

The Equal Access to Justice Act and Small Business – Analysis and Critique

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Introduction

The Equal Access to Justice Act (EAJA)¹ was enacted in 1980 as a means of equalizing the playing field between the federal government and small business litigants, as well as certain other parties.² EAJA was predicated on the assumption that the gross disparity in available financial resources placed small businesses in a uniquely vulnerable position, subjecting them to potential abuse by regulatory agencies.³ Furthermore, the costs of litigation often serve as an initial deterrent, preventing small businesses from even pursuing legal relief.⁴ It is of no value to a small business to succeed on the merits in court only to find itself in a financial “rut” due to excessive litigation costs. By allowing financially limited parties to recover attorney’s fees from the government, it was hoped that regulatory action would proceed with an eye toward the merits rather than the financial vulnerability of a given business or individual.⁵ In the event that the government was not deterred, EAJA sought to eliminate any financial handicap.⁶

Twenty-one years after the enactment of EAJA, several issues must be addressed. Various ambiguities within the text of EAJA have raised interpretive issues that have been a constant source of litigation within the courts. At times, the Supreme Court has taken a stance on these issues and has just recently issued a ruling that may have a serious impact on the availability of EAJA. Does the efficacy of EAJA remain intact or has judicial treatment of EAJA created the need for congressional action?

Moreover, EAJA incorporates some substantive limitations on the ability to recover fees. Have those limitations hindered the effectiveness of the Act? While EAJA

has been amended in the past, the substance of EAJA has remained largely intact. Is additional revision necessary and if yes, to what extent?

Finally, the current lack of any comprehensive reporting and record keeping regarding the actual use of EAJA in courts and administrative proceedings⁷ makes it difficult, if not impossible, to accurately assess the impact and effectiveness of EAJA.

This Note addresses the above issues and provides a critical analysis of EAJA's success. The first section of this Note discusses some of the Act's background and legislative history, focusing on the concerns that EAJA's sponsors sought to address. The second section provides a brief description of the basic provisions of EAJA.

The rest of the Note analyzes some of EAJA's limitations and explores various possible revisions that might bolster EAJA's effectiveness. The third section discusses the scope of the "prevailing party" provision,⁸ focusing particularly on the Supreme Court's recent rejection of the "catalyst theory." The Court's decision limits the scope of an already failing EAJA, creating the need for congressional intervention. The fourth section argues that an automatic fee-shifting standard for EAJA would prove more efficient and effective than the current "substantial justification" standard.⁹ The fifth section argues that EAJA's hourly rate cap¹⁰ places an artificial limitation on the recovery of fees under EAJA, thus limiting its ability to compensate parties who lack the financial resources necessary for litigation.

The sixth section evaluates the actual impact of EAJA in terms of its actual use in courts and administrative proceedings, concluding that EAJA has failed to live up to expectations.

I. Background and Legislative History

Under the American Rule on attorney's fees parties to litigation must bear their own legal fees.¹¹ Although limited common law and statutory exceptions existed prior to EAJA,¹² these did not apply to the federal government without "express statutory authorization."¹³

The sponsors of EAJA were concerned with the difficulties that small businesses face in contesting unwarranted government interference.¹⁴ Indeed, the committee report referred to "evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate . . ."¹⁵ However, while the protection of small business may have provided the initial impetus and was, in fact, the primary concern that EAJA sought to address,¹⁶ the preamble to EAJA expresses a somewhat broader intent to protect "individuals, partnerships, corporations and other organizations."¹⁷

Congress found "that certain named entities may be deterred from seeking review of or defending against unreasonable government action because of the expense involved."¹⁸ By providing recourse for recovery of fees and costs, Congress sought "to diminish this deterrent effect."¹⁹ By achieving that end Congress hoped to "promote three more general goals":²⁰ (1) to enable victims of abusive governmental conduct to seek vindication of their rights despite financial limitations²¹ (2) to reduce the incidence of governmental abuse,²² and (3) "to refine the administration of federal law – to foster greater precision, efficiency and fairness in the interpretation of statutes and in the formulation and enforcement of governmental regulations."²³

At the same time, Congress feared that a mandatory fee-shifting statute might “chill public officials charged with enforcing the law from vigorously discharging their responsibilities.”²⁴ The “substantial justification standard balances “the constitutional obligation of the Executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights.”²⁵ By denying fee awards when the government’s position is “substantially justified,” Congress intended to safeguard against potential for over-deterrence, recognizing that some enforcement efforts may be reasonable though they ultimately fail.²⁶ Furthermore, precluding government liability where “special circumstances make an award unjust”²⁷ reflected a desire to provide a “safety valve . . . to insure that the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts”²⁸ and to give “the court discretion to deny awards where equitable considerations dictate an award should not be made.”²⁹

II. The Act

EAJA was originally enacted in 1980³⁰ and became effective on October 1, 1981.³¹ The Act included a “sunset provision,” repealing EAJA on October 1, 1984, three years after it first took effect.³² Congress reenacted EAJA as a permanent statute in 1985.³³ EAJA was subsequently amended in 1996 under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).³⁴

The Act consists of several fee-shifting provisions, which allow certain parties to recover attorney’s fees from the government in civil actions and administrative adjudication.

