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BEFORE THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW
UNITED STATES HOUSE OF REPRESENTATIVES
REGARDING H.R. 1996
October 11, 2011

Thank you for providing this opportunity to share my views on H.R. 1996, the "Government Litigation Savings Act." This bill proposes sensible amendments to provisions of the Equal Access to Justice Act (EAJA). My testimony will discuss specific improvements this carefully crafted bill makes to EAJA after providing an overview of basic principles applicable to awards of costs and, especially, attorney fees against the federal government and EAJA's effects on those principles.

Overview of Basic Principles

Payment of costs and attorney fees is a transfer of money, pure and simple. Our Constitution's Appropriations Clause bars payments from the public Treasury absent a Congressional appropriation. This Clause, Constitution, Article I, Section 9, Clause 7, stands as a bulwark ensuring that the Congress decides whether, and under what conditions, Treasury funds should be utilized. In the context of attorney fee payments, the federal judiciary applies the doctrine of sovereign immunity to preserve Congress's power over the public fisc. In particular, the judiciary has recognized that without a waiver of sovereign immunity, courts may not award attorney fees to be paid by the United States or its agencies. *See., e.g.,*

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Ardestani v. Immigration & Naturalization Service, 502 U.S. 129, 137 (1991) ("The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity.")

Over the years, Congress has enacted statutes authorizing awards of attorney fees in particular proceedings against the United States under varying conditions. These conditions have been set forth in subject-matter specific statutes. In these limited circumstances, Congress has determined that public policy considerations outweigh the need to avoid a drain on the public fisc to pay attorney fees. *See, e.g.,* 5 U.S. C. § 552(a)(4)(E) (Freedom of Information Act). In contrast, EAJA's statutory scheme is applicable generally to federal agencies and programs, rather than being limited to a particular subject-matter or agency. EAJA does not interfere with these more particular statutory provisions. Likewise, H.R. 1996 also does not affect those provisions.

The purpose of EAJA was and remains "to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority." *Ardestani*, *supra*, 502 U.S. at 138. EAJA applies to award attorney fees where the United States is a party to a judicial proceeding, *see* 28 U.S.C. § 2412, and to prevailing parties in most agency adversary adjudications, *see* 5 U.S.C. § 504(a). EAJA accomplishes its goal of awarding attorneys fees to prevailing parties in judicial proceedings and administrative actions in four key respects:

(1) There is a general waiver of sovereign immunity rendering the United States susceptible to an award of attorney fees under certain circumstances when a private party would otherwise be responsible for paying his or her own attorney fee

after receiving an award in a judicial proceeding. *See* 28 U.S.C. § 2412(b). Absent any award based on a finding that the government "acted in bad faith," these court ordered awards are usually to be paid from the Judgment Fund established under 31 U.S.C. § 1304—a permanent indefinite appropriation. *See* 28 U.S.C. § 2412(c)(2) (referencing 28 U.S.C. § 2414, 2517); *see also* General Accountability Office (GAO), Principles of Federal Appropriations Law ("The Red Book), Vol. III, Chapter 14 (providing explanation of payment procedure). This regime applies to settlements as well.

(2) There is a second, separate waiver of sovereign immunity authorizing attorney fee awards and expenses any time the non-government party prevails, and the government's underlying conduct was not substantially justified, absent special circumstances. *See* 28 U.S.C. § 2412(d); 5 U.S.C. § 504(a). This is a one-way loser pays provision that creates different law against the American taxpayer. Ordinarily, in American litigation, whether in court or an administrative proceeding, each party bears the cost of defraying its own attorney fees. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). By offering to pay attorneys fees to those who sue the federal government or are sued by the federal government, EAJA puts the federal government in a unique and largely disfavored position. While EAJA includes some limitations and conditions on recoveries, these limitations and conditions have not been successful in cabining in awards and have led to substantial, unproductive tangential litigation. H.R. 1996 includes needed amendments to more precisely specify the means of determining an award.

(3) EAJA includes standards for recovering attorneys fees, including, as referred to above, when the underlying conduct was not "substantially justified" and when the non-government party is considered the "prevailing party." 28 U.S.C. 2412(d)(1)(A); 5 U.S.C. § 504(a)(1). Vague terms, like these, can lead to protracted side litigation and manipulation. For example, the private party may only settle a dispute if the settlement includes language that it should be considered the prevailing party in the dispute and that the government's position was not substantially justified – regardless of the actual facts. This could lead to abusive and unintended awards; particularly when the party seeking the award has no direct financial stake in the proceeding, but is suing over a policy difference. H.R. 1996 seeks to avoid this kind of abuse and to clarify the provision.

