COMMENT: THE EQUAL ACCESS TO JUSTICE ACT AND ITS EFFECT ON ENVIRONMENTAL LITIGATION.

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Highlight

The Equal Access to Justice Act of 1980 significantly expanded the opportunities for fee shifting in administrative proceedings or civil litigation against the federal government. Although a sunset provision expired the EAJA in 1983, Congress made a permanent and retroactive reauthorization of the Act in 1985. The author traces the history of fee shifting in America, and details the evolution of the EAJA. The conclusion suggests that this Act will see increasing use in environmental and public interest litigation in coming years.

Text

[*533] I. INTRODUCTION

Traditionally, courts in the United States have barred awards of attorney fees and costs to prevailing parties in civil litigation. Three common law exceptions to this rule have developed, but these exceptions have been narrowly applied. In recent decades, **[*534]** numerous statutes have included fee shifting provisions, permitting recovery of attorney fees and costs in some private litigation, and granting recovery of costs alone in some litigation against the federal government. Shifting of attorney fees, as distinct from costs, in litigation against the government had long been precluded by the doctrine of sovereign immunity.

The Equal Access to Justice Act of 1980 (EAJA) [1] significantly changed the existing opportunities for fee shifting when the United States is a party. The Act allowed virtually all prevailing parties to recover both attorney fees and costs in civil litigation with the federal government, unless the government could prove that its position was substantially justified. [2] The intent of the Act was twofold: first, to encourage litigation that would otherwise be deterred by the expense of seeking judicial review, and second, to assist those parties that attempt to defend against unreasonable governmental action. [3] The Act applied to both judicial and administrative proceedings. [4]

Congress anticipated that small businesses would be the primary beneficiaries of the Act, and that the legislation would be extensively applied. [5] Although small businesses did account for a large proportion of all claims filed in the first year of the Act, general application of the legislation was more diverse. [6] Far more surprising, however, was that overall response to the Act was extremely limited. The Congressional Budget Office projected that fee awards would be granted in 3000 federal court cases and 2700 administrative proceedings during the first year of the Act alone, amounting to an estimated $ 69 million cost to the government. [7] Actual results differed markedly: thirteen federal court awards **[*535]** and one administrative award were granted in the first year, for a total amount of just over $ 700,000. [8]

The first year results were especially unusual in that the potential effect of the Act was so broad. The Act applied to more than thirty federal agencies that conduct 14,000 administrative proceedings each year. [9] In addition, the Act could apply to all of the estimated 12,000 federal court cases lost by the government in civil litigation each year. [10]

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[1] *5 U.S.C. § 504*, ***28 U.S.C. § 2412*** (1982) (amended 1985).

[2] *5 U.S.C. § 504*(a)(1), ***28 U.S.C. § 2412***(D)(1)(A) (1982).

[3] Equal Access to Justice Act of 1980, tit. II § 202, *94 Stat. 2321, 2325.*

[4] *5 U.S.C. § 504* applies to administrative actions, and ***28 U.S.C. § 2412*** applies to judicial proceedings. The provisions are similar.

[5] The EAJA was enacted as Title II of the Small Business Act. The House Committee on the Judiciary estimated first year costs at $ 69 million (Congressional Budget Office figures); the Justice Department estimated a $ 125 million annual cost. H.R. REP. No. 1418, 96th Cong., 2d Sess. 20-21 (1980).

[6] *Impelementation of the Equal Access to Justice Act: Oversight Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on Judiciary*, 97th Cong., 2d Sess. (1982) [hereinafter cited as *Implementation Hearings*].

[7] H.R. REP. No. 1418, *supra* note 5.

[8] *Implementation Hearings*, *supra* note 6. *See also* ADMINISTRATIVE CONFERENCE OF THE U.S., REPORT BY THE DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS ON REQUESTS FOR FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT, OCT. 1, 1981 THROUGH JUNE 30, 1982 (1982); ADMINISTRATIVE CONFERENCE OF THE U.S., REPORT OF THE CHAIRMAN OF THE ADMIN. CONFERENCE OF THE U.S. ON AGENCY ACTIVITIES UNDER THE EQUAL ACCESS TO JUSTICE ACT, OCT. 1, 1981 THROUGH SEPT. 30, 1982 (1982) [hereinafter cited as ADMINISTRATIVE CONFERENCE REPORTS].

[9] H.R. REP. No. 1418, *supra* note 5, at 22.

[10] *Id.*

Some commentators attributed the limited application of the EAJA to a lack of awareness of the existence of the statute or the extent of its reach. [11] Other observers suggested that the paucity of applications reflected confusion over the provisions of the Act or pessimism concerning narrow judicial interpretations. [12] Although only ten percent of all applications filed for fees were granted in the first year of the Act, the applications that were filed represented less than one-half of one percent of all possible applications. [13] Regardless of the cause, there was considerable room for expansion in the application of the Act.

The EAJA was originally enacted as an experiment. A sunset provision specified automatic repeal on October 1, 1984, three years after the effective date of the legislation. [14] Although Congress amended and extended the Act before it expired, President Reagan vetoed it in November, 1984. [15] In his veto announcement, **[*536]** the President supported the original legislation, but he opposed some of the 1984 amendments. In spite of his objections, however, the President encouraged Congress to "make the permanent and retroactive reauthorization of the [A]ct a top priority in the 99th Congress." [16] Congress did authorize the EAJA early in the 99th Congress. [17] The House and the Senate passed identical Bills that made certain concessions to the Administration's concerns, and President Reagan signed the retroactive legislation into effect on August 5, 1985. [18]

The 1984 proposed amendments and the 1985 Reauthorization Act both addressed and clarified a number of issues raised during the three-year trial period. [19] The primary issues concerned 1) the definition of an eligible party, 2) the definition of a prevailing party, 3) identification of the government's position, 4) the requirements for a substantially justified position, and 5) the determination of fees and costs. The Reagan Administration's primary concern related to the identification of the government's position. [20]

This Comment will analyze the manner in which Congress responded to the issues raised during the three-year trial period of the Act, and the reasons for the Administration's objections to the 1984 amendments. The Comment also discusses future applicability of the Act. Environmental litigation is the focus of the analysis because many of the leading cases have been environmentally related. Furthermore,

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[11] Stewart, *Beat Big Government and Recover Your Legal Fees,* 69 A.B.A. J. 912, 915 (1983).

[12] Note, *The Equal Access to Justice Act in the Federal Courts,* 84 COLUM. L. REV. 1089, 1094 (1984).

[13] *Implementation Hearings, supra* note 6. *See also* ADMINISTRATIVE CONFERENCE REPORTS, *supra* note 8.

[14] 5 U.S.C. § 504(e)(2)(c), ***28 U.S.C. § 2412***(d)(5)(c).

[15] H.R. 5479 cleared Congress on Oct. 11, 1984, with unanimous approval in both judiciary committees and voice vote approval in both the House and Senate. President Reagan announced a pocket veto on Nov. 9, 1984.

[16] Washington Post, Nov. 10, 1984, at A4, col. 1,2; Memorandum of Disapproval of H.R. 5479, 20 WEEKLY COMP. PRES. Doc. 1814, 1814-15 (Nov. 8, 1984) [hereinafter cited as Memorandum of Disapproval].

[17] S. 1487, 99th Cong., 1st Sess., 131 CONG. REC. S9996-97 (daily ed. July 24, 1985); H.R. 2378 99th Cong., 1st Sess. 131 CONG. REC. S9997 (daily ed. July 24, 1985).

[18] H.R. 2378 cleared the House on June 24, 1985; S. 1487, the identical Senate Bill, was passed on July 24, 1985. President Reagan signed H.R. 2378 on Aug. 5, 1985. 32 WEEKLY COMP. PRES. Doc. 966 (Aug. 12, 1985).

[19] H.R. 5479, 98th Cong., 2d Sess., 130 CONG. REC. H11, 479-81 (daily ed. Oct. 4, 1984).

[20] Memorandum of Disapproval, *supra* note 16.

environmental litigation is especially suited to the EAJA, because the costs of such litigation are often extremely high while the resources of the plaintiffs are frequently low.