A. Pre-1996 EAJA

i. Waiver of Federal Immunity

28 U.S.C. § 2412(b)

§ 2412(b) completely eliminates the federal government’s immunity with respect to attorney’s fees, subjecting the government to liability “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.”³⁵ § 2412(b) “does not create any new substantive rights to attorney’s fees awards.”³⁶

ii. The “Prevailing Party” Provisions

28 U.S.C. § 2412(d)(1)(A) & 5 U.S.C. § 504(a)(1)

§ 2412(d)(1)(A) expands the scope of government liability, requiring a court to award attorney’s fees to “a prevailing party other than the United States . . . in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.”³⁷

§ 504(a)(1) provides identical relief in the context of administrative proceedings, pertaining to “an agency that conducts an adversary adjudication.”³⁸ As in the judicial context, recovery of fees is available to a “prevailing party other than the United States . . . unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.”³⁹

iii. Hourly Rate Cap

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

§ 2412(d)(2)(A) and § 504(b)(1)(A) provide that awards for attorney’s fees cannot exceed \$125 per hour “unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.”⁴⁰

iv. Eligibility Requirements

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

§ 2412(d)(2)(B) and § 504(b)(1)(B) define eligible parties as individuals whose net worth “did not exceed \$2,000,000 at the time the civil action was filed” and businesses with no more than 500 employees and a net-worth that “did not exceed \$7,000,000 at the time the civil action was filed.”⁴¹

B. SBREFA – 1996 EAJA Amendments

SBREFA, signed into law on March 29, 1996 as part of the Contract with America Advancement Act of 1996,⁴² was designed to “foster a more cooperative, less threatening regulatory environment among agencies, small businesses and other small entities.”⁴³ The legislation provides a framework to make federal regulators more accountable for their enforcement actions by providing small entities with an opportunity for redress of arbitrary enforcement actions.” The Act consists of various subtitles designed to achieve that goal. Subtitle C amended EAJA in three ways.

i. Hourly Rate Cap

SBREFA raised EAJA’s hourly rate cap from \$75 per hour to \$125 per hour, in order to bring EAJA awards “more closely in line with current hourly rates charged by attorneys.”⁴⁴ Congress hoped that raising the cap would enlarge the pool of attorneys

from which prospective parties could choose by making eligible suits “more attractive to attorneys.”⁴⁵

ii. The “Excessive Demand” Provisions

28 U.S.C. § 2412(d)(1)(D) & 5 U.S.C. § 504(a)(4)

While leaving the original “prevailing party” provisions intact, the 1996 amendments incorporated new provisions, in both the judicial and administrative context, allowing eligible parties to claim “fees and other expenses related to defending against the excessive demand”⁴⁶ if the demand by the United States or the agency “is substantially in excess of the judgment finally obtained by the United States”⁴⁷ or the agency “and is unreasonable when compared with such judgment, under the facts and circumstances of the case.”⁴⁸ The claim is forfeit, however, if “the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.”⁴⁹

Furthermore, whereas the “prevailing party” provisions apply to any adversary adjudication conducted by an agency⁵⁰ and “any civil action (other than cases sounding in tort),”⁵¹ the “excessive demand” provisions only apply to a “civil action brought by the United States”⁵² and an “adversary adjudication arising from an agency action to enforce a party’s compliance with a statutory or regulatory requirement.”⁵³

iii. Eligibility Requirements

For purposes of the old “prevailing party” provisions, the net worth and size eligibility requirements remained unchanged. However, the amendments added an alternative definition for eligible parties, applicable only to the new “excessive demand”

provisions. Instead of linking eligibility to specific net worth and size amounts, the alternative definition includes “‘a small entity’ as defined in section 601.”⁵⁴

§ 601 provides that “‘small entity’ shall have the same meaning as the terms ‘small business’, ‘small organization’ and ‘small governmental jurisdiction.’”⁵⁵ The term ‘small business,’ in turn, is equated with ‘small business concern’ under section 3 of the Small Business Act,⁵⁶ defined as “one which is independently owned and operated and which is not dominant in its field of operation.”⁵⁷

In addition, the Administrator of the Small Business Administration is authorized to “specify detailed definitions or standards by which a business concern may be determined to be a small business concern.”⁵⁸ The SBA has exercised this authority to establish size standards for several hundred different industries, using SIC Codes.⁵⁹

III. Prevailing Party

In order to recover fees under the original EAJA provisions, the litigant must qualify as a “prevailing party.”⁶⁰ The meaning of “prevailing party,” for purposes of EAJA, is the same as under other fee-shifting statutes.⁶¹ To prevail, a party must have attained “some relief on the merits of his claim.”⁶² It is necessary to have some final determination of the “substantial rights of the parties,”⁶³ enabling the litigant to “point to a resolution of the dispute which changes the legal relationship between” the parties.⁶⁴ The Supreme Court has ruled that it is not necessary to prevail on the “central issue” in the litigation,⁶⁵ rather it is sufficient to prevail on “any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing the suit.”⁶⁶ Furthermore, the Court has held that the mere attainment of nominal damages is sufficient to confer “prevailing party” status.⁶⁷ The Court has also held that settlement

agreements enforced through a consent decree may provide a basis for a fee award.⁶⁸ Most recently, the Court limited the definition of “prevailing party” in the fee-shifting context by rejecting the “catalyst theory,” under which a party qualifies as “prevailing,” even without a final legal determination, if the government voluntarily changes its position as a direct result of the party’s litigation efforts.⁶⁹

