

# JOURNAL OF LEGISLATION

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*Lowell E. Baier*

Abolishing the Prohibition on  
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Preserving the Needle in the Electronic Haystack:  
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Properly Report Employer Wrongdoing

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# REFORMING THE EQUAL ACCESS TO JUSTICE ACT

Lowell E. Baier\*

*The Equal Access to Justice Act (EAJA), which allows the recovery of attorneys’ fees from the federal government when the government’s actions or omissions were not substantially justified, is one of the broadest and widest-reaching federal statutes on the books. This article examines the history and ideological roots of EAJA, focusing on its legislative purpose as a measure that protects individual citizens and small businesses. In exploring EAJA’s mechanisms, it focuses on problems that have emerged with EAJA in recent years, particularly in environmental litigation. It discusses how environmental groups and other non-profits engage in abusive procedural litigation, receive excessive attorneys’ fees in cases totally disconnected from EAJA’s original purpose, and force the government into settlements at great expense. The article then considers reforms, situating the proposed Government Litigation Savings Act of 2011 (GLSA) in the context of past successful and attempted reforms to EAJA.*

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## INTRODUCTION

The Equal Access to Justice Act (EAJA) is one of the broadest-reaching, yet most obscure federal laws in existence. Its basic function is simple: in any case, be it in court or in an administrative agency proceeding, where the federal government’s position is not substantially justified, a prevailing party is entitled to receive attorneys’ fees, provided that there is no other applicable fee-shifting statute. It is a safety net, designed to make sure that a party cannot be harassed by unjustifiable government activity solely because of the prohibitive expense of attorneys’ fees, and it was originally passed to protect the small business community from governmental overreach, just as earlier fee-shifting statutes were designed to promote specific causes such as civil rights litigation.

In the past thirty years, this law has gone from a welcome corrective measure for the small business community to a powerful weapon wielded against federal agencies that has caused them to spend millions of dollars in payments for largely meritless lawsuits, and an almost certainly larger amount of money in preparing for, responding to, and fighting such lawsuits. And it has produced an incalculable waste of taxpayer money and loss of government productivity.

This article explains how EAJA got to its current state, takes a hard look at the abuses proliferating in the EAJA system, and examines reform measures that have been proposed, both in previous Congresses and the current Congress.

Part 1 explains how EAJA came into being. The aim is to not only show a unified and comprehensible congressional intent in passing EAJA, but also to show that this intent was the culmination of a historical process which makes clear the intent underlying EAJA, and why it is different from other fee-shifting statutes in

federal law.

Part 2 then provides an explanation of the evolution of EAJA up to the present. Both parts of the EAJA mechanism (embedded in 5 U.S.C. § 504 and 28 U.S.C. § 2412) are laid out, with explanations of the amendments introduced by Congress in later years, and important court cases interpreting EAJA.

Part 3 discusses the problems with the EAJA system. Though this Part discusses individual aspects separately, it cannot be over-emphasized that they form a system or constellation of problems, each of which contributes to the damage caused by the others. Among these problems are: (1) the routine evasion of the statutory cap on attorneys' fees in a large number of cases; (2) the abusive litigation engaged in by massive 501(c)(3) organizations not subject to the caps; (3) the *Jean* incentive for the government to settle costs disputes, as well as the related ability to turn losing cases into fee-award cases by artful settlement; and (4) perhaps most important of all, the burgeoning costs of the unreformed EAJA system.

Part 4 then examines the proposals to reform EAJA made from 1981 to the present. The article concludes by supporting the pending Government Litigation Savings Act of 2011, though with the caveat that stronger measures are likely necessary to fully correct EAJA.

#### I. THE DEVELOPMENT OF THE ADMINISTRATIVE STATE & THE EQUAL ACCESS TO JUSTICE ACT: EVOLUTION AND REFORM

The Equal Access to Justice Act (EAJA) is a law with unusually deep roots in several historical periods. The deepest, and perhaps most obvious, root of EAJA is the Administrative Procedure Act (APA),<sup>1</sup> the act which centralized the procedures and law of administrative agencies.<sup>2</sup> The APA was a bill of rights for individuals and groups dealing with administrative agencies,<sup>3</sup> and among other things EAJA expands the rights it created; indeed, it is codified in part as an amendment to the APA.<sup>4</sup> But describing EAJA as just an outgrowth or reform of the APA obscures much of the story. It would likely not have been seen as necessary absent the steady expansion of the administrative state and the entitlement programs of the 1950's and 1960's; moreover, though similar in form and emphasis (as a fee-shifting statute) to similar laws passed in the 1970's, instead of emphasizing public goods and mechanisms for public participation, it instead emphasizes protection *from* regulation. EAJA owes as much to the burgeoning wave of anti-regulatory thinking that was gaining prominence in the late 1970's but is more commonly associated with the ascendance of President Ronald Reagan and de-regulation in the 1980's.

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1. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1947), (codified as amended in scattered sections of 5 U.S.C. § 500).

2. See generally George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986).

3. Shepherd, *supra* note 2, at 1558; see also DONALD D. BARRY & HOWARD R. WHITCOMB, *THE LEGAL FOUNDATIONS OF PUBLIC ADMINISTRATION* (3d. ed. 2005).

4. 5 U.S.C. § 504.

This Part examines these historical periods in order to show the hybrid conceptual nature of EAJA. Section A begins with the development of the administrative state, and emphasizes the APA, both as a conceptualization of the appropriate role of the administrative agencies, and as an attempt to provide protections from over-regulation or agency overreach (a repeating theme that would return in force in EAJA's enactment).

Section B discusses the expansion of the administrative state beyond its already substantial state when the APA was passed. It also emphasizes the growth of "entitlement" thinking: of legal, political, and moral arguments about *rights* to various benefits from the government.

Section C looks at the increased concern with civil rights, environmentalism, and other areas of what is now commonly called "public interest" law, as well as the increasing deployment of fee-shifting legislation and its rapid spread across the U.S. code after the *Alyeska* decision. Section C concludes by examining the debate surrounding EAJA before its enactment; this section emphasizes differences between the original version of the bill which aimed at public participation *in* regulation—and the enacted version—which stressed public protection *from* regulation. This section leads into the discussion of the enactment of EAJA itself in Part 2, Section A.

#### A. *The Beginning of the Modern Administrative State*

When Franklin D. Roosevelt (FDR) became America's thirty-second President in 1933, the Great Depression was nearing bottom, following the 1929 stock market crash.<sup>5</sup> The economy was in collapse, and the nation in despair.<sup>6</sup> The prior decade had seen the heights of the *laissez-faire* approach to governance, an approach in which government's role was limited to a policing role to ensure public health and industrial safety, and a facilitating role to private enterprise to promote production and output.<sup>7</sup> The approach relied on market forces to fulfill supply and demand and ensure economic prosperity; the sovereignty of the market was very much assumed.<sup>8</sup> FDR's approach was an open rejection of the *laissez-faire* philosophy of the prior decade. He believed comprehensive intervention and agency regulation by the federal government was essential to achieve economic rehabilitation and equilibrium in the economy.<sup>9</sup> The "New Deal" Administration first promised, and then institutionalized, social and economic security for all citizens, but in return created a reliance and dependency on and control by the federal government characterized by many as a sharp departure from America's foundational character

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5. See generally ANTHONY BADGER, *THE NEW DEAL* (2002); FRANK FREIDEL, *FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY* (2006); WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL* (2009); *THE READER'S COMPANION TO AMERICAN HISTORY* 783-86, 957-58 (Eric Foner & John A. Garraty, eds., 1991) [hereinafter Foner & Garraty].

6. See FREIDEL, *supra* note 5; MURRAY N. ROTHBARD, *AMERICA'S GREAT DEPRESSION* (1963).

7. E.g., Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189, 1191-92 (1985).

8. ROTHBARD, *supra* note 6, at 3-85.

9. See Rabin, *supra* note 7, at 1248.

of enterprise, individualism, and self-reliance.<sup>10</sup>

Through the newly created Works Projects Administration (WPA) (funded with \$5 billion), Roosevelt immediately created an abundance of public works projects to provide jobs for the twenty-five percent of the country unemployed.<sup>11</sup> A national minimum wage and child labor law to protect against exploitation were added in 1938, reinforcing a standard eight hour day, forty hour workweek.<sup>12</sup> The centerpiece of FDR's economic recovery program was the National Industrial Recovery Act,<sup>13</sup> followed by the Agricultural Adjustment Act which provided farm subsidy payments,<sup>14</sup> the Tennessee Valley Authority to address regional poverty and destitution,<sup>15</sup> and the Civilian Conservation Corps (CCC), employing 2.5 million young men improving America's national parks and forests with trails, roads, and structures.<sup>16</sup> Likewise, the Social Security Administration was created in 1935 and provided old age pensions for people sixty-five and older.<sup>17</sup> The old age insurance system was expanded in 1939 to provide survivors insurance for widows and orphans.<sup>18</sup> Later amendments greatly broadened this coverage, indexed them against inflation via cost-of-living adjustments (COLA),<sup>19</sup> and added disability benefits for those unable to work.<sup>20</sup> The 1935 Social Security Act also created the Federal-State Unemployment Compensation Program.<sup>21</sup> "The public came to look upon government as its guarantor against acute economic deprivation,"<sup>22</sup> and FDR's many social and economic programs as entitlements.<sup>23</sup>

Beyond directly trying to provide jobs and federal aid, the New Deal also dramatically expanded the federal government's administrative operations to manage all of the social and economic recovery programs launched in the 1930's. Eleven federal agencies were created in the time period prior to the Civil War.<sup>24</sup> From 1865 to 1933, twenty-two more were added, bringing the total to thirty-

10. This issue is too multifaceted to be explored in depth here. For a discussion of Social Security as a departure from individualism, *see id.* at 1250.

11. *Id.* at 1249.

12. Fair Labor Standards Act, Pub. L. No. 75-718, 52 Stat. 1060 (1938).

13. Rabin, *supra* note 7, at 1243.

14. *See id.* at 1247.

15. *See* PAUL CONKIN, *FDR AND THE ORIGIN OF THE WELFARE STATE* (1967).

16. Rabin, *supra* note 7, at 1250 n.181.

17. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935). In its earliest incarnation, Social Security was an insurance program, with benefits "keyed to contributions during the working life of a recipient." Rabin, *supra* note 7, at 1250. Of course, the program soon grew. For the most complete synopsis and analysis of the 1935 Social Security Act and all subsequent amendments, *see* GARY SIDOR, *CONG. RESEARCH SERV., RL30920, MAJOR DECISIONS IN THE HOUSE AND SENATE ON SOCIAL SECURITY: 1935-2009* (2010).

18. Social Security Amendments of 1939, Pub. L. No. 76-379, § 202, 53 Stat. 1360, 1364-1365 (1939).

19. Act of July 1, 1972, Pub. L. No. 92-336, § 202, 86 Stat. 406, 412-417 (1972).

20. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441 (1980).

21. Social Security Act §§ 301-303, 86 Stat. at 626-627.

22. Rabin, *supra* note 7, at 1253.

23. *See generally* MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* (1986); JAMES T. PATTERSON, *AMERICA'S STRUGGLE AGAINST POVERTY IN THE TWENTIETH CENTURY* (1981).

24. *COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES*, S. DOC. NO. 8, at 7-11 (1941).

three.<sup>25</sup> During the New Deal, seventeen new agencies were created, an increase of more than fifty percent.<sup>26</sup> Among the most notable New Deal agencies were the Civil Aeronautics Board (now the Federal Aviation Administration), National Labor Relations Board, Federal Deposit Insurance Corporation, Federal Communications Commission, Securities and Exchange Commission, and Social Security Administration, each widely recognizable by its acronym.

Congress became concerned about the expanding powers that federal agencies possessed in the administrative regulation of private conduct, rights, and obligations,<sup>27</sup> which Harvard Law School Dean and legal scholar Roscoe Pound termed “administrative absolutism.”<sup>28</sup> Roosevelt himself said these agencies with the authority to execute legislative, judicial, and executive powers “threaten[] to develop a fourth branch of government for which there is no sanction in the Constitution.”<sup>29</sup> The lynchpin justifying expansive federal intervention in all aspects of American life was the country’s economic collapse and the free market’s failure to rebound. The New Deal strategy relied on the expertise of these new federal agencies working collaboratively with industry to develop effective solutions to eliminate economic uncertainty and disruption created by the laissez-faire system. The judiciary, though at first reactive, eventually exercised restraint and deference in shaping agencies’ regulatory policy, and so provided the agencies vast discretionary authority.<sup>30</sup> To challenge an agency’s action, standing and the right to sue required the assertion of a formal legal right, explicitly created by statute, or a common law right, in those “aggrieved or whose interests are adversely affected . . . and then only to protect [a] public interest rather than narrow pursuit of the petitioner’s economic interest.”<sup>31</sup>

Increasing resentment of the agencies’ latitude in matters affecting the rights of private citizens attracted political attention. In the mid 1930’s, FDR directed studies of administrative methodology and conduct within the agencies.<sup>32</sup> In 1939 he ordered the Attorney General to investigate the administrative law process and procedures of the federal agencies and recommend improvements.<sup>33</sup> The AG’s analysis and Final Report were completed in 1941,<sup>34</sup> but were overshadowed by America’s entry into World War II.<sup>35</sup>

These concerns were set aside until the war ended in 1945. In 1946, after seeing the results of the AG’s Final Report as well as a reportedly painstaking and detailed

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25. *Id.*

26. *Id.*

27. Shepherd, *supra* note 2, at 1641-42. *See generally* H.R. REP. NO. 1980 (1946).

28. Rabin, *supra* note 7, at 1264.

29. Franklin D. Roosevelt, *Message from the President of the United States (Jan. 12, 1937)*, in THE PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, at iii-v (1937).

30. *See* Rabin, *supra* note 7, at 1271.

31. *Id.* at 1269.

32. Shepherd, *supra* note 2, at 1584-85.

33. *See* Rabin, *supra* note 7, at 1265 & n.243.

34. S. DOC. NO. 8.

35. Shepherd, *supra* note 2, at 1641-42.

ten-year study that it conducted itself,<sup>36</sup> Congress enacted the Administrative Procedure Act (APA) to promote “accessibility, accountability, and fairness in governance” and “legal and consistent procedures for both fairness to the public and for administrative reasons of consistency, accountability, and efficiency.”<sup>37</sup> One Senator characterized it as “a bill of rights for hundreds of thousands of Americans whose affairs are controlled or regulated” by federal agencies.<sup>38</sup>

The APA’s articulated framework for regulating agencies and insuring due process is as follows: (1) to require agencies to keep the public informed of their procedures and rules; (2) to afford the public participation in the rulemaking process; (3) to establish uniform standards for the conduct of formal rulemaking and adjudication; and (4) to define the scope of judicial review.<sup>39</sup>

The APA defines and organizes administrative agency action in two parts: adjudication and rulemaking. Adjudication of past and present rights and liabilities requires a trial-like hearing and a final decision with a written record of the proceedings subject to judicial review.<sup>40</sup> Rulemaking is a legislative action regulating the future conduct of people by rules and regulations established through hearings, public notice in the Federal Register, and a comment period.<sup>41</sup> It too is subject to judicial review.<sup>42</sup> The APA did not provide for a waiver of the sovereign immunity of the United States; while an agency action could be contested administratively at the agency level, citizens could not then challenge agency actions in federal court unless specifically provided for in the underlying statute giving rise to the dispute.<sup>43</sup> Moreover, no provision was made in the APA for a statutory exception to the American Rule,<sup>44</sup> and so private parties had to bear their own costs and legal fees for agency adjudication. To reverse an agency action, one had to prove the action was “arbitrary and capricious” and not supported by substantial evidence.<sup>45</sup> While the substantial evidence test had theoretically been the norm before the APA, the Supreme Court famously proclaimed Congress’s dissatisfaction with the state of administrative regulation before the APA and the courts’ application of the substantial evidence test in *Universal Camera Corp. v. NLRB*: “It is fair to say that in all this Congress expressed a mood,” while on the one hand “the sponsors of the legislation indicated that they were reaffirming the

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36. H.R. REP. NO. 1980, at 11-16.

37. PUBLIC ADMINISTRATION AND LAW 110 (Julia Beckett & Heidi O. Koenig, eds., 2005).

38. BARRY & WHITCOMB, *supra* note 3.

39. *See generally* U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947), available at <http://www.law.fsu.edu/library/admin/1947cover.html>.

40. Administrative Procedure Act § 5, 60 Stat. at 239-40.

41. *Id.* at § 4, 60 Stat. at 238-39.

42. *Id.* at § 10, 60 Stat. at 243-44.

43. *Id.* In 1976, Congress explicitly provided a waiver of sovereign immunity for all APA cases. Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (1976).

44. The American Rule states that attorneys’ fees are not ordinarily recoverable in the absence of statutory authorization. *E.g.* *Alyeska Pipeline Svc. Co. v. Wilderness Soc’y*, 421 U.S. 240, 240 (1975) (applying the rule to federal cases); *see also* HENRY COHEN, CONG. RESEARCH SERV., 94-970, AWARD OF ATTORNEYS’ FEES BY FEDERAL COURTS AND FEDERAL AGENCIES 1-2 (2009).

45. 5 U.S.C. 706(2)(a) (2006); Rabin, *supra* note 7, at 1265.

prevailing ‘substantial evidence test’ . . . with equal clarity they expressed disapproval of the manner in which the courts were applying their own standards.”<sup>46</sup>

Despite the attempt to “tame potentially unruly [agency] administrators,”<sup>47</sup> and some success on the part of the APA, substantial discretionary authority continued to be the norm.<sup>48</sup> As the Court put it in *SEC v. Chenery*: “Our duty is at an end when it becomes evident that the [agency’s] action is based upon substantial evidence and is consistent with the authority granted by Congress.”<sup>49</sup> Concerns lingered that agencies developed “close informal relationships with constituency groups,” amalgamating public and private decision makers relatively free from judicial interference.<sup>50</sup>

### B. *The Expansion of the Administrative State*

World War II put all of America to work in a unified effort to win the war and preserve Western democracy, and so the resulting period (perhaps excepting the Korean War (1950-53)) was one of major economic expansion, prosperity, and peace.<sup>51</sup> The successive presidential administrations of Harry Truman following FDR’s death in 1945, and especially the two terms of Dwight D. Eisenhower, reinforced a sense of civil security with a deep respect and trust in the federal government as the continually expanding New Deal entitlement programs of the 1930’s, managed by a diversity of federal agencies, provided a safety net for the middle class and the elderly, disabled and poor.<sup>52</sup>

The Eisenhower administration also expanded entitlement programs, including public assistance (Supplemental Security Income) for the needy such as the blind, the handicapped, the disabled, the elderly poor, and single parents with dependent children, later expanded to poor two-parent families with children.<sup>53</sup> Public housing and rent supplements, food stamps and school lunch programs followed, as did the necessary expansion of federal agencies to manage the expanded entitlement programs.<sup>54</sup> President Eisenhower continued to deploy the peace dividend—the continued expansion of the American economy after the kick-start of World War

46. 340 U.S. 474, 487 (1951).

47. Rabin, *supra* note 7, at 1271.

48. *Id.*

49. *SEC v. Chenery Corp.*, 332 U.S. 194, 207 (1947).

50. Rabin, *supra* note 7, at 1271.

51. *See generally* KATZ, *supra* note 23; STEPHEN A. MARGLIN & JULIET B. SCHOR, *THE GOLDEN AGE OF CAPITALISM: REINTERPRETING THE POSTWAR EXPERIENCE* (1992); PATTERSON, *supra* note 23; Michael Dahlen, *The Rise of American Big Government: A Brief History of How We Got Here*, *THE OBJECTIVE STANDARD*, Fall 2009.

52. *See generally* KATZ, *supra* note 23; MARGLIN & SCHOR, *supra* note 51; PATTERSON, *supra* note 23; Dahlen, *supra* note 51.

53. *See* 42 U.S.C. §§ 301-713, 1381-83 (2006).

54. *See* National School Lunch Act, Pub. L. No. 79-396, 60 Stat. 230 (1946); Supplemental Nutrition Assistance Program, 7 U.S.C. § 2013 (2006); GAIL RADFORD, *MODERN HOUSING FOR AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA* (1996); LAWRENCE J. VALE, *FROM PURITANS TO THE PROJECTS: PUBLIC HOUSING AND PUBLIC NEIGHBORS* (2000).

II—with the development of other major public works such as the interstate highway system.<sup>55</sup> All of this led to a massive, albeit relatively gradual, expansion of federal agency authority.

The expansion of administration also made litigation against the United States more frequent and more commonplace. Prior to 1956, judgments against the United States were sporadic enough that Congress still dealt with them by specific congressional appropriations.<sup>56</sup> In 1956, Congress enacted the Judgment Fund, a permanent, indefinite, open-ended appropriation without fiscal year limitations (in this manner paralleling the appropriations for entitlement legislation) for the payment of final judgments against the United States which were not otherwise provided for.<sup>57</sup> In 1961, Congress amended the Judgment Fund statute to allow payments from the fund by the Department of Justice for the settlement of actual or imminent litigation.<sup>58</sup>

The civil rights movement gained national attention in 1954 with the U.S. Supreme Court decision *Brown v. Board of Education of Topeka*, desegregating public schools in Topeka, Kansas.<sup>59</sup> It expanded through the efforts of Dr. Martin Luther King Jr.'s non-violent desegregation efforts in the 1950's and 1960's, and the militancy of other groups such as the Nation of Islam and Malcolm X.<sup>60</sup> This unrest set in part the stage for the expansion of a new era of social programs with the election of President John F. Kennedy followed by President Lyndon Johnson.

President Kennedy wanted to revitalize socially and economically deprived communities using federal agency outreach, and began taking some steps in that direction.<sup>61</sup> Following Kennedy's assassination, President Johnson's War on Poverty was built around the same concept.<sup>62</sup> Johnson first came to Washington in 1937 as a New Deal loyalist, and as President (1963-69) he was outspokenly resolved to broaden and expand FDR's "New Deal" by creating the "Great Society."<sup>63</sup> Where FDR's justifications for massive government intervention were the economic distress, unemployment, uncertainty, and dislocation caused by the Great Depression, Johnson's justifications for expanded federal government intervention were racial discrimination, social disenfranchisement, and regional

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55. Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374 (1956). *See generally* STEPHEN AMBROSE, *EISENHOWER: SOLDIER AND PRESIDENT* (1990).

56. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-978SP, *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 14-2 to -8* (2008).

57. This appropriation is located at 31 U.S.C. § 1304 (1956).

58. Act of Aug. 30, 1961, Pub. L. No. 87-187, 75 Stat. 415-16 (1961) (codified as amended at 28 U.S.C. § 2414 (2006)).

59. 347 U.S. 483 (1954).

60. *See generally* STOKELY CARMICHAEL WITH EKWUEME MICHAEL THELWELL, *READY FOR REVOLUTION* (2003); MALCOLM X: THE MAN AND HIS TIMES (John Henrik Clarke ed., 1969); ROBERT WEISBROT, *FREEDOM BOUND: A HISTORY OF AMERICA'S CIVIL RIGHTS MOVEMENT* (1990).

61. *See* Rabin, *supra* note 7, at 1272.

62. *Id.*

63. ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER* (1982); Foner & Garraty, *supra* note 5, at 600-01; Editorial, *The Road to a Downgrade, A Short History of the Entitlement State*, WALL ST. J., July 28, 2011 [hereinafter *The Road to a Downgrade*].

poverty.<sup>64</sup> Johnson's expansions of the administrative state were to prove among the most consequential: social reforms included federal education aid, a liberal immigration law, major civil rights legislation (most notably the Civil Rights Act of 1964 and Voting Rights Act of 1965), Medicaid, subsidizing healthcare for the poor, and Medicare for all others over 65.<sup>65</sup>

The Great Society, like the New Deal, brought dramatic expansion of federal agencies to the expanding social reform and entitlement programs in health, housing, education, and public welfare. These mandatory contributory social insurance programs account for sixty-six percent of the national budget today, not including veterans' medical programs, or military and federal civilian retirement programs and pensions.<sup>66</sup>

Johnson's War on Poverty was also codified in the Economic Opportunity Act of 1964 (EOA) which prescribed "maximum feasible participation" among the poor and disenfranchised.<sup>67</sup> Neighborhood service centers staffed by federal employees were established throughout the country as the institutional mechanism to deliver federal programs addressing physical and mental health, housing, urban renewal, education, family planning, manpower training, legal aid, juvenile delinquency, and related welfare programs.<sup>68</sup> From these community-based centers arose a reform movement of organized group efforts led by community leaders and organizers who resorted to militant tactics like demonstrations, marches, and sit-ins to embarrass state and municipal welfare administrators into action, energizing local programs under the rubric of the "maximum feasible participation" ordained by the 1964 EOA.<sup>69</sup>

The National Welfare Rights Organization led the reform movement throughout the 1960's on the thesis that "welfare should be recognized as a *right*, not a *privilege*, and a guaranteed minimum income should be assured to every family by the federal government."<sup>70</sup> Some thinkers conceptualized various entitlements as something akin to property rights,<sup>71</sup> while others conceptualized them as expanded due process rights.<sup>72</sup>

The erosion of political support and the continuing political counter-emphasis on the ethos of individualism and self-reliance eventually led to the dismantling of many of the Great Society's welfare programs following Johnson's departure in 1969.<sup>73</sup> But the legacy of maximizing local and individual participation in federal agency proceedings set a precedent for the future of regulatory agency response and reform during major economic, political and societal turmoil affecting broad public

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64. Rabin, *supra* note 7, at 1272-73, 1275, 1279.

65. *Id.* at 1272-78; *see also* CARO, *supra* note 63.

66. *The Road to a Downgrade*, *supra* note 63.