(4) EAJA also penalizes the government if it is not sufficiently successful in seeking judicial review of an agency adjudication or a civil action commenced by the United States. *See* 28 U.S.C. § 2412(d)(1)(D). This provision states that if the government's position in the appeal is unreasonably "substantially in excess of the judgment finally obtained by the United States," the other party gets its fees and other expenses. *Id*. There is no such provision against such demands for the private party, which can disadvantage government civil actions and enforcement proceedings.

H.R. 1996 is a sensible, balanced amendment to the Equal Access to Justice Act

I will now summarize the changes and clarifications H.R. 1996 makes to EAJA's substantive attorney fee award provisions and the addition of requirements to collect and assemble precise data permitting insight into EAJA's results in practical terms.

Amendments both to the administrative proceedings and litigation attorney fee award provisions of EAJA:

H.R. 1996 raises the rate of payment for attorneys from $125 per hour to $ 175 per hour and substitutes a precise means of determining cost of living increases to the rate of payment for general "increase in the cost of living" terminology. H.R. 1996, §§ 2(a)(1)(B), 2((a)(2)(cost of living provision); 2(b). In return for raising the fee, these amendments eliminate the exception to the fee limit for an attorney who asserts that "a special factor, such as the limited availability of qualified attorneys or agents for the proceedings" justifies a higher fee. 5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A). The issue of what this terminology means was the subject to the Supreme Court's first decision construing EAJA, *Pierce v. Underwood*, 487 U.S. 552 (1988). *Pierce* observes that if the exception is construed broadly to encompass any proceeding where skilled and experienced enough were in short supply, the exception would "effectively eliminate" the cap. For this reason, the Court held that the term must refer to qualified attorneys in a "specialized" sense, providing as examples practice specialties "such as patent law, or knowledge of foreign law or language." Unfortunately, this ruling did not end litigation over whether the fee cap can be pierced. Far from it. The Federal appellate court decisions are in disarray.

The Ninth Circuit has gone so far as to hold that a practice in social security law is specialized enough to pierce the cap. *See Pirus v. Bowen*, 869 F.2d 536 (9th Cir. 1989). Compare *Pirus* and its progeny with cases such as *Perales v. Casillas*, 950 F.2d 1066 (5th Cir. 1992), which look at piercing the cap with a jaundiced eye, and *Raines v. Shalala,* 44 F.3d 1355 (7th Cir. 1995) which rejects the theory that social security law is a specialty warranting piercing the cap but seems to suggest that distinctive legal knowledge may sometimes warrant piercing the cap. Similarly, there should be no need to litigate how to determine cost of living increases in the limit on a case-by-case basis. There is too much litigation over these issues to discuss here. Plainly, this litigation is wasteful. The Supreme Court has wisely admonished that a "request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983). With the benefit of experience, H.R. 1996 both raises the cap and eliminates lawyers' ability to foment litigation seeking to eviscerate the cap's application. These amendments mark a signal improvement over the vagaries inherent in the current law.

Both the administrative proceedings and litigation provisions of H.R. 1996 place an additional limit or cap on the aggregate amount the public fisc will pay to an individual or entity for attorney fees or other expenses. The amendments limit payments for a single proceeding to the amount of $200,000 and prohibit payment to the same individual or entity for more than three proceedings initiated in a single year. This approach keeps awards from taking funds from substantive programs to an undue or excessive extent, and is set high enough not to detract from EAJA's core purposes. Importantly, it serves to dissuade professional litigants, where the additional incentive of hope for an extremely substantial attorney fee award to bring a claim is not appropriate.

H.R. 1996 additionally eliminates exceptions to net worth and employee limits on attorney fee awards. This change in eligibility for an award places all entities on an equal footing rather than favoring some entities over all others. H.R. 1996 would also limit award eligibility to a party "who has a direct and personal monetary interest" in the proceeding, "including because of personal injury, property damage or unpaid agency disbursement." As with the limits on fees paid in a proceeding, these proposals seek to confine EAJA to its legitimate and original purpose: "to diminish the deterrent effect of seeking review of, or defending against, government action," Pub. L. 96-481, Title II, § 202(c)(1), 94 Stat. 2325 (1980), by honing in awards to parties with concrete injuries justifying an award.

