vibra-Tech Eng’rs v. United States*, 787 F.2d 1416, 1419 (10th Cir. 1986) (holding awards of fees under EAJA Subsection (d) are limited to matters that are “part of the district court action”).

80. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988).

81. John C. Dods & Timothy J. Kennedy, *The Equal Access to Justice Act*, 50 UMKC L. Rev. 48, 52 (1981).

82. *LeVernier Constr.*, 947 F.2d at 501; *Full Gospel Portland Church v. Thornburgh*, 927 F.2d 628 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 867 (1992).

the client where the case is tried."⁸³ Thus, expenses for such routine activities as factual investigation and legal research prior to filing a complaint would be allowable.

As an illustration, when a contractor presents a claim to an agency for payment on a government contract, prior to any final decision by an agency contract officer and the filing of a formal lawsuit under the Contract Disputes Act,⁸⁴ no "civil action" has yet been instituted within the meaning of the EAJA and legal expenses for work at that pre-litigation administrative stage could not be recovered later in court.⁸⁵ However, once a final decision has been made by an agency contract officer, and the government contractor seeks direct court review of that decision, the EAJA would allow an award of attorney's fees. Indeed, another paragraph in EAJA Subsection (d) specifically defines "civil action brought by or against the United States" to include "an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978."⁸⁶ This provision, which was added in 1985, further clarifies that once a matter has progressed beyond the administrative level and formal litigation has ensued, EAJA Subsection (d) authorizes recovery of those costs attributable to the litigation phase of the matter.⁸⁷

Notwithstanding the limitation of EAJA Subsection (d) to judicial proceedings, the Supreme Court has held a fee claimant under unusual circumstances may recover attorney's fees under this subsection for administrative proceedings

83. *Oliveira v. United States*, 827 F.2d 735, 744 (Fed. Cir. 1987).

84. 41 U.S.C. § 609 (1988 & Supp. V 1993).

85. *LeVernier Constr.*, 947 F.2d at 500-02; *Keyava Constr. v. United States*, 15 Cl. Ct. 135, 138 (1988).

86. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(E) (1988). Under the Contract Disputes Act, a government contractor may seek review of the decision of an agency contracting officer either through a direct action in the United States Court of Federal Claims, 41 U.S.C. § 609(a) (1988 & Supp. V 1993), or by an agency board of contract appeals. *Id.* § 606 (1988). If a contractor seeks direct review in the Court of Federal Claims, and a decision of the contracting officer is found to be without substantial justification, Subsection (d)(2)(E) directly applies to authorize a fee award. *See also* Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(F) (1988 & Supp. V 1993) (defining "court" for purposes of EAJA Subsection (d) to include the Court of Federal Claims). If a contractor instead seeks review in the agency board of contract appeals, a separate part of the EAJA applying to adversarial administrative adjudications expressly provides for an award of fees if the government's position is found to be without substantial justification. Equal Access to Justice Act, 5 U.S.C. §§ 504(a)(1) (1988) (providing for award of fees in "adversary adjudication"), and 504(b)(1)(C) (Supp. V 1993) (defining "adversary adjudication" to include an appeal of a contracting officer's decision to an agency board of contract appeals under the Contract Disputes Act). *See generally* Donald J. Kinlin, *Equal Access to Justice Act*, 16 Pub. Cont. L.J. 266, 268 (1986) (discussing jurisdiction of boards of contract appeals and the United States Claims Court over EAJA applications).

87. H.R. Rep. No. 120, 99th Cong., 1st Sess. 17 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 146 (stating amendments to the EAJA clarify that "civil action brought by or against the United States" includes judicial review of agency action and an appeal from a decision of a contracting officer).

that are “intimately connected” to an ongoing judicial proceeding.⁸⁸ In *Sullivan v. Hudson*,⁸⁹ the Court held attorney’s fees may be collected for administrative proceedings in a Social Security benefits case that follows a court remand to the agency, provided the court has properly retained jurisdiction over the matter and contemplates the entry of a judgment upon completion of all proceedings.⁹⁰ In other words, attorney’s fees may be available when post-litigation administrative proceedings are supplemental to the judicial proceedings and remain subject to ultimate approval by a court maintaining supervisory powers. However, in the more recent decision of *Shalala v. Schaefer*,⁹¹ the Court clarified that a court may retain jurisdiction pending a remand to the agency—and thus may award attorney’s fees under EAJA Subsection (d) for post-litigation administrative proceedings—only if the judicial review statute permits a remand without the prior entry of judgment.⁹² Thus, the exception allowing recovery of EAJA Subsection (d) fees for subsequent administrative proceedings applies only in the context of “statutes regulating in great detail the interaction between the court and the agency, specifically those statutes which provide for continuing court jurisdiction over post-remand agency proceedings.”⁹³

Although EAJA Subsection (d) is restricted by its terms to judicial proceedings, this is less a limitation on the availability of an award of attorney’s fees against the federal government than a recognition that a separate but related statutory provision governs the award of attorney’s fees for unreasonable government conduct at the administrative level. Under a separate section of the EAJA—codified at Section 504 of Title 5⁹⁴—a prevailing party in an “adversary

88. *Sullivan v. Hudson*, 490 U.S. 877, 892, 109 S. Ct. 2248, 2258 (1989).

89. *Id.*

90. *Id.*

91. 113 S. Ct. 2625 (1993).

92. *Id.* at 2628-31. Under the Social Security Act, which was at issue in both *Hudson* and *Schaefer*, the district court may remand a Social Security benefits case to the agency under either sentence four or sentence six of 42 U.S.C. § 405(g) (1988). *Schaefer*, 113 S. Ct. at 2629. Sentence six, which allows a remand only if the agency requests the remand before answering the complaint or where new evidence is properly adduced, specifically provides that the new agency decision is to be filed with the court after proceedings on remand. *Id.* at 2629 & nn.1-2. Thus, the statute plainly contemplates the court will retain jurisdiction pending the remand. However, under sentence four, which generally authorizes remands for other reasons, the court is directed by statute to enter a judgment at the time of any remand. Because judgment must be entered immediately upon the court’s grant of a sentence-four remand, the court may not retain jurisdiction and thus may not award fees in the forthcoming administrative proceedings. *Id.* at 2628-31. The different effects of sentence-four and sentence-six remands upon the application of the EAJA is discussed in detail *infra* section III.A.2.b (discussing prevailing party status in the context of government benefit cases and Social Security claims).

93. *Full Gospel Portland Church v. Thornburgh*, 927 F.2d 628, 632-33 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 867 (1992) (holding EAJA fees are not available for post-litigation administrative proceedings when the district court did not retain continuing jurisdiction and did not remand the case to the agency, even though the agency may have implemented the court’s conclusion in its administrative determination).

94. Equal Access to Justice Act, 5 U.S.C. § 504 (1988 & Supp. V 1993). As stated earlier,

adjudication" before an administrative agency may obtain an award for legal expenses when the government's position is not substantially justified.⁹⁵ The statute defines an administrative proceeding as "adversarial" if it involves an adjudication under the Administrative Procedure Act in which the United States is represented by counsel or otherwise.⁹⁶ Moreover, if a party successfully seeks judicial review of an adversary adjudication by an agency, EAJA Subsection (d)(3) authorizes awards of attorney's fees by the court for both the judicial and the prior administrative phases of the proceedings if the government's position during the adversary adjudication was not substantially justified.⁹⁷

B. Jurisdiction to Award EAJA Fees

From the date of the original enactment of the EAJA, questions have arisen regarding whether Subsection (d), by providing for an award by "any court," authorizes an award of attorney's fees against the government in courts created by Congress with judges that do not enjoy the protections of Article III of the United States Constitution.⁹⁸ Subsequent amendments to the EAJA have explicitly extended authority to award attorney's fees under the EAJA to certain non-Article III tribunals,⁹⁹ thus simultaneously reducing the opportunity for controversy about the scope of the EAJA and indicating that courts not included within that express authorization are without power to apply the EAJA.¹⁰⁰ Nevertheless, the issue has persisted and demanded the attention of the courts, most significantly in the context of bankruptcy courts.¹⁰¹ In the end, however, the controversy may be of limited

although much of the discussion in this article is pertinent to the interpretation of the EAJA Section 504, which applies the same standard for awards of attorney's fees at the administrative level and contains a nearly identical definition of party, this article is limited in scope to an examination of EAJA Subsection (d) for awards of attorney's fees in court.

95. *Id.* § 504(a)(1) (1988).

96. *Id.* § 504(b)(1)(C) (Supp. V 1993). See generally *Ardestani v. Immigration & Naturalization Serv.*, 112 S. Ct. 515, 519-21 (1991) (holding administrative deportation proceedings are not "adversary adjudications" for which fees may be awarded under EAJA Section 504 because such proceedings are not subject to or governed by Section 554 of the Administrative Procedure Act).

97. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(3) (1988). See generally *Full Gospel Portland Church*, 927 F.2d at 630-31 (holding EAJA Subsection (d)(3) authorizes court awards of fees for both judicial review and administrative proceedings only if the challenged administrative action involved an "adversary adjudication" governed by the Administrative Procedure Act, as required by the EAJA Section 504(b)(1)(C)).

98. Judges of both the Supreme Court and inferior courts are appointed for life tenure, "during good Behaviour," and may not have their compensation diminished during their term in office. U.S. Const. art. III, § 1.

99. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(F) (1988 & Supp. V 1993) (defining "court" to include the United States Court of Federal Claims and the Court of Veterans Appeals).

100. See *infra* section II.B.2 (discussing the definition of "court" in 28 U.S.C. § 2412(d)(2)(F) and concluding this definition excludes other non-Article III entities).

101. See *infra* section II.B.1 (discussing conflicting court decisions concerning whether bankruptcy courts have authority to make awards of fees under the EAJA).

practical significance because there is an alternative method by which EAJA fees may properly be awarded in cases originating in the bankruptcy courts.¹⁰²

1. The Broad Reference in Paragraph (d)(1)(A) to "Any Court" Could be Understood to Cover Non-Article III Tribunals Including Bankruptcy Courts

Paragraph (d)(1)(A) of the EAJA authorizes award of attorney's fees in any civil action brought by or against the United States "in any court having jurisdiction of that action,"¹⁰³ which by itself would suggest that any adjudicative body styled as a court would have authority to consider an award of attorney's fees under this statute.¹⁰⁴ The word "court" would certainly encompass at least Article III district courts and courts of appeals with judges appointed for life tenure and would not appear to exclude other judicial tribunals.¹⁰⁵ The expansive and all-inclusive modifier, "any," further suggests the reference has broad application.¹⁰⁶

Early EAJA cases raised the question whether such non-Article III courts as the Tax Court¹⁰⁷ and the Claims Court¹⁰⁸ had jurisdiction to award attorney's fees under the EAJA, with courts reaching mixed results. The question with respect to both of these courts has since been answered by express statutory enactments. In 1982, Congress adopted a new and distinct fee-shifting provision for Internal Revenue cases that specifically authorized awards by the Tax Court¹⁰⁹ and

102. See *infra* section II.B.3 (concluding bankruptcy courts, as an arm of the district courts, may recommend the award of the EAJA fees by the district courts).

103. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988).

104. See *O'Connor v. United States Dep't of Energy*, 942 F.2d 771, 773 (10th Cir. 1991) ("The term 'court' is generally defined in its plain, ordinary, and every day meaning as '[a] person or group of persons whose task is to hear and submit a decision on cases at law.'" (quoting Webster's II New Riverside University Dictionary)).

105. In *Freytag v. Commissioner*, 501 U.S. 868, 111 S. Ct. 2631 (1991), the Supreme Court considered whether the chief judge of the Tax Court may appoint special trial judges consistent with the Appointments Clause of the Constitution, which authorizes Congress to vest the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. 2, § 2, cl. 2. The Court interpreted the phrase "Courts of Law" to include legislative courts and not to be limited to Article III courts. *Freytag*, 501 U.S. at 888-90, 111 S. Ct. at 2444-46.

106. Cf. *Freytag*, 501 U.S. at 892, 111 S. Ct. at 2651 (Scalia, J., concurring in part) (disagreeing with the majority that the Tax Court can be the type of court referred to in the Appointments Clause because the Clause "refers to 'the Courts of Law,'" which narrows the class of courts down to those Article III courts envisioned by the Constitution, as opposed to meaning "any 'Court of Law'").

107. *Bowen v. Commissioner*, 706 F.2d 1087 (11th Cir. 1983) (holding the non-Article III Tax Court lacked jurisdiction to award EAJA fees). See also *McQuiston v. Commissioner*, 78 T.C. 807, 811 (1982).

108. *Essex Electro Eng'rs v. United States*, 757 F.2d 247, 250-52 (Fed. Cir. 1985) (holding the non-Article III Claims Court had jurisdiction to award EAJA fees). See also *Bailey v. United States*, 1 Cl. Ct. 69, 72-74, *vacated in part on other grounds*, 721 F.2d 357 (Fed. Cir. 1983).

109. Pub. L. No. 97-248, § 292(a), 96 Stat. 324, 572 (1982) (codified at 26 U.S.C. § 7430 (1988)).

simultaneously withdraws tax cases from the scope of the EAJA.¹¹⁰ In 1985, a new definition section was added to the EAJA specifying that "court" includes the Claims Court¹¹¹ (now Court of Federal Claims).¹¹²

However, the issue has persisted in the context of bankruptcy courts, whose judges are appointed for a term of fourteen years by the court of appeals for that circuit.¹¹³ Once again, the courts have reached varying results on the question of whether a non-Article III court has jurisdiction to award EAJA fees.¹¹⁴

In *In re Davis*,¹¹⁵ the United States Court of Appeals for the Eleventh Circuit, following an earlier decision that the non-Article III Tax Court was without authority to award the EAJA fees,¹¹⁶ concluded that bankruptcy judges were excluded from the EAJA because only courts with judges appointed pursuant to Article III have proper jurisdiction to award attorney's fees under that statute.¹¹⁷ The Eleventh Circuit ruled that the term "court" in EAJA Subsection (d) is a short-form of the statutory term "court of the United States,"¹¹⁸ which is defined in 28 U.S.C. § 451 as including the Supreme Court, the courts of appeals, the district courts, the Court of International Trade, and any court "the judges of which are entitled to hold office during good behavior."¹¹⁹

The court reasoned that this cross-reference from the EAJA to the definition of "court of the United States" in Section 451 was appropriate for two reasons. First, Paragraph 2412(d)(1)(A) allows a court to award attorney's fees "in addition

110. Pub. L. No. 97-248, § 292(c), 96 Stat. 324, 574 (1982) (codified at 28 U.S.C. § 2412(e) (1988)). See generally *infra* section II.D (discussing exclusion of tax cases from the EAJA).

111. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(F) (1988 & Supp. V 1993).

112. The Claims Court was re-named the "United States Court of Federal Claims" in 1992. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516 (1992).

113. 28 U.S.C. § 152(a)(1) (1988 & Supp. V 1993).

114. Compare *O'Connor v. United States Dep't of Energy*, 942 F.2d 771, 772-74 (10th Cir. 1991) (holding bankruptcy court is a "court" under EAJA Section 2412(d)(1)(A) with authority to award fees) with *In re Davis*, 899 F.2d 1136, 1138-40 (11th Cir.) (holding non-Article III bankruptcy court lacks jurisdiction to award EAJA fees), *cert. denied*, 498 U.S. 981, 111 S. Ct. 510 (1990). See generally Anthony M. Sabino, "And Unequal Justice for All"—*Bankruptcy Court Jurisdiction under the Equal Access to Justice Act*, 22 Mem. St. U. L. Rev. 453, 489-90 (1992) (concluding that "[o]n the whole," a "technical reading" of the statute "seems the better argument, thus, ever so slightly, establishing a rule against bankruptcy court jurisdiction under the EAJA," but that "Congress can and should amend section 2412 to provide explicitly that bankruptcy courts may adjudicate EAJA issues"); Mathew J. Fischer, Note, *The Equal Access to Justice Act—Are the Bankruptcy Courts Less Equal Than Others*, 92 Mich. L. Rev. 2248, 2251-52 (1994) (concluding "courts should construe the EAJA consistently with its language, history, and purpose, and allow the bankruptcy courts to shift fees and costs against the federal government in appropriate cases"); Charles R. Haywood, Comment, *The Power of the Bankruptcy Courts to Shift Fees Under the Equal Access to Justice Act*, 61 U. Chi. L. Rev. 985, 986 (1994) (concluding "the best resolution of the question is that the EAJA grants bankruptcy courts the power to shift fees against the government").

115. 899 F.2d 1136 (11th Cir.), *cert. denied*, 498 U.S. 981, 111 S. Ct. 510 (1990).

116. *Bowen v. Commissioner*, 706 F.2d 1087 (11th Cir. 1983).

117. *Davis*, 899 F.2d at 1138-40.

118. *Id.* at 1139.

119. 28 U.S.C. § 451 (1988).

to any costs awarded pursuant to subsection (a).¹²⁰ Subsection 2412(a), in turn, allows a judgment against the United States for "costs, as enumerated in section 1920 of this title."¹²¹ Section 1920 details the type of costs that may be taxed by a judge or clerk of "any court of the United States."¹²² Having found the term "court of the United States" in Section 1920, the Eleventh Circuit was finally led to Section 451, with its restrictive definition of "court of the United States" as meaning only judges appointed with Article III protections.¹²³ Second, the *Davis* court relied¹²⁴ on a statement in the legislative history of the EAJA that "[t]he courts so empowered [to award fees under the EAJA] are those defined in Section 451 of title 28, United States Code."¹²⁵

The simple response to the *Davis* decision is that the EAJA simply does not say courts must be constitutional Article III courts. Instead, Congress adopted, in Paragraph (d)(1)(A), the unqualified term "any court," which cannot reasonably be read as an abridged version of "court of the United States" as found in Section 451. The statutory term of art, "court of the United States," does not appear in the EAJA.¹²⁶ The zig-zag path that the Eleventh Circuit takes to find its way to the restrictive phrase, "court of the United States," bouncing from one statutory section to another, pausing only long enough to find a sign-post to the next statute, is a convoluted approach to statutory interpretation, particularly when it evades the simple and unadorned language of the statute actually before the court.¹²⁷

As the United States Court of Appeals for the Tenth Circuit held in *O'Connor v. United States Department of Energy*,¹²⁸ in concluding that non-Article III courts are encompassed within the EAJA:

The reference in § 2412(d)(1)(A) to § 1920 clearly enumerates only the types of costs that can be awarded under this provision, not the types of courts having jurisdiction over EAJA awards. Any attempt to splice the

120. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988).

121. *Id.* § 2412(a) (1988 & Supp. V 1993).

122. *See id.* § 1920 (1988).

123. *In re Davis*, 899 F.2d 1136, 1138-39 (11th Cir.) (following *Bowen v. Commissioner*, 706 F.2d 1087 (11th Cir. 1983), and reasoning bankruptcy courts are without jurisdiction to award EAJA fees), *cert. denied*, 498 U.S. 981, 111 S. Ct. 510 (1990); *Bowen v. Commissioner*, 706 F.2d 1087, 1088 (11th Cir. 1983) (holding non-Article III Tax Court was without jurisdiction to award EAJA fees).

124. *Davis*, 899 F.2d at 1139.

125. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4996 (discussing EAJA Subsection (b)).

126. *Laboratory Supply Corp. v. United States*, 5 Cl. Ct. 28, 30 (1984) ("Section 2412 does not anywhere use the term 'court of the United States.'").

127. *See Freytag v. Commissioner*, 501 U.S. 868, 888, 111 S. Ct. 2631, 2644 (1991) (holding "[t]he text of the [Appointments] Clause does not limit 'the Courts of Law' to those courts established under Article III of the Constitution").

128. 942 F.2d 771 (10th Cir. 1991).

jurisdictional phraseology of § 1920 onto § 2412(d)(1)(A) violates the plain and unambiguous meaning of "any court."¹²⁹

Nor may a stray statement in the legislative history countermand the plain language of the statute. Had Congress intended to restrict the EAJA to constitutional Article III courts, it well knew how to do so, as its use of the statutory term of art, "court of the United States," in other contexts demonstrates.¹³⁰

Moreover, restricting EAJA Subsection (d) to Article III courts would be difficult to reconcile with that other part of the EAJA which applies to an "adversary adjudication" at the administrative level.¹³¹ If the EAJA extends to administrative proceedings and authorizes awards by agency tribunals, then it is difficult to understand why non-Article III adjudicatory bodies structured as courts presiding over adversary judicial proceedings would be excluded.¹³²

Nevertheless, the analysis cannot end here. The reference to "any court" in Paragraph (d)(1)(A) is not the only provision in the EAJA that bears on the meaning of "court." The other provision, which is addressed immediately below, creates complexity and ambiguity, and by so doing likely circumscribes the waiver of sovereign immunity in the EAJA to its narrowest construction of application only by Article III judges.

2. The Definition in Paragraph (d)(2)(F) of "Court" as Including the Court of Federal Claims and the Court of Veterans Appeals Suggests These Are the Only Two Non-Article III Courts Within the Scope of the EAJA

Even if we conclude the ordinary understanding of "any court" in Paragraph (d)(1)(A) encompasses any adjudicatory body styled or structured as a court,

129. *Id.* at 773-74.

130. *See, e.g.*, 28 U.S.C. §§ 373 (1988) (referring to "court of the United States" as defined in 28 U.S.C. § 451 (1988) in discussing retirement and resignation of judges), and 1821 (1988 & Supp. V 1993) (referring to "court of the United States" as defined in 28 U.S.C. § 451 (1988) in discussing fees for court witnesses). As one commentator aptly states:

It imputes ignorant confusion to Congress to maintain that, after using "court of the United States" throughout Title 28, it intended its references to "a court" and "any court" in the EAJA to be synonymous with "court of the United States." If Congress had intended to limit the EAJA to Article III courts, it could easily have done so by simply using the phrase "court of the United States."

Haywood, *supra* note 114, at 1009 (footnote omitted).

131. Equal Access to Justice Act, 5 U.S.C. § 504 (1988 & Supp. V 1993). *See generally supra* notes 94-96 and accompanying text (outlining Section 504 and the award of fees in agency "adversary adjudication").

132. *O'Connor*, 942 F.2d at 774 (stating that given the breadth of the EAJA in applying to adversary agency adjudications, "[g]ranted bankruptcy courts jurisdiction under the plain language of § 2412(d)(1)(A) is . . . congruous with the statutory scheme and furthers the statutory purpose of placing the initial determination of whether fees are warranted with the forum most familiar with the merits of the action") (footnote omitted).

including courts with judges appointed without the protections of Article III, the subsequent addition by Congress of Paragraph (d)(2)(F) must "give us some pause in this regard."¹³³ When the EAJA was re-enacted in 1985, Congress added a new paragraph stating "'court' includes the United States Claims Court"¹³⁴ (now the Court of Federal Claims).¹³⁵ In 1992, this paragraph was expanded by the addition of the United States Court of Veterans Appeals to the definition.¹³⁶

In *United States Navy-Marine Corps Court of Military Review v. Cheney*,¹³⁷ the United States Court of Military Appeals concluded this paragraph did not preclude jurisdiction over EAJA claims by non-Article III courts. The court reasoned that the definition of "court" to include the Claims Court is merely a clarification and not a limitation of the term.¹³⁸ As the court stated, the use of "includes" in a definitional provision demonstrates an intent by the drafter "to provide a non-exhaustive list of examples to clarify the meaning of a term."¹³⁹ When Congress intends to craft an exclusive definition, it uses the word "means."¹⁴⁰

However, to say Paragraph (d)(2)(F) is not a limiting, but is rather an enlarging, definition does not fully answer the question of its purpose in the EAJA or the effect it has on interpretation of the term "any court" in the earlier Paragraph (d)(1)(A). We still must ask why Congress thought it was necessary to specifically denote these two courts in a definitional provision. Nor is it correct to say that a definition using the verb "includes" invariably amounts to a mere list of examples to which we may add similar objects. An "enlarging definition" may also use the verb "includes" to change the "common meaning" of the defined term by adding "to the number of particulars to which the term applies."¹⁴¹

133. *United States Navy-Marine Corps Court of Military Review v. Cheney*, 29 M.J. 98, 102 (C.M.A. 1989) (holding non-Article III Court of Military Appeals had authority to award fees under the EAJA).

134. Equal Access to Justice Act, Pub. L. No. 99-80, § 2(c)(2), 99 Stat. 183, 185 (1985) (codified at 28 U.S.C. § 2412(d)(2)(F) (1988 & Supp. V 1993)).

135. The Claims Court was re-named the "United States Court of Federal Claims" in 1992. Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516 (1992).

136. Pub. L. No. 102-572, § 506(a), 106 Stat. 4506, 4513 (1992). 28 U.S.C. § 2412(d)(2)(F) (1988 & Supp. V 1993) now reads: "'[C]ourt' includes the United States Court of Federal Claims and the United States Court of Veterans Appeals."

137. 29 M.J. 98 (C.M.A. 1989).

138. *Id.* at 102.

139. *Id.* (quoting *City of Brunswick v. United States*, 661 F. Supp. 1431, 1444-45 (S.D. Ga. 1987), *rev'd on other grounds*, 849 F.2d 501 (11th Cir. 1988), *cert. denied*, 489 U.S. 1053, 109 S. Ct. 1313 (1989)).

140. *Id.* See also Barbara Child, *Drafting Legal Documents: Principles and Practices* 357 (2d ed. 1992) (stating a drafter uses the verb "means" to stipulate a full and complete definition of a term). For example, the definition of "party" in EAJA Subsection (d)(2)(B) uses "means" and thus is intended as an all-encompassing and exclusive description of the individuals and entities that qualify as a "party." See Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B) (1988). See generally section III.B (discussing the definition of "party" for EAJA Subsection (d)).

141. Child, *supra* note 140, at 361.

Thus, we could conclude the "common meaning" of "any court" in Paragraph (d)(1)(A) is a narrow one covering only constitutional courts, while the enlarging definition of Paragraph (d)(2)(F) expands the term to add two special bodies that would not otherwise be included. Indeed, the logical conclusion to be drawn from the enlarging definition of "court" is that Congress understood the original meaning of "court" to be restricted to Article III courts and determined to add these two particular non-Article III courts to those tribunals having authority to award attorney's fees under the EAJA. By application of the interpretive canon of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), the enactment of Paragraph (d)(2)(F) suggests that other entities of a similar nature, that is, other non-Article III courts, that have not been specifically designated are excluded from the scope of the EAJA.¹⁴²

There is a plausible contrary explanation, although it has become increasingly less plausible over time. When Paragraph (d)(2)(F) was originally enacted in 1985 with a sole reference to the Claims Court, the Claims Court had recently been created¹⁴³ and there had been intervening litigation concerning whether this new entity had authority to award attorney's fees under the EAJA. This litigation had ultimately culminated in an appellate ruling upholding the Claims Court's authority.¹⁴⁴ Thus, considering the historical context of its enactment and the existing case law, Paragraph (d)(2)(F) may have been added simply to reflect the new court structure and to confirm the authority of the new adjudicatory body to award EAJA fees. The legislative history confirms this understanding. The House Report on the bill re-enacting the EAJA in 1985 notes that the Claims Court had been created since the original enactment of the EAJA and states that "[s]ince some question has been raised about the jurisdiction of the U.S. Claims Court to make [EAJA] awards . . . this amendment clarifies the jurisdictional issue, and codifies existing law."¹⁴⁵ In light of this context, Paragraph (d)(2)(F) could be understood as commending the judicial interpretation of the EAJA as extending to non-Article III courts.

142. Sabino, *supra* note 114, at 485.

143. The Claims Court (now the Court of Federal Claims) was created by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982), as a non-Article III trial court, with appellate jurisdiction given to the new Article III United States Court of Appeals for the Federal Circuit.

144. *Essex Electro Eng'rs v. United States*, 757 F.2d 247, 250-52 (Fed. Cir. 1985).

145. H.R. Rep. No. 120, 99th Cong., 1st Sess. 17-18 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 146. *See also* Fischer, *supra* note 114, at 2271-72 (emphasizing that the legislative history "states that the amendment is merely a clarification, rather than a change, in the existing law," and thus does not suggest that Congress intended to exclude other non-Article III courts); Haywood, *supra* note 114, at 998 (arguing amendment did not implicitly exclude bankruptcy courts because Congress "did not say that it was *adding* the Claims Court to the authorized courts; rather, it clarified that the definition of 'court' *included* the Claims Court, thus 'codify[ing] existing law'").

Similarly, after the creation of the Court of Veterans Appeals in 1988,¹⁴⁶ there was litigation concerning whether this new tribunal had the authority to award attorney's fees under the EAJA, culminating in a decision by the Court of Veterans Appeals declaring that it lacked jurisdiction under the EAJA.¹⁴⁷ Once again, Congress amended the EAJA to specifically grant authority to this new court, by adding the Court of Veterans Appeals to the definitional provision in Paragraph (d)(2)(F).¹⁴⁸ And, once again, the legislative reports characterize the change as a clarification.¹⁴⁹

However, when the same issue arises on a second occasion, and the same limited response is made, it becomes more difficult to regard the amendment as merely a clarification of existing law rather than a creation of new law. Although the new addition to Paragraph (d)(2)(F) did again arise in response to a transitional situation involving the creation of a new court and doubts reflected in litigation about the authority of that body to award EAJA fees, Congress chose not to respond to this repeated situation by clarifying the purportedly expansive meaning of "any court" under Paragraph (d)(1)(A). Congress instead added a second particular to the list of included entities in the definition of "court." Moreover, by 1992, doubts had also arisen concerning the authority of the bankruptcy courts to award EAJA fees,¹⁵⁰ but Congress did not "clarify" the matter by adding bankruptcy courts to Paragraph (d)(2)(F). Thus, we see emerging a pattern of ad hoc, case-by-case congressional action with respect to the EAJA and non-Article III courts.¹⁵¹ When Congress has seen fit to act by

146. Pub. L. No. 100-687, § 301(a), 102 Stat. 4113 (1988).

147. *Jones v. Derwinski*, 2 Vet. App. 231, 232-35, *vacated sub nom. Jones v. Principi*, 985 F.2d 582 (Fed. Cir. 1992).

148. Pub. L. No. 102-572, § 506(a), 106 Stat. 4506, 4513 (1992) (codified at 28 U.S.C. § 2412(d)(2)(F) (1988 & Supp. V 1993)).

149. H.R. Rep. No. 1006, 102d Cong., 2d Sess. 25 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3921, 3934 (stating the provision "amends EAJA and clarifies that it applies to the Court of Veterans Appeals"); S. Rep. No. 342, 102d Cong., 2d Sess. 39-40 (1992) ("It is not the intent of the committee, by specifying the Court of Veterans Appeals, to exclude any other nonarticle III courts having jurisdiction of an action from qualifying as a 'court' under EAJA."). *See also* Fischer, *supra* note 114, at 2272 (arguing the amendment was "a response to a particular court opinion" and "merely a clarification of existing law," and thus "does not support the exclusion of the bankruptcy courts from EAJA jurisdiction"); Haywood, *supra* note 114, at 1005-06 (arguing that "the legislative history of this amendment makes clear that Congress considers the EAJA to extend beyond Article III courts" and that the intent to "clarify" demonstrates "that Congress considered the EAJA to have always included the Court of Veterans Appeals, and thus implicitly other parallel Article I courts as well").

150. *Compare O'Connor v. United States Dep't of Energy*, 942 F.2d 771, 772-74 (10th Cir. 1991) (holding bankruptcy court is a "court" under EAJA Subsection (d)(1)(A) with authority to award fees) *with In re Davis*, 899 F.2d 1136, 1138-40 (11th Cir.) (holding bankruptcy court lacks jurisdiction to award EAJA fees), *cert. denied*, 498 U.S. 981, 111 S. Ct. 510 (1990).

151. *Jones*, 2 Vet. App. at 233 (stating "an examination of the development of the EAJA and the specific amendments to, and in connection with, the 1980 original enactment, shows that when Congress has provided for the application of the EAJA to analogous litigation (Claims Court, Tax Court, Social Security Administration (SSA) decision review in district courts), it has done so by

adding particulars to a definition, the courts would be intruding upon the legislative province by presuming to expand the particulars further.¹⁵²

Under these circumstances, it cannot be gainsaid that substantial doubts have arisen and the EAJA is at least susceptible to conflicting interpretations.¹⁵³ Accordingly, the "unequivocal expression" of an intent to extend the waiver of sovereign immunity is absent,¹⁵⁴ and the EAJA cannot be held to unambiguously grant jurisdiction to non-Article III courts, such as the bankruptcy courts, other than the two specified. Through the enactment and subsequent amendment of Paragraph (d)(2)(F), Congress has taken direct and specific control over the meaning of the term "court" and the EAJA must be interpreted in strict conformity therewith.

3. *Bankruptcy Courts May Recommend Award of EAJA Fees by District Court*

Over time, the debate about whether Article I courts have authority to make awards under the EAJA has narrowed precisely because the statute has been expanded. As noted, two Article I courts—the Court of Federal Claims and the Court of Veterans Appeals—have been expressly included among the courts authorized to make awards under the EAJA.¹⁵⁵ The Tax Court has authority to award attorney's fees under an identical substantial justification standard pursuant to a separate fee-shifting statute in the Internal Revenue Code.¹⁵⁶ Even in the context of bankruptcy courts, the question is of declining practical significance. Whether or not a bankruptcy court has authority in its own right to award EAJA fees against the government, the EAJA is manifestly available in bankruptcy cases through the process of a recommendation for an award made by the bankruptcy court to the district court.

In 1982, the Supreme Court held in *Northern Pipeline Construction Company v. Marathon Pipeline Company*¹⁵⁷ that the broad grant of jurisdiction to non-Article III bankruptcy judges to hear all cases related to bankruptcy matters violated the separation of powers requirements of the United States Constitution. In response, Congress enacted the Bankruptcy Amendments and

specific, affirmative legislation").

152. Sabino, *supra* note 114, at 486.

153. See *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992) (holding when statutory waiver of sovereign immunity is susceptible to more than one interpretation, the statute fails to unambiguously extend the waiver beyond the more limited understanding).

154. *Id.* at 1016. See also *Ardestani v. Immigration & Naturalization Serv.*, 112 S. Ct. 515, 521 (1991) (reaffirming that a waiver of sovereign immunity "must be strictly construed in favor of the United States").

155. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(F) (1988 & Supp. V 1993).

156. 26 U.S.C. § 7430(c)(6) (1988) (defining "court proceeding" for purposes of this fee-shifting statute to include a civil action brought in the Tax Court).

157. 458 U.S. 50, 102 S. Ct. 2858 (1982).

the Federal Judgeship Act of 1984¹⁵⁸ to re-structure the bankruptcy courts as units or divisions of the district courts.¹⁵⁹ As the United States Court of Appeals for the Fourth Circuit has explained:

Under this new structure, federal district courts exercise original jurisdiction over all "matters and proceedings in bankruptcy," 28 U.S.C. § 1334, and bankruptcy judges "serve as judicial officers of the United States district court established under Article III of the Constitution." 28 U.S.C. § 152(a)(1). Bankruptcy courts are mere "unit[s] of the district court," 28 U.S.C. § 151, and derive their jurisdiction only through 28 U.S.C. § 157(a), which authorizes district courts to refer bankruptcy matters at their discretion to bankruptcy courts. However, district courts retain the power to withdraw any reference from the bankruptcy court. 28 U.S.C. § 157(d). Thus, "while functionally there may appear to be a separate bankruptcy court, for jurisdictional purposes there is only one court, *i.e.*, the district court." *In re Northwest Cinema Corp.*, 49 B.R. [479,] 480 [(Bankr. D. Minn. 1985)].¹⁶⁰

Thus, since district courts clearly possess the jurisdiction to award attorney's fees under the EAJA, bankruptcy courts would have the power to recommend an EAJA award to be imposed by the district court.¹⁶¹ Since an award of attorney's fees is not a "core" bankruptcy proceeding over which a bankruptcy court has authority to make a final disposition (subject to referral of the matter from the district court),¹⁶² the bankruptcy court would be obliged "to submit proposed factual findings and conclusions of law to the Article III [district] court, where they shall be reviewed *de novo*."¹⁶³

The requirement that the district court pass upon the bankruptcy court's recommendation regarding an EAJA award delays resolution of attorney's fee matters by adding another step to the process.¹⁶⁴ Moreover, because of both its expertise on matters of bankruptcy law and its greater familiarity with the case litigated before it, the bankruptcy court's recommendation is likely to be given practical deference, notwithstanding the standard of *de novo* review by the

158. Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified in scattered sections of 11 U.S.C. and 28 U.S.C.).

159. 28 U.S.C. § 151 (1988); *In re Grewe*, 4 F.3d 299, 304 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1056 (1994); 1 Collier on Bankruptcy § 3.01[2][a] (15th ed. 1993).

160. *Grewe*, 4 F.3d at 304 (footnote omitted).

161. *In re Davis*, 899 F.2d 1136, 1141 (11th Cir.), *cert. denied*, 498 U.S. 981, 111 S. Ct. 510 (1990).

162. *Id.* at 1140-41.

163. Sabino, *supra* note 114, at 487. If the government consents to jurisdiction over a matter by the bankruptcy court, the bankruptcy judge could render a final judgment on an EAJA matter subject to ordinary appellate review. *Davis*, 899 F.2d at 1141-42; Sabino, *supra* note 114, at 487.

164. See Fischer, *supra* note 114, at 2283 ("The resulting delay and aggravation to the courts caused by forwarding proposed findings to the district courts ill serves the purposes of the EAJA and the bankruptcy system." (footnotes omitted)).

district court.¹⁶⁵ Nevertheless, it seems appropriate that the final authority on this matter, which involves both the exaction of funds from the public fisc and a conviction of unreasonable conduct by the government, should be reserved to the Article III district judge and not exercised by a tribunal that serves as an adjunct to the court.¹⁶⁶

165. *Id.* at 2282 (arguing that the procedures "require[] an adjudication by a court that is one step removed from the parties and the administration of the case," and that "the de novo review performed by the district court may amount to little more than a rubber stamp of the bankruptcy court's proposed findings").

166. Shortly before publication of this article, Congress passed and the President signed the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994) (codified in scattered sections of titles 11 and 28 of the U.S.C.). Section 113 of that act waives the sovereign immunity of the federal and state governments with respect to bankruptcy proceedings before the bankruptcy courts. This waiver authorizes the bankruptcy courts to enter monetary awards against the federal and state governments, including an "order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit . . . consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28." *Id.* § 113, 108 Stat. at 4117 (codified at 11 U.S.C. § 106(a)(3)) (emphasis added). Notwithstanding this reference to a paragraph of the EAJA, it appears plain upon close study that this section of the statute does not answer the question of the authority of a bankruptcy judge to award fees against the federal government pursuant to the substantial justification standard of Subsection (d) of the EAJA.

By its own terms, Section 113 must be understood as waiving the sovereign immunity of the federal and state governments only with respect to awards of attorney's fees pursuant to the bankruptcy statutes and rules. *See id.* (authorizing an "order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure" (emphasis added)). Moreover, the reference to the EAJA is specifically to that discrete subpart, in Paragraph 2412(d)(2)(A), which defines "fees and other expenses" to include reasonable expenses of expert witnesses and the reasonable costs of studies and analyses, and that limits the amount of reasonable attorney's fees to \$75 per hour adjustable for an increase in the cost of living or a special factor. 28 U.S.C. § 2412(d)(2)(A) (1988). Neither Section 113 nor any other provision of the Bankruptcy Reform Act of 1994 refers to the provision of the EAJA, 28 U.S.C. § 2412(d)(1)(A) (1988), that creates a new basis for an award of fees when the position of the United States lacks substantial justification. A preliminary search of the legislative history behind the Bankruptcy Reform Act of 1994 finds no mention of the EAJA or any expression of an intent to extend the authority of the bankruptcy courts to award fees under the EAJA. Moreover, as discussed in the text above, when Congress previously has acted to expand the list of adjudicatory bodies authorized to apply the EAJA, it has done so by amending the EAJA itself through an expansion of the definition of "court" in 28 U.S.C. § 2412(d)(2)(F) (1988 & Supp. V 1993). Finally, Section 113 waives the sovereign immunity of both the states and the federal government, whereas the EAJA of course applies only to the United States. *See* H.R. Rep. No. 835, 103d Cong., 2d Sess. (1994) (explaining purpose of Section 113 as making the bankruptcy statutes in Title 11 applicable to the states and the federal government).

In sum, Section 113 is limited in scope, authorizing bankruptcy courts to award attorney's fees against the federal government only pursuant to other provisions in the bankruptcy statutes or rules, with the reference to the EAJA's definition of "fees and other expenses" serving only to limit the amount of such fees that may be awarded against the government. *See Price v. United States (In re Price)*, No. 93-3133, 1994 WL 696819, at *5-6 (7th Cir. Dec. 14, 1994) (holding Section 113 of the Bankruptcy Reform Act of 1994 waived the sovereign immunity of the United States with respect to a provision in the Bankruptcy Code, 11 U.S.C. § 362(h), that authorizes an award of attorney's fees to a party injured by a willful violation of the bankruptcy stay rule, and holding that such fees are subject to the \$75 per hour cap stated in Paragraph 2412(d)(2)(A)). Given Section 113's

4. Subject Matter Jurisdiction over the Cause of Action

By the express language of EAJA Subsection (d), which authorizes an award by "any court having *jurisdiction* of that action,"¹⁶⁷ a court may award attorney's fees under the statute only if it has proper subject matter jurisdiction over the underlying cause of action.¹⁶⁸ As the United States Court of Appeals for the Ninth Circuit has ruled, "[s]ubject matter jurisdiction to decide the merits of the underlying action is a 'condition precedent' to an award of fees or costs under EAJA."¹⁶⁹ For example, if an action is transferred by a district court to the Court of Federal Claims, which has exclusive jurisdiction over contract claims against the federal government, the absence of jurisdiction on the substantive cause of action also deprives the district court of the power to grant an award of attorney's fees under the EAJA.¹⁷⁰

However, while many statutory prerequisites to a suit involving the federal government are deemed jurisdictional in nature, the crucial question under the EAJA is whether the court in which the lawsuit is filed (as opposed to some other forum) has subject matter jurisdiction over an action of that type.¹⁷¹ Thus, for example, when a government action against a private party has been dismissed for

specification of fees awards pursuant to the bankruptcy title and rules, the section's pointed reference to a limited definition section of the EAJA (to the exclusion of the substantial justification provision of the EAJA), the silence of the legislative history as to any intent to expand the scope of the EAJA, and the failure of Congress to follow its previous pattern of amending the definition of "court" in the EAJA when it intended to authorize a new entity to make EAJA awards, the new bankruptcy provision falls far short of a clear and unambiguous expression of congressional intent to allow a non-Article III court to pronounce EAJA liability upon the United States. Especially in view of the substantial controversy in the courts surrounding the authority of the bankruptcy courts to award fees under the EAJA, we would have expected a more definitive statement if the Bankruptcy Reform Act of 1994 were intended to address this question.

167. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988).

168. *Lundin v. Mecham*, 980 F.2d 1450, 1461 (D.C. Cir. 1992); *Smith v. Brady*, 972 F.2d 1095, 1097 (9th Cir. 1992).

169. *Clark v. Busey*, 959 F.2d 808, 810 (9th Cir. 1992) (holding a district court could not award fees under the EAJA when the plaintiffs wrongly filed suit in district court seeking declaratory and injunctive relief against the Federal Aviation Administration (FAA) because the court of appeals has exclusive jurisdiction for judicial review of FAA actions).

170. *Francis E. Heydt Co. v. United States*, 948 F.2d 672, 674-78 (10th Cir. 1991). *See also* *Greater Detroit Recovery Auth. v. EPA*, 916 F.2d 317, 324 (6th Cir. 1990) (holding because the district court lacked jurisdiction, the award of EAJA fees was improper); *Johns-Manville Corp. v. United States*, 893 F.2d 324, 328 (Fed. Cir. 1989) (holding court could not award EAJA fees when plaintiff improperly filed suit in the Claims Court); *Lane v. United States*, 727 F.2d 18, 20-21 (1st Cir.) (holding court could not award EAJA fees when plaintiff improperly filed suit in a district court), *cert. denied*, 469 U.S. 829, 105 S. Ct. 113 (1984).

171. *United States v. 87 Skyline Terrace*, 26 F.3d 923, 928 (9th Cir. 1994) (explaining the difference between a court's "lacking potential jurisdiction" over a type of claim and thus being without authority to award the EAJA fees, and a court's "having potential, but lacking actual jurisdiction" and thus able to award EAJA fees notwithstanding a statutory flaw in the initiation of the suit that deprives the court of jurisdiction to decide the merits).

lack of subject matter jurisdiction because an agency failed to obtain prior authorization from an official to bring suit as required by a statute, the court would retain the authority to consider an award of attorney's fees under the EAJA because it had proper jurisdiction over an action of that nature, notwithstanding the invalidity of the particular suit for quasi-jurisdictional reasons.¹⁷²

C. Exclusion of "Cases Sounding in Tort"

1. The Exclusion of Tort Cases from the EAJA

Although EAJA Subsection (d) applies generally and broadly to any "civil action," the subsection itself declares one explicit exception to coverage—"cases sounding in tort."¹⁷³ Congress chose to exclude tort cases from the scope of the EAJA because it believed alternative fee payment methods, such as contingency fee arrangements, were adequate to ensure that injured persons could obtain legal representation to seek redress for torts committed by government employees or entities.¹⁷⁴ Indeed, apparently for the same reason, Congress has not made any provision for award of attorney's fees in tort cases against the federal government under other statutes.¹⁷⁵

Accordingly, if a claim against the government is the substantive equivalent of a claim to be compensated for tortious wrongdoing, an attorney's fee award under EAJA Subsection (d) is not available. In *McLarty v. United States*,¹⁷⁶ an Assistant United States Attorney obtained copies of a Georgia attorney's federal income tax returns and submitted them in support of the government's successful

172. *Id.* at 927-29. However, because *87 Skyline Terrace* involved the actions of the Internal Revenue Service in the initiation of forfeiture proceedings to enforce the tax laws, the case likely fell within the exclusion of the EAJA for internal revenue matters, although the court failed to consider or discuss this provision. Equal Access to Justice Act, 28 U.S.C. § 2412(e) (1988). See generally *infra* section II.D (discussing the exclusion of tax cases from the EAJA).

173. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988) (providing the EAJA applies to "any civil action (other than cases sounding in tort)"). See also *Campbell v. United States*, 835 F.2d 193, 195-96 (9th Cir. 1987) (stating tort actions were expressly excluded from the EAJA).

174. H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 25 (1980), reprinted in 1980 U.S.C.C.A.N. 5003, 5014; S. Rep. No. 253, 96th Cong., 1st Sess. 20 (1979). The Federal Tort Claims Act expressly provides for payment of attorney's fees out of the damages award itself, up to a maximum of 25% of the amount of damages recovered in a tort suit against the United States. 28 U.S.C. § 2678 (1988).

175. For example, the Federal Tort Claims Act provides only that attorney's fees may be paid out of a damages award recovered in a tort suit against the United States and makes no provision for any shifting of fees to the government. 28 U.S.C. § 2678 (1988). See *Joe v. United States*, 772 F.2d 1535, 1536-37 (11th Cir. 1985) (per curiam) ("The FTCA does not contain the express waiver of sovereign immunity necessary to permit a court to award attorneys' fees against the United States directly under that act."). However, in an extreme case, the United States could be assessed attorney's fees in a tort case under the common-law bad faith rule pursuant to EAJA Subsection (b), which waives the immunity of the United States for attorney's fees to the same extent as a private person under the common law. Equal Access to Justice Act, 28 U.S.C. § 2412(b) (1988).

176. 6 F.3d 545 (8th Cir. 1994).

opposition to the attorney's application to be admitted *pro hac vice* to the federal court for the District of Minnesota to represent a criminal defendant.¹⁷⁷ In an action for damages brought by the attorney against the United States, the district court granted summary judgment in favor of the attorney, ruling that reasonable government officials would have known the disclosure of tax returns for this purpose was in violation of federal law.¹⁷⁸ After the matter was settled for \$3,000 during the pendency of an interlocutory appeal, the attorney sought an award of attorney's fees under the Internal Revenue Code or the EAJA.¹⁷⁹ The court concluded the wrongful disclosure of tax records was a tort and thus attorney's fees could not be awarded under EAJA Subsection (d).¹⁸⁰ Because the plaintiff sought monetary compensation for the wrongful disclosure in the nature of damages for lost income and for anger and humiliation,¹⁸¹ as contrasted with some equitable form of relief such as an injunction against further disclosure, the court was correct in characterizing the claim as one sounding in tort.

2. *The Application of the Tort Exclusion to the Case as a Whole and Not to Individual Issues*

The statutory exception for "cases sounding in tort" requires an analysis of the nature of the case as a whole, rather than artificially breaking out individual parts of a claim into tort and non-tort components. In *In re Turner*,¹⁸² a federal law enforcement officer who had been sued for negligence in conducting a high speed pursuit of a speeding motorcyclist successfully moved to have the United States substituted as a defendant pursuant to a federal statute that makes the government the proper defendant in suits alleging tortious conduct by a government employee who was acting within the scope of employment.¹⁸³ The district court awarded attorney's fees under the EAJA, ruling that the government's refusal to certify that the officer was acting within the scope of employment had not been substantially justified.¹⁸⁴ The United States Court of Appeals for the District of Columbia Circuit reversed, holding the case fell within the statutory exception for "cases sounding

177. *Id.* at 547.

178. *Id.*

179. *Id.* Because the case did not involve "the determination, collection, or refund of any tax," 26 U.S.C. § 7430(c)(1)(B)(iii) (1988), the court concluded fees were not available under the Internal Revenue fee-shifting statute. *McLarty*, 6 F.3d at 548. See generally section II.D (discussing Section 7430 and the exclusion of tax-related cases from the EAJA).

180. *McLarty*, 6 F.3d at 549. The court noted the government could be liable in tort cases for attorney's fees under Subsection (b) of the EAJA, 28 U.S.C. § 2412(b) (1988), which makes the government liable to the same extent as a private party, although the court concluded the district court's finding the government's position was substantially justified implicitly stated the government had not acted in a manner to be subject to fees under the bad faith rule. *McLarty*, 6 F.3d at 549.

181. *Id.* at 547.

182. 14 F.3d 637 (D.C. Cir. 1994).

183. 28 U.S.C. § 2679(d)(1) (1988).

184. *Turner*, 14 F.3d at 639.

in tort."¹⁸⁵ The district court had reasoned that the exception did not apply because the issue litigated was the question of the officer's statutory immunity and the resolution of that issue did not involve tort law.¹⁸⁶ Relying upon the plain language of the statute, the District of Columbia Circuit held: "The statute itself . . . does not parse 'cases' into tort and non-tort issues but instead provides a blanket exception for *cases* that sound in tort."¹⁸⁷ Since there was no doubt the underlying lawsuit filed by the original plaintiff was actionable in tort, the application of the exception was indisputable.¹⁸⁸

Judge Williams, concurring in the *Turner* case, cautioned that the court was not called upon to consider the application of the tort case exception to non-tort claims that happen to be resolved in the same lawsuit as a tort claim but could have been brought as separate non-tort actions against the federal government.¹⁸⁹ Thus, for example, if a defendant to a civil action by the government were to raise a counterclaim against the United States under the Federal Tort Claims Act,¹⁹⁰ or the government were to attempt to collect on an obligation as a permissive counterclaim against a tort plaintiff,¹⁹¹ the citizen defendant or plaintiff would not be precluded by the tort case exception from seeking attorney's fees under EAJA Subsection (d) for legal expenses attributable to the discrete non-tort claim. The statutory exception reasonably applies only to preclude an award of attorney's fees for legal expenses incurred with respect to a claim seeking relief under principles of tort law, not for separable claims seeking distinct non-tort relief that are merely joined to a tort claim in a single lawsuit assigned a single court docket number.

3. Constitutional Torts

The House Report on the EAJA in 1980 stated the exclusion of tort cases from EAJA Subsection (d) did not apply to "constitutional tort" cases.¹⁹² However, there

185. *Id.* at 640-41.

186. *Id.* at 640.

187. *Id.*

188. *Id.* at 640-41.

189. *Id.* at 643 (Williams, J., concurring).

190. For example, in *FDIC v. Irwin*, 916 F.2d 1051 (5th Cir. 1990), the FDIC brought suit against the directors of a bank for breach of fiduciary duties, and the directors counterclaimed under the Federal Tort Claims Act alleging an improper determination the bank was insolvent. *Id.* at 1051-52.

191. For example, in *Livera v. First Nat'l State Bank*, 879 F.2d 1186 (3d Cir.), *cert. denied*, 493 U.S. 937, 110 S. Ct. 332 (1989), the guarantor of the bank loan also guaranteed by the Small Business Administration (SBA) filed suit, alleging the SBA, acting through the bank, deprived the guarantor of statutory protections and charged an improper interest rate, and SBA counterclaimed for alleged default on the guarantor's obligation. *Id.* at 1188-89. *See also* John M. Steadman et al., *Litigation with the Federal Government* §18.104, at 549 (3d ed. 1994) ("The Government may counterclaim without limitation.")

192. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4997. *See also* *Spencer v. NLRB*, 712 F.2d 539, 545 (D.C. Cir. 1983) (stating in dictum constitutional torts are within the scope of the EAJA), *cert. denied*, 466 U.S. 936, 104 S. Ct. 1908

is nothing in the statutory language that would abridge the blanket exclusion of all tort claims.¹⁹³ A comment in the legislative history may not prevail over the plain and unqualified language in the statute, especially in view of the requirement that waivers of sovereign immunity be unequivocally expressed.¹⁹⁴ When a constitutional claim is the equivalent of a private claim for tortious wrongdoing, as revealed by a claim for relief in the form of compensatory damages, the claim should be recognized as tortious in substance, with the constitutional provision at issue creating the cause of action and establishing the standard for determining whether government conduct is wrongful in nature.

In *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*,¹⁹⁵ the United States Court of Appeals for the Fifth Circuit ruled that constitutional torts were not within the tort exception from the EAJA and thus could give rise to an EAJA Subsection (d) fee award.¹⁹⁶ However, the court paused only briefly on the question and reached its conclusion without detailed analysis. Moreover, a review of the factual background to that case in an earlier decision suggests the lawsuit may have raised only a claim for equitable relief to enjoin unconstitutional conduct, and thus may not have involved a true tort claim, constitutional or otherwise, seeking compensatory damages.¹⁹⁷ Indeed, in dicta in a recent decision, the United States Court of Appeals for the Ninth Circuit observed that "the reference to 'constitutional torts' in the House Report is vague," and may have been intended merely to confirm that the EAJA applies "to injunction actions against government employees in their official capacity for wrongful or tortious conduct."¹⁹⁸ In any event, the constitutional tort question has arisen rather infrequently.

D. Exclusion of Internal Revenue Code Proceedings

In 1982, the EAJA was amended to withdraw federal tax cases,¹⁹⁹ which are now governed by a separate fee-shifting scheme under the Internal Revenue Code.²⁰⁰ Under 26 U.S.C. § 7430, attorney's fees may be paid to the prevailing party in suits "in connection with the determination, collection, or refund of any

(1984).

193. See *Velez v. United States*, No. 83-Civ. 7021, 1989 WL 51842, at *1 (S.D.N.Y. May 9, 1989) (rejecting the argument that exclusion of tort cases from the EAJA does not include constitutional torts as "contrary to the plain wording of the statute").

194. See *Lehman v. Nakshian*, 453 U.S. 156, 160-61, 101 S. Ct. 2698, 2701-02 (1981) (holding waivers of sovereign immunity must be expressed unequivocally).

195. 679 F.2d 64 (5th Cir. 1982).

196. *Id.* at 68.

197. See *Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Bd.*, 578 F.2d 1122 (5th Cir. 1978).

198. *Kreines v. United States*, 33 F.3d 1105, 1108 (9th Cir. 1994).

199. Pub. L. No. 97-248, § 292(c), 96 Stat. 324, 574 (1982) (codified at 28 U.S.C. § 2412(e) (1988)).

200. *Id.* § 292(a), 96 Stat. at 572 (1982) (codified at 26 U.S.C. § 7430 (1988)).

tax, interest or penalty."²⁰¹ Section 7430 imposes a similar standard for fee awards to that provided under the EAJA, although it places the burden upon the fee claimant to "establish[] that the position of the United States in the proceeding was not substantially justified."²⁰²

To avoid any confusion or overlapping coverage between the EAJA and Section 7430, the 1982 amendment to the EAJA added Subsection (e) which states in pertinent part: "The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1954 applies"²⁰³

The courts have generally applied this provision strictly to exclude all tax-related disputes from the scope of the EAJA, whether or not the party cites to or purports to found the action under the Internal Revenue Code.²⁰⁴ Whenever a proceeding has any "connection with the determination, collection or refund of any tax" that has been imposed pursuant to the Internal Revenue Code,²⁰⁵ the EAJA must yield to Section 7430.²⁰⁶

E. EAJA Subsection (d) Does Not Supersede Other Fee-Shifting Statutes

1. EAJA Section 206—The Non-Displacement Provision

One final qualification of the scope of the EAJA must be addressed—the unavailability of Subsection (d) when another fee-shifting statute covers the

201. 26 U.S.C. § 7430(a) (1988). See generally Joel P. Bennett, *Winning Attorney's Fees From the U.S. Government* at ch. 6 (1984 & Supp. 1993); Debra C. Chini, *Recent Development, The 1988 Amendment to 26 U.S.C. Section 7430: Expanding Taxpayers' Rights to Recover Costs in Tax Controversies*, 42 Vand. L. Rev. 1711 (1989).

202. 26 U.S.C. § 7430(c)(4)(A)(i) (1988). Under the EAJA, the burden is upon the government to prove its position was substantially justified. See *infra* section IV, forthcoming (discussing entitlement to an EAJA award). Section 7430 also does impose certain additional requirements for a fee award, such as the requirement that the party have exhausted administrative remedies within the Internal Revenue Service before seeking judicial review. 26 U.S.C. § 7430(b)(1) (1988).

203. Equal Access to Justice Act, 28 U.S.C. § 2412(e) (1988).

204. *In re Grewe*, 4 F.3d 299, 301-03 (4th Cir. 1993); *Smith v. Brady*, 972 F.2d 1095, 1099 (9th Cir. 1992); *United States v. McPeck*, 910 F.2d 509, 511-13 (8th Cir. 1990).

205. 26 U.S.C. § 7430(a) (1988). Compare *McLarty v. United States*, 6 F.3d 545, 548-49 & n.5 (8th Cir. 1993) (holding Section 7430 does not apply to a claim of wrongful disclosure of tax returns "that was completely unrelated to any civil tax proceeding" and did not occur in the course of any activities by the Internal Revenue Service to determine or collect taxes) with *Huckaby v. United States Dep't of Treasury*, 804 F.2d 297, 298 (5th Cir. 1986) (holding Section 7430 applies to a wrongful disclosure of tax records because the government came to possess them "for the purpose of determining tax liability"). See also *United States v. Arkinson (In re Cascade Roads, Inc.)*, 34 F.3d 756, 768-69 (9th Cir. 1994) (holding that bankruptcy proceeding, in which the bankruptcy trustee attempted to prevent the United States from exercising a set-off for taxes from a judgment against the government in favor of the bankrupt debtor, was a proceeding in connection with the determination and collection of taxes and therefore fell under Section 7430 and not the EAJA).

206. *Grewe*, 4 F.3d at 301-02.

subject matter. Subsection (d) itself anticipates this qualification in its introductory phrase, stating that the provision applies “[e]xcept as otherwise specifically stated.”²⁰⁷ Section 206 of the EAJA, which has not been codified, states more explicitly and emphatically:

Nothing in section 2412(d) . . . 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.²⁰⁸

2. *Using the EAJA to Supplement Other Fee Statutes that Do Not Cover Certain Types of Cases or Claims*

The EAJA may be used to supplement existing fee provisions, but not to replace or supersede other fee-shifting statutes. The subtle distinction between supplementing and superseding has been the subject of much litigation with conflicting results. In general, courts have allowed resort to the EAJA in only two circumstances: (1) where no other statute provides for fee-shifting for that type of case, or (2) where another fee-shifting statute applies to similar or related claims but does not cover the particular type of claim or proceeding. In both circumstances, the application of the EAJA fills in a gap in the availability of fee recovery without intruding upon Congress’ considered adoption of particular eligibility or entitlement standards necessary to obtain an award under another fee-shifting statute.

As an example of the first circumstance, the United States Court of Appeals for the Fourth Circuit in *Guthrie v. Schweiker*²⁰⁹ and the United States Court of Appeals for the Ninth Circuit in *Wolverton v. Heckler*²¹⁰ both ruled that the EAJA could be used to supplement Section 406(b)(1) of the Social Security Act, which allows payment of attorney’s fees out of any benefit award made to the claimant.²¹¹ Because the non-displacement language of Section 206 precludes use of the EAJA only in the context of other statutes that authorize “an award” of attorney’s fees, the result here was plainly correct.²¹² Section 406(b)(1) establishes a fee payment arrangement by ensuring the payment of a claimant’s

207. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988).

208. Act of Oct. 21, 1980, Pub. L. No. 96-481, § 206, 94 Stat. 2325, 2330 (1980) (lapsed), as reenacted by Equal Access to Justice Act, Pub. L. No. 99-80, § 3, 99 Stat. 184, 186 (1985) (not codified).

209. 718 F.2d 104, 107-08 (4th Cir. 1983).

210. 726 F.2d 580, 582 (9th Cir. 1984).

211. 42 U.S.C. § 406(b)(1) (1988).

212. See generally James R. Cromwell, *A Substantial Paradox: Attorney’s Fees Under the Equal Access to Justice Act in Social Security Appeals*, 7 U. Ark. Little Rock L.J. 355, 366-67 (1984) (discussing the pre-1985 decisions holding the EAJA applies to Social Security cases).

attorney out of the benefit award; it is not a fee-shifting statute authorizing the exaction of a fee award from the government.²¹³ Lest there be any doubt that the *Guthrie* and *Wolverton* results were concurrent with the congressional purpose, an uncodified section of the EAJA as re-enacted in 1985 expressly provides Section 406(b)(1) shall not prevent the award of attorney's fees under the EAJA.²¹⁴

An illustration of the second circumstance of the EAJA supplementation of fee-shifting schemes can be found in court approval of the extension of the EAJA to claims or cases that are beyond the scope of other fee-shifting statutes that apply to similar types of claims or cases. For example, in cases governed by environmental protection statutes that allow for an award of attorney's fees in district court actions but are silent on fees for appellate petitions for judicial review of agency action, the courts have allowed the use of the EAJA to supplement the district court fee provision and permit an award for attorney's fees incurred in appellate judicial review.²¹⁵

Similarly, courts applying the original EAJA held that the statute covered eminent domain cases,²¹⁶ notwithstanding another fee-shifting provision in the Uniform Relocation Assistance and Real Property Acquisition Policies Act that provided for an award of attorney's fees to property owners in condemnation cases in those rare instances when the federal agency is held to be without authority to condemn the property or the government abandons the condemnation.²¹⁷ At the time these cases were decided, the question of the application of the EAJA to condemnation cases was close. On the one hand, as the majority of courts held, applying the EAJA to condemnation cases did "not change or invalidate the requirements set forth in [the Uniform Act] for an award of attorney's fees and expenses to property owners in condemnation cases" that were covered by the Uniform Act.²¹⁸ Thus, it could be contended, the use of the EAJA effected a legitimate expansion of coverage without altering the standards for recovery in

213. See *Wolverton*, 726 F.2d at 582 ("The EAJA provides for shifting the burden of attorneys' fees from the private litigant to the government. The Social Security Act does not provide for fee shifting.").

214. Equal Access to Justice Act, Pub. L. No. 99-80, § 3, 99 Stat. 183, 186 (1985) (uncodified). See generally Louise L. Hill, *An Analysis and Explanation of the Equal Access to Justice Act*, 19 *Ariz. St. L.J.* 229, 250-52 (1987) (discussing applicability of the EAJA to Social Security judicial review cases); Hill, *supra* note 10, at 77-78 (same).

215. See, e.g., *Environmental Defense Fund, Inc. v. EPA*, 716 F.2d 915, 918-19 (D.C. Cir. 1983) (stating the EAJA fills a gap when fee-shifting provision in Resource Conservation and Recovery Act, 42 U.S.C. § 6972(e) (1988), does not apply to appellate petition for review); *Natural Resources Defense Council, Inc. v. EPA*, 703 F.2d 700, 704-06 (3d Cir. 1983) (stating the EAJA supplements the Clean Water Act fee provision, 33 U.S.C. § 1365(d) (1988), which allows fees for district court actions but is silent on fees for appellate petitions for review).

216. *United States v. 341.45 Acres of Land*, 751 F.2d 924, 931-36 (8th Cir. 1984), *vacated*, 786 F.2d 1168 (8th Cir. 1986); *United States v. 329.73 Acres of Land*, 704 F.2d 800, 804-08 (5th Cir. 1983) (en banc); *United States v. 101.80 Acres of Land*, 716 F.2d 714, 726-27 (9th Cir. 1983).

217. 42 U.S.C. § 4654 (1988).

218. *341.45 Acres of Land*, 751 F.2d at 933.

those particular cases controlled by the Uniform Act. On the other hand, one could argue the Uniform Act fee-shifting provision generally covered cases sounding in eminent domain (and thus excluded the EAJA from overlapping coverage), although the Uniform Act provision articulated a more limited standard for recovery by restricting fee-shifting to cases leading to a particular result (a ruling of lack of proper authority by the government or an abandonment of the condemnation by the government).²¹⁹ The application of the EAJA to eminent domain cases was subsequently confirmed by Congress in the re-enactment of the EAJA by the addition of a specific provision defining "prevailing party" in the context of a condemnation action.²²⁰

Finally, in very recent decisions, the United States Court of Appeals for the Seventh Circuit in *Equal Employment Opportunity Commission v. O & G Spring & Wire Forms Specialty Co.*,²²¹ and the United States Court of Appeals for the Fourth Circuit in *Equal Employment Opportunity Commission v. Clay Printing Co.*,²²² held that the EAJA was available to supplement the attorney's fee provision applicable to actions under the Age Discrimination in Employment Act (ADEA)²²³ to allow awards of fees to private employers successfully defending against claims brought by the government as plaintiff on behalf of alleged victims of age discrimination. Under the ADEA, which incorporates the attorney's fee provision of the Fair Labor Standards Act,²²⁴ an award of attorney's fees is specifically authorized in favor of "the plaintiff or plaintiffs" which is "to be paid by the defendant."²²⁵ The statute does not provide for fee awards to prevailing defendants.

In determining whether EAJA Subsection (d) could be used to correct that omission and authorize an award to a prevailing defendant in an ADEA case against the government as plaintiff, the Seventh Circuit stated the question as whether the statute "prohibits awarding fees to a prevailing defendant—which would preclude application of the EAJA—or . . . is silent on the matter—which means the EAJA or the common law steps in to fill the void."²²⁶ Although "the language of the provision, with its emphasis on an award 'to the plaintiffs' to be paid 'by the

219. *Id.* at 942 (Gibson, J., dissenting) (stating EAJA Section 206 excludes condemnation cases from the EAJA because its application would modify or repeal the existing fee-shifting guidelines for condemnation cases under the Uniform Act provision). *See also 329.73 Acres of Land*, 704 F.2d at 816-19 (Rubin, J., dissenting).

220. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(H) (1988). *See also* H.R. Rep. No. 120, 99th Cong., 1st Sess. 18 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 147 (explaining one purpose of amendment was to make "clear that condemnation cases are covered by the Act"). *See generally infra* section III.A.5 (discussing definition of "prevailing party" for eminent domain cases).

221. 38 F.3d 872 (7th Cir. 1994).

222. 13 F.3d 813 (4th Cir. 1994).

223. 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993).

224. *Id.* § 626(b) (1988).

225. *Id.* § 216(b) ("The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.").

226. *EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 882 (7th Cir. 1994).

defendants,' strongly suggests by negative implication that it precludes awarding fees to a prevailing defendant,"²²⁷ both the Fourth Circuit²²⁸ and the Seventh Circuit²²⁹ concluded that Congress did not actually intend to preempt the availability of fee awards to prevailing defendants through other sources of law for fee-shifting. Accordingly, because the statute is silent on awards in favor of defendants, these courts concluded that supplementation of the ADEA by the EAJA does not contravene a considered decision by Congress to preclude or restrict an award under these circumstances.²³⁰

227. *Id.* (quoting 29 U.S.C. § 216(b) (1988)).

228. *EEOC v. Clay Printing Co.*, 13 F.3d 813, 817-18 (4th Cir. 1994).

229. *O & G Spring & Wire Forms Specialty Co.*, 38 F.3d at 883-84.

230. Another part of the Seventh Circuit's analysis is plainly mistaken, insofar as the court treats the scope and availability of EAJA Subsections (b) and (d) as an identical inquiry. In *O & G Spring & Wire Forms Specialty Co.*, the Equal Employment Opportunity Commission (EEOC) conceded that EAJA Subsection (b) could be invoked to allow an award against the government to a defendant in an age discrimination case through the common-law rule allowing recovery if a plaintiff acts in bad faith, but nevertheless challenged the application of EAJA Subsection (d) to allow an award when the plaintiff's position is not substantially justified. *Id.* at 881. The court responded:

[W]hile the EEOC concedes that EAJA sec. 2412(b) (the bad faith standard) applies to the ADEA, it maintains that the ADEA preempts application of sec. 2412(d) (the substantial justification standard). This distinction is untenable. The ADEA either preempts application of EAJA sec. 2412 or it does not. We have held that it does not, and thus nothing precludes application of all of sec. 2412, including the substantial justification standard of sec. 2412(d).

Id. at 883. The Seventh Circuit's reasoning is flawed. The distinction is more than tenable; it is explicit under the statute.

EAJA Subsections (b) and (d), although both appearing in Section 2412 of Title 28, are distinct and independent fee-shifting provisions, related only in their mutual effect of expanding the responsibility of the United States to compensate opponents in litigation for their costs under appropriate circumstances. Moreover, the scope of these respective provisions differs, as dictated by the plain language of the subsections. As discussed generally *supra* section I.B.2, Subsection (b) subjects the United States to liability for fees "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." 28 U.S.C. § 2412(b) (1988). (An award of fees against a losing party that has promoted litigation or manipulated the judicial process in bad faith is one of the recognized common-law exceptions to the American Rule. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59, 95 S. Ct. 1612, 1622 (1975). For a discussion of awards for bad faith under EAJA Subsection (b), see generally Sisk, *supra* note 7, at 784-85.)

By its terms, Subsection (b) is available "[u]nless expressly prohibited by statute." *Id.* Accordingly, even when another fee-shifting statute governs the precise situation at issue, Subsection (b) remains available as an alternative to incorporate other, including common-law, bases for a fee award—unless the statute expressly prohibits any alternative. Through Subsection (b), a party in litigation with the federal government could properly demand attorney's fees under a common-law exception to the American Rule, such as the bad faith rule, even when a specific statute provides for a fee award according to particular standards for a case of that type or subject matter. In other words, EAJA Subsection (b) may stand side-by-side with another fee-shifting statute, unless "expressly prohibited" by the statute.

By contrast, Subsection (d) is available "[e]xcept as otherwise specifically provided by statute," 28 U.S.C. § 2412(d)(1)(A) (1988), which EAJA Section 206 clarifies as meaning that "[n]othing in section 2412(d) . . . alters, modifies, repeals, invalidates, or supersedes" any other provision shifting

Unfortunately, the line of reasoning applied by the Fourth and Seventh Circuits is questionable and the analysis incomplete. As discussed in the next section of this article, EAJA Subsection (d) may be used to supplement fee-shifting statutes that do not apply to a type of claim or proceeding, but may not be used to displace a statute that only permits a fee award under narrower circumstances than represented in the particular case at hand. The attorney's fee statute at issue in *O&G Spring & Wire Form Specialty Co.* and *Clay Printing* plainly governed the subject matter or claim—age discrimination—at issue there. That the ADEA authorizes a fee award only under the restricted circumstances of a prevailing plaintiff and remains silent on the matter of fee awards to prevailing defendants gives no warrant to expand fee-shifting by substituting the substantial justification standard of EAJA Subsection (d). Neither court mentioned, much less applied, the explicit non-displacement language of EAJA Section 206.²³¹

However, the result in *O&G Spring & Wire Form Specialty Co.* and *Clay Printing* may be defended on different grounds, limited to the unique context of the ADEA as applied to the federal government. The non-displacement provision in EAJA Section 206 states that “[n]othing in section 2412(d) . . . 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.”²³² Thus, this limitation on the scope of EAJA Subsection (d) is implicated only if another federal statute provides for an award of fees in an action “brought by or against the United States,” that is, if an existing statute waives the sovereign immunity of the United States for an award of fees in that type of proceeding. Somewhat surprisingly, and in sharp contrast with other civil rights statutes such as Title VII of the Civil Rights Act of 1964,²³³ the ADEA contains no waiver of sovereign immunity for fee-shifting

fees against the federal government. Act of Oct. 21, 1980, Pub. L. No. 96-481, § 206, 94 Stat. 2325, 2330 (lapsed), as reenacted by Equal Access to Justice Act, Pub. L. No. 99-80, § 3, 99 Stat. 184, 186 (1985) (not codified). Thus, as discussed further in the next section of this article, Subsection (d) may never stand side-by-side with another fee-shifting statute. Either an existing fee-shifting statute governs the type of claim or proceeding or the EAJA does; the EAJA cannot overlap or intersect with another fee-shifting provision that authorizes awards against the government. The silence in the ADEA with respect to fee awards to defendants (and, more importantly, the absence of any provision for a fee award against the government under the ADEA) left both Subsection (b) and Subsection (d) available in the *O & G Spring & Wire Forms Specialty Co.* and *Clay Printing* cases. However, when a fee-shifting statute does speak to the type of claim or proceeding at issue, Subsection (d) must bow out, even as Subsection (b) remains available as an alternative basis for invoking a common-law exception to the American Rule.

231. Act of Oct. 21, 1980, Pub. L. No. 96-481, § 206, 94 Stat. 2325, 2330 (lapsed), as reenacted by Equal Access to Justice Act, Pub. L. No. 99-80, § 3, 99 Stat. 184, 186 (1985) (not codified).

232. *Id.* (emphasis added).

233. 42 U.S.C. § 2000e-5(k) (1988 & Supp. V 1993) (“[T]he Commission [EEOC] and the United States shall be liable for costs [including attorney’s fees] the same as a private person.”). On awards of attorney’s fees against the federal government under civil rights statutes, see generally Sisk,

and thus does not authorize *any* award of attorney's fees against the federal government, whether acting as plaintiff or defendant.

As discussed above, the general attorney's fee provision incorporated into the ADEA provides only for an award of fees in favor of plaintiff and makes no provision for an award of fees to a prevailing defendant, whether private or sovereign.²³⁴ Moreover, even when the federal government is charged as a defendant employer with age discrimination against a federal employee, the ADEA neglects to authorize a fee award against the United States. When Congress extended the ADEA to federal employees, it added a new section applicable only to federal employees, rather than incorporating federal employees within the Act's existing provisions.²³⁵ Because this specific section of federal employees does not include a specific waiver of sovereign immunity or an exception to the American Rule, three courts of appeals have held that attorney's fees may not be awarded against the federal government under the ADEA.²³⁶ In sum, there is *no* fee-shifting statute applicable to the federal government under any circumstances that could be displaced or superseded by the application of EAJA Subsection (d) in this particular context. Because of this strange legislative omission, age discrimination cases involving the federal government as a party remain frontier territory for fee-shifting, wide open to exploration by the EAJA.

3. *The EAJA May Not Displace Other Statutes or Alter Standards for Fee Recovery Under Other Provisions*

Although the EAJA may be used to supplement the coverage of other fee statutes, Section 206 precludes abuse of the EAJA to replace or supersede other fee-shifting statutes that may have different standards for recovery or measurement of a fee award. Nonetheless, the EAJA will seldom come into conflict with other fee-shifting statutes, as other provisions usually are more generous. Most fee-shifting statutes authorize a fee award to parties who have prevailed or substantially prevailed in litigation with the government,²³⁷ whereas EAJA

supra note 7, at 769-72.

234. 29 U.S.C. §§ 216, 626(b) (1988 & Supp. V 1993).

235. *Id.* § 633a (1988). See generally Sisk, *supra* note 7, at 770-71 (discussing attorney's fee awards against the federal government under the ADEA).

236. *Lewis v. Federal Prison Indus., Inc.*, 953 F.2d 1277, 1281-82 (11th Cir. 1992); *Palmer v. General Servs. Admin.*, 787 F.2d 300, 300-02 (8th Cir. 1986); *Kennedy v. Whitehurst*, 690 F.2d 951, 962-66 (D.C. Cir. 1982).

237. For example, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1988), a fee award to a prevailing plaintiff is "virtually automatic." Sisk, *supra* note 7, at 770. See also *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402, 88 S. Ct. 964, 966 (1968) (holding under civil rights fee-shifting statutes, a prevailing party is entitled to a fee "unless special circumstances would render an award unjust"). Similarly, under environmental protection statutes such as the Clean Water Act, 33 U.S.C. § 1365(d) (1988), and the Clean Air Act, 42 U.S.C. §§ 7604(d) (1988), 7607(f) (1988), both by congressional revision and judicial interpretation, the

Subsection (d) also requires that the prevailing party establish that the government's position in the case lacks "substantial justification."²³⁸ Moreover, most fee-shifting statutes authorize an award of a "reasonable" fee,²³⁹ which allows attorneys to recover fees measured by their hours worked and an hourly rate prevailing in the community,²⁴⁰ whereas EAJA Subsection (d) places a \$75 per hour cap on fee awards.²⁴¹ Accordingly, when another fee-shifting statute is available, a fee claimant will rarely wish to substitute the EAJA with its more stringent entitlement standard and fee limitation.

However, under unusual circumstances, the specific limitations of another fee-shifting statute may make the EAJA an attractive alternative. For the most part, courts have refused to allow fee claimants the option of choosing the EAJA over another fee-shifting statute that applies to the type of case before the court. In *Beck v. Secretary of the Department of Health and Human Services*,²⁴² a lawsuit was brought under the National Childhood Vaccine Injury Act of 1986 (Vaccine Act),²⁴³ which provides a no-fault compensation scheme for certain persons who die or are injured in connection with the administration of a vaccine.²⁴⁴ The Vaccine Act places a cap on the award for certain types of expenses and damages, including attorney's fees, of \$30,000.²⁴⁵ The Claims Court awarded the full amount of \$30,000 in attorney's fees and costs, as well as over \$1,000,000 in compensation.²⁴⁶ The plaintiff's attorney sought to obtain an additional award of attorney's fees under the EAJA.²⁴⁷

On appeal, the United States Court of Appeals for the Federal Circuit affirmed the capped fee award,²⁴⁸ holding an additional award under the EAJA was barred by the language in the statute stating that Subsection (d) applied "[e]xcept as otherwise specifically provided by statute."²⁴⁹ Because the Vaccine Act "does specifically provide for attorney['s] fees,"²⁵⁰ the court of appeals held the EAJA "may not be used to supplement an award of fees under the Vaccine

standard for eligibility for a fee award is increasingly the same as that under traditional "prevailing party" statutes. Sisk, *supra* note 7, at 778-81.

238. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988). See generally *infra* section IV, forthcoming (discussing entitlement to an EAJA Subsection (d) fee award).

239. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562, 106 S. Ct. 3088, 3096-97 (1986), *rev'd on reh'g on other grounds*, 483 U.S. 711, 107 S. Ct. 3078 (1987).

240. Sisk, *supra* note 7, at 748-56.

241. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A) (1988). See generally *infra* section V, forthcoming (discussing measurement of an EAJA Subsection (d) fee award).

242. 924 F.2d 1029 (Fed. Cir. 1991).

243. 42 U.S.C. § 300aa-1 to -34 (1988 & Supp. V 1993).

244. *Beck*, 924 F.2d at 1031.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 1037-38.

249. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988).

250. *Beck v. Secretary of the Dep't of Health & Human Servs.*, 924 F.2d 1029, 1037 (Fed. Cir. 1991).

Act.²⁵¹ The court's holding was dictated by the non-displacement mandate of the EAJA, because a contrary holding would have eviscerated the fee cap intentionally imposed by Congress on fee awards for claims under the Vaccine Act.

Unfortunately, the Federal Circuit in an earlier case, *Gavette v. Office of Personnel Management*,²⁵² had allowed the use of EAJA Subsection (d) in a situation that had the precise consequence of superseding another fee-shifting statute and evading the stricter standard for an award under that statute. In *Gavette*, a federal employee challenging an involuntary disability retirement took a successful appeal from a decision of the Merit Systems Protection Board.²⁵³ The claim was governed by the Back Pay Act,²⁵⁴ which authorizes an award of attorney's fees whenever it is "in the interest of justice" for the court to do so.²⁵⁵ Notwithstanding that the Back Pay Act contains a fee-shifting provision, albeit with a stricter standard for an award, a divided Federal Circuit, sitting in banc, ruled that the federal employee could alternatively seek an award of attorney's fees under the EAJA.²⁵⁶ The majority stated that the EAJA could be used as a supplement whenever another fee-shifting statute "provides for attorney[']s fees in a narrower set of circumstances than those covered by the EAJA," which, the court explained, included when the other statute establishes "a more difficult standard" for an award of attorney's fees.²⁵⁷ This decision cannot be reconciled with the unequivocal and emphatic non-displacement language in EAJA Section 206.²⁵⁸

When the EAJA and another fee-shifting statute appear to intersect, the courts must examine the scope, as distinguished from the standards, of the other statute. When the other statute does not apply to the type of case or claim before the court such that no fee award could be made by that court in a case of that subject matter under any circumstances, the EAJA may properly be used to supplement the statute.²⁵⁹ In such an instance, the EAJA extends fee-shifting to

251. *Id.* at 1038.

252. 808 F.2d 1456 (Fed. Cir. 1986) (in banc). *See generally* Nancy A. Street, Note, *Gavette v. Office of Personnel Management: The Right to Attorney Fees Under the Equal Access to Justice Act*, 36 Am. U. L. Rev. 1013, 1025 (1987) (approving the holding in *Gavette* that "the EAJA does not preclude the cumulative application of another, less expansive fee-shifting statute").

253. *Gavette*, 808 F.2d at 1457-58.

254. 5 U.S.C. § 5596 (1988 & Supp. V 1993).

255. *Id.* §§ 5596(b)(1) (1988), 7703(c) (1988).

256. *Gavette*, 808 F.2d at 1463-65.

257. *Id.* at 1464-65. *See also* Beck v. Secretary of the Dep't of Health & Human Servs., 924 F.2d 1029, 1038 (Fed. Cir. 1991) (explaining *Gavette* as holding "the EAJA may be used to supplement another statute's attorney fee provision where the other statute has a more difficult or narrow standard for awarding fees").

258. *See* EEOC v. Consolidated Serv. Sys., 30 F.3d 58, 59 (7th Cir. 1994) (holding the EAJA does not apply to Title VII cases which are governed by Title VII's attorney's fee provision because "Congress made as clear as it could that the Act was inapplicable to cases in which a statute regulating awards of attorney's fees against the government was already in place").

259. *Gavette*, 808 F.2d at 1471 (Bissell, J., dissenting in part) (distinguishing other cases as

a new field of legal claims for relief, that is, to a new type of civil action. However, when another applicable fee-shifting statute imposes a narrower standard or requires a more demanding showing to obtain a fee recovery, recourse to the EAJA would make it a substitute for, rather than a supplement to, the specific fee-shifting statute that governs that subject matter. Adhering to the non-displacement mandate of the EAJA does not leave a "no-man's land" between the substantial justification standard of EAJA Subsection (d) and the stricter standard of another fee-shifting statute.²⁶⁰ Rather, this position respects the decision of Congress to adopt different and unique fee award standards and limitations tailored to the specific context and enforcement of a particular statutory scheme.

For example, under the Freedom of Information Act (FOIA),²⁶¹ a plaintiff seeking attorney's fees must not only demonstrate eligibility by having "substantially prevailed" in a request for government documents,²⁶² but must also demonstrate entitlement to an award.²⁶³ Among the factors to be considered by the court in determining entitlement are (1) the benefit to the public derived from the case, (2) the commercial benefit to the plaintiff, (3) the nature of the plaintiff's interest in the records sought, and (4) whether the government's withholding of the records had a reasonable basis in law.²⁶⁴ Thus, although the reasonableness of the government's conduct is one factor in determining entitlement to a fee award under the FOIA, other factors such as the absence of a public benefit or a commercial benefit to the plaintiff might preclude an award. The EAJA, with its solitary "substantial justification" standard for entitlement to an award, cannot legitimately be used to evade the additional FOIA entitlement prerequisites, which reflect different policy considerations unique to that particular statutory scheme.²⁶⁵

allowing use of the EAJA as a supplement only when another fee-shifting statute "did not cover the type of action involved in those cases and thus no fee award could be made under that provision").

260. See *id.* at 1465 n.52 (arguing that if the EAJA did not apply to supplement the Back Pay Act, there would be a "no-man's land" of "circumstances falling in between the 'interest of justice' standard [of the Back Pay Act] and the 'substantial justification' standard [of the EAJA]").

261. 5 U.S.C. § 552 (1988).

262. *Id.* § 552(a)(4)(E).

263. *Church of Scientology v. Harris*, 653 F.2d 584, 590 (D.C. Cir. 1981).

264. *Long v. IRS*, 932 F.2d 1309, 1313 (9th Cir. 1991); *Aronson v. United States Dep't of Hous. & Urban Dev.*, 866 F.2d 1, 3 (1st Cir. 1989); *Church of Scientology*, 653 F.2d at 590. See generally *Sisk*, *supra* note 7, at 774-75 (discussing entitlement to fee award under the FOIA).

265. In *Nichols v. Pierce*, 740 F.2d 1249 (D.C. Cir. 1984), a plaintiff who successfully challenged the sufficiency of procedural protections accorded to tenants receiving federal housing subsidies sought an award of attorney's fees under both the FOIA and the EAJA. *Id.* at 1251. However, because the court concluded the FOIA had only "tangential relevance" and the case did not actually arise under the FOIA, no true conflict or intersection between the FOIA and the EAJA was presented in that case. *Id.* at 1252-54. See also *Martenson v. United States Internal Revenue Serv.*, No. 4-81-44, 1981 WL 1941, at *4 n.6 (D. Minn. Dec. 30, 1981) (holding a plaintiff in a FOIA case who failed to make the required showing for an award of fees under Section 552(a)(4)(E) was barred under EAJA Section 206 from seeking fees under the EAJA).

Similarly, defendants in civil rights cases prosecuted by the government may not gain access to the EAJA to avoid the rule that prevailing defendants in discrimination cases may obtain an award only if the plaintiff's case is "frivolous, unreasonable or without foundation."²⁶⁶ The courts of appeals that have specifically addressed the issue²⁶⁷ have concluded that the EAJA does not apply to actions brought under Title VII of the Civil Rights Act of 1964,²⁶⁸ because Title VII contains its own specific provision governing the award of attorney's fees.²⁶⁹ Because the different and more exacting standard for an award of attorney's fees against a civil rights plaintiff furthers the intent of Congress "to promote vigorous enforcement of the provisions of Title VII,"²⁷⁰ the application of the EAJA to lower that standard, even slightly, would subvert the policies underlying the specific statutory scheme of that act.²⁷¹ Accordingly, as the United States Court of Appeals for the Eighth Circuit held in *Huey v. Sullivan*,²⁷² the non-displacement language in Section 206 prohibits the EAJA "from either narrowing or broadening the award of fees allowed by other provisions of federal law."²⁷³

The legislative history of the EAJA confirms this understanding. The bill reports in both Houses of Congress explain that the EAJA does not apply to

266. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S. Ct. 694, 700 (1978). However, given the close similarity between the "substantial justification"-unreasonableness standard of EAJA Subsection (d) and the "frivolous, unreasonable, or without foundation" standard for fee awards to defendants under civil rights cases, we may assume there would rarely be a case in which the government's case would be sufficiently weak to justify an award under one but not the other standard. See generally section IV.B, forthcoming. However, since the Supreme Court has ruled a showing by the government of "substantial justification" under the EAJA means "more than merely undeserving of sanctions for frivolousness," *Pierce v. Underwood*, 487 U.S. 552, 566, 108 S. Ct. 2541, 2550 (1988), a defendant's burden in showing entitlement to fees may be slightly "lighter under the EAJA than under" civil rights statutes. See *EEOC v. Consolidated Serv. Sys.*, 839 F. Supp. 1285, 1287 (N.D. Ill. 1993), *aff'd*, 30 F.3d 58 (7th Cir. 1994).

267. *EEOC v. Consolidated Serv. Sys.*, 30 F.3d 58, 59 (7th Cir. 1994); *Huey v. Sullivan*, 971 F.2d 1362, 1366-67 (8th Cir. 1992) (involving request for award of expert fees under the EAJA), *cert. denied*, 114 S. Ct. 1642 (1994); *EEOC v. Kimbrough Inv. Co.*, 703 F.2d 98, 103 (5th Cir. 1983).

268. 42 U.S.C. § 2000e-17 (1988).

269. 42 U.S.C. § 2000e-5(k) (1988 & Supp. V 1993).

270. *Christiansburg Garment Co.*, 434 U.S. at 422, 98 S. Ct. at 701 (explaining that allowing assessment of fees against a plaintiff on the same basis as against a defendant would "add to the risks inherent in most litigation and would undercut the efforts of Congress to promote vigorous enforcement of the provisions of Title VII"). But see *Consolidated Serv. Sys.*, 30 F.3d at 59 (holding the *Christiansburg* standard for awards of fees to defendants in Title VII cases precluded application of the different EAJA standard for an award of fees against a government plaintiff in a Title VII case, but expressing doubt about "whether the government needs the protection of a standard so friendly to plaintiffs as that adopted in *Christiansburg*").

271. *EEOC v. Consolidated Serv. Sys.*, 839 F. Supp. 1285, 1289-90 (N.D. Ill. 1993), *aff'd*, 30 F.3d 58 (7th Cir. 1994).

272. 971 F.2d 1362 (8th Cir. 1992), *cert. denied*, 114 S. Ct. 1642 (1994).

273. *Id.* at 1367.

“civil actions . . . already covered by existing fee-shifting statutes.”²⁷⁴ The legislative reports on the EAJA further state:

[T]his section is not intended to replace or supersede any existing fee-shifting statutes such as the Freedom of Information Act, the Civil Rights Acts, and the Voting Rights Act in which Congress has indicated a specific intent to encourage vigorous enforcement, or to alter the standards or the case law governing those Acts. It is intended to apply only to cases (other than tort cases) where fee awards against the government are not already authorized.²⁷⁵

The language in the legislative reports thus makes clear that the EAJA does not apply to cases of a certain type (those *covered* by existing fee-shifting statutes) or to *alter* the standards detailed in other statutes that govern specific types of claims.²⁷⁶

In conclusion, EAJA Section 206 could not be more clear in its message, stated with multiple synonyms to emphasize the point, that nothing in the EAJA “alters, modifies, repeals, invalidates, or supersedes” any other fee-shifting statute.²⁷⁷ In essence, Section 206 is a “hands-off” provision, instructing the courts to steer the EAJA clear of the waters already being fished under other fee statutes.²⁷⁸ The application of the EAJA as an end-run around more stringent standards for recovery in a particular fee-shifting statute runs up hard against this unequivocal prohibition.

274. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4997; S. Rep. No. 253, 96th Cong., 1st Sess. 20 (1979).

275. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4997; S. Rep. No. 253, 96th Cong., 1st Sess. 20 (1979).