67. Rabin, *supra* note 7, at 1273.

68. *Id.*

69. *See id.*; ALLEN J. MATUSOW, *THE UNRAVELING OF AMERICA* (1984); Foner & Garraty, *supra* note 5, at 471.

70. Rabin, *supra* note 7, at 1277 (emphasis added).

71. *See, e.g.*, Charles Reich, *The New Property*, 73 *YALE L.J.* 773 (1964).

72. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970).

73. *See* Rabin, *supra* note 7, at 1278 n.298.

interests for two decades thereafter.

*C. The Era of Public Interest Law: Civil Rights, Consumerism, and Environmentalism*

At roughly the same time, trust in the federal government began to wane. The assassination of Dr. King in 1968 and the ensuing race riots, which destroyed many inner cities, divided and polarized the country.<sup>74</sup> America was at war in Southeast Asia, and many questioned the commitment made in Washington to militarily democratize South Vietnam, a failed exploit which ended fifteen years later in a humiliating loss at a cost of 58,220 Americans killed, 153,303 wounded, 1,687 missing in action and \$111 billion.<sup>75</sup> America's involvement provoked angry, militant anti-war protests spanning almost two decades, and a bitterness and distrust of government that survives yet today in generations of veterans, and those who lost family members and friends.<sup>76</sup>

In the early 1970's, distrust of government only grew, as a series of crises underlined the failings of government. From the Watergate scandal<sup>77</sup> to the skyrocketing price of oil,<sup>78</sup> there was cause for unease. Matters worsened when the Yom Kippur War caused the 1973-1974 oil embargo, and with shortages compounded by Richard Nixon's earlier price controls on domestic oil,<sup>79</sup> rationing became widespread.<sup>80</sup> The OPEC cartel steadily raised oil prices, which reached over \$80 a barrel during the second major energy crisis in 1979.<sup>81</sup> The response to the oil crises included significant regulatory growth. A national maximum speed

74. See generally WEISBROT, *supra* note 60.

75. STEPHEN DAGGETT, CONG. RESEARCH SERV., RS22926, COSTS OF MAJOR U.S. WARS 2 (2010); ANNE LELAND & MARI-JANA OBOROCEANU, CONG. RESEARCH SERV., RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 11 (2010); DEFENSE PRISONER OF WAR/MISSING PERSONNEL OFFICE, VIETNAM-ERA STATISTICAL REPORT: AMERICANS UNACCOUNTED FOR IN SOUTHEAST ASIA (June 1, 2011), available at <http://www.dtic.mil/dpmo/vietnam/statistics/2011/documents/Stats20110602.pdf>.

76. Rabin, *supra* note 7, at 1281.

77. *Watergate Retrospective: The Decline and Fall*, TIME, Aug. 19, 1974, available at <http://www.time.com/time/magazine/article/0,9171,942983,00.html>. See generally CARL BERNSTEIN AND BOB WOODWARD, *THE FINAL DAYS* (1976).

78. The initial rise in the price of oil from its stability in the late 1960's was largely caused by U.S. government action, as President Richard Nixon abandoned the gold standard and ended the Bretton Woods Accord, destabilizing international financial markets. See generally DANIEL YERGIN, *THE PRIZE: THE EPIC QUEST FOR OIL, MONEY AND POWER* (1991); David Hammes & Douglas Wills, *Black Gold: The End of the Bretton Woods and the Oil-Price Shocks in the 1970's*, 9 INDEP. REV. 501 (2005).

79. See DAVID FRUM, *HOW WE GOT HERE: THE 70'S: THE DECADE THAT BROUGHT YOU MODERN LIFE—FOR BETTER OR WORSE* (2000); RITCHIE OVENDALE, *THE ORIGINS OF THE ARAB-ISRAELI WARS* (2004); YERGIN, *supra* note 78; Roy Licklider, *The Power of Oil: The Arab Oil Weapon and the Netherlands, the United Kingdom, Canada, Japan, and the United States*, 32 INT'L STUD. Q. 205, 209 (1988).

80. In fact, gasoline rationing coupons like those used during World War II were printed but never distributed. FRUM, *supra* note 79; *Gas Fever: Happiness is a Full Tank*, TIME, Feb. 18, 1974; *Rationing Coupons Shredded*, N.Y. TIMES, June 2, 1984; *Rationing: Spotty Local Starts*, TIME, Feb. 25, 1974.

81. See YERGIN *supra* note 78; Licklider, *supra* note 79; *The Arabs' Final Weapon*, TIME, Sep. 17, 1973.

limit of 55 MPH was imposed by the Emergency Highway Energy Conservation Act.<sup>82</sup> Development of the U.S. Strategic Petroleum Reserve began in 1975,<sup>83</sup> and in 1977 the cabinet-level Department of Energy was created,<sup>84</sup> followed by the National Energy Act of 1978.<sup>85</sup>

The mood of the times was such that the leadership and wisdom of both political and business leaders were “no longer taken for granted.”<sup>86</sup> Over the same two decades, a steady drumbeat of consumer products complaints and environmental disasters was driving regulatory growth. Ralph Nader and his followers attacked the consumer products industry, beginning with the auto industry, which he vilified in his 1965 book *Unsafe at Any Speed*. These efforts and similar ones led to a host of federal consumer product safety laws to protect the consumer. The Auto Safety Act of 1966 was a direct response to Nader’s persistence, followed by the Wholesome Meat Act of 1967, the Magnuson-Moss Warranty Act, the FTC Improvements Act that restructured the Federal Trade Commission, and the creation of the Consumer Products Safety Commission in 1972.<sup>87</sup>

Environmental disasters in the 1960’s and 1970’s further eroded the public’s trust of the federal government and gave rise to an important new movement – environmentalism. The hazards of atomic fallout had become a public concern due to worries about nuclear war, and that continued throughout this period.<sup>88</sup> Rachel Carson published *Silent Spring* in 1962, alerting America to the danger of uncontrolled pesticides like DDT which were killing the environment, thereby igniting the beginning of the environmental movement to protect man and nature.<sup>89</sup> Lake Erie was declared “dead,” contaminated by the uncontrolled dumping of heavy metals, phosphorus and other man-made industrial pollutants.<sup>90</sup> The Santa

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82. Emergency Highway Energy Conservation Act, Pub. L. No. 93-239, 87 Stat. 1046 (1974).

83. See Energy Policy and Conservation Act, Pub. L. No. 94-163, §§ 151-166, 89 Stat. 871, 881-90 (1977).

84. Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1980).

85. The National Energy Act of 1978 is the collective name for the following statutes: Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1980); Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 (1980); National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 (1980); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 (1980); Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (1980).

86. Rabin, *supra* note 7, at 1281-82.

87. *Id.* at 1283-84. “A number of consumer protection laws followed the 1966 Motor Vehicle Safety Act. Some of the most significant legislation of this period . . . included the Federal Cigarette Labeling and Advertising Act of 1966, the Child Protection Act of 1966, the Fair Packaging and Labeling Act of 1966, the Wholesome Poultry Products Act of 1967, the Flammable Fabrics Act of 1967, the Natural Gas Pipeline Safety Act of 1968, the Federal Consumer Credit Protection Act of 1968, the Radiation Control Act of 1968, the Coal Mine Health and Safety Act of 1969, the Child Protection and Safety Toy Act of 1969, the Fire Research and Safety Act of 1969, and the Fair Credit Reporting Act of 1970.” *Id.* at 1284 n.317.

88. See *Radioactive Fallout from Nuclear Testing at Nevada Test Site 1950-60: Hearing Before the Subcomm. on Labor, Health and Human Services and Education, and Related Agencies, S. Comm. on Appropriations*, 105th Cong. (1997); *Study: 1950’s Nuclear Fallout Worse than Thought*, CNN, Mar. 1, 2002, available at [http://articles.cnn.com/2002-03-01/us/nuclear.fallout\\_1\\_nuclear-tests-fallout-hot-spots?](http://articles.cnn.com/2002-03-01/us/nuclear.fallout_1_nuclear-tests-fallout-hot-spots?)

89. See Rabin, *supra* note 7, at 1282.

90. NOEL M. BURNS, *ERIE: THE LAKE THAT SURVIVED* 111-24 (1985). See generally WILLIAM MCGUCKEN, *LAKE ERIE REHABILITATED: CONTROLLING CULTURAL EUTROPHICATION 1960S-1990S* (2000).

Barbara oil spill in 1969 despoiled California beaches.<sup>91</sup> The Cuyahoga River in Cleveland caught fire in 1969, the 10th time since 1868, bringing national attention to its environmental pollution from industrial wastes being dumped in it for over a century.<sup>92</sup> Continuous smog alerts in Los Angeles were identified as causing widespread respiratory illnesses.<sup>93</sup> Public awareness of acid rain developed in the 1970's following a series of *New York Times* articles on earlier scientific reports of the environmental damage acid rain was causing in the Northeast.<sup>94</sup>

In 1978, the Love Canal located in Niagara Falls, NY, became the “national symbol of [our government's] failure to exercise a sense of concern for future generations.”<sup>95</sup> Twenty-one thousand tons of toxic waste had been negligently disposed of in the canal by the Hooker Chemical Company, contaminating the adjacent thirty-six block neighborhood and leading to the relocation of 800 families and reimbursement for their homes and lots.<sup>96</sup> And finally, the Three Mile Island nuclear disaster in 1979 capped two decades of increasing awareness of environmental disasters and further deepened America's lack of trust in the federal government, with the Nuclear Regulatory Commission cited for lack of performance, control and response to the disaster.<sup>97</sup>

It became apparent the existing laws and regulations to protect and insure the public's safety and health and the environment had not been adequate. Economists, in particular George Stigler, were developing theories explaining why regulatory agencies were subject to ‘capture’—a phenomenon where, by virtue of concerted effort on the part of the regulated industries, regulatory agencies would begin to regulate from the perspective of those industries instead of in the public interest.<sup>98</sup> There was a ground swell of support for scrutiny of the federal government's actions and demands for massive enactment of consumer protection and environmental laws and regulations in the 1960's-70's.<sup>99</sup>

The public's interest in these new laws and regulations exposed numerous

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91. Rabin, *supra* note 7, at 1282.

92. See Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 *FORDHAM ENVTL. L.J.* 89, 90, 101-03 (2002).

93. Rabin, *supra* note 7, at 1282.

94. See JOHN A. HANNIGAN, *ENVIRONMENTAL SOCIOLOGY: A SOCIAL CONSTRUCTIVIST PERSPECTIVE* 130-32 (1995).

95. Sam Howe Verhovek, *After 10 Years, the Trauma of Love Canal Continues*, *N.Y. TIMES*, July 29, 2008, at B1 (quoting Commissioner David Axelrod, New York State Health Department).

96. See CRAIG E. COLTEN & PETER N. SKINNER, *THE ROAD TO LOVE CANAL* (1996); LOIS MARIE GIBBS, *LOVE CANAL: AND THE BIRTH OF THE ENVIRONMENTAL HEALTH MOVEMENT* (2010); ALLAN MAZUR, *A HAZARDOUS INQUIRY* (1998).

97. Thomas R. Wellock, *Three Mile Island: A Nuclear Crisis in Historical Perspective*, 67 *HISTORIAN* 507, 547-48 (2005) (book review).

98. See, e.g., George Stigler, *The Theory of Economic Regulation*, 2 *BELL J. OF ECON. & MGMT. SCI.* 3, 3-18 (1971).

99. The new environmental laws included the following: Clean Air Act (1963, substantially amended 1970); The Wilderness Act (1964); Water Quality Control Act (1965); Clean Water Restoration Act (of 1966); Endangered Species Preservation Act (ESA) (1966, substantially amended 1969 and 1973); The National Environmental Policy Act (NEPA) (1970); Wild Free-Roaming Horses and Burros Act (1971); Marine Mammal Protection Act (1972); National Forest Management Act (1976); Federal Land Policy and Management Act (1976); and the Resource Conservation and Recovery Act (1976).

structural weaknesses in federal regulatory agencies, stemming largely from the latter's confusion over the interrelationship between their dual functions as advocates for and judges of the public interest. The public demanded the protections afforded by these new laws, and the right to privately enforce them if the federal agencies failed to do so, and so hold the government and big business accountable for their actions or omissions.<sup>100</sup>

The National Environmental Policy Act (NEPA)<sup>101</sup> was an important component of this regulatory reform, since it forced federal agencies to assess and afford substantial preference to intangible aesthetic, environmental and conservation values, and fully explain their decisions and actions as they related to public interests.<sup>102</sup> NEPA went a substantial step farther than the APA had in making it clear that federal agencies did not have a blank check of discretionary authority – at least not when statutorily enumerated values were in play.<sup>103</sup>

Judicial recognition of the rise of environmental consciousness and the birth of public interest environmental law can be attributed to three major cases: *Scenic Hudson Preservation Conference v. FPC*,<sup>104</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*,<sup>105</sup> and *Tennessee Valley Authority v. Hill*.<sup>106</sup> In *Scenic Hudson*, the court ordered the FPC to account for preservation of all forms of natural life (i.e. conservation); assess intangible aesthetics, scenic beauty, natural heritage, and historic values in decision-making; and permit third party intervenors to contribute materially to the proceedings.<sup>107</sup> *Overton Park* established that these intrinsic, intangible values are of extraordinary magnitude and are to be treated as paramount in agency decisions.<sup>108</sup> The *Hill* case established the primacy of wildlife and species conservation over economic considerations.<sup>109</sup>

These developments helped shape a national perspective that led to the broadening of the waiver of the United States' sovereign immunity in certain instances, notably the Clean Air Act, Clean Water Act, and Endangered Species Act, empowering the public to initiate private citizen suit litigation against both the federal government and big business. This was enhanced further by Congress legislatively permitting the recovery of attorneys' fees, making a host of statutory exceptions to the American Rule.<sup>110</sup> The 1970s clearly became the era of public interest representation, and it's not surprising that the two leading environmental

100. See *infra* notes 117-123 and accompanying text.

101. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

102. *Id.* §§ 4332-33. NEPA's "distinctive" system of Environmental Impact Statements were far reaching, in contrast with the rest of the Act's largely aspirational language. See Rabin, *supra* note 7, at 1284-85.

103. National Environmental Policy Act of 1969 § 4331.

104. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

105. 401 U.S. 402 (1971).

106. 437 U.S. 153 (1978).

107. 354 F.2d at 624-25. This case has been described as marking the birth of the environmental movement "more than any other single judicial decision." Rabin, *supra* note 7, at 1297-98.

108. 401 U.S. at 412-13.

109. 437 U.S. at 194.

110. See COHEN, *supra* note 44; Henry Cohen, *Awards of Attorneys' Fees Against the United States: The Sovereign is Still Somewhat Immune*, 2 W. NEW ENG. L. REV. 177 (1979).

public interest law firms were established in that period: the Natural Resources Defense Council in 1970 as a byproduct of the *Scenic Hudson* case,<sup>111</sup> and in 1971 the Sierra Club Legal Defense Fund, called Earthjustice after 1997.<sup>112</sup>

When the Clean Air Act (1963),<sup>113</sup> Clean Water Act (1965)<sup>114</sup> and the Endangered Species Act (1966)<sup>115</sup> were initially enacted, none provided for a waiver of sovereign immunity, authorized private citizen suits, or authorized the recovery of attorneys' fees. To enforce each, a citizen had to establish a related violation of the APA. However, the APA did not authorize the recovery of attorneys' fees. Provoked by continuing environmental disasters, and looking to the example of civil rights legislation which did provide for private citizen suits and the recovery of attorneys' fees, each of these three statutes were amended in 1970, 1972 and 1973, respectively.<sup>116</sup>

The first citizen-suit provision in an environmental statute to waive sovereign immunity and provide fee shifting was the 1970 amendment to the Clean Air Act.<sup>117</sup> The amendment granted standing to private citizens to enforce the Act by bringing suit against violators, and alternatively to protect themselves from an overzealous EPA (which enforced the Clean Air Act) by likewise bringing suit against the EPA.<sup>118</sup> For this reason, the citizen suit provision is also known as a "private attorney general" provision.<sup>119</sup> The 1970 amendment further provided for the reimbursement of attorneys' fees and litigation costs to any party whenever a court deemed it appropriate, whether from the federal government or private defendants.<sup>120</sup>

The Clean Water Act was likewise amended in 1972 to provide for private citizen suits, thereby waiving the federal government's sovereign immunity.<sup>121</sup> The 1973 Endangered Species Act amendment did the same.<sup>122</sup> Like the Clean Air Act, both the Clean Water Act and Endangered Species Act amendments also provided for the shifting of litigation costs, including reasonable attorneys' fees and expert witness fees, for the benefit of the prevailing or substantially prevailing party.<sup>123</sup> The appropriated source of money for such reimbursement by the federal government was the Judgment Fund, administered by the Department of Justice

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111. Rabin, *supra* note 7, at 1298.

112. Earthjustice, OUR HISTORY, [http://earthjustice.org/about/our\\_history](http://earthjustice.org/about/our_history) (last visited Aug. 14, 2011).

113. Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963).

114. Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965). The 1965 Act was itself an amendment to the Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1949).

115. Act of Oct. 15, 1966, Pub. L. No. 89-669, 80 Stat. 926 (1966).

116. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

117. Clean Air Act Amendments of 1970 § 304, 84 Stat. at 1706-07.

118. *Id.*

119. COHEN, *supra* note 44, at 5.

120. Clean Air Act of 1970 § 304(d), 84 Stat. at 1706.

121. Federal Water Pollution Control Act Amendments of 1972 § 505, 86 Stat. at 888-89.

122. Endangered Species Act of 1973 § 11(g), 87 Stat. at 900-01.

123. Endangered Species Act of 1973 § 11(g)(4), 87 Stat. at 901; Federal Water Pollution Control Act Amendments of 1972 § 505(d), 86 Stat. at 889.

totally free of oversight or accountability.<sup>124</sup>

However, other than the Clean Air, Clean Water, and Endangered Species Acts, none of the other consumer protection or environmental statutes enacted in the 1960s and 1970s provided for either private citizen suits, or the fee shifting to reimburse them for attorneys' fees and litigation costs. The only other statutory vehicle a private citizen had to challenge the federal government's agency action was the APA, but again, that had no provision for recovering attorneys' fees.

The prime regulatory agencies of immediate concern to private citizens and especially small business owners were both created in 1970: the Environmental Protection Agency (EPA), headed by William D. Ruckelshaus, and the Occupational Safety and Health Administration agency (OSHA), headed by George Guenther.<sup>125</sup> In addition to the public outcry these two new agencies caused by their enforcement methods, the Internal Revenue Service, Social Security Administration, Department of Veterans Affairs, Equal Employment Opportunity Commission, Federal Trade Commission, and the Department of Labor were next on the public's radar for overzealous and arbitrary enforcement or lack of compliance with the laws and regulations they were charged to administer.<sup>126</sup> But the explosion of lawsuits over enforcement of many of the new environmental statutes had yet to occur.

Running parallel to the enactment of the many new environmental statutes and regulations during this time period was a lawsuit begun in 1970 that ultimately made its way before the U.S. Supreme Court as *Alyeska Pipeline Service Co. v. Wilderness Society*.<sup>127</sup> On May 12, 1975, the Court ruled that federal agencies and courts did not have the authority to award attorneys' fees and litigation costs to any party acting as a private attorney general in the absence of express statutory authority.<sup>128</sup> The Supreme Court's *Alyeska* decision struck like dynamite, and immediately prompted Congress to, amongst other responses, enact the Civil Rights

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124. See Endangered Species Act of 1973 § 11(g)(4), 87 Stat. at 901; Water Pollution Control Amendments of 1972 § 505(d), 86 Stat. at 889; Clean Air Act of 1970 § 304(d), 84 Stat. at 1706; see also discussion *supra* p. 9.

125. *Chronology of EPA Administrators*, U.S. ENVIRONMENTAL PROTECTION AGENCY (June 13, 2011), <http://www.epa.gov/aboutepa/history/admin/agency/index.html>; *Occupational Safety & Health Administration, Former Assistant Secretaries (1971-2009)*, U.S. DEPARTMENT OF LABOR, [http://www.osha.gov/as/opa/former\\_secretaries.html](http://www.osha.gov/as/opa/former_secretaries.html) (last visited Sep. 16, 2011).

126. See generally *Judicial Access/Court Costs: Hearings on H.R. 5103 & 6429 Before the Subcomm. on SBA and SBIC Authority & General Small Business Problems of the H. Comm. on Small Business*, 96th Cong. (1980) [hereinafter *Judicial Access/Court Costs*]; *Equal Access to Courts: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 95th Cong. (1978) [hereinafter *Equal Access to Courts*]; *Public Participation in Agency Proceedings: Hearings on H.R. 3361 and Related Bills Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 95th Cong. (1977) [hereinafter *Public Participation in Agency Proceedings*]; *Public Participation in Federal Agency Proceedings Act of 1977: Hearings on S. 270 Before the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary*, 95th Cong. (1977) [hereinafter *Public Participation in Federal Agency Proceedings Act of 1977*]; *Public Participation in Federal Agency Proceedings, S. 2715: Hearing on S. 2715 Before the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary*, 94th Cong. (1976) [hereinafter *Public Participation in Federal Agency Proceedings, S. 2715*].

127. 421 U.S. 240 (1975).

128. *Id.* at 269.

Attorneys' Fee Awards Act of 1976,<sup>129</sup> since civil rights was an area in which the award of attorneys' fees had traditionally been regarded as appropriate.<sup>130</sup> Related bills followed.

Among these bills were broad proposals by the Department of Justice and by Senator Edward Kennedy (D-MA). The Department of Justice proposed a bill to automatically pay attorneys' fees in any federal litigation to a prevailing party.<sup>131</sup> Senator Kennedy also wanted to create a generic law to cover fees in a wide variety of cases to underwrite the actions of private attorney generals acting in the public interest, and avoid a Senate filibuster every time a fee shifting provision was added to proposed legislation.<sup>132</sup> Public interest groups, including the ACLU, testified before Congress that the *Alyeska* decision "struck a sharp blow at the public interest bar by cutting off its most promising economic base."<sup>133</sup> Others saw *Alyeska* as a "trend towards making legal recourse less accessible to ordinary citizens."<sup>134</sup>

The ferment created by *Alyeska* led to the precursors of EAJA. However, the first such proposals were very much in the environmentalist or public-interest mode. Eight days following the Supreme Court's *Alyeska* decision, S. 2530, a bill to provide equal access to the courts when suing the federal government, was introduced on October 20, 1975 on the floor of the U.S. Senate by Senator James L. Buckley (D-NY) as public interest legislation.<sup>135</sup> It was assigned to the Senate Judiciary Committee for consideration, where it remained.<sup>136</sup>

Shortly thereafter, however, on November 20, 1975, Senator Edward Kennedy introduced Senate bill 2715, the "Public Participation in Government Proceedings Act of 1976," which proposed to amend the APA.<sup>137</sup> The intent of this bill was to improve the public's perception of their relationship with the federal government, make government more responsive and responsible to private citizens, and increase public participation in federal agency proceedings.<sup>138</sup> Concerned that the costs of hiring attorneys and expert witnesses barred most Americans from participating in government agency proceedings, the bill initially proposed providing funding for legal fees *in advance* for private citizens or public interest organizations to hire attorneys.<sup>139</sup> Senator Buckley suggested also including criminal defendants with

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129. 42 U.S.C. §1988(b).

130. See S. REP. NO. 94-1011 (1976).

131. S. REP. NO. 95-737 (1978).

132. See generally *Public Participation in Agency Proceedings*, supra note 126, at 32-39; *Public Participation in Government Proceedings Act of 1976: Hearing on S. 2715 Before the S. Comm. on Government Operations*, 94th Cong. 12-13 (1976) [hereinafter *Public Participation in Government Proceedings Act of 1976*].

133. *Causes of Popular Dissatisfaction with the Administration of Justice: Hearing Before the Subcomm. on Constitutional Rights of the Committee on the Judiciary*, 94th Cong. 67 (1976).

134. *Id.* at 121.

135. *Bill Summary & Status, 94th Congress (1975-1976), S.2530, All Information*, LIBRARY OF CONGRESS, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d094:S.2530:@@L> (last visited Jan. 12, 2012).

136. *Id.*

137. *Public Participation in Federal Agency Proceedings, S. 2715*, supra note 126.

138. See generally *Public Participation in Government Proceedings Act of 1976*, supra note 132.

139. *Public Participation in Federal Agency Proceedings, S. 2715*, supra note 126, at 14; S. REP. NO. 94-

civil litigants.<sup>140</sup>

The criteria for advance funding required (1) a high likelihood the agency could provide the petitioner the relief sought in substantial measure; (2) that the agency proceeding served an important public purpose; (3) that the petitioner represented an interest which could reasonably have been expected to contribute substantially to a fair determination of the proceeding, and provide a fair balance of interests; (4) that the economic interest of the person or organization was small in comparison to the cost of effective participation in the proceeding; and (5) that the petitioner did not have sufficient resources to participate effectively in the absence of an *advance* payment for attorneys' fees.<sup>141</sup> In this early proposal, \$10 million per year for an experimental three-year period was to be appropriated and a central, independent disbursing agent designated to coordinate attorneys' fee awards.<sup>142</sup> This made perfect sense for a Congress that was struggling to re-examine the nature and scope of the agencies' administrative processes in the light of public pressure embodied by the host of new environmental and public-interest statutes of the 1970s.

