Winter 1987

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Claire Elizabeth Winold

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INSTITUTIONALIZING AN EXPERIMENT: THE EXTENSION OF THE EQUAL ACCESS TO JUSTICE ACT—QUESTIONS RESOLVED, QUESTIONS REMAINING

CLAIRE ELIZABETH WINOLD

IN 1980, Congress passed a bill creating a far-reaching new liability for the federal government. The Equal Access to Justice Act (EAJA) provided that private parties who prevailed in actions brought by or against the United States could recover attorney’s fees in addition to any other relief awarded. Because of its experimental nature, much of the bill was enacted with sunset clauses under which the legislation was to terminate automatically in 1984. In 1985, key provisions of the EAJA were reenacted as permanent law, along with several clarifying amendments. In this Comment, the author examines some of the difficulties encountered by courts in interpreting the original Act. While many of these issues were resolved by the 99th Congress in its extension of the Act, questions nevertheless remain. The Comment concludes with some suggestions for analysis in these areas.

I. BACKGROUND

It is a central tenet of the American litigation experience that each party, win or lose, must pay his own attorney’s fees. This is the “American rule” in contrast with the “English rule” followed by most common law countries where prevailing parties normally recover fees from their opponents.¹

The rigors of the American rule have been ameliorated somewhat by reforms regarding access to courts, which include adoption of the contingency fee system, provision of attorneys to indigent defendants,² and simplified judicial processes for small claims and uncontested divorces.³ Further, the courts have fashioned, through their equitable powers, a variety of exceptions to the American rule. One of the earliest was the “common fund” exception which allowed an award of fees to a party who had created or preserved a fund. Thus, for example, if a stockholder’s suit succeeded in preventing an unwise corporate expenditure, all the stockholders

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would pay the fees of the initial litigant from the monies saved. Another exception was for "bad faith." Fees were awarded to a successful party when the opponent had acted in "bad faith, vexatiously, wantonly, or for oppressive reasons." Litigants engaging in dilatory tactics were liable for fees awarded by the courts to their opponents. Courts imposing this sanction did so by invoking their right to protect judicial integrity.

In addition to court-imposed attorney fee-shifting mechanisms, Congress and state legislatures have included fee provisions in statutes. For example, the Interstate Commerce Act provides for the award of attorney's fees to successful plaintiffs. The Clayton Act also provides for the recovery of a reasonable attorney's fee. These and other statutes provide for fee awards between private parties, abrogating the American rule. Fee awards are included as a remedy along with provisions for injunctions and/or damages. Some state statutes provide for fee awards to prevailing parties in a certain category of cases, such as contracts or actions for damages of $10,000 or less. Other states have fee provisions for specific causes of action including unfair dairy trade practices and medical malpractice claims. On the federal and state levels, fee-shifting statutes vary in that some provide for mandatory awards only to plaintiffs—so-called "one-way" shifting—while others award fees to whichever party prevails in the litigation. A frequently articulated goal of fee shifting is the promotion of private enforcement of public policy. Congress increasingly has not relied on the regulatory agencies alone to implement its policies. Instead, specific provisions for citizen suits, and often for attorney's fees,

6. For a discussion of the "judicial integrity" goal, see Zemans, Fee Shifting and the Implementation of Public Policy, 47 LAW & CONTEMP. PROBS. 187, 190 (Winter 1984).
9. For a list of federal fee award statutes, see R. ARONSON, ATTORNEY-CLIENT FEE ARRANGEMENTS: REGULATION AND REVIEW 156 (1980).
14. See Zemans, supra note 6, at 190, 199.
have been included in environmental and other regulatory measures.\textsuperscript{15}

In the late 1960's and early 1970's some federal courts began to expand this "private attorney general" theory. Litigants who sought to further important public interests were awarded fees from defendants, even in the absence of specific statutory authority.\textsuperscript{16} These courts posited that when the legislature enacted statutes protecting certain interests (such as environmental, consumer protection, and civil rights) litigants enforcing such rights or protecting such interests should not bear the full costs of representation.

The development of the private attorney general theory was occasionally justified as an extension of the common fund or common benefit exceptions rather than a radical departure from the established rule.\textsuperscript{17} The United States Supreme Court, however, considered this development to be too radical, at least to the extent that the lower courts were implying congressional intent for fee awards in acts where the statute and its legislative history were silent. In \textit{Alyeska Pipeline Service Co. v. Wilderness Society},\textsuperscript{18} the Court called a halt to further expansion by judicial discretion of the private attorney general rationale.

The \textit{Alyeska} litigation was brought by environmental groups attempting to prevent the Secretary of the Interior from issuing permits for the construction of the Alaska pipeline allegedly in violation of federal laws. A preliminary injunction was granted in the United States District Court for the District of Columbia based on the Mineral Leasing Act of 1920 and the National Environmental Policy Act of 1969 (NEPA).\textsuperscript{19} Alyeska and the State of Alaska then intervened in the lawsuit. The Interior Department subsequently took steps which were arguably in compliance with both statutes and the district court dissolved the preliminary injunction and dismissed the complaint.\textsuperscript{20}