276. The Federal Circuit has contended that the legislative history shows the non-displacement provisions in the EAJA were “intended only to exclude existing statutes which were *more expansive* than the EAJA.” *Gavette v. Office of Personnel Management*, 808 F.2d 1456, 1464 (Fed. Cir. 1986) (in banc). Thus, the *Gavette* court majority ruled, the EAJA could be used to supplement other fee-shifting statutes that impose “a more difficult standard” for recovery of fees. *Id.* at 1464-65. As the Fifth Circuit concluded upon reviewing the legislative history quoted above, it appears one of the motivations behind the non-displacement provisions in the EAJA was to address the concerns of civil rights groups that the statute not be applied to lessen the remedy provided in existing fee-shifting statutes. In existing statutes, plaintiffs were ordinarily entitled to recover an award of fees if they prevailed. Plaintiffs were not required to show the government’s position was without substantial justification. *United States v. 329.73 Acres of Land*, 704 F.2d 800, 805-06 (5th Cir. 1983) (en banc). That purpose, however, was accomplished through statutory language prohibiting the use of the EAJA to alter, modify, repeal, invalidate, or supersede any existing fee-shifting statute—with no exception stated for statutes less generous in standard or more demanding in requirements.

277. Act of Oct. 21, 1980, Pub. L. No. 96-481, § 206, 94 Stat. 2325, 2330 (lapsed), *as reenacted* by Equal Access to Justice Act, Pub. L. No. 99-80, § 3, 99 Stat. 184, 186 (1985).

278. *See 329.73 Acres of Land*, 704 F.2d at 818 (Rubin, J., dissenting) (stating Section 206 “indicates an intention not to trespass on territory covered by all other statutes”).

III. ELIGIBILITY FOR A FEE AWARD

A. Nature of the Result (Prevailing Party Requirement)

[A] court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . 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. (EAJA § 2412(d)(1)(A))²⁷⁹

1. Prevailing Party Status—The Classic Eligibility Requirement for Fee-Shifting

The classic test of eligibility for an award under fee-shifting statutes is whether the plaintiff has "prevailed" in the case.²⁸⁰ The meaning of "prevailing party" under the EAJA is the same as under other fee-shifting statutes.²⁸¹ To qualify as a "prevailing party," the party seeking fees must have attained "some relief on the merits of his claim."²⁸² There must have been some final determination of "the substantial rights of the parties,"²⁸³ such that the plaintiff can "point to a resolution of the dispute which changes the legal relationship between itself and the defendant."²⁸⁴ In *Texas State Teachers Ass'n v. Garland*

279. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988) (emphasis added).

280. See generally Sisk, *supra* note 7, at 742-44 (discussing prevailing party eligibility standard for attorney's fee awards).

281. *Continental Web Press, Inc. v. NLRB*, 767 F.2d 321, 323 (7th Cir. 1985) ("The meaning of 'prevailing party' seems to be the same under the Equal Access to Justice Act as under other attorney's fee statutes, such as 42 U.S.C. § 1988."). See also *SEC v. Comserv Corp.*, 908 F.2d 1407, 1412 n.4 (8th Cir. 1990) (stating the standards for prevailing party status under the EAJA are the same as under other fee-shifting statutes); *Guglietti v. Secretary of Health & Human Servs.*, 900 F.2d 397, 398 (1st Cir. 1990) (same); *National Wildlife Fed'n v. Federal Energy Regulatory Comm'n*, 870 F.2d 542, 544 & n.1 (9th Cir. 1989) (same); H.R. Rep. No. 1418, 96th Cong., 2d Sess. 21 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 5010 (the interpretation of the phrase, "prevailing party," "is to be consistent with the law that has developed under existing statutes"); S. Rep. No. 253, 96th Cong., 1st Sess. 7 (1979) (same). See generally Rueben B. Robertson & Mary C. Fowler, *Recovering Attorneys' Fees from the Government Under the Equal Access to Justice Act*, 56 Tul. L. Rev. 903, 905 (1982) ("The legislative history explains that 'prevailing' is to be defined as it is under existing statutes providing for attorneys' fee awards to prevailing parties, which means that parties may prevail by obtaining favorable settlements or voluntary dismissals or by winning on some significant, separable issues even if not on all issues in the case.").

282. *Hanrahan v. Hampton*, 446 U.S. 754, 757, 100 S. Ct. 1987, 1989 (1980) (per curiam).

283. *Id.* at 758, 100 S. Ct. at 1989.

284. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792, 109 S. Ct. 1486, 1493 (1989). See also *Milton v. Shalala*, 17 F.3d 812, 813 (5th Cir. 1994).

Independent School District,²⁸⁵ the Supreme Court rejected a test for prevailing party status that required a party to prevail on the "central issue" in the litigation and not merely upon significant secondary issues.²⁸⁶ The Court adopted a general rule that, to be a prevailing party under fee-shifting statutes, a litigant need only succeed on "any significant issue in [the] litigation which achieve[d] some of the benefit the parties sought in bringing the suit."²⁸⁷

In its latest word on the subject, the Supreme Court, in *Farrar v. Hobby*,²⁸⁸ held that the mere attainment of nominal damages is not so minimal or technical in nature as to deprive a party of prevailing status.²⁸⁹ Although a verdict might be for a nominal sum, such as one dollar,²⁹⁰ the judgment nevertheless materially alters the legal relationship between the parties:

A plaintiff may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages. A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay.²⁹¹

Farrar thus lowers the threshold for qualifying as a prevailing party to a very low level. *Farrar*, however, also stands for the proposition that even a party who has prevailed may be denied a fee award.²⁹² The Court held that, although the nominal nature of the judgment "does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded" under a fee-shifting statute.²⁹³ Indeed, the Court concluded that the proper measure of a fee award in a case of such limited success, with no additional equitable relief or corresponding public benefit, was "usually no fee at all."²⁹⁴ As *Farrar* illustrates, the fact of success may be enough to qualify a party for fees, but the extent of success remains important to the assessment of what constitutes a reasonable fee.²⁹⁵

Similarly, the fact of partial success in a multiple claim case is far from irrelevant to the fee award calculation. A plaintiff may qualify as a prevailing party by winning a single claim in a multiple claim lawsuit. Nevertheless, a loss

285. 489 U.S. 782, 109 S. Ct. 1486 (1989).

286. *Id.* at 792, 109 S. Ct. at 1493.

287. *Id.* at 789, 109 S. Ct. at 1492.

288. 113 S. Ct. 566 (1992).

289. *Id.* at 573.

290. *Id.* at 571.

291. *Id.* at 574.

292. *Id.* at 574-75.

293. *Id.*

294. *Id.* at 575.

295. See generally Sisk, *supra* note 7, at 760-62 (discussing downward adjustment of fee award to reflect a party's limited degree of success in litigation). See also section V, forthcoming (discussing measurement of an EAJA fee award).

on other claims may affect the amount of ultimate recovery.²⁹⁶ To the extent work done on distinct claims can be segregated, the plaintiff's attorney may be unable to recover for time expended on those unsuccessful claims.²⁹⁷ However, if the case involves what is essentially a single claim arising from a common nucleus of operative fact, and the plaintiff advances separate legal theories that "are but different statutory avenues to the same goal," then all of the time spent on all aspects of the case may be compensable.²⁹⁸

In a case involving multiple claims, a plaintiff may obtain attorney's fees even if he or she has prevailed only on a claim for which attorney's fees may not be awarded (a "non-fee claim"), provided the plaintiff also asserted a related claim for which attorney's fees are available (a "fee claim") that the court did not reach in its disposition of the case.²⁹⁹ The unresolved fee claim must be "substantial" (non-frivolous) and must arise out of a common nucleus of operative fact with the non-fee claim.³⁰⁰ Because of the broad scope of EAJA Subsection (d), applying to "any civil action" against the federal government with limited exceptions,³⁰¹ there are not likely to be many scenarios in which a non-fee claim would be combined with a claim covered by the EAJA in a suit against the federal government.

Finally, to qualify as a prevailing party, a party need not have taken the case to trial and obtained a judgment. A party obtaining a consent decree or a favorable settlement has prevailed.³⁰² For a party who settles with the federal government to be considered as having prevailed, there must be a "clear causal relationship" between the settlement and the litigation.³⁰³

Although the general standards for prevailing party status are the same under the EAJA as under other fee-shifting statutes, there are certain patterns of litigation problems that appear to arise more frequently under the EAJA or that present unique problems for this particular fee-shifting scheme. The remainder of this section addresses the peculiarities of the "prevailing party" eligibility requirement as it applies in the EAJA context.

296. See section V, forthcoming (discussing measurement of an EAJA fee award).

297. *Hensley v. Eckerhart*, 461 U.S. 424, 434-35, 440, 103 S. Ct. 1933, 1940, 1943 (1983).

298. See *Paris v. United States Dep't of Hous. & Urban Dev.*, 988 F.2d 236, 239-40 (1st Cir. 1993) (discussing prevailing party status). *But see* *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 520 n.6 (1st Cir. 1987) (leaving for another day the question of whether jurisprudence on "mixed bags of claims—some successful, some not" applies to EAJA cases). See generally *Sisk*, *supra* note 7, at 751-53 (discussing measurement of fee award in cases with multiple claims, successful and unsuccessful).

299. *Maher v. Gagne*, 448 U.S. 122, 132 & n.15, 100 S. Ct. 2570, 2576 & n.15 (1980).

300. *Id.* at 132 n.15, 100 S. Ct. at 2576 n.15; *Paris*, 988 F.2d at 239-40; *Plott v. Griffiths*, 938 F.2d 164, 167-68 (10th Cir. 1991).

301. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988). See generally *supra* section II (discussing the scope of Subsection (d)).

302. *Maher*, 448 U.S. at 129, 100 S. Ct. at 2575.

303. *Petrone v. Secretary of Health & Human Servs.*, 936 F.2d 428 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1161 (1992).

2. *The Prevailing Party Standard in Cases Involving Judicial Review of Administrative Action*

a. *Prevailing Party Status in Administrative Procedure Cases*

As a general rule under fee-shifting statutes, success on procedural, evidentiary, or most preliminary matters, no matter how significant, is not sufficient to qualify a litigant as a prevailing party.³⁰⁴ Thus, for example, in ordinary litigation, a plaintiff does not become a prevailing party by obtaining an interlocutory ruling that a complaint should not be dismissed for failure to state a claim, which only allows the case to proceed to the merits,³⁰⁵ or by obtaining appellate reversal of an adverse trial judgment, which only results in a remand for further proceedings.³⁰⁶

However, because EAJA applications frequently are made in the context of a petition for judicial review of agency action, the dispute on the merits may have focused primarily upon questions of administrative procedure. For example, the Administrative Procedure Act (APA)³⁰⁷ authorizes a party to petition for a judicial order directing an agency to publish a regulation for public notice and comment prior to adoption.³⁰⁸ As the United States Court of Appeals for the District of Columbia Circuit reminds us,

[i]n the real world of the APA, an opportunity for comment . . . is not to be denigrated. While it does not assure that the petitioner will be able to persuade the agency to change its proposal, of course, it does give the petitioner a chance. And if that chance were not in itself something of value in the real world, then there would be no need for the notice and comment procedures of the APA.³⁰⁹

Indeed, a statute providing the waiver of sovereign immunity or the cause of action for a private party against the federal government may be intended primarily to ensure that government decisions adhere to fair procedural standards, without necessarily granting a private party the opportunity to directly challenge the substance of the decision itself.

304. See *Environmental Defense Fund, Inc. v. Reilly*, 1 F.3d 1254, 1257 (D.C. Cir. 1993) (“Generally a plaintiff who has obtained a remand for further proceedings is not at that point a ‘prevailing party’ for the purpose of collecting its attorney’s fee. Only if it ultimately succeeds on the merits of its underlying claim may it be awarded the attorney’s fee it incurred in obtaining the remand.”).

305. *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S. Ct. 2672, 2675-76 (1987).

306. *Hanrahan v. Hampton*, 446 U.S. 754, 758-59, 100 S. Ct. 1987, 1990 (1980) (per curiam).

307. 5 U.S.C. §§ 551-576 (1988 & Supp. V 1993).

308. See *id.* §§ 553 (1988), 702 (1988), 706(d) (1988).

309. *Environmental Defense Fund, Inc. v. Reilly*, 1 F.3d 1254, 1257 (D.C. Cir. 1993) (discussing prevailing party requirement in context of environmental statute fee-shifting provision).

In *Golden Gate Audubon Society v. Army Corps of Engineers*,³¹⁰ a federal district court considered whether an environmental organization had prevailed for purposes of an EAJA award, when the court remanded the matter to the Army Corps of Engineers to redetermine whether a port's dredge material discharge area constituted protected wetlands as defined in the regulations interpreted by the court.³¹¹ In response to the government's argument that the environmental organization had not prevailed because of the remand to the agency, the court stated:

[W]hat constitutes "success" in environmental litigation must take into account that many environmental laws mandate "procedures" rather than "results." Indeed, environmental litigation is generally undertaken to force the relevant agency to properly perform its statutory responsibility. Thus, although a remand may appear to be a hollow victory in another context (e.g., a social security case), it is of considerably more importance in the environmental context.³¹²

When considering whether a party has truly prevailed in federal government litigation resulting in a declaration of procedural rights or a remand to the agency, the court must exercise its discretion based upon its familiarity with the case in evaluating three basic factors. First, the court, by referring to the pleadings and other filings in the litigation, should determine whether the private party sought primarily to challenge administrative procedures or instead raised a procedural objection as a means to the end of obtaining a reversal of an administrative decision on its merits. Second, the court must consider whether a judgment with a strong procedural component has enforced the central purpose of the statute, by asking whether the statute creating the cause of action was designed to ensure that administrative decisions conform to procedural requirements or instead to allow private parties to seek substantive benefits or relief. Third, the court should judge whether, as a practical matter, the outcome of the litigation amounts to a mere technical victory that is of little lasting value to a litigant or instead constitutes a meaningful success that affects the

310. 732 F. Supp. 1014 (N.D. Cal. 1989) (hereinafter *Golden Gate II*).

311. See *Golden Gate Audubon Soc'y v. Army Corps of Eng'rs*, 717 F. Supp. 1417 (N.D. Cal. 1988) (hereinafter *Golden Gate I*).

312. *Golden Gate II*, 732 F. Supp. at 1023 n.13. See also *Reilly*, 1 F.3d at 1257-58 (allowing an environmental group to prevail in its challenge to hazardous waste rule when the court vacated the rule on judicial review, even though the identical rule was later adopted after the agency provided the required opportunity for notice and comment); *Animal Lovers Volunteer Ass'n v. Carlucci*, 867 F.2d 1224, 1225 (9th Cir. 1989) (stating that a declaration that environmental statute requires agency to prepare an environmental impact statement constitutes a "substantive" victory on the merits for purposes of the EAJA); *National Wildlife Fed'n v. Hanson*, 859 F.2d 313, 316-17 (4th Cir. 1988) (allowing a fee award under the EAJA). See generally Michael D. Axline, *Environmental Citizen Suits* § 8.03(A), at 8-7 to 8-8 (1992) (explaining "success often is measured differently" in environmental suits than in other litigation).

substantive rights of the parties or promotes the public interest represented by the statutory purpose.

The decision in *National Wildlife Federation v. Federal Energy Regulatory Commission*³¹³ evaluates these considerations, and comes to opposite conclusions for different claims in the same case. Petitioners, environmental organizations, had challenged the issuance by the Federal Energy Regulatory Commission of preliminary permits to develop license applications for hydroelectric power projects, resulting in a judicial remand of the matter back to the Commission for reconsideration. On the subsequent EAJA fee application, the United States Court of Appeals for the Ninth Circuit determined that part of this procedural victory was inadequate to support a claim for attorney's fees, but simultaneously found that another part of the remand judgment provided sufficient benefits to qualify the environmental organizations as prevailing parties.³¹⁴ In the first claim, the court had found that the Commission's decision not to formulate a comprehensive plan for the river basin was not supported by adequate evidence, which left the court unable to evaluate the merits of the decision on the present record.³¹⁵ Because this part of the remand order permitted the agency to develop a clearer evidentiary record while offering no commentary on the merits of the decision or the Commission's application of the pertinent statute, the court concluded that "this victory is insufficient to establish [the environmental organizations] as 'prevailing part[ies]' under EAJA."³¹⁶

However, with respect to another claim, the court had remanded the matter to the Commission with explicit direction to give special weight to a fish and wildlife factor when considering the suitability of the river basin for electrical power development.³¹⁷ The Ninth Circuit found the environmental organizations were prevailing parties as to this claim.³¹⁸ Several factors supported this conclusion. First, although the remand with guiding directions did not require a particular outcome, the decision "clarified and strengthened" the substantive environmental legal protections asserted by the organizations.³¹⁹ Second, the "significance of the decision [went] well beyond the particular facts of th[e] case," meaning the litigation had promoted a general public interest.³²⁰ Finally, the directive that special weight be given to this particular factor on remand effectuated the purposes of the environmental statute at issue, thereby enforcing the legislative mandate of Congress.³²¹

313. 870 F.2d 542 (9th Cir. 1989) (hereinafter *National Wildlife Fed'n II*).

314. *National Wildlife Fed'n v. Federal Energy Regulatory Comm'n*, 801 F.2d 1505 (9th Cir. 1986) (hereinafter *National Wildlife Fed'n I*).

315. *Id.* at 1511.

316. *National Wildlife Fed'n II*, 870 F.2d at 545.

317. *National Wildlife Fed'n I*, 801 F.2d at 1515.

318. *National Wildlife Fed'n II*, 870 F.2d at 545.

319. *Id.* at 545-46.

320. *Id.* at 546 (quoting *Mantolete v. Bolger*, 791 F.2d 784, 787 (9th Cir. 1986)).

321. *Id.*

Similarly, in *Moseanko v. Yeutter*,³²² farmer-borrowers brought an action challenging the procedures adopted by the Farmers Home Administration (FmHA) to offset the farm program payments of farmers whose FmHA loans were delinquent.³²³ The court found the lawsuit had served as a catalyst for a moratorium on the use of the challenged regulations and the later adoption of new regulations which provided many of the procedural protections sought by the lawsuit.³²⁴ Although the relief sought in the action was only procedural in nature, and did not necessarily mean that the farmers would avoid the offset of payments, the court concluded attorney's fees under the EAJA were nonetheless justified. First, the lawsuit specifically sought procedural safeguards, focusing upon the validity of the procedures applied by FmHA rather than upon the particular merits of an individual offset decision.³²⁵ Second, the Debt Collection Act³²⁶ expressly provided for procedural rights to borrowers in connection with a government decision to use administrative offset.³²⁷ In this instance, both the relief sought by the litigant and the purpose of the governing statute were distinctly procedural in nature; indeed, the only success available in the litigation was procedural.

By contrast, in *A. Hirsch, Inc. v. United States*,³²⁸ the litigant pursued a substantive goal but obtained only a procedural victory, depriving it of prevailing party status. In that case, an importer sought judicial review of a determination by the International Trade Commission not to review an order imposing an import duty.³²⁹ The Court of International Trade remanded the case, holding that the Commission was required to provide a more detailed explanation for its conclusion that allegations of changed circumstances did not warrant a review of the order.³³⁰ Significantly, the court did not grant the importer's alternative request that the Commission be ordered to reconsider its rejection of the review petition.³³¹ Ultimately the Commission reaffirmed its determination with a more detailed explanation, and the Trade Court later upheld the agency's action.³³²

The importer argued it qualified as a prevailing party and was eligible for an EAJA award because the statute at issue required the Commission to articulate its reasons for a decision and because a remand for that purpose was one of the forms of relief requested in its complaint.³³³ On appeal from the Trade Court's denial of attorney's fees, the United States Court of Appeals for the Federal

322. 944 F.2d 418 (8th Cir. 1991).

323. *Id.* at 419.

324. *Id.* at 419-20, 427.

325. *Id.* at 427.

326. 31 U.S.C. § 3716 (1988).

327. *Moseanko v. Yeutter*, 944 F.2d 418, 427-28 (8th Cir. 1991).

328. 948 F.2d 1240 (Fed. Cir. 1991).

329. *Id.* at 1241-42.

330. *Id.* at 1242-43.

331. *Id.* at 1243.

332. *Id.*

333. *Id.* at 1244.

Circuit held that “[a]scertaining the ‘prevailing party’ in litigation requires the court to ‘look to the substance of the litigation to determine whether an applicant has *substantially* prevailed in its position, and not merely the technical disposition of the case or motion.”³³⁴ Examining “the claimed ‘victory’ in the context of the litigation as a whole,” reviewing the arguments made by the parties, and granting some deference to the Trade Court’s characterization of the case, the Federal Circuit concluded the importer’s true goal was to force a review by the Commission of the import duty determination.³³⁵ Under the totality of the circumstances, “the remand ordered was simply an interim procedural win with no lasting substantive benefit” to the importer.³³⁶

In conclusion, “the judgment as to whether someone has won depends upon the game being played.”³³⁷ Success in each case must be analyzed in terms of the nature of the underlying statutory cause of action, the purpose of the lawsuit, and the importance of the outcome. When a party is seeking primarily procedural relief pursuant to a statute designed to structure the procedures for governmental action, then a judicial decision directing the agency to reexamine a decision under the correct procedures may constitute significant relief on the merits that qualifies the litigant as a prevailing party. However, the court considering a fee application must examine the totality of the circumstances surrounding the litigation to ensure that the prominent aim of the lawsuit is to achieve a procedural directive to the agency, that such relief would promote the principal purpose of the pertinent statute, and that the victory would be one that provided meaningful benefits to the party or the general public.

b. Prevailing Party Status in Government Benefit Cases and the Peculiar Context of Social Security Claims

In contrast with claims for procedural relief brought pursuant to statutes designed primarily to ensure administrative compliance with procedural rules, a disappointed claimant or applicant who seeks review of the denial of a government benefit or government funding is asking for substantive relief in its purest form. Although objections to procedures followed by the agency in making an adverse benefits or funding determination may feature prominently in the litigation, the manifest aim is the substantive one of obtaining the payment of the benefit or funds.³³⁸ Because claims for disability benefits brought under

334. *Id.* (quoting *Devine v. Sutermeister*, 733 F.2d 892, 897-98 (Fed. Cir. 1984)).

335. *Id.* at 1245-46.

336. *Id.* at 1245. See also *Austin v. Department of Commerce*, 742 F.2d 1417, 1420-21 (Fed. Cir. 1984) (determining the substance of the action by federal employees adversely affected by a reduction in force was to obtain reinstatement; thus, a remand of the matter to the Merit Systems Protection Board to remedy a defect in a hearing, without expressing any opinion on the validity of the reduction in force, did not entitle the employees to an EAJA award).

337. *Sisk*, *supra* note 7, at 781.

338. See *Cromwell*, *supra* note 212, at 368 (stating “the central issue in any appeal from a claim

the Social Security Act³³⁹ constitute by far the largest class of government benefits litigation,³⁴⁰ and because individual benefit claims "comprise the vast majority of all EAJA litigation,"³⁴¹ these issues have arisen with persistence in that context.³⁴²

Until recently, it was settled law in the courts of appeals that a procedural victory in an individual benefits case, followed by a remand to the agency, was insufficient to qualify the litigant as a prevailing party.³⁴³ In *McGill v. Secretary of Health and Human Services*,³⁴⁴ the United States Court of Appeals for the Second Circuit explained its denial of an EAJA award to a party who obtained a remand in a Social Security benefits case:

for social security benefits is whether the claimant is eligible for benefits").

339. 42 U.S.C. § 405(g) (1988). Title II of the Social Security Act, 42 U.S.C. §§ 401-433 (1988 & Supp. V 1993), establishes the Social Security Disability Insurance Program, under which workers with adequate quarters of employment may apply for disability benefits. Title XVI, 42 U.S.C. §§ 1381-1383d (1988), establishes the Supplemental Security Income Program, which provides disability benefits to individuals with minimal income and assets. In the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 101, 108 Stat. 1464, 1465 (1994), the Social Security Administration was removed from the Department of Health and Human Services and established as an independent agency in the executive branch.

340. The Social Security Administration is "probably the largest adjudicative agency in the western world," *Heckler v. Campbell*, 461 U.S. 458, 461 n.2, 103 S. Ct. 1952, 1954 n.2 (1983) (citing Jerry L. Mashaw et al., *Social Security Hearing and Appeals* at xi (1978)), processing over 2 million disability claims each year. *Heckler v. Day*, 467 U.S. 104, 106, 104 S. Ct. 2249, 2251 (1984).

341. *Krent*, *supra* note 11, at 495. Although other federal statutes may also authorize benefits, most individual benefits claims arise under the Social Security Act. *Id.* at 495 n.127. The vast majority of EAJA awards have been made to claimants who succeeded in challenging adverse Social Security disability benefit decisions. *Pierce v. Underwood*, 487 U.S. 552, 564, 108 S. Ct. 2541, 2549 (1988). *See also Mezey & Olson*, *supra* note 6, at 13, 17 (stating Social Security disability claimants have "flooded the federal courts with EAJA petitions" and finding Social Security cases constituted 60.5% of a federal court decision sample).

342. Under the Social Security Act, 42 U.S.C. § 406(b)(1) (1988), the court may allow payment of attorney's fees in an amount not to exceed 25% of past-due benefits owed to the claimant. However, this fee is paid entirely out of the past-due benefits; the Social Security Act itself does not provide for an award of attorney's fees. An uncodified section of the EAJA as re-enacted in 1985 expressly provides that Social Security claimants may seek an award of attorney's fees under the EAJA. Equal Access to Justice Act, Pub. L. No. 99-80, § 3(b), 99 Stat. 183, 186 (uncodified). If the attorney obtains fees for the same work under both the Social Security Act and the EAJA, the attorney must refund to the claimant the amount of the smaller fee. *Id.*

343. *See, e.g., Bertrand v. Sullivan*, 976 F.2d 977, 979 (5th Cir. 1992) (ruling a Social Security disability claimant does not qualify as a prevailing party until he has received an award); *Myers v. Sullivan*, 916 F.2d 659, 666 (11th Cir. 1990) (same); *Singleton v. Bowen*, 841 F.2d 710, 711-12 (7th Cir. 1988) (same); *Brown v. Secretary of Health & Human Servs.*, 747 F.2d 878, 881-83 (3d Cir. 1984) (same); *Cook v. Heckler*, 751 F.2d 240, 241 (8th Cir. 1984) (same); *Swenson v. Heckler*, 801 F.2d 1079, 1080 (9th Cir. 1984) (same). *See generally Winold*, *supra* note 9, at 931 (stating the "circuits have agreed that obtaining a remand alone will not support an award of fees").

344. 712 F.2d 28 (2d Cir. 1983), *cert. denied*, 465 U.S. 1068, 104 S. Ct. 1420 (1984).

Unlike a plaintiff who files a lawsuit alleging violations of a procedural due process right and seeks compensation for such deprivation, the ultimate relief to which a social security claimant is normally entitled is not vindication of procedural rights but an award of benefits for a claimed disability. While it is true that a favorable ruling on plaintiff's procedural claim that the [administrative law judge] should have conducted a more thorough hearing may ultimately affect the outcome on the merits of plaintiff's disability claim, nevertheless her procedural claim is not a matter on which plaintiff can be said to prevail for purposes of shifting counsel fees.³⁴⁵

The Supreme Court endorsed this understanding in *Sullivan v. Hudson*,³⁴⁶ stating that "where a court's remand to the agency for further administrative proceedings does not necessarily dictate the receipt of benefits, the [Social Security] claimant will not normally attain 'prevailing party' status within the meaning of § 2412(d)(1)(A) until after the result of the administrative proceeding is known."³⁴⁷ The Court characterized a remand under such circumstances as the kind of "procedural or evidentiary rulings" that are not themselves "matters on which a party could 'prevail' for purposes of shifting his counsel fees to the opposing party."³⁴⁸ For purposes of the EAJA, the Court ruled that "the Social Security claimant's status as a prevailing party" in the civil action is "often completely dependent on the successful completion of the remand proceedings before the Secretary."³⁴⁹

This approach is consistent with the analysis outlined above. For purposes of prevailing party status, while relief that is procedural in effect may be sufficient in an action brought pursuant to administrative procedural statutes to compel an agency to adhere to procedural constraints, an interim procedural victory is insufficient in a lawsuit that is brought for the purpose of obtaining substantive relief from the government in the form of an entitlement, such as restoration of employment or payment of a benefit.³⁵⁰ In the latter case, "correct

345. *Id.* at 32 (citations omitted).

346. 490 U.S. 877, 109 S. Ct. 2248 (1989).

347. *Id.* at 886, 109 S. Ct. at 2255. *See also id.* at 887, 109 S. Ct. at 2255 (observing "the vast majority of the courts of appeals have come to this conclusion"). *But see* *Shalala v. Schaefer*, 113 S. Ct. 2625, 2631 (1993) (characterizing this statement in *Hudson* as dicta).

348. *Hudson*, 490 U.S. at 886-87, 109 S. Ct. at 2254-56 (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 759, 100 S. Ct. 1987, 1990 (1980)).

349. *Id.* at 887, 109 S. Ct. at 2255. Under the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 101, 108 Stat. 1464, 1465 (1994), remand proceedings would be held before the Social Security Administration as an independent agency in the executive branch.

350. A class action suit brought by Social Security disability claimants to challenge the agency's procedures for determining eligibility for benefits might fall under the former classification of administrative procedure actions rather than the latter classification of substantive benefit claims. *See McDonald v. Secretary of Health & Human Servs.*, 884 F.2d 1468, 1474-75 (1st Cir. 1989) (holding

procedures and use of correct substantive standards are largely (if not entirely) instruments to a desired end . . . relief from a restriction, grant of a benefit, imposition of a restriction on others, etc."³⁵¹ When the goal is substantive in nature, any remand that does not effectively dictate the receipt of the claimed benefit cannot confer prevailing party status "since [the claimant's] rights and liabilities and those of the government have not yet been determined."³⁵²

In *Shalala v. Schaefer*,³⁵³ the Supreme Court abruptly changed course. The Court announced that a Social Security claimant who obtains a judgment reversing the denial of benefits and remanding the case to the administration becomes a prevailing party at the time of the court judgment, notwithstanding that an actual award of benefits will not occur without further administrative proceedings on remand (and, in fact, might not occur at all).³⁵⁴ The Court reached its conclusion with little evaluation of the considerations discussed above, other than to pronounce that obtaining a remand "certainly meets [the] description" of success on a

disability claimants who successfully brought class action challenging Social Security Administration's application of severity regulations and denial of benefits were prevailing parties for purposes of the EAJA). Although the plaintiffs in such a case would also be seeking an award of benefits on an individual basis, the class action nature of the lawsuit would make the administrative procedural question of predominant or even solitary importance in the litigation and the success on that issue would have significant benefits for a large segment of the public.

351. *Waterman S.S. Corp. v. Maritime Subsidy Bd.*, 901 F.2d 1119, 1122 (D.C. Cir. 1990) (ruling that remand to agency to allow shipping companies to contest grant of authority allowing competitor to conduct around-the-world shipping service with unsubsidized ships did not qualify them as prevailing parties for the EAJA because while the order shifting the burden of proof may have improved their chances of winning substantive benefit, they had not yet prevailed; however, since the outcome on the remand may have represented a victory on the merits, the case had to be remanded to the district court to determine whether there was such a victory and whether their litigative success caused it).

352. John J. Sullivan, Note, *The Equal Access to Justice Act in the Federal Courts*, 84 Colum. L. Rev. 1089, 1100 (1984). See also *Brown v. Secretary of Health & Human Servs.*, 747 F.2d 878, 883 (3d Cir. 1984).

By contrast, if the court rules in favor of a party's entitlement to government benefits or funding, the party has prevailed, even if the case is remanded to the agency for further proceedings or to calculate the amount of benefits. See, e.g., *Massachusetts Fair Share v. Law Enforcement Assistance Admin.*, 776 F.2d 1066, 1067-68 (D.C. Cir. 1985) (ruling applicant for government funding was prevailing party notwithstanding remand to the agency because applicant established an entitlement to relief on the merits and the agency agreed to award funding); *Najor v. Secretary of Health & Human Servs.*, 675 F. Supp. 379, 381 (E.D. Mich. 1987) (allowing a Social Security claimant to prevail when court reversed decision of administration and remanded solely for calculation of benefits); *Barrige v. Bowen*, 673 F. Supp. 1167, 1168 (N.D.N.Y. 1987) (same). Under such circumstances, of course, the victory was not procedural in any sense, but resulted in substantive relief.

353. 113 S. Ct. 2625 (1993).

354. *Id.* at 2631-32. Subsequent to the *Shalala v. Schaefer* decision, courts of appeals have recognized prior settled circuit law has been overturned and Social Security claimants securing even a procedural remand now qualify as prevailing parties under the EAJA. See, e.g., *Breaux v. United States Dep't of Health & Human Servs.*, 20 F.3d 1324, 1325 (5th Cir. 1994); *O'Connor v. Shalala*, 23 F.3d 1232, 1234-35 (7th Cir. 1994); *Kershaw v. Shalala*, 9 F.3d 11, 13 (5th Cir. 1993).

significant issue.³⁵⁵ Upon close examination, one finds the Court's decision was a special one tailored to the idiosyncratic disjunction of the governing statutes and designed to avoid the "Catch-22" situation that would otherwise prevent even an ultimately successful benefits claimant from obtaining an EAJA award.

Several aspects of the Social Security adjudication process combine with the requirements of the EAJA to make the "prevailment question" awkward in this peculiar context.³⁵⁶ First, even a successful Social Security claimant cannot obtain an award for legal expenses incurred at the administrative level. The administrative version of the EAJA³⁵⁷ applies only to "adversarial adjudications" conducted pursuant to the Administrative Procedure Act in which the United States is represented by counsel or otherwise.³⁵⁸ Social Security disability claims are processed in a non-adversarial manner, even when they come before an administrative law judge.³⁵⁹ During the reenactment of the EAJA, Congress expressly considered and rejected a provision that would have extended the administrative EAJA to Social Security benefits proceedings.³⁶⁰

Second, although EAJA Subsection (d) applies to "proceedings for judicial review of agency action,"³⁶¹ including judicial review of adverse Social Security benefit determinations, the court's authority to grant attorney's fees under the EAJA begins and ends with the judicial proceeding. Thus, unless the court may retain jurisdiction over the claim pending further administrative proceedings, the court relinquishes any authority to award attorney's fees based upon a subsequent grant of benefits at the administrative level.³⁶²

Third, the EAJA requires a party seeking attorney's fees to file an application "within thirty days of final judgment in the action."³⁶³ For purposes

355. *Schaefer*, 113 S. Ct. at 2632.

356. *See* *Guglietti v. Secretary of Health & Human Servs.*, 900 F.2d 397, 399 (1st Cir. 1990) (characterizing the prevailing party determination as the "prevailment question").

357. Equal Access to Justice Act, 5 U.S.C. § 504 (1988).

358. *Id.* § 504(b)(1)(C). *See generally* *Ardestani v. Immigration & Naturalization Serv.*, 112 S. Ct. 515, 519-21 (1991) (holding administrative deportation proceedings are not "adversary adjudications" for which fees may be awarded under the EAJA Section 504 because such proceedings are not subject to or governed by Section 554 of the Administrative Procedure Act).

359. *Sullivan v. Hudson*, 490 U.S. 877, 891, 109 S. Ct. 2248, 2257-58 (1989) (holding Social Security administrative proceedings are not adversarial for purposes of the EAJA Section 504); *Willis v. Sullivan*, 931 F.2d 390, 399-400 (6th Cir. 1991) (same).

360. 130 Cong. Rec. 24828-29 (statements of Rep. Morrison explaining proposal to extend the EAJA to Social Security administrative proceedings was rejected in the House), 29280 (statements of Sen. Heflin explaining proposal to extend the EAJA to Social Security administrative proceedings was not included in the bill passed by Congress and that this "seems to be a fight which will have to be fought another day"). *See generally* *Hudson*, 490 U.S. at 897-98, 109 S. Ct. at 2260-61 (White, J., dissenting) (describing the legislative history of this proposal).

361. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988).

362. *See supra* section II.A.2 (discussing the limitation of EAJA Subsection (d) to judicial proceedings).

363. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B) (1988). *See generally infra* section VI, forthcoming (discussing the procedures for seeking an EAJA award).

of the EAJA, Congress has defined "final judgment" as a court judgment that is "final and not appealable."³⁶⁴ A "final judgment" means "a judgment rendered by a court that terminates the civil action for which EAJA fees may be received"; it "does not encompass decisions rendered by an administrative agency."³⁶⁵ Accordingly, if a court judgment remanding a Social Security case for further administrative proceedings is one that terminates the civil action, a claimant has only thirty days after all appellate rights have expired to request an award. The claimant does not have the luxury of waiting until the administrative proceedings on remand have run their course with a final decision on allowance of benefits.³⁶⁶

At first, it appeared the Supreme Court had found a way around this dilemma, although this approach ultimately was circumscribed by the plain language of the Social Security judicial review statute. In *Sullivan v. Hudson*,³⁶⁷ the Court held the EAJA fees may be collected for administrative proceedings in a Social Security benefits case that follow a court remand to the agency, provided the court has properly retained jurisdiction over the matter and

364. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(G) (1988).

365. *Melkonyan v. Sullivan*, 501 U.S. 89, 97, 111 S. Ct. 2157, 2162 (1991).

366. See *Cromwell*, *supra* note 212, at 369 ("It is improbable that the decision on the post-remand hearing will occur within the 30-day period following final judgment in the court action that is the statutory limitation for the filing of a fee petition.").

In a Supreme Court brief, the government suggested an alternative approach to this problem, but one that was both inefficient and contrary to the language of the Social Security Act and the EAJA. Under the government's approach, a Social Security claimant would file an EAJA fee application within 30 days after the court's remand judgment became final, thereby satisfying the timeliness requirement. The court then would hold the application until after the claimant had satisfied the remaining prerequisite to an EAJA fee award by prevailing through a successful award of benefits before the agency on remand. Brief for the Petitioner (Secretary of Health and Human Services) at 25-28, *Shalala v. Schaefer*, 113 S. Ct. 2625 (1993) (No. 92-311). To begin with, this approach is wasteful and inefficient, as it requires the Social Security claimant to petition for a fee award at a point in time before he or she had prevailed (assuming an actual award of benefits is the crucial element of prevailing) and also requires the court to accept this premature application for filing, notwithstanding that the claimant may be unsuccessful on remand, thus making the application for fees ineffective. Moreover, the EAJA requires a party submitting an application for fees to "show[] that the party is a prevailing party." Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B) (1988). If the prerequisite to being deemed a prevailing party is success on the remand, the claimant cannot satisfy this explicit statutory requirement for a fee application at the time of the court judgment. Finally, the indirect effect of this approach would be to confer a type of continuing jurisdiction upon the district court over the Social Security dispute that had been remanded, which, as discussed below, is narrowly circumscribed under the Social Security Act. Even though the EAJA fee award dispute is collateral to the merits, it is also ancillary to the Social Security dispute and not independent of it. In any event, the Supreme Court in *Shalala v. Schaefer*, 113 S. Ct. 2625 (1993), did not accept the government's suggested approach. See also *id.* at 2633 (Stevens, J., concurring) (rejecting "the Government's rather bizarre proposal of requiring all Social Security claimants who achieve a sentence-four remand to file a protective EAJA application within 30 days of the remand order, and then update or amend their application if they are successful on remand"). See generally *infra* part VI, forthcoming (discussing the procedures for seeking an EAJA award).

367. 490 U.S. 877, 109 S. Ct. 2248 (1989).

contemplates the entry of a judgment upon completion of all proceedings.³⁶⁸ Thus, although the administrative version of the EAJA does not apply, EAJA Subsection (d) would cover legal expenses on remand as having been incurred ancillary to, and thus as part of, the civil action in the court.³⁶⁹ Under the *Hudson* approach, when the court has maintained supervisory powers over the remand, an EAJA award may be made to a successful claimant when the administrative proceedings have concluded and the case has returned to the court for final adjudication.

Although the *Hudson* approach continues to have validity, its application has been limited to a small subclass of Social Security remands. As the Supreme Court explained and clarified in *Shalala v. Schaefer*,³⁷⁰ the statute permits retention of continuing jurisdiction over a remanded case only in narrow circumstances. Under the Social Security Act, a district court may remand a Social Security benefits case to the agency under either sentence four or sentence six of 42 U.S.C. § 405(g).³⁷¹ Sentence six, which allows a remand only if the agency requests the remand before answering the complaint or where new evidence is properly adduced, specifically provides that the new agency decision is to be filed with the court after proceedings on remand.³⁷² Thus, the statute plainly contemplates that the court will retain jurisdiction pending a sentence-six remand, which in turn would permit the court to entertain an EAJA application after a claimant received an award of benefits in the administrative proceedings. The *Hudson* answer to the dilemma retains full force in the context of a sentence-six remand.³⁷³

The vast majority of Social Security case remands, however, fall under sentence four of Section 405(g), which generally authorizes the reviewing court to affirm, modify, or reverse a benefits determination, with or without a remand.³⁷⁴

368. *Id.* at 892, 109 S. Ct. at 2258.

369. *Id.* (ruling "administrative proceedings may be so intimately connected with judicial proceedings as to be considered part of the 'civil action' for purposes of a fee award").

370. 113 S. Ct. 2625 (1993).

371. *Id.* at 2629 (discussing 42 U.S.C. § 405(g) (1988)).

372. *Id.* at 2629 & nn.1-2. Sentence six of Section 405(g) reads:

The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

42 U.S.C. § 405(g) (1988).

373. *Schaefer*, 113 S. Ct. at 2631 n.4 ("*Hudson* remains good law as applied to remands ordered pursuant to sentence six.>").

374. Sentence four of Section 405(g) reads: "The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision

By the plain language of sentence four, the court is directed to enter a judgment at the time of any remand.³⁷⁵ In *Sullivan v. Finkelstein*,³⁷⁶ the Court ruled that "each final decision of the Secretary [is] reviewable by a separate piece of litigation," and that a sentence-four remand "terminate[s] the civil action" seeking judicial review of the agency benefits decision.³⁷⁷ Because judgment must be entered immediately upon a court's grant of a sentence-four remand, the court may not retain jurisdiction and, thus, may not award attorney's fees in the forthcoming administrative proceedings.³⁷⁸

Accordingly, since most remands under the Social Security Act are granted pursuant to sentence four rather than sentence six, meaning that a final judgment will be entered at a point in time well before the conclusion of the proceedings on remand, a court will rarely be able to consider an application for EAJA fees after the final resolution of a benefits claim on the merits. Indeed, even if the claim were again denied on remand and benefits were subsequently granted by the court after a new petition for judicial review, the *Finkelstein* holding that each agency decision is reviewable by a separate piece of litigation means the court's award would be limited to legal expenses attributable to the second judicial review. In sum, the interaction between the Social Security Act's provision authorizing retention of jurisdiction pending remand only under narrow circumstances and the EAJA's requirement that an application for a fee award be made within a short period after the court's entry of judgment effectively dictates that attorney's fees be awarded at the time of the initial remand judgment—or not at all.

In sum, if a Social Security claimant were held ineligible to seek an award until such time as benefits were awarded, few claimants who obtained an ordinary sentence-four remand—even as a prelude to an administrative award of benefits—could qualify. As the *Shalala v. Schaefer* Court recognized, the rule that a Social Security claimant does not become a prevailing party until benefits are actually awarded is "at war" with the view that a sentence-four remand is a final judgment for purposes of EAJA procedures.³⁷⁹

To avoid this anomalous result, the Supreme Court in *Shalala* understandably deemed the Social Security claimant to be a prevailing party eligible to

of the Secretary, with or without remanding the cause for a rehearing . . ." 42 U.S.C. § 405(g) (1988). Shortly before publication of this article, Congress passed the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 101, 108 Stat. 1464, 1465 (1994), under which administration of disability programs has been assigned to the Social Security Administration as an independent agency in the executive branch. Accordingly, the reference to "Secretary" in Section 405(g) has been stricken and replaced by "Commissioner of Social Security." *Id.* § 107, 108 Stat. at 1477.

375. 42 U.S.C. § 405(g) (1988) (the court "shall have power to enter . . . a judgment" with or without a remand).

376. 496 U.S. 617, 110 S. Ct. 2658 (1990).

377. *Id.* at 624-25, 110 S. Ct. at 2663.

378. *Shalala v. Schaefer*, 113 S. Ct. 2625 (1993).

379. *Id.* at 2630 n.3.

apply for the EAJA fees at the time of the remand. Whatever the ultimate outcome of the sentence-four remand proceedings, the claimant may now obtain an award of attorney's fees—assuming, of course, the government's position is found to be without substantial justification.³⁸⁰ In light of the peculiar statutory constraints, and the unfortunate disjunction between the Social Security Act and the EAJA, any other approach would improperly deny recovery of attorney's fees to virtually every Social Security claimant who did not succeed in obtaining an outright reversal of a denial of benefits by the court.

While this seems to be the only reasonable outcome under these somewhat unique circumstances, the result is, nevertheless, unsatisfactory both in terms of a general understanding of the prevailing party requirement and in practical terms of extending the full benefit of the EAJA to successful Social Security claimants. First, as discussed above, a claimant for government benefits has not truly prevailed on the merits of the claim prior to receiving the benefits that are the goal and purpose of the litigation. However necessary such a deviation from ordinary understanding and established attorney's fees jurisprudence may be in this context, it remains an unfortunate departure from sound general principles.³⁸¹

Second, a Social Security claimant who obtains a remand is likely to have a weaker claim for EAJA fees than he or she might have later upon obtaining a victory on the merits. Because attorney's fees may be awarded only when the government's position is found to be without substantial justification, the claimant may find it difficult to contend that the government's conduct was unreasonable when the court has merely identified a procedural defect justifying a remand.³⁸² If, instead, the EAJA evaluation were delayed until after further exploration of the merits of the claim on remand, it might become apparent that the agency's initial denial of benefits had been substantively unreasonable on the merits, thus justifying an award of attorney's fees for lack of substantial justification. In sum, as a practical matter, the EAJA inquiry is premature at the time of a judgment for remand and would be better informed if made after further administrative proceedings.

Third, although a claimant obtaining a sentence-four remand may obtain an EAJA award for legal expenses attributable to the judicial review proceeding, the claimant may not recoup legal expenses incurred in the post-remand administrative proceedings.³⁸³ This remains the case even if the claimant is successful in receiving benefits on the remand and even if the changed outcome or additional administrative proceedings reveal the unreasonable nature of the earlier denial of

380. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988).