[*537] Part II of the Comment reviews traditional perspectives on fee shifting in civil litigation, as embodied in the American rule and its common law exceptions. Part III discusses the emergence of statutory exceptions to the American rule, permitting fee shifting in specific situations. Part IV considers the major provisions of the EAJA, the problems encountered and issues raised during the trial period, and the potential effects of the reauthorized Act. Special attention is given to the 1984 amendments opposed by the Reagan Administration. The effects of both the original amendments and the compromise revisions are examined and compared. The Conclusion suggests that the EAJA will see increasing application in coming years, especially in public interest and environmental litigation.

II. TRADITIONAL VIEWS ON AWARDING ATTORNEY FEES AND COSTS: THE AMERICAN RULE AND ITS COMMON LAW EXCEPTIONS

Courts in England have granted attorney fees and costs to prevailing parties since the thirteenth century, but American courts did not follow the English example. [21] In 1796, the Supreme Court noted that "the general practice of the United States" was to exclude attorney fees from damage awards unless they were authorized specifically by statute. [22] Although Congress approved a few early fee shifting statutes, the amounts recoverable were limited to costs and fixed at insignificant amounts. [23] The American rule has long held that attorney fees and costs generally are not recoverable.

Although the American rule is well established, three narrow exceptions have developed over the years. The first exception allows reasonable attorney fees to a prevailing party who has created or preserved a "common fund" for the benefit of others. [24] In time, this exception was expanded to include those situations where no actual fund was involved, but where a "common benefit" was created or preserved for an identifiable class. [25] The intent **[*538]** of the common fund or common benefit exception was to provide an incentive to those who sought to raise common or class issues, and to prevent unjust enrichment to those who did not take part in the litigation.

The second exception awards attorney fees to a prevailing party when the other party has acted in "willful disobedience of a court order" [26] or has acted in "bad faith" [27] generally. The purpose of the bad faith exception is to assess a penalty or fine against an abusive litigant and provide restitution to the aggrieved

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[21] *See* Goodhart, *Costs*, 38 YALE L.J. 849 (1929); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 234-36 (1935).

[22] *Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).*

[23] *See* *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-57 (1975).*

[24] *Trustees v. Greenough, 105 U.S. 527, 532-33 (1882).*

[25] *See, e.g.*, *Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939).* *See generally* Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974).

[26] *Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923).*

[27] *Hall, 412 U.S. at 5.* *See* *Vaughan v. Atkinson, 369 U.S. 527 (1962).*

party. [28] This exception has been the least difficult to apply, and it is partially codified in the Federal Rules of Civil Procedure. [29]

The Supreme Court created a third exception to the American rule in 1968 by granting attorney fees and costs to a prevailing party that had acted as a "private attorney general" in public interest litigation. [30] Although the initial application of the private attorney general reasoning involved a case in which fee shifting was already permitted under statute, [31] the rationale was quickly extended to other cases where no fee shifting statutes applied. [32] It thus became a recognized common law exception to the American rule, at least for a brief time.

In 1974, in *Wilderness Society v. Morton,* [33] the District of Columbia Circuit Court of Appeals used the private attorney general exception to allow attorney fees to environmental groups that **[*539]** had enjoined the issuance of federal permits for construction of the Alaska pipeline. Although Congress enacted legislation [34] that voided the injunction and granted the permits, the District of Columbia Circuit held that plaintiffs had prevailed on their claim and had vindicated "important statutory rights of all citizens." [35] The court reasoned that fee shifting was especially appropriate in this case, because the cost of the litigation was high and the resources of the litigants were greatly mismatched. [36] A refusal to grant fees and costs in such cases, the court noted, would deter potential litigants from any future attempts to enforce environmental protection statutes. [37]

Wilderness Society v. Morton was reversed by the Supreme Court the following year, however, in *Alyeska Pipeline Service Co. v. Wilderness Society.* [38] The *Alyeska* Court acknowledged that the private attorney general concept could be applied by Congress in specific fee shifting provisions, but the decision stated

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[28] *Toledo Scale, 261 U.S. at 426-28; Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).*

[29] *See FED. R. CIV. P. 37.*

[30] *Newman v. Piggie Park Enter., 390 U.S. 400 (1968).*

[31] The Court granted attorney fees to a party who prevailed in a claim based on Title II of the Civil Rights Act of 1964, § 204(a), *78 Stat. 244* (as codified at 42 U.S.C. § 2000 (1982)). Although the Civil Rights Act contained a fee shifting provision, the Court based its reasoning on the "private attorney general" doctrine. *Newman, 390 U.S. at 402.*

[32] *La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972), aff'd, 488 F.2d 559 (9th Cir. 1973), cert. denied, **417 U.S. 968 (1974).***

[33] *495 F.2d 1026 (D.C. Cir. 1974), rev'd sub. nom Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).*

[34] Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, tit. II, *87 Stat, 576, 584 (1973)* (codified at *30 U.S.C. § 185, 43 U.S.C. § 1651* (1982)).

[35] *Wilderness Soc'y, 495 F.2d at 1032.*

[36] Plaintiffs documented 4500 hours of attorney time spent on the case. *Id.*

[37] *Id.*

[38] *421 U.S. 240 (1975).*

that the concept could no longer be applied "whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award." [39]

Alyeska significantly curtailed common law exceptions to the American rule. The private attorney general exception was no longer recognized absent congressional action, and the common benefit exception was also indirectly limited. The Court noted that the common benefit exception should apply only when the beneficiaries were "small in number and easily identifiable," and where tangible benefits "could be traced with some accuracy." [40] Some federal courts had previously argued against taking such a narrow approach to the common benefit exception, arguing as well against making sharp distinctions between the common benefit and the private attorney general rationale. [41] But *Alyeska* **[*540]** reinforced the American rule and limited its nonstatutory exceptions, even though many legal critics favored the opposite view. [42]

Alyeska's reasoning rested on the fact that Congress created several statutory exceptions to the American rule. Thus, the Court held, Congress had "reserved to itself" the responsibility for granting such exceptions. [43] In Congress, the response was swift. Numerous fee shifting provisions were passed, [44] and a desire to modify the severity of the *Alyeska* decision was explicitly stated. [45] Although Congress did not enact a blanket override of the American rule, it was prepared to provide numerous statutory exceptions, especially where it felt public policy could be furthered by encouraging litigation.

III. THE EMERGENCE OF STATUTORY ALLOWANCES FOR FEE SHIFTING

Although *Alyeska* spawned considerable legislative activity over fee shifting allowances, the origins of congressional interest in this area date back to the eighteenth century. The Judiciary Act of 1789 contained a provision regarding the fees that United States Attorneys should receive when the federal government prevailed in litigation, [46] and a 1793 statute permitted prevailing parties in federal courts to recover attorney fees and costs in the same amounts as were allowed in the courts of the forum state. [47]

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[39] *Id. at 263.*

[40] *Id. at 264 n.39.*

[41] *See, e.g.,* *Natural Resources Defense Council v. EPA, 484 F.2d 1331, 1333 n.1 (1st Cir. 1973)* ("The concept of 'benefit' includes any substantial improvement, financial or otherwise, provided to the beneficiary group. Whether that group is limited or includes the whole public should therefore ordinarily not affect the form of analysis.").

[42] *See* *Alyeska, 421 U.S. at 270 nn.45-46.*

[43] *Id. at 269.*

[44] *Ie.g.,* Civil Rights Attorney's Fees Awards Act of 1976, ***42 U.S.C. § 1988*** (1982); Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. § 1270*(d); Ethics in Government Act of 1978, *2 U.S.C. § 288i*(d).

[45] The Senate Report accompanying the Civil Rights Attorney's Fees Awards Act of 1976 stated that the purpose of the Act was "to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska."* S. REP. NO. 1011, 94th Cong., 2d Sess. 1 (1976).