The Catalyst Theory

One of EAJA’s primary goals is to encourage private litigants to challenge unreasonable government action and deter regulatory abuse.⁷⁰ In light of that goal, it would seem that a party should be entitled to a fee award under EAJA when litigation serves as a “catalyst” for voluntary government action that achieves the favorable result sought by the private litigant. Indeed, prior to 1994, every Federal Court of Appeals that addressed the issue supported the “catalyst theory.”⁷¹ To qualify as a “prevailing party” under the “catalyst theory,” the courts had looked for three basic conditions to be met. First, the party had to show that it received at least some of the benefit sought by the lawsuit. Second, the party had to demonstrate that the suit stated a genuine claim. Third, the party had to show that the suit was a “substantial” or “significant” cause of the opposing party’s action providing relief.⁷² While the Fourth Circuit rejected the “catalyst theory” in 1994, nine Courts of Appeals have since reaffirmed its relevance to the determination of a “prevailing party.”⁷³

Yet, in *Buckhannon*, the Supreme Court rejected the predominant view, holding that the “catalyst theory” “is not a permissible basis for the award of attorney’s fees.”⁷⁴ While the *Buckhannon* case did not involve EAJA,⁷⁵ Supreme Court determinations

regarding the “prevailing party” standard “are generally applicable in all cases in which Congress has authorized an award of fees to a ‘prevailing party.’”⁷⁶

In reaching its decision, the Court mentioned several policy arguments. First, the “catalyst theory” may actually deter the government from altering its conduct if such action could lead to attorney’s fee liability.⁷⁷ Second, rejection of the “catalyst theory” will have minimal impact since most cases will not be rendered moot by a decision to alter conduct. A case will not be dismissed for mootness when the private litigant seeks damages for past conduct, “and even when the private party seeks only equitable relief,” “a voluntary cessation of a challenged practice does not render the case moot ‘unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.’”⁷⁸ Finally, the “catalyst theory” requires an analysis of the party’s subjective motivations, and could result in “a second major litigation.”⁷⁹

The Court did not provide any support for these arguments and they are hardly persuasive, particularly when viewed in the context of EAJA. Rather than deterring the government from altering its conduct, as the Supreme Court suggested, the threat of liability for attorney’s fees is likely to encourage a change in conduct, as it would avoid the potentially significantly larger award of attorney’s fees that protracted litigation could produce.⁸⁰ In fact, EAJA rests on the premise that the prospect of attorney’s fee liability will deter the government from abusive or irresponsible conduct.⁸¹ The “catalyst theory” serves as an effective way to deter the abusive conduct before it even begins.

Furthermore, opportunities to moot the litigation are not likely to be scarce under EAJA. The Act is not limited to cases where the private litigant seeks to alter a broad regulatory policy or recover for damages. EAJA allows a party to recover fees in a broad

range of cases. When a litigant challenges the enforcement of regulatory penalties or other fees, it is easy for the government to moot the suit by waiving the penalty or fee assessment. Without the “catalyst theory,” the government can essentially sidestep EAJA by abandoning its position whenever faced with the probability of losing its case.⁸²

Finally, application of the “catalyst theory” need not result in “a second major litigation.”⁸³ The “catalyst theory” has been “[de]veloped over decades . . . in legions of federal-court decisions.”⁸⁴ While the basic test applied by the courts necessarily involves some fact-finding, it is “the sort that the district courts, in their factfinding expertise, deal with on a regular basis.”⁸⁵ In fact, the determinations required under the “catalyst theory” are less extensive than those required for a “substantial justification” inquiry,⁸⁶ which is an element of most EAJA cases.

In his concurring opinion, Justice Scalia provided another argument in opposition to the catalyst rule. He argued that the “catalyst theory” accommodates the “extortionist” that takes advantage of “greater strength in financial resources, or superiority in media manipulation, rather than *superiority in legal merit*.”⁸⁷ However, this argument is particularly irrelevant to EAJA since the Act only applies to parties with limited financial resources.⁸⁸ EAJA claimants clearly will not possess “greater strength in financial resources,”⁸⁹ and are unlikely to wield significant influence over the media, either.

The *Buckhannon* decision unnecessarily limits the scope of an already faltering EAJA, creating a compelling need for congressional intervention. There are two ways that Congress might reinstate the “catalyst theory.” First, Congress might define “prevailing party” in a manner that rejects the *Buckhannon* decision and clearly incorporates the “catalyst theory.” This approach would not be limited to EAJA, though,

since it would define the term “prevailing party” as applied to all federal fee-shifting statutes.⁹⁰

A second, narrower, approach might be to explicitly incorporate the “catalyst theory” as a distinct provision of EAJA, without revising the definition of “prevailing party.” This targeted remedy would address the arguably stronger need for the “catalyst theory” in the context of EAJA while leaving other fee-shifting statutes intact. It would also provide greater flexibility, allowing Congress to treat every fee-shifting statute separately and make a focused determination regarding the need for the “catalyst theory” in each unique context. In order to ensure that the “catalyst theory” does not discourage desirable government action, Congress can emphasize the need to establish a link between the filing of the lawsuit and the subsequent change in conduct before applying the rule.⁹¹