If agencies were generally incapable of regulating in the public interest without considering the viewpoints of all the segments of the public included in the regulatory process (a judgment already embedded in the APA),<sup>143</sup> the next logical step was to reimburse citizens for participating in the agency process and thereby improving it. Congresswoman Shirley Chisholm (D-NY) encouraged an "affirmative action approach" in the legislation to bring in those who had been "locked out of the decision making process by virtue of their income, their race, their economic scale or their educational limitations."<sup>144</sup>

Senator Edward Kennedy described the intent of the legislation as "encouraging participation by groups, whether they are women, minorities, the elderly, consumers, environmentalists, or other different elements in our society, whose interests have not been represented before the various agency decisions in the past."<sup>145</sup> Presciently, one witness in a Senate hearing characterized the scope of the pending legislation as follows:

When we talk about reimbursing citizen organizations, everybody seems to think we are talking about paying the Sierra Club or the Environmental Defense Fund. And I know it is not the intent of your bill to do that. You are talking about paying any citizen organization which can contribute to the proceedings . . . . You are not just talking about financing the public interest bar or financing so-called environmental groups. You are talking about giving citizens of all stripes the ability to come in and test their notions and have their points of view heard.<sup>146</sup>

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863, at 23 (1976).

140. *Public Participation in Federal Agency Proceedings*, S. 2715, *supra* note 126, at 75.

141. *Id.* at 149.

142. *Id.* at 70; S. REP. NO. 94-863, at 45 (1976).

143. *See Public Participation in Federal Agency Proceedings*, S. 2715, *supra* note 126.

144. *Id.* at 78.

145. *Public Participation in Government Proceedings Act of 1976*, *supra* note 132, at 13 (testimony of Senator Edward M. Kennedy).

146. *Public Participation in Federal Agency Proceedings*, S. 2715, *supra* note 126, at 53. (testimony of Tersh Boasberg).

This early concept of funding attorneys' fees in advance to serve private citizens and broad public interest groups was discredited as setting a dangerous precedent that would raid the Treasury by incentivizing special interest groups to litigate for their own sake and to further their own interests, as well as encouraging parties to bring insubstantial claims.<sup>147</sup> Regulatory agencies were already backlogged and overburdened, and broader citizen participation would only delay proceedings.<sup>148</sup> It was further argued that the legislation would encourage the participation of those with the least financial interest in the outcome, but failed to cover those who were most affected.<sup>149</sup> One public interest law firm testified that narrow interest groups such as the Sierra Club would dominate, and it would be more burdensome for regulatory agencies to determine what was in the public interest if constantly faced with special interest concerns.<sup>150</sup> The same witness also raised concerns about the possibility of collusion between agency staff and special interests groups if the groups were further rewarded by receiving fee award compensation from the same agency.<sup>151</sup>

After President Jimmy Carter took office on January 20, 1977, Congress began to intensify their efforts to redefine and narrow the scope of EAJA. The American economy was rapidly spiraling downward with another major recession looming and interest rates rising to historic levels. Both small and large business enterprises were in crisis, with unemployment high at 7.5 percent, and small businesses, in particular, were struggling to survive and meet payroll.<sup>152</sup> This brought a new urgency to enacting EAJA, which was redefined to meet the needs of average citizens and small businessmen for attorneys to protect their businesses and their rights from being damaged by what Senator Pete Domenici characterized as a "bureaucratic blitzkrieg" waged in Washington on America's businesses.<sup>153</sup> The enforcement of new regulations created by EPA and OSHA became drivers that sparked the outrage of small business.<sup>154</sup> Moreover, expanding enforcement and

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147. *Public Participation in Government Proceedings Act of 1976*, *supra* note 132, at 24 (testimony of Joseph C. Swidler).

148. *See* S. REP. NO. 94-863, at 8 (1976) (testimony of Ben Blackburn).

149. *See Public Participation in Federal Agency Proceedings Act of 1977*, *supra* note 126, at 103.

150. *See Public Participation in Government Proceedings Act of 1976*, *supra* note 132, at 60 (testimony of John T. C. Low, Southeastern Legal Foundation).

151. *See id.* at 60-61.

152. *See* FRUM, *supra* note 79. President Carter's own words best portray the despair of the nation over the 1979 oil shock crisis:

It is a crisis of confidence . . . a crisis that strikes at the very heart and soul and spirit of our national will . . . . We can see this crisis in the growing doubt about the meaning of our own lives and in the loss of a unity of purpose for our Nation. . . . The erosion of our confidence in the future is threatening to destroy the social and the political fabric of America . . . . Our people are losing . . . faith, not only in government itself but in the ability as citizens to serve as the ultimate rulers and shapers of our democracy . . . . Looking for a way out of this crisis, our people have turned to the Federal Government and found it isolated from the mainstream of our nation's life. Washington, D.C., has become an island.

President Jimmy Carter, Speech, Crisis of Confidence (July 15, 1979), *available at* [http://www.cartercenter.org/news/editorials\\_speeches/crisis\\_of\\_confidence.html](http://www.cartercenter.org/news/editorials_speeches/crisis_of_confidence.html).

153. *See* 123 CONG. REC. 39,116 (1977).

154. *See Judicial Access/Court Costs*, *supra* note 126; *Equal Access to Courts*, *supra* note 126; *Public Participation in Federal Agency Proceedings Act of 1977*, *supra* note 126.

new regulations in other agencies, such as the National Labor Relations Board, Equal Employment Opportunity Commission, Federal Trade Commission, and the Department of Labor were causing American businesses enormous costs they could not afford.<sup>155</sup>

In this atmosphere, the tide began to turn against regulation. Unrest in Iran caused a second oil crisis in 1978,<sup>156</sup> and the U.S. prime rate for borrowing money immediately jumped to ten percent, before increasing steadily to its historic high of 21.5% by December 1980.<sup>157</sup> This led to an asset/liability crisis throughout the savings and loan industry causing massive failures to occur.<sup>158</sup> The regulatory systems in place provided inadequate protection against this crisis, and the Carter administration began a phased deregulation of oil price controls in April, 1979.<sup>159</sup> It was the beginning of the era of deregulation.<sup>160</sup>

As the deregulation movement began to coalesce, the initial wholesale public interest approach to EAJA of providing advance funding for all groups to participate rapidly lost favor, and instead Congress turned to the pressing need to enable private citizens and small businesses to challenge regulatory agencies. The central principle remained that if a party prevailed against the government, it would be eligible to recoup attorneys' fees.

Senator Pete Domenici (R-NM) introduced the revised legislation on the Senate floor during the 95th Congress on December 15, 1977 (S. 2354), with Senator Gaylord Nelson (D-WI) making the following statements in support: "In case after case, a federal bureaucratic blitzkrieg has rolled over innocent victims, causing unjustified damage to large numbers of business enterprises and individuals."<sup>161</sup> He continued, "The need for this legislation highlights a basic dilemma which the U.S. faces along with the other industrial democracies. Can we have a powerful national government to enforce the laws which protect public health and safety and preserve competition in the marketplace, while avoiding a government which is so powerful, intrusive and arbitrary that it poses a menace to individual and economic freedom?"<sup>162</sup>

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155. See generally *Equal Access to Courts*, *supra* note 126; *Public Participation in Federal Agency Proceedings*, S. 2715, *supra* note 126.

156. See YERGIN, *supra* note 78, at 785; *Another Crisis for the Shah: A Grim Week of Strikes, Slowdowns and Lingering Discontent*, TIME, Nov. 13, 1978, at 44.

157. *Prime Interest Rate History*, FEDPRIMERATE.COM, [http://www.wsjprimerate.us/wall\\_street\\_journal\\_prime\\_rate\\_history.htm](http://www.wsjprimerate.us/wall_street_journal_prime_rate_history.htm) (last visited Nov. 27, 2011).

158. Timothy Curry & Lynn Shibut, *The Cost of the Savings and Loan Crisis*, 13 FDIC BANKING REV. 26, 27 (2000); Ramon P. DeGennaro & James B. Thompson, *Capital Forbearance and Thrifts: An Ex Post Examination of Regulatory Gambling*, FED. RES. BANK OF CHI. PROC. 406, 406 (May 1993).

159. President Jimmy Carter, Energy Address to the Nation (Apr. 5, 1979), in [1989] 1 PUB. PAPERS 609-14 (1980).

160. See STEPHEN BREYER, REGULATION AND ITS REFORM 4 (1982); ROBERT E. LITAN & WILLIAM D. NORDHAUS, REFORMING FEDERAL REGULATION 1 (1983); Cynthia R. Farina, *Undoing the New Deal Through The New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 230 (1998); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001).

161. 123 CONG. REC. 39,117 (1977).

162. *Id.* at 39,119.

## II. THE EQUAL ACCESS TO JUSTICE ACT

As detailed above, by the late 1970's Congress's general focus had shifted to the protection of small business and individuals from the reach of an overzealous regulatory state. With that goal set, the development of the new EAJA legislation proceeded swiftly. This Part focuses on EAJA itself. Section A discusses the passage of and subsequent amendments to EAJA, while Section B explores the many changes and controversies that EAJA, like any legislation, has been subjected to over the years. Section C concludes by providing a primer on how EAJA applications currently work. This Part highlights several provisions which while historically uncontroversial, have played an extremely significant role in recent developments.

### A. The Passage of EAJA

As it ultimately passed, EAJA served two purposes. First, it continued the trend of waiving sovereign immunity to place the United States on equal footing with other litigants. Since 1966, 28 U.S.C. 2412 had provided for the recovery of court costs from the United States.<sup>163</sup> EAJA built upon this by providing that the United States could be held liable for another party's attorneys' 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."<sup>164</sup> But EAJA did much more than this, also creating a completely novel structure whereby the United States could be held liable for attorneys' fees in situations where no private party ever had been under the American Rule. This was intended to protect citizens and businesses from the long, sometimes arbitrary arm of government regulation.

Thus, when Senator Domenici reintroduced the EAJA legislation in the 96th Congress (S. 265) on January 31, 1979, he described the bill as necessary because "[i]ndividuals and small businesses are in far too many cases forced to knuckle under to regulations . . . because they cannot afford the adjudication process."<sup>165</sup> Original co-sponsor Senator Dennis DeConcini (D-AZ) echoed Senator Domenici's remarks: "Through the device of fee shifting, this legislation will improve our citizens' access to courts and administrative proceedings. It will encourage them to vindicate their rights and not to acquiesce in a ruling or sanction which they believe arbitrary, misguided or unfair."<sup>166</sup> Senator DeConcini further commented on the importance of taking fee awards from the budgets of offending agencies as a "quantitative measure of whether an agency is engaging in excessive unreasonable regulation."<sup>167</sup> S. 265 was reported out and recommended to the Senate by the Judiciary Committee on July 20, 1979, and passed the Senate on July 31, 1979 by a vote of ninety-four to three. The counterpart House bill H.R. 2846 was introduced

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163. Act of July 18, 1966, Pub. L. No. 89-507, § 1, 80 Stat. 308, 308 (1966).

164. Equal Access to Justice Act, Pub. L. No. 96-481, §§ 204(a), 94 Stat. 2321, 2328 (1980).

165. 125 CONG. REC. 1437 (1979).

166. *Id.* at 1439.

167. *Id.*

on September 6, 1979 by Representative Morris Udall (D-AZ), and a similar bill, H.R. 6429, was introduced on February 5, 1980 by Representative Joseph McDade (R-PA). Significantly, the House bills provided as an essential element that to qualify to collect attorneys' fees and litigation costs for challenging an agency decision, a party had to have a direct and personal interest in the action of the government, have suffered an injury, or have a likelihood of suffering irreparable harm.<sup>168</sup>

Initial projections of EAJA's cost were high: the Department of Justice estimated that the legislation could cost the government as much as \$250 million per year.<sup>169</sup> The Congressional Budget Office projected a lower cost of \$108 million in 1980, and \$137 million by 1982.<sup>170</sup>

The House and Senate had been moving in tandem throughout the 95th and 96th Congresses considering substantively similar versions of the same EAJA bill. As the House and Senate moved towards consensus and closure on EAJA in the spring and summer of 1980, and with the 96th Congress attempting to rapidly adjourn ahead of the presidential election, House bill H.R. 6429, titled the Small Business Equal Access to Justice Act, was reported out of the Committee on Small Business on May 16, 1980. On June 10, 1980, it was incorporated as Title II in a much larger small business bill (H.R. 5612), and passed in the House on a roll call vote of 367 to 33, with 33 members not voting. On September 19, 1980, the Senate Select Committee on Small Business sent H.R. 5612 to the Senate for approval. On September 26th, the House Judiciary Committee approved and referred to the House for approval the Senate's version of EAJA, S. 265, accepting the Senate bill as written notwithstanding the House's slightly different approved version of EAJA. On the same day, September 26th, the Senate incorporated S. 265 into H.R. 5612 and passed the bill by simple voice vote.

Because the House and Senate versions of the bill were not identical in their wording and differed on several concepts, they were submitted to a Congressional Conference Committee for reconciliation. The joint Conference Committee of the House and Senate met, and their report was filed with the House and Senate on September 30, 1980. The next day, October 1, 1980, both the House and Senate approved the final version of the bill and sent it to the White House for President Carter's signature. On October 21, 1980, H.R. 5612 became Public Law 96-481. President Carter issued this statement:

[The] legislation provides small businesses with "equal access to justice" – another high priority of the White House Conference on Small Business. Many small businesses have learned from bitter experience that when an unfair action is brought against it by a Government agency it may be cheaper and easier to pay a fine than to fight for vindication. This new law will change that . . . . Some of the

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168. H.R. REP. NO. 96-1005, pt. 1, at 9 (1980). This is significant because the requirement was subsequently dropped. See discussion *infra* p. 29.

169. E.g., *The Awarding of Attorneys' Fees in Federal Courts: Hearings Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 95th Cong. 89 (1978) [hereinafter *The Awarding of Attorneys' Fees in Federal Courts*].

170. S. REP. NO. 96-253, at 10 (1979).

proposals previously advanced were too broad in their application and too expensive, but this legislation strikes a fair balance between the Government's obligation to enforce the law and the need to encourage business people with limited resources to resist unreasonable Government conduct.<sup>171</sup>

Since EAJA was characterized as an "experimental bill" by the Congress with a three year sunset (September 30, 1984), Congress kept a careful eye on the Act through five congressional hearings and five committee reports between the date of EAJA's enactment on October 1, 1980, and the date of its permanent reenactment on July 24, 1985.

One of Congress' primary concerns about EAJA had been its potential costs. While in 1979 the Congressional Budget Office had projected that EAJA would cost over \$100 million during the experimental three-year period,<sup>172</sup> in 1985, it produced new projections putting the annual cost at \$3 million in 1986, growing to \$7 million by 1990.<sup>173</sup> The following table of costs lists the actual costs and number of EAJA applications, including both agency and court cases that occurred during fiscal years 1982-1984, as reported by the Administrative Conference of the United States and the Administrative Office of the U.S. Courts:<sup>174</sup>

Fiscal Year	Total Apps.	# Granted	Total EAJA	Avg. Award
1982	133	13	\$676,692	\$52,053
1983	121	60	\$1,727,556	\$28,793
1984	423	170	\$1,370,240	\$8,060

Given the early utilization of EAJA, several specific issues of concern materialized. Congress particularly sought to clarify the meaning of certain key statutory phrases, including "position of the United States," "substantially justified," and "prevailing party," and to adjust the definition of "party" to make it consistent in both agency adjudications and court proceedings, which the 1980 statute failed to do. These developments, and others, are more thoroughly addressed in Section B of this Part.<sup>175</sup>

After 1980, EAJA was established law, but it was just beginning its journey to its present form. Because the original bill contained a sunset provision effective September 30, 1984, it was necessary for the legislation to be permanently reauthorized. Congress first did so on October 11, 1984, in a bill that was ultimately vetoed by President Ronald Reagan.<sup>176</sup> President Reagan did not disapprove of EAJA itself, instead insisting on a series of technical changes desired by the

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171. Presidential Statement on Signing H.R. 5612 into Law, 16 WEEKLY COMP. PRES. DOCS. 2381 (October 21, 1980).

172. See discussion *supra* note 170.

173. H.R. REP. NO. 99-120, pt. 2, at 2 (1985).

174. See ADMIN. CONFERENCE REPORTS, *infra* note 232; ADMIN. OFFICE REPORTS, *infra* note 232.

175. See *infra* Part 2.B.

176. Memorandum of Disapproval of H.R. 5479, 20 Weekly Comp. Pres. Docs. 1814, 1814 (Nov. 8, 1984) (Re: Equal Access to Justice Act Amendments).

Department of Justice.<sup>177</sup> Notably, in a *Memorandum for the Heads of Executive Departments and Agencies* issued alongside the veto, Reagan directed agencies to “accept and retain on file any applications for awards of fees and expenses . . . and . . . continue to provide . . . appropriate assistance in making such applications . . . as if the Act were in force . . . such claims shall then be reviewed by the agency in accordance with the terms of the reauthorized Act . . . particularly to small businesses . . . .”<sup>178</sup> This directive reinforced the fact that EAJA’s purpose was to enable private citizens and small business to defend themselves from overzealous regulatory agencies. After some changes were made,<sup>179</sup> on August 8, 1985, Reagan finally signed a new, permanent Equal Access to Justice Act.<sup>180</sup>

This bill was also explicitly tied to small business, with Rep. Robert Kastenmeier (D-WI) explaining that “[t]he main purpose of the legislation is to ensure access to justice for individuals and small businesses and organizations who are involved in civil disputes with the Federal Government.”<sup>181</sup> Senator Domenici, again the Senate champion of the bill, echoed his House colleague on the purpose of EAJA:

[T]he essential concept of the Equal Access to Justice Act is that when a small business or individual citizen prevails in litigation with the Federal Government, that was initiated by the Federal Government, then that individual or business entity should be reimbursed for his or her attorney’s fees and costs if the government’s position was not substantially justified . . . [w]e must eliminate the possibility of . . . Pyrrhic victories . . . . Equal justice is not available when one cannot afford to fight.<sup>182</sup>

Senator Dale Bumpers (D-AK) elaborated: “We believe that if a small business successfully challenges the Federal bureaucracy . . . [it] should be able to recover [its] costs.”<sup>183</sup> The reenactment of EAJA, however, did not occur without opposition. One agency in particular, the National Labor Relations Board (NLRB), complained about the administrative burden EAJA had placed on the agency, certainly a prescience for the more significant burden it would place on the Departments of Agriculture and Interior two decades later: “[T]he act has had a negative impact on the agency’s mission, in the sense that it has necessitated an expenditure of resources that could otherwise have been utilized in handling NLRB

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177. *Id.* at 1815. DOJ was concerned that absent an explicit statutory statement otherwise, EAJA litigation could be used as an excuse to open the record and essentially re-litigate the merits of the case. *See infra* pp. 26-27.

178. Memorandum from the President, 20 WEEKLY COMP. PRES. DOCS. 1815, 1815 (Nov. 8, 1984) (Re: Equal Access to Justice Act).

179. Specifically, *inter alia*, provisions responding to DOJ’s concerns. *See infra* pp. 26-27.

180. Act of Aug. 5, 1985, Pub L. No. 99-80, 99 Stat. 183.

181. 131 CONG. REC. 16,916 (1985).

182. *Id.* at 20,354. A host of business and professional associations as well as government agencies supported EAJA’s permanent reenactment. *Id.* at 16,916-17, 20,354.

183. *Id.* at 20,354.

matters at a time when we could least afford it.”<sup>184</sup> The act had cost NLRB \$275,000 in administrative and personnel costs alone in the first full year of enactment. Nonetheless, EAJA once again became law in 1985.

The 1985 EAJA varied from the 1980 EAJA in several ways. The most significant alterations are discussed more thoroughly in the following section, but in essence the new version of the law resolved some conflicts by making 5 U.S.C. 504 and 28 U.S.C. 2412(d) (the administrative process and judicial sections, respectively) more closely mirror each other,<sup>185</sup> by establishing that the “position of the United States” included the position underlying the litigation as well as its position in the litigation,<sup>186</sup> and by specifying that any court inquiry in an EAJA case must be based solely on the record, either the record generated in court or the record generated before an agency.<sup>187</sup> It also made EAJA permanent.<sup>188</sup>

Subsequent to 1985, there were several more minor amendments to EAJA, predominantly of a technical nature, including amendments in 1986,<sup>189</sup> 1988,<sup>190</sup> 1992,<sup>191</sup> 1993,<sup>192</sup> 1995,<sup>193</sup> 1996,<sup>194</sup> 1998,<sup>195</sup> and 2011.<sup>196</sup> The most significant of these revisions was in 1992, when Congress added proceedings before the Court of Appeals for Veterans Claims to the scope of EAJA,<sup>197</sup> and in 1995, when Congress stopped the reporting of EAJA payments.<sup>198</sup> Like any other law, EAJA has constantly been adjusted to remain current.

184. *Equal Access to Justice: Hearing Before the Subcomm. on Agency Admin. of the S. Comm. on the Judiciary*, 97th Cong. 130 (1982) [hereinafter *Equal Access to Justice*].

185. Act of Aug. 5, 1985 § 1(c). For example, as originally drafted the net worth cap was clear in Title 5 but ambiguous in Title 28. *Implementation of the Equal Access to Justice Act: Oversight Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 3 (1982) [hereinafter *Implementation of the Equal Access to Justice Act*] (testimony of J. Paul McGrath, Assistant Att’y Gen., Civil Div., U.S. Dep’t of Justice). The amendments corrected this. § 2(c), 99 Stat. at 185.

186. Act of Aug. 5, 1985 §§ 1(c), 2(c), 99 Stat. at 184, 185.

187. *Id.* at §§ 1(a), 2(b), 99 Stat. at 183, 184-85.

188. *Id.* at § 1(c), 99 Stat. at 184.

189. Tax Reform Act of 1986, Pub. L. No. 99-514, § 2, 100 Stat. 2085, 2095 (1986).

190. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 5239(b), 102 Stat. 3342, 3746 (1988).

191. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, §§ 301(a), 502(b), 506, 902(b)(1), 106 Stat. 4506, 4511, 4512, 4513, 4516 (1992).

192. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 4(b), 107 Stat. 1488, 1489 (1993).

193. Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 104-66, § 1091(b), 109 Stat. 707, 722 (1995) (repealing the Department of Justice reporting requirements).

194. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, §§ 231-32, 110 Stat. 847, 862-63 (1996).

195. Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 512, 112 Stat. 3315, 3341-3342 (1998).

196. Act of Jan. 4, 2011, Pub. L. No. 111-350, § 5(a), 124 Stat. 3677, 3841-42 (2011).

197. Federal Courts Administration Act of 1992 § 506, 106 Stat. at 4513.

198. Federal Reports Elimination and Sunset Act of 1995 § 1091(b), 106 Stat. at 722.

*B. Growing Pains: Controversial Inclusions and Exclusions in 1980, 1985, and Subsequent Court Cases*

Because EAJA created an unprecedentedly large exception to the American Rule, it should be no surprise that it did not function perfectly from the onset. A large amount of the 98th Congress's energy in reauthorizing EAJA in 1985 was devoted to improving the act. Moreover, Supreme Court decisions, both direct EAJA cases and some others, have had a great impact on EAJA as well. This section will explore each significant issue in turn, highlighting the evolution of EAJA and bringing its history down to the present.

1. Position of the United States

One issue that was unclear in the 1980 EAJA was the meaning of the "position of the United States" that EAJA requires to be "substantially justified." Following the passage of EAJA, courts differed on the proper interpretation of the "position of the United States."<sup>199</sup> The issue was whether the underlying action of the agency should be considered or just the position of the government during the EAJA litigation afterwards. As the Department of Justice explained, the Reagan Administration was concerned that the "position of the United States" issue was burdening the courts by trying the underlying claim not once, but twice, leading to extensive discovery of how the underlying agency position was formulated. This would inhibit free discussion and exchange of ideas within an agency for fear of later discovery and judicial inquiry. The 98th Congress addressed this issue by clarifying in H.R. 5479, their final EAJA reenactment bill, that the position of the United States "includes the underlying agency action which led to the litigation." To facilitate this, agencies and the courts considering EAJA applications were directed to the administrative, factual record made before the agency or district court.<sup>200</sup>

The "position of the United States" issue lingered, however, because in litigation the government sought ways to limit its liability under EAJA. One way it did so was by attempting to distinguish between the underlying proceeding and the EAJA proceeding. The government's argument was that so long as the government's position in *opposing the fees* was "substantially justified," it should not pay attorneys' fees incurred during the EAJA proceeding. The Supreme Court ended the debate in the 1990 case *Commissioner, INS v. Jean*.<sup>201</sup> In *Jean*, the Court held that the government could not avoid paying for attorneys' fees incurred in a successful fee application following a case that otherwise qualified for EAJA.<sup>202</sup> This definitively established that, for the purpose of evaluating the position of the United States in an EAJA case, the entire case is a single unit. Fees ought to be

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199. *Equal Access to Justice*, *supra* note 184, at 144.

200. Act of Aug. 5, 1985 §§ 1(a), 2(b), 99 Stat. at 183, 184-85.

201. 496 U.S. 154 (1990)

202. *Id.* at 161.

denied for any issue on which the opposing party did not “prevail,”<sup>203</sup> but there is only one substantial justification determination in a given case. *Jean* marked the end of the government’s attempts to make arguments to the contrary.

## 2. Substantially Justified

In addition to having to refine the definition of “position of the United States” after 1980, it was also necessary to settle the standard for “not substantially justified.” Congress struggled to define it over the three year period leading up to EAJA. The determinative standard finally agreed upon in 1980 was a reasonable basis rule, under which the government can avoid liability if it can demonstrate that it had a reasonable basis in both law and fact for its action. This standard struck a balance between the mandatory or presumptive fee awards proposed in early versions of EAJA and the Department of Justice’s recommended completely discretionary award of fees where a court finds that the government’s position was “arbitrary, frivolous, unreasonable, or groundless.” Moreover, the burden of proof was placed on the government because it had control of the evidence and easier access to knowledge of the facts in question. Congress believed it was easier for the government to prove the reasonableness of its action than for a private party to show that the government was unreasonable in its action.