[46] Federal Judiciary Act of 1789, Ch. 20, § 35, *1 Stat. 73, 92.*

[47] Act of March 1, 1793, Ch. 20, § 4, *1 Stat. 332, 333.*

Considering the early acceptance of the American rule by state courts, however, it is not surprising that the 1793 statute did little to encourage fee shifting. The statute received little use, and it expired in 1799. [48]

[*541] In 1842, Congress gave the Supreme Court discretionary authority to award attorney fees in federal litigation, but the Court took no action under that grant. [49] By the 1850's, Congress noted that there was no uniform system governing the awards of costs in federal litigation. [50] As a result, an 1853 Act established standard amounts for specific items to be allowed to prevailing parties in federal courts. [51] Amounts chargeable under the 1853 Act were set at almost token levels, however, and when the Act was codified nearly one hundred years later, these amounts were changed only slightly. [52] Thus, despite these legislative attempts to permit fee shifting in federal courts, the Supreme Court commented in 1967 that the American rule was effectively limited only by the narrow common law exceptions, and that attorney fees and costs were still "not ordinarily recoverable." [53]

To this point the discussion has only concerned private litigation in federal courts. Fee shifting in litigation against the federal government has an even more limited history. The doctrine of sovereign immunity prohibits suits in any form against the federal government, unless Congress makes express statutory exceptions to the contrary. [54] As Congress proceeded to waive sovereign immunity in certain situations over the years, the Supreme Court continued to uphold the immunity doctrine in relation to fees and costs. A decision by the Court in 1926 summarized the rule as follows: "In the absence of a statute directly authorizing it, courts will not give judgment against the United States for costs or expenses." [55] In 1948, Congress officially recognized this approach in section 2412 of title 28 of the United States Code: "The United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress." [56]

[*542] This partial waiver of sovereign immunity sanctioned an obvious double standard. The United States could be awarded costs when it prevailed over a private party in litigation, but the private party would be denied costs if it was to prevail. [57] Congress made an attempt to rectify this double standard in

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[48] The Act of 1793 was extended two times: Act of Fed. 25, 1795, ch. 28, ***1 Stat. 419;*** Act of Mar. 31, 1796, *1 Stat. 451.* *See* Alyeska Pipeline Serv. *Co. v. Wilderness Soc'y, 421 U.S. 240, 248 n.19 (1975).*

[49] Act of Aug. 23, 1842, ch. 188, § 7, *5 Stat. 516, 518.* *See Alyeska, 421 U.S. at 250.*

[50] H.R. REP. No. 50, 32d Cong., 1st Sess. (1852).

[51] Act of Feb. 26, 1853, ch. 80, *10 Stat. 161.*

[52] *Id. See also* *28 U.S.C. §§ 1920,* 1923(a) (Supp. II 1946).

[53] *Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).*

[54] *See* Cohen, *Awards of Attorneys' Fees Against the United States: The Sovereign Is Still Somewhat Immune,* 2 W. NEW ENG. L. REV. 177, 178-79 (1979).

[55] *United States v. Chemical Found., Inc., 272 U.S. 1, 20 (1926).*

[56] Act of June 25, 1948, ch. 646, *62 Stat. 973* (codified as amended at ***28 U.S.C. § 2412*** (1982)).

[57] *See* Note, *Will the Sun Rise Again for the Equal Access to Justice Act?,* 48 BROOKLYN L. REV. 265, 273-77 (1982).

1966, by placing "the private litigant and the United States on an equal footing . . . in the award of costs." [58] The 1966 Act [59] amended section 2412 of title 28 of the United States Code to read: "Except as otherwise specifically provided by statute, a judgment for costs . . . not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States." [60] This Act removed the sovereign immunity rationale that had prevented awards of costs against the government, but it continued to deny awards of attorney fees. Apparently, Congress deferred to the American rule, although it made no statutory provision for the common law exceptions to that rule. [61]

As of 1966, attorney fees and costs were recoverable in private litigation only if one of the common law exceptions to the American rule applied, and litigation costs alone were recoverable in suits against the government, unless otherwise provided by statute. Before 1966, Congress enacted few statutes that contained fee shifting provisions. [62] By the late 1960's and early 1970's, however, Congress included fee shifting provisions in several statutes: for example, the Clean Air Act of 1970, [63] the Federal Water Pollution Control Act Amendments of 1972, [64] and the **[*543]** Noise Control Act of 1972. [65] These statutes permitted fee shifting in private litigation, but they still did not grant recovery in litigation against the government. [66] By the time of the *Alyeska* decision in 1975, only three statutes specifically allowed awards of both attorney fees and costs against the federal government. [67] After *Alyeska*, the situation changed rapidly.

One of the first examples of fee shifting legislation Congress enacted after *Alyeska* was the Civil Rights Attorney's Fees Awards Act of 1976. [68] The express purpose of that Act was "to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska."* [69] The Civil Rights Fees Act allowed recovery of both attorney fees and costs in litigation against the government, and its language was more expansive and explicit than any previous fee shifting provision.

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[58] S. REP. NO. 1329, 89th Cong., 2d Sess. (1966). *See also* H.R. REP. NO. 1535, 89th Cong., 2d Sess. (1966).

[59] Act of July 18, 1966, Pub. L. No. 89-507, § 1, ***80 Stat. 308*** (codified as amended at ***28 U.S.C. § 2412*** (1982)).

[60] *Id.*

[61] *See* *Natural Resources Defense Council v. EPA, 484 F.2d 1331, 1335 n.3 (1973).*

[62] *E.g.*, Atomic Energy Act of 1954, *42 U.S.C. § 2184* (1982); Communications Act of 1934, *47 U.S.C. §§ 206,* 407; Labor-Management Reporting and Disclosure Act of 1959, *29 U.S.C. §§ 431*(c), 501(b). *See* E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY FEES (1981).

[63] *42 U.S.C. §§ 7413*(b), 7604(d), 7606(f).

[64] *33 U.S.C. § 1365*(d).

[65] *42 U.S.C. § 4911*(d).

[66] In rare instances, courts were able to find implied, if not explicit, statutory authorization to recover fees and costs from the United States. *See, e.g.*, the interpretation of the Clean Air Act amendments in *Natural Resources Defense Council, 484 F.2d at 1335.*

[67] Freedom of Information Act, ***5 U.S.C. § 552***(a)(4)(E) (1982); Privacy Act, ***5 U.S.C. § 552***(a)(g)(2)(B), (3)(B), (4); Civil Rights Act, *42 U.S.C. §§ 2000a-3*(b), 2000b-1, 2000e-5(k).

[68] ***42 U.S.C. § 1988.***

[69] *S. REP. NO. 1011, supra* note 45. *See also* H.R. REP. NO. 1558, 94th Cong., 2d Sess. 1-3 (1976).

[70] Following the Civil Rights Fees Act, Congress included fee shifting provisions in a growing number of statutes. [71] By 1980, more than 100 federal statutes allowed recovery of attorney fees and costs. [72]

However, there are problems in the application of these provisions. One of the major problems has been that an award is permitted only when a court deems it "appropriate." [73] In addition to providing no measurable standard for the granting of awards, most of the fee shifting provisions contain sparse statutory **[*544]** language and vague legislative history. [74] This ambiguity reduces the effectiveness of the provisions, as the judicial discretion approach too often yields inconsistent and arbitrary results. [75]

As early as 1973, hearings were conducted in Congress with an intent to create a general waiver to the sovereign immunity of the federal government in relation to attorney fees. [76] Finally, in 1980 Congress enacted the Equal Access to Justice Act, with two major provisions. The first part of the Act amended the 1966 Act concerning attorney fees in civil litigation with the government, making the United States subject to all common law exceptions to the American rule. [77] The EAJA realized the "equal footing" goal that the 1966 Act had set: "The change simply reflects the belief that, at a minimum, the United States should be held to the same standards in litigation as private parties." [78]

The second major provision of the EAJA created a general statutory exception for fee shifting against the government. [79] Under this new rule, any eligible prevailing party could sue for attorney fees resulting from litigation against the United States. Individual authorizing statutes were no longer required. The most important aspect of this provision was that it shifted the burden of proof to the federal agency involved in the litigation to show that its position was substantially justified.

The House report that accompanied the Act in 1980 noted the disparity between the resources of federal agencies and private parties: "While the influence of the bureaucracy over all aspects of life has increased,

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[70] *See* E. LARSON, *supra* note 62, at 6; Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?,* 126 U. PA. L. REV. 281, 306 (1977).