IV. Substantial Justification

“The heart of the Equal Access to Justice Act and the focus of most of the litigation concerning the statute is the provision for a mandatory award of attorney’s fees unless the ‘position of the United States was substantially justified.’”⁹² Congress chose the “substantial justification” standard in order to prevent EAJA from having “a chilling effect on reasonable Government enforcement efforts,”⁹³ and out of concern for the potentially large cost that a mandatory fee-shifting provision would impose on the Government.⁹⁴ While there was some initial disagreement amongst the courts as to the definition of the “substantial justification” standard,⁹⁵ the Supreme Court resolved the dispute in *Pierce v. Underwood*.⁹⁶ Expressly rejecting the 1985 House Report, which endorsed a “more than mere reasonableness” standard,⁹⁷ the Court held that “substantial

justification” requires that the government’s position, in both its underlying conduct and its litigation posture, have a “reasonable basis both in law and fact.”⁹⁸

“[A]n indispensable attribute of any fee incentive is that a party must be able to judge at the outset of the litigation the likelihood of a fee award upon prevailing.”⁹⁹

However, a standard of reasonableness, “by its very nature . . . demands application on a case-by-case basis,”¹⁰⁰ making it virtually impossible to evaluate the likelihood of a fee award at the outset of litigation.

This inherent ambiguity has led to inconsistent application of the standard in the courts. For example, in *Hoang Ha v. Schweiker*,¹⁰¹ the court found that the federal defendant’s position was not substantially justified because it was “inconsistent with the practice of his own agency and with clearly established precedent.”¹⁰² However, in *Wyandotte Savings Bank v. National Labor Relations Board*,¹⁰³ the Sixth Circuit concluded that the Board was substantially justified in making “a reasonable attempt to reopen a closed question.”¹⁰⁴ Likewise, in *S & H Riggers & Erectors, Inc. v. O.S.H.R.C.*,¹⁰⁵ the Fifth Circuit held that the government was substantially justified in attempting to challenge prior precedent.¹⁰⁶

Automatic Fee-Shifting – A Better Standard

EAJA was designed to provide eligible parties with an incentive to challenge unreasonable government behavior. Its success necessarily depends upon the ability to predict the likelihood of an award upon prevailing. However, the inherent ambiguity of the “substantial justification” standard belies that need for predictability, rendering it unsuitable to the effectuation of EAJA’s purpose.¹⁰⁷ Eliminating the “substantial justification” defense, thus automatically entitling a “prevailing party” to fee awards,

would significantly enhance EAJA's predictability and boost incentives.¹⁰⁸ As a result, the Act's primary aim of deterring unreasonable government conduct would be more effectively advanced.

Furthermore, the fear that an automatic fee-shifting standard does not "account for the reasonable and legitimate exercise of governmental functions and thus might have a chilling effect on proper government enforcement efforts"¹⁰⁹ is unfounded. Policymakers are unlikely to consider the prospect of fees when seeking to implement broad policies that advance financial and social goals.¹¹⁰ The likelihood of over-deterrence may be slightly stronger for federal officials who implement policy directives on a fact specific basis.¹¹¹ However, agency actions are usually protected by deferential standards of review such as "substantial evidence in the record" or "arbitrary and capricious," which provide agency officials with an effective "safe harbor" when "implementing policy at the outskirts of their authority."¹¹² To the extent that an automatic standard provides less protection for government conduct, "the damage to executive branch interests created by allowing some legitimate efforts to be assessed for fees would be far less than the detrimental effects of allowing any exception to a fee incentive."¹¹³

The "substantial justification" standard is at odds with the fundamental purpose of EAJA. In seeking a middle ground that would prevent the potential "chilling effect" of an automatic fee-shifting standard, Congress has compromised the ultimate success of the Act. The vagueness of the "substantial justification" standard has led to "confused and inconsistent"¹¹⁴ decisions and has allowed the denial of fee-awards to become the exception rather than the rule.¹¹⁵ An automatic fee-shifting standard would be

more suited to the achievement of EAJA's goals, while still providing adequate protection for "reasonable Government enforcement efforts."¹¹⁶

V. Hourly Rate Cap

EAJA places a cap of \$125 per hour on the award of attorney's fees.¹¹⁷ EAJA's rate cap is the exception rather than the norm amongst fee-shifting statutes, and awards under alternative fee-shifting statutes can be significantly higher. It is unclear why Congress placed a rate cap on EAJA claims. However, in *Pierce*, the Supreme Court pointed to the cap as confirmation that "Congress thought that \$75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be."¹¹⁸ While the statute does provide for some upward adjustment of the fee based on cost of living increases and "special factors," the Court, in *Pierce*, held that the "special factor" provision must be interpreted narrowly so as to "preserve the intended effectiveness of the \$75 cap."¹¹⁹

The EAJA rate cap can result in fees that are well below market rate in many markets, preventing adequate reimbursement of attorney's fees to eligible parties, and discouraging competent counsel from undertaking meritorious cases on a contingency or reduced-fee basis. In contrast, The Civil Rights Attorney's Fees Awards Act of 1976¹²⁰ includes no such cap on awards, instead basing awards solely on prevailing market rates. The impact of the rate cap is adequately demonstrated by the outcome in *Sorenson v. Mink*.¹²¹ Although social security claimants prevailed against federal and state agencies for identical violations of federal law, the court, in *Sorenson*, was forced to award significantly lower rates against the federal government under EAJA than against the state agencies under § 1988.¹²²

By eliminating the rate cap and tying EAJA awards to prevailing market rates, Congress will simply be placing EAJA on par with other fee-shifting statutes. More importantly, allowing recovery in amounts that more accurately reflect existing market rates will ensure that eligible parties are able to obtain competent counsel, and that they are adequately reimbursed for litigation costs. Eliminating the artificial rate cap would not lead to over compensation since awards would still need to reflect existing market rates.