381. See *Schaefer*, 113 S. Ct. at 2633 (Stevens, J., dissenting) (describing earlier *Hudson* ruling that Social Security claimants are not prevailing parties absent successful conclusion of the remand proceedings as "consistent with 'prevailing party' jurisprudence in other areas of the law").

382. Of course, depending upon the circumstances, a significant procedural error may justify a finding of lack of substantial justification by the government as much as an untenable decision on the merits.

383. *Schaefer*, 113 S. Ct. at 2631; *Curtis v. Shalala*, 12 F.3d 97, 100-01 & n.5 (7th Cir. 1993).

benefits.³⁸⁴ Moreover, if the claimant should ultimately fail to obtain an award of benefits, even after a remand, then the claimant should not receive any fee award. Under such circumstances, the remand will have been nothing more than a technical winning of one battle on the way to defeat in the war.

In the end, the best resolution of this problem would be legislative action by Congress,³⁸⁵ either through an amendment to the Social Security Act to provide generally for retention of jurisdiction by the court pending remands of claims to the agency or through a narrow amendment to the EAJA allowing a party, after prevailing in a remand to an agency, to return to the court for the limited purpose of filing an application for attorney's fees.³⁸⁶

3. *Prevailing Party Status When Litigation Has Served as a Catalyst to a Change in Federal Law, Policy, or Conduct*

a. *Introduction to "Catalyst Theory" in EAJA Cases*

Federal law regulating private actors and providing federal benefits to citizens is constantly evolving, both through administrative promulgation of new or modified regulations and congressional enactment of new statutes and amendment of old ones. Consequently, the legal landscape may shift right out from under parties involved in ongoing federal government litigation, and the governing rules may change in the middle of the journey from the filing of an action to the final judgment. In some instances, the litigation in question may itself have been a material factor in prompting the intervening change in federal law or policy by attracting the attention of federal policymakers or by causing administrators to change course for fear of an adverse judicial determination.

384. See *Schaefer*, 113 S. Ct. at 2635-36 (Stevens, J., dissenting) (arguing "allowing for the recovery of legal fees incurred on remand before the Agency [is] necessary to effectuate the purposes underlying EAJA," especially because a sentence-four remand "necessarily means that the Secretary has committed legal error" and that the expenses incurred on remand are attributable to the agency's error).

385. See *Curtis*, 12 F.3d at 101 n.5 (finding "considerable merit" to the argument that the purposes of the EAJA would be served by allowing recovery of fees for legal expenses incurred in sentence-four remands but saying "if any change is to be made, it is up to Congress alone to do so").

386. When the reenactment of the EAJA was considered in 1984, the Senate version would have amended 28 U.S.C. § 2412(d)(1)(B) to expressly provide that a Social Security claimant who obtained a remand was not a prevailing party, but would have added a new 28 U.S.C. § 2412(d)(2)(H)(iii) allowing a claimant who prevailed by obtaining an award of benefits on remand to file an EAJA application within 30 days of the success on remand. 130 Cong. Rec. 30,151 (1984). These provisions were not included in the EAJA as reenacted in 1985. See also Dawn C. Bradshaw, *EAJA: An Analysis of the Final Judgment Requirement as Applied to Social Security Disability Cases*, 58 Fordham L. Rev. 1269, 1287 (1990) (arguing, as an interpretation of the statute under the case law prior to *Shalala v. Schaefer*, "[w]hen a disability claimant is found to be disabled and entitled to benefits by the Secretary on remand [so as to qualify as a prevailing party], he should be able to apply immediately for EAJA fees").

A primary purpose of the Equal Access to Justice Act is to encourage private parties to initiate litigation to challenge unreasonable government rules and policies and, thereby, to directly influence the policy deliberations of administrative agencies.³⁸⁷ As stated in an early decision concerning the EAJA, "Congress hoped to refine the administration of federal law—to foster greater precision, efficiency, and fairness in the interpretation of statutes and in the formulation and enforcement of governmental regulations."³⁸⁸ The legislative reports on the EAJA stated:

The bill rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy. An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law.³⁸⁹

Accordingly, if a private party resists an unreasonable government policy or initiative—with the result that the policy or initiative is changed during the pendency of the action—should not that litigant be deemed a prevailing party for purposes of an EAJA award?

Under general fee-shifting jurisprudence, a plaintiff need not obtain a final judgment to recover a fee award. A party may also qualify as a prevailing party if the lawsuit played a "provocative role" or served as a "catalyst" in prompting the defendant to take favorable actions that mooted the lawsuit.³⁹⁰ As the Supreme Court noted in *Hewitt v. Helms*:³⁹¹

A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.³⁹²

387. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 12 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4991 (stating purpose of the EAJA as "help[ing] assure that administrative decisions reflect informed deliberation"). See generally Krent, *supra* note 11, at 467-76 (discussing purpose of the EAJA in encouraging monitoring of administrative decisions and deterring governmental wrongdoing but suggesting the EAJA has had little success in promoting this purpose).

388. *Spencer v. NLRB*, 712 F.2d 539, 550 (D.C. Cir. 1983), cert. denied, 466 U.S. 936, 104 S. Ct. 1908 (1984). See also *Commissioner v. Jean*, 496 U.S. 154, 165 n.14, 110 S. Ct. 2316, 2322 n.14 (1990) (quoting the committee reports accompanying the EAJA legislation in 1980 and stating they reflect "the dual concerns of access for individuals and improvement of Government policies").

389. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4988-89; S. Rep. No. 253, 96th Cong., 1st Sess. 7 (1979).

390. *Paris v. United States Dep't of Hous. & Urban Dev.*, 988 F.2d 236, 241 (1st Cir. 1993); *Public Citizen Health Research Group v. Young*, 909 F.2d 546, 549 (D.C. Cir. 1990); *Williams v. Miller*, 620 F.2d 199, 202 (8th Cir. 1980).

391. 482 U.S. 755, 107 S. Ct. 2672 (1987).

392. *Id.* at 760-61, 107 S. Ct. at 2676. See also *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d

Until recently,³⁹³ the validity of the catalyst theory was settled both in general and as applied under the EAJA.³⁹⁴ Three different scenarios raising questions about the application of the catalyst theory are addressed below. These scenarios are discussed in descending order of plausibility, that is, in terms of the strength of a claim that a single lawsuit has served as a true causal agent leading to a change in a government position. First, when a party can demonstrate that the government voluntarily changed its case-specific application of a policy or regulation or ceased conduct adversely affecting the party in direct response to the filing of the lawsuit, the catalyst theory reflects the existence of an informal settlement of the dispute. Second, when an agency has adopted a change in a general policy or promulgated new or amended regulations with general application, it may be more difficult (although not impossible) for a party to show that his or her individual action provoked the change as opposed to other general factors influencing the evolution of policy. Finally, when Congress adopts new legislation that affects the outcome of ongoing litigation, and fails to expressly indicate whether the statutory revisions establish litigants in pending litigation as prevailing parties, the courts should view with skepticism any argument that an individual party's lawsuit constituted the moving force behind the enactment of new laws by our nation's legislative body.

b. Catalyst Theory Applied to Voluntary Change of Case-Specific Conduct or Policy Enforcement by the Government

Professor Harold Krent, in analyzing whether the EAJA has been successful in deterring unjustifiable government action, has concluded that the prospect of an award of attorney's fees is more likely to motivate a federal official implementing a policy in a fact-specific case context than it is to influence government policymakers in formulating general government positions.³⁹⁵ Thus, "[t]he prospect of litigation costs might make the [Federal Aviation Administration] pause before levying a small fine against a pilot under a novel theory of culpability."³⁹⁶ Similarly, concern about an adverse outcome in a particular piece

541, 544 (3d Cir. 1994) (stating under the "catalyst theory," "a plaintiff who can prove that the existence of the lawsuit accomplished the original objectives of the lawsuit without a formal judgment can be a prevailing party").

393. See *infra* section III.A.3.e (discussing controversy about the future of catalyst theory in fee-shifting cases).

394. See generally Hill, *supra* note 214, at 248 n.111 (stating it is "the consensus of the courts that is it not necessary that the specific relief sought in an action be achieved for one to be a prevailing party in a lawsuit," provided the party can "show that the litigation effort was a causal factor in achieving his basic objectives or improving his situation," with citation to the EAJA cases). See generally *infra* sections III.A.3.b-d (discussing application of catalyst theory in EAJA cases).

395. Krent, *supra* note 11, at 471-76.

396. *Id.* at 472-73. See also 131 Cong. Rec. S9992 (daily ed. July 24, 1985) (remarks of Sen. Grassley, one of the primary sponsors of the EAJA, stating during presentation of the bill to the Senate for final passage that "the purpose of the Equal Access to Justice Act is to make Government

of litigation may well cause a federal official to cease an enforcement action against a private party or alter application of a standard to a party seeking a government benefit. Indeed, the very fact of a change in government position in such a fact-specific context would suggest that the reason for the change was related to the dispute with the individual, rather than flowing from general government or agency-wide policy interests.³⁹⁷

The paradigmatic catalyst scenario arises when the government has proposed to take a particular action in a concrete factual setting but, in direct response to a litigation challenge, changes course and alters its conduct. For example, in *Thomas v. Peterson*,³⁹⁸ conservation groups brought an action under environmental protection statutes against the Forest Service to enjoin construction of a timber road in a national forest.³⁹⁹ The district court granted summary judgment for the government,⁴⁰⁰ but the court of appeals reversed on the merits.⁴⁰¹ Although the court of appeals did not specifically order the district court to enjoin the construction of the road, it held the district court had erred by denying the injunction and remanded the matter to the district court to fashion an appropriate remedy for the Forest Service's failure to comply with environmental statutes.⁴⁰² On remand, the Forest Service, rather than complying with the environmental statutes, withdrew the proposal to construct the road.⁴⁰³ Although

bureaucrats think long and hard before they start an enforcement action").

397. Of course, it may be difficult in some cases to draw the fine line between a change in a case-specific application of a policy and a change in the underlying policy. For example, in *Montes v. Thornburgh*, 919 F.2d 531 (9th Cir. 1990), a group of political asylum applicants challenged new filing requirements imposed by an individual immigration judge beyond those required by regulation. *Id.* at 533. After the filing of the lawsuit, the Executive Office for Immigration Review suspended those additional requirements and reopened the cases in which those requirements had been applied. *Id.* The court had little difficulty concluding the litigation had been the catalyst prompting the change and thus the asylum applicants were prevailing parties for purposes of an EAJA fee award. *Id.* at 538. Although the additional requirements were imposed by a single immigration judge, and were arguably contrary to the regulations, those requirements had some general effect beyond an individual case. Nevertheless, in view of the limited application of the additional requirements to cases considered by a single official, this example likely falls on the case-specific application side of the line rather than the general policy side of the line. In any event, the distinction is not a magical one upon which the outcome of the prevailing party inquiry should directly depend. Rather, it is an analytical device that can assist the court in determining the kinds of cases to which a catalyst theory properly applies and in assessing the circumstances surrounding the case to determine whether the lawsuit truly was the provocative agent in bringing about the change in government conduct or policy.

398. 841 F.2d 332 (9th Cir. 1988) (hereinafter *Thomas III*).

399. *Id.* at 334.

400. *Thomas v. Peterson*, 589 F. Supp. 1139 (D. Idaho 1984) (hereinafter *Thomas I*).

401. *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985) (hereinafter *Thomas II*).

402. *Id.* at 765. See also *Thomas III*, 841 F.2d at 334 (describing court of appeals ruling on the merits).

403. *Thomas III*, 841 F.2d at 334. The district court ruled that if the Forest Service decided to revive the road construction project in the future, the conservation groups could return to the court for an appropriate order or injunction consistent with the appellate court's ruling. *Id.*

the government argued otherwise,⁴⁰⁴ the conservation groups plainly had prevailed by halting the very government project they had challenged. As the Ninth Circuit ruled, "given [the] court's unequivocal reversal of the district court's decision [on the merits] and the clear causal connection between [the] court's decision and the Forest Service's decision to withdraw the road proposal, it is indisputable that [the environmental groups] are a prevailing party" ⁴⁰⁵ In effect, the government had responded to the adverse preliminary decisions by informally agreeing to settle the case on the opposing side's terms.

On the opposite end of the spectrum, a party will not qualify as having prevailed if the specific conduct challenged is terminated for reasons unrelated to the lawsuit. In *McQuiston v. Marsh*,⁴⁰⁶ a manufacturer brought suit to prevent the United States Army from awarding a contract to a competitor in alleged violation of federal procurement laws.⁴⁰⁷ Meanwhile, the Army conducted an audit and determined the item covered by the contract was no longer necessary.⁴⁰⁸ Although the manufacturer moved for an award of attorney's fees under the EAJA, the trial court found and the appellate court affirmed that "no causal nexus existed between [the] lawsuit and the action taken by the Army, and that his lawsuit did not prompt the Army to cancel its . . . contract."⁴⁰⁹ In sum, the switch in direction was due to changed circumstances, not the existence of the party's lawsuit.⁴¹⁰

The first prong of the catalyst theory test is whether the lawsuit was a material factor in the particular outcome.⁴¹¹ In cases that end short of a judgment by the court on the merits, the district court in exercising its discretion is "presented with the task of choosing between two interpretations of the same sequence of events" in deciding whether the lawsuit was truly a catalytic factor in bring about the desired end.⁴¹² As long as alternative explanations are plausible, the district court's

404. *Id.* at 337.

405. *Id.*

406. 790 F.2d 798 (9th Cir. 1986).

407. *Id.* at 799.

408. *Id.*

409. *Id.* at 801.

410. *Id.*

411. Under the catalyst theory, it is the lawsuit—not prelitigation efforts—that must play a provocative role in bringing about the result before the party is eligible for attorney's fees incurred in bringing the lawsuit. In *Forest Conservation Council v. Devlin*, 994 F.2d 709 (9th Cir. 1993), the Ninth Circuit rejected an organization's argument that the concept of prevailing party under the EAJA be extended to allow an award of fees "where a party's pre-litigation activities were solely responsible for bringing about the desired result." *Id.* at 712. The EAJA authorizes an award only with respect to fees "incurred by [the prevailing party] in any civil action." Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988). The court could "discern no congressional intent to subsidize a party's pre-litigation efforts to convince a government agency that its actions are misguided. The EAJA does not serve to compensate public interest groups for their lobbying efforts, no matter how successful those efforts may be." *Forest Conservation Council*, 994 F.2d at 713. If the lawsuit does not "precipitate the outcome," then there is no justification for an award of fees expended on that lawsuit. *Id.*

412. *Wilderness Soc'y v. Babbitt*, 5 F.3d 383, 387 (9th Cir. 1993).

choice of one over the other will stand.⁴¹³ In making this evaluation of the circumstances, the court should look not only at the chronology of events,⁴¹⁴ but also the substance and texture of the developments, asking whether the circumstances suggest that the government's change of course was motivated by concerns about the litigation as opposed to other general factors or policies.⁴¹⁵

The second prong of the catalyst theory requires a determination whether the government's voluntary change in approach, even if responsive to the lawsuit, was truly an acknowledgment of the strength of the party's legal claim rather than a generous gesture:

"If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiff's interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." For prevailing party purposes, a claim has a basis in law as long as it is not "frivolous, unreasonable, or groundless."⁴¹⁶

The catalyst theory applies most comfortably in federal government litigation when the government has effectively agreed to settle a case by altering its particularized conduct specifically directed to the individual party and in direct response to the filing of the action. "[I]n litigation as in battle one may prevail by persuading one's adversary to retire from the field," thereby establishing eligibility for a fee award.⁴¹⁷

c. Catalyst Theory and Change of General Policy or Adoption of Regulations by the Government

When governmental agencies adopt general policies or promulgate regulations, they generally do so "only after considerable internal debate and after

413. *Id.* See also *Forest Conservation Council*, 994 F.2d at 712 ("Whether the requisite causal connection existed between the lawsuit and the result is a factual question for the district court.").

414. See *Braafladt v. Board of Governors*, 778 F.2d 1442, 1444 (9th Cir. 1985) ("[C]hronological events are important, although not a definitive factor, in determining whether or not a defendant can be reasonably inferred to have guided his actions in response to a plaintiff's lawsuit.").

415. See *Wilderness Soc'y*, 5 F.3d at 387-88 (reversing district court's conclusion that environmental organizations were not prevailing parties under the EAJA where the surrounding circumstances, including testimony by government officials, indicated the government's decision was part of a deliberate attempt by high-level officials to avoid the precedential impact of the underlying lawsuit).

416. *Sablan v. Department of Fin.*, 856 F.2d 1317, 1327 (9th Cir. 1988) (quoting *California Ass'n of the Physically Handicapped, Inc. v. Federal Communications Comm'n*, 721 F.2d 667, 672 (9th Cir. 1983), and *Fitzharris v. Wolff*, 702 F.2d 836, 838 (4th Cir. 1983)). See also *Wilderness Soc'y*, 5 F.3d at 388 (quoting *Sablan*, 856 F.2d at 1327, in an EAJA case); *Associated Builders & Contractors of La., Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 378 (5th Cir. 1990) (holding plaintiff could not obtain a fee award if the defendant's action was a "wholly gratuitous response to a lawsuit that lacked colorable merit").

417. *Stomper v. Amalgamated Transit Union*, 27 F.3d 316, 317 (7th Cir. 1994) (discussing general prevailing party fee-shifting rules).

interested private parties have a chance to influence the process."⁴¹⁸ Because these decisions are generally influenced by political forces, follow a lengthy internal deliberative process, and reflect a response to a multitude of concerned interests within and outside the government, the likelihood that a change in general governmental policy is attributable to the filing of a particular lawsuit is greatly diminished. As Professor Krent has observed, "[i]t is myopic to think that officials at the National Highway Transportation Safety Administration (NHTSA) or the Environmental Protection Agency (EPA) consider the potential financial impact from an adverse attorney-fee award in setting seatbelt policy or effluent standards, any more than Congress would consider litigation costs in enacting broad social policy."⁴¹⁹ Even when a specific complaint has been lodged in court against a policy, "[f]ew government policymakers consider it likely that their policy will be set aside upon judicial review, let alone that it would be considered *ex post* to be unreasonable."⁴²⁰ For the same reason, it is likely to be the unusual case in which the pendency of a lawsuit can be said to have served as the catalyst for a change in general government policy, even when the lawsuit sought a similar policy outcome.

In *Beach v. Smith*,⁴²¹ a father brought an action challenging the government's policy with respect to issuance of arrest warrants under the Parental Kidnapping Prevention Act.⁴²² The action was dismissed for lack of standing,⁴²³ but the father filed an appeal.⁴²⁴ In the meantime, the Justice Department was engaged in frequent discussions with congressional critics of its guidelines for issuing arrest warrants in such cases. The Department's Criminal Division recommended changes in the guidelines. Congress scheduled hearings on the matter. Ultimately, the guidelines were changed. Shortly before the change in the guidelines, the Department also authorized issuance of an arrest warrant for the father's former wife.⁴²⁵ Based upon these developments, the court of appeals dismissed the appeal as moot.⁴²⁶ The father sought attorney's fees under the EAJA, asserting that the sequence of events demonstrated that his lawsuit had prompted the Department's issuance of the warrant and change in policy.⁴²⁷ The United States Court of Appeals for the Ninth Circuit affirmed the district court's finding that the Justice Department's actions were prompted by new evidence justifying the issuance of the warrant and congressional criticisms of the guidelines which led to the Criminal Division's recommendations of changes in

418. Krent, *supra* note 11, at 468.

419. *Id.* at 471.

420. *Id.* at 472.

421. 743 F.2d 1303 (9th Cir. 1984).

422. *Id.* at 1304-05.

423. *Beach v. Smith*, 535 F. Supp. 560 (S.D. Cal. 1982).

424. *Beach*, 743 F.2d at 1305.

425. *Id.*

426. *Id.*

427. *Id.* at 1306.

the guideline requirements.⁴²⁸ Moreover, there was no evidence in the record that the Department had reached its decision because it feared an adverse decision in the case on the merits.⁴²⁹

When the government adopts a general policy or promulgates a new regulation, a party in pending litigation challenging that policy has a heavy burden in demonstrating that government policymakers were moved by fear of an adverse outcome in that litigation rather than by broader social and policy concerns. Even heavy burdens, however, can be lifted under the right circumstances. For example, in *Public Citizen Health Research Group v. Young*,⁴³⁰ the United States Court of Appeals for the District of Columbia Circuit affirmed a finding that a public interest group was a prevailing party in its effort to force the Food and Drug Administration (FDA) to require a warning about Reye's Syndrome on aspirin labels.⁴³¹ Under the particular circumstances of the case, it was apparent the efforts of the plaintiffs led directly to the promulgation of new regulations by the FDA. The D.C. Circuit observed that there was an "absence of alternative explanations" for the agency's action.⁴³² The agency's action was a complete reversal of its prior position that its alternative voluntary labeling program was working well.⁴³³ Moreover, there was no new scientific data to explain the change in position, as the final study of the association between the Reye's Syndrome and aspirin was not completed until after the promulgation of the new regulations.⁴³⁴ Given that the key change in government position came just eleven weeks after oral argument of motions in the district court, during which the court gave the plaintiff public interest group "a very hospitable reception,"⁴³⁵ there was strong evidence that the government was motivated in its change of policy by what it perceived the courts were about to do.⁴³⁶

d. Catalyst Theory and Legislative Changes Enacted by Congress

Except in rare circumstances, it would seem presumptuous indeed for a party litigating a case pending in the courts to contend that his or her initiation of a lawsuit compelled the Congress of the United States to enact new legislation for

428. *Id.*

429. *Id.*

430. 909 F.2d 546 (D.C. Cir. 1990).

431. *Id.* at 549-51.

432. *Id.* at 551.

433. *Id.*

434. *Id.* at 548, 551.

435. *Id.* at 550.

436. See also *Martin v. Heckler*, 733 F.2d 1499, 1501 (11th Cir. 1984) (holding plaintiffs challenging federal agency policy on Aid to Families with Dependent Children program were prevailing parties when agency changed its policy after counsel for the agency stated in court it would rescind the policy, reinstate all applicants, and pay retroactive benefits), *vacated on reh'g on other grounds*, 773 F.2d 1145 (1985).

his benefit. As the United States Court of Appeals for the Fifth Circuit stated in *Milton v. Shalala*,⁴³⁷ “[t]he mere possibility that Congress acted because of an individual claimant’s suit (or reacted to a large number of similar suits) is too speculative in our view considering the many influences upon members of Congress in casting their votes.”⁴³⁸ The courts of appeals have appropriately been hesitant to hold that a lawsuit by an EAJA fee petitioner caused the United States Congress to change the statutory law governing the claim at issue.⁴³⁹

Awarding EAJA fees to those who obtain a favorable outcome because of an intervening change in the statutory law does not promote the statutory purpose and reflects conceptual error. One of the primary purposes of the EAJA is to compensate those who force the government to conform to the law. When the underlying statutory law is changed, however, a party simply has not prevailed by showing that the government’s prior conduct or decision was wrongful. When Congress changes the statutory law, the very shape and substance of the claim is altered. The party has not prevailed upon the claim that was brought at the time the lawsuit was filed, nor has the government’s position developed at that time been defeated.⁴⁴⁰ Instead, the party has been the “fortuitous beneficiary” of new legal standards that changed the legal landscape, and “serendipity is not a reason for rewarding lawyers.”⁴⁴¹ Unless it can be said that Congress was moved to revise statutory law for fear of a judicial declaration of its unconstitu-

437. 17 F.3d 812 (5th Cir. 1994).

438. *Id.* at 815. See also *Truax v. Bowen*, 842 F.2d 995, 997 (8th Cir. 1988) (stating “even granting that Congress’ enactment of [a statute changing the law] was partly a result of the thousands of suits filed” to challenge the administrative application of the statute, “the causal link between [the plaintiff’s] individual lawsuit and Congress’s action is too tenuous to satisfy the catalyst test”).

439. See, e.g., *Milton*, 17 F.3d at 814-15; *Petrone v. Secretary of Health & Human Servs.*, 936 F.2d 428, 430 (9th Cir. 1991) (per curiam), *cert. denied*, 112 S. Ct. 1161 (1992); *Guglietti v. Secretary of Health & Human Servs.*, 900 F.2d 397, 400 (1st Cir. 1990); *Shepard v. Sullivan*, 898 F.2d 1267, 1272 (7th Cir. 1990); *Hendricks v. Bowen*, 847 F.2d 1255, 1258 (7th Cir. 1988); *Truax*, 842 F.2d at 997. But see *Perket v. Secretary of Health & Human Servs.*, 905 F.2d 129, 134-35 (6th Cir. 1990) (holding the pendency of a suit was a necessary cause of the ultimate victory after a change in the law, and this was sufficient to make the plaintiff a prevailing party for purposes of the EAJA); *Hyatt v. Heckler*, 807 F.2d 376, 382 (4th Cir. 1986) (same), *cert. denied*, 484 U.S. 820, 108 S. Ct. 79 (1987); *Robinson v. Bowen*, 679 F. Supp. 1011, 1015 (D. Kan. 1988) (same), *aff’d*, 867 F.2d 600 (10th Cir. 1989) (per curiam). The *Perket* decision and the similar rulings of other courts have justly been criticized as confusing a condition of recovery (the pendency of a suit at the time of the change in the law) with a cause of recovery. *Guglietti*, 900 F.2d at 400. Although the pendency of the lawsuit may have been necessary to take advantage of the change in the law, the “proximate cause of [the litigant’s] victory was the congressional enactment of a standard under which he was entitled to relief.” *Hendricks*, 847 F.2d at 1258.

440. See *Hendricks*, 847 F.2d at 1258 (holding a Social Security benefits claimant who obtained benefits under a statutory reform was not a prevailing party since “[t]he Secretary did not reinstate [his] benefits because the Secretary wanted to compromise a dispute or because he became convinced that his prior position was unprincipled” but rather because “Congress mandated reconsideration of all such currently pending claims under a newly enacted standard”) (footnote omitted).

441. *Id.* at 1259 (Easterbrook, J., concurring).

tionality, a rare occurrence,⁴⁴² the enactment of new legislation initiates a new legal regime and cannot be said to convey prevailing party status upon those whose suits were filed and whose claims were litigated under the old and now-discarded standards.⁴⁴³

It would appear, however, to be consistent with the underlying principles of the EAJA to award attorney's fees if the party were able to demonstrate that he or she would inevitably have prevailed under the prior standards of law and notwithstanding the beneficial change in the statute.⁴⁴⁴ As Judge Easterbrook said, concurring in *Hendricks v. Bowen*,⁴⁴⁵ "[w]hen the EAJA otherwise would have required the government to pay, . . . the creation of a new entitlement in the [statutory revision] should not make [the party] worse off."⁴⁴⁶ If a litigant can demonstrate that the government's position was unreasonable and thus not substantially justified under preexisting law, then the lawsuit as it stood prior to the statutory revision was precisely the type of challenge to wrongful government action that the EAJA was designed to encourage. However, lest this door swing open too wide, this approach would only apply in cases of inevitable victory and demonstrable unreasonableness in the government's position *and* would not permit recovery of attorney's fees for work performed on the merits of the case past the date of the statutory change. Of course, the best approach of all would be for Congress to anticipate the effect of statutory changes on pending litigation and expressly provide for whether those parties may obtain a fee award for legal expenses incurred prior to the legislative enactment.⁴⁴⁷

442. See *Bullfrog Films, Inc. v. Catto*, 815 F. Supp. 338, 341 (C.D. Cal. 1993) (holding plaintiffs challenging constitutionality of regulations issued pursuant to treaty were prevailing parties for an EAJA award because the litigation was "the catalyst in sparking the enactment" by Congress of legislation setting forth new statutory standards for implementation of the treaty).

443. But see *Paris v. United States Dep't of Hous. & Urban Dev.*, 988 F.2d 236, 241 (1st Cir. 1993) ("The fact that Congress delivered the plaintiffs' requested relief rather than the parties sued, [the agencies], provides no relevant distinction. [The agencies] and Congress are manifestations of the same entity, the government.").

444. The majority of courts of appeals have rejected this approach. See, e.g., *Milton v. Shalala*, 17 F.3d 812, 815 (5th Cir. 1994) (holding the "inevitable victory" theory falsely confuses the separate standards that the party have prevailed and that the government's position lack substantial justification); *Petrone v. Secretary of Health & Human Servs.*, 936 F.2d 428, 430 (9th Cir. 1991) (rejecting theory without substantial discussion), *cert. denied*, 112 S. Ct. 1161 (1992); *Guglietti v. Secretary of Health & Human Servs.*, 900 F.2d 397, 402 (1st Cir. 1990) (same).

445. 847 F.2d 1255 (7th Cir. 1988).

446. *Id.* at 1261 (Easterbrook, J., concurring). See also *Petrone*, 936 F.2d at 431 (O'Scannlain, J., dissenting); *Perket v. Secretary of Health & Human Servs.*, 905 F.2d 129, 133-34 (6th Cir. 1990).

447. See *Hendricks*, 847 F.2d at 1259 (observing "Congress was on full notice that there were thousands of outstanding claimants whose claims would be remanded and reconsidered by the operation of the Reform Act," but there was "nothing in the Reform Act express[ing] a desire or expectation that those claimants would receive attorneys' fees if their benefits were reinstated"). Cf. *Paris*, 988 F.2d at 238, 241 (holding that because the particular litigation was referenced in the legislative history, the plaintiffs were prevailing parties entitled to a fee award).

e. The Future of the Catalyst Theory

In a closely divided en banc decision rendered on rehearing, the United States Court of Appeals for the Fourth Circuit recently held, in *S-1 & S-2 v. State Board of Education*,⁴⁴⁸ that the catalyst theory was no longer a viable legal basis for determining prevailing party status. The sole basis for the majority view was that the Supreme Court's most recent decision on prevailing party status in a fee-shifting case, *Farrar v. Hobby*,⁴⁴⁹ had not mentioned the theory. Because the *Farrar* decision stated that "[t]he plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement,"⁴⁵⁰ the Fourth Circuit en banc majority concluded that cases applying the catalyst theory had been overruled.⁴⁵¹ The catalyst theory, however, simply was not at issue in *Farrar*, where the only question was whether an actual judgment, but one for nominal damages, was sufficient to qualify a plaintiff as a prevailing party.⁴⁵² Nor did the Fourth Circuit majority explain why a plaintiff should be denied a fee award when a defendant has voluntarily acceded to the plaintiff's demands in direct response to a legal action and thereby mooted the need for the litigation to proceed to judgment.⁴⁵³

The Fourth Circuit en banc minority is likely on stronger ground in rejecting the conclusion that *Farrar* abrogated the catalyst theory *sub silentio*.⁴⁵⁴ The dissenters adopted the majority opinion issued by the original panel, which observed that the *Farrar* Court's reference to enforceable judgment, consent decree, or settlement must be read in the context of the actual issue raised in the

448. 21 F.3d 49 (4th Cir.) (en banc), *cert. denied*, 115 S. Ct. 205 (1994).

449. 113 S. Ct. 566 (1992).

450. *Id.* at 573 (citations omitted).

451. *S-1 & S-2*, 21 F.3d at 51. See also Joel H. Trotter, Note, *The Catalyst Theory of Civil Rights Fee Shifting After Farrar v. Hobby*, 80 Va. L. Rev. 1429, 1430-31, 1450-51 (1994) (arguing while *Farrar* "[a]dmittedly . . . did not explicitly concern catalyst theory," the Court consolidated criteria for prevailing party status into a "coherent test" that "forecloses catalyst theory," although also concluding that a plaintiff may sometimes be able to obtain an enforceable judgment and thus prevail in such cases pursuant to an exception to the mootness doctrine that allows a court in appropriate circumstances to issue an injunction despite a defendant's voluntary cessation of a challenged practice).

452. *Farrar*, 113 S. Ct. at 573-74.

453. The en banc majority, *S-1 & S-2*, 21 F.3d at 51, did adopt the dissenting opinion of the original panel, *S-1 v. State Bd. of Educ.*, 6 F.3d 160, 168-72 (4th Cir. 1993) (Wilkinson, J., dissenting), which provides more explanation for the result. Judge Wilkinson argued the term "prevailing party" means litigants "must prevail in their status as parties, not as agents of reform." *Id.* at 170. Moreover, he contended "the catalyst theory of fee recovery engenders confusion and unnecessary litigation." *Id.* at 171. For these reasons, he contended any "voluntary change in conduct must be formalized in a legally enforceable settlement agreement to transform a plaintiff into a prevailing party" for purposes of fee-shifting. *Id.*

454. *S-1 & S-2*, 21 F.3d at 51 (Ervin, J., dissenting).

case.⁴⁵⁵ "Given the importance that the catalyst theory long has had in prevailing party doctrine[,] the original panel decision, adopted by the en banc dissenters, stated, "we would expect that if the Court intended to hold it no longer a viable theory it would address the issue head-on in a case in which it was dispositive."⁴⁵⁶ Both before and subsequent to *S-1 & S-2*, other courts of appeals have concluded that the catalyst theory survived *Farrar*.⁴⁵⁷

Although the *S-1 & S-2* en banc decision sets the stage for Supreme Court review of this issue, the Court is unlikely to discard the catalyst theory outright and require that every lawsuit be driven through to a judgment before the checkered flag can be waved. Nevertheless, the *S-1 & S-2* decision may have the salutary effect of prompting a reconsideration of the parameters of the theory. The Supreme Court may well emphasize that the theory may be applied only when the causal connection between the filing of the lawsuit and the change in conduct or policy is close and unattenuated. In that way, the Court may find a middle ground between allowing defendants to "deprive plaintiffs of attorney fees by unilaterally mooting the underlying case by conceding to plaintiffs' demands"⁴⁵⁸ and discouraging public officials from policy initiatives for "fear that worthwhile changes may be retroactively linked to a lawsuit and result in a hefty bill for attorneys' fees."⁴⁵⁹

4. *Interim Attorney's Fee Awards Under the EAJA*

In general, a court will consider an application for attorney's fees only at the end of the litigation, thereby avoiding repeated requests for new awards of fees at each successive stage of litigation.⁴⁶⁰ Courts will consider fee petitions on an interlocutory basis only "in cases of protracted litigation where a party's ability to obtain redress . . . would be imperiled without such an award."⁴⁶¹ If courts prematurely assess attorney's fees, "the ultimately successful party might end up having subsidized a large segment of the losing party's suit."⁴⁶² Accordingly,

455. *S-1*, 6 F.3d at 166-67.

456. *Id.* at 166 (citation omitted). See also *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 547 (3d Cir. 1994) ("We believe it is not likely that the Supreme Court would overturn such a widespread theory without even once mentioning it, particularly when it was inapplicable to the case at hand.").

457. See, e.g., *Baumgartner*, 21 F.3d at 546-50; *Zinn v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994); *Craig v. Gregg County*, 988 F.2d 18, 21 (5th Cir. 1993); *American Council of the Blind, Inc. v. Romer*, 992 F.2d 249, 250-51 (10th Cir.), *cert. denied*, 114 S. Ct. 184 (1993).

458. *Baumgartner*, 21 F.3d at 548 (arguing against rejection of catalyst theory from a policy standpoint).

459. *S-1*, 6 F.3d at 172 (Wilkinson, J., dissenting) (arguing the catalyst theory with its reliance on a simple chronology of events to show causation discourages officials from taking initiative to change laws or improve conditions).

460. Gregory C. Sisk, *Interim Attorney's Fees Awards Against the Federal Government*, 68 N.C. L. Rev. 117, 151-52 (1989).

461. *Yakowicz v. Pennsylvania*, 683 F.2d 778, 781 (3d Cir. 1982).

462. *Grubbs v. Butz*, 548 F.2d 973, 976 (D.C. Cir. 1976).

interim fee awards should be the exception and restricted to situations where "delay[ing] a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel."⁴⁶³ When such an award is permitted, the court should protect the opposing party's right to recoup those fees if the court's order is later overturned, such as through "the simple device of requiring the party recovering interim fees to post a bond guaranteeing repayment in the event of reversal."⁴⁶⁴ And, as an absolute requirement to any successful petition for attorney's fees at any stage of litigation, the party must establish that it is truly a prevailing party.⁴⁶⁵

In the context of the federal government, however, interim fee awards are not generally available because of two special statutes which authorize payment of judgments against the United States only when the government has exhausted its appellate rights and the judgment has become final. Subsection 1304(a) of Title 31, United States Code, establishes a general appropriation, called the Judgment Fund, as the sole source for payment of court awards and judgments against the United States and its agencies, except when another statute designates a different payment source.⁴⁶⁶ Section 2414 of Title 28, United States Code, which is referred to in Subsection 1304(a), establishes one of the primary conditions on payments from the Judgment Fund.⁴⁶⁷ Section 2414 authorizes payment only of "final judgments," and a judgment is deemed to be final only when "the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same."⁴⁶⁸ As this author has written previously, "[t]he manifest purpose of these statutes is to protect the public Treasury. Congress has determined that the United States ought not to pay unreviewed awards by district courts when the United States contemplates appellate action, because a successful appeal will render such payments unjustified."⁴⁶⁹

By virtue of the explicit statutory restrictions on payments from the Judgment Fund, interim attorney's fees generally may not be awarded against the federal government because, by their very nature, they remain subject to eventual appellate review and thus do not qualify as "final judgments" under Sections 2414 and 3104.⁴⁷⁰ Nevertheless, a few federal courts, sympathetic to the private

463. See *Bradley v. School Bd.*, 416 U.S. 696, 723, 94 S. Ct. 2006, 2022 (1974) (citing the substantial hardship factor as a justification for interim fee awards, although not stating expressly that a finding of hardship was a necessary prerequisite to such an award). See generally Sisk, *supra* note 460, at 156-59.

464. Michael D. Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 Cornell L. Rev. 207, 271 (1984). See generally Sisk, *supra* note 460, at 159.

465. See generally Sisk, *supra* note 460, at 153-56.

466. 31 U.S.C. § 1304(a) (1988).

467. 28 U.S.C. § 2414 (1988).

468. *Id.*

469. Sisk, *supra* note 460, at 123.

470. See generally *id.* at 124-25.

litigant pleading hardship, have permitted interim fee awards against the United States, notwithstanding these express statutory provisions precluding payments of awards before the government has exhausted its rights to appellate review.⁴⁷¹

In *Office of Personnel Management v. Richmond*,⁴⁷² the Supreme Court held erroneous advice given by a government employee to a benefits claimant could not estop the government from denying benefits which were not otherwise permitted by law.⁴⁷³ The Court emphasized the “straightforward and explicit command of the Appropriations Clause” of the Constitution that “no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.”⁴⁷⁴ The Court specifically admonished that the general appropriation to pay judgments “does not create an all-purpose fund for judicial disbursement. A law that identifies the source of funds is not to be confused with the conditions prescribed for their payment.”⁴⁷⁵ Of course, one of the “conditions prescribed for . . . payment” from the Judgment Fund is that the judgment be final. When Congress has explicitly directed that appropriations be used to pay only final judgments, an interim or premature court award of public funds would disregard “the duty of all courts to observe the conditions defined by Congress for charging the public Treasury.”⁴⁷⁶ In light of the *Richmond* decision, those earlier court decisions granting interim fee awards against the United States are of doubtful validity and are subject to reconsideration.

This general rule precluding interim fee awards, however, does not apply to Subsection (d) of the Equal Access to Justice Act.⁴⁷⁷ When a fee award is payable from agency funds, rather than from the Judgment Fund, the express finality requirement in Section 2414 does not apply.⁴⁷⁸ In contrast with most attorney’s fees provisions waiving the sovereign immunity of the United States,⁴⁷⁹

471. *Trout v. Garrett*, 891 F.2d 332 (D.C. Cir. 1989) (approving interim fee award under Title VII); *Rosenfeld v. United States*, 859 F.2d 717 (9th Cir. 1988) (approving interim fee award under Freedom of Information Act). *But see Sisk*, *supra* note 460, at 125-37 (concluding interim fee awards may not be paid by the United States from the Judgment Fund prior to exhaustion of appellate rights and criticizing court decisions allowing such awards as contrary to the statutory language and the principle of strict construction of waivers of sovereign immunity).

472. 496 U.S. 414, 110 S. Ct. 2465 (1990).

473. *Id.* at 423, 110 S. Ct. at 2471.

474. *Id.* at 424, 110 S. Ct. at 2471 (discussing U.S. Const. art. I, § 9, cl. 7).

475. *Id.* at 432, 110 S. Ct. at 2475.

476. *See Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385, 68 S. Ct. 1, 3 (1947). *See also Richmond*, 496 U.S. at 420, 110 S. Ct. at 2469.

477. *See generally Sisk*, *supra* note 460, at 139-42.

478. *See generally id.* at 137-38.

479. Subsection (b) of the EAJA remains subject to the award payment provisions of the Judgment Fund statutes. Equal Access to Justice Act, 28 U.S.C. § 2412(b) (1988). EAJA Subsection (b) makes the United States liable for fees “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.” *Id.* Awards of attorney’s fees made pursuant to Subsection (b) are payable by the United States, *id.* § 2412(c)(2), unless the award is based upon the common-law rule permitting fees for bad faith conduct, in which case the award must be charged against agency funds. *Id.* The EAJA makes

EAJA Subsection (d) expressly provides that “[f]ees . . . awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.”⁴⁸⁰ Consequently, such payments are not made from the Judgment Fund, and thus are not subject to any statutory finality requirement.

Although the EAJA contains no language expressly providing that interim fees are available, the legislative history offers strong support for the implication of interim fee authority. The Conference Report accompanying the bill stated: “An award may . . . be appropriate where the party has prevailed on an interim order which was central to the case, or where an interlocutory appeal is ‘sufficiently significant and discrete to be treated as a separate unit.’”⁴⁸¹ In *Haitian Refugee Center v. Meese*,⁴⁸² the Eleventh Circuit cited the legislative history and concluded such a remedy should be available.⁴⁸³ Thus, “[t]he path toward permitting interim fee awards under Subsection 2412(d) of the EAJA . . . appears well marked.”⁴⁸⁴ Nevertheless, interim fee awards properly remain as uncommon in the EAJA context as they do elsewhere.

Significantly, the Eleventh Circuit also held, in accordance with the legislative history quoted above, that the party seeking an interim fee must have

payment of Subsection (b) fee awards (other than for bad faith) expressly subject to the Judgment Fund limitations of Section 2414. *Id.*

480. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(4) (1988). The EAJA makes fee awards under Subsection (d) payable from agency funds as part of the statute’s purpose in deterring unreasonable government conduct. As Professor Krent explains,

if fee awards come out of the implementing agency’s budget, as they largely do under the EAJA, then the possibility of deterrence increases. Agency officials, like managers in private firms, are then forced to internalize the costs of their actions more fully, for they recognize that adverse fee awards may prevent them from pursuing other policy objectives.

Krent, *supra* note 49, at 2066 (footnote omitted).

481. H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 22 (1980), reprinted in 1980 U.S.C.C.A.N. 5003, 5011; H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4990; S. Rep. No. 253, 96th Cong., 1st Sess. 7 (1979). These reports quote Van Hoomissen v. Xerox Corp., 503 F.2d 1131, 1133 (9th Cir. 1974).

482. 791 F.2d 1489 (11th Cir.), modified on reh’g, 804 F.2d 1573 (1986) (per curiam).

483. *Id.* at 1495-96. See also *Kopunec v. Nelson*, 801 F.2d 1226, 1228 (10th Cir. 1986) (citing legislative history concerning interim fee awards and permitting award of fees under the EAJA when case was remanded to the agency for ultimate disposition).

484. Sisk, *supra* note 460, at 141. In *Gillikin v. United States*, 764 F. Supp. 261 (E.D.N.Y. 1991), a district court held interim fee awards are not available under the EAJA because “the ‘prevailing party’ may not be identified until a final, unappealable judgment has been entered.” *Id.* at 269. The court mistakenly relied upon 28 U.S.C. § 2412(d)(2)(H) (1988) for the proposition a judgment must be entered before a party can be deemed to have prevailed. Paragraph 2412(d)(2)(H) (1988) defines “prevailing party” only for the purpose of eminent domain proceedings. This paragraph provides that only a party who obtains a “final judgment” for an amount closer to the party’s valuation of the property than to the government’s valuation qualifies as a prevailing party. However, the court also cited 28 U.S.C. § 2412(d)(1)(B) (1988), which provides that a party seeking an award of fees shall submit an application “within thirty days of final judgment in the action.” If

actually "prevailed" upon a main or central issue in the case.⁴⁸⁵ In the subsequent case of *Texas State Teachers Ass'n v. Garland Independent School District*,⁴⁸⁶ the Supreme Court rejected a proposed test for prevailing party status under the Civil Rights Attorney's Fee Act, 42 U.S.C. § 1988,⁴⁸⁷ that required a party to prevail on the "central issue" in the litigation and not merely upon significant secondary issues.⁴⁸⁸ The Court strongly criticized the central issue standard as an unworkable test "focusing on the subjective importance of an issue to the litigants" and thereby turning "largely on the mental state of the parties."⁴⁸⁹ The Court instead held that, to be a prevailing party, a litigant need only succeed on "any significant issue in [the] litigation which achieve[d] some of the benefit the parties sought in bringing the suit."⁴⁹⁰

Although the *Texas State Teachers Ass'n* Court made clear it was enunciating a general prevailing party rule for fee-shifting statutes,⁴⁹¹ particular statutory contexts may require exceptions to the general standard. The legislative history of the EAJA, the only authority respecting the possibility of interim fee awards under that statute, expressly contemplates such an award "where the party has prevailed on an interim issue which was *central* to the case."⁴⁹² Moreover, attorney's fees are available under the EAJA only when the government's position in the litigation is not substantially justified,⁴⁹³ a standard that requires the court to evaluate the reasonableness of the government's position in the context of the case as a whole,⁴⁹⁴ an inquiry that cannot be made before the court resolves the heart of the case. Even though the Supreme Court found the "central issue" standard to be unwieldy, it nevertheless appears to be the appropriate standard for interim fee awards under the EAJA.

this provision is read not only to limit the time within which an application must be made after a final judgment but also to preclude any application before final judgment, then the *Gillikin* court would be correct in concluding that an interim award is not available under the EAJA. However, the statute does not expressly preclude a party that has truly prevailed in the case from seeking a fee award before final judgment, nor has it been read to prevent a court from entering an order as to fees simultaneously with or in the absence of a formal judgment on the merits. The *Gillikin* court's analysis should give pause to courts considering whether the EAJA authorizes interim relief. Under the rare circumstances where such an award is merited and the party has clearly prevailed on a central issue, the stronger authority appears to be such an award is permissible.