[71] *See e.g.,* Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. § 1270*(d) (1982); Outer Continental Shelf Lands Act Amendments of 1978, *43 U.S.C. § 1349*(a)(5); Ocean Thermal Energy Act of 1980, *42 U.S.C. § 912*(d). *See* Note, *Awards of Attorneys' Fees to Unsuccessful Environmental Litigants, 96 HARV. L. REV. 667 n.2 (1977);* Berger, *supra* note 70, at 303 n.104.

[72] E. LARSON, *supra* note 62, at 323-27.

[73] See discussion and list of statutes in Note, *supra* note 71.

[74] *Id.* at 681.

[75] *Id.*

[76] *The Effect of Legal Fees on the Adequacy of Representation, Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary,* 93d Cong., 1st Sess. (1973); *Awarding of Attorney Fees, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. (1975). Senate Bill 1001 in the 95th Congress (1977) was the first draft of the EAJA. *See* S. REP. NO. 586, 98th Cong., 2d Sess. 3-4 (1984) (legislative history of the EAJA).

[77] ***28 U.S.C. § 2412***(b).

[78] H.R. REP. NO. 1418, *supra* note 5, at 9.

[79] ***28 U.S.C. § 2412***(d)(1)(A).

the ability of most citizens to contest any unreasonable exercise of authority has decreased." [80] Passage of the EAJA signified a major attempt to equalize this disparity, **[*545]** by removing cost as a deterrent to those who challenge federal action.

IV. THE EQUAL ACCESS TO JUSTICE ACT: APPLICATIONS AND AMENDMENTS

The intent of Congress in passing the 1980 Act was clear: "Providing an award of fees to a prevailing party represents one way to improve citizen access to courts and administrative proceedings . . . . In so doing, fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority." [81] Despite this laudable goal, Congress intially approved the Act only as a "limited experiment," at the end of which the "cost and impact of the legislation" was to be reviewed. [82] The underlying concern was that response to the legislation might be so great that the cost to government would be prohibitively high, or that the Act would have a chilling effect on agency action. [83] As it happened, litigants used the Act far less during the trial period than anyone anticipated, and final cost to the government fell short of even the most conservative estimates. [84]

Although initial application of the EAJA was not as extensive as anticipated, it was sufficient to raise a number of important issues. Several issues arose with such frequency that legislative review and amendment seemed appropriate. In this sense, the sunset provision may have been providential; rather than repealing the Act, Congress significantly strengthened it with the 1984 amendments. However, opposition to some of the amendments by the Reagan Administration resulted in a veto of the 1985 EAJA extension bill, requiring further legislative action. [85]

The following discussion will review five basic elements of the Act. In each section, the original legislative intent and statutory definition will be assessed, followed by an analysis of the application and effect of the provision, an analysis of the 1984 proposed amendments and the 1985 revisions, and, where appropriate, an **[*546]** examination of the Reagan Administration objections.

A. The Definition of an Eligible Party

The 1980 Act defined an eligible party as 1) any individual whose net worth did not exceed $ 1 million at the time an adversary adjudication was initiated, or 2) any "partnership, corporation, association, or public or private organization other than an agency" whose net worth did not exceed $ 5 million and who did not have more than 500 employees at the time an adversary adjudication was initiated. [86] "Adversary adjudication" was defined broadly as any situation where "the position of the United States is represented by counsel or otherwise," within the guidelines of section 554 of title 28 of the United States Code, but

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[80] H.R. REP. No. 1418, *supra* note 5, at 10.

[81] *Id.* at 12.

[82] *Id.* at 13.

[83] *Id.* at 7.

[84] *See* ADMINISTRATIVE CONFERENCE REPORTS, *supra* note 8.

[85] *See supra* notes 15-17 and accompanying text.

[86] *5 U.S.C. § 504*(b)(1)(B) (1982) (amended 1985); ***28 U.S.C. § 2412***(d)(2)(B) (amended 1985).

excluding ratemaking and licensing application hearings. [87] The Act also excluded tort actions involving the government. [88]

In application during the three-year test period, the definition of eligible party raised three primary issues. The first issue concerned the status of local governmental units. The original Act made no specific reference to local governments, and therefore several federal courts held that they were not within the scope of the Act. In a leading case, *Citizens Council v. Brinegar,* [89] a local government successfully enjoined the federal department of Transportation from planning a new highway route without adequate compliance with the National Environmental Policy Act (NEPA). Although the local government plaintiffs obtained the equitable relief they sought, they were denied recovery of attorney fees under the EAJA.

Congress explicitly amended this section of the Act in 1984, **[*547]** by including the phrase "unit of local government" in the eligibility requirements. [90] Maximum eligibility criteria were also changed, from the $ 1 million standard to $ 2 million for individuals, and from $ 5 million to $ 7 million for corporations, associations, and organizations. Eligible local governments must still be within the $ 7 million net worth limit and employ less than 500 people. The 1985 Reauthorization Bill retained this amendment. [91]

The second eligibility issue to arise in the trial period concerned the range of applicability of the EAJA to federal boards and agencies. Three specific government entities were addressed. First, several cases during the trial period held that the EAJA did not apply to Boards of Contract Appeals decisions, because the Boards are exempt from the Administrative Procedure Act and attorney fees are not specifically authorized in the Contract Disputes Act. [92] Congress disagreed, amending the EAJA in both the 1984 and 1985 Bills to include Boards of Contract Appeals proceedings. [93] Congress also amended the Act to emphasize the coverage of the EAJA to judicial proceedings involving the Social Security Administration [94] although the 1985 Bill did not cover as many proceedings as some Senators desired. [95] Finally, an

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[87] The definition of 'adversarial adjudication' for the purpose of this section excludes ratemaking and licensing application hearings. However, the exclusion does not extend to proceedings under section 554 involving the suspension, annulment, withdrawal, limitation, amendment, modification or conditioning of license." H.R. REP. No. 1418, *supra* note 5, at 15. For the rationale behind limiting the EAJA to "adversarial" situations, see *S. REP. No. 586, supra* note 76, at 6 and Johnston, *The Equal Access to Justice Experiment,* ORE. STATE BAR BULL., NOV. 1984 at 15.

[88] ***28 U.S.C. § 2412***(d)(1)(A).

[89] *741 F.2d 584 (3d Cir. 1984).*

[90] *See* H.R. 5479, *supra* note 18.

[91] *See* H.R. 2378, *supra* note 17.

[92] The Contract Disputes Act of 1978 established Boards of Contract Appeals to conduct contract dispute resolution hearings for federal agencies. *41 U.S.C. § 607* (1982). *See also* H.R. REP. No. 992, 98th Cong., 2d Sess. 11 (1984).

[93] H.R. 5479, *supra* note 18; H.R. 2378, *supra* note 17.

[94] *Id. See also* H.R. REP. No. 992, *supra* note 92, at 13; S. REP. No. 586, *supra* note 76, at 21-22.

[95] 131 CONG. REC. S9993-94 (daily ed. July 24, 1985) (statement of Sen. Thurmond).

amendment which specifically included tax hearings of the Internal Revenue Service was proposed in 1984 but never adopted. [96]

The last major eligibility issue to come out of the trial period was perhaps the most significant. It concerned the scope of the EAJA in relation to other statutes that already contain fee shifting provisions. The EAJA clearly states that it applies to any statute that contains no fee shifting provision or prohibition. [97] But controversy arises when a statute already has a fee shifting provision. Many agencies have argued that the language in the **[*548]** EAJA, "except as otherwise specifically provided by statute," [98] precludes any additional fee shifting beyond what is originally provided in the statute in question. [99] The opposing view is that Congress intended the EAJA to "fill the gaps" in other statutes, authorizing fee shifting where a statute is silent. [100] A majority of federal courts have adopted the latter approach.