VI. Evaluating the Success of EAJA

Through an empirical study of court rulings on EAJA applications from 1980 to 1990, Professors Susan Gluck Mezey and Susan M. Olson found that the Act has not been used substantially by small businesses and that there is no evidence that it has been a significant check on governmental regulation.¹²³ The study revealed that businesses, small or large, represent approximately 11 percent of all EAJA petitioners.¹²⁴ In contrast, “an unanticipated group of beneficiaries – Social Security disability plaintiffs – flooded the federal courts with EAJA petitions.”¹²⁵ While Social Security claimants had a 69 percent success rate,¹²⁶ only 28 percent of business fee petitions were successful during that same time period.¹²⁷ Furthermore, rather than promoting deregulation, the study revealed that EAJA has attracted “almost as many petitioners affirmatively requesting regulatory enforcement as those challenging regulatory enforcement.”¹²⁸

Moreover, the initial cost estimate, issued by the Congressional Budget Office (CBO) prior to the original enactment of EAJA, estimated that the total awards for all judicial proceedings would be “approximately \$67.7 million in fiscal year 1982, \$77.6 million in fiscal year 1983, and \$90 million in fiscal year 1984.”¹²⁹ For administrative

adjudications, the awards were estimated to be “\$19.4 million in fiscal year 1982, increasing to \$21.3 million and \$22.4 million in fiscal years 1983 and 1984, respectively.”¹³⁰ However, the General Accounting Office (GAO) issued a report in 1998, analyzing EAJA data from fiscal year 1982 to fiscal year 1994.¹³¹ The report found that over the twelve-year span, only 1,593 applications were filed with federal agencies,¹³² of which 604 resulted in an award of fees totaling approximately \$4.5 million, an average of approximately \$7,500 per claim.¹³³ During that same time period, only 6,773 applications were filed in federal court, and 5,642 resulted in awards of fees totaling \$29.6 million, an average of approximately \$5,200 per claim. GAO also found that “claims against the Department of Health and Human Services (primarily filed against the Social Security Administration)” accounted for “about 85 percent of all applications submitted, about 92 percent of applications granted, and about 56 percent of the amounts paid.”¹³⁴

The results of the GAO study suggest that EAJA has failed to achieve its objectives. The combined twelve-year total of \$34.1 million in fees awarded barely reached one-third of CBO’s estimates for even the first year of EAJA’s enactment alone. Furthermore, the study confirms Professors Mezey and Olson’s conclusion that EAJA has primarily become a tool for individual social security claimants, while playing a much less significant role amongst its intended beneficiaries. It is clear that EAJA must undergo some substantial revision if it is to achieve its initial objectives.¹³⁵

Conclusion

While EAJA has achieved limited success, it has ultimately failed to encourage small businesses to challenge unreasonable or oppressive governmental behavior. There is no indication that EAJA has been an effective deterrent against unreasonable

government conduct. However, much of EAJA's difficulty can be attributed to identifiable problems such as the various substantive limitations on the ability to recover fees under EAJA and the current lack of any EAJA reporting and record keeping. Additionally, the historically minimal use of EAJA as a small business tool¹³⁶ suggests that there may be a general lack of awareness regarding EAJA in the small business community. Congress needs to address these issues if EAJA is to become an effective aid to the small business community.

¹ Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified at 28 U.S.C. § 2412 and 5 U.S.C. § 504).

² See H.R. Rep. No. 99-120 (I), at 2 (1985) ("The Act reduces the disparity in resources between individuals, small businesses, and other organizations with limited resources and the Federal Government.").

³ See H.R. Rep. No. 96-1418, at 10 (1980) ("In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue.").

⁴ See *Id.* at 1, (1979) ("The bill rests on the premise that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights.").

⁵ See H.R. Rep. No. 1418, *supra* note 3, at 12 ("By allowing a decision to contest government action to be based on the merits of the case rather than the cost of litigating, S. 265 helps assure that administrative decisions reflect informed deliberation.").

⁶ See H.R. Rep. No. 1418, *supra* note 3, at 6 ("The purpose of the bill is to reduce the deterrents and disparity . . .").

⁷ 5 U.S.C. § 504(e) requires the Chairman of the Administrative Conference of the United States to provide annual reports to Congress regarding agency use of EAJA. However, the Administrative Conference ceased to exist in 1995.

⁸ See 28 U.S.C. § 2412(d)(1)(A); 5 U.S.C. § 504(a)(1).

⁹ *Id.*

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

¹¹ See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 240 (1975) ("Under the 'American Rule' . . . attorney's fees are not ordinarily recoverable by the prevailing litigant in federal litigation in the absence of express statutory authorization.").