485. *Haitian Refugee Center*, 791 F.2d at 1496.

486. 489 U.S. 782, 109 S. Ct. 1486 (1989).

487. 42 U.S.C. § 1988 (1988).

488. *Texas State Teachers Ass'n*, 489 U.S. at 792-93, 109 S. Ct. at 1493-94.

489. *Id.* at 791, 109 S. Ct. at 1493.

490. *Id.* at 789, 109 S. Ct. at 1492. See generally *supra* section III.A.1 (discussing the general requirements for prevailing party status).

491. *Texas State Teachers Ass'n*, 489 U.S. at 784, 791, 109 S. Ct. at 1489, 1493.

492. H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 22 (1980), reprinted in 1980 U.S.C.C.A.N. 5003, 5011; H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4990. See also S. Rep. No. 253, 96th Cong., 1st Sess. 7 (1979).

493. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988).

494. See generally *infra* section IV, forthcoming (discussing the entitlement inquiry of whether the government's position was substantially justified under the EAJA).

In any event, as this author has written previously:

The distinction between prevailing on a "central" issue or a "significant" issue often may be largely a semantical debate and should not obscure the underlying basis for a strict standard of success, however articulated, before an interim award against the government is appropriate. The question is less whether a party has prevailed on some issue than whether the party's entitlement to fees is sufficiently clear at an interlocutory stage to justify an early award of fees. The objective is to ensure that fees are not awarded prematurely when there remains substantial doubt as to the party's ultimate entitlement to fees. The court should resolve any doubts about whether a party has achieved sufficient relief on the merits to qualify as a prevailing party by denying any interim award and waiting until the litigation has reached a more mature stage. Likewise, if the court found the merits of the underlying claims close so that there is a fair prospect of reversal on appeal, the court properly may regard the litigant's prevailing party status as tentative and uncertain. Under such circumstances, the court should be reluctant to order any immediate payment of fees. Again, the presumption remains that interim awards are disfavored.⁴⁹⁵

5. *The Statutory Rule for Prevailing Party Status in Eminent Domain Cases*

"[P]revailing 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 (EAJA § 2412(d)(2)(H)).⁴⁹⁶

When Congress re-enacted the EAJA in 1985, it amended the statute to confirm the application of the EAJA to eminent domain cases and to define the meaning of "prevailing party" in this context.⁴⁹⁷ Under this definition, a landowner litigating a condemnation case with the federal government qualifies as a "prevailing party" eligible for an EAJA award only if the ultimate award for the subject property is as close or closer to the valuation which the landowner advocated at trial than that award is to the figure for which the government

495. Sisk, *supra* note 460, at 155-56.

496. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(H) (1988).

497. Equal Access to Justice Act, Pub. L. No. 99-80, § 2(c)(2), 99 Stat. 184, 186 (1985) (codified at 28 U.S.C. § 2412(d)(2)(H) (1988)). See generally *supra* section II.E.2 (discussing scope of the EAJA as applying to eminent domain cases).

contended.⁴⁹⁸ "If the award is exactly in the middle, [the statute] gives the benefit to the property owner."⁴⁹⁹

The determination is a simple mathematical calculation. For example, in *United States v. 50.50 Acres of Land*,⁵⁰⁰ the landowner appraised the land at \$5,530,000; the government valued the land at \$3,467,000; and the court's just compensation award was \$4,485,771.⁵⁰¹ Thus, the landowner's appraisal evidence was \$1,044,229 *greater* than the court's award, while the government's appraisal evidence was \$1,018,771 *lower* than the court's award.⁵⁰² Accordingly, the government was the prevailing party, and the landowner was ineligible for any fee award.

The courts have adhered strictly to the terms of the statute, irrespective of the equities of the case, the distance between the ultimate award and the government's valuation, or the landowner's recovery of far more than the government had offered for the property. Thus, in *United States v. 1002.35 Acres of Land*,⁵⁰³ although the government undervalued the land at \$441,000, while the court awarded the landowner \$4,890,000, the government nevertheless was the prevailing party under the EAJA definition because the landowner went too high and asserted the valuation of the land at \$11,000,000.⁵⁰⁴ The statute is explicit and leaves no room for manipulation on this point.

By the plain language of the provision, an attorney's fee award is not available to parties in eminent domain cases who obtain a settlement from the government. The statute defines "prevailing party" for this peculiar context as one "who obtains a final judgment (*other than by settlement*)" for an amount which is at least as close to the property's valuation as to the government's valuation.⁵⁰⁵ The House Report explains that "it is presumed that any claim for expenses and fees under the Act which a party might have asserted in the event of trial would be considered by the parties in their negotiations and that an appropriate allowance, if any, would be made in the settlement amount agreed upon, so that a final judgment achieved through settlement shall foreclose thereafter the assertion of any such claim."⁵⁰⁶ For that reason, property owners considering settlement with the government in eminent domain cases are advised to evaluate the settlement offer with the

498. See generally Gina A. Leahy, Note, *Attorneys' Fees—Are Fees and Costs Collectible Under the EAJA in an Eminent Domain Proceeding*, 23 Suffolk U. L. Rev. 96 (1989).

499. H.R. Rep. No. 120, 99th Cong., 1st Sess. 18 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 147.

500. 931 F.2d 1349 (9th Cir. 1991).

501. *Id.* at 1358.

502. *Id.* at 1358 n.7.

503. 942 F.2d 733 (10th Cir. 1991).

504. *Id.* at 735.

505. 28 U.S.C. § 2412(d)(2)(H) (1988) (emphasis added).

506. H.R. Rep. No. 120, 99th Cong., 1st Sess. 18-19 (1985), reprinted in 1985 U.S.C.C.A.N. 147. However, the House Report emphasizes that the exclusion of settled cases from the scope of the EAJA in eminent domain cases "is [not] meant to limit the definition of 'prevailing party' under other circumstances." *Id.* at 19.

understanding that acceptance of the settlement bars any subsequent claim for attorney's fees. The Department of Justice has instructed its counsel "to vigorously contest any claim for attorneys' fees filed by a party after settlement of a condemnation case."⁵⁰⁷

B. Nature of the Party (Net Worth and Employment Size)

"[P]arty" 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 1986 (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. § 1141(j)(a)), may be a party regardless of the net worth of such organization or cooperative association . . . (EAJA § 2412(d)(2)(B)).⁵⁰⁸

1. Net Worth and Employment Size Limitations

The EAJA sweeps broadly, allowing fees to both plaintiffs and defendants who prevail in a civil action by demonstrating unjustified government conduct. The statute, however, imposes certain threshold requirements before a party, plaintiff or defendant, is eligible for a fee award—although the thresholds are set rather high. One of the primary purposes of the statute is to equalize the litigating strength between private litigants of modest means and the federal government with the substantial resources it can marshal.⁵⁰⁹ During the legislative hearings for the EAJA, Senator Domenici, one of the primary sponsors of the bill, explained:

The basic problem this bill seeks to overcome is the inability of many Americans to combat the vast resources of the Government in administrative adjudication. In the usual case, a party has to weigh the high cost of litigation or agency proceedings against the value of the rights to be asserted. Individuals and small businesses are in far too many cases forced to knuckle under to regulations even though they have a

507. Office of Legal Policy, United States Department of Justice, *Award of Attorney Fees and Other Expenses in Judicial Proceedings Under the Equal Access to Justice Act 40* (1985).

508. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B) (1988).

509. Hill, *supra* note 214, at 243; Krent, *supra* note 11, at 462-67.

direct and substantial impact because they cannot afford the adjudication process. In many cases the Government can proceed in expectation of outlasting its adversary. The purpose of the bill is to redress the balance between the Government acting in its discretionary capacity and the individual.⁵¹⁰

To implement this purpose, Paragraph (d)(2)(B) of the EAJA establishes various eligibility qualifications for a Subsection (d) award, excluding very wealthy individuals and large organizations.⁵¹¹ Under this provision, only individuals with a net worth that does not exceed \$2 million,⁵¹² and unincorporated business owners, partnerships, corporations, associations, units of local government, and organizations with a net worth that does not exceed \$7 million at the time the civil action was filed are eligible for attorney's fees.⁵¹³ Tax-exempt organizations and cooperative agricultural organizations are exempt from the net worth limitation.⁵¹⁴ In addition, non-individual party entities (without any exception for tax-exempt or cooperative agricultural organizations) are eligible only if they employ fewer than 500 persons.⁵¹⁵

For the administrative proceeding version of the Equal Access to Justice Act, 5 U.S.C. § 504,⁵¹⁶ Congress directed the agencies to consult with the Chairman of the Administrative Conference of the United States and then, by rule, to establish uniform procedures for the submission and consideration of applications for EAJA awards.⁵¹⁷ In 1981, the Chairman of the Administrative Conference issued "Model Rules for Implementation of the Equal Access to Justice Act in Agency Proceedings,"⁵¹⁸ which included suggested regulations for determining party eligibility under the EAJA.⁵¹⁹ Reuben B. Robertson, the Chairman of the Administrative

510. *Award of Attorneys' Fees Against the Federal Government: Hearings on S. 265 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 16 (1980). See also *Commissioner v. Jean*, 496 U.S. 154, 163, 110 S. Ct. 2316, 2321 (1990) ("[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions."); H.R. Rep. No. 120, 99th Cong., 1st Sess. 4 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 133 (stating the purpose of the EAJA is to "reduce[] the disparity in resources between individuals, small businesses, and other organizations with limited resources and the federal government").

511. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B) (1988).

512. *Id.* § 2412(d)(2)(B)(i).

513. *Id.* § 2412(d)(2)(B)(ii).

514. *Id.*

515. *Id.*

516. Equal Access to Justice Act, 5 U.S.C. § 504 (1988). See generally *supra* section II.A.2 (discussing limitation of scope of EAJA Subsection (d) to judicial proceedings and the alternative Section 504 for adversary adjudications before administrative agencies).

517. Equal Access to Justice Act, 5 U.S.C. § 504(c)(1) (1988).

518. 46 Fed. Reg. 32,907 (1981) (codified at 1 C.F.R. §§ 315.101-310 (1994)). After the reenactment of the EAJA in 1985, the Model Rules were revised to reflect the changes in the law. 51 Fed. Reg. 16,659 (1986).

519. 1 C.F.R. § 315.104 (1994). The definition of "party" for purposes of the administrative

Conference at the time the Model Rules were initially drafted, and Mary Candace Fowler, a staff attorney in the Chairman's office, authored a law review article published in 1982 that further explained the Model Rules and analyzed the EAJA.⁵²⁰ Although the Model Rules are not binding upon the courts in interpreting the statute⁵²¹ and the commentary in this present Article departs at points from the approach of the Model Rules, those rules serve as helpful guidelines and thoughtful suggestions on interpretation of the statutory eligibility requirements.

a. Net Worth Ceiling

The term "net worth" plainly requires a valuation based upon a person's or an entity's total assets less total liabilities.⁵²² In *Kuhns v. Board of Governors of the Federal Reserve System*,⁵²³ the United States Court of Appeals for the District of Columbia Circuit suggested the better practice is to establish net worth in accordance with generally accepted accounting principles, or with a description of the principles used in valuation of assets and liabilities together with a statement that such principles were applied uniformly in determining net worth.⁵²⁴ Without more explicit indication in the statute, one would expect that Congress anticipated that net worth would be determined in the ordinary way according to accepted accounting principles. In requiring a net worth determination for eligibility, "Congress would not have wanted [the courts] to create a whole new set of accounting principles just for use under the Equal Access to Justice Act."⁵²⁵

proceedings version of the EAJA is now identical to that in Subsection (d) for judicial proceedings. Compare 5 U.S.C. § 504(b)(1)(B) (1988) with 28 U.S.C. § 2412(d)(2)(B) (1988).

520. Robertson & Fowler, *supra* note 281.

521. Indeed, the Model Rules represent the consultative advice of the Chairman of the Administrative Conference and are not directly binding upon individual agencies, although most agencies have generally followed this approach. See Robertson & Fowler, *supra* note 281, at 914-16. See also 46 Fed. Reg. 32,900 (1981) (explaining "the Chairman's statutory role is consultative; . . . the Act does not empower the Chairman to compel other agencies to adopt specific procedures or interpretations").

522. See H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4994 ("'Net worth' is calculated by subtracting total liabilities from total assets."); S. Rep. No. 253, 96th Cong., 1st Sess. 17 (1979) (same). Because net worth is to be determined as of "the time the civil action was filed," 28 U.S.C. § 2412(d)(2)(B) (1988), assets acquired or liabilities incurred during the course of the litigation should be excluded from the net worth calculation. 46 Fed. Reg. 32,900, 32,902 (1981) (explaining "assets acquired or obligations incurred during a proceeding should be excluded from net worth").

523. 930 F.2d 39 (D.C. Cir. 1991) (considering the identical definition of a party under 5 U.S.C. § 504 (1988), the EAJA provision applying to "adversary adjudications" at the administrative level).

524. *Id.* at 41-42.

525. *Continental Web Press, Inc. v. NLRB*, 767 F.2d 321, 323 (7th Cir. 1985). See also *American Pac. Concrete Pipe Co. v. NLRB*, 788 F.2d 586, 591 (9th Cir. 1986).

i. Acquisition Cost v. Fair Market Value

The statute does not specify on what basis assets are to be valued. Under generally accepted accounting principles, the acquisition cost of an asset, that is, "the actual incurred cost—arrived at through agreement by two independent entities," would be recorded.⁵²⁶ The legislative history also states that valuation of assets should be made on the historical cost of acquisition of assets, rather than fair market value.⁵²⁷ A fair market value approach would be both contrary to generally accepted accounting principles and would require parties to engage in the additional effort of obtaining appraisals of the current value of assets.⁵²⁸ Even in the unique context of an eminent domain case, where an appraisal of the land was readily available because it had been performed as part of the case on the merits, the United States Court of Appeals for the Ninth Circuit held that the net worth of an individual who prevailed in a condemnation case should be calculated based upon the acquisition cost of the land owned by him as \$43,001, rather than the present fair market value of the land at \$1,404,190.⁵²⁹

In addition to being consistent with established accounting practices, the acquisition cost measure is consonant with the "legislative design to equalize litigating resources" between private parties and the government.⁵³⁰ The alternative fair market value approach might exclude from eligibility a party of modest means that owns real property that has appreciated significantly in value, notwithstanding the likely unavailability of that asset to support the individual's or business' efforts to resist unjustifiable government action.⁵³¹ For example, a farmer who acquired

526. A. Douglas Hillman et al., *Principles of Accounting* 550 (6th ed. 1992). For very large public companies, with assets substantially in excess of the net worth ceilings established by the EAJA, financial statements are recomputed to show the current cost of certain assets. See E. McGruder Faris, *Accounting and Law in a Nutshell* 353-55 (1984). See also Hillman, *supra*, at 557-59 (discussing alternative methods to historical cost principle).

527. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4994; S. Rep. No. 253, 96th Cong., 1st Sess. 17 (1979).

528. Robertson & Fowler, *supra* note 281, at 925 ("[A]cquisition cost will often be easier to prove than market value, which might require expert appraisals or similar evidence, particularly since the relevant market value will be on the date the proceeding began and not at the time the evidence of net worth is presented."). See also *Continental Web Press*, 767 F.2d at 323 ("[T]he net worth figure must be derived from the company's books rather than from an appraisal.").

529. *United States v. 88.88 Acres of Land*, 907 F.2d 106, 107-08 (9th Cir. 1990). See also *Hoopa Valley Tribe v. Watt*, 569 F. Supp. 943, 945 (N.D. Cal. 1983) (valuing assets of Indian tribe according to historical cost of acquisition).

530. Krent, *supra* note 49, at 2074 n.121 (stating "the EAJA . . . obviously reflects a legislative design to equalize litigating resources and not merely to satisfy a compensation design"). See generally Krent, *supra* note 11, at 463-67 (discussing the legislative purpose of the EAJA in equalizing the strength of the parties).

531. Under other circumstances, the law turns a deaf ear to protestations by a person or entity that they lack the "wherewithal" to meet an obligation without liquidating or borrowing against an asset essential to continuation of a business enterprise. A taxpayer would not be able to avoid a due and owing tax payment by claiming insufficient liquid assets to pay the obligation without

farm land at relatively low cost when originally purchased, but which land has now significantly appreciated in value, often can be described as "land rich but cash poor." Although a net worth determination calculated with respect to current market value might show a significant positive balance, the land is committed to ongoing use as part of the farming enterprise. An appreciation of land value on paper, which has not been realized in a true gain through sale, is a poor measure of an individual's or entity's true resources available to cope with legal expenses in the litigation at hand.⁵³²

ii. Depreciation

The fact that assets should be listed at acquisition cost does not mean that depreciation should not be applied to those types of assets that decline in value over time because they have a limited useful life (in contrast with land). The government has argued in the past that, if the cost of acquisition rather than fair market value is the measure, then neither loss nor gain in the value of assets should be considered.⁵³³ At first glance, it may appear a party is trying to have its cake and eat it too, when it is argued assets that have appreciated should be valued at acquisition cost, while assets with a limited useful life should be depreciated. However, for at least two reasons, typical accounting adjustments for depreciation should be permitted in calculating a party's net worth for purposes of EAJA Paragraph (d)(2)(B).

First, "subtracting accumulated depreciation from the cost of acquisition 'is a generally accepted accounting practice.'"⁵³⁴ Unless the statute were to clearly indicate otherwise, one would not expect a party to be obligated to create a special balance sheet crafted under peculiar accounting methods unique to the EAJA. As the United States Court of Appeals for the Seventh Circuit stated, in concluding that net worth should be based on a party's ordinary financial statements including an accounting for depreciation, the EAJA fees proceeding "is intended to be summary;

mortgaging or selling a capital asset. See *United States v. Tucker*, 686 F.2d 230, 233 (5th Cir.) (holding, absent exceptional circumstances, "mere unavailability of liquid assets on the tax due date does not excuse criminal liability" for failure to pay taxes), *cert. denied*, 459 U.S. 1071, 103 S. Ct. 492 (1982). Likewise, an individual cannot avoid payment of contractual debt or a criminal penalty by seeking to shield capital business assets. However, the very purpose behind the EAJA is to protect individuals and entities from suffering financial hardship because of the need to expend resources on legal fees to resist unjustifiable governmental conduct. Accordingly, a cost basis approach for valuing assets comports with the statutory purpose.

532. See *Robertson & Fowler*, *supra* note 281, at 925 ("[I]n an inflationary economy, the acquisition cost approach will enable more parties to meet the eligibility . . . standards.").

533. See *American Pac. Concrete Pipe Co. v. NLRB*, 788 F.2d 586, 590 (9th Cir. 1986) (describing government's argument); 46 Fed. Reg. 32,900, 32,907 (1981) (describing argument of government agencies that the strict adherence to an acquisition cost standard "would avoid the need for appraisals and would also exclude adjustments to basis for items like depreciation or capital additions").

534. *American Pac. Concrete Pipe Co.*, 788 F.2d at 591; *Continental Web Press, Inc. v. NLRB*, 767 F.2d 321, 323 (7th Cir. 1985).

it is not intended to duplicate in complexity a public utility commission's rate of return proceeding."⁵³⁵

Second, because net worth is a rough measure of the resources available to pay legal expenses, the fact that assets have declined in value is further evidence of the limited resources the individual or entity may apply to attorney's fees.⁵³⁶ Even if the asset were liquidated, the depreciation in value would leave the party less able to withstand the government's conduct than at the time the asset was purchased.⁵³⁷ Moreover, net worth of a business should be determined on the assumption that the entity is an ongoing enterprise, which means depreciation is necessary to reflect the realistic limitations on the useful life of an asset. When an asset is depreciable, the party must constantly anticipate the eventual need to replace that asset, thus requiring an outlay of additional liquid resources simply to maintain an ongoing enterprise and thereby further diminishing the assets truly available to sustain litigation with the federal government.

iii. Exclusion of Assets from Net Worth Calculation

Based upon reasoning similar to that supporting valuation of assets at acquisition cost rather than fair market value, some claimants for attorney's fees under EAJA Subsection (d) have argued that assets not available to pay legal expenses should not be considered at all in calculating the party's net worth. For example, in *City of Brunswick v. United States*,⁵³⁸ a city government argued that certain "restricted" assets, such as its water and sewage system, that were not generally available to meet payment of debts should not be counted as assets in determining net worth.⁵³⁹ The United States Court of Appeals for the Eleventh Circuit rejected the argument that "restricted" assets should be excluded from the calculation, saying the "ability to pay" factor was taken into account by Congress in choosing the \$7 million figure for eligibility and should not further enter into the calculation of net worth.⁵⁴⁰

535. *Continental Web Press, Inc.*, 767 F.2d at 323.

536. See Robertson & Fowler, *supra* note 281, at 926 ("Where . . . parties can demonstrate that the market value of their assets when the proceeding began was significantly lower than the acquisition cost, they should be permitted to use market value. In this way, eligibility will turn on the actual financial condition of the party, as it should, rather than on a technicality.").

537. To be more accurate, depreciation is "the process of allocating the cost of an asset to the periods the asset benefits," not a process of valuing the asset in terms of its current market value. Hillman, *supra* note 526, at 505. Nevertheless, because depreciation is based upon the estimated useful life of an asset, in view of such factors as expected wear and tear, climate and use conditions, and obsolescence, *id.*, depreciation over the course of time roughly approximates decline in value. See *Continental Web Press, Inc.*, 767 F.2d at 323 ("[A] balance sheet only approximates economic reality, and does not reflect it perfectly.").

538. 849 F.2d 501 (11th Cir. 1988), *cert. denied*, 489 U.S. 1053, 109 S. Ct. 1313 (1989).

539. *Id.* at 502-03.

540. *Id.* at 503.

The court's remark that the "ability to pay" factor should play no role in the net worth calculation was an unfortunate overstatement, as this statutory purpose is quite properly adduced in interpreting the statute. As stated above, in the absence of any explicit definition of "net worth" in the statute, the congressional intent to ease the burden of individuals and entities with limited resources enmeshed in litigation with the federal government sustains the conclusion that acquisition cost is the proper measure for appreciable assets and that depreciation is properly accounted for with respect to assets having a limited useful life.

Nevertheless, the Eleventh Circuit reached the correct result in *City of Brunswick* by requiring that all assets be considered in the net worth evaluation. Nor does the argument for use of acquisition cost ultimately support a contrary result. In concluding earlier that an asset should be valued on the basis of acquisition cost rather than fair market value, when the appreciation has not been realized through sale so as to enhance the party's ability to pay legal expenses, one is interpreting the statute's reference to net worth in the manner most consistent with the statutory purpose of alleviating the disparity in resources between citizens and the government in ability to maintain legal action. By contrast, with respect to the suggestion that certain assets should be excluded altogether from the net worth calculation, one is confronted with an argument that takes the statute's general purpose and extrapolates it out in a manner that directly conflicts with the plain language of the statute.

When faced with the need to interpret a statutory term, a court's interpretive choice is properly informed by an ascertainment of the statute's purpose. However, a court may not divorce the general intent of a statute from its actual text and use that abstract purpose to either add or delete language from the provision. EAJA Paragraph (d)(2)(B) directs the court to determine the "net worth" of eligible parties, without any suggestion that the court may choose which assets to include and which to omit from the calculation. In sum, the court must decide, by reference to the statute's text, structure, context, and purpose, how to properly value assets for purposes of determining net worth. It may not, however, decide to construct an artificial or false figure of net worth by excluding any asset from the calculation.

If a party holds title to an asset, that asset must be included in the net worth calculation.⁵⁴¹ By the same token, if the very government conduct at issue in the case has brought title to an asset into question and removed the control of that asset from the party, thereby effectively depriving the party of the attributes of ownership, that asset cannot be said to be part of the party's net worth at the time the action was commenced.⁵⁴² In *United States v. All Monies (\$637,944.57)* in

541. *Id.* at 503 & n.5 (holding since it was undisputed the city held title to the water and sewage system, these assets must be included in the net worth calculation, but pension assets were properly excluded from the net worth calculation because the city did not have title to them).

542. If title to an asset is in dispute for reasons other than the government's actions at issue in a case, the question of whether to include the asset in the net worth calculation should be determined according to generally accepted accounting principles governing preparation of a balance sheet with respect to contested assets and liabilities.

Account No. 29-0101-62,⁵⁴³ the government seized \$637,944.57 from the claimants' bank account pursuant to civil forfeiture statutes, contending the money was traceable to the illegal exchange of a controlled substance.⁵⁴⁴ The claimants brought an action for return of the funds, resulting in a judgment that they were innocent owners who neither knew about nor consented to any illegal transfer into the account.⁵⁴⁵ In determining eligibility for an EAJA award, the district court ruled that, because it was not clear whether the claimants retained title to the account and the government had deprived them of these monies during the crucial stages of the litigation, these funds should not be included in the calculation of their net worth.⁵⁴⁶

This decision is not only equitable but fully consonant with the statute. EAJA Paragraph (d)(2)(B) directs that net worth be determined as of "the time the civil action was filed."⁵⁴⁷ If, at the time the action is filed, the government specifically denies that the party has proper title to an asset, then the government is in no position to later insist that the party be deemed to have had full ownership of the asset for purposes of computing net worth as of that same point in time.

iv. Proof of Net Worth

Under EAJA Paragraph (d)(1)(B), a party seeking attorney's fees "shall, within thirty days of final judgment in the action, submit to the court an application . . . which shows that the party . . . is eligible to receive an award" under Subsection (d).⁵⁴⁸ Accordingly, courts agree a party must make some showing of eligibility, including some establishment that the claimant falls beneath the net worth ceiling.⁵⁴⁹

The Model Rules for the administrative version of the EAJA propose that the fee claimant be required to submit both a sworn statement asserting the party's net worth falls below the ceiling⁵⁵⁰ and a "detailed exhibit" providing "full disclosure of the applicant's . . . assets and liabilities."⁵⁵¹ This provision is intended to be

543. No. 89-00386-DAE, 1991 WL 335150 (D. Haw. Sept. 11, 1991).

544. *Id.* at *1-2.

545. *Id.* at *6.

546. *Id.*

547. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B) (1988).

548. *Id.* § 2412(d)(1)(B).

549. *United States v. 68.94 Acres of Land*, 736 F. Supp. 541, 546-47 (D. Del. 1990) (refusing to allow an individual to qualify as a party under the EAJA where she did not establish or even allege in her application that her personal net worth was under the statutory cap); *United States v. Hopkins Dodge Sales, Inc.*, 707 F. Supp. 1078, 1080 (D. Minn. 1989) (disallowing an award to an EAJA fee applicant who failed to demonstrate eligibility status in terms of net worth and number of employees until after the 30-day period for filing an application).

550. Model Rules for Implementation of the Equal Access to Justice Act in Agency Proceedings, 1 C.F.R. § 315.201(b) (1994).

551. *Id.* § 315.202(a). The Model Rules also provide the net worth exhibit will be part of the public record in the case, unless the applicant establishes legal grounds for withholding confidential financial information from public disclosure. *Id.* § 315.202(b).

flexible and not place undue burdens upon the applicant,⁵⁵² thus making it unnecessary for every party in every case to support a claim for an award of attorney's fees by presentation of an audited balance sheet before any question has been raised about eligibility.

In *D'Amico v. Industrial Union of Marine & Shipbuilding Workers*,⁵⁵³ a district court held that, as part of the initial application, a fee claimant should be obliged to submit an affidavit, signed under penalty of perjury, that he, she, or it meets the net worth limitation.⁵⁵⁴ However, the court stated, "it would impose unnecessarily burdensome restrictions on recovery to require an applicant to prove, to the government's satisfaction and in its initial application for fees and costs under the EAJA, that the applicant met all of the eligibility requirements."⁵⁵⁵ The court ruled that, before an applicant should be required to prepare a balance sheet with detailed information about net worth, the government must make "some at least minimally factually supported argument" that the applicant is not eligible.⁵⁵⁶

However, the express provision in the statute, that a fee petitioner "submit . . . an application . . . which shows that the party . . . is eligible to receive an award,"⁵⁵⁷ must be taken seriously and strictly adhered to, especially as part of a statute waiving the sovereign immunity of the United States. Contrary to the *D'Amico* court's ruling, a conclusory assertion in an affidavit that the party is eligible is merely an allegation, not a "showing." Especially in the case of businesses, associations, organizations, and other entity fee claimants, a detailed balance sheet establishing net worth is a legitimate requirement and represents an appropriate judicial application of the statutory demand for a "showing." Moreover, businesses and other entities ordinarily will have financial or accounting records that allow relatively easy preparation of such a balance sheet.

A somewhat lesser and more informal showing may be appropriate in the case of individual applicants, given the vast majority of individual litigants will fall under the \$2 million eligibility ceiling. Although more than a mere conclusory assertion in an affidavit is required, an individual's net worth exhibit might appropriately consist of an informal statement that the person owns certain major assets, such as a house or car, that were purchased at a certain cost, and that the person does not believe other personal possessions would exceed the net worth limitation. As the administrative Model Rules contemplate, the adjudicator may

552. Robertson & Fowler, *supra* note 281, at 924.

553. 630 F. Supp. 919 (D. Md. 1986).

554. *Id.* at 921-23.

555. *Id.* at 922. See also *Cabo Distrib. Co. v. Brady*, No. C-92-2591-DLJ, 1993 WL 313112, at *2 (N.D. Cal. Aug. 3, 1993). But see *Fields v. United States*, 29 Fed. Cl. 376, 381-83 (1993) (disagreeing with *D'Amico* and rejecting as inadequate an affidavit by applicant stating his net worth was less than \$2 million, the net worth of his unincorporated business was less than \$7 million, and he did not employ more than 500 employees, and holding that a complete balance sheet, reflecting all assets and liabilities, was required).

556. *D'Amico*, 630 F. Supp. at 922. See also *Cabo Distrib. Co.*, 1993 WL 313112, at *2.

557. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B) (1988).

always "require an applicant to file additional information to determine its eligibility for an award."⁵⁵⁸ Once the issue has been fully joined, with a supported contesting opposition from the government challenging the net worth claim, the petitioner for a fee then must establish eligibility based upon net worth calculated according to generally accepted accounting principles.⁵⁵⁹

b. Employment Size Ceiling

For all non-individual parties, without exception, there is a limitation on size to 500 employees.⁵⁶⁰ Since there apparently have been few entities whose employment size has bordered upon this eligibility line and who have sought EAJA awards, this limitation has not yet aroused substantial controversy. However, assuming an entity with a large number of employees would not have already exceeded the net worth ceiling, one could anticipate a case in which disputes arise as to the proper counting of part-time employees or of those characterized as independent contractors.

With respect to part-time employees, there are two possible approaches. First, the statute's reference to "500 employees"⁵⁶¹ as the limitation measure could be read to mean any natural person who receives a salary or wage from the entity, other than non-employee contractors. Second, the statute could be understood to contemplate a standard of full-time employment equivalents. The Model Rules for the administrative version of the EAJA measures part-time employees on a "proportional basis."⁵⁶²

The "full-time equivalent" approach best conforms with the purpose of the provision in excluding large employers from eligibility based on the likely assumption that an entity able to maintain a large payroll has sufficient available resources to withstand unreasonable government conduct. An entity (such as an educational institution providing part-time employment to students or a charitable organization employing numerous people as part-time support staff) that employs a large number of part-time employees may not truly be classified as a large

558. Model Rules for Implementation of the Equal Access to Justice Act in Agency Proceedings, 1 C.F.R. § 315.202(a) (1994).

559. See *supra* section III.B.1.a (discussing calculation of net worth).

560. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B)(ii) (1988).

561. *Id.*

562. Model Rules for Implementation of the Equal Access to Justice Act in Agency Proceedings, 1 C.F.R. § 315.104(e) (1994). The commentary to the Model Rules states temporary or seasonal workers should be excluded from this calculation. 46 Fed. Reg. 32,902 (1981). As one commentator has argued, if part-time employees are to be counted on a proportional basis, then it should follow temporary or seasonal workers should also be included on a prorated basis. Rutcofsky, *supra* note 8, at 318. However, given employment size is to be measured at the time the action is initiated, it is arguable temporary or seasonal employees should be counted only if they are actually employed as such on that date, although this could permit manipulation of employment size through selection of the date for filing a civil action. *Id.*

employer or possess substantial resources sufficient to maintain litigation with the federal government.

Nevertheless, the first approach has the merit of being tethered closely to the literal language of the statute, which refers to "employees" without qualification and does not make any exception for part-time employment or otherwise suggest adding together multiple employees to reach a sum of a single full-time employee. Congress apparently did view employment size as a rough measure of an entity's available resources. Congress could have made more particular distinctions among employers based upon the status of employees, the total hours worked by employees, or, for that matter, the actual payroll based on total salaries and wages paid to employees, all of which might have been a more refined measure of litigation resources. Congress did not make that choice.

With respect to the question of independent contractors, the statute's reference to "employees" would clearly exclude them, based upon common legal principles for determining employment status.⁵⁶³ Existing standards for other purposes, including federal tax purposes,⁵⁶⁴ should be applied here to determine which individuals should be characterized as employees and which as independent contractors.

2. Individual Party Eligibility

a. Natural Persons

Under EAJA Paragraph (d)(2)(B)(i), an "individual" is eligible for a fee award if his or her "net worth did not exceed \$2,000,000 at the time the civil action was filed."⁵⁶⁵ The legislative history explains that the term, "individual," means "a natural person."⁵⁶⁶ Other than the net worth ceiling, the statute places no limitations on the characteristics of individuals eligible for a fee award, thus extending eligibility, for example, to non-citizen aliens as well as to United States citizens.⁵⁶⁷

563. See Hill, *supra* note 10, at 55-56 n.29 (stating for purposes of the EAJA, "the common law definition of 'employee' would likely control").

564. Whether a "relationship is one of employment or of independent contractor is often litigated," Michael D. Rose & John C. Chommie, *Federal Income Taxation* § 13.06, at 775 (3d ed. 1988), and thus substantial case precedent exists to assist in the resolution of this question. Multiple factors for classifying workers as independent contractors or employees have developed through the tax case law, beginning with *United States v. Silk*, 331 U.S. 704, 716, 67 S. Ct. 1463, 1469 (1947), and discussed in *Rev. Rul. 87-41*, 1987-1 C.B. 296.

565. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B)(i) (1988).

566. H.R. Rep. No. 120, 99th Cong., 1st Sess. 14 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 143.

567. See *Haitian Refugee Ctr., Inc. v. Smith*, 644 F. Supp. 382, 386 (S.D. Fla. 1984) (holding Haitian nationals who successfully challenged the legality of asylum procedures instituted by the Immigration and Naturalization Service qualified as parties under EAJA Section 2412(d)(2)(B)), *aff'd*, 791 F.2d 1489 (11th Cir.), *vacated in part on other grounds*, 804 F.2d 1573 (11th Cir. 1986).

b. Married Persons and Persons with Jointly Owned Property

In *United States v. All Monies* (\$637,944.57) in Account No. 29-0101-62,⁵⁶⁸ the government contended that married claimants to money seized from a joint bank account comprised a single unit for purposes of EAJA's \$2 million net worth ceiling.⁵⁶⁹ The district court properly rejected this argument, relying upon the express language of the statute that the net worth limitation applies to an "individual," not to a group or class of people.⁵⁷⁰ Moreover, interpreting the statutory term, "individual," to comprehend the marriage community invokes the declining legal fiction of the common law that husband and wife become one person upon marriage.⁵⁷¹ When Congress intends to establish a special rule applying to the marital community, as for example in the income tax laws,⁵⁷² it does so explicitly.

Accordingly, for a husband and wife who jointly own property, as well as for non-married individuals who jointly own property, the net worth ceiling of \$2 million must be applied to each individual separately. The court must determine what share of jointly owned property should be allocated to each individual for a net worth calculation, applying principles of property law prevailing in the state whose law governs the property at issue in the net worth calculation.

c. Decedents' Estates

In *Hoffman v. Heckler*,⁵⁷³ a federal district court awarded EAJA fees to the representative of a deceased person's estate. The court concluded that "[p]recluding attorneys from receiving attorney's fees if their clients died before the filing of attorney's fees motions would discourage attorneys from representing sick people entitled to benefits."⁵⁷⁴ For purposes of the EAJA, the estate of a decedent represents "the posthumous interest of an individual,"⁵⁷⁵ whose individual net worth must be calculated to determine eligibility.

568. No. 89-00386-DAE, 1991 WL 335150 (D. Haw. Sept. 11, 1991).

569. *Id.* at *4.

570. *Id.*

571. See *Thompson v. Thompson*, 218 U.S. 611, 614, 31 S. Ct. 1111, 1111 (1910) (observing "[a]t the common law the husband and wife were regarded as one"). See also *All Monies*, 1991 WL 335150, at *4 (ruling that only by ignoring the "plain meaning [of 'individual'] and employing an outdated legal fiction could the court conclude that [the married couple] together represent a single natural person" for application of the EAJA net worth limitation).

572. See, e.g., 26 U.S.C. § 6013(a) (1988) (allowing "[a] husband and wife [to] make a single return jointly of income taxes").

573. 656 F. Supp. 1136 (E.D. Pa. 1987).

574. *Id.* at 1137.

575. *In re Davis*, 899 F.2d 1136, 1143 n.15 (11th Cir.) (describing the holding in *Hoffman*), cert. denied, 498 U.S. 981, 111 S. Ct. 510 (1990).

3. *Non-Individual Party Eligibility*

Paragraph (d)(2)(B) lists a number of entities, other than individuals, to whom the provisions of EAJA Subsection (d) apply—unincorporated businesses, partnerships, corporations, associations, units of local government, and organizations.⁵⁷⁶ For parties other than individuals, there are two eligibility requirements, one measured by net worth and the other measured by size:

- First, the net worth of these entities may not exceed \$7 million at the time the action was filed, with the exception of tax-exempt, non-profit organizations and agricultural cooperative associations, which are not subject to the net worth limitation.⁵⁷⁷
- Second, these entities may not have more than 500 employees at the time the action is filed, regardless of whether they are a tax-exempt entity or an agricultural cooperative association.⁵⁷⁸

Both the net worth and the employment size limitations must be satisfied for non-individual entity eligibility.⁵⁷⁹

a. *Business Enterprises*

Paragraph (d)(2)(B) defines “party” to mean, *inter alia*, an “owner of an unincorporated business, or any partnership, [or] corporation.”⁵⁸⁰ The statute thus describes commonly-recognized business organizations.

576. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B) (1988).

577. *Id.* § 2412(d)(2)(B)(ii).

578. *Id.* See also *American Ass'n of Retired Persons v. EEOC*, 873 F.2d 402, 404 (D.C. Cir. 1989).

579. Prior to the re-enactment of the EAJA in 1985, the definition of “party” in the original statute was awkwardly phrased and susceptible to the interpretation that the net worth and employment size limitations were disjunctive, such that an entity that failed under one limitation (such as having more than 500 employees) but passed under the other (such as by having a net worth under the statutory ceiling) would remain eligible for a fee award. See *Unification Church v. Immigration & Naturalization Serv.*, 762 F.2d 1077, 1083-91 (D.C. Cir. 1985) (providing a detailed discussion of the possible interpretations of the “party” definition under the original EAJA and concluding the limitations should be read conjunctively, such that an entity would not be eligible for an award unless it fit under both the net worth and employment size ceilings). In 1985, Congress revised the definition of “party” in Paragraph (d)(2)(B) to mean either (1) an individual which has a net worth that does not exceed \$2 million, or (2) an entity which has a net worth that does not exceed \$7 million and which does not have more than five hundred employees. H.R. Rep. No. 120, 99th Cong., 1st Sess. 14 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 142-43. See generally 1 *Derfner & Wolf*, *supra* note 76, ¶ 5.03[12][a], at 5-55 n.149 (explaining confusion under original Act and stating the “1985 Act specified that a corporate entity would have to meet both tests [net worth and employment size] to be eligible for fees” under both the administrative and judicial proceeding versions of the EAJA).

580. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B)(ii) (1988).

i. Owners of Unincorporated Businesses

The sole proprietorship is "the oldest, simplest, and most prevalent form of business enterprise."⁵⁸¹ Rather than the \$2 million net worth ceiling for an individual,⁵⁸² an individual who sues or is being sued with respect to activities as a sole proprietor of an unincorporated business benefits from a higher net worth ceiling of \$7 million.⁵⁸³ However, this higher ceiling is available only when the suit is brought or defended in the proprietor's capacity as the owner of an unincorporated business, that is, with respect to the operations of the particular business enterprise, as opposed to litigation relating to the personal or other activities of the owner.⁵⁸⁴

Although the net worth ceiling is more generous, the calculation of the net worth of the owner of an unincorporated business presumably must include both the proprietor's personal and business assets.⁵⁸⁵ Although for accounting purposes a sole proprietorship may be treated as an entity separate from its owner,⁵⁸⁶ as a matter of law, the sole proprietor retains unlimited personal liability for the debts and torts of the business.⁵⁸⁷ Assets are held in the name of the individual owner, and credit is extended based upon the owner's personal creditworthiness. Moreover, the EAJA does not refer to the unincorporated business as the eligible entity, but rather to "the owner of an unincorporated business" as the eligible party. Accordingly, it is the net worth of the "owner," not of the business conceived of as a separate entity, that must be determined for this purpose.

ii. Partnerships

Although each of the general partners remains personally liable for partnership debts,⁵⁸⁸ states have increasingly recognized partnerships as separate entities, rather than mere aggregations of individuals, for at least some purposes.⁵⁸⁹ As

581. Harry G. Henn & John R. Alexander, *Laws of Corporations* § 18, at 57 (3d ed. 1983).

582. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B)(i) (1988).

583. *Id.* § 2412(d)(2)(B)(ii).

584. Model Rules for Implementation of the Equal Access to Justice Act in Agency Proceedings, 1 C.F.R. § 315.104(d) (1994); Rutcofsky, *supra* note 8, at 316. See also *Moody v. United States*, 783 F.2d 1244, 1247 (5th Cir. 1986) (disallowing a party with individual net worth above the EAJA ceiling from claiming the higher ceiling for owner of an incorporated business when the record supported the district court's factual determination that the suit was brought in his individual capacity).

585. Model Rules for Implementation of the Equal Access to Justice Act in Agency Proceedings, 1 C.F.R. § 315.104(b)(2) (1994); Rutcofsky, *supra* note 8, at 316.

586. Hillman, *supra* note 526, at 16.

587. Henn & Alexander, *supra* note 581, § 18, at 58; Hillman, *supra* note 526, at 16.

588. 1 Alan R. Bromberg & Larry E. Ribstein, *Bromberg & Ribstein on Partnership* § 1.03(c)(4), at 1:28 (1988).

589. See generally *id.* § 1.03, at 1:19-1:42; William S. McKee et al., *Federal Taxation of Partnerships and Partners* ¶ 1.02, at 1-5 to 1-6; Harold G. Reuschlein & William A. Gregory, *The*

a leading treatise on partnership law suggests, the entity approach is attractive "mainly because it is realistic and closely in accord with the expectations of most businessmen."⁵⁹⁰ In contrast with sole proprietorships, partnerships have long been regarded in actual business practice as entities, rather than collections of individuals, by those engaging in commercial transactions with them.⁵⁹¹

Under the Uniform Partnership Act,⁵⁹² contracts may be executed⁵⁹³ and real property may be acquired⁵⁹⁴ in the name of the partnership.⁵⁹⁵ Many states allow a partnership to sue and be sued in its own name, with the judgment binding all joint property of the partnership.⁵⁹⁶ Although a partnership is not a taxpaying entity, the Internal Revenue Code recognizes the partnership as a separate accounting entity⁵⁹⁷ and provides for preparation of a partnership tax return to determine the amount of income that should be taxed to the partners.⁵⁹⁸ The partners have a fiduciary responsibility to the other partners,⁵⁹⁹ which includes making an account to the partnership for any benefits derived from any transaction connected to the partnership or its property.⁶⁰⁰ Accordingly, under common practice, the net worth of a partnership may easily be calculated pursuant to its financial statements and tax reporting documents.

Law of Agency and Partnership § 182, at 264-65 (2d ed. 1990). These sources all discuss entity and aggregate concepts of partnerships.

590. Reuschlein & Gregory, *supra* note 589, § 182, at 264.

591. Bromberg & Ribstein, *supra* note 588, § 1.03(b), at 1:20.

592. Uniform Partnership Act, 6 U.L.A. 1 (1969). The Revised Uniform Partnership Act was adopted by the National Conference of Commissioners on Uniform State Laws in August, 1992. Revised Uniform Partnership Act, 6 U.L.A. 227 (Supp. 1994). For contrasting views on the Revised Uniform Partnership Act, compare Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 Bus. Law. 1 (1993) with Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 Bus. Law. 45 (1993). However, because the original Uniform Partnership Act has been enacted and remains the law in most of the states, while the Revised Uniform Partnership Act has been enacted in only a few states, this article relies upon the original uniform act as a more representative statement of the law on partnership extant among the several states. For purposes of the EAJA, the Revised Uniform Partnership Act is even more explicit in affirming the entity theory of partnership. Revised Uniform Partnership Act § 201 (1994) ("A partnership is an entity.").

593. Uniform Partnership Act § 9, 6 U.L.A. 132 (1969).

594. *Id.* §§ 8(3) and 10, 6 U.L.A. 115, 155.

595. The Uniform Partnership Act "reveals a definite preponderance of entity-based over aggregate features." Bromberg & Ribstein, *supra* note 588, § 1.03(b), at 1:22. The Revised Uniform Partnership Act applies the entity approach "in virtually every situation" and the final version was amended "to include a statement that partnerships are entities." Weidner & Larson, *supra* note 592, at 3. See also Revised Uniform Partnership Act § 201 (1994) ("A partnership is an entity.").

596. 2 Bromberg & Ribstein, *supra* note 588, §§ 5.06(c) and 5.12(c), at 5:42-45, 5:90-100; Reuschlein & Gregory, *supra* note 589, § 207, at 313-17.