In the 1983 case of *Natural Resources Defense Council v. EPA*, for example, the Third Circuit held that the EAJA allowed recovery of attorney fees on a Clean Water Act claim based on section 509(b)(1), even though the attorney fees provision in that Act is found in section 505(d). [101] The court reasoned that "Congress intended the EAJA to expand the potential for fee awards under certain circumstances, not to freeze the absence of counsel fee provisions in existing statutes." [102] Other courts have followed this interpretation, holding that the EAJA allows fee shifting in claims based on the Resource Conservation and Recovery Act (RCRA) [103] and the Surface Mining Control and Reclamation Act (SMCRA), [104] even when the claims are not brought under the existing fee shifting provisions in those statutes. [105]

This approach represents the trend in federal court cases, although the opposite view, that the EAJA is precluded if the statute in question has any fee shifting provisions at all, remains a successful argument in some courts. [106] Congress did not address this issue in the 1984 proposed amendments or in the 1985 revisions. However, unless a statute specifically prohibits fee shifting or existing sections already provide for it, the EAJA should **[*549]** clearly apply.

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[96] *See* 130 CONG. REC. H9297-302 (daily ed. Sept. 11, 1984).

[97] ***28 U.S.C. § 2412***(b).

[98] *Id.* § 2412(a), (d)(1)(A).

[99] *See, e.g.*, *Citizens for Responsible Resource Dev. v. Watt, 579 F. Supp. 431 (M.D. Ala. 1984).*

[100] ***Environmental Defense Fund v. EPA, 716 F.2d 915, 918 (D.C. Cir. 1983).***

[101] *Natural Resources Defense Council v. EPA, 703 F.2d 700 (3d Cir. 1983).*

[102] *Id. at 705-06.*

[103] ***Environmental Defense Fund, 716 F.2d 915.***

[104] *Citizens for Responsible Resource Dev., 579 F. Supp. 431.*

[105] RCRA allows fee shifting in citizen suits filed in district court. *42 U.S.C. § 6972*(a). In ***Environmental Defense Fund, 716 F.2d 915,*** the court held that the EAJA allowed fee shifting in appellate level RCRA claims. Likewise, the SMCRA case, *Citizens for Responsible Resource Dev., 579 F. Supp. 431,* extended EAJA fee shifting to section 526 of that Act, although SMCRA only allows fee shifting under section 520.

[106] *See supra* notes 103 and 104 and cases cited therein (for agency arguments and reasoning).

B. The Definition of a Prevailing Party

To recover attorney fees under the EAJA, an eligible party must first be established as a "prevailing party." [107] Once this is done, the burden of proof shifts to the government, which must show a substantially justified position to prevent fee shifting. The EAJA itself did not define "prevailing party," but Congress provided explicit guidelines in the House report that accompanied the Act: "It is the Committee's intention that the interpretation of the term [prevailing party] . . . be consistent with the law that has developed under existing statutes." [108]

This term "prevailing party" has been extensively litigated under other statutes, and the House report cited several cases to indicate approval of the established interpretations. The term is "not . . . limited to a victor only after entry of a final judgment following a full trial on the merits." [109] For example, it is accepted (and cited in the House report) that a party will be considered prevailing if the party 1) obtains a favorable settlement, [110] 2) gains a voluntary dismissal of a groundless complaint, [111] 3) prevails on only one issue in the case, [112] 4) prevails on an interim order, [113] or 5) prevails on an interlocutory appeal. [114]

Litigation under the EAJA during the trial period applied and upheld these interpretations. [115] Other EAJA cases added to the list of situations deemed "prevailing." For example, in 1983, the Environmental Defense Fund was found to be a prevailing party and awarded attorney fees for providing an impetus to the Environmental Protection Agency to reinstate hazardous waste reporting regulations that the Agency had suspended without **[*550]** normal notice and comment procedures. [116] In another case, a party prevailed when it caused the EPA to revise its planning activities. [117] In yet another EAJA case, the Fifth Circuit held that intervenors may be considered prevailing parties, if they contribute significantly to the material presented. [118]

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[107] *5 U.S.C. § 504*(a)(1) (1982); ***28 U.S.C. § 2412***(a), (b), (d)(1)(A).

[108] H.R. REP. NO. 1418, *supra* note 5, at 11.

[109] *Id.*

[110] *Foster v. Boorstin, 561 F.2d 340* (D.C. cir. 1977).

[111] *Corcoran v. Columbia Broadcasting Sys., 121 F.2d 575 (9th Cir. 1975).*

[112] *Bradley v. School Bd., 416 U.S. 696 (1974).*

[113] *Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976).*

[114] Van Hoomissen v. Xerox Corp., 503 F.id 1131 (9th Cir. 1974).

[115] *Matthew v. United States, 713 F.2d 677 (11th Cir. 1983); United States v. Citizens State Bank, 668 F.2d 444 (8th Cir. 1982); Environmental Defense Fund v. Watt, 554 F. Supp. 36 (E.D.N.Y. 1982), aff'd, 722 F.2d 1081 (2d Cir. 1983).*

[116] ***Environmental Defense Fund, 716 F.2d 915.***

[117] Environmental Defense Fund v. Gorsuch, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20,303 (D.D.C. Dec. 7, 1982).

[118] *American Trucking Ass'n v. ICC, 666 F.2d 167 (5th Cir. 1982).*

In 1983, the Supreme Court summarized the standard in this manner: "Plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bring suit." [119] Although the Court spoke in the context of a plaintiff's action in a Civil Rights Fees Act case, the Court acknowledged that the "standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" [120] Another court's characterization of the term holds that "for a plaintiff to prevail [under the EAJA], it is sufficient that his lawsuit acted as a 'catalyst' in prompting defendants to take action to meet his claims." [121] The term "prevailing party" has received an expansive interpretation by the courts.

The only unsettled issue to arise in this area during the trial period of the EAJA concerned land condemnation proceedings. Some cases held that a landowner could not be considered a prevailing party if condemnation proceedings took place after litigation. [122] Both the Ninth Circuit and the Fifth Circuit held otherwise, however, allowing recovery of attorney fees by the landowner if he obtained more money than originally offered by the government. [123] Congress adopted this approach in the 1984 proposed amendments and the 1985 Reauthorization Act, specifying that in eminent domain proceedings a party will be **[*551]** "prevailing" if the party receives a final judgment at least as close to its valuation of the property as the government's valuation. [124]

As a threshold requirement for fee shifting under the EAJA, the "prevailing party" criterion is on its face a more difficult standard to meet than what is required in other fee shifting statutes. Most environmental statutes, for example, permit awards of fees and costs "to any party." [125] Some commentators suggest that the environmental statutes' standard should allow fee shifting to unsuccessful litigants as well as to those who prevail on the merits or receive some benefits sought. [126] The reasoning behind this approach seems sound; fee awards to unsuccessful litigants encourage socially desirable litigation in much the same manner as that proposed by the private attorney general doctrine. [127] Unfortunately, the Supreme Court

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[119] *Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)* (quoting *Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)).*

[120] *Id.* at 433 n.7.

[121] *Citizens' Coalition for Block Grant Compliance v. City of Euclid, 537 F. Supp. 422, 425 (N.D. Ohio 1982).*

[122] *United States v. 341.45 Acres of Land, 542 F. Supp. 482 (D. Minn. 1982); United States v. 160 Acres of Land, 555 F. Supp. 84 (D. Utah 1982).*

[123] *United States v. 101.80 Acres of Land, 716 F.2d 714 (9th Cir. 1983); United States v. 329.73 Acres of Land, 704 F.2d 800* (5th cir. 1983).

[124] H.R. 5479, *supra* note 19. This was one amendment the Reagan Administration supported. *See* *S. REP. No. 586, supra* note 76, at 24-25. *See also* *S. 1487, supra* note 17.

[125] *E.g.*, Clean Water Act, *33 U.S.C. § 1365*(d) (1982). *See* Note, *supra* note 71, at 681 n.26.

[126] *See* Note, *supra* note 71.