¹² There are more than 200 federal fee-shifting statutes. See Joseph J. Ward, *Corporate Goliaths in the Costume of David: The Question of Association Aggregation Under the Equal Access to Justice Act – Should the Whole Be Greater than its Parts?*, 26 Fla. St. U. L. Rev. 151, 156 (Fall 1998). However, other fee-shifting statutes are limited to specific causes of action. See *e.g.* 42 U.S.C. § 1988 (1976) (Civil Rights

Attorney's Fee Awards Act of 1976). The main common law exceptions are (1) the "common fund" exception, which allows non-party beneficiaries to a law suit to contribute to the cost of the attorney; and (2) the "bad faith" exception, which allows recovery of attorney's fees when the losing party has acted in "bad faith." See Barry S. Rutcofsky, *The Award of Attorneys' Fees Under the Equal Access to Justice Act*, 11 Hofstra L. Rev. 307, 309 (Fall 1982).

¹³ *Alyeska*, *supra* note 11, at 240.

¹⁴ See H.R. Rep. No. 1418, *supra* note 3, at 10.

¹⁵ *Id.*

¹⁶ See Ar Lewe S. Ragozin, *The Waiver of Immunity in the Equal Access to Justice Act; Clarifying Opaque Language*, 61 Wash. L. Rev. 217, 219 (1986).

¹⁷ EAJA, *supra* note 1.

¹⁸ H.R. Conf. Rep. No. 96-1434, at 20 (1980).

¹⁹ *Id.*

²⁰ *Spencer v. N.L.R.B.*, 712 F.2d. 539, 550 (1983).

²¹ See H.R. Rep. No. 1418, *supra* note 3, at 10 ("The exception created by S. 265 focuses primarily on those individuals for whom cost may be a deterrent to vindicating their rights.").

²² H.R. Rep. No. 1418, *supra* note 3, at 10 ("An adjudication or civil action provides a concrete, adversarial test of government regulation and thereby insures the legitimacy and fairness of the law.").

²³ *Spencer*, *supra* note 20. The committee report accompanying EAJA explained: "At the present time, the government with its greater resources and expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views . . . a party who chooses to litigate an issue against the government is not only representing his or her own vested interest but is also refining and formulating public policy." H.R. Rep. No. 1418, *supra* note 3, at 10.

²⁴ H.R. Rep. No. 120(I), *supra* note 2, at 10.

²⁵ H.R. Rep. No. 1418, *supra* note 3, at 10.

²⁶ See *id.* at 1.

²⁷ 28 U.S.C. § 2412(d)(1)(A); 5 U.S.C. § 504(a)(1).

²⁸ H.R. Rep. No. 1418, *supra* note 3, at 11.

²⁹ *Id.*

³⁰ EAJA, *supra* note 1.

³¹ See EAJA, *supra* note 1, § 208.

³² See *id.* § 204(d)(5)(e).

³³ See Pub. L. No. 99-80, 99 Stat. 183 (1985). Several amendments were included at the time of the reauthorization. The legislation included an express provision requiring substantial justification inquiries to consider the government's underlying position as well as its litigation position. However, the legislation also required that the determination of the government's position be made based on the record rather than on the basis of discovery. Furthermore, the net worth requirement for eligible parties was raised from \$1 million to \$2 million for individuals and from \$5 million to \$7 million for businesses.

³⁴ Small Business Regulatory Enforcement Act of 1996, Pub L. No. 104-121, §§ 231-33, 110 Stat. 847, at 862 (codified at 5 U.S.C. 504 and 28 U.S.C. 2412).

³⁵ 28 U.S.C. § 2412(b).

³⁶ Gregory C. Sisk, *A Primer on Awards of Attorney's Fees Against the Federal Government*, 25 Ariz. St. L.J. 733, 784 (1993).

³⁷ § 2412(d)(1)(A).

³⁸ 5 U.S.C. § 504(a)(1).

³⁹ *Id.*

⁴⁰ See 28 U.S.C. § 2412(d)(2)(A); 5 U.S.C. § 504(b)(1)(A).

⁴¹ See 28 U.S.C. § 2412(d)(2)(B); 5 U.S.C. § 504(b)(1)(B).

⁴² SBREFA, *supra* note 34, § 232(b)(1), 110 Stat. at 857.

⁴³ Judith E. Kramer, *Equal Access to Justice Act Amendments of 1996: A New Avenue for Recovering Fees From the Government*, 51 Admin. L. Rev. 363, 368 (Spring 1999) (citing 142 Cong. Rec. S3242 (daily ed. Mar. 29, 1996) (Joint Managers' Statement of Legislative History and Congressional Intent)).

⁴⁴ SBREFA, *supra* note 34, § 232(b)(1), 110 Stat. at 863.

⁴⁵ *Id.*

⁴⁶ 28 U.S.C. § 2412(d)(1)(D); 5 U.S.C. § 504(a)(4).

⁴⁷ 28 U.S.C. § 2412(d)(1)(D).

⁴⁸ 28 U.S.C. § 2412(d)(1)(D); 5 U.S.C. § 504(a)(4).

⁴⁹ *Id.*

⁵⁰ 5 U.S.C. § 504(a)(1).

⁵¹ 28 U.S.C. § 2412(d)(1)(A).

⁵² 28 U.S.C. § 2412(d)(1)(D).

⁵³ 5 U.S.C. § 504(a)(4).

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

⁵⁵ 5 U.S.C. § 601(6).

⁵⁶ 5 U.S.C. § 601(3).

⁵⁷ 15 U.S.C. § 632(a)(1).