However, some federal courts, particularly the D.C. Circuit, focused on a Senate report from the 1980 EAJA deliberations that rejected the term “reasonably justified” and instead held that a standard of “substantially justified” should be used, which was more stringent than one of reasonableness.<sup>204</sup> In 1985, the House Judiciary Committee issued a report approving of these cases, and explaining that “[b]ecause in 1980 Congress rejected a standard of ‘reasonably justified’ in favor of ‘substantially justified,’ the test must be more than mere reasonableness.”<sup>205</sup> However, the Congress as a whole never took a position on the issue, and no correlative amendment was made to EAJA.

The issue instead passed to the Supreme Court, which settled it in 1988, in the case *Pierce v. Underwood*.<sup>206</sup> The Court held that the 1980 legislative history was superior to the 1985 legislative history, for the latter was neither an authoritative interpretation of the statute (the domain of the courts) nor an authoritative expression of Congressional intent (being merely a House Committee report).<sup>207</sup> This ruling lessened the burden on the government, since the now uniform standard to show that an action was substantially justified was the easier one, and reduced the potential for over-zealous attorneys’ fees awards under EAJA.<sup>208</sup>

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203. *Id.* at 163.

204. *E.g.*, *Spencer v. NLRB*, 712 F.2d 539, 546-558 (D.C. Cir. 1983).

205. H.R. REP. NO. 99-120, at 9 (1985); see Louise L. Hill, *An Analysis and Explanation of the Equal Access to Justice Act*, 19 ARIZ. ST. L. J. 229, 243 (1987).

206. 487 U.S. 552 (1988).

207. *Id.* at 566-67.

208. For more information on “substantially justified,” including a detailed discussion of factors courts consider in making the “substantially justified” determination, see Gregory C. Sisk, *The Essentials of the*

### 3. Prevailing Party – The *Buckhannon* Standard

To recover attorneys' fees and litigation costs under EAJA a petitioner has to prove that he was the "prevailing party" in the outcome of a proceeding. Congress again struggled to define the intent behind this term and ultimately construed the standard broadly to mean prevailing on less than all the issues in a case. A settlement or a dismissal, either voluntary or directed, in favor of the petitioner or on an interim order central to the case, would be enough to be eligible to recover one's attorneys' fees and costs.<sup>209</sup> This legislative history was consistent with the landmark case *Ruckelshaus v. Sierra Club*.<sup>210</sup> *Ruckelshaus* interpreted a very different type of fee-shifting statute, one that had existed for over a decade, which provided for an award of fees "whenever appropriate."<sup>211</sup> In *Ruckelshaus*, the Supreme Court determined that it was not "appropriate" to award attorneys' fees to a party that did not achieve any success on the merits,<sup>212</sup> but that total success was not necessary either.<sup>213</sup>

*Ruckelshaus* did not apply to EAJA, however, because EAJA only authorized attorneys' fee awards to a "prevailing party." Several cases touched on the "prevailing party" language over the years, and the Supreme Court finally issued a definitive interpretation in 2001, in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*.<sup>214</sup> Although not explicitly an EAJA case,<sup>215</sup> *Buckhannon* has been uniformly applied to EAJA.<sup>216</sup> In *Buckhannon*, the Court rejected the possibility that a party, through filing a lawsuit, was a catalyst for government action who could recover attorneys' fees as a

*Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two)*, 56 LA. L. REV. 1, 18-78 (1995).

209. H.R. REP. NO. 96-1005, pt. 1, at 9 (1980).

210. 463 U.S. 680 (1983).

211. When the case was decided, sixteen statutes used this language, including the Clean Air Act, the Clean Water Act, and the Endangered Species Act. For a full list, see *id.* at 682 n.1. For a discussion of interpretations of this language, see, for example, Joshua E. Hollander, Note, *Fee-Shifting Provision in Environmental Statutes: What They Are, How They Are Interpreted, and Why They Matter*, 23 GEO. J. LEGAL ETHICS 633, 638-39 (2010).

212. *Ruckelshaus*, 463 U.S. at 694.

213. *Id.* at 690.

214. 532 U.S. 598 (2001).

215. Cf. Macon Dandridge Miller, Note, *Catalysts as Prevailing Parties Under the Equal Access to Justice Act*, 69 U. CHI. L. REV. 1347 (2002). Miller's piece, written shortly after *Buckhannon* came down, argued the *Buckhannon* rule should not be applied to EAJA for a variety of reasons. *Id.* at 1348. Subsequent holdings by lower courts uniformly disagreed with this analysis. See *infra* note 216 and accompanying text.

216. *E.g.*, Aronov v. Napolitano, 562 F.3d 84, 88-89 (1st Cir. 2009); Othman v. Chertoff, 309 F. App'x 792, 794 (5th Cir. 2008) (unpublished opinion); Ma v. Chertoff, 547 F.3d 342, 344 (2d Cir. 2008); Biodiversity Conservation Alliance v. Stem, 519 F.3d 1226, 1230 (10th Cir. 2008); Morillo-Cedron v. Dist. Dir. for the U.S. Citizenship & Immigration Servs., 452 F.3d 1254, 1257-58 (11th Cir. 2006); Goldstein v. Moatz, 445 F.3d 747, 751 (4th Cir. 2006); Marshall v. Comm'r of Soc. Sec., 444 F.3d 837, 840 (6th Cir. 2006); Vacchio v. Ashcroft, 404 F.3d 663, 673-74 (2d Cir. 2005); Thomas v. Nat'l Sci. Found., 330 F.3d 486, 492 n.1 (D.C. Cir. 2003); Brickwood Contractors, Inc. v. United States, 288 F.3d 1371, 1377-78 (Fed. Cir. 2002); Perez-Arellano v. Smith, 279 F.3d 791, 794-95 (9th Cir. 2002).

prevailing party.<sup>217</sup> The Court explained that “a defendant’s voluntary change in conduct . . . lacks the necessary judicial *imprimatur*”<sup>218</sup> to convey “prevailing party” status. This has been widely restated as holding that for there to be a “prevailing party,” there must be a “judicially sanctioned change in the legal relationship of the parties.”<sup>219</sup> In theory, this case ought to have reduced the number of EAJA payments made to environmental organizations in out-of-court settlements but, as will be shown, it has not. By stipulating that a catalyst party is the “prevailing party” in a settlement agreement approved by court order pursuant to *Kokkonen v. Guardian Life Insurance Co.*,<sup>220</sup> plaintiffs have been able to achieve “prevailing party” status merely by a settlement agreement (regardless of the settlement terms) incorporated into a court’s consent decree, notwithstanding *Buckhannon*.<sup>221</sup>

#### 4. Defining the Limits of EAJA Eligibility: How to Qualify as a “Party” and the Net-Worth Exception for 501(c)(3) Organizations

Even leading up to the passage of EAJA in 1980, a fierce battle was fought over the question of what sorts of parties qualified for EAJA awards. In particular, key language in the House version of EAJA that required a party to have a direct and personal interest in the proceedings to qualify for an EAJA award was deleted during the Conference Committee’s reconciliation of the two bills.<sup>222</sup> The report of the Committee on Small Business specified that this qualifying standard meant that to qualify, a party must have been “injured, in imminent threat of injury, or [be] likely to suffer irreparable harm.” The Committee’s expressed intent was that EAJA “should not provide funds for intervenors, friends of the court or others who have not been injured.”<sup>223</sup> Ultimately this standard was not included in EAJA, and as later history will show, the absence of this qualifying standard created a loophole in EAJA that permitted environmental groups to repeatedly sue agencies and recoup

217. *Buckhannon*, 532 U.S. at 600-01.

218. *Id.* at 605.

219. *E.g.* *District of Columbia v. Jeppsen ex rel. Jeppsen*, 514 F.3d 1287, 1291 (D.C. Cir. 2008); *Dattner v. Conagra Foods, Inc.*, 458 F.3d 98, 102 (2d Cir. 2006); *John T. ex rel. Paul T. v. Del. Cnty. Intermediate Unit*, 318 F.3d 545, 556, 559 (3d Cir. 2003).

220. In *Kokkonen*, the Supreme Court held that a district court can embody a settlement contract in an order of dismissal, and thus retain jurisdiction over a settled case. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 381 (1994).

221. As one commentator put it: “Because it appears that the catalyst theory is dead under EAJA, plaintiffs must either obtain a ‘judicially sanctioned change in the legal relationship of the parties,’ or incorporate fees into a court-approved settlement agreement.” Patrick Parenteau, *Citizen Suits Under the Endangered Species Act: Survival of the Fittest*, 10 WIDENER L. REV. 321, 349 (2004) (footnote omitted). A more detailed history of the catalyst theory is available in Lucia A. Silecchia, *The Catalyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1 (2004).

222. Notably, this standard is stricter than the standard for Art. III standing. *See generally* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992). It would have been possible for a party to litigate successfully, but not be deemed to have a direct enough interest to recover its attorneys’ fees. *See infra* Part 3.B.

223. H.R. REP. NO. 96-1005, pt. 1, at 9 (1980).

millions in legal fees.

However, some qualifying standards were included. In the 1980 EAJA, individuals with a net-worth exceeding \$1 million were explicitly disqualified from employing EAJA to recover legal fees, as were businesses with a net worth exceeding \$5 million.<sup>224</sup> In 1985, these limits were retained but increased to \$2 million for individuals and \$7 million for organizations.<sup>225</sup>

As finally passed, there were crucial exceptions to this cap on net-worth. One, disingenuously labeled a “technical change” during the reconciliation of the House and Senate bills, has had far-reaching consequences: a provision that non-profit 501(c)(3) organizations could utilize EAJA without regard to the net-worth limitations that applied to private individuals and businesses. Notwithstanding limited but spirited discussions regarding the role of 501(c)(3) organizations in utilizing EAJA over the course of the six years of its legislative history, this provision never appeared in any hearing, report, or legislative draft until it first appeared on September 26, 1980 in the House Committee on the Judiciary Report (96-1418) accompanying their review of S. 265. Just four days later, on September 30, 1980, the joint House and Senate Conference Committee Report was issued, and the reconciled bill was approved by both the House and Senate the next day, October 1, 1980. Neither report offered any explanation or reason for this key last-minute addition to the bill. While the true history of the insertion will remain shrouded in time, the later impact of this stealth amendment is measured in millions of dollars in cost to the taxpayers.

The sudden appearance of the exception for 501(c)(3) organizations making it easier for them to access EAJA funds is particularly shocking given the tone of the prior debate on the issue. Debate on whether non-profit 501(c)(3) organizations should be permitted to utilize EAJA at all began as early as 1976. Senator Mac Mathias (D-MD) reflected the views of many who strongly believed that “public interest” groups added to agency proceedings and needed to be included within EAJA “to ensure their effective participation” as part of America’s democratic process.<sup>226</sup> The central concept of the bill early on was to promote responsible and responsive decision making for all Americans. Frequent reference was made during the many hearings to legislation of the prior decade providing for the award of attorneys’ fees to the poor, minorities and women for civil rights enforcement, which had enabled and stimulated intervention by public interest groups.<sup>227</sup> In essence, this view was that 501(c)(3)s, and especially public interest law firms, represented and fulfilled the role of the public in agency and regulatory deliberations when others could not due to a lack of financial and legal resources.

Many witnesses, however, questioned whether these “public interest” groups were not really “special interest” groups in disguise, which really represented the narrow views of a few. In defense, Senator Edward Kennedy, an early champion of the bill, remarked, “[a]s you know, there have been comments made that this is sort

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224. Equal Access to Justice Act §§ 203(a), (b), 94 Stat. at 2326, 2329.

225. Act of Aug. 5, 1985 §§ 1(c), 2(c), 99 Stat. at 183, 185.

226. *Public Participation in Federal Agency Proceedings*, S. 2715, *supra* note 126, at 4.

227. *See id.* at 6, 174, 329.

of a public service relief bill for lawyers. And it is very important that we disprove that at the very outset.”<sup>228</sup> The Southeastern Legal Foundation’s position at many hearings reflected the thinking of many opponents of the bill. They wanted 501(c)(3)s to be prohibited from utilizing EAJA because those groups were already receiving a subsidy in the form of their tax exempt status, and did not need any additional subsidies. The Southeastern Legal Foundation argued that, by the same token, poorly funded organizations were not representative, and so were unworthy of further subsidy. Finally, the group suggested that if non-profits were to be allowed to utilize EAJA, then an organization’s total award should be limited to a hard cap of \$5-10,000 in any one year.<sup>229</sup> The widely-respected Judge George E. MacKinnon of the U.S. Court of Appeals for the District of Columbia Circuit submitted a remarkably blunt assessment:

What this bill is really asserting is that interested citizens must be subsidized to present their views to Federal agencies. I see no substantial proof to support that assertion. . . . It has been my experience that meritorious views generally attract their own financial support when they need it.

In practically every case I have seen where agency action is attacked by public interest protestants or litigants they are usually very well funded by voluntary organizations that enjoy tax-free status.<sup>230</sup>

The Washington Legal Foundation reinforced Judge MacKinnon’s position:

We fear that the biggest beneficiary of any provision allowing successful plaintiffs to recover costs when suing the Federal Government would be public interest law firms, whether liberal or conservative. We question whether it is a good idea for the taxpayer to support the litigation activities, even if successful, of public interest and special interest groups. . . .

Therefore we suggest that the Committee consider striking the words “or against” from Section 203 and the bill be confined to the award of attorneys’ fees in cases where the federal agency has initiated the action. . . .

Alternatively, the Committee might consider revising the definition of “party” provided in Subsection (d)(2)(B) to exclude non-profit associations or organizations from coverage under the bill. Another solution would be to insert a provision providing that only parties with a direct, personal stake in the litigation would have “standing” to seek attorneys’ fees. In any case, we urge the Committee to give this matter careful consideration. This bill must not be converted into a lawyer’s relief act for the benefit of public interest lawyers.<sup>231</sup>

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228. *Id.* at 54.

229. See *Public Participation in Agency Proceedings*, *supra* note 126, at 700 (testimony of Ben B. Blackburn, President, Southeastern Legal Foundation); *Public Participation in Government Proceedings Act of 1976*, *supra* note 132, at 58-59 (testimony of John T. C. Low, Southeastern Legal Foundation).

230. *Public Participation in Federal Agency Proceedings Act of 1977*, *supra* note 126, at 394.

231. *Judicial Access/Court Costs*, *supra* note 126, at 163-64 (statement of Daniel J. Popeo, General

In essence, from 1976 on, the poles of debate were either that non-profits should be entirely excluded from access to EAJA, or that they should be included but subject to the same net worth limitation of \$5 million that businesses and individuals would be governed by. In no recorded testimony did any witness, representative, or senator support an exemption releasing non-profits from any net-worth restrictions. Nonetheless, the exemption mysteriously appeared in the final law.

### 5. Social Security and Other Administrative Situations

A huge percentage of EAJA claims are filed against the Social Security Administration.<sup>232</sup> When it reauthorized EAJA in 1985, Congress wrestled with the inclusion of fee awards in Social Security Act cases and Board of Contract Appeals, neither of which had been included in the 1980 Act. The agency rather than the adjudicative officer or hearing examiner was designated to make the final decision on fee awards at the agency level, a point of contention during the three-year experimental period,<sup>233</sup> and ultimately EAJA was applied to these cases.<sup>234</sup> In particular, the 1985 amendments to EAJA specifically included a provision to harmonize attorneys' fee applications under EAJA with attorneys' fee applications under the Social Security Act so that individual claimants, and not their attorneys, would benefit from the overlapping provisions.<sup>235</sup> However, confusion over specific applications of EAJA to Social Security claims persisted. A series of cases dealing with narrow fact patterns gradually refined the issue, culminating in 1993 with *Shalala v. Schaefer*.<sup>236</sup>

Judicial review of decisions of the Social Security Administration is governed by 42 U.S.C. § 405(g), which gives courts the power to conclude a claim or to make a partial determination and remand the claim to the agency. In *Schaefer*, the Court held that one category of remands, those under sentence four of § 405(g), were final orders that qualified the claimant for EAJA, while another, those under sentence six of § 405(g), were interim orders that did not qualify the claimant for EAJA, although such claimants could later qualify for EAJA after their cases were

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Counsel and National Executive Director, Washington Legal Foundation).

232. From 1985, the Department of Health & Human Service's (HHS) percentage of overall EAJA applications varied from a minimum of 65.2% to a maximum 93.4%. Since the overwhelming majority of HHS's EAJA caseload was Social Security cases, those cases clearly dominated EAJA activity. See ADMIN. CONF. OF THE U.S., REP. OF CHAIRMAN OF ADMIN. CONF. ON AGENCY ACTIVITIES UNDER THE EQUAL ACCESS TO JUSTICE ACT (1982) [hereinafter ADMIN. CONFERENCE REPORTS]; ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT BY THE DIRECTOR ON REQUESTS FOR FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT OF 1980, in 1982 JUD. CONF. REP (1982) [hereinafter ADMIN. OFFICE REPORTS]; see also Comm'r, INS v. Jean, 496 U.S. 154, 164 n.12 (1990); *Pierce v. Underwood*, 487 U.S. at 563.

233. See Act of Aug. 5, 1985 § 1(a)(3), 99 Stat. at 183.

234. See *id.* at §§ 1(c), 3, 99 Stat. at 184, 186.

235. See *id.* at § 3, 99 Stat. at 186; see also *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002) (discussing same).

236. 509 U.S. 292, 294-95 (1993).

concluded before the agency.<sup>237</sup> This case brought clarity to the question of which types of Social Security cases could receive attorneys' fees under EAJA, and when. The determination that a remand under sentence four of § 405(g) immediately qualified for an EAJA application was partially responsible for the surge of Social Security EAJA claims in fiscal year 1994.<sup>238</sup>

It was initially unclear whether tax cases would be subject to EAJA, but the Congress acted quickly on the uncertainty, directing tax cases in 1982<sup>239</sup> to an EAJA-like provision in the Internal Revenue Code.<sup>240</sup> Finally, in 1992 the scope of EAJA was expanded by the inclusion of the Court of Appeals for Veterans Claims, which is the dedicated appellate court for decisions of the Veterans Administration.<sup>241</sup>

### C. How an EAJA Claim Works

This Section completes the Article's discussion of the development of EAJA by giving a brief primer on the operation of an EAJA claim. As discussed previously, EAJA makes recovery available to a private party that prevails in an administrative proceeding<sup>242</sup> or lawsuit<sup>243</sup> against the United States, its agencies, or officials. Filing an EAJA claim is a simple matter: within thirty days after prevailing in a proceeding against the United States, the party must file a motion for attorneys' fees to the agency or court, stating and itemizing the fees requested, and alleging that the position of the United States was not substantially justified.<sup>244</sup> This allegation need not be supported in any way; rather, the mere allegation is intended to require the fee petitioner to "think twice,"<sup>245</sup> and the burden of proof on the issue lies with the government.<sup>246</sup>

In order to file a petition to receive attorneys' fees under EAJA, the party must meet other requirements. First and foremost, it must be a "prevailing party." This requirement was authoritatively defined by *Buckhannon*,<sup>247</sup> which has already been discussed in detail.<sup>248</sup> The essential test is that for there to be a "prevailing party," there must be a "judicially sanctioned change in the legal relationship of the

237. *Id.* at 297-98.

238. See discussion *infra* pp. 48-49.

239. See the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324. (1982).

240. See 5 U.S.C. § 504(f) (2006); 28 U.S.C. § 2412(e) (2006).

241. Federal Courts Administration Act of 1992, § 506, 106 Stat. at 4513.

242. EAJA recovery is limited to "adversary adjudications," which are defined in the statute. "Adversary adjudications" include proceedings under 5 U.S.C. § 554 "in which the position of the United States is represented by counsel or otherwise," among others. 5 U.S.C. § 504(b)(1)(C).

243. Except for tort cases. 28 U.S.C. § 2412(d)(1)(A) (2006). For more on this exception, see 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. 217, 246-49 (1994).

244. 5 U.S.C. § 504(a)(2); 28 U.S.C. § 2412(d)(1)(B).

245. *Scarborough v. Principi*, 541 U.S. 401, 415 (2004).

246. *E.g.*, *Pierce v. Underwood*, 487 U.S. at 552, 557.

247. 532 U.S. at 600.

248. See discussion *supra* pp. 28-29.

parties.”<sup>249</sup>

In addition to the “prevailing party” requirement, EAJA has further restrictions: EAJA relief is only available to an individual with a net worth of under \$2 million, or an organization (including an “unincorporated business, or any partnership, corporation, association, unit of local government, or organization”) with a net worth of under \$7 million.<sup>250</sup> In addition, organizations may not have more than 500 employees.<sup>251</sup> However, 501(c)(3) corporations, 501(a) tax-exempt organizations, and agricultural cooperative associations are all exempt from the \$7 million net-worth cap.<sup>252</sup>

When a party is the recipient of an EAJA award, further conditions apply. EAJA recovery is limited to \$125 an hour, unless an “increase in the cost of living or a special factor, such as the limited availability of qualified attorneys [or agents] for the proceedings involved, justifies a higher fee.”<sup>253</sup> In theory, this cap is stringent: in 1988, the Supreme Court held that the “special factors” should be limited to “attorneys having some distinctive knowledge or specialized skill needful for the litigation in question.”<sup>254</sup> As examples, the Court mentioned those familiar with foreign law or a foreign language, as well as patent attorneys.<sup>255</sup> In practice, however, courts use market rates for their base calculations,<sup>256</sup> and as a result awards at rates above \$125 an hour are commonplace, as will be discussed in Part 3.<sup>257</sup>

Attorneys’ fees are not the only expense for which EAJA provides compensation. EAJA specifically refers to “fees and other expenses,” which are defined as including “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 [or agency] to be necessary for the preparation of the party’s case.”<sup>258</sup> Expert witness fees are clearly limited to the amounts paid for expert witnesses by the United States or the agency involved,<sup>259</sup> but the rule for paralegal fees has only recently been settled. In 2008, the U.S. Supreme Court held that

249. *E.g.* *Bill M. ex rel. William M. v. Neb. Dep’t of Health and Human Servs.*, 570 F.3d 1001, 1004 (8th Cir. 2009); *District of Columbia v. Jeppsen ex rel. Jeppsen*, 514 F.3d 1287, 1291 (D.C. Cir. 2008); *Dattner v. Conagra Foods, Inc.*, 458 F.3d 98, 102 (2d Cir. 2006); *Highway Equip. Co. v. FECO, Ltd.*, 469 F.3d 1027, 1034 (Fed. Cir. 2006); *John T. ex rel. Paul T. v. Del. Cnty. Intermediate Unit*, 318 F.3d 545, 559 (3d Cir. 2003); *Am. Disability Ass’n, Inc. v. Chmielarz*, 289 F.3d 1315, 1319 (11th Cir. 2002).

250. 5 U.S.C. § 504(b)(1)(B)(i)-(ii); 28 U.S.C. § 2412(d)(2)(B)(i)-(ii).

251. 5 U.S.C. § 504(b)(1)(B)(ii); 28 U.S.C. § 2412(d)(2)(B)(ii).

252. 5 U.S.C. § 504(b)(1)(B)(ii); 28 U.S.C. § 2412(d)(2)(B)(ii).

253. 5 U.S.C. § 504(b)(1)(A)(ii); 28 U.S.C. § 2412(d)(2)(A)(ii).

254. *Pierce v. Underwood*, 487 U.S. at 572.

255. *Id.* The patent example is particularly striking because patent attorneys, unlike other legal specialists, must pass a specialized patent bar exam.

256. *See, e.g.*, *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 579-80 (2008). Courts use many methods to calculate “reasonable” fees; one very common tool is the Laffey Matrix and its variants, which several courts use to set fees for attorneys in the Washington, D.C. area. *E.g.*, *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 371 (D.D.C. 1983); *see also Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 426 F.3d 694, 708 (3d Cir. 2005).

257. *See infra* Part 3.A.

258. 5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A).

259. 5 U.S.C. § 504(b)(1)(A)(i); 28 U.S.C. § 2412(d)(2)(A)(i).

paralegal fees are included in the expenses necessary for the party's case, and like attorneys' fees are calculated based on market rates.<sup>260</sup> Finally, an award may be reduced or denied "to the extent that the [prevailing party] during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy"<sup>261</sup> or if "special circumstances make an award unjust."<sup>262</sup>

Once an EAJA proceeding has been concluded, it can be appealed. For the most part, EAJA appeals follow normal appellate procedure, but there are some nuances. In agency proceedings, judicial review is available, but only if sought by a party other than the United States.<sup>263</sup> In judicial proceedings, if the United States chooses to appeal an award of EAJA fees and the award is affirmed in whole or in part, the United States must pay interest on the award.<sup>264</sup> Once the EAJA proceeding is concluded, awards are paid "by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise."<sup>265</sup>

The procedural rules underlying EAJA applications illustrate the goals of the legislation. Relief is primarily available to individual litigants and small organizations. Once an application is made, the burden of proof rests with the presumptively larger and wealthier government party, and the inquiry is limited to the existing record. For claimants, adjudicative officers, and courts, the process is designed to be simple and efficient.

### III. EMERGING PROBLEMS WITH THE EQUAL ACCESS TO JUSTICE ACT

Since Congress ended the reporting on the Equal Access to Justice Act in 1995, it has been correspondingly difficult to assess the amounts of EAJA awards or the patterns of EAJA use. Nevertheless, some data points have emerged, both positive and negative.

The positive is easy to summarize. First, since Congress's expansion of EAJA to cover the Court of Appeals for Veterans' Claims, those matters have grown to be a consistent volume of traffic in much the same manner as Social Security.<sup>266</sup> Like

260. 553 U.S. at 571, 579-80.