[127] *Id.* at 682.

recently held that a party should not be awarded fees under such statutes unless the party achieves some success on the merits of its case. [128]

Thus, as it now stands, the "prevailing party" requirement of the EAJA is liberally interpreted, while the "to any party" requirement of many environmental statutes is being narrowly construed. This increases the potential utility of the EAJA to environmental litigants. Not only does the EAJA "fill the gaps" for fee shifting in many environmental statutes, but it provides a more predictable standard for eligibility. Furthermore, the EAJA avoids the discretionary approach of the environmental statutes' fee shifting provisions, because it makes an award of fees mandatory unless the government can prove that its position was substantially justified. As will be seen, this shifting burden of proof is the most important, and most controversial, element of the EAJA.

C. Identification of the Government's Position

Once a prevailing party has been established, the government **[*552]** bears the burden of proving that its position was substantially justified. [129] During the three-year test period of the Act, courts denied nearly ninety percent of applications for fees and costs, and the majority of these claims were denied on the basis that the government's position was substantially justified. [130] The most contested element in these cases concerned the scope of the government's "position."

The original Act did not define "position," nor did the legislative history discuss it. [131] As such, the interpretation of this term was left to the courts, and differing definitions quickly developed. One approach was that the government's position consisted of only the agency's litigation position. The other approach held that the underlying agency action should also be reviewed.

The "litigation position only" theory gained early acceptance in several courts. Within two years of the effective date of the Act, courts of the Fourth Circuit, District of Columbia Circuit, and Federal Circuit had adopted this approach, [132] but their reasoning was not persuasive. In *Tyler Business Services v. NLRB*, for example, the Fourth Circuit based its reliance on the "litigation position only" theory on a tenuous interpretation of section 504(a) of title 5 and the associated House report. [133] Section 504(a) concerns administrative appeals for fees under the EAJA, and it allows fee shifting unless the "position of the agency as a party to the proceeding" is substantially justified. The *Tyler* court interpreted this to limit "position" to the litigation stance only, in both administrative and judicial proceedings. However, neither the Act nor the House report even attempted to define "position," and supporting language in the Act seems to indicate a broader interpretation. Indeed, the more obvious statutory construction would be that

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[128] *Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983).*

[129] *5 U.S.C. § 504*(a) (1982); ***28 U.S.C. § 2412***(d).

[130] *See* ADMINISTRATIVE CONFERENCE REPORTS, *supra* note 8.

[131] Note, *supra* note 12, at 1102.

[132] *Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983); Tyler Business Servs. v. NLRB, 695 F.2d 73 (4th Cir. 1982); Broad Ave. Laundry & Tailoring v. United States, 693 F.2d 1387 (Fed. Cir. 1982).*

[133] *Tyler, 695 F.2d at 75. See 5 U.S.C. § 504*(a) (1982); H.R. REP. NO. 1418, *supra* note 5, at 18. *See also* Note, *supra* note 12, at 1102.

since the stated intent of the Act was to discourage unreasonable agency actions, the standard for judicial review in EAJA cases should include an analysis of those **[*553]** underlying agency actions. [134]

The underlying action theory proposed that in an EAJA claim a court should consider both the record of the agency's actions that led to the dispute and the position argued by the agency before the court. The Third Circuit and the Ninth Circuit upheld this stricter standard of review during the test period. [135] The reasoning behind this approach was that to "exclude consideration of the bureaucratic action which necessitated the lawsuit would remove the very incentive which Congress unquestionably intended to provide." [136] As the Ninth Circuit pointed out, however, the distinction between the two approaches may sometimes be irrelevant, as "[c]ourtroom attempts to defend unreasonable agency actions usually will be unreasonable also." [137]

This controversy was the major issue before Congress during consideration of the EAJA extension bill in 1984. [138] Despite objections by the Reagan Administration, [139] Congress included an amendment which said that the "position of the United States includes the underlying agency action which led to the litigation." [140] The rationale behind this amendment was stated by Representative Kastenmeier on the floor of the House:

Although the administration does not like this particular interpretation, this expansive reading of the term is necessary to ensure the basic purpose of the act. Otherwise the Government could act in an unjustified manner until it filed suit or walked into the courtroom, and then escape liability. [This amendment] is merely asking that the Federal Government be accountable for its conduct. [141]

The House and Senate reports that accompanied the 1984 amendments carefully reviewed the difference between the **[*554]** "litigation position only" and the "underlying action" theories. [142] Both reports expressed overwhelming congressional support for the "underlying action" amendment. Despite congressional support for this interpretation, however, President Reagan vetoed the 1984 Extension Bill primarily because of this amendment. The 1985 compromise legislation specified that the position of the agency or the United States means, "in addition to the position taken by the agency in the adversary

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[134] Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, § 202, *94 Stat. 2321, 2325.* H.R. REP. NO. 1418, *supra* note 5, at 18.

[135] *Rawlings v. Heckler, 725 F.2d 1192 (9th Cir. 1984); Natural Resources Defense Council v. EPA, 703 F.2d 700 (3d Cir. 1983); Dougherty v. Lehman, 711 F.2d 555 (3d Cir. 1983); Hoang Ha v. Schweiker, 707 F.2d 1104 (9th Cir. 1983).*

[136] *National Resources Defense Council, 703 F.2d at 710.*

[137] *Hoang Ha, 707 F.2d at 1106.*

[138] 130 CONG. REC. H9299-300 (daily ed. Sept. 11, 1984) (statements of Reps. Kastenmeier and Morrison).

[139] *See supra* notes 15-17 and accompanying text.

[140] H.R. 5479, *supra* note 19.

[141] 130 CONG. REC. H9299 (daily ed. Sept. 11, 1984).

[142] H.R. REP. NO. 992, *supra* note 92; *S. REP. NO. 586, supra* note 76.

adjudication [or civil action], the action or failure to act by the agency upon which the adversary adjudication [or civil action] is based." [143]

Although this amendment seems to reflect the "underlying action" theory more than the "litigation position only" approach, the extent of the legislative compromise here can only be seen in light of the additional amendment concerning a "substantially justified position." As with the liberal interpretations of the "prevailing party" term, the "action or failure to act" definition still offers potential litigants more accountable and predictable results when the government has acted unreasonably. If used wisely, this amendment should prevent agencies from relying solely on legal reasoning to avoid responsibility for their underlying actions in fee shifting cases.

D. Requirements for a Substantially Justified Position

To shift the burden of proof in an EAJA claim for recovery of attorney fees and costs, a prevailing party must "make a simple allegation that the United States acted without substantial justification." [144] Congress intended the government to bear this burden of proof because "it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshall the facts to prove that the Government was unreasonable." [145] Although the "substantially justified" standard received only slightly more attention in the statutory language and legislative history of the Act than did the term "position," it was upon the interpretation of the latter term that most courts based their reasoning in denying or granting fees during the trial period. Most courts did not need **[*555]** to analyze the "substantially justified" standard critically if they adopted the "litigation position only" theory. The interpretation of this standard will play a more important role in post-1985 cases. [146]

Congress described the standard in this way: "The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made." [147] Congress emphasized that the standard did not imply the government's position was not substantially justified just because it lost its case. [148] In arriving at this standard, Congress considered and rejected three other alternatives. The first proposed alternative granted mandatory awards to all prevailing parties. This was rejected for its potentially "chilling effect on proper government enforcement efforts." [149] The second alternative suggested a purely discretionary approach. This was rejected because of the "natural reluctance of

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[143] *S. 1487, supra* note 17.

[144] H.R. REP. NO. 1418, *supra* note 5, at 13.

[145] *Id.* at 11.

[146] The Committee expects that the determination of what is 'substantially justified' will be decided on a case-by-case basis due to the wider variety of factual contexts and legal issues which make up government disputes." H.R. REP. NO. 992, *supra* note 92 at 7.

[147] H.R. REP. NO. 1418, *supra* note 5, at 10.