597. See 26 U.S.C. §§ 701-709 (1988 & Supp. V 1993).

598. *Id.* § 6031 (1988).

599. See generally Bromberg & Ribstein, *supra* note 588, § 6.07, at 6:67-94 (discussing fiduciary duty among partners); Reuschlein & Gregory, *supra* note 589, § 188, at 278-81 (same).

600. Uniform Partnership Act § 21(1), 6 U.L.A. 258 (1969).

The EAJA appears to speak directly to the issue whether a partnership should be considered a separate entity or an aggregation of its members for purposes of the net worth eligibility ceiling.⁶⁰¹ The definition of "party" under EAJA Paragraph (d)(2)(B) refers to "any partnership" as the eligible entity, without any reference to the individual members of the partnership.⁶⁰² Accordingly, and in contrast with the reference to the "owner of an unincorporated business,"⁶⁰³ the statute appears to contemplate that the partnership be conceived of as an entity separate from its members.⁶⁰⁴ The net worth of a partnership, therefore, should be calculated, according to generally accepted accounting principles, on the basis of partnership assets and liabilities, without including separate property and liabilities of the individual partners.⁶⁰⁵

601. Because the EAJA expressly lists "any partnership" as among the discrete entities eligible for a fee award and subject to the net worth and employment size limitations, 28 U.S.C. § 2412(d)(2)(B) (1988), this situation is distinguishable from that raised in *Carden v. Arkoma Assocs.*, 494 U.S. 185, 110 S. Ct. 1015 (1990). In *Carden*, the Supreme Court ruled that, in contrast with corporations, partnerships are not separate legal entities for purposes of determining diversity of citizenship jurisdiction, meaning the citizenship of each individual partner (including limited partners investing in a limited partnership) had to be taken into account to determine whether there was complete diversity for federal court jurisdiction. *Id.* at 187-97, 110 S. Ct. at 1017-1022. The Court ruled that whether a particular artificial entity should be considered as a citizen, separate from its members, for purposes of diversity jurisdiction was a question that should be left to Congress. *Id.* at 196-97, 110 S. Ct. at 1021-1022. By contrast, as discussed above, Congress in the EAJA expressly listed the partnership as a separate entity, meaning its eligibility should be considered apart from its individual partners.

602. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B)(ii) (1988).

603. *Id.*

604. See also Bromberg & Ribstein, *supra* note 588, § 1.03(c)(3), at 1:27 ("[P]ractical considerations and the trend of authority favor entity treatment of the partnership in litigation.")

605. In addition to governing the determination of eligibility of a general partnership for EAJA fees, the same approach should also apply to other forms of partnerships, including the limited partnership and the new "variation on the partnership theme, a 'limited liability partnership.'" See generally Robert W. Hamilton, *Cases and Materials on Corporations* 146-61, 174 (5th ed. 1994) (discussing limited partnerships and limited liability partnerships). Moreover, a majority of states authorize "the creation of a limited liability company, a relatively new organizational form that combines a corporate liability shield with favorable [partnership] tax treatment." Richard C. Reuben, *Added Protection*, A.B.A. J. 54, 54 (Sept. 1994). See generally Larry E. Ribstein & Robert A. Keatinge, *Ribstein & Keatinge on Limited Liability Companies* (1993). Although the limited liability company is not incorporated (and thus is not a corporation), it does provide limited liability for all investors, who are called members. Hamilton, *supra*, at 162. The entity "may be conceptualized most easily as a limited partnership in which there is no general partner." *Id.* An appropriately organized limited liability company qualifies for partnership treatment for federal income tax purposes and thus is not taxed as a corporation. *Id.* at 163. For purposes of eligibility under the EAJA, a limited liability company should be treated as a partnership.

iii. Corporations

The corporation as a separate juridical entity is a common character in the law.⁶⁰⁶ The meaning of "corporation" as an eligible party under the EAJA should not provoke controversy or confusion. As a business enterprise with a separate legal personality, the net worth of a corporation should be determined on the basis of its own separate assets and liabilities, unless unusual bases for disregarding the corporate identity are present.⁶⁰⁷

The Model Rules for the administrative version of the EAJA propose that the net worth of affiliated corporations be aggregated to determine eligibility.⁶⁰⁸ As Robertson and Fowler state, "[t]he test of the model rules turns on ownership or control of a majority interest of another entity, whether the applicant for an award is the controlling entity or the controlled entity."⁶⁰⁹ They further explain the purpose of this rule: "Parties that meet the eligibility standards only because of technicalities of legal or corporate form, while having access to a large pool of resources from parent or affiliated companies, do not fall within [the group of those with limited resources] of intended beneficiaries; and the Act's purposes will best be achieved if these parties are excluded from eligibility."⁶¹⁰

To the contrary, the statute's purpose, by its plain language, is to make corporations eligible for an award on each corporation's own terms. A small corporation that is properly organized as an independent entity should not be excluded from eligibility merely because a majority of its stock is held by an ineligible company, any more than any corporation should be excluded from liability because some, most, or all of its individual shareholders are wealthy individuals. A fundamental characteristic of a corporation, which the Congress presumably understood in specifically listing "corporation" among eligible parties, is the separation of ownership from management and the creation of a separate legal personality.⁶¹¹ The statute directs us to consider the net worth of the "corporation," not to look to the wealth of those who have invested in the company's stock. As Robertson and Fowler acknowledge, to "read the eligibility provisions of the statute to exclude [subsidiaries and affiliates of ineligible corporations], of course, adds a substantial amount to their explicit terms."⁶¹²

Nor is it necessary to depart from the statute's terms to achieve the statute's purpose. Although the concern underlying the Model Rules on affiliated corpora-

606. See generally Henn & Alexander, *supra* note 581, ch. 3 (discussing nature of corporateness or corporate personality).

607. See *id.* §§ 146-153, at 344-75 (discussing disregard of the corporate entity).

608. Model Rules for Implementation of the Equal Access to Justice Act in Agency Proceedings, 1 C.F.R. § 315.104(f) (1994).

609. Robertson & Fowler, *supra* note 281, at 927.

610. *Id.* at 926.

611. Henn & Alexander, *supra* note 581, §§ 78-80, at 144-52.

612. Robertson & Fowler, *supra* note 281, at 926.

tions is understandable, it can appropriately be addressed by means other than generally refusing to respect corporate personality whenever a corporation is a subsidiary or affiliate. First, as discussed below in section III.C of this article,⁶¹³ a party, even if otherwise eligible by means of net worth and employment size, cannot ask for an award of attorney's fees unless he, she, or it has actually incurred an obligation to pay legal expenses.⁶¹⁴ Thus, if a subsidiary or affiliated corporation does not bear its own legal expenses, but rather has "access to a large pool of resources from parent or affiliated companies,"⁶¹⁵ then the subsidiary or affiliated corporation has simply failed to "incur" legal expenses for which it may be reimbursed under the EAJA.

Second, if the corporate form is ignored or abused by parent or affiliated corporations, thereby dissolving the line of independence between corporate entities, then established law would permit disregarding the corporate personality under those circumstances. In *United States v. Lakeshore Terminal & Pipeline Co.*,⁶¹⁶ a federal district court held a wholly-owned subsidiary corporation was ineligible for an EAJA Subsection (d) award by taking into account the high net worth and large employment size of the principal corporation.⁶¹⁷ The court found the totality of the facts indicated that the principal and subsidiary were "not autonomous and independent companies."⁶¹⁸ Both companies had the same president and shared the same office; the principal corporation performed various administrative, accounting, and other functions at the subsidiary; and, most importantly, the principal corporation responded to the litigation, remained actively involved in the litigation, and described the interest in the subject matter of the litigation as being the interest of the principal corporation.⁶¹⁹ The court reached its conclusion that the subsidiary was ineligible for an EAJA award as a representative of the principal only after carefully noting that it did "not believe that the fact that [the subsidiary corporation] is a wholly owned subsidiary of [the principal corporation] is, in itself, dispositive of this issue."⁶²⁰

By contrast, in *Design & Production, Inc. v. United States*,⁶²¹ the Claims Court ruled a corporation was eligible for an EAJA Subsection (d) award, notwithstanding that it was a wholly-owned subsidiary of a larger, ineligible corporation and that the president, certain vice presidents, and one director of the corporations overlapped.⁶²² The evidence established that the subsidiary

613. See *infra* section III.C (discussing the requirement a party incur an obligation for legal expenses to be eligible for an EAJA Subsection (d) award).

614. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988) (providing for a fee award for expenses "incurred by that party in any civil action").

615. See Robertson & Fowler, *supra* note 281, at 926.

616. 639 F. Supp. 958 (E.D. Mich. 1986).

617. *Id.* at 961-63.

618. *Id.* at 962.

619. *Id.*

620. *Id.*

621. 20 Cl. Ct. 207 (1990).

622. *Id.* at 211-12.

corporation acted independently of its parent in bringing the civil action, that the parent corporation never took an active role nor financed the litigation, that the corporation offices were at different locations, and that the subsidiary corporation performed its own administrative, accounting, and insurance functions.⁶²³ Based upon "the totality of the facts," the Claims Court concluded the subsidiary was eligible for an award as an independent entity.⁶²⁴

As in other areas of the law, the separate corporate identity of subsidiary and affiliated corporations should be respected, unless the business transactions and accounts become intermingled, corporate formalities are not observed, the corporations are inadequately financed as a separate unit to meet normal obligations foreseeable for that business, or the respective enterprises are not held out to the public as separate entities.⁶²⁵ Even if a corporation is the sole or primary shareholder of a subsidiary corporation, the principal corporation's net worth should be calculated based upon its own assets (which, of course, would include the acquisition value of the shares of stock held in the subsidiary corporation) and its reported employment size should reflect only its own employees. Similarly, the subsidiary corporation's net worth and employment size should be determined separate from its parent for eligibility purposes.

b. Associations

Associations in the United States today engage in a multitude of activities, including establishing safety standards, continuing education, public information, professional standards, research and statistics, political education, and community service.⁶²⁶ "Association" is a "term of vague meaning used to indicate a collection or organization of persons who have joined together for a certain or common object."⁶²⁷

The inclusion of "association" as an eligible party under EAJA Paragraph (d)(2)(B)⁶²⁸ may have reference to any number of entities, including unincorporated business enterprises that have corporate attributes, professional societies, public interest groups, fraternal clubs, and trade associations. Any entity composed of a number of persons which has been formed for some special purpose or business, but does not fit comfortably into another category, may qualify as an "association."⁶²⁹

623. *Id.* at 212.

624. *Id.* at 211-12.

625. Henn & Alexander, *supra* note 581, § 148, at 354-56. A different approach also may be appropriate with respect to professional or personal service corporations, as discussed *infra* section III.B.3.b.i.

626. George D. Webster, *The Law of Associations* § 1.01, at 1-2 to -5 (1992).

627. *Black's Law Dictionary* 121 (6th ed. 1990).

628. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B)(ii) (1988).

629. *See Black's Law Dictionary*, *supra* note 627, at 121 (defining "association," *inter alia*, as the "act of a number of persons uniting together for some special purpose or business").

i. Business Associations

In the business context, the word "association" may have several meanings. First, most states authorize licensed professionals, although traditionally unable to practice in a corporate form, to create a professional corporation or association.⁶³⁰ Although most state statutes providing for this form of business enterprise authorize incorporation, some provide for the formation of "associations."⁶³¹ For federal income tax purposes, professional corporations are classified as "associations," and are taxed as corporations.⁶³² Professionals who have formed a professional corporation enjoy certain tax or other advantages, but remain personally liable for their professional acts.⁶³³ For similar reasons, states may allow a professional or other person to create a personal service corporation.⁶³⁴

As a general policy, the law "favor[s] the recognition of corporations as entities independent of their shareholders."⁶³⁵ When a professional corporation operates as a typical corporation, this general policy should be followed and net worth should be determined based upon separate corporate assets and liabilities. However, the question becomes more difficult, at least for net worth calculation purposes, when, in the case of a professional or personal service corporation, "most, if not all, of the income [is] attributable to the controlling shareholder's personal skill and effort."⁶³⁶ When the professional or personal service corporation's income is generated primarily through the services performed solely by the individual professional, courts have struggled with the question of when corporate personality should be disregarded in this unique context.⁶³⁷ Moreover, because the primary "asset" of a service corporation or association may be that of the individual, it is difficult to imagine how net worth could be calculated without taking into account the individual whose services are the basis of the entity's existence. Accordingly, in the context of professional or personal service corporations representing the work efforts of a single individual without other significant capitalization, net worth for purposes of EAJA eligibility likely should

630. Boris I. Bittker & James S. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶ 2.06, at 2-27 to -29 (6th ed. 1994); Henn & Alexander, *supra* note 581, § 77, at 138.

631. Henn & Alexander, *supra* note 581, at 139.

632. Bittker & Eustice, *supra* note 630, ¶ 2.06, at 2-28.

633. Henn & Alexander, *supra* note 581, at 140-41.

634. See generally Bittker & Eustice, *supra* note 630, ¶ 2.07, at 2-29 to -40 (discussing personal service corporations).

635. Keller v. Commissioner, 77 T.C. 1014, 1031 (1981), *aff'd*, 723 F.2d 58 (10th Cir. 1983).

636. See Bittker & Eustice, *supra* note 630, ¶ 2.07, at 2-30 (discussing the concerns of the Internal Revenue Service with separate taxation of service corporations when the primary income of the corporation is based upon the efforts of the sole or primary shareholder).

637. See, e.g., Sargent v. Commissioner, 929 F.2d 1252 (8th Cir. 1991) (holding professional hockey players were "employees" of personal service corporations that had contracted with the hockey team, while dissenting judge would have affirmed Tax Court finding that players were subject to control of and thus were "employees" of the hockey team).

be calculated in the same manner as for the owner of an unincorporated business.⁶³⁸

Second, an enterprise that, while not actually holding a corporate charter, possesses the primary attributes of a corporation may be characterized as an "association." For example, an entity that is designated as a business trust or partnership under state law may nevertheless be classified under federal tax laws as an "association," and thus may be taxable as a corporation, if it exhibits such corporate attributes as centralized management, continuity of existence, free transferability of interests, and limited liability.⁶³⁹ If an association or business trust would be treated as a corporation for purposes of federal taxation statutes, presumably it should likewise be treated as a corporation for purposes of the EAJA. In any event, EAJA Paragraph (d)(2)(B) refers to "association" as a separate entity. Thus, when an association has some level of formal and independent existence, its net worth and employment size should be determined separate from that of its members.

Finally, the term "association" would comfortably apply to farmer cooperatives organized by agricultural producers. Indeed, EAJA Paragraph (d)(2)(B) explicitly classifies this type of cooperative business association, as defined under an agricultural statute, as an "association," and establishes a special eligibility rule for this entity, as discussed below.⁶⁴⁰

ii. Trade Associations

A "trade association" is a group of businesses within an industry, often competitors with one another, who have united to further a common business purpose, such as to establish standards, promote relations with the government, or educate the general public.⁶⁴¹ For EAJA eligibility purposes, trade associations cause a degree of consternation because their participation in litigation will usually be as a representative of the interests of the members of the industry, which may include businesses and corporations that would not be eligible in their own right for

638. See *supra* section III.B.3.a.i (discussing eligibility of an owner of an unincorporated business for an EAJA award).

639. See 26 U.S.C. § 7701(a)(3) (1988) (defining "corporation" for tax purposes as including "associations"); 26 C.F.R. § 301.7701-2 (1994) (listing for purposes of classifying an organization as an "association" such characteristics as the existence of associates, continuity of life, centralization of management, limited liability for debts, etc.). See also *Morrissey v. Commissioner*, 296 U.S. 344, 356-57, 56 S. Ct. 289, 294-95 (1935) (holding an entity may be classified as an "association" and thus may be taxable as a corporation if it has more corporate characteristics than non-corporate characteristics). See generally *Bittker & Eustice*, *supra* note 630, ¶¶ 2.02 and 2.03, at 2-6 to -10, 2-10 to -15.

640. See *infra* section III.B.3.b.iii (discussing eligibility of agricultural cooperatives for an EAJA award).

641. See *Webster*, *supra* note 626, § 15.03[3], at 15-22 to -24 (defining "trade association"). See also *id.* §§ 17.10 (discussing role of associations in setting standards for the industry), and 17.12 (discussing sponsoring of joint trade shows or conventions by trade associations).

an EAJA award. Thus, it may be argued, since the ineligible business enterprise members of the association would have ample resources to pursue litigation with the federal government, a trade association may not institute that litigation on their behalf and claim eligibility for a fee award because the association, regarded as a separate entity, would come under the net worth and employment size ceilings.

The Model Rules issued by the Chairman of the Administrative Conference with respect to the administrative version of the EAJA state that a party "that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award."⁶⁴² The accompanying explanation to the Model Rules stated that this provision was adopted with particular attention to the situation of trade associations.⁶⁴³ Some government agencies had suggested a trade association should be deemed ineligible if any member would be ineligible individually or if all the members, when aggregated, would not be eligible.⁶⁴⁴ The Chairman responded:

[T]rade associations may sometimes become involved in litigation on their own account (e.g., as employers) as well as in the interests of their membership. On reflection, we believe the best way of handling this situation is through the provision on participation on behalf of others. When a proceeding involves a trade association independent of its membership, the association's eligibility should be measured individually, like any other applicant's; when an association is representing primarily the interests of its members, the agency can examine the facts of the particular situation.⁶⁴⁵

Accordingly, while aggregation of the net worth of all members may not be required, the Model Rules contemplate "individual consideration of each member; associations with ineligible members are not eligible for the Act."⁶⁴⁶ If the association were to represent only "a discrete group of members," then "only those businesses' net worth should be aggregated."⁶⁴⁷

The courts have divided on this issue. In *National Truck Equipment Association v. National Highway Traffic Safety Administration*,⁶⁴⁸ the United States Court of Appeals for the Sixth Circuit ruled the net worth and employment size of a trade association representing some 1,400 manufacturers must be measured by an aggregation of all of its members.⁶⁴⁹ Thus, since at least six member organizations employed over 500 persons and at least one member had a net worth in excess of

642. Model Rules for Implementation of the Equal Access to Justice Act in Agency Proceedings, 1 C.F.R. § 315.104(g) (1994).

643. 46 Fed. Reg. 32,900, 32,903 (1981).

644. *Id.*

645. *Id.*

646. Rutcofsky, *supra* note 8, at 317 (describing the position of the Model Rules).

647. *Id.*

648. 972 F.2d 669 (6th Cir. 1992).

649. *Id.* at 671-74.

\$7 million,⁶⁵⁰ the trade association was ineligible for an EAJA award. Relying upon the Model Rules and its commentary, the Sixth Circuit stated that the members had received significant benefits from affiliating with the trade association in the litigation.⁶⁵¹ The court held the purposes of the EAJA would not be served by an award to a trade association whose membership “contains a number of companies who can readily afford the costs [of litigation] to protect their own interests.”⁶⁵²

By contrast, in *Love v. Reilly*,⁶⁵³ the United States Court of Appeals for the Ninth Circuit held that, if a trade association is a legitimate party with standing in the litigation, the fact that one of its constituent members who has also benefited from the lawsuit is ineligible does not preclude an EAJA fee award to the association.⁶⁵⁴ Because the trade association had a net worth of \$265,000 and only seven employees, it was eligible for an award.⁶⁵⁵ The court expressly rejected the

650. *Id.* at 671.

651. *Id.* at 672-73.

652. *Id.* at 674. The Sixth Circuit also reasoned that by excluding agricultural cooperatives and tax-exempt organizations from the net worth requirement, Congress specifically contemplated the aggregation of net assets for other organizations. *Id.* at 673-74. Indeed, the court invoked the interpretive canon of *expressio unius est exclusio alterius* (the expression of one thing is to the exclusion of the other), apparently meaning the special non-aggregation rule for agricultural cooperatives and tax-exempt organizations was in contrast with a general aggregation requirement for all other entities listed in the EAJA. *Id.* at 674. For several reasons, this argument cannot withstand careful analysis. First, contrary to the court’s suggestion, *id.* at 673-74, Congress did not exclude agricultural cooperatives and tax-exempt organizations from the net worth limitation because they would otherwise be subject to aggregation. There is nothing in the statute or legislative history to suggest concerns about ineligibility due to aggregation of assets motivated the special eligibility rule for these two entities. Nor is there any reason to believe that, but for the special exception from the net worth requirement, the net worth of agricultural cooperatives and tax-exempt organizations would be determined on an aggregation basis (or that a tax-exempt organization’s net worth even could be so calculated). Instead, as discussed *infra* sections III.B.3.b.iii (discussing agricultural cooperatives) and III.B.3.d.iii (discussing non-profit tax-exempt organizations), Congress apparently intended to preserve the assets of these two entities for use in farmer cooperative ventures and charitable purposes, however their net worth might be calculated. In sum, the special exception has nothing to do with or to say about aggregation. Second, agricultural cooperatives and tax-exempt organizations are excepted only from the net worth ceiling, not the employment size limitation. Thus, if aggregation were truly the general rule under the statute, aggregation would still apply to these two entities in measuring number of employees, an argument that no one has made. Finally, EAJA Paragraph (d)(2)(B) cannot reasonably be read to create a general aggregation rule governing all entities, with the sole exceptions of agricultural cooperatives and tax-exempt organizations. Corporations are also listed as eligible parties; and, while controversy has arisen in the special context of affiliated corporations, no one has suggested a corporation’s net worth and employment size should generally be calculated by reference to the assets and employees of individual shareholders. Thus, the inclusion of corporations (as well as other separate entities, such as partnerships, etc.) precludes the Sixth Circuit’s conclusion that the “obvious meaning” of the statute is “Congress intended aggregation in circumstances not covered by the exceptions” from the net worth ceiling for agricultural cooperatives and tax-exempt organizations. *Id.* at 674.

653. 924 F.2d 1492 (9th Cir. 1991).

654. *Id.* at 1494.

655. *Id.*

government's argument that an association had the additional burden of proving each of its members was individually eligible for the EAJA fees.⁶⁵⁶

The Ninth Circuit, in the *Love* case, presents the better argument. EAJA Paragraph (d)(2)(B) appears to contemplate consideration of each of the listed non-individual parties as an entity. There is nothing in the statute that suggests an entity is to be valued based upon its constituent parts or members, with the explicit exception of unincorporated businesses, where the eligible party is the "owner."⁶⁵⁷ Accordingly, in the absence of a compelling reason, such as the practical inability of meaningfully determining an entity's separate net worth,⁶⁵⁸ the entity focus of the EAJA should be respected. Many of the parties that may be eligible under the EAJA can be said to participate in litigation in a representational capacity. Yet it would be a tenuous argument indeed to suggest that a labor union's net worth should reflect an aggregation of its individual members⁶⁵⁹ or that an environmental organization becomes ineligible because its litigation goal of protecting a natural preserve would benefit a wealthy individual member who hikes through the affected area.⁶⁶⁰

Moreover, as with other concerns raised about supposed free-riding of ineligible parties on the litigation efforts of eligible parties⁶⁶¹ and with whether an eligible party is the real party in interest when the litigation is financed by an ineligible entity,⁶⁶² the courts have often failed to appreciate that strict adherence to the essential eligibility requirement that a party have actually incurred an obligation for legal expenses resolves most concerns.⁶⁶³ As a threshold matter, the question of a trade association's net worth and employment size need not even be addressed unless it has first demonstrated it is a legitimate entity, it has incurred legal fees, and it is a proper party to the civil action.

First, the trade association must be a separate entity that possesses attributes of individuality and independence, and is not a captive of a single company or small discrete group of companies. Because an association's membership will ordinarily consist of businesses in the particular industry, it will appropriately be responsive to their interests and subject to their collective direction. Nevertheless, a legitimate

656. *Id.*

657. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B)(ii) (1988).

658. *See supra* section III.B.3.b.i (discussing professional or personal service corporations).

659. 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4456, at 489 (1981) (observing representation of members by various types of trade associations "parallels the authority of labor unions").

660. *Id.* § 4456, at 491 (noting associational representation issues typically "emerge from litigation by the multitude of 'public interest' groups that have been formed for the specific purpose of airing grievances in court").

661. *See infra* section III.B.5 (discussing situation of multiple parties to successful litigation against the federal government, both eligible and ineligible).

662. *See infra* section III.C.2 (explaining courts have mistakenly analyzed the issue of eligibility for a fee award in terms of whether the eligible party is a real party in interest to the litigation).

663. *See infra* section III.C.3 (discussing the requirement that a party have incurred an obligation for legal fees to be eligible for an EAJA award).

trade association (as contrasted with the lobbying office of a particular company) must be a representative of the entire industry, have independent management, and have a separate and regular source of funding. Most trade associations "are formed with far broader purposes than could be represented by a single piece of legislation or other policy challenged," and may take positions in litigation that are not supported unanimously within the association.⁶⁶⁴ However, if a trade association is controlled by a single company or discrete group of companies, and thus lacks meaningful independence, then its separate existence should be disregarded in the same manner that courts will pierce the corporate veil when the corporate form is abused.⁶⁶⁵

Second, if a trade association is not responsible for payment of its own attorney's fees, then it may not recover a fee award for the simple and straightforward reason that it has not actually incurred any legal expenses, which is an eligibility requirement under the EAJA.⁶⁶⁶ If the trade association does not have a separate source of funds to maintain legal representation (such as regular membership dues),⁶⁶⁷ and the litigation is actually supported by an outside financier, the trade association is ineligible for an EAJA award for that adequate reason,⁶⁶⁸ quite apart from any general objection that might be made to the eligibility of trade associations as a class of entities.

Third, because EAJA fees are available only to actual parties in litigation,⁶⁶⁹ a trade association may apply for a fee award only if it had standing to participate in the lawsuit. In *Hunt v. Washington State Apple Advertising Commission*,⁶⁷⁰ the Supreme Court upheld the ability of an association to sue on behalf of its members if it shows that (a) the members individually would otherwise have standing to sue in their own right, (b) the interests the organization seeks to protect are germane to its purpose, and (c) neither the claim asserted nor the relief requested requires participation in the lawsuit by the individual members.⁶⁷¹ Although this form of

664. *Associated Gen. Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1409 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992).

665. *See supra* section III.B.3.a.iii (discussing eligibility of corporations for an EAJA award).

666. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988) (requiring a court to award fees "incurred by that party" in a civil action with the government). *See generally infra* section III.C (discussing the requirement that a party have incurred legal expenses to be eligible for an EAJA fee award).

667. In commentary accompanying the Model Rules for the administrative version of the EAJA, the Chairman of the Administrative Conference suggested the eligibility of a trade association for EAJA fees might turn on "whether the association is financing its participation in the litigation out of its general budget or through special assessments against members that have agreed to participate." 46 Fed. Reg. 32,900, 32,903 (1981). In the latter situation, the trade association arguably is not incurring any obligation to pay its own legal expenses because a discrete group of outsiders are financing the litigation.

668. *See infra* section III.C.3.b (discussing ineligibility of party when an outside financier has supported the cost of legal counsel).

669. *See infra* section III.B.4.a (discussing ineligibility of amicus curiae for an EAJA fee award).

670. 432 U.S. 333, 97 S. Ct. 2434 (1977).

671. *Id.* at 343, 97 S. Ct. at 2441. *See also* *International Union, (UAW) v. Brock*, 477 U.S. 274,

associational or representational standing remains controversial⁶⁷² and creates other uncertainties, such as the preclusion results that flow from judgments in associational cases,⁶⁷³ the Supreme Court has affirmed its general validity.

If the trade association is a legitimate party with standing to pursue a claim against the federal government (and if it has incurred fees), that one of its constituent members who also benefits from the outcome of the lawsuit is ineligible should not preclude an award in the ordinary case.⁶⁷⁴ The arguments made against fee recovery by a trade association litigating on behalf of an industry's interests parallel the concerns about the propriety of associational standing in general, given the inevitable questions that arise about whether the association adequately and truly represents the interests of its members. However, if the courts are willing to recognize an association's standing in a representational capacity, it is difficult to justify excluding such an association, if otherwise eligible, from a fee award under

281-82, 106 S. Ct. 2523, 2525 (1986). See generally Webster, *supra* note 626, § 170.09, at 17-54.7 to -55 (discussing association standing to sue on behalf of members).

672. See Association for Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr., 19 F.3d 241, 244 (5th Cir. 1994) (holding an advocacy organization lacked associational standing to sue on behalf of developmentally disabled persons, since allegedly injured party was not member of organization); Rent Stabilization Ass'n v. Dinkins, 5 F.3d 591, 595-97 (2d Cir. 1993) (holding an association representing landlords lacked standing to challenge city's rent stabilization scheme where resolution of claims required participation of individual members due to fact that challenges were to regulations as applied); Associated Gen. Contractors v. Coalition for Economic Equity, 950 F.2d 1401, 1405-09 (9th Cir. 1991) (holding an organization of construction contractors had standing to challenge city ordinance giving preference to minority contractors notwithstanding organization's position was contrary to interest of minority members), *cert. denied*, 112 S. Ct. 1670 (1992); Maryland Highways Contractors Ass'n v. Maryland, 933 F.2d 1246, 1253 (4th Cir.) (holding an association of contractors lacked standing to challenge minority business enterprise statute because of conflict of interest existing by reason of minority members of association who benefit from statute), *cert. denied*, 112 S. Ct. 373 (1991).

673. Wright et al., *supra* note 659, § 4456, at 486 ("The status and legal incidents of . . . associations remain in often spectacular uncertainty. The preclusion results that flow from litigation involving association matters are correspondingly confused."). See also Virginia Hosp. Ass'n v. Baliles, 830 F.2d 1308 (4th Cir. 1987) (holding by divided court that non-profit association of public and private hospitals in Virginia was not a party to earlier litigation on same issue by an individual hospital, notwithstanding association's non-controlling participation in earlier suit, and thus was not bound by judgment under collateral estoppel).

674. In an unusual case, such as where the trade association's position in the lawsuit conforms to an agenda set by a dominating industry member that itself would be ineligible for a fee award, the government might oppose the fee request on the ground "that special circumstances make an award unjust." See Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988). See also Louisiana *ex rel. Guste v. Lee*, 853 F.2d 1219, 1224 (5th Cir. 1988) (quoting from a Department of Justice policy document suggesting government attorneys argue litigation by an eligible party, such as a trade association, on behalf of an ineligible party is an "attempt to avoid the eligibility limitations of the Act [and thus] constitutes special circumstances which make an award unjust"). However, at least two courts have concluded the "special circumstance" reference applies only to "substantive issues, such as close or novel questions of law," and does not include financial circumstances as a basis for defeating an award. National Truck Equip. Ass'n v. National Highway Traffic Safety Admin., 972 F.2d 669, 672 (6th Cir. 1992); Grason Elec. Co. v. NLRB, 951 F.2d 1100, 1103 (9th Cir. 1991).

the EAJA. Congress explicitly included "association" within the definition of "party" in Paragraph (d)(2)(B),⁶⁷⁵ presumably with the knowledge that associations are, by their nature, representational in character and function.

iii. Agricultural Cooperatives

The EAJA applies a special eligibility rule to certain agricultural cooperative associations. Under EAJA Paragraph (d)(2)(B), "cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a))" is excepted from the \$7 million net worth ceiling in the EAJA.⁶⁷⁶ Section 15(a) of the Agricultural Marketing Act defines "cooperative association": "[A]ny association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services."⁶⁷⁷

An agricultural cooperative is a mutual association of individual farmers who organize together to market agricultural products and acquire farm supplies.⁶⁷⁸ It is owned by member agricultural producers and is operated for the mutual benefit of those members on a non-profit, cost basis.⁶⁷⁹ As with any collective effort, an agricultural cooperative provides farmers with the greater bargaining and organizational strength that is provided by group action, allowing them to reduce merchandising and transportation costs, market products on a basis comparable to other industries, and obtain goods and services necessary for production at a reasonable price.⁶⁸⁰ Because farming remains so uniquely dependent upon changes in the weather and the whims of nature, "[a]gricultural production is a peculiarly precarious area of the national economy."⁶⁸¹ The benefits obtained through pooled marketing and cooperative purchasing enhance the ability of individual farmers to survive the annual and seasonal ebbs and flows in production yield and agricultural commodity pricing.

The Agricultural Marketing Act of 1929⁶⁸² was the first of a series of federal statutes authorizing federal financial assistance to agricultural cooperatives.⁶⁸³

675. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B)(ii) (1988).

676. *Id.*

677. 12 U.S.C. § 1141j(a) (1988). In addition, the statute requires the association be operated for "the mutual benefit of the members," states certain rules with respect to voting rights of members and payments of dividends to members, and imposes restrictions on the amount of business transacted with non-members. *Id.*

678. See generally United States Department of Agriculture, Legal Phases of Farmer Cooperatives 1-18 (1976); Mary Beth Matthews, *Recent Developments in the Law Regarding Agricultural Cooperatives*, 68 N.D. L. Rev. 273 (1992).

679. Legal Phases of Farmer Cooperatives, *supra* note 678, at 3.

680. *Id.* at 16-18.

681. Case-Swayne Co. v. Sunkist Growers, Inc., 355 F. Supp. 408, 409 (C.D. Cal. 1971).

682. 12 U.S.C. § 1141(a)-(j) (1988).

683. Legal Phases of Farmer Cooperatives, *supra* note 678, at 525-32.

Congress has taken special account of agricultural cooperatives in other statutes,⁶⁸⁴ frequently by reference to the definition of cooperatives in the Agricultural Marketing Act, including certain exemptions from securities laws,⁶⁸⁵ transportation regulations,⁶⁸⁶ and antitrust laws.⁶⁸⁷ Accordingly, Congress has established "a special regulatory framework" to encourage the creation and operation of agricultural cooperatives to strengthen the economic independence and viability of farmers.⁶⁸⁸

The EAJA does not explain the purpose behind the special eligibility rule for these associations. Cynics have suggested this exception merely reflects the political power of a special economic interest, arguing that some agricultural cooperatives cannot be characterized as entities of modest means with limited resources.⁶⁸⁹ Nevertheless, as it has in the past, Congress has determined that these associations serve an important public purpose, and, therefore, notwithstanding the higher net worth of some cooperatives, they should remain eligible to obtain an EAJA award.

Moreover, the criticism directed at this eligibility rule reflects a misunderstanding of the nature of cooperatives, or at least of the way in which Congress has viewed farmer cooperatives. Although an agricultural cooperative is a business association, it is *not* a for-profit enterprise which accrues financial benefits to those who have invested money in the business.⁶⁹⁰ A cooperative provides its services at cost to its members,⁶⁹¹ meaning that the actual beneficiaries of its activities are the individual agricultural producers, most of whom presumably would be eligible for an EAJA Subsection (d) award as owners of their independent farming enterprises. In other words, if an agricultural cooperative is forced to expend legal fees to resist unjustifiable governmental action, the price ultimately would be paid by the farmer. Based upon its favorable view of farmer cooperatives and their role in the agricultural economy, Congress determined that an attorney's fee award should be available to such entities irrespective of net worth. However, the special

684. See generally *id.* at 510-39.

685. 15 U.S.C. § 781(g)(2)(E) (1988).

686. 49 U.S.C. § 10526(a)(5) (1988).

687. 7 U.S.C. §§ 291-292 (1988).

688. Terence J. Centner, *Retained Equities of Agricultural Cooperatives and the Federal Securities Act*, 31 U. Kan. L. Rev. 245, 248 (1983).

689. See *Award of Attorneys' Fees Against the Federal Government: Hearings on S. 265 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm.*, 96th Cong., 2d Sess. 83, 86 (1980) (statement of Nan Aron, Director, Council for Public Interest Law, observing six agricultural cooperatives were listed on the Fortune 500). See also Keith G. Meyer et al., *Agricultural Law: Cases and Materials* 574 (1985) (reporting nine agricultural cooperatives appear on the 1983 Fortune 500 list).

690. *Legal Phases of Farmer Cooperatives*, *supra* note 678, at 6.

691. Farmer members receive dividends based upon patronage, not upon capital investment. *Id.* at 2-7; Matthews, *supra* note 678, at 274-75.

exception is only with respect to the net worth limitation; agricultural cooperatives that employ more than 500 employees are excluded from EAJA Subsection (d).⁶⁹²

c. Units of Local Government

Under the original EAJA, the courts generally concluded local government bodies did not qualify for an award of EAJA fees because they had not been included in the Paragraph (d)(2)(B) definition of "party."⁶⁹³ With the re-enactment of the EAJA in 1985, Congress specifically added "unit of local government" to this paragraph.⁶⁹⁴ Congress determined that "small governmental units face the same inherent problems and deterrence factors as do small private businesses when involved in adversary adjudications or litigation with the United States."⁶⁹⁵ As the committee report accompanying the 1985 re-enactment bill noted, municipal and county governmental units are frequently involved in disputes with the federal government concerning programs providing federal assistance and funding to local governments.⁶⁹⁶

In determining what constitutes a discrete "unit" of local government for purposes of the net worth and employment size limitations, the court presumably should respect the structures and divisions created by statute or ordinance antecedent to the dispute and determine which unit of local government is the proper party to the litigation in terms of entitlement to the particular benefit or assistance under the federal government program at issue.⁶⁹⁷ By explicitly adopting the term "unit of local government," Congress excluded state governments and divisions of state governments from eligibility for a fee award under EAJA Subsection (d).⁶⁹⁸ The "net worth" of a "unit of local government" should be determined according to the same accounting principles as those applied to other

692. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B)(ii) (1988).

693. *Citizens Council v. Brinegar*, 741 F.2d 584, 590-92 (3d Cir. 1984); *Commissioners of Highways v. United States*, 684 F.2d 443, 445 (7th Cir. 1982).

694. Equal Access to Justice Act, Pub. L. No. 99-80, § 2(c)(1), 99 Stat. 184, 185 (1985) (codified at 28 U.S.C. § 2412(d)(2)(B) (1988)).

695. H.R. Rep. No. 120, 99th Cong., 1st Sess. 15 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 143.

696. *Id.*

697. *Id.* at 14-15 (stating the term "unit of local government" is "intended to have broad applicability and includes cities, counties, villages, parishes, Indian tribes, and incorporated or unincorporated towns or townships," as well as "any general or special purpose district organized under State law (such as a school district, sewer district, irrigation district or planning district)").

698. Certain entities separately organized by a state government as a tax-exempt organization, like a hospital or higher educational institution, may be able to qualify for an EAJA award under the separate party category of "organizations." See H.R. Rep. No. 120, 99th Cong., 1st Sess. 15 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 143 (observing terms "corporation" or "organization" have not generally been interpreted as applying to governmental units, other than "hospitals and higher educational institutions separately organized by States or localities under section 501(c)(3) of the Internal Revenue Code"). See generally *infra* section III.B.3.d (discussing eligibility of organizations for an EAJA fee award).

entities,⁶⁹⁹ including the valuation of all assets to which the local governmental unit has title.⁷⁰⁰

d. Organizations

The last entity listed in Paragraph (d)(2)(B) is "organization." This appears to be something of a catch-all provision, although it is not open-ended. The term "organization" has been understood to express the concept of a group of people that has a more or less constant membership and shares a common purpose.⁷⁰¹ Some specific examples are discussed below.

i. Indian Tribes

As an example of an organization of people with a common purpose, one federal district court in *Hoopa Valley Tribe v. Watt*,⁷⁰² found that an Indian tribe qualified as an eligible party for an EAJA fee as "an 'association' or 'organization.'"⁷⁰³ The tribe, not its individual members, was the party, and therefore its net worth and not the net worth of its members determined its eligibility to seek a fee award.⁷⁰⁴ Depending upon the circumstances and its functions and powers, an Indian tribe may also qualify as an eligible party as a "unit of local government."⁷⁰⁵

ii. Labor Unions

With respect to a labor union, which plainly qualifies as an organization, the issue has been whether the local union's eligibility in terms of net worth and employment size should be determined without reference to the national or international union with which it is affiliated. Although the EAJA is silent on the matter, there is no reason to believe Congress would have intended to unsettle the structural character of labor unions established under pre-existing labor law. In *Miller v. Hotel & Restaurant Employees & Bartenders Union, Local 2*,⁷⁰⁶ a federal

699. See *supra* section III.B.1.a (discussing the calculation of "net worth" under the EAJA).

700. *City of Brunswick v. United States*, 849 F.2d 501, 502-03 (11th Cir. 1988) (holding the city's net worth must be calculated based on total assets, with no exclusion of certain "restricted" assets not generally available to pay debts), *cert. denied*, 489 U.S. 1053, 109 S. Ct. 1313 (1989).

701. *In re Davis*, 899 F.2d 1136, 1144 (11th Cir.) (concluding trustee of a bankruptcy estate was not an "organization" eligible for EAJA fees), *cert. denied*, 498 U.S. 981, 111 S. Ct. 510 (1990). See also *infra* part III.B.4.b (discussing the exclusion of bankruptcy estates from the definition of "party" for purposes of EAJA Subsection (d)).

702. 569 F. Supp. 943 (N.D. Cal. 1983).

703. *Id.* at 945.

704. *Id.*

705. See H.R. Rep. No. 120, 99th Cong., 1st Sess. 14 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 143 (stating the term, "unit of local government," is to have "broad applicability" and include "Indian tribes").

706. 107 F.R.D. 231 (N.D. Cal. 1985), *rev'd on other grounds*, 806 F.2d 1371 (9th Cir. 1986).

district ruled that eligibility for an EAJA award should be based on the local union's own net worth, and persuasively noted:

Congress was certainly aware of the institutional structure of union[s] when it enacted the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401, *et seq.*, which explicitly recognizes the distinctions between local, intermediate, and national/international organizations, and in part, concerns the use of trusteeship powers by international unions over locals. *See* 29 U.S.C. §§ 461-66.⁷⁰⁷

Moreover, as the *Miller* court pointed out, because "the vast majority of unions are affiliated or connected in some manner to a national or international union," most of which report assets above the EAJA net worth ceiling, a requirement that the local union's assets be aggregated together with its affiliated national or international union would exclude almost all local unions from the EAJA.⁷⁰⁸ Such a general exclusion of labor unions from the benefits of the statute would be contrary to the enacted findings of Congress in the preamble to the EAJA, which specifically included labor among the intended beneficiaries of the act:

The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable government action because of the expense involved in securing the vindication of their rights in civil actions and administrative proceedings.⁷⁰⁹

Accordingly, just as a court considering eligibility for an EAJA Subsection (d) award should respect the separate identity of individual corporations, notwithstanding a subsidiary or affiliated relationship,⁷¹⁰ a court should, likewise, uphold the

707. *Id.* at 237 n.4. In the bill report accompanying the EAJA upon re-enactment in 1985, the House Judiciary Committee stated its "intent that if the local union is considered to be a separate labor organization for purposes of the Labor Management Reporting and Disclosure Act of 1959, it should be considered to be a separate organization for purposes of the EAJA as well." H.R. Rep. No. 120, 99th Cong., 1st Sess. 17 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 146. Accordingly, the committee report stated, "the local's entitlement of fees should be determined without regard to the assets and/or employees of the international union with which the local is affiliated." *Id.* Moreover, when the re-enactment legislation was passed in the House, Representative Kastenmeier, as chairman of the subcommittee and shepherd of the bill on the floor, noted the district court decision in the *Miller* case and approved its agreement with the committee report position that a local union is considered separately from its affiliate for purposes of EAJA eligibility. 131 Cong. Rec. H4762 (daily ed. June 24, 1985) (statements of Rep. Kastenmeier).

708. *Miller*, 107 F.R.D. at 236-37 (citing Leo Troy & Neil Sheflin, *United States Union Sourcebook* (1985)).

709. Act of Oct. 21, 1980, Pub. L. No. 96-481, § 202(a), 94 Stat. 2325, 2325 (1980). *See also Miller*, 107 F.R.D. at 237 (holding exclusion of the vast majority of local unions from the EAJA because of affiliation with national or international union "would virtually render [Congress's] inclusion of the term 'labor' in section 202 surplusage").

710. *See supra* section III.B.3.a.iii (discussing eligibility of corporations for an EAJA award).

longstanding recognition that "a local union is a legal entity apart from its international and that it is not a mere branch or arm of the latter."⁷¹¹ Because it is the local union that is the representative of the bargaining unit, and because "the local union has no guarantee that an International will finance its legal expenses or that it can enjoy the use of the International's assets and employees,"⁷¹² the local union is entitled in its own right to maintain litigation and to assert eligibility as a party to recover those legal expenses it has actually incurred through an EAJA award.

iii. Non-Profit Tax-Exempt Organizations

Finally, EAJA Paragraph (d)(2)(B) applies a special eligibility rule to non-profit organizations that are exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.⁷¹³ Such an entity is excepted from the \$7 million net worth ceiling in the EAJA.⁷¹⁴ In general, Section 501(c)(3) tax-exempt status is afforded only to non-profit organizations that serve certain charitable purposes and that are not involved in legislative lobbying or political activity. Section 501(c)(3) provides a tax-exemption to the following types of organizations:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation [with certain exceptions], and which does not participate in, or intervene in (including the publishing or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.⁷¹⁵

711. International Bhd. of Elec. Workers, 121 N.L.R.B. 143, 146-49 (1958). *See also* Carbon Fuel Co. v. United Mine Workers, 444 U.S. 212, 100 S. Ct. 410 (1979) (holding international union and regional subdivision could not be held liable for illegal "wildcat" strikes by local unions and were not obliged to use all reasonable means to prevent and end unauthorized strikes).

712. *Miller*, 107 F.R.D. at 237. If litigation maintained in the name of the local union is in fact financed by the national or international union, then the local union would be ineligible for an EAJA fee award because it has failed the requirement the party actually have incurred legal expenses. *See generally infra* section III.C (discussing the requirement a party have incurred fees to receive an EAJA award). This should answer the concern that an ineligible national or international union may evade the eligibility requirements of the EAJA by maintaining and financing litigation through the front of an eligible local union.

713. 26 U.S.C. § 501(c)(3) (1988).

714. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B)(ii) (1988).

715. 26 U.S.C. § 501(c)(3) (1988).