261. 5 U.S.C. § 504(a)(3); 28 U.S.C. § 2412(d)(1)(C).

262. 5 U.S.C. § 504(a); 28 U.S.C. § 2412(d)(1)(A). For a discussion of the "special circumstances" provision, which is often ignored or conflated with substantial justification, see Louise L. Hill, *Equal Access to Justice Act—Paving the Way for Legislative Change*, 36 CASE. W. RES. L. REV. 50, 69-71 (1985).

263. 5 U.S.C. § 504(c)(2).

264. 28 U.S.C. § 2412(f).

265. 5 U.S.C. § 504(d); 28 U.S.C. § 2412(d)(4). However, fees are not always paid in the manner required by the statute. According to testimony on March 18, 2010 by Department of the Interior employee Pamela Haze, funds for EAJA awards are often advanced by the Department of Justice and gradually reimbursed, but "[m]any of the departments have not been keeping up with all of the reimbursements." *Conserving America's Land and Heritage: Department of the Interior FY 2011 Budget Request: Hearing Before the Subcomm. on Interior, Environment and Related Agencies of the H. Comm. on Appropriations*, 111th Cong. 363 (2010). It appears that Congress was aware of this issue at least as early as 2003, when the Equal Access to Justice Reform Act was first introduced. See *infra* note 436 and accompanying text.

266. See, e.g., *Battling the Backlog Part II: Challenges Facing the U.S. Court of Appeals for Veterans'*

Social Security cases, these cases are eminently worthy ones: cases in which a veteran making a claim has not only proven his position, but shown to the court's satisfaction that the initial rejection of benefits by the agency was not substantially justified. And again, like Social Security cases, the majority of these cases are small payments which though modest to the federal government, have made all the difference to claimants who otherwise could not have afforded the representation they needed to get their claim properly addressed before an agency or court. Second, the available evidence suggests that the volume of Social Security cases has not fallen.<sup>267</sup> Even though the intent of EAJA was to attempt to reform agency behavior by taking payments directly out of agency budgets, it may be the case that bureaucracies on the size and scale of the Social Security Administration simply have an inherent rate of error, and that EAJA has become a compensatory mechanism for innocent victims of its error. Though arguably unintended, it is a salutary result.

However, a host of problems have developed with EAJA, to which this Part now turns. It should be emphasized that these problems are not essentially independent. The problem of abusive litigation, for instance, goes hand-in-hand with the failure of the net worth cap as an effective prevention tool; the failure of the net worth cap produces more repeat litigants and increases the government's perverse incentives to settle; repeat litigants routinely exploit the exceptions to the statutory cap, and thus raise the costs of EAJA generally, etc.

Nevertheless, it's overwhelming to examine all of EAJA's problems simultaneously, and so Part 3 will proceed by analyzing each of the weaknesses of the current regime individually, with examples. Many examples chosen for one section apply equally well to other sections, thus showing the interdependence of the problems.

Section A discusses the most immediate and obvious problem: the fact that in many, if not most cases, EAJA's statutory cap is evaded, and *Pierce's* instructions to lower courts to interpret the "special factor" language narrowly have been mostly ignored, with a host of exceptions being carved out.

Section B then discusses the exemption of 501(c)(3) groups from the EAJA net-worth caps, and how in the absence of reporting, 501(c)(3) groups have aggressively used EAJA to take millions of dollars in attorneys' fees in drawn-out, largely meritless procedural litigation.

Section C discusses the ability of groups to evade EAJA's requirements by convincing the government to settle with pro-forma declarations of success, as well

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*Claims: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 711 (2006) (testimony of Hon. William P. Greene, Jr., Chief Judge, U.S. Court of Appeals for Veterans Claims regarding EAJA workloads in the previous ten years, which ranged from 226 to over 1500 EAJA applications per year).

267. See discussion *supra* note 232. Though there is no extant data on the current volume of Social Security cases, the volume in the final three years of reporting was as follows: in 1992, 252 applications (92.3% of all EAJA applications); in 1993, 227 applications (86.3% of all EAJA applications); and in 1994, 2,206 applications (92% of all EAJA applications). ADMIN. CONFERENCE REPORTS, *supra* note 232; ADMIN. OFFICE REPORTS, *supra* note 232; U.S. DEP'T OF JUSTICE, EQUAL ACCESS TO JUSTICE ACT: 1993 ANNUAL REPORT [hereinafter 1993 DOJ REPORT]; U.S. DEP'T OF JUSTICE, EQUAL ACCESS TO JUSTICE ACT: 1994 ANNUAL REPORT [hereinafter 1994 DOJ REPORT].

as the perverse incentive created by the decision in *INS v. Jean* for the government to settle weak claims.

Section D then concludes by looking from a broad perspective at the costs of the EAJA regime to the federal government as it currently stands.

### A. *The Evasion of the Statutory Cap*

In Part 2.B, this article discussed the Supreme Court case *Pierce v. Underwood*, which defined the “substantially justified” standard.<sup>268</sup> Additionally, in that case, the Supreme Court also held that EAJA’s cap of \$75 an hour (now \$125 an hour) on attorneys’ fees, which by statute only can be exceeded due to an increase in the cost of living or a “special factor,” should be narrowly construed and the “special factors” limited to “attorneys having some distinctive knowledge or specialized skill needful for the litigation in question.”<sup>269</sup> As examples, Justice Scalia’s opinion mentioned those familiar with foreign law or a foreign language, as well as patent attorneys.<sup>270</sup> If lower courts had obeyed this interpretation as faithfully as they have its “substantially justified” interpretation, it might have reduced excessive attorneys’ fees awards under EAJA. Instead, it has been ignored, and environmental lawyers are routinely awarded fees above the statutory cap, which has increased the abuse of EAJA.<sup>271</sup>

The statutory cap is now a cap in name only. Not only is it exceeded for cost-of-living adjustments, which is understandable as the cap is not tied to inflation, but it is routinely exceeded both through the explicit justification of higher rates and also fee calculations that treat the cap as an afterthought.<sup>272</sup>

The practice of market-based fee calculations has even received the approval of the Supreme Court: In *Richlin Sec. Serv. Co. v. Chertoff*,<sup>273</sup> the decision cited in Part 2.C that deals with paralegals,<sup>274</sup> the Court discusses attorneys’ fees as “incurred by the party,” while noting that under EAJA, “incurred” fees are calculated based on prevailing market rates and then reduced to the statutory cap, and not connected to documented expenses cited by the parties.<sup>275</sup> The use of market rates in fee calculations predisposes agencies and courts to effectively abrogate *Pierce*, for attorneys nearly everywhere now charge more than \$125 an

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268. *Pierce v. Underwood*, 487 U.S. at 563-65.

269. *Id.* at 572.

270. *See id.*

271. Justice Scalia’s specific examples are properly regarded as *dicta*, or non-binding. *See id.* Nonetheless, courts could have chosen to follow them.

272. Lower courts have never been satisfied with the *Pierce* standard for the cap. For a thorough, though somewhat outdated, analysis of appellate interpretations of the standard, see Sisk, *supra* note 208, at 145-176. The following discussion is limited to the abusive situations that are commonplace at present.

273. 553 U.S. 571 (2008).

274. *See* discussion *supra* pp. 34-35.

275. *Id.* at 577; *see also* Sisk, *supra* note 208, at 105-127. This is in the context of calculating the amount of fees incurred. The question of if fees are incurred in the first place is more complex, especially when evaluating multi-party and mixed eligibility cases. For reading on that issue, see Sisk, *supra* note 243, at 341-360.

hour. In Washington, D.C., for example, where much environmental litigation takes place, according to the 2011 Laffey Matrix, a *first-year* attorney should be paid \$305 *per hour* and a paralegal should be paid \$165.<sup>276</sup> Because the Laffey Matrix is defined as a “reasonable” fee,<sup>277</sup> the implication is that it is *unreasonable* to obey the dictates of *Pierce* and the language of EAJA. Thus the clear holding of *Pierce* has arguably become a dead doctrine in practice.

An example of the fee calculations in a typical EAJA case exemplifies evasion of the statutory cap. In *Nadarajah v. Holder*,<sup>278</sup> the Ninth Circuit awarded fees under EAJA in a habeas corpus petition. When all was said and done, petitioner received \$156,778.68 for 658.45 hours of work,<sup>279</sup> for an average hourly rate of \$238.10. In making this award, the court made several determinations that illustrate how far the application of EAJA has drifted from the intent behind the legislation, and how easily that drift is exploited by non-profit environmental organizations.

First, the court held that petitioner’s attorneys had “distinctive knowledge and specialized skill in immigration law.”<sup>280</sup> Although the court explicitly did not assert that immigration law *per se* is “a specialty similar to patent law,”<sup>281</sup> it followed the law of several circuit courts in holding that subspecialties within immigration law could merit fees in excess of EAJA’s statutory cap.<sup>282</sup> In particular, the *Nadarajah* court cited “specialized expertise in constitutional immigration law and litigation involving the rights of detained immigrants.”<sup>283</sup> The court awarded fees at market rates despite the government’s objection that the case “turned on statutory interpretation and did not involve the application of complex statutes or regulations.”<sup>284</sup> The implication of the Department of Justice’s argument is that in general it accepts that “complex statutes or regulations” are now an established expertise meriting fees in excess of EAJA’s statutory rate. Finally, the court also found that the petitioner had established the un-rebutted presumption that no qualified counsel would have taken his case if payment was limited to the statutory cap of \$125 an hour.<sup>285</sup>

But the court’s justifications for exceeding the statutory cap did not end there. The government raised an issue very relevant in environmental litigation, which was that the petitioner was represented in part by the American Civil Liberties Union (ACLU), and “did not submit his retainer agreement with the ACLU, or evidence of the ACLU employees’ hourly salaries, and therefore the court cannot

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276. Laffey Matrix, <http://www.laffeymatrix.com/see.html> (last visited Aug. 27, 2011). There is some unreality to this, as of course, almost no paralegals make \$165 an hour; but it is routine practice for law firms to bill their time at vastly inflated rates.

277. *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 361 (D.D.C. 1983).

278. 569 F.3d 906 (9th Cir. 2009).

279. *Id.* at 926.

280. *Id.* at 912.

281. *Id.* at 913.

282. Including the 3rd, 7th, and 9th Circuits. *Id.*

283. *Id.*

284. *Id.* at 914.

285. *Id.* at 915.

evaluate the appropriateness of the fee request.”<sup>286</sup> The court was dismissive of this argument, because “the award of attorneys’ fees . . . is not cost-based, and . . . the award of prevailing market rates—regardless whether the claimant is represented by private counsel or a non-profit legal services organization—should not be viewed as an unjustified ‘windfall’ profit to the attorney.”<sup>287</sup> This was the holding of *Hensley v. Eckerhart*, a civil rights case,<sup>288</sup> but it was applied to EAJA cases as well by *Jean*.<sup>289</sup> In essence, *Nadarajah* is an example of the principle that an EAJA claimant is *always* entitled to receive attorneys’ fees at market rates, irrelevant of if and how much the claimant paid or did not pay for the services of the attorneys in the case.<sup>290</sup> The only obstacle is establishing that the attorneys had sufficient expertise.

In fairness, that determination does come into play in some cases. In *Nadarajah*, for example, Judge Tallman filed a partial dissent, largely because he disagreed with the determination that the petitioner’s attorneys had expertise meriting fees in excess of the statutory rate.<sup>291</sup> The same conservative application of the *Pierce* standard can be found in *Ace Constructors, Inc. v. United States*,<sup>292</sup> a Court of Federal Claims case. In that case, a government contractor prevailed in a suit against the Army Corps of Engineers dealing with construction at a military facility.<sup>293</sup> The court denied petitioner’s request for EAJA fees above the statutory maximum expressly because it was not convinced by petitioner’s claims that limited attorneys were available to them, that their attorneys had a “specialized practice of construction litigation, with particular emphasis on public construction projects and government contracts,” and that the case presented “numerous and complex” issues.<sup>294</sup> The court held that the “nature of the case” did not fall “within the ‘identifiable practice specialty’ contemplated by the Supreme Court in *Pierce*.”<sup>295</sup> Instead, the court limited fees to the statutory cap plus a cost of living increase, although even then it awarded petitioner \$127,669.73<sup>296</sup> for 809.2 hours,<sup>297</sup> at an average hourly rate of \$157.77.

The pattern of evading the statutory cap by broadly construing the *Pierce* standard can be seen in a variety of environmental cases. One recent, particularly large award saw the Natural Resources Defense Council receive \$503,628.03 in attorneys’ fees<sup>298</sup> for 1,612.4 hours of work,<sup>299</sup> at an average hourly rate of

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286. *Id.* at 916.

287. *Id.*

288. 461 U.S. 424 (1983)

289. *See* Commissioner, *INS v. Jean*, 496 U.S. 154, 160.

290. Although this case dealt with the ACLU specifically, the principle is equally applicable to any provider of pro bono representation through the *Jean* court’s adoption of *Hensley*.

291. *Nadarajah*, 569 F.3d at 926 (Tallman, J., dissenting).

292. 81 Fed. Cl. 161 (2008).

293. *Id.* at 173.

294. *Id.* at 168.

295. *Id.*

296. *Id.* at 169.

297. *Id.* at 168 n.6.

298. *Natural Res. Def. Council, Inc. v. Locke*, 771 F. Supp. 2d 1203, 1219 (N.D. Cal. 2011).

299. *Id.* at 1212; Plaintiff’s Motion for Attorneys’ Fees and Expenses and Memorandum in Support at 22,

\$312.35. Unlike the above-cited cases, in this case the government conceded that “[e]nvironmental law is a recognized specialty for which enhanced rates are appropriate,” that NRDC’s attorneys “possess environmental legal expertise[] that . . . was necessary in this case” and “that NRDC could not have secured other qualified counsel at the statutory rate.”<sup>300</sup> With the government failing to even request a *Pierce* inquiry there was no need for the court to make one, but it seems likely that the court would have found for NRDC if asked.<sup>301</sup> In fact, in granting the award, the court praised NRDC for seeking fees for slightly less than two-thirds of the hours its attorneys actually worked, and for applying an additional ten percent reduction in its claim, ultimately “seeking recovery for just over half of the time spent on this case.”<sup>302</sup> Thus, the court’s justification for awarding NRDC half a million dollars at two and a half times the statutory rate was to point out that the government only objected to the hours, not the rate, and to praise NRDC for not seeking a full million dollars.

Cases like this abound. In a recent EAJA claim against the Department of Agriculture, Citizens for Better Forestry received attorneys’ fees totaling \$166,918.18 for 444.2 hours of work, at an average hourly rate of \$375.77.<sup>303</sup> In the same case, Defenders of Wildlife received attorneys’ fees totaling \$248,903.46 for 463.5 hours of work, for an average hourly rate of \$537.01.<sup>304</sup> As in the NRDC case, in this case the court determined that the environmental attorneys who worked on the case for the petitioners possessed necessary expertise justifying fee awards in excess of the statutory cap in EAJA.<sup>305</sup> In this case, it did so despite the fact that the Department of Agriculture strenuously objected to the overall fee awards<sup>306</sup> and to the justification for the rates<sup>307</sup> and hours<sup>308</sup> claimed by each individual attorney in the case. It must be cautioned that the attorneys’ fees claimed in this case were characterized as claimed under both EAJA and the citizen suit provision of the Endangered Species Act, which does not have a statutory cap.<sup>309</sup> However, the environmental groups’ claim was based on a faulty environmental impact statement,<sup>310</sup> and that is fundamentally a National Environmental Policy Act claim, for which EAJA governs awards of attorneys’ fees. Thus, although it would be necessary to access internal Department of Justice records to be certain, it seems safe to characterize this massive fee award as pursuant to EAJA.

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*Locke*, 771 F. Supp. 2d 1203 (N.D. Cal. 2011) (No. 01-0421).

300. *Locke*, 771 F. Supp. 2d at 1210.

301. In fact, it is settled law in the Ninth Circuit that notwithstanding *Pierce*, environmental expertise is an “identifiable practice specialty that requires distinctive knowledge” cognizable for EAJA purposes. *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991).

302. *Locke*, 771 F. Supp. 2d at 1212.

303. *Citizens for Better Forestry v. U.S. Dept. of Agric.*, No. 08-1927, 2010 WL 3222183, at \*14-15 (N.D. Cal. Aug. 13, 2010).

304. *Id.* at \*15.

305. *Id.* at \*4-5.

306. *Id.* at \*5.

307. *Id.* at \*6-9.

308. *Id.* at \*9-14.

309. 16 U.S.C. § 1540(g) (2006).

310. *Citizens for Better Forestry*, 2010 WL 3222183, at \*1.

In the environmental arena, it is clear that EAJA's statutory fee cap of \$125 an hour hardly applies; even if the government chooses to fight to apply the fee cap, it is a negligible obstacle to overcome. In the rare cases when the cap is applied faithfully, cost of living increases alone have become substantial enough to make the fixed cap seem dated. EAJA fees are being awarded at hourly rates anywhere from \$157.77 to \$537.01. This marginalizes the cap, and it also creates tremendous cost uncertainty for the government. If the volume of litigation or the market rates for attorneys' fees increase in the future, the situation will only become worse.

### B. The 501(c)(3) Exemption, and Abusive Procedural Litigation

The exemption of 501(c)(3) groups from the EAJA net-worth cap posed a clear potential problem from the outset. EAJA allows recovery in any case where fee-shifting is not otherwise provided for, and the federal government is the defendant. As one might guess, many of the challenges permitted under the APA are procedural (thus, "Administrative Procedure Act"). These challenges can often have the effect of changing agency action when the agency has seriously misjudged the data or bypassed the data in favor of a political result, and when a proper examination would practically mandate another result. But these challenges can often also just lead to unnecessary delay; the courts will basically order an agency to return to square one and do its analysis more completely or in more detail<sup>311</sup> and the agency does, but the underlying decision or policy is left unchanged,<sup>312</sup> since the scope of court review is to determine whether or not what an agency did was *permissible*, not if it was *correct* (as a matter of policy, that is).<sup>313</sup> Now, even this latter result can sometimes have a useful public purpose in making sure that agencies adopt publicly well-reasoned policies,<sup>314</sup> especially when the decision is a particularly momentous or unique one. Nevertheless, the potential for abuse is clear: consistent procedural litigation could cause an endless backlog of delays, or even the abandonment of regulatory action,<sup>315</sup> as the precision and justification for government action that the APA formally demands is in practice extremely costly and difficult to achieve. This is especially true when delaying an action is a victory

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311. See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194, 200 (1947) [hereinafter *Chenery II*] ("[In *Chenery I*], [w]e held no more and no less than that the Commission's first order was unsupportable for the reasons supplied by that agency . . . . The administrative process had taken an erroneous, rather than a final, turn. Hence, we carefully refrained from expressing any views as to the propriety of an order rooted in the proper and relevant considerations.") (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) [hereinafter *Chenery I*] (internal citations omitted)).

312. E.g., *Chenery II*, 332 U.S. at 209-10 ("The Court by this present decision sustains the identical administrative order which only recently it held invalid. As the Court correctly notes, the Commission has only 'recast its rationale and reached the same result.'") (Jackson, J., dissenting) (citation omitted).

313. *Id.* at 209 ("The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight . . . . Whether we agree or disagree with the result reached, *it is an allowable judgment* which we cannot disturb.") (emphasis added).

314. *Id.*

315. A former Chief of the U.S. Forest Service has described this dynamic in play in litigation against his agency. Jack Ward Thomas, Chief Emeritus, U.S. Forest Serv., Speech: The Future of the National Forests – Who Will Answer an Uncertain Trumpet? (Winter, 2006), in *CHALLENGES FACING THE U.S. FOREST SERV. – A CRITICAL REVIEW* (Daniel Kemmis, ed. 2008).

for the group—or can be marketed to its followers and contributors as a victory.<sup>316</sup>

Historically, the predominant counterbalance to the problem was a natural economic one: lawyers are *expensive*.<sup>317</sup> It would cost a prohibitive amount to most groups to hire legal talent in order to consistently abuse the APA to slow down agencies, and it would be seen as a patent waste of money considering that this kind of opposition would at best achieve delays, and would breed resentment among the agencies towards the groups and causes harassing them. So one could simply not bring all theoretically meritorious APA challenges, nor, in most cases, would one want to.

The 501(c)(3) exemption disrupts this cost deterrence. If a 501(c)(3) group with a radical agenda sues the government on substantively flimsy but technically correct procedural grounds, it can (depending on how “prevailing party” is applied) win EAJA fees for the litigation, effectively removing the costs of delaying the agency. And if this step is costless it can be repeated at will, paralyzing the agency from ever taking action. Or even worse, if groups could convince the government to pay attorneys’ fees that were effectively higher than their actual outlay (by convincing the court to pay market rate instead of the EAJA cap), they could *profit* from continuously suing the government, particularly given the well-known discrepancies between the pay for public-interest legal work and the pay at the high end of the legal market.<sup>318</sup> Notably, the median salary for a public interest lawyer

316. Another example of this can be found in the greater Yellowstone ecosystem, covering three states, where the gray wolf was reintroduced in 1995-96 as a “nonessential experimental population.” The official 1987 *Northern Rocky Mountain Recovery Plan* provided that a sustainable population would be reached—and the wolf would be “recovered”—when three states (Idaho, Montana, and Wyoming) had a combined total of 300 wolves comprising thirty breeding pairs for three successive years. That objective was reached in 2002. But because of prolonged litigation initiated by the Humane Society of the United States and others, state management plans have been prevented from being implemented. Today the wolf population is 1,706—over 5.6 times the 1987 agreed upon figure of 300. Congress finally ended seventeen years of litigation through legislation, but the plaintiffs achieved their goal of expanding the wolf population well beyond the recovery goal set in 1987, simply by continuing to litigate. U.S. FISH & WILDLIFE SERVICE, NORTHERN ROCKY MOUNTAIN WOLF RECOVERY PLAN (1987), *available at* [http://www.fws.gov/montanafieldoffice/Endangered\\_Species/Recovery\\_and\\_Mgmt\\_Plans/Northern\\_Rocky\\_Mountain\\_Gray\\_Wolf\\_Recovery\\_Plan.pdf](http://www.fws.gov/montanafieldoffice/Endangered_Species/Recovery_and_Mgmt_Plans/Northern_Rocky_Mountain_Gray_Wolf_Recovery_Plan.pdf); U.S. Nat’l Park Serv., U.S. Dep’t Interior, *Wolves of Yellowstone* (Aug. 15, 2011, 11:21 MST), <http://www.nps.gov/yell/naturescience/wolves.htm>.

Attorneys’ fees have been awarded in this case: the plaintiffs initially petitioned the court for \$673,950 in attorneys’ fees and costs. Their amended motion requested \$388,370 in fees and costs, which on objection by the government the court reduced to \$263,099. Memorandum in Support of Plaintiffs’ Motion for Fees and Costs, *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008) (No. 08-cv-00056). For an example of typical coverage of the wolf issue by an environmental group, see Earthjustice, *Wolves in Danger*, [http://earthjustice.org/our\\_work/campaigns/wolves-in-danger](http://earthjustice.org/our_work/campaigns/wolves-in-danger) (last visited Sep. 16, 2011). Note the prominent appeal for contributions.

317. See, e.g., *Laffey*, 572 F. Supp. 354; *Laffey Matrix*, *supra* note 276 and accompanying text.

318. This issue has been insufficiently studied at present, but it is related to the broader issue of plaintiffs with economic motives. Although EAJA explicitly is meant to aid businesses, the question of profit is historically controversial in environmental litigation. See, e.g., Michael Lee, Comment, *Attorneys’ Fees in Environmental Citizen Suits and the Economically Benefited Plaintiff: When Are Attorneys’ Fees and Costs Appropriate?*, 26 PACE ENVTL. L. REV. 495 (2009). Of course, attorneys’ fees are only one way organizations can profit; simple settlements are often even more lucrative. See, e.g., Julie Wootton, *El Paso rep: Pipeline settlement has caused ‘worry, concern and anger’*, ELKO DAILY FREE PRESS, (Aug. 4, 2010, 10:46 PM), *available at* [http://elkodaily.com/news/local/article\\_0bd0d540-a055-11df-9756-001cc4c03286.html](http://elkodaily.com/news/local/article_0bd0d540-a055-11df-9756-001cc4c03286.html) (describing anger at a \$20 million settlement between El Paso Corp., a pipeline builder, and Western

with 11-15 years of experience in 2010 was \$70,085; the median salary for a *first-year* associate at a large (500+ lawyers) firm was \$135,000.<sup>319</sup> Depending on what figure was picked for “market rate,”<sup>320</sup> the public interest firm could more than recoup what it paid its lawyers and pocket the rest.

A factor that mitigated this problem was the fact that Congress wisely put in reporting requirements mandating that courts and agencies report on how many EAJA fee awards were requested, by whom, and how much was being paid out; as noted above, Congress was concerned about the possible costs of EAJA. If 501(c)(3) groups began abusing EAJA, the pattern would become clear in the reporting, and Congress could nip it in the bud. And it probably would have been a public relations nightmare for any particular 501(c)(3) group caught effectively bilking the government out of funds, so this likely deterred groups from abusing EAJA.

Unfortunately, in passing the Federal Reports Elimination and Sunset Act of 1995,<sup>321</sup> Congress looked at the history of EAJA reporting from 1981 to 1995,<sup>322</sup> saw an EAJA program that effectively had stayed at a few million dollars a year total without much growth, and decided the reporting provision was superfluous (and of course incurring a cost itself), eliminating it entirely.<sup>323</sup> Now the coast was clear for 501(c)(3) groups to profit: there was no reporting, and no one would know how much money the groups were making in suing agencies. Without centralized reports, it was hard for anyone to accurately gauge whether the rate of EAJA activity was staying constant or increasing. Meanwhile, at the same time it had become clear that courts were calculating EAJA fees not from the actual costs incurred in a representation, or from how much the actual attorneys (many of whom were in-house or pro bono) cost, but rather from a reasonable fee for a private attorney.<sup>324</sup> So courts would not object if environmental litigants claimed attorneys’ fees well in excess of what they themselves were paying their in-house counsel.