[148] *Id. Accord S. & H. Riggers & Erectors, Inc. v. Occupational Health & Safety Review Comm'n, 672 F.2d 426 (5th Cir. 1982).*

[149]

agencies to award fees against themselves," and because it offered little direction to the courts. [150] The third alternative, proposed by the Justice Department, was the "arbitrary and frivolous" standard. [151] Congress rejected this, because it would place a greater burden of proof on the private litigant, and because it would not deter unreasonable agency action. [152]

The majority of federal courts accepted the "reasonableness" test as is, although they applied it in somewhat different ways. Some commentators suggested that a "reasonableness" test for a substantially justified position should be interpreted in line with the similarly worded *Rule 37 of the Federal Rules of Civil Procedure.* [153] But Rule 37 applies primarily to "bad faith" situations, **[*556]** and as such it is closer to the rejected "arbitrary and frivolous" standard. [154] Other commentators suggested that the analysis should be based on the government's probability of prevailing. [155] This approach was rejected explicitly by the 1980 House report, however. [156] In an effort to describe more carefully the appropriate standard of review, the District of Columbia Circuit proposed that "the test should . . . be slightly more stringent than 'one of reasonableness.'" [157] Significant support for this interpretation is found in the Senate's rejection of a proposal to use the term "reasonably justified" in the standard, preferring instead to keep the "substantially justified" standard. [158] One of the sponsors of the Act indicated that the intent behind this language was to create a "greater burden" on the government than a standard of "reasonable" justification. [159]

Congress proposed no changes in 1984 to the standard of review for the government's burden of proof. [160] But the 1985 Reauthorization Act included a new limitation on the determination of a substantially justified position: "Whether or not the position of the United States was substantially justified shall be determined on the basis of the record . . . which is made in the civil action [or adversary adjudication] for which fees and other expenses are sought." [161]

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[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] Note *supra* note 57, at 273-77.

[154] H.R. REP. NO. 1418, *supra* note 5, at 14.

[155] Note, *supra* note 12, at 1114.

[156] Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing." H.R. REP. NO. 1418, *supra* note 5, at 11.

[157] *Spencer v. NLRB, 712 F.2d 539, 558 (D.C. Cir. 1983).*

[158] S. REP. NO. 253, 96th Cong., 1st Sess. 8 (1979).

[159] *Award of Attorneys' Fees Against the Federal Government: Hearings on S. 265 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 37-38 (1980) (statement of Sen. DeConcini).

[160] H.R. 5479, *supra* note 19.

[161] ***28 U.S.C. 2412***(b) (amended 1985).

In effect, this amendment limits discovery in an EAJA proceeding to the record developed on the merits of the case. [162] One of the primary concerns of the Reagan Administration in 1984 was that EAJA proceedings would become more prolonged than **[*557]** the underlying cases. [163] This compromise amendment attempted to curtail exhaustive fee proceedings, although in the end it may only prolong all of the underlying cases. Litigators must now prepare the record in advance if they plan to seek fees later. When the assessment of the government's position does come under review, however, courts must still apply a "reasonableness" test. In keeping with the intent of both the original Act and the 1985 amendments, courts should apply the "slightly more stringent than reasonableness" test to the government's position. Before that position can be found "substantially justified," [164] courts should require a "strong showing" by the government. [165]

With this view of "reasonableness" in mind, the three-stage test employed by the Third Circuit may be the most effective way to assess whether or not the government's position has a "reasonable basis both in law and fact." The Third Circuit requires that the government prove: 1) a reasonable basis in truth for the facts alleged in the government's position, 2) a reasonable basis in law for the legal theory proposed by the government, and 3) reasonable support in the facts for the legal theory advanced. [166] The "slightly more stringent than reasonableness" test of the District of Columbia Circuit, combined with the three-stage analysis of the Third Circuit, will afford a standard of review that is both efficient and in keeping with the spirit of the Act.

Another significant issue in the EAJA concerns matters of first impression before a Court. Only a few such cases were confronted by courts during the trial period, but all these cases held that the government's position was substantially justified because there was either an absence of case law or the issue was not yet settled. [167] In *SOCATS v. Clark*, [168] the Ninth Circuit critically **[*558]** reviewed one of these decisions. The court intimated that complexity of the issue alone should not be a sufficient reason to find the government's position justified, but the court did defer to the district court's reasoning that there was no previous ruling on the issue. [169]

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[162] *See* 131 CONG. REC. S9992-94 (daily ed. July 24, 1985) (statements of Senators Grassley and Thurmond).

[163] *Id.*

[164] The Senate Committee on the Judiciary approved this approach in 1984. S. REP. NO. 586, *supra* note 76, at 10.

[165] The Ninth Circuit has applied the "strong showing" test in the H.R. REP. NO. 1418, *supra* note 5, to assess whether the government's position was "substantially justified." *Environmental Defense Fund v. Watt, 722 F.2d 1081, 1085 (9th Cir. 1983).*

[166] *Dougherty, 711 F.2d at 564.*

[167] *Schoenherr v. United States, 566 F. Supp. 1365 (E.D. Wis. 1983)* (construction of applicable statute in fact situation was not previously settled); *SOCATS v. Watt, 556 F. Supp. 155* (D. Or.), *modified and aff'd sub nom. SOCATS v. Clark, 720 F.2d 1475 (9th Cir. 1983)* (worst case analysis required unusually complex analysis with no previous case law); *Trustees for Alaska v. Watt, 556 F. Supp. 171 (D. Alaska 1983)* (government "reasonable," although it incorrectly interpreted new legislation).

[168] *720 F.2d 1475 (9th Cir. 1983).*

[169] We do not agree that § 1502.22 [CEQ worst case analysis regulation] is difficult to interpret. It is straightforward and means what it says . . . . Much of the [government's] confusion about it was self-induced." *Id. at 1481.* Note that the Ninth Circuit allowed EAJA attorney fees on appeals in this case, even though it affirmed the district court's denial of fees at that level. The court's reasoning was that the issue was no longer one of first impression (citing a Fifth Circuit ruling in the interim) *Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983).*

In environmental and public interest law, some of the most important cases are matters of first impression. Such cases usually require a large amount of attorneys' time and expert witness costs, and the litigants rarely have adequate resources, especially compared to those of the government. It seems incongruous with the intent of the Act to preclude fee shifting in such consequential circumstances. Faced with limited resources, potential litigants would be discouraged from pursuing new issues. Courts should at least apply the same strict standard of scrutiny to the government's position in matters of first impression as they would to more settled issues. Congress, in fact, provided a "safety valve" for the government in such situations, suggesting that an agency should not be held liable when "special circumstances would make an award unjust." [170] The purpose of this clause was to ensure that the government would not be deterred from advancing new or controversial arguments in litigation. [171] Private litigants should also have a "safety valve" when new issues are presented; attorney fees and costs should not be denied automatically in matters of first impression.

A final issue in this area concerns the continuing utility of the common law exceptions to the American rule. The EAJA **[*559]** codified the "bad faith" and the "common fund" or "common benefit" exceptions to the American rule in civil litigation with the federal government. [172] These exceptions do not shift the burden of proof to the government, but neither do they preclude awards if the government's position is found to be "substantially justified." Therefore, in those cases where the government's position is found to be substantially justified, a private party can still recover fees and costs if one of the common law exceptions applies. Obviously, if there was "bad faith" in the government's position, awards could be granted under section 204(d)(1)(A) of the Act. But there may be occasions when the private litigant can also recover under the "common benefit" exception. This is especially applicable to environmental and public interest litigation. Although the Supreme Court has held that the common benefit exception is restricted to an identifiable class with discernible benefits, this alternative should not be ignored by potential claimants. [173] Furthermore, if the general statutory waiver in the Act is amended or curtailed in coming years, it is possible that courts will be more receptive to a variation of the private attorney general exception again.

E. Determination of Fees and Costs

To recover fees and costs under the EAJA, a prevailing party must file an itemized statement with the court within thirty days of final judgment in the case. [174] This statement must include the amount of expert witness, study, or test costs, and the amount of attorney time and the rates being charged. The Act sets only two limits on these costs: expert witnesses cannot be paid at a higher rate than government

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[170] ***28 U.S.C. § 2412***(d)(1)(A) states that an award will be made "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." House Report 1418 refers to this clause as a "safety valve" for the government. H.R. REP. NO. 1418, *supra* note 5, at 11.

[171] H.R. REP. NO. 1418, *supra* note 5, at 11.

[172] ***28 U.S.C. § 2412***(b) (1982).