⁵⁸ 15 U.S.C. § 632(a)(2)(A).

⁵⁹ *Kramer*, *supra* note 43, at 378. The SBA’s size standards are codified at 13 C.F.R. § 121.201.

⁶⁰ *See* 28 U.S.C. § 2412(d)(1)(A); 5 U.S.C. § 504(a)(1).

⁶¹ *See* H.R. Rep. No. 1418, *supra* note 3, at 11 (stating that the interpretation of the term “prevailing party” should “be consistent with the law that has developed under existing statutes). *See also* SEC v. Comserv Corp., 908 F.2d 1407, 1412 (8th Cir. 1990) (stating that standards for “prevailing party status under EAJA are the same as under other fee-shifting statutes).

⁶² *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (*per curiam*).

⁶³ *Id.* at 758.

⁶⁴ *Texas State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 789, 792 (1989).

⁶⁵ *Id.* at 792.

⁶⁶ *Id.* at 789.

⁶⁷ *Farrar v. Hobby*, 506 U.S. 103, 112 (1992).

⁶⁸ *Maher v. Gagne*, 448 U.S. 122, 129 (1980).

⁶⁹ *See Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources* 121 S.Ct. 1835, 1838 (2001).

⁷⁰ *Spencer*, *supra* note 20 and accompanying text.

⁷¹ *Buckhannon*, *supra* note 69, at 1851 (Ginsburg, J.,dissenting).

⁷² *Id.* at 1843.

⁷³ *Id.* at 1852 (Stevens, J.,dissenting).

⁷⁴ *Buckhannon*, *supra*, note 69 at 1838.

⁷⁵ The case concerned fee-shifting provisions of the Fair Housing Amendments Act and the American Disabilities Act, *see id.*

⁷⁶ *Hensley v. Eckerhart*, 461 U.S. 424, 433, n.7 (1983).

⁷⁷ *See Buckhannon*, *supra* note 69, at 1842.

⁷⁸ *Id.* at 1842-43.

⁷⁹ *Id.* at 1843 (referring to a statement in *Hensley* that “[a] request for attorney’s fees should not result in a second major litigation,” 461 U.S. 424, 437).

⁸⁰ *See Id.* at 1859 (Ginsburg, J., dissenting).

⁸¹ H.R. Conf. Rep. No. 1434, *supra* note 18, at 20.

⁸² See *Buckhannon*, *supra* note 69, at 1850 (Ginsburg, J., dissenting) (arguing that the majority’s decision “allows a defendant to escape a statutory obligation to pay a plaintiff’s counsel fees, even though the suit’s merit led the defendant to abandon the fray, to switch rather than fight on, to accord plaintiff sooner rather than later the principal redress sought in the complaint”).

⁸³ *Hensley*, *supra* note 76, at 437.

⁸⁴ *Buckhannon*, *supra* note 69, at 1853 (Ginsburg, J., dissenting).

⁸⁵ *Buckhannon*, *supra* note 69, at 1859 (Ginsburg, J., dissenting) (quoting *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 548 (3rd Cir. 1994)).

⁸⁶ One commentator’s description aptly demonstrates the complexity of the “substantial justification” standard:

The substantial justification standard in effect requires parties to relitigate their underlying dispute. Eligible parties must demonstrate to the judge or hearing officer that the government was not only wrong in the underlying litigation, but that it was inexcusably wrong. To make that showing, private parties must analyze all the legal questions and factual disputes anew in an effort to persuade the decisionmaker of the government’s lack of substantial justification. At times, fresh research by both sides is required to determine whether, in light of prior precedents, the government was justified in asserting the position that it did. At other times, research can reveal whether the government should have known not to rely on a discredited witness or statistical study. Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act – A Qualified Success*, 11 *Yale L. & Pol’y Rev.* 458, 481 (1993).

⁸⁷ *Buckhannon*, *supra* note 69, at 1847 (Scalia, J., concurring).

⁸⁸ See 28 U.S.C. § 2412(d)(2)(B); 5 U.S.C. § 504(b)(1)(B).

⁸⁹ *Krent*, *supra* note 86, at 481.

⁹⁰ See 28 U.S.C. § 2412(d)(1)(A); 5 U.S.C. § 504(a)(1).

⁹¹ For example, Congress might refer to the three-prong test that has developed in the courts prior to *Buckhannon*, see *supra* note 69 at 1843.

⁹² Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney’s Fees For Unreasonable Government Conduct (Part Two)*, 56 *La. L. Rev.* 1, 5 (1995).

⁹³ H.R. Rep. No. 120(I), *supra* note 2, at 10.

⁹⁴ Niki Kuckes, *Reenacting the Equal Access to Justice Act: A Proposal for Automatic Attorney’s Fee Awards*, 94 *Yale L.J.* 1207, 1211 (1985).

⁹⁵ The legislative history accompanying the original enactment of EAJA reveals that Congress intended the substantial justification standard to be “essentially one of reasonableness, H.R. Rep. No. 1418, *supra* note 3, at 10. Indeed, prior to 1985, twelve of thirteen Circuits applied a “reasonableness” standard, see *Sisk*, *supra* note 92, at 19-20. However, the House Report accompanying the 1985 reenactment of EAJA sought to “clarify” the meaning of the standard stating that the “test must be more than mere reasonableness,” H.R. Rep. No. 120(I), *supra* note 2, at 9. The Report prompted several courts to require something more than reasonableness, See *Sisk*, *supra* note 92, at 19-20.