Sure enough, after 1995 the agencies began to get a distinct sense that EAJA was being used against them in the context of more and more aggressive litigation, particularly in environmental contexts. Ironically, this litigation seemed to be worst at the U.S. Fish & Wildlife Service (FWS), one of the most over-worked and least-adequately funded of all the federal agencies. By the mid-2000’s, such abuse was clearly rampant. Throughout 2010-2011, several outside groups conducted studies of various degrees and scope to try to determine the extent of the problem. Some of the findings were quite shocking.

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Watersheds Project and the Oregon Natural Desert Association).

319. *New Findings on Salaries for Public Interest Attorneys*, NALP BULLETIN, September 2010, available at <http://www.nalp.org/sept2010pubintsal> (last visited July 28, 2011).

320. Notably, they could refer to standardized figures like the Laffey matrix. *See supra* notes 276-277 and accompanying text.

321. Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 104-66, 109 Stat. 707 (1995).

322. *See infra* note 330.

323. Federal Reports Elimination and Sunset Act of 1995 § 1091(b) (“REPORT ON EQUAL ACCESS TO JUSTICE- Section 2412(d)(5) of title 28, United States Code, is repealed.”).

324. *See, e.g., Meyer v. Sullivan*, 958 F.2d 1029, 1033 (11th Cir. 1992); *see also* discussion *supra* Part 3.A.

For instance, consider the case of *NRDC v. Salazar*,<sup>325</sup> found in a study of EAJA cases closing in the 2009-2010 period. In that case, the mega-million-dollar<sup>326</sup> 501(c)(3) Natural Resources Defense Council (also using attorneys from Earthjustice) sued the Department of the Interior in 2005, claiming that FWS's 2004 biological opinion on the impact of two state water projects—the Central Valley Project and the State Water Project—on the threatened delta smelt was “arbitrary and capricious.”<sup>327</sup> They kept the agency in court for more than six years,<sup>328</sup> and the only thing they managed to win was a court order making FWS submit a revised, improved biological opinion in 2009.<sup>329</sup> What was NRDC's payout for this essentially meaningless victory? It was \$1,906,500, a figure justified in NRDC's motion for attorneys' fees by their and Earthjustice's special expertise in environmental litigation. Notably, this fee award is more in a single court case than had been granted against the entire Interior and Agriculture Departments in the *entire thirteen-year history of the reporting period for both agency AND court cases*.<sup>330</sup> Moreover, that 1.9 million dollar figure is also more than the usual *yearly* payout of the entire EAJA program (which is to say, both agency and court costs, for the entire federal government and all of its agencies) throughout the reporting period 1982-1994!<sup>331</sup> Only in 1986, 1987, and 1994 did EAJA payments reach more than \$1.9 million, and in 1994, there were several miscellaneous reasons regarding the timing of Social Security case payouts (which usually form the overwhelming bulk of EAJA payments—more than seventy-five percent of volume in most years) for the spike.<sup>332</sup>

Were this not troubling enough, the Center for Biological Diversity filed a petition on March 9, 2006 to reclassify the delta smelt—the same species that was the focus of the above litigation—from threatened to endangered. Though FWS published a ninety day finding concluding the petition might have merit, and began a status review, it missed its twelve month deadline to make a final decision, and was immediately sued by the Council for Endangered Species Act Reliability (CESAR) for missing the deadline. This lawsuit settled, and CESAR accepted \$35,000 in attorneys' fees for essentially harassing the over-worked FWS.<sup>333</sup>

Or consider a case called *Pacific Coast Federation of Fishermen's*

325. *Natural Res. Def. Council, Inc. v. Salazar*, No. 1:05-cv-01207-OWW-GSA (E.D. Cal. Sept. 23, 2009).

326. 2010 net worth: \$183,873,198. NRDC, *NRDC Financial Report* (2010), available at <http://www.nrdc.org/about/annual/finances.pdf>.

327. See Plaintiff's Motion for an Award of Attorneys' Fees and Costs, *Natural Res. Def. Council, Inc. v. Salazar* (No. 1:05-cv-01207). The standard for winning a case in the APA is to show agency action is arbitrary and capricious.

328. See *id.*

329. See Interim Remedial Order Following Summary Judgment and Evidentiary Hearing, *id.* (No. 1:05-cv-01207) (Jan. 28, 2011).

330. Cf. ADMIN. CONFERENCE REPORTS, *supra* note 232; ADMIN. OFFICE REPORTS, *supra* note 232; 1993 DOJ REPORT, *supra* note 267; 1994 DOJ REPORT, *supra* note 267.

331. Cf. sources cited *supra* note 330.

332. Cf. sources cited *supra* note 330.

333. *Council for Endangered Species Act Reliability v. Salazar*, No. 1:09-cv-02091-OWW-DLB (E.D. Cal. Sept. 8, 2010).

*Associations/Institute for Fisheries Resources v. Guitierrez*.<sup>334</sup> The Pacific Coast Federation, represented in no small coincidence by the same attorneys from NRDC and Earthjustice who had litigated *NRDC v. Salazar*, filed an almost identical case in 2006, this time adding the Department of Commerce to the list of defendants as well as The Department of Interior and FWS. The issue at hand in the lawsuit? That FWS's 2005 biological opinions on the impact of the Central Valley Project and the State Water Project (the same projects at issue in *NRDC v. Salazar*) on three salmonid species were deficient.<sup>335</sup> The outcome for this practically carbon-copied litigation? It was \$2,193,550 in attorneys' fees.<sup>336</sup> So the same attorneys bringing an almost identical complaint regarding the same agency's actions on the same two projects over the same time span were allowed to recover years' worth of litigation fees on basically redundant cases and work. One might fault the Department of Justice for not moving to consolidate this case with *NRDC v. Salazar* (and get the costs a little under control), but the abusive intent of these cases is obvious. And to add insult to injury, these cases could later be cited by the NRDC and Earthjustice attorneys as specialized expertise, thus justifying ever-higher attorneys' fees for those groups.

### *C. Losing Cases, Settlements, and the Jean Incentive*

Another problem that has emerged in the EAJA context is the confluence of perverse incentives on the part of both the EAJA filer and the government to settle. There are three aspects to this problem: the financial incentives created by *Jean*, the *Buckhannon* case's malleable standard for the prevailing party, and the government's authority and incentives to settle.

The Supreme Court's decision in *INS v. Jean*, discussed above in Part 2, ties litigation regarding EAJA awards into an EAJA award itself. *Jean* resolved a potential problem in EAJA where the government might have plausibly claimed that though it had not been substantially justified in its initial action, it nevertheless was justified in opposing a fee motion, or an appeal of that motion, etc. There were only two possible ways out of the possible recursion problems. One was to automatically make the further litigation linked to the initial "substantial justification" issue, so that if a party was entitled to EAJA fees on the merits, it was automatically entitled to fees for contesting the government's attack on its award; this is the route taken by the *Jean* court, quite plausibly seeing it as the closest fit to Congress's intent with EAJA. The other route would have been to automatically deny all fees related to the award itself.

Though a neat and logical solution, this resolution highly incentivizes the government to not contest EAJA awards in close cases or in cases where the plaintiff's demands are easier to simply meet than to litigate over, and instead try to

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334. *Pacific Coast Federation of Fishermen's Ass'n/Inst. for Fisheries Res. v. Guitierrez*, No. 1:06-cv-00245-OWW-GSA (E.D. Cal. Aug. 8, 2008).

335. *See* Plaintiff's Notice of Motion and Motion for an Award of Attorneys' Fees and Costs, *id.* (No. 1:06-cv-00245-OWW-GSA).

336. *See* Stipulation to Settle Attorneys' Fees and Costs, *id.* (No. 1:06-cv-00245-OWW-GSA).

settle them for less. Contrariwise, a plaintiff who knows their case is weak can use the specter of increased costs via *Jean* in a victory to push the government to settle.<sup>337</sup>

Moreover, the plaintiff has a strong motive to constantly push for settlement in the first place. If the government settles the main case, *Buckhannon* comes into play. In theory, *Buckhannon* should have prevented settlement from being adequate to garner attorneys' fees, since in ruling out the 'catalyst theory,' *Buckhannon* made a sharp distinction between voluntary changes in behavior of a party and the judicially-stamped *imprimatur* on a change in legal relationship between the parties wrought by court action.<sup>338</sup> A settlement agreement is usually thought to be a prime example of the former, not the latter.

Unfortunately, there are many ways to fulfill the letter of *Buckhannon*, if not its spirit. The easiest way is to stipulate that the court will have continuing jurisdiction to oversee enforcement of the settlement. Many courts have held that this is sufficient involvement by the court to grant 'prevailing party' status. Alternately, the parties can simply stipulate that one party is the prevailing party, which frequently occurs. In that case the plaintiff can subsequently file for an award under EAJA, which is difficult to rebut, given the stipulation, or, more often, make an EAJA motion, and then settle for EAJA fees in an addendum or as part of the overall settlement.

It must be recalled that the government's authority to enter into settlement agreements is unmediated and unreviewable, and can be used in any manner the Attorney General or his/her designees see fit: to appease repeat litigants, to cut losses, to foreclose judicial review of an activity, or any other reason. Since the Department of Justice handles all litigation on behalf of the federal government, there can be a significant mismatch of incentives or motivations, even within the government.<sup>339</sup>

This confluence of factors can result in some very unmeritorious cases garnering fees. Consider the case of the Rio Grande Silvery Minnow.<sup>340</sup> Advocates for the West, Defenders of Wildlife, Forest Guardians, National Audubon Society, Sierra Club, and Southwestern Environmental Center sued the Bureau of Reclamation regarding the Rio Grande Silvery Minnow and the Bureau of Reclamation's supposed failure to consider the impacts to the species of various water management issues in a final biological opinion regarding the species issued by FWS for the Bureau.<sup>341</sup> In the case, litigated for more than ten years, including

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337. Ironically, this places the government in the exact situation that small business faced when EAJA was first passed: rather than fight on the merits, it is forced to "knuckle under," in the words of Senator Domenici.

338. *Buckhannon*, 532 U.S. at 605.

339. Among other litigation functions, the Department of Justice executes the Attorney General's authority to enter into settlements in "imminent litigation or suits." 28 U.S.C. § 2414 (2006). This authority is absolute. For a thoughtful treatment of the danger it poses, see generally Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327 (2009).

340. *Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973 (D.N.M. 2002).

341. *Id.* at 976.

an appeal to the Tenth Circuit (which affirmed the lower court),<sup>342</sup> the plaintiffs managed to lose on every point with one technical exception.

First, the judge found that FWS had not failed to receive and use the best available scientific data; though they had committed a minor procedural violation of the Endangered Species Act because the Bureau had not consulted with FWS about the possibility of using two different sources of water to protect the minnow, even that failure had not rendered the biological opinion invalid.<sup>343</sup> The court denied their challenges to the Bureau for failure to conserve the species and causing jeopardy as unripe.<sup>344</sup> In whole, the judge simply affirmed the final biological opinion issued by FWS.<sup>345</sup>

The plaintiffs, however, cited two things in moving for EAJA fees. The first were voluntary changes made by FWS in response to their litigation—considerations that are clearly irrelevant under *Buckhannon*, since they would be arguing a textbook ‘catalyst’ case. The other was some commendatory and sympathetic remarks made by the judge in praising the plaintiffs’ performance:

“Even though I am constrained by the highly deferential standard of review to affirm the final Biological Opinion issued by the Fish and Wildlife Service on June 29, 2001,” notably, the only actual issue in the case,

I believe it is appropriate to compliment Plaintiffs’ counsel for their work on behalf of the endangered silvery minnow and the entire middle Rio Grande system. It is my impression that at the time this lawsuit was filed, not much was being done by the federal agencies, or by the other major players with interests in the middle Rio Grande, to confront seriously the hard, difficult issues . . . [b]y filing this lawsuit, the Plaintiffs’ attorneys got the ball rolling . . . . As a result, Plaintiffs prevailed on at least one significant issue in the case.<sup>346</sup>

Now, it is difficult to say what motivated the judge in this case to say that the plaintiffs had prevailed on a “significant issue.” Only a few paragraphs above, he noted that though he had found that “a procedural violation of the Endangered Species Act did occur . . . the Biological Opinion is not arbitrary and capricious as a result of this procedural violation.”<sup>347</sup> That is to say, the supposedly “significant” issue the plaintiffs’ counsel had prevailed on was meaningless to the disposition of the case.

Nevertheless, there was the very real possibility of an EAJA award to the plaintiffs, since they had “prevailed on at least one significant issue in the case” if one took the language literally. This consolation gesture on the judge’s part (one must keep in mind that they lost substantively), and their technical victory in revealing a minor procedural defect, led the plaintiffs to move for \$1.845 million in attorneys’ fees.<sup>348</sup> Again, the claim was legally dubious: *Buckhannon* rules out

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342. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1133 (10th Cir. 2010).

343. *Rio Grande Silvery Minnow*, 469 F. Supp. 2d at 1002.

344. *Id.*

345. *Id.* at 1002-03.

346. *Id.* at 1002.

347. *Id.*

348. Plaintiffs’ Motion for Award of Attorney Fees and Litigation Expenses at 8, *Rio Grande Silvery*

“catalyst” claims, and the court did not give the plaintiffs any substantive legal relief or change any aspect of the legal relationships between the parties, so the case would not meet any aspect of *Buckhannon*. The federal government though, perhaps wanting to simply end this incredibly lengthy ten-year case, and mindful that if they lost, even procedurally, further litigation regarding the attorneys’ fees would itself increase attorneys’ fees and be recoverable for the plaintiffs under the *Jean* doctrine, settled for a still shockingly large \$822,003.74.<sup>349</sup> Similar borderline cases in which EAJA plaintiffs supposedly “prevail” are not hard to find.<sup>350</sup>

#### D. The Growing Costs of EAJA

The costs to the federal government of the exploitable EAJA system go deep, and so does the waste of taxpayer funds. Congress was initially hesitant to make EAJA a permanent law because it feared the potential costs of EAJA, and its initial inclusion of a sunset clause matched this worry, as did the inclusion of reporting provisions. However, from 1981-1985, the maximum *total* yearly expenditure for EAJA, from both 5 U.S.C. § 504 and 28 U.S.C. § 2412, had never gone above \$2.1 million.<sup>351</sup> (The Department of Justice, recall, had been afraid of an expense in the range of \$250 million per year!) Congress was thus willing to make EAJA permanent, though it retained the reporting provision.

The later expenses in the reporting period for EAJA were not particularly discouraging to Congress either. Through 1993, EAJA payouts never went past \$3.9 million (not adjusted for inflation);<sup>352</sup> and though in 1994, the total payout spiked to a considerably higher \$8.2 million, this change was due to several well-explained factors.<sup>353</sup> The predominant factor was a change in reporting methodology for 28 U.S.C. § 2412 cases which caused the number of cases to modestly increase in some areas, but skyrocket for Health and Human Services (covering Social Security cases, which compose the bulk of EAJA, having never been less than forty-two percent of cases, and by 1985 onwards consistently being upwards of ninety percent of cases, with commensurately large proportions of payouts, though relatively low average actual awards, since they are small cases).<sup>354</sup> The second was the application of EAJA to Court of Appeals for Veterans Claims cases by the Federal Courts Administration Act of 1992; volumes of those cases began to climb after that law became applicable in 1993.<sup>355</sup> And the third was a major Supreme Court case decided in 1993, *Schaefer v. Shalala*, which

*Minnow*, 469 F. Supp. 2d 973 (D. N.M. 2002) (No. 99-1320).

349. Plaintiffs’ and Federal Defendants’ Joint Stipulation Resolving Plaintiffs’ June 26, 2010 “Motion for Award of Attorney Fees and Litigation Expenses,” Dkt. No. 710 at 1, *Rio Grande Silvery Minnow*, 469 F. Supp. 2d 973 (D. N.M. 2002) (No. 99-1320).

350. *See, e.g.*, Settlement Agreement Respecting Attorneys’ Fees and Costs at 3, *Fund for Animals v. Hall*, No. 03-0677 (D.D.C. Sept. 2, 2011).

351. *See* sources cited *supra* note 330.

352. *Id.*

353. 1994 DOJ REPORT, *supra* note 267, at 3.

354. *Cf.* sources cited *supra* note 330.

355. 1993 DOJ REPORT, *supra* note 267, at 3.

adjusted forward the timing for EAJA filing in Social Security cases and Court of Appeals for Veterans Claims cases, causing a temporary surge in cases in 1994.<sup>356</sup> The increase in reported payouts was almost entirely due to Social Security cases, especially given that the absolute increase in cases from any other agency besides HHS was miniscule: in 1994 there were precisely fifty 28 U.S.C. § 2412 applications for every agency except HHS (2206), and Veterans' Affairs (145), as compared to forty-one 28 U.S.C. § 2412 applications for each agency except HHS (222) in 1993.<sup>357</sup> Moreover, the average EAJA payout in 1994 was \$3733, the second lowest average on record, again suggesting that the bulk of the increase was a multitude of small-award cases from HHS.<sup>358</sup>

Naturally, an uptick in Social Security cases was hardly likely to trouble Congress. It is hard to select a more sympathetic case than an elderly or disabled person denied Social Security benefits without a substantial justification on the government's part in doing so (keep in mind that that the latter is a requirement for an EAJA award). And given that Social Security recipients for the most part represent a powerful, actively voting bloc, Congress would likely view EAJA payments to them as not only inexpensive, but also in large part fulfilling the intent of EAJA: providing recompense for those wronged by government activity who likely would not be able to afford a lawyer to collect on these claims.

But there is considerable evidence that the costs of EAJA have climbed in other, less desirable, ways. The author of this paper conducted a study on a small subset of twenty frequent environmental litigants. The study, which examined cases marked as "closed" by the PACER system in a one-year span from September 1, 2009 to August 31, 2010, found that EAJA payments to those groups alone had at least equaled \$5.8 million in that period.<sup>359</sup> Most of those awards were directed against the Department of Interior, specifically FWS and the Bureau of Reclamation. This payout dwarfs the total payout to every agency in every other year from 1982-1994 with the sole exception of Social Security cases in 1994, for the reasons discussed above.<sup>360</sup> A similar study examining tax returns from the same twenty groups found the average yearly attorneys' fees claimed by those groups to be \$9.1 million.<sup>361</sup>

More precise information regarding the costs to specific agencies of EAJA is sparse, but suggestive. For instance, a study by Michael J. Mortimer and Robert W. Malmshemer of litigation against the Forest Service from 1999 to 2005 found that the Forest Service had paid out a total of at least \$6,137,583,<sup>362</sup> at an average

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356. *Id.*; see also discussion *supra* p. 32-33.

357. 1993 DOJ REPORT, *supra* note 267, at 3.

358. *Cf. id.*

359. Memorandum from Miguel Dickson & Chris Segal, PACER Search Results 2-3 (July 25, 2011) (on file with University of Notre Dame Law School Journal of Legislation). Of course, this figure only encompasses court awards under 28 U.S.C. § 2412, and does not include agency awards under 5 U.S.C. § 504.

360. *Cf. sources cited supra* note 330.

361. See Memorandum from Chris Segal, 990 Search Results (July 11, 2011) (on file with University of Notre Dame Law School Journal of Legislation).

362. Michael J. Mortimer & Robert W. Malmshemer, *The Equal Access to Justice Act and US Forest Service Land Management: Incentives to Litigate?*, 109 J. FORESTRY 352, 354 (Sept., 2011).

payout per year of \$876,798.<sup>363</sup> The results corroborated the findings of Lauren B. Stull regarding the incentives for various groups to sue the Forest Service.<sup>364</sup> And again, one must keep in mind that this is a payout from one agency within one department in the federal government, while the EAJA figures quoted in the paragraphs above were for the *entire federal government*. These costs of course do not factor in the Forest Service's costs in preparing for and conducting litigation. No doubt, their effectiveness and morale have been compromised by dealing with so much litigation so regularly.<sup>365</sup>

The attorneys' fees awarded under EAJA represent only one part of the total costs of EAJA to the American taxpayer. The personnel costs of preparing for litigation through pleadings and discovery, submitting evidence to administrative or judicial proceedings, employees being deposed, and reanalyzing and rewriting environmental impact statements and biological opinions found inadequate by the courts have been elusive costs to quantify. However the Government Accountability Office is now conducting a study of overall EAJA costs.<sup>366</sup> Their first report investigating the Environmental Protection Agency revealed that from FY 1995-2010, a total of 2,500 environmental cases (155 per year) were filed against EPA, each defended by the Department of Justice's Environment and Natural Resources Division. From 1998-2010, DOJ spent \$43 million to defend EPA cases, or \$3.3 million annually.<sup>367</sup> The attorneys' fee awards paid out by DOJ on behalf of EPA totaled approximately \$1.8 million.<sup>368</sup> Thus, for every \$1.00 paid out in fee awards, DOJ alone spends \$1.83 in personnel and administrative costs. The related internal costs at EPA remain un-quantified.

The U.S. Fish and Wildlife Service (FWS) has been an even more visible and dramatic victim of excessive litigation, much of it eligible for EAJA. Recall the kinds of cases discussed in Section B in which a statutory deadline of some sort or another was missed. The APA allows a party to bring suit to "compel agency action unlawfully withheld or unreasonably delayed."<sup>369</sup> Since the Endangered Species Act sets very specific and inflexible deadlines to respond to petitions regarding species status,<sup>370</sup> FWS is often in the position of missing those deadlines. This is

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363. *Id.*

364. Lauren B. Stull, *The Equal Access to Justice Act and Federal Land Management: Incentives to Litigate?* (June 29, 2007) (unpublished M.S. thesis, Virginia Polytechnic Institute and State University) (on file with University of Notre Dame Law School Journal of Legislation).

365. Thomas, *supra* note 315.

366. *E.g.* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME (2011). Additional reports on EAJA expenditures are expected in the near future.

367. *Id.* at 19.

368. *Id.*

369. 5 U.S.C. § 706(1) (2006).

370. Under the Endangered Species Act, FWS has three classification levels to identify and designate "endangered species": candidate, threatened or endangered. Candidate species are listed by FWS's own initiative through its annual Candidate Notice of Review (CNOR) process. Warranted-but-precluded by higher priority findings become resubmitted petitions one year from the date of the finding following the same CNOR process, and remain on the candidate list and reviewed annually. Petitions by third party individuals or organizations outside FWS to secure classifying species as threatened or endangered require that FWS make an initial finding within ninety days as to whether the petition presents substantial scientific or commercial

especially the case in recent years, as groups such as the Center for Biological Diversity have stepped up the pace of petition listing requests.

Consider, for instance, that from 1998 to 2003, the FWS had petitions to list as endangered 13, 16, 35, 15, 25, and 21 species respectively,<sup>371</sup> and that from 2003 to 2010 that workload was 298 (with one petition for 225 species), 11, 23, 695 (with a petition for 206 species, and another for 475), 56, 63, and 432 (with a petition for 404 species) respectively.<sup>372</sup> FWS has not had proportionally large budget increases, so it is doubtful it can routinely deal with five times as much work as in earlier years, let alone in some cases up to fifty times as much work. Moreover, consider that in FWS's estimation, in 2010 it cost on average \$345,000 to publish a proposed rule regarding a given species with a critical habitat finding.<sup>373</sup> With a single petition for 225, 206, 475, or 404 species, it's clear that FWS will not be able to comply in a timely fashion, and then any group will be free to sue under the APA and recover fees for doing so from EAJA.

This problem has become so intractable that FWS has engaged in a multidistrict litigation settlement with its two most persistent aggressors, the Center for Biological Diversity, and WildEarth Guardians (WEG).<sup>374</sup> The multidistrict litigation with WEG was based on thirteen outstanding suits against the defendants filed in 2009 and 2010 in six different federal district courts scattered across the country. Each case was based on FWS missing either a ninety-day or twelve-month statutory deadline to make a threatened or endangered finding on twenty-three different species. The thirteen cases had been all consolidated as multidistrict litigation and moved to the U.S. District Court for the District of Columbia.<sup>375</sup> The WildEarth Guardians Settlement Agreement for these thirteen consolidated cases however extended its reach further by taking judicial notice, recognizing and incorporating the existence of 251 identified candidate species that had been awaiting publication of a proposed rule by the FWS for "long periods of time" and

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information indicating that the petitioned action may be warranted. If a petitioned action is found to present substantial information indicating the petitioned action may be warranted, the Secretary of Interior must within twelve months of the date of the petition make a finding as to whether the petitioned action is warranted, not warranted, or warranted but precluded by higher priority action ("warranted-but-precluded"). If warranted, FWS must publish in the Federal Register a proposed regulation to implement the listing ("Proposed Rule").

Within twelve months after publishing the Proposed Rule, FWS is required to publish a final regulation either placing the species at issue and its related critical habitat needed for survival on the threatened or endangered list, withdraw the earlier Proposed Rule, or notice the invocation of a six-month extension to make its determination. FWS also has the authority to list species on an emergency basis without regard to the petition or candidate process when they determine there is a significant risk to the well-being of any species simply by publishing such a determination by regulation in the Federal Register.

371. Letter from Office of ESA Litigation, U.S. Fish & Wildlife Serv. to author (Aug. 9, 2011) (on file with University of Notre Dame Law School Journal of Legislation).