Although the statute does not explain the purpose behind this special rule for Section 501(c)(3) organizations, the reason is evident. Although such an organization may have a net worth exceeding \$7 million, those funds are held solely to pursue a charitable purpose and not to sustain a commercial or profitable venture. Notwithstanding that such an organization may be able to divert sufficient resources to maintain litigation with the federal government, Congress determined that the public interest is better served by allowing that organization to be reimbursed under the EAJA so that its funds may be devoted to its charitable purpose rather than expended on legal expenses necessitated by unjustifiable government action. Nevertheless, Congress was apparently unwilling to extend this generosity so far as to include those charitable ventures that have grown to such substantial size as to employ more than 500 employees. Accordingly, Section 501(c)(3) organizations remain subject to the EAJA's employment size ceiling.⁷¹⁶

Because EAJA Paragraph (d)(2)(B) excepts from the net worth ceiling only those organizations "described in section 501(c)(3) of the Internal Revenue Code,"⁷¹⁷ non-profit organizations with interests falling outside of those listed in Section 501(c)(3), although exempt from taxation under other provisions of the Internal Revenue Code, do not qualify for the EAJA net worth exception. Thus, for example, a social welfare organization that engages in legislative lobbying, and thus is excluded from Section 501(c)(3), remains subject to the EAJA net worth ceiling, notwithstanding that the social welfare organization may be exempt from taxation under Section 501(c)(4) of the Internal Revenue Code.⁷¹⁸

4. Other Entities

By its express terms, EAJA Subsection (d) authorizes an award of attorney's fees only to "a prevailing party,"⁷¹⁹ thus barring awards to non-parties, such as those who appear as *amicus curiae* in litigation. Moreover, the definition of "party" in Paragraph (d)(2)(B) is exclusive, thus precluding a fee award to any entity that falls outside of the broad parameters of the definition.

a. *Amicus Curiae*

In *Lundin v. Mecham*,⁷²⁰ the District of Columbia Circuit observed that "[t]he natural reading of the [EAJA] is that only 'parties,' as the term is used in its technical legal sense, may recover fees under the statute."⁷²¹ However, the

716. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B)(ii) (1988).

717. *Id.*

718. See 26 U.S.C. § 501(c)(4) (1988) (providing tax-exemption to, inter alia, "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare").

719. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988).

720. 980 F.2d 1450 (D.C. Cir. 1992).

721. *Id.* at 1461.

Lundin court also noted that “the specific statutory section defining ‘party’ makes no mention of any such limitation and at least one court has come to a contrary conclusion.”⁷²² The “natural reading” of the statute must prevail, especially under the rule of strict construction to be given to waiver of sovereign immunity.⁷²³ Had Congress intended to allow attorney’s fees to those who were not joined or intervened as parties to the action and thus not subject to the judgment, it would have said so. Nor is an understanding of the term “party” as extending only to those joined in the litigation appropriately dismissed as a construction of the word in a “technical legal sense.”

There are important and substantial differences between a true party and non-party amici. Only a party to a lawsuit may raise issues, press claims, and direct the litigation.⁷²⁴ However valuable the arguments of an amicus curiae may be to the successful outcome of a civil action by or against the United States, the amicus remains a “volunteer” who cannot be said to have incurred legal expenses as a result of the government’s conduct giving rise to the lawsuit.⁷²⁵ Neither the language nor the purpose of the EAJA justify expanding the waiver of sovereign immunity to include fee awards to amici.

However, neither *Lundin* nor the district court case it cited, *Coleman v. Block*,⁷²⁶ actually involved a request for EAJA fees by an amicus curiae to recover fees incurred in preparing supportive briefing in that case. Rather, in each case, an actual party to the instant case (that is, a true party subject to the jurisdiction of the court), sought to recover, as part of its fee award, the legal expenses that the party had incurred in appearing as an amicus curiae in a separate but related case. In *Coleman*, the district court allowed a fee award under another part of the EAJA⁷²⁷ for the party’s legal expenses in writing an amicus brief and appearing at oral argument in an appellate case, the outcome of which was “crucial” to the party prevailing in the case pending before the district court.⁷²⁸ In *Lundin*, the parties also had participated as intervenors or amici in other related cases, but the District of Columbia Circuit concluded it

722. *Id.* (citing *Coleman v. Block*, 589 F. Supp. 1411 (D.N.D. 1984)).

723. *See Ardestani v. Immigration & Naturalization Serv.*, 112 S. Ct. 515, 520 (1991) (reaffirming, in construing another part of the EAJA, that a waiver of sovereign immunity “must be strictly construed in favor of the United States”).

724. *See Sanchez-Trujillo v. Immigration & Naturalization Serv.*, 801 F.2d 1571, 1581 n.9 (9th Cir. 1986) (stating amicus may not frame the issues for appeal).

725. *See A. Hirsh, Inc. v. United States*, 948 F.2d 1240, 1250-51 (Fed. Cir. 1991) (holding an amicus curiae who filed a brief in support of party opposing an appeal from Rule 11 sanction was a “volunteer” and had not incurred any legal expenses by reason of the appeal).

726. 589 F. Supp. 1411 (D.N.D. 1984).

727. Equal Access to Justice Act, 28 U.S.C. § 2412(b) (1988) (providing for an award of fees to a “prevailing party” against the United States on the same terms a private party would be liable for fees under the common law or a statute).

728. *Coleman*, 589 F. Supp. at 1419.

could not award attorney's fees under the EAJA for this work because it was performed under the jurisdiction of another court.⁷²⁹

Although ultimately it may reflect a properly stringent interpretation of a waiver of sovereign immunity, the *Lundin* court's negative conclusion could be criticized as overly technical or even mistaken in its identification of the issue. The parties in *Lundin*, as well as those in *Coleman*, were not seeking an award of attorney's fees for work performed in another case as such. Rather, they were seeking an award of attorney's fees for expenses incurred by reason of and as part of the instant litigation, arguing that the prosecution of that lawsuit required or was enhanced by the filing of supportive briefing in related cases. Thus, although the expenses involved were based upon the time spent preparing documents filed in the related case, the parties in *Lundin* and *Coleman* contended that the need to incur those expenses flowed from the party's participation in the instant case before the court and the legal work was performed in the name of the party joined to the present case.⁷³⁰ Nevertheless, in the absence of any supporting language in the statute, and given the nature of the statute as a waiver of sovereign immunity, the better course may be to construe the statute narrowly and therefore demand a rather tight nexus between the work performed and the litigation in which the fee award is sought.⁷³¹

b. Entities Not Designated in Definition of "Party"

EAJA Paragraph (d)(2)(B)⁷³² provides an all-inclusive definition of the term "party," signaled by the use of the verb "means" to indicate that the description is intended to be complete.⁷³³ Thus, courts have been reluctant to authorize an EAJA fee award in favor of a litigant who does not comfortably fit within the specific statutory definition of "party."

For example, in *In re Davis*,⁷³⁴ the United States Court of Appeals for the Eleventh Circuit rejected a claim by the trustee of a bankruptcy estate for an award under EAJA Subsection (d).⁷³⁵ First, the court rejected the suggestion that the trustee could be considered an eligible "individual" under the EAJA definition by being regarded as the representative of an individual debtor. The court carefully distinguished a trustee of a bankruptcy estate from the representa-

729. *Lundin v. Mecham*, 980 F.2d 1450, 1461-63 (D.C. Cir. 1992).

730. This argument is more compelling in *Coleman* than in *Lundin* because the amicus work in the *Coleman* case was performed with respect to an appeal pending in another case that would result in a controlling appellate precedent. See *Coleman*, 589 F. Supp. at 1419 (stating the appellate decision in the related case was "crucial" to the plaintiff prevailing in the instant case).

731. See *infra* section V, forthcoming (discussing the measurement of the fee award and legal expenses for which recovery may be sought).

732. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B) (1988).

733. Child, *supra* note 140, at 357 (stating a drafter uses the verb "means" to stipulate a full and complete definition of a term).

734. 899 F.2d 1136 (11th Cir.), *cert. denied*, 498 U.S. 981, 111 S. Ct. 510 (1990).

735. *Id.* at 1142-45.

tive of the estate of a deceased person.⁷³⁶ Whereas an estate of a deceased person "represent[s] the posthumous interest of an individual,"⁷³⁷ a bankruptcy estate is "a completely different creature."⁷³⁸ The trustee "does not represent the interests of debtor alone; rather, he owes a complex set of obligations and fiduciary duties to the court, the debtor, the shareholders (in the case of a bankrupt corporation), and, most importantly, the creditors."⁷³⁹

Second, the *Davis* court ruled the bankruptcy estate could not be shoe-horned into the category of an eligible "organization." The Eleventh Circuit found that "the conception of an 'organization' as a 'group of people that has a more or less constant membership, a body of officers, [and] a purpose'"⁷⁴⁰ best "captures Congress's intent in drafting the EAJA, and comports more closely with a narrow construction of the EAJA's waiver of sovereign immunity."⁷⁴¹ Although the bankruptcy trustee "represents, in part, a group of creditors who share the common interest and purpose of recovering the maximum return on the debts owed to them," even this "abstract common purpose" often will mask what in reality is "a set of violently competing individual interests."⁷⁴² Moreover, the court observed that this purported organization "is of a transient and limited nature."⁷⁴³ Given the unusual nature of this entity, the court concluded that it did not fit comfortably within the definition of "party" and thus was not eligible for an award under the EAJA.

The list of entities falling under the definition of "party" in EAJA Paragraph (d)(2)(B) will cover most parties to litigation, extending from individuals to business corporations and affiliational associations. However, when we are confronted by an unusual entity seeking a fee award, such as the bankruptcy estate that serves as little more than "a locus of property or monetary value against which the creditors have claims,"⁷⁴⁴ it is best to leave the designation of new entities to Congress and read the EAJA definition of eligible "party" strictly and narrowly.⁷⁴⁵

736. *Id.* at 1143 n.15.

737. *Id.* (citing *Hoffman v. Heckler*, 656 F. Supp. 1136, 1137 (E.D. Pa. 1987), which awarded EAJA fees to the representative of a decedent's estate).

738. *Id.*

739. *Id.*

740. *Id.* at 1144 (quoting Webster's Third New International Dictionary 1590 (1976) (emphasis added)).

741. *Id.*

742. *Id.*

743. *Id.*

744. *Id.* at 1145 n.18.

745. The addition of "unit of local government" to the definition of "party" in 1985 suggests Congress intends to maintain strict control of the particular entities to which it will extend the benefits of the EAJA. See Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B) (1988).

5. Fee Awards in Cases with Both Eligible and Ineligible Parties

By reason of the net worth and employment size limitations, "the United States may be liable for attorneys' fees to some plaintiffs who qualify under EAJA, but, in the same litigation, may not be liable to other plaintiffs who do not or would not, if they applied, qualify under the EAJA."⁷⁴⁶ In such cases, the court must be assured that a fee award to an eligible party is based upon the legal expenses actually incurred by that individual party.⁷⁴⁷ When, as is common, attorneys for multiple parties in litigation with the government work together as a team by assigning one attorney or firm the role of lead counsel or by dividing litigation tasks,⁷⁴⁸ the court must be careful to ensure the award of EAJA fees does not allow either the ineligible or the eligible party to take "a free ride through the judicial process, at the government's expense."⁷⁴⁹

However, as explained below, the "free ride" concern is largely overstated and is directly addressed by the statute's direction that an eligible party may recover only attorney's fees for which it has accepted an obligation and thus has actually incurred.⁷⁵⁰ When an attorney charges the client a fee for service, a party who is eligible for an award has no economic reason to accept an inequitable assessment of legal expenses or to allow an ineligible party to indirectly benefit from an EAJA fee award through artful reallocation to eligible parties of legal expenses.

a. Eligible and Ineligible Parties Separately Represented by Different Counsel

When eligible and ineligible parties are separately represented by different counsel, an eligible party may obtain a fee award only for the litigation expenses actually incurred through that party's counsel, notwithstanding that counsel for an ineligible party may have undertaken litigation tasks that also benefited the eligible party.⁷⁵¹ In deciding which legal expenses are truly attributable to the

746. *American Ass'n of Retired Persons v. EEOC*, 873 F.2d 402, 406 (D.C. Cir. 1989).

747. *See generally infra* section III.C (discussing the requirement a party have incurred fees to receive an EAJA award).

748. *See generally* Mary Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, 72 Minn. L. Rev. 697 (1988) (discussing lawyers as team workers in litigation).

749. *American Ass'n of Retired Persons*, 873 F.2d at 406-07 (citing *Louisiana ex rel. Guste v. Lee*, 853 F.2d 1219, 1225 (5th Cir. 1988)).

750. *See* Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988) (stating court may award fees "incurred by that party" in a civil action with the government). *See generally infra* section III.C (discussing the requirement a party have incurred legal expenses to be eligible for an EAJA fee award).

751. *See American Ass'n of Retired Persons*, 873 F.2d at 404-07 (holding fee award to eligible plaintiff was limited to legal work performed by the eligible plaintiff's separate counsel, and did not include an award for legal work performed by the law firm for an ineligible plaintiff, notwithstanding that this law firm served as lead counsel and performed litigation tasks for the benefit of all

eligible party, the court should begin by determining who is counsel of record for the eligible party.⁷⁵² However, because “parties can manipulate who is counsel of record” for a particular party, the court should also “consider appearances and representations made by the various attorneys on behalf of their respective clients.”⁷⁵³ A showing that the counsel of record for an eligible party has actively participated in the litigation—and demonstrated an independent solicitude for the interests of that particular party—is concrete evidence that he or she, while cooperating with counsel for an ineligible party, has retained the responsibility to speak for the client.⁷⁵⁴ Moreover, when an eligible party is being represented by a legitimate legal services organization (an entity that represents only indigent clients), the concern about manipulation of counsel of record disappears and “the possibility of one client using another to obtain fees otherwise unavailable” under the EAJA fades away.⁷⁵⁵

In any event, the statute directly addresses this concern and ensures that a fee award will not enrich an ineligible party by authorizing awards of fees only to the extent a particular party has incurred legal fees.⁷⁵⁶ Thus, the fact that the attorney is precluded from recovering on behalf of an eligible party any legal expenses that instead were paid by an ineligible party should make manipulation of counsel of record designations generally unavailing. If an ineligible party arranges for its retained attorney to be named as counsel of record for an eligible party, but the ineligible party nevertheless continues to be responsible for payment of that attorney’s bill, then the eligible party simply has not incurred legal expenses to justify an award of fees.⁷⁵⁷ By contrast, if an eligible party is truly responsible for its own legal expenses, the fact that the legal services

plaintiffs).

752. *Id.* at 406. In *American Ass’n of Retired Persons*, the D.C. Circuit characterized these factors for consideration as a means of determining which parties, eligible or ineligible, are real parties in interest to the litigation. *Id.* at 405-06 (citing *Unification Church v. Immigration & Naturalization Serv.*, 762 F.2d 1077 (D.C. Cir. 1985)). As discussed in detail *infra* section III.C.2, this is not the best way to state the issue because any party with standing to seek relief on the merits from the court is a true real party in interest to the litigation. The question is better understood as asking which of the parties to the lawsuit has actually incurred an obligation for legal expenses. See *infra* section III.C.3 (discussing requirement a party have incurred an obligation for legal expenses to be eligible for an EAJA Subsection (d) award).

753. *American Ass’n of Retired Persons*, 873 F.2d at 406.

754. See *id.*

755. See *id.*; *Unification Church*, 762 F.2d at 1083.

756. See Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988) (stating the court may award legal fees “incurred by that party” in the civil action involving the government).

757. To prevent parties from concealing the actual attorney’s fee arrangements among the various attorneys and the eligible and ineligible parties, the court may require each party to reveal the nature of its agreement to be responsible for legal expenses of its counsel as contracted at the time the party entered into litigation. As part of the attorney’s documentation of hours reasonably expended on the litigation, the attorney should state by affidavit whether the party being represented was responsible for those fees or the nature of the arrangement for compensation in the absence of any fee-shifting award.

performed by its attorney culminated in successful litigation that also benefits the ineligible party should not prevent the eligible party from being made whole through reimbursement by a fee award.⁷⁵⁸ In sum, if a court remains focused on the question of who is ultimately responsible for paying the legal expenses in the absence of a fee award, as evidenced by antecedent fee arrangements and patterns of payments,⁷⁵⁹ most of the concerns about manipulation or "free riding" of ineligible parties on the statutory eligibility of other eligible parties simply fade away.⁷⁶⁰

Moreover, even if the general possibility of an attorney's fee award at the conclusion of litigation might motivate certain actions by counsel,⁷⁶¹ that prospect

758. Under such circumstances, the ineligible party may truly be a "free rider," but it has ridden on the efforts and expenses of the eligible party, not the government. The government is liable under the EAJA only to reimburse the eligible party for its legal expenses incurred by reason of the government's unreasonable conduct. That payment makes the eligible party whole; it does not enrich the ineligible party. We might postulate a circumstance in which the eligible and ineligible parties anticipate the virtual certainty of an EAJA award in advance of the litigation and arrange the distribution of legal tasks so that most legal expenses are incurred by the eligible party. If such a situation arose, a court might be justified in denying a fee award because "special circumstances make an award unjust." See Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988). *But see supra* note 674 (discussing possible limitation of the "special circumstance" rule to substantive issues). However, this scenario is extreme, as parties eyeing litigation with the federal government could seldom anticipate both that they would prevail on the merits and that the court would conclude that the government was not only wrong but unreasonable in its position. If an eligible and ineligible party entered into such an arrangement, and the government's position was found substantially justified so as to avoid a fee award, then the eligible party would be left to bear the heavier legal expenses caused by the disproportionate allocation of litigation tasks between them. If the parties attempted yet another level of manipulation by agreeing in advance that the ineligible party would reimburse the eligible party in the event the scheme failed through denial of a fee award, then once again the existence of such an alternative agreement would vitiate everything that went before, because it would mean the eligible party was not really at any risk of incurring an obligation for fees and thus would not be able to request a fee award. In the end, assuming the attorneys have contracted on a fee for service basis, simple economics provides the disincentive for manipulative behavior designed to allow an ineligible party to shift its legal expenses to the government through the front of an eligible party.

759. When the attorneys for the various parties have arranged for payment on a basis other than fee for service, such as by a contingency fee or a fee to be paid out of the benefits obtained in class action litigation, there may be a greater risk of manipulation and a correspondingly greater basis for judicial scrutiny of fee applications. If the hours recorded by counsel for eligible parties appear disproportionately high compared to that of counsel for ineligible parties, or if the court finds the attorneys have evasively assigned certain lead attorneys as counsel of record for an eligible rather than an ineligible party, the court may determine to disallow certain hours or to reallocate legal expenses among the parties on a proportionate or other appropriate basis, as discussed below with respect to the situation of common counsel for both eligible and ineligible parties. *See infra* section III.B.5.b.

760. *See generally infra* section III.C (discussing the requirement a party incur an obligation for legal expenses to be eligible for an EAJA award).

761. *But see* Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719, 755-59 (1988) (concluding, based upon an empirical study of the Civil Rights Attorneys

is made even more remote in the context of the EAJA. Parties postulating *ex ante* whether they may collect an EAJA fee "must not only . . . assess the strength of their claims against the United States, but [must] also gauge whether courts on review will find that the government's position had been substantially unjustified."⁷⁶² Given the unpredictability of an EAJA award,⁷⁶³ the litigation choices made by various counsel are likely to be driven by more immediate economic and practical considerations such as the respective resources of the parties and ability of their counsel and by determination of the best strategy to achieve success on the merits.

What about the reverse scenario, that of an eligible party obtaining legal representation as a free rider on an ineligible party? In *Louisiana ex rel. Guste v. Lee*,⁷⁶⁴ the United States Court of Appeals for the Fifth Circuit considered a case in which both a state government (which is not an eligible party under the EAJA) and private environmental groups (who were eligible) sought an award of attorney's fees against the federal government.⁷⁶⁵ The court declared that "[i]f the party ineligible for fees is fully willing and able to prosecute the action against the United States, the parties eligible for EAJA fees should not be able to take a free ride through the judicial process at the government's expense."⁷⁶⁶

Fees Award Act of 1976, 42 U.S.C. § 1988 (1988 & Supp. V 1993), the prospect of obtaining a fee award "play[s] a lesser role in civil rights litigation than one might expect").

762. Krent, *supra* note 11, at 466.

763. *Id.* at 461 n.15 ("Litigants are unlikely to predict with accuracy whether courts will find the government position to be substantially justified."). Even if accurate prediction were possible, the prospect of an EAJA award would remain remote. Professor Harold Krent's study found when an EAJA application was filed after a party prevailed in civil litigation with the federal government, an award was made in between 70% and 85% of the cases, depending on the type of case. *Id.* at 484. (Professors Susan Mezey and Susan Olson in a study limited to reported decisions found a high rate of successful applications in individual benefits cases, but a majority of petitions for fees were denied in cases concerning government regulation. Mezey & Olson, *supra* note 6, at 18.) In the particular context of Social Security Act cases, where the "substantial evidence" standard of review on the merits closely parallels the EAJA substantial justification standard, Krent's study suggests many attorneys do not seek an EAJA award because they are content with the contingent fee paid out of claimants' past-due benefits, although they would likely have been successful in obtaining an award if an application had been filed. *Id.* at 497-99. However, in other contexts, many parties who prevail in litigation with the federal government undoubtedly decide not to request an EAJA award because they do not have a strong argument the government's position was not substantially justified. Nevertheless, even assuming the 70% success rate could be applied generally to all civil cases in which a party prevails against the government, an attorney making an *ex ante* prediction about fee recovery must discount the possibility of an EAJA award on two levels. First, let us suppose the attorney believes there is a 40% chance of prevailing on the merits of the case. Second, while the actual likelihood of an EAJA award would vary according to the particular circumstances of the case, let us assume there is a 70% chance of a successful EAJA application after success on the merits. Combining these two probabilities results in an *ex ante* evaluation of the chance of ultimately recovering litigation expenses under the EAJA at only 28%.

764. 853 F.2d 1219 (5th Cir. 1988).

765. *Id.* at 1223-25.

766. *Id.* at 1225.

The Fifth Circuit's fear that eligible parties might take a free ride on the backs of ineligible parties—with the ultimate financial burden being shifted to the government—is not adequately explained by the court. Initially, whatever expenses are incurred by the ineligible party that “is fully willing and able to prosecute the action against the United States” will not be recoverable because the party is ineligible. The eligible parties will only be able to recover those legal expenses they have individually incurred through their own counsel. If the ineligible party is “fully willing and able to prosecute the action,” then the eligible parties will have little incentive to rack up significant legal expenses for which they are separately responsible. Given the relatively high “substantial justification” standard for an EAJA recovery,⁷⁶⁷ parties entering into litigation with the federal government will seldom be able to anticipate that they can succeed in both prevailing on the merits and establishing that the government's position is unreasonable.⁷⁶⁸ Thus, if eligible parties decide to expend significant resources of their own to prosecute the action, notwithstanding the separate presence of an ineligible party in the lawsuit,⁷⁶⁹ this expenditure likely will reflect the view of those eligible parties that their active participation is necessary to a successful outcome or that the ineligible party is not adequately or competently presenting the claim or defense against the federal government.⁷⁷⁰

767. See *infra* section IV, forthcoming (discussing the “substantial justification” or reasonableness standard for entitlement to an EAJA Subsection (d) award).

768. See also *supra* note 763 (discussing *ex ante* prediction of the likelihood of obtaining an EAJA award).

769. This assumes the expenses are legitimately attributable to and actually incurred by the eligible parties, and not the result of artful reallocation of expenses among the parties with an EAJA fee award in mind. In *Louisiana ex rel. Guste*, there was no prospect of reallocation of legal expenses among the various parties because the ineligible party (the state government) could hardly contrive to have its attorneys employed in the state attorney general's office named as counsel of record for the private environmental organizations. Thus, no legal expenses that otherwise would have been borne by the ineligible state government could have been surreptitiously transferred to the eligible private parties.

770. To be sure, there is some danger that the attorney for an eligible party may act from a profit maximization incentive to charge more time to the litigation than may be appropriate or necessary, not so much because of the remote possibility of an EAJA award as because an attorney on a fee-for-services contract may thereby enhance the fees charged to the client. See Earl Johnson, Jr., *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 *Law & Soc'y* 569, 575-82 (1980-81) (arguing fee-for-service attorneys have a profit maximization incentive to charge more time to a matter than a fully informed client would desire). However, the attorney's economic interest should be tempered by other factors, including professional standards and a sense of responsibility to a client. Herbert M. Kritzer et al., *The Impact of Fee Arrangement on Lawyer Effort*, 19 *Law & Soc'y* 251, 253 (1985). Moreover, in the particular context where the eligible party is one among many parties, the party is likely to question excessive time spent by the attorney, given the party's expectation that litigation tasks will be shared among the multiple parties and their counsel. In any event, excessive or duplicative time charged by an eligible party's attorney should be addressed in the determination of a reasonable fee, rather than a determination of threshold eligibility for an award. See generally Sisk, *supra* note 7, at 750-51 (discussing disallowance of time that was excessive for the particular task or proceeding or was duplicative of other attorney efforts). The same principle

The Fifth Circuit in *Louisiana ex rel. Guste* perhaps cannot be faulted for suggesting "that in special circumstances the participation of a party ineligible for EAJA fees may make a fee award for other eligible parties unjust."⁷⁷¹ However, such special circumstances would be rare and should be found only when eligible parties or their attorneys have abused the situation, such as by needlessly joining an action brought by an ineligible party that is destined for inevitable victory or by incurring excessive or duplicative legal expenses when counsel for an ineligible party is fully and ably prosecuting the matter. In ordinary circumstances, excessive or duplicative legal expenses would be excluded as part of the process of measuring a reasonable fee award.⁷⁷²

b. Eligible and Ineligible Parties Jointly Represented by Common Counsel

When "there is one counsel representing several plaintiffs of disparate size or wealth, especially where the size or wealth of one or more of those plaintiffs would likely disqualify it from recovering fees under the EAJA," concern about evasion of the party eligibility requirements is at its greatest.⁷⁷³ Under such circumstances, the single counsel could attribute all or nearly all of the legal work performed to the eligible party, while minimizing the amount of the total legal expenses that have been incurred on behalf of the ineligible party.⁷⁷⁴ A

applies to intervenors in litigation, where "the usual course" is to acknowledge the eligibility of an intervenor for a fee award but "to deal with the question of intervenors' fees in the computation portion of the fee proceedings, by denying fees where intervenors' work was duplicative or nonproductive." 1 Derfner & Wolf, *supra* note 76, ¶ 7.03[1], at 7-13 to -14.

771. *Louisiana ex rel. Guste v. Lee*, 853 F.2d 1219 (5th Cir. 1988) (referring to EAJA Subsection (d), 28 U.S.C. § 2412(d)(1)(A) (1988), providing an exception to an EAJA award when "special circumstances make an award unjust"). See also *United States v. 27.09 Acres of Land*, 808 F. Supp. 1030, 1036-37 (S.D.N.Y. 1992) (finding "special circumstances" justified denial of an award to a homeowners' association that intervened to oppose construction of postal facility where three units of local government were already vigorously challenging the action), *vacated on other grounds*, 1 F.3d 107 (2d Cir. 1993). But see *supra* note 674 (discussing interpretation of "special circumstances" rule to substantive issues).

772. See generally *infra* section V, forthcoming (discussing the measurement of a fee award under EAJA Subsection (d)).

773. See *American Ass'n of Retired Persons v. EEOC*, 873 F.2d 402, 405-06 (D.C. Cir. 1989).

774. Of course, to engage in this manipulation, the attorney would have to permanently forgo the right to collect these attorney's fees from the large or wealthy ineligible party, even in the event the request for an EAJA fee award is denied. As discussed in detail *infra* section III.C.3, an EAJA award may only be made to a party that has incurred an obligation for a fee award. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988) (stating an award may be made for legal expenses "incurred by that party" in the civil action). If an attorney representing both an eligible party and an ineligible party would look, in the absence of a fee award, to the ineligible party for payment of all fees, then the eligible party simply has not incurred any obligation for legal expenses that can properly be reimbursed under the EAJA. Nevertheless, given the rather high net worth and employment size limitations, an attorney could attribute substantial legal expenses to an eligible party without great risk that the fee would be uncollectible from that eligible party in the event an

simple answer to the problem might be to deny an EAJA award for any part of the legal expenses that are not uniquely attributable to the eligible party, based on the assumption that the wealthy or large ineligible party would have been willing to foot the entire legal bill to pursue the general matter raised in the lawsuit, even in the absence of other litigants.⁷⁷⁵ This solution, although harsh, has been offered by at least one judge as arguably dictated by the strict construction afforded to a waiver of sovereign immunity.⁷⁷⁶

However, the opposing argument is more compelling. Just as the lawsuit presumably could have been pursued individually by the ineligible party, the litigation also could have been brought solely on behalf of the eligible party, who then would have obtained a full recovery of the expenses. The fact that a wealthy or large ineligible party has also joined the litigation should not preclude eligible parties from recovering their legal expenses. To be sure, the contention that a separate suit would truly have been initiated by the eligible party (notwithstanding limited resources) might seem more plausible when the parties have retained separate counsel than when a single attorney simultaneously represents both the eligible and ineligible party. The very fact that the eligible and ineligible party are joined together under one roof could suggest a dependence of the eligible party's claim on the pursuit of the ineligible party's claim. However, this need not necessarily be the case. Even a wealthy party that is ineligible for an EAJA award may be unwilling to take responsibility for paying all of an attorney's legal expenses if its individual stake in the litigation does not justify that investment or if substantial benefits from a successful action will accrue to others. The mere presence of an ineligible party, therefore, does not necessarily mean the litigation would have been instituted without the participation of the eligible parties.

Before a court presumes to look beyond the allocation of legal expenses agreed to by the attorney and the jointly represented eligible and ineligible clients, the court should be required to articulate some reason for ignoring any contractual arrangement for fee payment agreed to in advance by a competent and informed client.⁷⁷⁷ If the eligible party truly agreed to accept exclusive

application for fees under the EAJA was denied. Still, under such circumstances, we might expect the eligible party to object to being charged with a disproportionate share of the fees. The economic interests of the eligible party likely would make it an unwilling partner to such an arrangement.

775. See *Sierra Club v. United States Army Corps of Eng'rs*, 776 F.2d 383, 394 (2d Cir. 1985), cert. denied, 475 U.S. 1084, 106 S. Ct. 1464 (1986) (Meskill, J., dissenting) (arguing that "it seems incongruous to hold that if the ineligible plaintiff alone [had prosecuted the claim], fees could not be awarded under the EAJA, but because the ineligible plaintiff was joined by less wealthy friends, fees may be awarded").

776. *Id.* (arguing attribution of one plaintiff's ineligibility to all other plaintiffs was required since "[t]he EAJA, as a waiver of sovereign immunity, must be strictly construed and not enlarged beyond what a fair reading of the language requires").

777. Once again, as discussed in detail *infra* section III.C.3.b, if the attorney has billed only the ineligible client for his or her fees, thus looking exclusively to that party for payment, then the eligible party has simply not incurred any legal expenses for which an award may be sought under

financial responsibility for a particular share of the legal charges (meaning that no recourse would ever be made to the ineligible party to pay that share, either directly or as a guarantor), that fact alone should be given significant weight.⁷⁷⁸ The eligible party has no economic incentive to accept what it views as an inequitable burden for legal fees, and no reason to agree to serve as a pawn for an ineligible party's scheme to shift legal expenses. Thus, we may reasonably assume that the allocation agreed to in advance reflects the considered judgment of each client as to what is appropriately its responsibility.⁷⁷⁹ Such a fee arrangement would be worthy of consideration only if it had been established before the institution of litigation. By contrast, a *post hoc* allocation of legal expenses between eligible and ineligible parties by the attorney when preparing the fee application would be subject to greater scrutiny. Thus, the foregoing discussion assumes the antecedent existence of a fee-for-service contract, which contemplates a particular allocation of legal expenses or services among multiple clients.

However, if the court concludes the attorney took advantage of the eligible client and charged an unfair share of legal expenses to that party, either for the benefit of the ineligible client or with an eye to the possibility of an EAJA award, the court should refuse to follow that allocation of fees in making an EAJA award. The attorney then should also be precluded from using that inequitable allocation of the fee burden to collect the difference between any EAJA award and the billed fees from the wronged client. Similarly, if the attorney for both eligible and ineligible parties has arranged for payment on a basis other than fee-for-service, such as by a contingency fee or a fee paid from the benefits obtained in class action litigation, no pre-existing allocation of expenses or services among the multiple clients is likely to have been created. If a contingency fee or class action fee arrangement provides for an allocation of the burden of legal expenses, such as by reducing each party's share of the ultimate benefits according to a particular formula, the court should evaluate the reasonableness of this allocation in the same way that it would otherwise supervise the assessment of a fee on a contingency or class action basis.

Under circumstances where a pre-existing allocation of legal expenses is not worthy of deference, the district court must be given broad discretion to make a case-by-case assessment.⁷⁸⁰ When the facts surrounding the representation of

the EAJA.

778. See 46 Fed. Reg. 32,900, 32,903 (1981) (describing position of the Federal Trade Commission that, when eligible and ineligible parties are represented by the same counsel, "the eligible party should be entitled to an award for the amount it agreed to pay before the proceeding began").

779. The court should reject any claim by an attorney that he jointly represented an ineligible client for a fee and an eligible client pro bono. Although a true pro bono representation can provide the basis for a recovery of an EAJA award, see *infra* section III.C.3.a, we would regard with fatal suspicion the assertion that an attorney collecting fees from a large or wealthy client was simultaneously affording pro bono representation to an individual or entity with limited resources.

780. See *Louisiana ex rel. Guste v. Lee*, 853 F.2d 1219, 1225 (5th Cir. 1988).

an eligible and ineligible party by a common attorney or law firm suggest that the ineligible party initiated the joint retention, orchestrated the pursuit of the matter, or controlled the litigation, a district court might be justified in questioning whether the eligible party is a front for the ineligible party. The district court should exercise its informed discretion, based upon its familiarity with the case and the parties from its adjudication of the merits and its review of the submissions by the parties with respect to any fee application, to determine the most equitable allocation of the sole counsel's hours of legal service among the jointly represented eligible and ineligible parties.⁷⁸¹

Some courts have ruled that eligible parties should be assigned the same proportionate share of the legal expenses as the ineligible parties.⁷⁸² However, the district court should not be constrained by any strict mathematical formula;⁷⁸³ the fact that an ineligible party has joined together with a larger group of eligible parties should not necessarily lead to an ever-smaller reduction in the amount of the EAJA fee recoverable. The court may find that a different share of the legal expenses should be attributed to either the eligible or the ineligible party based upon the entirety of the circumstances, including the role each party played in the initiation of the matter and direction of the litigation, an evaluation of whether "the eligible and ineligible parties had overlapping but not coextensive interests,"⁷⁸⁴ the benefit to be received by the ineligible party in comparison to the eligible parties, the share of other litigation costs incurred that may have been borne by the ineligible party, and other equitable considerations.

Again, however, the court should justify any departure from a fee-for-service arrangement agreed to by the parties before refusing to accept (for EAJA award purposes) the amount of the legal expenses for which an individual eligible party has incurred a legal obligation of payment. As discussed immediately below, courts have too often strained to develop special rules to respond to the fear that

781. It is important to understand the purpose of this allocation of legal services among the parties, eligible and ineligible. The allocation does not necessarily determine the fee the attorney may recover from an individual client, in the absence of or in addition to an EAJA fee award, although this allocation does involve some of the same factors that may be relevant in determining a reasonable fee and the basis for assessing that fee against the benefits obtained in a class action context. The primary purpose of this particular allocation of legal services is to determine which blocks of attorney time devoted to the litigation should be attributed to an eligible party and which blocks to an ineligible party, with the result establishing the hours of attorney time for which recovery of fees may be sought against the government under an EAJA application. If the total contingency fee or class action fee would be higher than the EAJA award calculated according to the legal services attributable to eligible parties, then the attorney may be allowed to recover that difference in direct or indirect payments from the clients, subject to ethical limitations and the supervisory power of the court to determine the reasonableness of the fee.

782. See *Sierra Club v. United States Army Corps of Eng'rs*, 776 F.2d 383, 393-94 (2d Cir. 1985) (awarding EAJA fees "based on the ratio of eligible plaintiffs to total plaintiffs, here eleven to twelve"), *cert. denied*, 475 U.S. 1084, 106 S. Ct. 1464 (1986).

783. *Louisiana ex rel. Guste*, 853 F.2d at 1225 (stating the district court is not constrained to apply the "strict proportional rule used by the *Sierra Club* Court").

784. *Id.*

parties may evade the eligibility requirements, while neglecting to first consider the simple answer provided in the statute that only those legal expenses actually incurred by an eligible party may be recovered in any EAJA award.

C. The Requirement that the Party Have "Incurred" Fees

[A] court shall award to a prevailing party other than the United States *fees and other expenses . . . incurred by that party* in any civil action . . . 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. (EAJA § 2412(d)(1)(A))⁷⁸⁵

1. Stating the Issue—Whether a Party is Eligible for Fees when Legal Expenses Are Paid by a Third Party

In *United States v. Paisley*,⁷⁸⁶ the United States Court of Appeals for the Fourth Circuit held that prevailing parties in litigation with the federal government were not eligible for an award of fees under the EAJA because they had not "incurred" any fees when their legal expenses would be covered by a third party.⁷⁸⁷ Shortly before accepting appointments to positions with the federal government, several former employees of the Boeing Company received a severance payment from the company upon leaving their employment.⁷⁸⁸ The government brought an action against them seeking civil penalties, alleging that these payments constituted illegal supplementation of a government employee's salary by an outside source.⁷⁸⁹ The Supreme Court ultimately held that receipt of such payments by persons who were not yet government employees was not a violation of the applicable statutes.⁷⁹⁰

Under controlling Delaware corporation law, Boeing was obliged to indemnify these employees for legal expenses incurred in successfully defending a suit brought against them by reason of the fact that they were employees of the corporation.⁷⁹¹ Under these circumstances, the Fourth Circuit held, the EAJA was not available for an award of attorney's fees to the former Boeing employees.⁷⁹² The court reasoned that when a prevailing party has "an unconditional

785. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988) (emphasis added).

786. 957 F.2d 1161 (4th Cir.), *cert. denied*, 113 S. Ct. 73 (1992).

787. *Id.* at 1163-64.

788. *Id.* at 1163.

789. *Id.*

790. *Crandon v. United States*, 494 U.S. 152, 110 S. Ct. 997 (1990).

791. *United States v. Paisley*, 957 F.2d 1161, 1163-64 (4th Cir.), *cert. denied*, 113 S. Ct. 73 (1992).

792. *Id.*

legal right to indemnification by a manifestly solvent third party," he has not "incurred" fees within the meaning of the EAJA.⁷⁹³ The EAJA limits the award to a prevailing party for those fees "incurred by the party" in the civil action.⁷⁹⁴

Judge Hall dissented in the *Paisley* case, arguing that the majority's decision allowed "the government to stand in the back of the line to pay attorney's fees," even though it was at fault in pursuing unjustified litigation.⁷⁹⁵ Even assuming that Boeing was compelled by state law to indemnify the former employees, Judge Hall saw the obligation as analogous to insurance.⁷⁹⁶ In Judge Hall's view, a fee award was appropriate pursuant to the common-law collateral source rule "which does not permit the wrongdoer to profit from his victim's foresight to secure an insurer."⁷⁹⁷

Under the Fourth Circuit's *Paisley* theory, if someone else is paying the bill, then the party has not "incurred" fees and thus may not obtain an award under the EAJA. This is a ruling with implications reaching far beyond the state corporation law obligation of one company to reimburse employees for litigation expenses in successfully defending a suit arising out of the corporation employment relationship. For example, indigent plaintiffs are frequently represented by pro bono counsel or by public interest organizations that provide legal services without charging a fee to the client. Similarly, government employees may be represented at no personal expense in litigation by counsel provided by public employee unions pursuant to their duty of fair representation.

Are EAJA fee awards unavailable to plaintiffs represented by counsel who either expect no payment from the client or who are paid by an outside third party? Can we give meaning and effect to the requirement that a party have "incurred" fees to be eligible for an award, while also assuring the availability of awards to public interest organizations and other entities that assist small businesses and non-wealthy individuals in asserting legal rights against the government? The discussion below addresses these questions, after first placing the issue into proper legal context.

2. *Mistakenly Avoiding the Issue by Applying a "Real Party in Interest" Analysis for Awarding EAJA Fees*

In *Grason Electric Co. v. National Labor Relations Board*,⁷⁹⁸ the United States Court of Appeals for the Ninth Circuit avoided this question, without specifically addressing it, by framing the question of the EAJA award as being available to whatever entity ultimately paid for the litigation. Applying what it called "real party in interest" analysis, the court looked past the actual party in

793. *Id.* at 1164.

794. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988).

795. *Paisley*, 957 F.2d at 1171 (Hall, J., dissenting).

796. *Id.*

797. *Id.*

798. 951 F.2d 1100 (9th Cir. 1991).

the litigation and considered whether an award of attorney's fees should be made under the EAJA to the entity that financed the litigation.⁷⁹⁹ In *Grason Electric Co.*, a multiemployer trade association financed the defense of six employers against whom the National Labor Relations Board had brought an unfair labor practice action.⁸⁰⁰ The Ninth Circuit held that, for purposes of the EAJA fee award, "the real party in interest is the party who would pay the fees in the absence of an attorney[']s fees award."⁸⁰¹ Because the litigation expenses were paid through an assessment by the trade association of each of its members, the court held the real parties in interest appeared to be each of the 48 members of the association.⁸⁰² The court remanded the matter to the agency, contemplating that the fee award would be paid to each member according to its assessed share of the litigation costs.⁸⁰³

This "real party in interest" approach, while perhaps ensuring that the award goes to the entity that is truly out-of-pocket, nevertheless, cannot be sustained. Under the Equal Access to Justice Act, as under fee-shifting statutes in general, the fee award belongs to the party in the litigation, not to some other entity that may have financed the litigation or may have some claim upon the award.⁸⁰⁴ Indeed, EAJA Subsection (d) states plainly that the award is to be made to the "prevailing party"⁸⁰⁵—not to some other entity that may have financed the litigation.

This is not to say that the party named in the lawsuit is invariably the true litigant to whom an award is due. However, the question then would be: Who is the proper party to the suit itself, that is, to the case on the merits? Under Federal Rule of Civil Procedure 17, every action "shall be prosecuted in the name of the real party in interest."⁸⁰⁶ In other words, "the rule insists that the named plaintiff possess, under the governing substantive law, the right sought to

799. *Id.* at 1105-06. *Grason Elec. Co.* involved an application for fees under that separate part of the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) (1988), providing for an award of fees to a prevailing party in an adversary adjudication at the administrative level. *Grason Elec. Co.*, 951 F.2d at 1101. However, this part of the EAJA contains the same language providing for an award to a prevailing party of fees "incurred by that party in connection with that proceeding." Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) (1988).

800. *Grason Elec. Co.*, 951 F.2d at 1101-02.

801. *Id.* at 1105.

802. *Id.* at 1106.

803. *Id.*

804. *See Evans v. Jeff D.*, 475 U.S. 717, 730-32, 106 S. Ct. 1531, 1538-39 (1986) (holding a fee-shifting statute bestows eligibility for fee awards on the *party*, not on the attorney, and the party may waive eligibility for fees as part of a settlement of the case, notwithstanding the objections of the attorney); *Phillips v. General Servs. Admin.*, 924 F.2d 1577, 1582 (Fed. Cir. 1991) (holding under the EAJA, "any fee award is made to the 'prevailing party,'" and thus an attorney who arranged for payment contingent on availability of a fee award "could not directly claim or be entitled to the award," the award "had to be requested on behalf of the party").

805. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988) (emphasis added).

806. Fed. R. Civ. P. 17(a).

be enforced."⁸⁰⁷ Thus, if the named plaintiff has no true interest in the case, but rather is serving as the front for another entity that is not merely financing the litigation but also seeks to obtain the benefits of that litigation on the merits, the court may insist that the hidden entity be brought into the light as the real party in interest, both for purposes of the merits and any fee award.⁸⁰⁸

When there is the prospect of an EAJA award, the "real party in interest" analysis should be applied forcefully by the courts to prevent evasion of the eligibility requirements of the statute.⁸⁰⁹ If the true force behind the litigation is an organization or individual that would be ineligible for an EAJA award because of wealth or number of employees, the "real party in interest" rule should be applied to prevent the interposition of a nominal front party in whose name the lawsuit is filed merely to ensure later availability of a fee award. For example, in *Wall Industries, Inc. v. United States*,⁸¹⁰ a corporation reached a settlement contract with its accounting firm, under which the accounting firm required the corporation to initiate a tax refund suit, selected the attorneys, determined the litigation strategy and the legal issues to be presented, and collected the full benefit of the tax refund.⁸¹¹ Moreover, the accounting firm took full responsibility for payment of all legal fees.⁸¹² The corporation was nothing more than a "stand-in" for the accounting firm. Under these unique circumstances, the accounting firm was indeed the real party in interest in every respect.⁸¹³ Because the accounting firm was ineligible for EAJA fees,⁸¹⁴ the "real party in interest" approach was properly applied in this case to bar an award.⁸¹⁵

807. Jack H. Friedenthal et al., *Civil Procedure* § 6.3, at 319-20 (2d ed. 1993) (quoting *Ellis Canning Co. v. International Harvester Co.*, 255 P.2d 658, 659 (Kan. 1953)).

808. See generally *Fleming James, Jr. et al.*, *Civil Procedure* §§ 10.3-.6, at 503-15 (4th ed. 1992) (discussing real party in interest rule).

809. By analogy, the Supreme Court has applied something similar to a "real party in interest" analysis to protect the integrity of federal diversity of citizenship jurisdiction from collusive efforts to create diversity through the presentation of a claim by a nominal party with state citizenship diverse from that of the defendant. See *Cashman v. Amador & Sacramento Canal Co.*, 118 U.S. 58, 61, 6 S. Ct. 926, 928 (1886) (holding where non-diverse party solicited diverse plaintiff to file lawsuit, engaged the attorney and paid all expenses, and secured an agreement from the alien to allow the county to manage and conduct the suit and to decide whether to compromise or settle the suit, the dispute was "really and substantially" between the non-diverse party and the defendant and thus was not properly within the jurisdiction of the federal court). See also *Ferrara v. Philadelphia Lab., Inc.*, 272 F. Supp. 1000, 1012-14 (D. Vt. 1967), *aff'd*, 393 F.2d 934 (2d Cir. 1968).