[173] *Alyeska, 421 U.S. at 240.* Note that the Ninth Circuit has limited the common benefit exception to a clearly identifiable class: *Southeast Legal Defense Group v. Adams, 657 F.2d 1118, 1123 (9th Cir. 1981)* (common benefit exception denied to entire citizenry and taxpayers of a state); *Steven v. Municipal Court, 603 F.2d 111, 113 (9th Cir. 1979)* (common benefit exception denied to all citizens of a county). *See also Trustees for Alaska v. Watt, 556 F. Supp. 171, 172 (D. Alaska 1983)* (common benefit exception denied to "the American public").

[174] ***28 U.S.C. § 2412***(d)(1)(B) (1982); similar language in *5 U.S.C. § 504*(a)(2).

expert witnesses, and attorney fees cannot be awarded at more than $ 75 per hour, "unless the court determines that an increase in the cost of living or a special factor, **[*560]** such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." [175] The Act also notes that awards may be reduced to the extent that the prevailing party delayed any of the proceedings. [176]

Congress did not amend any of these provisions in 1984 or 1985, but it did amend the determination and appealability of awards in administrative proceedings. The 1984 Bill specified that fee determination decisions by adjudicative officers in administrative proceedings were not reviewable by the agencies. [177] This amendment was made in response to the concern that agencies were reluctant to grant awards against themselves. [178] As a counter balance to this change, Congress also included an amendment that allowed the United States to appeal adverse administrative decisions. [179] The 1985 amendments returned final decision power to the agency, rather than an Administrative Law Judge. [180] Furthermore, the Act now requires that no fee awards be granted until a final judgment, after all appeals have been made. [181]

The Senate proposed an amendment that would have required agencies to pay all awards from their existing budgets. [182] The intent was to create a strong deterrent effect on unreasonable agency action, and as a result, achieve a "zero cost" to government. [183] The compromise amendment did not require this, but **[*561]** neither did it propose a separate appropriation to fund EAJA awards. The Act now states that awards should come from "any funds made available to the agency, by appropriation or otherwise." [184] Another amendment, also opposed by the Reagan administration, required that interest be paid on any awards not granted within sixty days of a final judgment. [185]

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[175] ***28 U.S.C. § 2412***(d)(2)(A); similar language in *5 U.S.C. § 504*(b)(1)(A). Note that the statutory allowance for common law exceptions to the American rule in the EAJA does not restrict filing times or fees and costs in any manner. "The United States shall be liable for such fees and expenses to the same extent than any other party would be liable under the common law." ***28 U.S.C. § 2412***(b).

[176] *5 U.S.C. § 504*(a)(3); ***28 U.S.C. § 2412***(d)(1)(C).

[177] H.R. 5479, *supra* note 19.

[178] 130 CONG. REC. H9299 (daily ed. Sept. 11, 1984) (statement of Rep. Kindness).

[179] H.R. 5479, *supra* note 19.

[180] *S. 1487, supra* note 17.

[181] *Id.*

[182] *S. REP. No. 586, supra* note 76.

[183] 130 CONG. REC. H9300 (daily ed. Sept. 11, 1984) (statement of Rep. Smith: "By doing this, it keeps the pressure on the agency not to be arbitrary or take actions not substantially justified . . . if this is done I think there will be a zero cost. The administration estimated the cost at $ 100 million. Well, at that time, they were asking for separate appropriations. The last thing we want to do is to give an agency a separate appropriation so that they can pay for whatever they did wrong. If we make them take such a cost out of their salaries and expenses account, then they will not have so many of these arbitrary decisions.").

[184] H.R. 5479, *supra* note 19; *S. 1487, supra* note 17.

[185] *Id.*

District courts are in the best position to establish the proper amount of an award. [186] A variety of methods have been used to calculate this amount, such as the "lodestar" method, or consideration of twelve specific factors. [187] Once a base amount is determined, courts are free to reduce the award in respect to the number of claims the party prevailed upon. In this regard, courts should consider the prevailing party's success on essential claims, not discrete arguments. [188] Courts may also reduce awards if there are inadequate records or duplicative efforts. [189]

Finally, the Act authorizes courts to increase attorney fees awards if a "special factor" justifies it. [190] Some courts have held that complex environmental issues are a justifiable "special factor" if there is a limited availability of qualified attorneys familiar with the issues presented. [191] In these cases, courts have granted an increase in the award. Other courts, however, have found there to be "no limited availability of environmental lawyers," and thus no justifiable reason to increase the $ 75 per hour limit on attorney fees. [192] But these same courts have made allowances for increases in billable hours in complex environmental cases. [193] In short, full recovery of attorney fees and costs is possible in complex environmental cases, despite the limitations in the Act.

[*562] V. CONCLUSION

The American rule has long barred recovery of attorney fees or costs in civil litigation. Over the years, courts have recognized two basic common law exceptions to this rule, one based on a theory of restitution, and the other an extension of the public policy to reward litigants that furthered social or legislative goals. A third exception, recognized for a brief time, expanded this latter, incentive-based rationale.

The United States government was immune to any fee shifting until 1966. At that time, Congress allowed private litigants to recover costs but not attorney fees in civil litigation with the federal government. In 1980, Congress passed the Equal Access to Justice Act, waiving the sovereign immunity of the United States in regards to fee shifting. The Act made the government liable for attorney fees and costs under any common law exceptions. It also created a new statutory exception to the American rule, by providing for a uniform award of fees and costs to prevailing parties in civil litigation with the federal government, unless the government could prove that its position was substantially justified.

The uniform statutory allowance for fee shifting in the EAJA was established originally for only three years, so that Congress could access the cost and effect of the legislation. Response to the Act was less extensive than anticipated. As a result, Congress amended the Act in 1984 to address those issues that

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[186] *See* Berger, *supra* note 70, at 295.

[187] *See* Note, *supra* note 57, at 295-302; *see generally* Berger, *supra* note 70.

[188] *See* *Citizens Council v. Brinegar, 741 F.2d 584 (3d Cir. 1984).*

[189] *See* Oregon Envtl. Council v. Kunzman, No. 82-504-RE, slip op. (D. Or. Aug. 9, 1984).

[190] ***28 U.S.C. § 2412***(d)(2)(A) (1982).

[191] *Citizens Council, 741 F.2d 584.*

[192] *Oregon Envtl. Council*, No. 82-504-RE, slip op. (D. Or. Aug. 9, 1984).

[193] *Id.*

were raised during the trial period. Although the Administration expressed approval of the original legislation, President Reagan objected to some of the amendments, and he vetoed the extension bill in late 1984. Congress reauthorized the EAJA early in 1985, however, and President Reagan approved the compromise legislation.

The 1985 amendments, and judicial interpretations made during the trial period, significantly strengthened the EAJA, especially concerning its application to public interest and environmental litigation. It is acknoledged, for example, that the Act will "fill the gaps" in other legislation, allowing fee shifting to the government in all cases, except those specifically prohibited or precluded by existing provisions.

The definition of "prevailing party" was also refined and amended during the trial period. It is now more expansive than was previously thought. As a result, the potential number of **[*563]** parties eligible to recover fees and costs from the government increased.

The most controversial amendment to the original Act now specified that the "position" the government must defend in order to avoid fee shifting should include the "action or failure to act by the agency" that led to the dispute, making agencies more accountable for their behavior. The government can still avoid fee shifting if it proves that its position was "substantially justified," as determined on the basis of the record developed on the merits of the case. This Comment suggests that courts should apply a "slightly more stringent than reasonableness" test to the government's position, and that awards be granted unless the government proves 1) a reasonable basis in truth for the facts alleged, 2) a reasonable basis in law for the legal theory proposed, and 3) that the facts reasonably support the legal theory.

It is also suggested that courts should not find the government's position "substantially justified" simply because the issue is a matter of first impression. In keeping with the intent of the Act, courts should encourage private litigants to pursue new issues or theories. In such cases, the fact that a party has prevailed may in itself be sufficient reason to grant an award.

A primary goal of the EAJA was to encourage government agencies to exercise care in any actions that might run counter to public interests. Now that the Act is reauthorized, it should clearly increase agency accountability, if not responsibility. Although the EAJA received relatively little attention during its trial period, it has the potential to become a valuable statute for public interest and environmental litigants in the coming years.