⁹⁶ *Pierce v. Underwood*, 487 U.S. 552 (1988) [hereinafter *Pierce*].

⁹⁷ See H.R. Rep. No. 120(I), *supra* note 2, at 9.

⁹⁸ *Pierce*, *supra* note 96, at 553. The Court provided two reasons for its rejection of the Report. First, a single committee or even a later session of Congress lacks the authority to interpret a previously enacted statute. Second, while the 1985 Congress made several amendments to EAJA in order to clarify ambiguities that had divided the courts, it chose to re-enact the “substantial justification” standard without modifying the language in any way. Therefore, it is unlikely that the House Report reflects the intent of Congress in re-enacting the standard, *id.* at 566-67.

⁹⁹ *Kuckes*, *supra* note 94, at 1222.

¹⁰⁰ *Sisk*, *supra* note 92, at 42; *see also Kuckes*, *supra* note 94, at 1218 (stating that “a ‘substantially justified’ standard is inherently a discretionary one, which can only be applied on a case-by-case basis”).

¹⁰¹ *Hoang Ha v. Schweiker*, 541 F. Supp. 711, 713 (N.D. Cal. 1982), *rev’d* on other grounds, 707 F.2d 1104 (9th Cir. 1983).

¹⁰² *Id.*

¹⁰³ *Wyandotte Sav. Bank v. NLRB*, 682 F.2d 119 (6th Cir. 1982).

¹⁰⁴ *Id.* at 120.

¹⁰⁵ *S & H Riggers & Erectors, Inc. v. O.S.H.R.C.*, 672 F.2d 426 (5th Cir. 1982).

¹⁰⁶ *See id.* at 430-31.

¹⁰⁷ *See Kuckes*, *supra* note 94, at 1225 (arguing that “in adopting this compromise ‘substantially justified’ standard, Congress failed to appreciate that exempting certain enforcement efforts from fee-shifting is incompatible with the Act’s basic purpose of encouraging private suits and discouraging agency abuses”); *see also Krent*, *supra* note 86, at 475 (suggesting that “[i]n the absence of the substantial justification standard, government decisionmakers might more readily consider the prospect of a fee award before acting, and the government’s exposure to fees would increase”).

¹⁰⁸ *See Kuckes*, *supra* note 94, at 1222 (noting that “[i]f using fees to create an incentive to private suits challenging unreasonable governmental actions were the sole objective, an automatic standard would be preferable to the present standard in every respect”).

¹⁰⁹ H.R. Rep. No. 1418, *supra* note 3, at 14.

¹¹⁰ *See Krent*, *supra* note 86, at 475.

¹¹¹ *See id.* at 472, 474-75.

¹¹² *Id.* at 475-76; *see also Kuckes* *supra* note 94, at 1226-27.

¹¹³ *Kuckes*, *supra* note 94, at 1227.

¹¹⁴ *Id.* at 1228.

¹¹⁵ *See id.* at 1210 (arguing that the substantial justification standard has “seriously impeded the development of an effective fee incentive” and accounts for the fact that “the number of fee applications has been strikingly low, given the tremendous volume of cases covered by the Act”).

¹¹⁶ H.R. Rep. No. 120(I), *supra* note 2, at 10.

¹¹⁷ *See* 28 U.S.C. § 2412(d)(2)(A); 5 U.S.C. § 504(b)(1)(A).

¹¹⁸ *Pierce*, *supra* note 96, at 572.

¹¹⁹ *Id.* at 573.

¹²⁰ 42 U.S.C. § 1988 (1976).

¹²¹ *Sorenson v. Mink*, 239 F.3d 1140 (9th Cir. 2001).

¹²² *See generally id.*. The court remanded for adjustment of the EAJA award on other grounds, *id.* at 1148, but observed that \$132 is the maximum hourly rate that can be awarded under EAJA, accounting for the cost-of-living adjustment, *id.*. In contrast, the court reversed and remanded for a new determination of the § 1988 award, *id.* at 1150, noting that \$132 “appear on this record to be considerably below the market rate,” *id.*.

¹²³ *See* Susan Gluck Mezey and Susan M. Olson, *Fee Shifting and Public Policy: The Equal Access to Justice Act*, 77 *Judicature* 13, 13, 19 (1993).

¹²⁴ *See id.* at 20.

¹²⁵ *Id.* at 13.

¹²⁶ *Id.* at 18.

¹²⁷ *See id.* at 20.

¹²⁸ *Sisk*, *supra* note 92, at 191 (referring to the Mezey and Olson study).

¹²⁹ *See* H.R. Rep. No. 1418, *supra* note 3, at 23.

¹³⁰ *Id.*.

¹³¹ General Accounting Office, *Equal Access to Justice Act: Its Use In Selected Agencies*, GAO-HEHS-98-58R (1998) [hereinafter *GAO Report*]. Fiscal Year 1994 was the last year that agencies had been required to report EAJA claims to the Administrative Office of the United States courts.

¹³² *Id.* at 13, Table II.1.

¹³³ *Id.*.

¹³⁴ *Id.* at 5.

¹³⁵ *See Krent*, *supra* note 86, at 507 (concluding that EAJA “has yielded only limited benefits”).

¹³⁶ *See GAO Report*, *supra* note 131.