H.R. 1996 sharpens the language of extant fee reduction provisions authorizing, but not requiring, reductions if the party seeking an award "unduly and unreasonably protracted the final resolution" of a proceeding. 28 U.S.C. § 2412(d)(1)(C); 5 U.S.C. § 504 (a)(3). H.R. 1996 substitutes terminology that requires reduction and does so not only for unreasonable protraction of a matter but also if the party "acted in an obdurate, dilatory, mendacious, or oppressive manner, or in bad faith." Under these circumstances, it would surely be unreasonable and against the taxpayers' interests to fully fund attorney fees for such action.

Transparency mandates:

The ability of Congress to perform oversight of EAJA depends on availability of information concerning agency payments predicated on the Act. Currently, this information is largely unavailable. The Government Accountability Office has recently attempted to collect data pertaining to one limited subset of EAJA payments, those arising from environmental proceedings. *See* GAO Report 11-650, *ENVIRONMENTAL LITIGATION: Cases against EPA and*

Associated Costs over Time (GAO, August 2011). This report reflects an inability to collect all data even when only three agencies are involved in the attempt to collect data. EAJA applies government-wide. The lack of data is striking. The costs EAJA imposes on the public fisc are opaque. As the Report reflects, "[c]urrently, no aggregated data on such environmental litigation or associated costs are reported by federal agencies. They key agencies involved – Justice, EPA and the Treasury – maintain certain data on individual cases in several internal agency databases, but collectively, these data do not capture all costs." *Id*. at 2.

Agencies have no obligation to collect and assemble data, and, even if some agencies did collect data, there is no central authority to organize and report the data in a sensible format both to the Congress and the public. H.R. 1996 remedies this lack of information. Specifically, H.R. 1996 requires the Chairman of the Administrative Conference of the United States to issue annual report to the Congress, and to make the report publicly available online, including relevant data, and requires the Attorney General to assist in assembly of the data. H.R. 1996 also requires GAO to conduct a one-time audit of EAJA's implementation during recent years, starting with 1995.

As the GAO report further underscores, some EAJA payments come from the permanent, indefinite appropriation established under 31 U.S.C. § 1304, commonly known as the Judgment Fund. The agency involved in such a proceeding has no monetary incentive to hold down the amount of an award to a reasonable level. These payments can be made as part of settlement, not just as the result of a contested decision.

When I was at the Department of Justice, it became a regular part of my workload to guard against unjustified raids on this Judgment Fund. I found it necessary to guard constantly

against unauthorized or excessive payments. What I wrote several years ago is on point today: "[A]gencies do not have a direct fiscal incentive to guard against excessive payments from the Judgment Fund, in that payments from the Judgment Fund do not reduce agency appropriations available for their programs . . . Special interests pursued by claimants are noisy and visible . . . The incentive to yield to the perceived special need du jour is all too evident." Westlaw, 1 Ann. 2004 ATLA-CLE 435 (2004).

H.R. 1996 requires that that the data included in the Chairman of the Administrative Conference's reports include data from settlements subject to nondisclosure provisions in settlement agreements, but does not affect any other information subject to the nondisclosure provisions. My experience is that, in monetary settlements, nondisclosure provisions are most commonly sought when a very substantial sum is to be paid. I consider inclusion of nondisclosure provisions in settlements ordinarily to be unjustified in settlements to which the government is a party but nondisclosure provisions are a fact of life. In order to assemble useful data, the limited disclosure H.R. 1996 mandates is essential.

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Conclusion

H.R. 1996 leaves intact the basic structure and central focus of EAJA. EAJA will remain available to recover attorney's fees when government has acted oppressively and unreasonably. H.R. 1996 serves to correct unintended consequences and clarifies vague terminology that has resulted in substantial, wasteful collateral litigation. H.R. 1996 also requires that the Congress receive information in order that it may determine how effectively EAJA works in practice and the costs associated with EAJA. This will permit the Congress to

provide more effective oversight and enhance the ability of citizens to hold their government accountable for the actions of government agencies. In my opinion, H.R. 1996 represents a move toward enhancing the ability of EAJA to best serve its intended purposes.

I will be happy to answer any questions.