372. *Id.*

373. *Id.*; *Cf.* Proposed Rules, 75 Fed. Reg. 78094, 78141 (proposed Dec. 14, 2010) (to be codified at 50 C.F.R. pt. 17) (listing median costs to prepare various findings and rules); Endangered and Threatened Wildlife and Plants: 12-Month Finding on a Petition to List the Sonoran Population of the Desert Tortoise as Endangered or Threatened.

374. *See In re Endangered Species Act Section 4 Deadline Litig.* 270 F.R.D. 1 (D.D.C. 2010).

375. *Id.* (at Docket); *see also* Certified True Copy of Conditional Transfer Order, *id.*

were without the legal protection of the ESA.<sup>376</sup> Even FWS admitted “many of these 251 candidate species have been on the candidate list for more than 10 years.”<sup>377</sup> The WEG Settlement Agreement goes even further by taking judicial notice of five other pending cases the plaintiff and others had filed challenging the merits of five warranted-but-precluded findings made by FWS.<sup>378</sup> The Settlement Agreement then recognizes and incorporates as Exhibit A, thirty-five outstanding settlement agreements and court orders from unrelated cases that require the action of multiple petition findings, final listing regulations and critical habitat determinations over which twelve different federal district courts still retain jurisdiction.<sup>379</sup> Finally, the WEG Settlement Agreement lists FWS’s entire species listing and critical habitat work plan for FY 2011 and 2012 and identifies over 880 species and internal priorities for FWS, the order in which their staff will address each, establishes yearly incremental deadlines for the staff, and commits FWS to dedicating “substantially all of the resources in the Listing Program” to accomplish the many tasks prescribed by the settlement agreement by September 30, 2016.<sup>380</sup> Notably, FWS’s admission in one pleading says there are over 851 species requiring ninety-day and twelve-month petition findings.<sup>381</sup>

The agreement anticipates this global settlement and work plan will “prevent the filing of an even greater amount of anticipated litigation, is in the public interest, and is an appropriate way to resolve the disputes [with others].”<sup>382</sup> The work plan moreover is intended to provide FWS an orderly administration of its Listing Program, maintain a balanced output of petition findings and designations, and reduce the number of candidate species.<sup>383</sup> Plaintiff WildEarth Guardians agreed not to petition for any new listings beyond ten per year prior to September 30, 2016,<sup>384</sup> or file any further litigation until after March 31, 2017, with multiple exceptions and exemptions, and not actively solicit others to do so.<sup>385</sup> However, the settlement agreement explicitly does “not preclude Guardians from providing biological information concerning the imperilment of species to other organizations or individuals, if requested.”<sup>386</sup>

The Center for Biological Diversity’s (CBD) settlement agreement is separate but complementary to the WEG agreement, and gives CBD separate rights to enforce certain deadlines in the WEG agreement.<sup>387</sup> Under the agreement, the court

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376. See Joint Motion For Approval of Settlement Agreement and Order of Dismissal of Guardians’ Claims, at 9 *In re Endangered Species Act Section 4 Deadline Litig.* 270 F.R.D. 1 (D.D.C. 2010) [hereinafter Motion and Order of Guardians’ Claims].

377. See *id.* at 2.

378. See *id.* at 11.

379. See *id.* at 19-20.

380. See *id.* at 9, 23-26.

381. Cf. *id.* at 2.

382. *Id.* at 6.

383. *Id.* at 10.

384. See *id.*

385. See *id.* at 9.

386. *Id.*

387. See Joint Motion For Approval of Settlement Agreement and Order of Dismissal of the Center’s Claims, at 7 *In re Endangered Species Act Section 4 Deadline Litig.* 270 F.R.D. 1 (D.D.C. 2010).

took judicial notice of three lawsuits in which CBD is a co-plaintiff which will be dismissed, or they will withdraw from, and one wherein CBD is the sole plaintiff which will be voluntarily dismissed, all in four separate federal district courts. By September 30, 2011, FWS is required to issue ninety-day findings for 477 species, and twelve-month findings for eleven species.<sup>388</sup> Prior to September 30, 2017, FWS is required to publish a proposed rule or a non-warranted finding in the *Federal Register* for thirty-two candidate species and eight non-candidate species.<sup>389</sup> When the 1,659 prescribed actions of species and critical habitat determinations from both settlement agreements are combined, this is what FWS's action plan calls for: by the end of FY2011 (September 30, 2011), 1,182 determinations; by FY 2012, 194 determinations; by FY 2013, 144 determinations; by FY 2014, 37 determinations; by FY 2015, 47 determinations; by FY 2016, 54 determinations; by FY 2017, 1 determination.<sup>390</sup> Moreover, the fifty-two determinations prescribed in the thirty-five outstanding but unrelated settlement agreements and court orders must be severally addressed within this same timeframe.

In sum, FWS now has no agency flexibility whatsoever; no discretion. Its work schedule and priorities have been set by court order, and it is reporting not only to the court but to private plaintiffs. All of this was triggered because FWS missed deadlines due to delays caused by the plaintiffs' excessive litigiousness. In fact, FWS even admits that meeting these deadlines will take "substantially all of the resources in the Listing Program."

The story of the ramifications and impact of these two settlement agreements on the federal government and American taxpayers does not end with just the domination of FWS by outside parties, and the effective hijacking of its budget and staff. Both settlement agreements of course specify that the plaintiffs are "prevailing part[ies]," and are entitled to an award of attorneys' fees and costs in this consolidated case, and in each of the thirteen cases that were severally consolidated into this case, as are each of the co-plaintiffs in each of the consolidated cases.<sup>391</sup> In the primary consolidated case, WildEarth Guardians received attorneys' fees of \$167,602<sup>392</sup> and the Center for Biological Diversity received attorneys' fees of \$128,158.<sup>393</sup> Fees in related cases may yet be awarded in the future. Funding for these multiple attorneys' fees will come directly from the Judgment Fund and EAJA, as determined by the guidelines of the Department of Justice which typically splits them by order of how much was subject to ESA fee-shifting, followed by EAJA fee-shifting.<sup>394</sup>

EAJA abuse then covers a remarkably wide range of activity: from individual

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388. *Id.* at 5.

389. *See id.* at 7.

390. *Compare id.*, with Motion and Order of Guardians' Claims, *supra* note 376.

391. Motion and Order of Guardians' Claims at 7.

392. *Id.* at Stipulation to Resolve WildEarth Guardians' Claims for Attorneys' Fees and Order, 2.

393. *Id.* at Stipulation to Resolve Center for Biological Diversity's Claims for Attorneys' Fees and Order, 2.

394. *See* U.S. Dep't of Justice, Payment of Attorney's Fees in Litigation Involving Successful Challenges to Federal Agency Action Arising Under the Administrative Procedure Act and the Citizen-Suit Provisions of the Endangered Species Act (2000).

payouts of millions of dollars in attorneys' fees in single cases, to the encouragement of repeat or derivative litigation, to the evasion of the statutory cap, and even to massive flotillas of lawsuits intended to entirely capture and restructure the work of an entire agency. Though the section above has shown some of these costs, one should recall these are lower-bound estimates, and there are always costs to the government, usually un-quantified,<sup>395</sup> including litigation costs to the Department of Justice<sup>396</sup> and lost efficiency and morale within the targeted agencies.

#### IV. EFFORTS AT REFORM

"Reform!" has oft been a rallying cry for the Congress, and issues surrounding EAJA are no exception. Part 2 of this article discussed some of the ways EAJA has been amended or altered by both Congress and courts. Unsurprisingly, many familiar with the story of abuse told in Part 3 believe it is imperative that EAJA be amended again. Over the years, many others have thought EAJA should be amended, in some cases for the exact same reasons. This Part explores past unsuccessful efforts at reform, before turning to the present.

Section A of this Part focuses on the House Small Business Committee's attempt to amend EAJA in 1981 to remove the 501(c)(3) exception, discussed earlier in Part 2.B. Section B revisits the legislative history of the 1985 amendments to EAJA, focusing on unsuccessful changes. Section C explores a 1992 attempt to limit EAJA awards strictly to the hourly cap. Section D examines a series of proposals, floated between 1997 and 2006, to make EAJA recovery automatic in suits against EPA and OSHA. Section E mentions an attempt, in 2010, to reinstitute tracking of payments. Finally, Section F discusses the Government Litigation Savings Act of 2011 (GLSA), currently pending before Congress. It examines the stated reasons for the introduction of the legislation and critically evaluates the changes the legislation would make. Ultimately, it includes suggestions for additional provisions that Congress could consider, drawn from the history of EAJA as previously outlined.

##### *A. 1981: The House Small Business Committee's Attempt to Limit the 501(c)(3) Exception*

EAJA went through many alterations in the years it spent in committee between 1975 and 1980, and again between 1981 and 1985. Many of the changes were nuanced, such as the selection of the term "substantially justified,"<sup>397</sup> and others were nearly invisible, such as the initial addition of the 501(c)(3) exception.<sup>398</sup>

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395. *But see infra* note 396.

396. *Cf.* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 366, at 19 (citing an average figure of \$3.3 million per year to defend EPA from lawsuits). For further discussion of the incidental costs of EAJA litigation, see *supra* pp. 49-50.

397. *See* discussion *supra* p. 27.

398. *See* discussion *supra* p. 29-32.

But the addition of the 501(c)(3) exception did not stay invisible. On the contrary, it was the subject of a failed amendment campaign that played out in 1981 and 1982. The 501(c)(3) exception first appeared on September 26, 1980, in the House Committee on the Judiciary Report 96-1418 accompanying their review of S. 265, and it became part of the final law just five days later, on October 1, 1980. After the election of 1980 and during budget negotiations in the spring of 1981, the House Small Business Committee took umbrage at this insertion, as well as the deletion of the requirement that an applicant have a “direct and personal” injury in order to recover.<sup>399</sup> The Committee launched a strenuous effort to amend EAJA back to its original intent, ultimately without success. Its proposed amendments (part of H.R. 2998) were characterized as “technical changes” intended to amend EAJA “to more closely reflect the Committee’s intent for H.R. 6429 as ordered reported” a year earlier.<sup>400</sup> In its own words:

the bill’s amendment to Title II of Public Law 96-481 [EAJA] would return the Equal Access to Justice Act to a form similar to that agreed upon by the House Small Business Committee in May of last year. Specifically, the amendment restricts the use of the Act to business owners and individuals who prevail in regulatory or judicial disputes with the Federal Government . . . .<sup>401</sup>

The proposed amendment would have struck out any reference to 501(c)(3) organizations and their exemption from the net-worth cap.

As the amendment was drafted, 501(c)(3)s would also be excluded by another qualifying standard inserted in the amendment. Rather than reinsert the “direct and personal interest” language to have standing to access funds utilizing EAJA, the House Small Business Committee took a different approach. The 1981 amendment required that the:

Prevailing party would have suffered a pecuniary loss in excess of \$500 in his individual capacity and not as a member or representative of an organization or group; or, the prevailing party was engaged in carrying on a trade or business for profit where the amount in controversy is in excess of \$500 . . . and was directly related to the conduct of such trade or business.<sup>402</sup>

Clearly, this would eliminate non-profit organizations. The House Small Business Committee’s intent that EAJA was to exclude 501(c)(3) organizations and only serve private citizens and small businesses was again made clear. The House approved the Small Business Committee’s proposed amendments to EAJA, but the Senate rejected them.

In 1982, during oversight hearings on “Implementation of the Equal Access to Justice Act,” the House Judiciary Committee’s Subcommittee on Courts, Civil

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399. For a discussion of the deletion of the direct and personal interest, see *supra* p. 29.

400. See H.R. REP. NO. 97-150, at 58 (1981).

401. See *id.* at 64.

402. See *id.* at 11.

Liberties, and the Administration of Justice (chaired by Robert W. Kastenmeier (D-WI)) asserted primary jurisdiction over the bill and rejected the House Small Business Committee's proposed amendments because it claimed it had never seen the amendments.<sup>403</sup> The Subcommittee on Agency Administration of the Senate Committee on the Judiciary also examined EAJA in 1982,<sup>404</sup> but not the proposed amendments, and nothing more ever came of it. However, the House Small Business Committee's hearings and reports document and preserve for history its perception that it was bypassed and ignored by its own Judiciary Committee and the Joint Senate and House Conference Committee, because EAJA was Title II in a small business bill over which the House Small Business Committee considered it had jurisdiction. After 1982, the only recorded discussion that occurred in the Congress on the 501(c)(3) issue was in a Senate hearing on April 14, 1983<sup>405</sup> during consideration of reauthorizing EAJA. At that hearing, the Washington Legal Foundation again advocated putting the same net-worth limitations on 501(c)(3)s that applied to small businesses.<sup>406</sup> Of course, the 501(c)(3) exception has returned to the spotlight in the present Congress, but that story is told in Section 4F.

### *B. 1980-1985: Other Failed Reform Efforts*

Over the years there have been several particularly noteworthy reform proposals. The amendment process leading up to the reauthorization of EAJA in 1985 was a particularly interesting period, with no fewer than eight different committee hearings (some spanning multiple days) and reports in the House and Senate. Of the many alterations debated in these proceedings, three failed amendments stand out as measures that had the potential to dramatically reduce the payment of EAJA attorneys' fees by the government, particularly in cases where excessive fees are sought or where the availability of fees drives the litigation. Some context for these ideas can be found in the Reagan Administration's 1982 budget submission, which claimed that "a literal industry has arisen for attorneys dependent on Federal fee awards."<sup>407</sup> Clearly, fee award reform was ripe for discussion.

The earliest of these other EAJA proposals came from the Office of Management and Budget (OMB). OMB suggested that EAJA be amended to require a petitioner to certify that if his or her EAJA application were denied, his or

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403. See *Implementation of the Equal Access to Justice Act*, *supra* note 185, at 1.

404. *Equal Access to Justice: Hearing on the Equal Access to Justice Act Before the Subcomm. on Agency Admin. of the S. Comm. on the Judiciary*, 97th Cong. (1982).

405. *Reauthorization of Equal Access to Justice Act: Oversight Hearing to Extend the Authorization of the Equal Access to Justice Act, S. 919 Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 98th Cong. (1983) [hereinafter *Reauthorization of Equal Access to Justice Act*].

406. See *id.* at 154, 165 (statements of Michael P. McDonald).

407. *Implementation of the Equal Access to Justice Act*, *supra* note 185, at 22 (comment by Congressman Barney Frank). President Reagan was proposing an EAJA-type cap for *all* attorneys' fees statutes. *Id.* at 297. The point nonetheless stands, that the Administration felt that the government was paying too much in attorneys' fees.

her attorney would still receive payment.<sup>408</sup> According to OMB, “this amendment will restrict contingency fee litigations against the Federal Government brought by and on behalf of attorneys whose notational clients bear no litigation risks or costs, and who are merely the means by which attorneys satisfy nominal standing requirements.”<sup>409</sup> The Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary discussed this proposal with universal disapproval: Representative Frank characterized it as “inequitable,”<sup>410</sup> and Sara-Ann Determan (testifying on behalf of the American Bar Association) objected to the suggestion that lawyers who represent poor persons were in fact representing their own political views.<sup>411</sup> The Alliance for Justice added its disapproval,<sup>412</sup> and the amendment was swiftly dropped.

The other two proposals of interest both came from the Department of Justice. The first is very faint in the legislative record, but apparently the Department suggested that there be an amendment requiring that fees not be disproportionate to the amount in controversy.<sup>413</sup> Stephen L. Babcock, testifying on behalf of the Administrative Conference of the United States, characterized this amendment as “directly contrary to the purpose of the act,”<sup>414</sup> and the suggestion was dropped. However, it is easy to see that if adopted, this amendment would have limited major EAJA awards to significant cases, as well as implicitly tied awards to direct monetary interests.

The Department’s other proposal was for a punitive amendment, which would have required courts to “deny all fees if . . . the initial amount sought [is found] to be unreasonably high or, perhaps, substantially unjustified.”<sup>415</sup> This proposal was never seriously taken up by Congress, but if adopted, it would undoubtedly have had a profound effect. Huge numbers of EAJA petitions are granted but largely reduced from the initial request, and the knowledge that an unreasonable initial fee request could result in a total denial of fees would reduce the size of initial requests, certainly making the use of judicial resources in EAJA cases more economical and perhaps reducing some of the huge fee awards that are still routinely seen.

Finally, two comments merit mention. In 1984, the Department of Justice expressed concern about “the use of so-called multiplier factors in awarding fees,” which increased fee awards above the \$75 an hour cap that was then part of EAJA.<sup>416</sup> In a written statement, Carolyn B. Kuhl, a Deputy Assistant Attorney General in the Civil Division, explained that the use of cost multipliers was

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408. *Id.* at 8. (comment by Congressman Barney Frank).

409. *Id.* at 20 (testimony of Sara-Ann Determan quoting OMB).

410. *Id.* (comment by Congressman Barney Frank).

411. *Id.* (testimony of Sara-Ann Determan).

412. *Id.* at 37-38 (testimony of Nan Aron).

413. *Reauthorization of Equal Access to Justice Act, supra* note 405, at 10 (comment of Senator Charles E. Grassley).

414. *Id.* (testimony of Stephen L. Babcock).

415. *Id.* at 33 (prepared statement of J. Paul McGrath).

416. *Equal Access to Justice Act Amendments: Hearing on H.R. 5059 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 98th Cong. 21 (1984) (testimony of Carolyn B. Kuhl).

“contrary” to the fee cap, encouraged “excessive free requests and prolonged litigation,” and damaged the public perception of EAJA.<sup>417</sup> At the same hearing, the Department submitted a copy of a memorandum that warned that “[i]t is questionable whether the Equal Access to Justice Act has done anything for its presumed beneficiaries, while it is certain that it has helped public interest legal groups finance their challenges to the deregulatory efforts of the Administration.”<sup>418</sup> No amendment ever came of the Department’s concerns, but in 1984 they eerily foreshadowed more recent developments.

### C. 1992: *The Access to Justice Act of 1992*

1992 saw an important change to EAJA, with the adoption of the Federal Courts Administration Act of 1992 applying EAJA to cases before the Court of Appeals for Veterans Claims.<sup>419</sup> But another EAJA reform was proposed as well: The Access to Justice Act of 1992.<sup>420</sup> The bill, which was introduced in both the House and Senate and referred to committees but never further acted upon, was an omnibus bill addressing several issues relating to litigation involving the federal government. These included, inter alia, a broad provision meant to build upon EAJA by allowing the United States to proactively enter into agreements for attorneys’ fees in a variety of situations,<sup>421</sup> and also an amendment to EAJA itself.<sup>422</sup> The amendment would have removed the “special factor” exception from EAJA’s statutory cap on hourly rates and codified the “cost of living” exception by pegging it to the Consumer Price Index for All Urban Consumers.<sup>423</sup> If adopted, this reform measure might have significantly limited the abuse chronicled in Part 3.A.<sup>424</sup> Unfortunately it was not adopted, and the Congressional Record contains no discussion, debate, or explanation of why.

### D. 1997-2006: *Modifying EAJA in Defense of Small Business*

Throughout the period 1997-2006, Congress considered several measures to modify EAJA to make it even more small-business friendly. Two of these bills aimed directly at making EAJA easier to use against OSHA and NLRB, agencies

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417. *Id.* at 26 (prepared statement of Carolyn B. Kuhl).

418. *Id.* at 153 (Appendix I(F): Department of Justice Memorandum Recommending the President not Approve Legislation Reauthorizing the Equal Access to Justice Act); *see also* Stephen Edward Blackman, Note, *Bad Faith and the EAJA: A Proposal for Strict Scrutiny of Government Fee Litigation Under the EAJA*, 20 ENVTL. L. 975, 988 (1990). The American Enterprise Institute expressed the same concerns, albeit outside of the Hearing context. Perspective, *The Private Attorney General Industry: Doing Well by Doing Good*, REGULATION, May-June 1982, at 5, available at <http://www.cato.org/pubs/regulation/regv6n3/v6n3-2.pdf>.

419. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 506, 106 Stat. at 4513 (1992).

420. The Access to Justice Act of 1992, H.R. 4155, 102d Cong. (1992); The Access to Justice Act of 1992, S. 2180, 102d Cong. (1992).

421. *Id.* at § 6.

422. *Id.* at § 4.

423. *Id.*

424. *See supra* p. 54-56.

whose overreach had been part of the original impetus behind EAJA. The third was a systematic EAJA reform bill which contained many of the same good ideas that the OSHA and NLRB bills had, and which in other important respects presaged measures included in the current GLSA. However, it also included some fairly bad ideas that were only plausible because the extent of EAJA's abuses were hidden and only beginning to spiral out of control during that time.

1. 1997-1999: The Fair Access to Indemnity and Reimbursement Act (FAIR Act)

In late 1997, House Bill 2449 and Senate Bill 1684 were introduced into the House and Senate, respectively. These bills were known as the "Fair Access to Indemnity and Reimbursement Act" (FAIR Act). The animating idea behind the FAIR Act was simple and well-stated in the "Findings and Purpose" section of the bill, so it is simply quoted below:

(a) FINDINGS- The Congress finds as follows:

(1) Certain small businesses and labor organizations are at a great disadvantage in terms of expertise and resources when facing actions brought by the National Labor Relations Board.

(2) The attempt to "level the playing field" for small businesses and labor organizations by means of the Equal Access to Justice Act has proven ineffective and has been underutilized by these small entities in their actions before the National Labor Relations Board.

(3) The greater expertise and resources of the National Labor Relations Board as compared with those of small businesses and labor organizations necessitate a standard that awards fees and costs to certain small entities when they prevail against the National Labor Relations Board.

(b) PURPOSE—It is the purpose of this Act—

(1) to ensure that certain small businesses and labor organizations will not be deterred from seeking review of, or defending against, actions brought against them by the National Labor Relations Board because of the expense involved in securing vindication of their rights;

(2) to reduce the disparity in resources and expertise between certain small businesses and labor organizations and the National Labor Relations Board; and

(3) to make the National Labor Relations Board more accountable for its enforcement actions against certain small businesses and labor organizations by awarding fees and costs to these entities when they prevail against the National Labor Relations Board.<sup>425</sup>

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425. Fair Access to Indemnity and Reimbursement Act of 1997, H.R. 2449, 105th Cong. § 2 (1997); Fair Access to Indemnity and Reimbursement Act of 1997, S. 1684, 105th Cong. § 2 (1997).

The obvious question is how the FAIR Act would improve on EAJA, and that question is simple to answer. The bill would have modified the National Labor Relations Act (NLRA) by adding in two sections. The first one, entitled “Administrative Proceedings” mandated that “[a]n employer who, or a labor organization that – (1) is the prevailing party in an adversary adjudication conducted by the Board under this or any other Act, and (2) had not more than 100 employees and a net worth of not more than \$1,400,000 at the time the adversary adjudication was initiated” automatically wins fees and other expenses under “section 504 of title 5, United States Code” (EAJA’s administrative section), “but without regard to whether the position of the Board was substantially justified or special circumstances make an award unjust.”<sup>426</sup> So the basic EAJA mechanism was to be retained, but recovery was to be automatic for a prevailing party, regardless of whether NLRB was justified or whether there were any special circumstances. Similarly, the second “Court Proceedings” section would have awarded fees under section 2412(d) of title 28 (EAJA’s courts section), with the same exemptions.

In May 1999, a modified version came out of the Subcommittee on Employer-Employee Relations of the House Education and the Workforce Committee. That bill, still called the FAIR Act, was only slightly different: in each case where NLRB was mentioned, parallel mention was made of OSHA.<sup>427</sup> Thus, if a party were to prevail against OSHA either in its administrative process or in court, attorneys’ fees recovery and costs against it would likewise be automatic.

Though neither bill was passed, several things about the attempts are noteworthy. First, Congress never lost track of the fact that EAJA was intended to aid small businesses. Thus, even while ending the reporting in 1995, Congress still was concerned that EAJA had not been as successful as desired, and continued to look for ways to improve the legislation. Second, the choice of targets—OSHA and NLRB—is significant: both agencies factored prominently into the discussions and rhetoric surrounding the passage of EAJA. And third, Congress made the net worth cap for qualifying for this automatic-recovery provision, i.e. \$1.4 million, significantly smaller than either the individual net worth cap for EAJA (\$2 million), or the organizational net worth cap (\$7 million), and similarly adjusted the maximum number of employees to be eligible from 500 in EAJA down to 100 in the FAIR Act.<sup>428</sup> Thus, Congress’s changes were entirely small-business oriented: an automatic recovery mechanism aimed at two often anti-small-business agencies, with even more tightly constrained financial eligibility requirements than those in EAJA.

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426. H.R. 2449 § 3 (internal quotation marks omitted); S. 1684 § 3 (internal quotation marks omitted).

427. Fair Access to Indemnity and Reimbursement Act of 1999, H.R. 1987, 106th Cong. (1999); Fair Access to Indemnity and Reimbursement Act of 1999, S. 1158, 106th Cong. (1999).