810. 15 Cl. Ct. 796 (1988), *aff'd mem.*, 883 F.2d 1027 (Fed. Cir. 1989).

811. *Id.* at 799 & nn.4-8.

812. *Id.* at 799.

813. See *id.* at 803-06.

814. *Id.* at 806.

815. By contrast, the Claims Court distinguished *Wall Indus., Inc.*, and found that a subsidiary corporation was independent of its parent corporation and qualified as a real party in interest in *Design & Prod., Inc. v. United States*, 20 Cl. Ct. 207 (1990). Although the fee applicant was a wholly-owned subsidiary and the corporations shared presidents, certain vice presidents, and a director, "no evidence [was] presented to suggest that [the parent corporation] will be the 'sole beneficiary of this attorney's fees application' or that [the parent corporation] was 'actively involved

However, the “real party in interest” rule can seldom be so easily invoked, especially if the aim is essentially to oust the named parties from the lawsuit (and thus from an ability to apply for an EAJA fee) and substitute another entity as the sole litigant. Consider the example of an ineligible trade association that supports and finances litigation by one of its members, who is eligible, to challenge governmental action that impacts upon the industry as a whole. If the association could properly have been made the named party, *and* if the association actually controls the lawsuit and makes the litigation decisions, then it should be recognized as the real party in interest both for purposes of the suit on the merits and for any later application for attorney’s fees.⁸¹⁶ But, in the absence of such control of the litigation, which may often be hard to prove, the mere fact of financial support does not change the lineup of the parties.⁸¹⁷ Since an individual member of the trade association would also be entitled to pursue a challenge to government regulation in its own right, the fact that the trade association provides financial support does not make the individual member any less a real party in interest, provided the named plaintiff remains the “master of the litigation” and has not surrendered the authority to direct the lawsuit to the trade organization.⁸¹⁸ Thus, as long as the named parties are legitimate, the fact that one of the parties or even a non-party entity is financing the litigation does not mean the court can reach beyond the named litigants and treat that single party or the outsider as the only real party in interest for the purpose of making a fee award.⁸¹⁹

in the underlying litigation.” *Id.* at 212 (quoting *Wall Indus., Inc. v. United States*, 15 Cl. Ct. 796, 804 (1988), *aff’d mem.*, 883 F.2d 1027 (Fed. Cir. 1989)). Instead, the evidence established that the subsidiary corporation acted independently in bringing the civil action, that the parent corporation never took an active role in nor financed the litigation, that the corporate offices were at different locations, and that the subsidiary corporation performed its own administrative, accounting, and insurance functions. *Id.* Accordingly, the court concluded “the totality of the facts” demonstrated that the subsidiary corporation was the real party in interest eligible to seek an EAJA award. *Id.*

816. *Cf. Mathies v. Seymour Mfg. Co.*, 23 F.R.D. 64, 84 (D. Conn. 1958) (holding when a diverse plaintiff is not only induced to bring suit and reimbursed for his expenses by another, but also “has surrendered or never had control of the suit, such control reposing in another who cannot sue because of non-diversity,” then a finding of collusion to improperly create diversity of citizenship federal jurisdiction is warranted and the lawsuit should be dismissed from federal court), *rev’d on other grounds*, 270 F.2d 365 (2d Cir. 1959).

817. *United States Phillips Corp. v. Windmere Corp.*, 971 F.2d 728, 730-31 (Fed. Cir. 1992) (stating the fact a third-party provides financial support of a party’s litigation as an indemnitor of litigation expenses does not confer party status), *cert. dismissed*, 114 S. Ct. 425 (1993). *See Wheeler v. City of Denver*, 229 U.S. 342, 350-52, 33 S. Ct. 842, 845 (1913) (holding although water company, which was not diverse from defendant, solicited diverse parties to bring the suit and agreed to indemnify them against their costs and attorney’s fees, the water company did not control the conduct of the litigation, and, accordingly, the action was not brought collusively by nominal parties to improperly create federal diversity of citizenship jurisdiction).

818. *Cf. Mathies*, 23 F.R.D. at 84 (stating “control is the decisive factor” and when the nominal diverse plaintiff is not in fact “the master of the litigation” because control resides in another who cannot sue because of non-diversity, then diversity of citizenship jurisdiction is not proper).

819. When an association prosecutes an action in its own name, with proper associational

The United States Court of Appeals for the District of Columbia Circuit made this very error in an understandable (but ultimately unnecessary) effort to ensure that an EAJA award was not made when an action against the government was financed by a large ineligible organization. In *Unification Church v. Immigration & Naturalization Service*,⁸²⁰ three aliens and the Unification Church brought an action to challenge the denial by the Immigration and Naturalization Service of applications by the three individuals to remain in the United States and to continue to work for the church.⁸²¹ When the plaintiffs achieved success and sought fees under the EAJA, the District of Columbia Circuit held that the church, and not the three individuals, was the only real party in interest for purposes of the fee request.⁸²² The church had chosen the attorney and had arranged for payment of all legal expenses.⁸²³ However, the individual plaintiffs cannot be so easily dismissed from the equation. As the court acknowledged, the individual plaintiffs, who had been in danger of being deported from the country, had rights at stake in the case on the merits.⁸²⁴ Thus, beyond any question, they were real parties in interest to the action. The fact that, as the court stated, the three individuals had “nothing at stake in the award of fees”⁸²⁵ is certainly relevant to their eligibility for fees (as outlined at length below),⁸²⁶ but it did not deprive them of their status as real parties in interest in the case.

The nature of the real party in interest does not shift from the merits proceeding to the fee adjudication. The Equal Access to Justice Act is clear on this point. The party who prevails, that is, the party who secures relief on the merits, is the same party to whom the fee award is to be made. The statute provides that the court “shall award to a *prevailing party* . . . fees and other expenses . . . incurred by *that party*” in the civil action.⁸²⁷ The three individual plaintiffs in the *Unification Church* case were prevailing parties and thus real parties in interest to that case. As discussed below,⁸²⁸ they were indeed ineligible for an EAJA award, but the reason for that conclusion is that they had “incurred”

standing, it certainly may seek recovery of fees it has incurred (that is, for which the association, rather than its members, is responsible). However, under such circumstances, a separate eligibility question arises, which was discussed previously, of whether an association's size and wealth determination for purposes of an EAJA award should be based upon its separate number of employees and net worth or upon an aggregation of the size and wealth of its constituent members. See *supra* section III.B (discussing eligibility limitations of net worth and employment size).

820. 762 F.2d 1077 (D.C. Cir. 1985).

821. *Id.* at 1079.

822. *Id.* at 1081.

823. *Id.* at 1082.

824. *Id.*

825. *Id.*

826. See *infra* section III.C.3 (discussing requirement that a party have “incurred” an obligation to pay fees to be eligible for an EAJA Subsection (d) award).

827. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988) (emphasis added).

828. See *infra* section III.C.3.b (discussing eligibility for an EAJA Subsection (d) award in the context of an outside financier of litigation).

no fees, not that they somehow had lost their status as parties to the lawsuit when it moved into the fee-shifting phase.⁸²⁹

Similarly, in the *Grason Electric Co.* case, the government had brought the unfair labor practice case against the six named defendant employers.⁸³⁰ Those six employers—and not the trade association—were the real parties in interest. The trade association was in no wise a real party in interest to the action on the merits. It had not been accused of any unfair labor practice. The association's interest, and that of the other non-party association members, was merely empathetic or ideological. The fact that the trade association or its members may have paid the legal expenses of the six employers did not make the association or its members real parties in interest to the lawsuit. Since neither the association nor its other members were prevailing parties in the proceeding, they were not eligible for an award of attorney's fees under the EAJA. The Ninth Circuit erred in suggesting otherwise.

3. A Party Must Have "Incurred" an Obligation to Pay Fees, Either Directly or Through a Nonrecourse Debt

The question whether a fee award may be made under the Equal Access to Justice Act to a party who has not directly "incurred" fees may not be avoided by shifting the focus from one prevailing party toward another party or entity who *did* make a payment for those legal expenses.⁸³¹ Thus, the question

829. Because the District of Columbia Circuit reaches the same result as I suggest below and travels much the same road in getting there, our differences could be dismissed as academic. I reach the conclusion that a party is eligible for an award of attorney's fees under the EAJA only if the party has "incurred" an obligation to pay fees. See *infra* section III.C.3 (discussing requirement that a party have "incurred" an obligation to pay fees to be eligible for an EAJA Subsection (d) award). Through the "real party in interest" analysis, the *Unification Church* court reached the same result by what may appear to be nearly an identical analysis:

We hold . . . that, where the fee arrangement among the plaintiffs is such that only some of them will be liable for attorney's fees, the court shall consider only the qualifications *vel non* under the Equal Access to Justice Act of those parties that will be themselves liable for fees if court-awarded fees are denied.

Unification Church v. Immigration & Naturalization Serv., 762 F.2d 1077, 1082 (D.C. Cir. 1985).

However, that our disagreement is not merely semantical becomes apparent when we realize that the "real party in interest" analysis lends itself not only to limiting the entities eligible to apply for fees but also to expanding the universe of eligible applicants. The Ninth Circuit, in *Grason Elec. Co. v. NLRB*, 951 F.2d 1100, 1105-06 (9th Cir. 1991), relied upon the "real party in interest" approach formulated in the *Unification Church* decision to look beyond the named parties to the case, identify other entities who funded the litigation, characterize those outside non-parties as the real parties in interest for purposes of the fee award, and suggest the EAJA award should be made to those who had paid the legal expenses. *Id.* at 1106. In sum, the "real party in interest" analysis may be used to limit or expand eligibility, depending upon the circumstances. By contrast, I view the EAJA as expressly limiting the fee award to those who were proper and prevailing parties to the action on the merits *and* who have also "incurred" an obligation to pay attorney's fees.

830. *Grason Elec. Co.*, 951 F.2d at 1101.

831. See *SEC v. Comserv Corp.*, 908 F.2d 1407, 1412-13 (8th Cir. 1990) (stating that asking

remains: May a prevailing party whose legal expenses are ultimately covered by another entity ever recover an award of attorney's fees under the EAJA? As discussed below,⁸³² the answer depends upon whether the party has incurred an obligation to pay the fees, even if the obligation will not result in personal liability, pursuant to an established custom or practice that comports with the purpose of the EAJA.

As always, one must begin with the language of the statute. As the United States Court of Appeals for the Federal Circuit has noted: "In its requirement that the fees have been 'incurred' by the party, § 2412(d) differs from . . . other fee-shifting statutes that authorize the award of 'a reasonable attorney's fee.'"⁸³³ The plain import of this language cannot be avoided. Before a party may claim an award of attorney's fees under the EAJA, that party must, in some sense, have "incurred" an obligation to pay those fees.

Obviously, a party that has retained an attorney and contracted to pay fees to that attorney has accepted an obligation. In the most direct sense of the word, such a party has "incurred" fees and thus is eligible to seek to shift that obligation to the government through an award under the EAJA. That is the easy case. But must the obligation be so direct? The nature of the obligation to pay attorney's fees and how it may be incurred is not described in the statute. Can it ever be said that a party represented by a public interest organization has incurred an obligation to pay fees? What if the party's legal expenses are covered by a form of insurance or a prepaid legal plan? What if a friend or relative confers a gift which is used to pay the fees? What if representation is provided by a third party by reason of a statutory obligation, such as an indemnification statute or a union's duty to provide fair representation to an employee in the bargaining unit?

In discussing the measure for awards under fee-shifting statutes in general, Professor Charles Silver observes that a fee agreement between a client and an attorney could be framed to create a nonrecourse debt.⁸³⁴ Although it may be true, for example, that "legal aid organizations typically refrain from charging their clients,"⁸³⁵ this does not necessarily mean that those clients have no right to recover attorney's fees or that no obligation has been incurred by the client.

whether third party who paid legal expenses is the real party in interest for an EAJA award is "addressing the wrong issue," and that the proper question is whether the party who prevailed "incurred" legal expenses).

832. See *infra* section III.C.3 (discussing requirement a party have "incurred" an obligation to pay fees to be eligible for an EAJA Subsection (d) award).

833. *TGS Int'l, Inc. v. United States*, 983 F.2d 229, 230 (Fed. Cir. 1993). However, in the *TGS Int'l* case, the Federal Circuit confused the eligibility requirement that a claimant for an EAJA award have "incurred" fees with the appropriate measure of the fee award, mistakenly holding an EAJA fee should be measured by a contingency fee agreement rather than by the time expended by the attorney.

834. Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 Tex. L. Rev. 865, 881-86 (1992).

835. *Id.* at 882.

Professor Silver argues fee agreements with an attorney should be considered in the same terms that apply to other debt instruments:

When thinking about debt instruments generally, it is typical to distinguish the debt an instrument creates from the extent of a debtor's personal liability on that debt and to recognize that a debt exists whether or not personal liability obtains. When one analyzes fee agreements in these terms, it becomes clear that fee agreements create legal obligations that can properly serve as the basis for fee awards, even in cases where plaintiffs receive legal aid.⁸³⁶

Thus, for example, a legal services organization could contract with an indigent client to create a nonrecourse debt, by which the organization essentially loans the value of legal services to the client but limits its right to collect upon that loan to any funds obtained by a fee award made to the client.⁸³⁷ Thus, while legal aid organizations "forsake the option of holding clients personally liable for fees, they acquire the power to seek compensation by enforcing their clients' rights to demand fee awards."⁸³⁸

Would the creation by contract of such a nonrecourse debt, under which the party to the case would have no personal liability, qualify as the "incurring" of fees within the meaning of the EAJA? Both because the debt created, notwithstanding its nonrecourse nature, is a true obligation, and because this approach seems to comport with the underlying purpose of the EAJA, the courts should accept this approach as establishing the eligibility of such parties for fee awards. Moreover, the kinds of arrangements excluded by this analysis would seem to correspond to those for which the EAJA was not intended to provide recovery. Illustration of this approach in the context of recurring situations is presented below.

a. Pro Bono Legal Services and Litigation Insurance

In the case of pro bono legal representation, a contractual arrangement by which a client accepts an obligation to pay attorney's fees and then conveys to the attorney the right to collect any fee award in full satisfaction of that obligation is an enforceable and legitimate debt instrument. As Professor Silver observes, lawyers who enter into such contracts expect to be paid and have agreed to perform legal services with the hope (conditioned on success in the

836. *Id.* at 883.

837. *Id.* at 883-84. See also Stephen Yelenosky & Charles Silver, *A Model Retainer Agreement for Legal Services Programs: Mandatory Attorney Fee Provisions*, 28 Clearinghouse Rev. 114, 116-18, 125-27, 131-32 (1994) (proposing a model retainer agreement for legal services programs that includes an attorney's fee provision creating a nonrecourse debt, which by excusing the client from personal liability remains consistent with federal law barring legal services programs from charging fees).

838. Silver, *supra* note 834, at 883-84.

litigation and any other requirements for obtaining an award under a fee-shifting statute) that a fee award will provide the compensation.⁸³⁹ "By agreeing to work for fee awards, [these attorneys] simply freed their clients from personal liability for fees. They did not take the further step of agreeing to serve their clients without charge, however, nor did they enter agreements that eliminated all means of collecting fees."⁸⁴⁰ In sum, such parties have incurred a true obligation to pay the legal expenses through assignment of any fee award, and they might not have received legal services without having agreed to incur such a nonrecourse debt.⁸⁴¹

The same analysis should apply to a litigant whose legal expenses are covered by insurance or a prepaid legal plan. If a party in litigation with the government is provided legal representation through a form of insurance, the insurance company typically will have reserved a contractual right to obtain any fee award to which the party would be entitled. When an insurance company pays a claim, it often uses a "loan receipt" device that "makes the payment to the insured technically a loan, to be repaid only out of proceeds of the claim against the third party, which claim is pledged to the insurer as security for the 'loan.'"⁸⁴² Thus, just as in the case of the legal aid organization or pro bono attorney retention contract, the insurer and the insured have agreed through the insurance contract to create a nonrecourse debt that may be satisfied only through an award made to the insured against the opponent in litigation.

In the *Grason Electric Co.* case discussed above, the Ninth Circuit described the trade association's financing of its members' defense against a government charge as involving a "kind of litigation insurance policy."⁸⁴³ Thus, depending upon the particular contractual arrangement between the association and its members, the association could be said to have loaned the funds for the legal representation to the charged employers, creating an obligation to be repaid by any attorney's fee award to which those employers might be entitled. Although the Ninth Circuit mistakenly applied a "real party in interest" analysis, it reached

839. *Id.* at 884-85.

840. *Id.* See also *Phillips v. General Servs. Admin.*, 924 F.2d 1577, 1582-83 (Fed. Cir. 1991) (holding a party had "incurred" fees for purposes of an EAJA award when the fee arrangement with her attorney provided for payment contingent on receipt of a statutory fee award, and stating "[i]nherent in the agreement is an intention on the part of [the party] to be obligated to her counsel for fees properly obtainable under the statute").

841. To be sure, a large amount of pro bono work is performed by attorneys to uphold the calling of the profession and without any expectation of compensation, even through a fee-shifting award. However, individual attorneys performing substantial amounts of pro bono work and public interest and legal services organizations providing representation to the disadvantaged do depend upon the prospect of attorney's fee awards being obtained in some of the spectrum of cases they take in order "to expand their capacity to serve victims for whom the private market fails to provide." See *Silver*, *supra* note 834, at 882.

842. James et al., *supra* note 808, § 10.4, at 507.

843. *Grason Elec. Co. v. NLRB*, 951 F.2d 1100, 1105 (9th Cir. 1991).

the right result—assuming the association's financing was pursuant to a true insurance arrangement that created a contractual subrogation right.⁸⁴⁴

Ensuring eligibility for fee awards to parties who are represented by legal aid organizations promotes the purpose of the EAJA “to encourage relatively impecunious private parties to challenge unreasonable or oppressive governmental behavior by relieving such parties of the fear of incurring large litigation

844. In *Phillips v. General Servs. Admin.*, 924 F.2d 1577 (Fed. Cir. 1991), the Federal Circuit essentially accepted the theory that a party who has contracted to create a nonrecourse obligation to convey a right to a statutory fee award has “incurred” fees to be eligible for a fee award. *Id.* at 1582-83. However, while the court was willing to accept this approach in the context of an attorney-client contract limiting the client's obligation to pay fees and instead obliging him or her to pay any fees awarded under the EAJA, the court suggested in dicta in a footnote that a fee award would be inappropriate “[i]f the party seeking legal fees is obligated to pay them to a third party which is not the professional providing the legal service.” *Id.* at 1583 n.5. The court did not explain why the creation of a nonrecourse obligation was adequately characterized as the incurring of fees in one instance but not in others. As one of the authorities for this dicta, the court cited *SEC v. Comserv Corp.*, 908 F.2d 1407 (8th Cir. 1990), for the proposition that a party has not incurred fees when legal expenses are provided for in an insurance policy carried by the party's employer. *Phillips*, 924 F.2d at 1583 n.5. The *Comserv Corp.* case, however, is attenuated authority for this proposition, given the unusual facts of the case and the important fact it did not involve payment of litigation expenses through insurance coverage purchased by the otherwise eligible party seeking an EAJA award. In *Comserv Corp.*, the Securities and Exchange Commission (SEC) brought an action against a corporate officer alleging various securities law violations and seeking an injunction against further illegal conduct. *Comserv Corp.*, 908 F.2d at 1409. Pursuant to a severance contract, the corporation had agreed to pay the officer's legal expenses incurred in connection with the SEC investigation and litigation. *Id.* at 1413. Moreover, as the court observed, the corporation would likely have been obliged to indemnify the officer in any event under state corporation law. *Id.* Thus, either by contract or statutory duty, the corporation was obligated to pay the party's legal fees. Insurance entered into the picture only because the corporation had purchased an insurance policy that reimbursed it for its costs in indemnifying a director or officer. *Id.* The officer himself had not purchased any insurance nor did it appear he had agreed to convey any right to a statutory fee award to anyone, either the corporation or the corporation's insurer. *Id.* at 1414 n.8. The record did not reveal whether the officer, if the recipient of an EAJA award, was obliged to reimburse the corporation for any portion of his legal expenses.

The Eighth Circuit's opinion in *Comserv Corp.* suggests a party is not eligible for fees whenever those expenses are paid by another source, with the sole exception being those parties represented by pro bono counsel. *Id.* at 1414-15. However, the *Comserv Corp.* case did not involve a party, otherwise eligible for an EAJA award, who was represented in the litigation against the government only by means of insurance coverage he had purchased. The Eighth Circuit, correctly in my view, understood the requirement that an obligation to pay fees have been incurred as meaning “that EAJA awards should be available where the burdens of attorneys' fees would have deterred the litigation challenging the government's action, but not where no such deterrence exists.” *Id.* at 1415-16. As discussed immediately below, I think providing for EAJA awards when a party is able to obtain coverage only through insurance protection falls within this limitation. Moreover, looking at the actual facts of the *Comserv Corp.* case, I believe the Eighth Circuit was correct in denying eligibility, given the party's legal expenses were paid through prior arrangement by an outside financier, as I also discuss further below. See *infra* section III.C.3.b (discussing eligibility for an EAJA Subsection (d) award in the context of an outside financier of the litigation).

expenses."⁸⁴⁵ In *Blum v. Stenson*,⁸⁴⁶ the Supreme Court stated that "[i]t is in the interest of the public that [non-profit public interest] law firms be awarded reasonable attorneys' fees to be computed in the traditional manner when its counsel perform legal services otherwise entitling them to the award of attorneys' fees."⁸⁴⁷ As Professor Silver notes, "fee awards enable legal aid agencies to expand their capacities to serve victims for whom the private market fails to provide."⁸⁴⁸ In *Cornella v. Schweiker*,⁸⁴⁹ the United States Court of Appeals for the Eighth Circuit approved an EAJA award to pro bono counsel, stating that "[i]f attorneys' fees to *pro bono* organizations are not allowed . . . , it would more than likely discourage involvement by these organizations in [cases against the government], effectively reducing access to the judiciary"⁸⁵⁰ The courts have routinely authorized awards under the EAJA to legal services organizations and attorneys providing legal representation pro bono.⁸⁵¹

Admittedly with some less force, the same reasoning should allow the recovery of attorney's fees when a party is afforded representation through a genuine insurance arrangement, including a policy issued by an insurance company or an association that has established protection against certain legal expenses for its members pursuant to a written agreement. If an insurance company or an insuring association is denied the opportunity to recover those expenses through a fee award, the ability to provide such insurance and the cost charged for such coverage will be increased. The intent of Congress in enacting the EAJA was "to diminish the deterrent effect of the expense involved in seeking review of, or defending against, unreasonable government action."⁸⁵² The availability and affordability of insurance coverage would be enhanced by the prospect of reducing insurance cost through the collection of fee awards, thereby granting small businesses and individuals of little wealth a greater opportunity to procure protection from the burdens of litigation with the government. Of course, the ability of the insurer to recover a fee award would still depend upon the eligibility of the insured, since fee awards are made only to parties. But this also comports with the purpose of the statute. The EAJA is concerned with increasing access to legal representation—either by legal aid

845. *Spencer v. NLRB*, 712 F.2d 539, 549 (D.C. Cir. 1983) (citing legislative history), *cert. denied*, 466 U.S. 936, 104 S. Ct. 1908 (1984).

846. 465 U.S. 886, 104 S. Ct. 1541 (1984).

847. *Id.* at 895, 104 S. Ct. at 1547 (quoting *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶ 9444, at 5048-49 (C.D. Cal. 1974)).

848. Silver, *supra* note 834, at 882.

849. 728 F.2d 978 (8th Cir. 1984).

850. *Id.* at 986-87.

851. *Phillips v. General Servs. Admin.*, 924 F.2d 1577, 1582-83 (Fed. Cir. 1991); *American Ass'n of Retired Persons v. EEOC*, 873 F.2d 402, 405-06 (D.C. Cir. 1989); *Watford v. Heckler*, 765 F.2d 1562, 1567 n.6 (11th Cir. 1985); *Cornella v. Schweiker*, 728 F.2d 978, 985-87 (8th Cir. 1984).

852. *Cornella*, 728 F.2d at 981 (quoting *Foley Constr. Co. v. United States Army Corps of Eng'rs*, 716 F.2d 1202, 1203 (8th Cir. 1983), *cert. denied*, 466 U.S. 936, 104 S. Ct. 1908 (1984)).

organizations or the availability of insurance-like arrangements—by small entities and relatively impecunious individuals.

b. The Outside Financier

When the costs of legal services for multiple parties joined together in the same lawsuit are incurred by a single party, the purposes of the EAJA are not implicated (beyond of course that single party, if eligible). In such a circumstance, the presence of the single party who pays all attorney's fees for all parties indicates that only the participation of that particular party was necessary to sustain the litigation. Thus, only that party should be eligible for a fee, and if it is ineligible for reasons of size or wealth, this merely confirms that the prospect of an EAJA award was unnecessary to ensure that the government action would be challenged in litigation.⁸⁵³

For example, in the *Unification Church* case,⁸⁵⁴ the church arranged to pay for legal services for the individual plaintiffs in that litigation against the government. This was not because it was providing pro bono representation or through some form of insurance for its members against the costs of litigation. Rather, the church itself was a participant in the litigation, had its own interests in the outcome of the litigation, and undoubtedly arranged for representation of the individuals to ensure a unified position among the plaintiffs on the issues involved in the action.⁸⁵⁵ The church itself was not eligible for a fee award because of the number of its employees.⁸⁵⁶ Thus, the District of Columbia Circuit was correct in saying that an award of attorney's fees under those circumstances

would open the door for the wholesale subversion of Congress's intent to prevent large entities from receiving fees under subsection (d). In a wide variety of circumstances, organizations obviously not qualified for an award under subsection (d) would be able to persuade individuals to be among the parties, and the organization would then receive free legal services if its side were to prevail.⁸⁵⁷

Use of the "real party in interest" approach, however, was misplaced and was not necessary to prevent such an abuse of the statute. If only one of several parties is the sole financier of litigation, then the other named parties have simply not

853. See also *supra* section III.B.5 (discussing EAJA awards in cases with both eligible and ineligible parties).

854. *Unification Church v. Immigration & Naturalization Serv.*, 762 F.2d 1077 (D.C. Cir. 1985).

855. See *id.* at 1082-83 (stating, when the church agreed to pay the fees for the individual plaintiffs, the allowance of a fee award to the individual plaintiffs would effectively allow the church to receive free legal services notwithstanding its ineligibility for an EAJA award because of the number of its employees).

856. *Id.* at 1091-92.

857. *Id.* at 1082.

“incurred” any fees so as to be eligible for a fee award.⁸⁵⁸ Of the four parties to the *Unification Church* lawsuit (the three individuals and the church), only the church had actually “incurred” any obligation to pay attorney’s fees.⁸⁵⁹ Thus, three of the parties were ineligible for an award because they had not incurred fees; the church, although having incurred fees, was ineligible because of the number of its employees.⁸⁶⁰

The same analysis would apply when the legal expenses of a party in litigation with the government are covered by an outside entity, either through an arrangement directly with the party’s attorney or by a promise at the inception of the litigation to reimburse the party fully for all legal expenses in the future. In either situation, the party has not truly incurred any obligation to pay attorney’s fees. Under such circumstances, the purposes of the EAJA are not implicated because legal services would have been afforded even in the absence of the fee-shifting statute. Moreover, when an outside entity advances the costs of litigation, the danger is heightened that the named party to the lawsuit may be serving as a front for another entity that would be ineligible for an EAJA award because of size or wealth.

To be sure, such an outside entity might attempt to create the appearance that the named party has incurred an obligation, perhaps by styling the fee payment as a nonrecourse debt payable only by a fee award, as discussed above. However, when such an arrangement is adopted on an ad hoc, case-specific basis—in contrast with the established practices of a legal aid organization, an attorney who provides representation pro bono or contingent on fee awards, or a genuine insurer—the burden should be on the applicant to establish that the arrangement is legitimate and was a true condition upon the payment of the party’s legal expenses. In sum, the obligation of the party to the litigation to pay attorney’s fees must be real, even if it is nonrecourse in nature, such that it may be said that the conveyance of the right to collect attorney’s fees to the financier of the litigation was a true condition precedent to the availability of legal services.

A gratuitous payment, however, such as one by a friend or relative, received by a party and then applied to a fee obligation would not prevent the party from being eligible for a fee award under the EAJA. A gift, even one made with the purpose of assisting the party with litigation expenses, would simply mean the party faced with a debt had found a collateral source by which to pay it. The crucial inquiry would be whether the gift was made without strings attached, such that the party would be free to choose whether to apply it to legal expenses, and whether the payment was directly correlated to the litigation expenses, in the sense that it

858. See also *supra* section III.B.5 (discussing EAJA awards in cases with both eligible and ineligible parties).

859. *Unification Church v. Immigration & Naturalization Serv.*, 762 F.2d 1077, 1082 (D.C. Cir. 1985) (stating that when the plaintiff’s attorney was “retained” by the individual plaintiffs, his “arrangement” for payment was solely with the church, and if a fee award were denied, “the Church will pay the fees”).

860. *Id.* at 1083-92.

constituted part of a prior arrangement to reimburse the party for litigation expenses. In other words, the question would be whether it amounted to a true gift as opposed to a specific arrangement by an outside party to finance the litigation. In the former instance, it is meaningful to say the party has incurred fees; in the latter, the party has never truly incurred an obligation but instead retained counsel with the prior understanding that another would pay the bill.

c. Statutory Indemnification

When a third party entity funds the litigation pursuant to a statutory obligation, the party who enjoys the benefits conferred by the statute has not "incurred" fees so as to be eligible for an award under the EAJA. For example, when there exists an unconditional right to full indemnification of legal expenses by another entity, then the party has not incurred any obligation and a fee award would not promote the purpose of the EAJA. As discussed at the outset of this section,⁸⁶¹ the Fourth Circuit reached precisely this result and for this reason in *United States v. Paisley*.⁸⁶² The court concluded the employer was obliged under state corporation law to indemnify former employees for the costs of defending themselves against litigation arising from the fact of their former employment:

[To hold that a party with an unconditional right to indemnification of its attorney's fees by a manifestly solvent third party might nevertheless qualify for an EAJA award] would not in fact serve a principal purpose of the EAJA: to avoid the deterring effect which liability for attorney[']s fees might have on parties' willingness and ability to litigate meritorious civil claims or defenses against the Government. The EAJA provides for fee-shifting to avoid this result. Consequently, in any situation in which the eligibility of a particular prevailing party for an EAJA award is in issue, it is appropriate to inquire whether that party would, as a practical matter, have been deterred from litigating had it been known that a fee-shifting award was not available upon a successful conclusion. If that question is asked here, it is obvious that [the individual parties] . . . would not have been deterred had the EAJA not then existed. This is the critical concern underlying the EAJA precondition that a fee claimant shall have "incurred" the expense.⁸⁶³

While the Fourth Circuit's analysis is correct in the abstract, it is not clear that it was correctly applied in the *Paisley* case. In his dissent, Judge Hall observed that the indemnification obligation in that case had been conditional; under the corporation statute, "victory was a prerequisite to even the possibility of indemnifi-

861. See *supra* section III.C.1.

862. 957 F.2d 1161 (4th Cir.), *cert. denied*, 113 S. Ct. 73 (1992).

863. *Id.* at 1164 (citation omitted).

ation."⁸⁶⁴ As the litigation began, therefore, the employees had no assurance of reimbursement and had to accept the risk of being held fully obliged to pay their own legal expenses. Thus, argued Judge Hall, the former employees "most definitely 'incurred' fees for which they were and are personally liable. That they have another potential source from which to obtain reimbursement ought not be a defense for the government."⁸⁶⁵ Under these circumstances, where the payment was uncertain and came only after the parties had incurred an obligation, the payment is analogous to a gift providing a collateral source for payment. Accordingly, an EAJA award may have been appropriate.

d. Statutory Duty of Fair Representation by Labor Organizations

A similar statutorily-imposed obligation may arise in the form of the duty of "fair representation" imposed upon a labor organization for the benefit of all employees represented by the union.⁸⁶⁶ As the exclusive labor representative of all employees in a bargaining unit,⁸⁶⁷ the union has a duty "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."⁸⁶⁸ When a union provides legal representation to an employee pursuant to this statutorily inferred obligation, the employee cannot be said to have incurred a fee obligation.⁸⁶⁹

864. *Id.* at 1171 (Hall, J., dissenting).

865. *Id.*

866. In the private sector, there is no express statutory duty of "fair representation." *Chauffeurs, Teamsters & Helpers, Local 391 v. Terry*, 494 U.S. 558, 564 n.3, 110 S. Ct. 1339, 1344 n.3 (1990). The duty was "judicially developed as a necessary corollary to the status of exclusive representative" by the union of an employee bargaining unit as provided for in labor statutes. 2 *The Developing Labor Law* 1409 (Patrick Hardin ed., 3d ed. 1992). Nevertheless, the Supreme Court has confirmed the duty is "grounded in federal statutes." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S. Ct. 908, 910 (1967). It is, therefore, plainly a duty imposed by law, not an obligation accepted by agreement.

However, in the federal sector, with respect to unions representing federal employees, the duty of fair representation has been codified in the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (1988). The statute provides that the labor organization recognized as the exclusive representative of a unit of employees "is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." 5 U.S.C. § 7114(a)(1) (1988).

867. National Labor Relations Act, 29 U.S.C. § 159(a) (1988) (private sector labor law); Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7114(a)(1) (1988) (federal government employee labor law).

868. *Vaca*, 386 U.S. at 177, 87 S. Ct. at 910. See *Terry*, 494 U.S. at 563, 110 S. Ct. at 1344. See also *National Treasury Employees Union v. Federal Labor Relations Auth.*, 721 F.2d 1402, 1406 (D.C. Cir. 1983) (approvingly quoting the language from *Vaca* set out in the text in discussing duty of fair representation for labor organization representing federal employees). See generally Robert A. Gorman, *Basic Text on Labor Law* (1976) (discussing duty of fair representation).

869. *But see* *American Fed. of Gov't Employees v. Federal Labor Relations Bd.*, 944 F.2d 922, 933 (D.C. Cir. 1991) (stating for purposes of provision of Civil Service Reform Act allowing award of "reasonable attorney fees incurred by an employee or applicant for employment" when prevailing in an employment matter, 5 U.S.C. § 7701(g) (1988) (emphasis added), a fee has been "incurred"

Because the duty to provide representation is imposed by law, the union may not exact, as a condition to representation, any promise from the employee to convey the right to a fee award. No obligation, direct or nonrecourse, exists on the employee's part for the legal expenses. No plausible understanding of the term "incurred" could extend to this scenario.

One court has noted that the "lesson" to be drawn from cases considering the requirement that attorney's fees have been incurred "is that EAJA awards should be available where the burden of attorneys' fees would have deterred the litigation challenging the government's actions, but not where no such deterrence exists."⁸⁷⁰ When an employee is guaranteed representation in matters related to the collective bargaining process by reason of the union's statutory duty as exclusive representative, he or she would not "require[] the assistance of a federal fee-shifting statute to overcome the deterrent of attorneys' fees."⁸⁷¹ Thus, if an EAJA award were sought by the employee, or on the employee's behalf, the application should be denied on the grounds that no fee obligation was incurred by the employee.

While this is an obstacle to recovery of EAJA fees by unions in theory, it may not be a great concern in practice. When a union is called by statutory duty to represent the interests of an employee in litigation, the union is able to do so in its own name and as a party to the litigation. Indeed, because the union's duty of fair representation "is coterminous with the union's power as exclusive representative,"⁸⁷² the duty will be implicated only in a context "when a union uses a power that it alone can wield," as, for example, when the collective bargaining agreement provides for a grievance procedure in which the union participates as sole representative of all employees.⁸⁷³ As a formal party to the proceeding, the union would be able directly to seek a fee award in its own right.

Most fair representation cases involve the union's duty to process an employee's grievance with an employer.⁸⁷⁴ Collective bargaining agreements

where an attorney-client relationship exists and counsel has rendered legal services on behalf of the employee, thus allowing a fee award to union-paid counsel). See also *Goodrich v. Department of Navy*, 733 F.2d 1578, 1579 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 1189, 105 S. Ct. 958 (1985).

870. *SEC v. Comserv Corp.*, 908 F.2d 1407, 1415-16 (8th Cir. 1990).

871. See *id.* at 1415 (holding employee whose legal fees were paid by his employer by contractual or statutory obligation had not incurred fees and thus was not eligible for an EAJA award).

872. *American Fed. of Gov't Employees v. Federal Labor Relations Auth.*, 812 F.2d 1326, 1326 (10th Cir. 1987). See also *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564, 96 S. Ct. 1048, 1056 (1976) (stating in private sector labor law, the duty of fair representation imposed upon the union is also "a responsibility equal in scope to its authority"). See *National Treasury Employees Union v. Federal Labor Relations Auth.*, 800 F.2d 1165, 1169-70 (D.C. Cir. 1985).

873. *American Fed. of Gov't Employees*, 812 F.2d at 1328.

874. *The Developing Labor Law*, *supra* note 866, at 1868. See, for example, *Chauffeurs, Teamsters & Helpers, Local 391 v. Terry*, 494 U.S. 558, 110 S. Ct. 1339 (1990) in which the union declined to refer to the grievance committee a challenge by employees to the employer's lay-off and recall policies. In *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903 (1967), an employee alleged he was wrongfully discharged in violation of the collective bargaining agreement and the union had arbitrarily and without cause refused to take his grievance with the employer to arbitration. See also

between labor organizations and employers typically establish a grievance procedure, providing for presentation of the grievance to the employer and binding arbitration in the absence of a satisfactory resolution between the union and employer.⁸⁷⁵ As the statutory agent of the employees, the union generally has the exclusive authority to administer the grievance and arbitration procedures created under the collective bargaining agreement.⁸⁷⁶ Thus, “[w]ages, hours, working conditions, seniority, and job security . . . became the business of [labor unions], as did the contractual procedures for the processing and settling of grievances, including those with respect to discharge.”⁸⁷⁷ If the grievance and arbitration process were to break down, any litigation that might ensue could be pursued by and in the name of the union as part of its continuing duty of fair representation. The union may file suit to compel arbitration of a grievance pursuant to a collective bargaining agreement⁸⁷⁸ or to enforce an arbitration award.⁸⁷⁹ Of course, these lawsuits do not ordinarily implicate the EAJA because the federal government is not the opposing party.

For the federal government to become a party to litigation involving an employee grievance, the matter would either have to be charged as an unfair labor practice before the National Labor Relations Board or involve federal government employees. In the context of private sector employees, it is generally not an unfair labor practice for an employer to refuse to follow the grievance procedure in a collective bargaining agreement or to refuse to comply with an arbitration award.⁸⁸⁰ Accordingly, a grievance matter involving a private sector employee would rarely come before the National Labor Relations Board or implicate the EAJA. However, a federal agency’s refusal to abide by a grievance procedure or to comply with an arbitration award with respect to federal employees may result in an unfair labor practice charge before the Federal Labor Relations Authority, which in turn may result in litigation if a party seeks judicial review.⁸⁸¹

American Fed. of Gov’t Employees, 812 F.2d at 1327-28 (holding federal employees union had no obligation under the statutory duty of fair representation to provide attorneys to represent employees with respect to a statutory disciplinary action that was not a grievance or other procedure growing out of a collective bargaining agreement); *National Treasury Employees Union*, 800 F.2d at 1167-72 (same).

875. *Terry*, 494 U.S. at 564, 110 S. Ct. at 1344.

876. *Vaca*, 386 U.S. at 190-95, 87 S. Ct. at 916-19. The same applies in the context of public employee unions representing federal government employees. Under the Civil Service Reform Act, when a federal government employee is subjected to a disciplinary action and chooses to make a grievance, the union will present the grievance on behalf of the employee. 5 U.S.C. § 7121(b)(3)(A) (1988). If the matter is not resolved to the union’s satisfaction, the union has the exclusive power to invoke binding arbitration with the agency. *Id.* See also *Cornelius v. Nutt*, 472 U.S. 648, 660 n.15, 105 S. Ct. 2882, 2889 n.15 (1985).

877. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563, 96 S. Ct. 1048, 1056 (1976).

878. *E.g.*, *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 77 S. Ct. 923 (1957).

879. *E.g.*, *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364 (1987).

880. Benjamin Aron, *Unfair Labor Practices and the Right to Strike in the Public Sector: Has the National Labor Relations Act Been a Good Model?*, 38 *Stan. L. Rev.* 1097, 1107-08 n.86 (1986).

881. *E.g.*, *Department of Health & Human Servs. v. Federal Labor Relations Auth.*, 976 F.2d

Again, and most importantly, the union would be a formal party to litigation proceedings arising out of an employee grievance matter. Because the union's duty of fair representation is tied to its role as exclusive representative of the employees, the duty will arise only in a context where the union would be the named party enforcing the claimed right. As a party, the union would be the entity that has "incurred" fees, even if the employee on whose behalf a grievance claim or unfair labor practice charge was pursued by the union has not personally incurred fees. As such, the union would be eligible in its own right to a fee award under the EAJA, assuming it met the other eligibility requirements.⁸⁸²

Finally, a labor union often provides legal representation for its members as a service afforded to its members beyond what it is required to do as a matter of statutory obligation.⁸⁸³ A union may provide legal services to its members in a pro bono capacity, acting "as a legal aid organization."⁸⁸⁴ Additionally, a union may give its members the opportunity to participate in a prepaid legal plan.⁸⁸⁵ In either instance, the employee should be eligible for attorney's fees for the same reasons discussed above applying to legal services organizations and litigation insurance plans. In sum, in most instances in which a union would participate in litigation on behalf of an employee, an EAJA award would be available either directly to the union as a prevailing party or to the employee having incurred a nonrecourse obligation for attorney's fees as a customer of legal aid services or litigation insurance.

4. *The Pro Se Litigant and the Requirement of Incurring Fees*

In *Kay v. Ehrler*,⁸⁸⁶ the Supreme Court unanimously held that a lawyer who represented himself pro se in a civil rights action was not eligible for an award of attorney's fees. The Court held that granting a fee award to a pro se litigant, even one who was himself a lawyer, would "create a disincentive to employ counsel

1409, 1413 (D.C. Cir. 1992) (holding judicial review of Federal Labor Relations Authority decision on charge federal agency's refusal to comply with an arbitration award constituted an unfair labor practice); *Department of Air Force v. Federal Labor Relations Auth.*, 775 F.2d 727, 732 (6th Cir. 1985) (same); *United States Marshall's Serv. v. Federal Labor Relations Auth.*, 778 F.2d 1432, 1436 (9th Cir. 1985) (same).

882. See *supra* section III.B.3.d (discussing the eligibility of "organizations," including unions, for an EAJA Subsection (d) award).

883. See, for example, *American Fed. of Gov't Employees v. Federal Labor Relations Auth.*, 812 F.2d 1326, 1327-28 (10th Cir. 1987), in which federal employees union provided attorney representation to members, but not non-member unit employees, in statutory disciplinary actions not part of the duty of fair representation because they do not involve a grievance or other procedure growing out of a collective bargaining agreement. See also *National Treasury Employees Union v. Federal Labor Relations Auth.*, 800 F.2d 1165, 1167-72 (D.C. Cir. 1986).

884. E.g., *Devine v. National Treasury Employees Union*, 805 F.2d 384 (Fed. Cir. 1986), *cert. denied*, 484 U.S. 815, 108 S. Ct. 67 (1987).

885. E.g., *National Treasury Employees Union v. Department of Treasury*, 656 F.2d 848 (D.C. Cir. 1981).

886. 499 U.S. 432, 111 S. Ct. 1435 (1991).

whenever [a pro se litigant] considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case."⁸⁸⁷

The Supreme Court's disapproval of an award of attorney's fees to a pro se litigant in this civil rights case undoubtedly applies generally to bar recovery of attorney's fees by pro se litigants under other fee-shifting statutes as well, including the Equal Access to Justice Act.

The *Kay* decision has been criticized as wrongly assuming that it is foolish or inappropriate for a person, especially a lawyer, to undertake his or her own representation, notwithstanding that a fee award would not be forthcoming unless the pro se had demonstrated sufficient legal ability to prevail in the litigation.⁸⁸⁸ The decision also has been criticized for failing to appreciate that a pro se litigant has incurred "a measurable loss—the value of the time involved in the representation—that is caused by a defendant's wrongful conduct."⁸⁸⁹ Nevertheless, whatever the wisdom of the decision, the Supreme Court's declared policy of encouraging retention of counsel to prosecute claims would apply with full force to preclude an award of attorney's fees to pro se litigants under the EAJA.⁸⁹⁰

Moreover, the reservation of fee awards to cases involving retained counsel is supported by the actual language of the the EAJA. By stating that an award shall be made for fees "incurred by the party,"⁸⁹¹ the EAJA plainly contemplated compensation only for legal expenses for which the party bears an obligation. Although a pro se litigant has experienced a loss in terms of the value of the time devoted to the lawsuit, it cannot be said that he or she has incurred any obligation, whether direct or nonrecourse in nature, to reimburse another party for legal expenses. The courts of appeals have uniformly held that attorney's fees are not available for pro se litigants under the EAJA.⁸⁹²

887. *Id.* at 438, 111 S. Ct. at 1438.

888. Charles Silver, *Incoherence and Irrationality in the Law of Attorney's Fees*, 12 Rev. Litig. 301, 333-40 (1993).

889. *Id.* at 335 n.119.

890. See *Demarest v. Manspeaker*, 948 F.2d 655 (10th Cir. 1991) (citing *Kay v. Ehrler* in holding attorney's fees are not available to pro se litigants under EAJA), *cert. denied*, 112 S. Ct. 1298 (1992).

891. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1988).

892. *Hexamer v. Foreness*, 997 F.2d 93 (5th Cir. 1993); *Demarest v. Manspeaker*, 948 F.2d 655 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1298 (1992); *Naekel v. Department of Transp.*, 845 F.2d 976 (Fed. Cir. 1988); *Merrell v. Block*, 809 F.2d 639 (9th Cir. 1987); *Crooker v. EPA*, 763 F.2d 16 (1st Cir. 1985).