428. H.R. 1987, §§ 3, 5; S. 1158, §§ 3, 5.

## 2. 2003-2005: The Occupational Safety and Health Fairness Act

Concern with OSHA did not fade from Congress' agenda after the failure of the FAIR Act. A considerably more complex and hands-on piece of legislation, the Occupational Safety and Health Fairness Act [hereinafter the "OSHA Fair Act"] was introduced in 2003.<sup>429</sup> Though many of the bill's provisions would take this article adrift into areas of labor law that have little to do with EAJA, section 6 of the OSHA Fair Act was quite similar to the FAIR Act discussed in the subsection above. It would have modified OSHA by adding in a fee-award provision for administrative proceedings<sup>430</sup> and for judicial proceedings.<sup>431</sup> Like the FAIR Act, these sections of the OSHA Fair Act removed the substantial justification defense and the special circumstances defense; these sections also limited this streamlined recovery process to groups with no more than 100 employees and \$1.5 million in net worth. The bill came up again in 2005, with substantively identical provisions.<sup>432</sup>

## 3. 2003-2006: The Equal Access to Justice Reform Act

Perhaps the most interesting and incisive reform legislation to concern EAJA before the GLSA was the sequence of bills spanning from 2003 to 2006, named the Equal Access to Justice Reform Act (EAJRA), first introduced in 2003.<sup>433</sup> Unlike the FAIR Act and the OSHA Fair Act, both of which aimed to modify EAJA solely in the context of proceedings against NLRB and/or OSHA, EAJRA instead sought to reform the entire EAJA mechanism. The bill had an unusually strong findings section:

(a) FINDINGS— The Congress finds that—

(1) the Equal Access to Justice Act (Public Law 96-481; 94 Stat. 2325 et seq.) (in this section referred to as "EAJA") was intended to make the justice system more accessible to individuals of modest means, small businesses, and nonprofit organizations (in this section collectively referred to as "small parties") through limited recovery of their attorneys' fees when they prevail in disputes with the Federal Government;

(2) although EAJA has succeeded, at modest cost, in improving access to the justice system for small parties, EAJA retains formidable barriers to attorneys' fees recovery (even for small parties that completely prevail against the Government), as well as inefficient and costly mechanisms for determining the fees recovery;

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429. Occupational Safety and Health Fairness Act of 2003, H.R. 1583, 108th Cong. (2003).

430. *Id.* at §§ 6, 32(a).

431. *Id.* at § 32(b).

432. Occupational Safety Fairness Act of 2005, S. 2006, 109th Cong. (2005).

433. Equal Access to Justice Reform Act of 2003, H.R. 2282, 108th Cong. (2003). It was introduced again in 2005, without significant changes. Equal Access to Justice Reform Act of 2005, H.R. 435, S. 2017, 109th Cong. (2005); Equal Access to Justice Reform Act of 2005, S. 2017, 109th Cong. (2005).

(3) among the barriers retained by EAJA are—

(A) EAJA's "substantial justification defense", whereby the Government can deny attorneys' fees recovery to prevailing small parties if the Government can show that its position, although proven illegal, was not abusive or entirely unreasonable;

(B) EAJA's hourly rate cap on attorneys' fees of \$125, which is well below the market rate for competent legal services in many legal markets (especially for complex and high-risk litigation against the Federal Government) and thus prevents fair reimbursement of attorneys' fees for small parties and discourages competent counsel from undertaking meritorious cases on a contingency or reduced-fee basis; and

(C) EAJA's outdated small business eligibility requirements, which have not increased or indexed for inflation the net worth threshold of \$7,000,000 established in 1985;

(4) among the inefficiencies retained by EAJA are—

(A) EAJA's substantial justification defense, which initiates collateral litigation over attorneys' fees recovery that both consumes significant Federal resources and prolongs the time, expense, and risk of pursuing fees recovery to the prevailing small party;

(B) EAJA's omission of any mechanism (such as the offer in compromise feature of Federal Rule of Civil Procedure 68) that would apply after a small party has prevailed on the merits of its claim to encourage both sides to reach a prompt and reasonable settlement of attorneys' fees;

(C) EAJA's failure to create an educational and technical assistance function within an appropriate agency to facilitate more efficient use, settlement, and payment of claims under EAJA; and

(D) EAJA's failure to reassign Congressional reporting obligations to an appropriate, existing agency (EAJA lodges annual Congressional reporting with the Administrative Conference of the United States, an agency which ceased to exist in 1995);

(5) none of these barriers or inefficiencies exists in the primary Federal fee-shifting statute applicable to State and local governments, Revised Statutes section 722 (42 U.S.C. 1988(b)), resulting in—

(A) an unequal level of accountability to Federal law among governments in the United States (shielding the Federal Government to a greater degree than State and local governments from the consequences of violating Federal law);

(B) an uneven playing field for small party victims of Federal law violations (discouraging resistance to illegal action by the Federal Government); and

(C) an inefficient use of Federal agency resources (burdening the Federal budget);

(6) a further barrier and inefficiency is the practice of Federal agencies of paying their EAJA liabilities from the General Treasury rather than their

own agency budgets, relieving those agencies of the financial consequences of their misconduct (i.e., EAJA liability) and burdening the Federal budget unnecessarily;

(7) it is in the national interest to remove these barriers and inefficiencies for small parties, particularly small business owners, involved in disputes with the Federal Government in order to develop sound policies relative to the national economy in which small businesses play a significant and strategic role; and

(8) the removal of these barriers and inefficiencies is essential to—

(A) equalize the level of accountability to Federal law among governments in the United States;

(B) discourage marginal or abusive Federal enforcement actions directed at small parties;

(C) stop the practice of paying EAJA liabilities from the General Treasury, which has insulated agencies from the financial consequences of their misconduct and burdened the Federal budget unnecessarily;

(D) refine and improve Federal policies through adjudication;

(E) promote a fair and cost-effective process for prompt settlement and payment of attorneys' fees claims; and

(F) provide a fairer opportunity for full participation by small businesses in the free enterprise system, further increasing the economic vitality of the Nation.<sup>434</sup>

The Congressional analysis of EAJA encapsulated in this section in many ways parallels this article's analysis. Thus, for instance, Congress approved of the fact that EAJA has mostly "succeeded, at modest cost, in improving access to the justice system for small parties," though noting it has not been perfectly successful.<sup>435</sup> Congress noted with disapproval the absence of reporting mechanisms, and highlighted the problems with the reimbursement-payment system, and the fact that payments are often being made out of the Judgment Fund instead of agencies' own budgets, as originally intended.<sup>436</sup>

EAJRA, like the FAIR Act and the OSHA Fair Act above, would have eliminated the substantial justification defense. Unlike the FAIR Act and the OSHA Fair Act, however, Congress moved in the other direction with the net worth caps—by raising them to \$10 million for organizations.<sup>437</sup> In one sense, this is an understandable move on Congress's part: it relied on the earlier \$7 million figure in EAJA, and roughly adjusted it upwards for inflation and cost of living changes. Nevertheless, this move came without Congress's awareness of the abuses of EAJA detailed in Part 3, and so it is unsurprising that the net worth cap adjustment has in

434. H.R. 2282.

435. *Id.* § 2(a)(2).

436. *Id.* § 4(b)(1). Sadly, there were no hearings on the bill, so the basis for this finding is unknown. However, it was confirmed in 2010 by testimony before the Subcommittee on Interior, Environment and Related Agencies of the House Committee on Appropriations. *See also* discussion *supra* note 265.

437. H.R. 2282 § 4(b).

recent times moved back in the constrictive direction in the GLSA.<sup>438</sup>

EAJRA also would have legislatively overruled *Buckhannon* by changing the definition of prevailing party in EAJA cases to include “catalyst” cases. As the legislation itself defined it, “prevailing party” would have included “a party whose pursuit of a non-frivolous claim or defense was a catalyst for a voluntary or unilateral change in position by the opposing party that provides any significant part of the relief sought.”<sup>439</sup> Again, one must consider the congressional intent here: improving small business access to attorneys’ fees. This provision would likely do exactly that, but would have the unintended side effect of opening EAJA to even more 501(c)(3) litigant abuse, since APA suits, ESA deadline suits and many other similar purely procedural suits would also in many cases apparently be “catalyst theory” winners. Of course, the emphasis here is on “apparently”: there is little accomplished in suing an agency because of a missed deadline, and then when the agency later completes the action, claiming that the lawsuit was the catalyst, as though it is fair to assume that the agency would have indefinitely ignored its legal obligations. Certainly, that assumption should not anchor a potentially sizable award of attorneys’ fees.

In sum, while attempting to protect the same constituency (small business), EAJRA took a different approach. This different approach was understandable given the picture of EAJA activity available to Congress in the mid-2000’s, but has significant drawbacks because of the EAJA abuses outlined in Part 3, and so would not be the best approach for EAJA reform.

#### *E. 2010: The Open EAJA Act of 2010*

2010 saw the beginning of a nascent reform movement that continues to the present. In March of 2010, Representative Cynthia Lummis (R-WY) and Senator John Ensign (R-NV) introduced the Open EAJA Act of 2010, H.R. 4717, S. 3122.<sup>440</sup> The Open EAJA Act sought to reinstitute the tracking of EAJA payments that had been abolished by the Federal Reports Elimination and Sunset Act of 1995.<sup>441</sup> In the findings section, the bill specifically cited the fact that since 1995, “[p]ayments authorized by EAJA have continued every year without Congressional oversight.”<sup>442</sup> It sought to remedy this by requiring the Department of Justice to report on EAJA awards in agency and court proceedings,<sup>443</sup> and requiring the Government Accountability Office to audit awards since 1995.<sup>444</sup> Despite the presumptive appeal of this simple bill, it was not enacted.

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438. See art 4.F.

439. H.R. 2282 § 5.

440. Equal Access to Justice Reform Act of 2010, H.R. 4717, 111th Cong. (2010); Equal Access to Justice Reform Act of 2010, S. 3122, 111th Cong. (2010).

441. See discussion *supra* pp. 43.

442. H.R. 4717 § 2; S. 3122 § 2.

443. H.R. 4717 § 3; S. 3122 § 3.

444. H.R. 4717 § 4; S. 3122 § 4.

*F. 2011: The Government Litigation Savings Act of 2011*

Today, the debate over whether or not EAJA should be amended has resumed. On May 25, 2011, Representative Cynthia Lummis (R-WY) and Senator John Barrasso (R-WY) introduced in the House and Senate, respectively, the Government Litigation Savings Act of 2011<sup>445</sup> (H.R. 1996, S. 1061) (hereinafter GLSA). In a joint press release, the lead sponsors explained that the legislation “will reduce the taxpayer’s burden to pay for attorney’s fees” and “returns EAJA to its original intent by instituting targeted reforms on who is eligible to receive EAJA reimbursements, limiting repeated lawsuits, and reinstating tracking and reporting requirements to make EAJA more transparent.”<sup>446</sup> The sponsors’ rhetoric was strong. Representative Lummis said:

When the government stopped tracking EAJA payments in 1995, it was a dream come true for radical environmental groups. Lack of oversight has fueled the fire for these groups to grind the work of land management and other federal agencies to a halt—and it does so on the taxpayer’s dime. Americans have unwittingly funded these obstructionist political agendas for far too long at the expense of individuals, small businesses, energy producers, farmers and ranchers who must pay out of their own pocket to defend the federal government against relentless litigation.<sup>447</sup>

Senator Barrasso added:

For far too long, special interest groups have funded their . . . agenda[s] with Americans’ hard earned taxpayer dollars. It’s absolutely absurd that Washington pays outside groups to repeatedly sue our government. It’s time to halt the endless cycle of reckless lawsuits and fix this broken system. Our bill will protect taxpayer dollars and restore accountability and transparency.<sup>448</sup>

Once enacted, the GLSA would make several amendments to EAJA. First, it would specify that to qualify for an award, a group must have “a direct and personal monetary interest in the adjudication, including because of [sic] personal injury, property damage, or unpaid agency disbursement,”<sup>449</sup> finally incorporating the failed 1981 reforms discussed in Part 4.A. It would raise the hourly cap from \$125

445. Government Litigation Savings Act, H.R. 1996, 112th Cong. (2011); Government Litigation Savings Act, S. 1061, 112th Cong. (2011).

446. Press Release, Congressman Cynthia Lummis, Lummis, Barrasso Fight Activist Lawsuits (May 25, 2011), *available at* <http://lummis.house.gov/News/DocumentSingle.aspx?DocumentID=243017> [hereinafter Lummis Press Release]; Press Release, Senator John Barrasso, Lummis, Barrasso Fight Activist Lawsuits (May 25, 2011), *available at* [http://barrasso.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord\\_id=2840aae7-802a-23ad-41a5-83423df0c962&Region\\_id=&Issue\\_id=](http://barrasso.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=2840aae7-802a-23ad-41a5-83423df0c962&Region_id=&Issue_id=) [hereinafter Barrasso Press Release].

447. Lummis Press Release, *supra* note 446; Barrasso Press Release, *supra* note 446.

448. Lummis Press Release, *supra* note 446; Barrasso Press Release, *supra* note 446.

449. H.R. 1996 § 2 (as referred to H. Subcomm. on Courts, Commercial and Admin. Law, July 11, 2011); S. 1061 § 2 (as referred to S. Comm. on the Judiciary, May 25, 2011).

to \$175, but remove the provision allowing for cost of living and other modifiers, instead automatically adjusting the cap to inflation,<sup>450</sup> as proposed in 1992 and discussed in Part 4.C. It would expand the discretion of agencies and courts to reduce fees by requiring them to reduce fees if a party “acted in an obdurate, dilatory, mendacious, or oppressive manner, or in bad faith” and by requiring them to deny fees that are intended to compensate supposedly “pro bono” work.<sup>451</sup> It would bar awards of over \$200,000 in a single agency adjudication or court case, and limit recovery by any one party to three such agency adjudications and three such civil cases in each calendar year, unless “an award exceeding such limits is required to avoid severe and unjust harm to the prevailing party.”<sup>452</sup> It would also build upon the 2010 proposal discussed in Part 4.E and reinstitute tracking of EAJA payments, including detailed information about the agency and officer or court and judge making each award, as well as the basis for the finding that the position of the United States was not substantially justified, and it would establish a public database of awards.<sup>453</sup> Finally, it would require the Government Accountability Office to survey awards made during the years from 1995 to the present.<sup>454</sup>

It seems clear that the intention of this legislation is, as Representative Lummis and Senator Barrasso said, to restrict the types of cases discussed in Part 3 of this article, while honoring the historic commitment to individual plaintiffs and small businesses that defines EAJA. Based on the approach of the legislation, it seems clear that the latter objective should be easily met. The permitted personal injury, property damage, or non-payment categories encompass the vast majority of claims individuals or businesses might bring, and the cap of \$200,000 per claim is sufficient for all but a handful of cases, especially considering that multiplied over six claims (three administrative and three judicial) the absolute maximum is \$1.2 million per year, and that’s before the safety value of the language permitting an “award exceeding such limits” if “required to avoid severe and unjust harm to the prevailing party.” The reporting changes seem designed simply to create accountability. However, two changes could potentially raise red flags for the groups the legislation is supposed to protect. The strict limit of \$175 an hour and the bar on recompense for “pro bono” work both could deter top private attorneys. Notwithstanding the American Bar Association’s commitment to pro bono work,<sup>455</sup> there is the possibility of lucrative compensation after the fact,<sup>456</sup> and the GLSA would somewhat reduce that possibility.

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450. H.R. 1996 § 2; S. 1061 § 2.

451. H.R. 1996 § 2; S. 1061 § 2.

452. H.R. 1996 § 2; S. 1061 § 2.

453. H.R. 1996 § 2; S. 1061 § 2.

454. H.R. 1996 § 3; S. 1061 § 3.

455. MODEL RULES OF PROF’L CONDUCT R. 6.1 cmt. (2006).

456. Examples of pro bono attorneys seeking fees abound. *E.g.*, *Court of Appeals Protects Pro Bono Attorneys’ Fees; Tells Government Agencies Not to Expect An Automatic Break on Fees*, LOS ANGELES CIVIL LITIGATION BLOG (May 7, 2011, 11:33 PM), <http://lacivillitigation.wordpress.com/2011/05/07/court-of-appeals-protects-pro-bono-attorneys-fees-tells-government-agencies-not-to-expect-an-automatic-break-on-fees/>; Martha Neil, *Fuss Over Firm’s \$1.8 M ‘Pro Bono’ Fee*, ABA JOURNAL: LAW NEWS NOW (Sep, 17, 2007, 3:35 PM), [http://www.abajournal.com/news/article/fuss\\_over\\_firms\\_18\\_m\\_pro\\_bono\\_fee/](http://www.abajournal.com/news/article/fuss_over_firms_18_m_pro_bono_fee/).

Turning to the GLSA's promise of reducing abusive 501(c)(3) litigation, the probable results are more mixed. In evaluating this issue, it's important to make a distinction between the fact that the government pays the other party's fees through EAJA and the cost of the environmental litigation itself. In their press release, Lummis and Barrasso both indicated their outrage at the fact that taxpayers are subsidizing groups that sue the government. But in fact, EAJA fees are only one way in which this litigation is costly. It costs the government money to defend the EAJA claim as well as the underlying case,<sup>457</sup> and litigation can "grind the work of land management and other federal agencies to a halt," in Lummis' words, without any EAJA payments at all. Indeed, many of the largest environmental cases are brought under the Endangered Species Act, as several examples discussed in Part 3.C illustrated.

Professors Michael J. Mortimer and Robert W. Malsheimer comment on this issue in a recent article in the *Journal of Forestry*, evaluating the impact of EAJA on the U.S. Forest Service.<sup>458</sup> Evaluating the years 1999 through 2005, the authors conclude that the use of litigation "as a tool to influence federal public land-management agency decisions" is increasing, and that "EAJA creates a litigation risk asymmetry that may cause stakeholders dissatisfied with U.S. Forest Service land management decisions to embrace litigation."<sup>459</sup> They caution, however, that there is "insufficient evidence to conclude that the EAJA is a driver for any particular plaintiff to challenge any particular US Forest Service project."<sup>460</sup> They explain:

Decisions to litigate are likely driven by multiple factors and policymakers should realize that EAJA reform might not eliminate or reduce US Forest Service land-management litigation. For example, some organizations' *raison d'être* is to initiate "public interest litigation." Even if EAJA were completely repealed, these organizations would likely continue to sue land-management agencies. Also, some national forest management decisions are so offensive to some stakeholders that litigation is probably inevitable.<sup>461</sup>

They also point out that many individuals and groups that sue the Forest Service are one-time plaintiffs, and that "many organizations have found that litigation provides an effective policy forum."<sup>462</sup> Nonetheless, they conclude:

The original intent of the EAJA has drifted with its use in national forest management litigation. In our study, most EAJA payments were made to environmental interest groups with widely varying financial capabilities. We note that many are quite well financed and therefore not the class of plaintiffs for which the law was designed to provide access to the expensive federal litigation system.<sup>463</sup>

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457. Cf. GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME., U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 366.

458. Mortimer & Malsheimer, *supra* note 362.

459. *Id.* at 357.

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

Mortimer and Malmsheimer's study was limited to the U.S. Forest Service over a period of six years, but their points are valid more broadly. It is hard to imagine that a group like the Natural Resources Defense Council, worth hundreds of millions of dollars,<sup>464</sup> sues the government because EAJA recovery is available. For many environmental groups, litigation is a way of life. Passing the GLSA might increase the costs of litigation for these groups while decreasing the costs to the government, but it is questionable whether that will be enough to reverse the tide of litigation that is engulfing the government. And, of course, the newly mandated EAJA tracking program will cost money as well.

Aside from this very significant concern, as far as it goes, the GLSA seems prudently drafted. The application of the net worth cap to 501(c)(3) organizations, in particular, will reduce the government's exposure in environmental and other EAJA litigation. Limits on the number of awards per year will reduce copycat lawsuits. The removal of exceptions to the statutory cap for "experts" will alleviate the widespread flaunting of the *Pierce* rule that was discussed in Part 3.A, and ensure that full-time environmental attorneys are on the same footing as attorneys in private practice. The removal of compensation for pro bono work will reinforce the traditional meaning of "pro bono." And of course, the reinstatement of tracking of EAJA payments will provide necessary accountability that is currently missing from EAJA. The history outlined in this article suggests additional measures, absent from the current legislation, that might also be considered.

A substantial portion of Part 3.B was devoted to the 501(c)(3) exception, and two of the major issues connected to the exception are problems with multiple litigants, such as the difficulty of tracking the movement of funds between and among them, and the availability of relatively cheap in-house counsel for environmental groups. One way to address the multiple parties issue would be to require that plaintiffs make disclosure of their corporate connections, presumably at the same time they disclose their net worth. The idea would be to include in the net worth of each litigant the net worth of all parent entities and wholly owned subsidiaries, to prevent the use of smaller ephemeral or shell organizations to circumvent the cap on net worth.<sup>465</sup> Another possibility would be to require the reduction of fees to the extent that sought-for fees represent duplicative work done by multiple parties.<sup>466</sup>

The fact that environmental organizations often maintain (relatively) low cost in-house counsel<sup>467</sup> is more problematic. One measure that Congress should consider would be to require that fees be denied to the extent that they represent

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464. See *supra* note 326 and accompanying text.

465. A similar system has been proposed for trade associations, where the net worth of an association's members would be counted towards the net worth of the association. John W. Finley, III, Note, *Unjust Access to the Equal Access to Justice Act: A Proposal to Close the Act's Eligibility Loophole for Members of Trade Associations*, 53 WASH. U. J. URB. & CONTEMP. L. 243, 260 (1998). Finley characterizes this as "a single-party variation on the mixed eligibility problem." *Id.* at 246.

466. Courts already do this to a certain extent. See, e.g., *United States v. Prabhu*, No. 2:04-cv-00589-RCL-LRL, 2007 WL 3119854 (D. Nev. Feb 25, 2008). Making this inquiry a statutory requirement can only help matters.

467. See discussion *supra* Part 3.B.

market rates over the actual cost of in-house counsel. This proposal calls into question the traditional convention of relying on market rates,<sup>468</sup> but if Congress is serious about reducing the cost of EAJA and making the law apply more fairly to different types of plaintiffs, it is an idea worth considering. One necessary action would be to legislatively abrogate *Jean's* application of *Hensley v. Eckerhart* to EAJA cases.<sup>469</sup> At present, the case stands for the principle that an award of attorneys' fees to a lawyer working for a non-profit organization is never an unjustified windfall. Such a rule flies in the face of both logic and the purpose of EAJA, and it stands in the way of any serious effort at reform.

Altogether, the GLSA would appear to be a solid, if basic, piece of legislation. Claims that it will harm veterans or Social Security claimants<sup>470</sup> appear to be unfounded. Claims that it will tremendously relieve the burden on agencies seem optimistic, but that is hardly a reason not to enact it. The GLSA reinstates necessary tracking of EAJA awards, and also represents a valuable first step in reducing excessive awards. Its changes follow the spirit and also the substance of many of the historical ideas behind EAJA, outlined in Parts 1.C and 2.A of this article, and also many past attempts at reform, outlined earlier in this Part. It could do more in that vein, and obviously entirely different legislation would be needed to address the problems with awards made under the Endangered Species Act and other similar statutes. But these are not arguments against the GLSA; rather, they are arguments for the GLSA and more.

#### CONCLUSION

The Equal Access to Justice Act is an "unusual form of fee-shifting statute," as Judge Posner pithily put it, and some of its departures from the standard fee-shifting template are "attributable to the Justice Department's reservations, shared by a number of members of Congress, about forking over government money to people litigating against the government."<sup>471</sup> But to describe it so is to short-change an intricate and special piece of legislation. It is among the most wide-reaching statutes in the U.S. Code, and what it attempts to do is as complex in execution as it is simple in concept: to aid those who would otherwise be truly hurt by fighting the government when it acts without justification. Balancing between giving money to practically every litigant and not giving out enough money has always been a difficult task for the application of EAJA, as funneling such monies to the right litigants has also been.

But it is clear that EAJA is in need of reform, in two very different ways. One needed reform, towards which overtures have been made several times in the past, is in further refining small business and individuals' access to the Act, particularly involving confrontations with EPA, OSHA, NLRB, and their like. Though no

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468. See discussion *supra* Part 3.A.

469. See discussion *supra* Part 3.A.

470. *E.g.* Fact Sheet: Reasons to Oppose the Government Litigation Savings Act, BRENNAN CENTER FOR JUSTICE, [brennan.3cdn.net/07bdabac735bf6ea95\\_c3m6b9n25.pdf](http://brennan.3cdn.net/07bdabac735bf6ea95_c3m6b9n25.pdf) (last visited Feb. 23, 2012).

471. *Matthews-Sheets v. Astrue*, 653 F.3d 560, 562 (7th Cir. 2011).

current legislation aims at this goal, it continues to be a worthwhile goal, and if not implemented in discussion of the Government Litigation Savings Act of 2011, it might well serve as a topic for future reforms.

The other needed reform looks to the abuses of EAJA chronicled in depth in Part 3 above. Thus, there needs to be a reduction in cases where plaintiffs prevail on process instead of substance; a reduction in the massive fees paid to 501(c)(3) litigants; a reduction in how many cases a litigant can flood the system with and still expect to recoup expenses; and a removal of the government's perverse incentive to settle cases to avoid costs spiraling, which will hopefully mitigate the danger posed by the Attorney General's settlement authority.

The GLSA handles these issues neatly. The inclusion of a standing requirement for a "direct and personal interest" will greatly reduce the extent to which 501(c)(3) organizations can intervene and assert their right to compensation. While they still might be able to meet Article III standing requirements, and still might be able to prevail on procedural issues, what the "direct and personal interest" language will do is reinstate the natural economic drawback of litigation. Litigants will no longer be able to slap the agency with an APA case for every minor procedural drawback: they will have to ask themselves the hard question every time of whether it is worth the legal expense to do so. The net worth cap, moreover, will remove the biggest of these organizations from getting reimbursed in such largely meritless cases. The hard cap on fees, now made "harder" by the GLSA, will also put a serious damper on how much EAJA pays out in these cases, while retaining a reasonable fee for most cases, including the overwhelming majority of EAJA users: Social Security and Veterans' Claims claimants.

There are, of course, other steps that the GLSA might take that would make the reform even more powerful: some of these steps were outlined in the end of Part 4.F. Nevertheless, it is unwise in the context of congressional legislation to let the perfect become the enemy of the good, and the GLSA is clearly good legislation. It is accountability-oriented and loophole-fixing: a classic, textbook example of reform legislation, and so hopefully will soon be the latest addition to EAJA.

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