On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed based on violations of the Mineral Leas-
ing Act without reaching the complex NEPA issues. Congress then amended the Mineral Leasing Act to allow the permits sought by Alyeska, effectively mooting the lawsuit.\textsuperscript{21} There was no authorization for fees in either of the relevant statutes and the Court of Appeals further noted that the case did not fall within the traditional common benefit or bad faith exceptions.\textsuperscript{22} However, because the environmental groups had sought to vindicate "important statutory rights" the court held they were entitled to fees.\textsuperscript{23} The court found that the current law precluded an award against the United States and deemed it inappropriate to burden the State of Alaska. The court instead required Alyeska to pay one-half of a fee representing "the reasonable value of the services rendered."\textsuperscript{24}

The Supreme Court reversed based on a strict adherence to the American rule. The Court acknowledged the validity of the various equitable exceptions and further noted that Congress possessed plenary power to provide attorney's fees under specific statutes. The Court emphasized, however, that the decision of which statutes to except from the American rule was Congress' alone to make and that "courts are not free to . . . pick and choose among plaintiffs and the statutes under which they sue . . . depending upon [their] assessment of the importance of the public policies involved in particular cases."\textsuperscript{25}

In direct response to Alyeska, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976.\textsuperscript{26} The Act identified seven civil rights statutes where fee shifting was necessary for effective private enforcement.\textsuperscript{27} While some civil rights legislation had already provided for fee shifting,\textsuperscript{28} the 1976 Act made fees available under statutes which had not included such provisions.\textsuperscript{29} The bulk

\begin{enumerate}
\item Id.
\item Wilderness Soc'y v. Morton, 495 F.2d 1026, 1029 (D.C. Cir. 1974).
\item Id. at 1032.
\item Id. at 1036.
\item Alyeska, 421 U.S. at 269.
\item The Act provides:
  In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of . . . [20 U.S.C. 1681 et seq.], or title VI of the Civil Rights Act of 1964 . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
\item See, e.g., id. § 2000e-5(k).
\item Id. § 2000a-3(b).
\end{enumerate}
of awards under the Civil Rights Attorney's Fees Awards Act come from private defendants, though the Supreme Court has held that the Fees Awards Act also applies to state governments.\textsuperscript{30}

In 1979 Congress began to consider a hitherto unprecedented expansion of the statutorily created exceptions to the American rule. A bill was proposed to award fees to parties prevailing in litigation against the United States, regardless of the cause of action or whether the private party was the plaintiff or defendant. The Equal Access to Justice Act (EAJA), enacted as Title II of the Small Business Export Expansion Act of 1980, was a far-reaching waiver of sovereign immunity.\textsuperscript{31} EAJA's legislative history reveals an overriding purpose to "remove economic deterrents to contesting government action"\textsuperscript{32} and to discourage government agencies from coercing compliance with regulations which may not otherwise be adequately contested.\textsuperscript{33}

EAJA has two analytically separate components. The first authorizes courts to award attorney's fees against the United States "to the same extent that any other party would be liable under the common law or under the terms of any statute."\textsuperscript{34} This provided a permanent waiver of immunity for cases falling within preexisting exceptions, such as the bad faith exception.\textsuperscript{35} The second and more significant component provided authority for fee awards to parties who prevail in a nontort civil action against the government, unless the "position of the United States was substantially justified or special circumstances make an award unjust."\textsuperscript{36} Additionally the United States was made liable for fees incurred by parties in ad-


\textsuperscript{32} H.R. REP. No. 1418, 96th Cong., 2d Sess. 6 (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4984 [hereinafter cited as HOUSE REPORT].

\textsuperscript{33} Id. at 10, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 4988.

\textsuperscript{34} 28 U.S.C. § 2412(b) (1982). According to the House Report, this permanent waiver of immunity "reflects the belief that . . . the United States should be held to the same standards in litigating as private parties." HOUSE REPORT, supra note 32, at 9, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 4987-88.

\textsuperscript{35} See supra notes 2-9 and accompanying text.

\textsuperscript{36} The section reads:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

versary agency adjudications. In both instances, however, millionaires and small businesses were excluded.

Together, these provisions covered most trials or agency proceedings in which the United States takes an adversary role. They were considered experimental and were enacted with sunset clauses. In 1985, these provisions of EAJA, with some clarifying amendments, were reenacted as permanent law.

II. "PREVAILING PARTY"

In order to be awarded EAJA fees the litigant opposing the government must be a "prevailing party." The House Report accompanying the original Act indicated that this phrase was to be construed as it had been in other fee-shifting statutes, notably the Civil Rights Attorney’s Fees Awards Act. Accordingly, parties who obtained a settlement or a voluntary dismissal would qualify as prevailing.

Although it is clear that a final judgment on the merits is not a prerequisite to a fee award, courts often require some judicial action before a fee application can be approved. The United States Court of Appeals for the Federal Circuit has labeled a remand of a Merit Systems Protection Board action for further evidence, a "purely procedural issue" which did not qualify the petitioners as prevailing.

37. The section provides:

An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.


39. Equal Access to Justice Act, Pub. L. No. 96-481, tit. II § 203(c), 204(c), 94 Stat. 2325, 2327, 2329 (1982) (These "repealer" sections provided that EAJA’s provisions would continue to apply through final disposition of any action commenced before the date of repeal.)


41. See supra note 26.


Although the EAJA does not cover the initial administrative proceedings of Social Security claimants, it does apply to any judicial review of the decision of the Social Security Administration.\(^\text{44}\) If a court finds that the Administration's denial of benefits was not supported by substantial evidence, it may either reverse or remand for additional agency-level proceedings.\(^\text{46}\) The circuits have agreed that obtaining a remand alone will not support an award of fees.\(^\text{46}\) However, if the claimant ultimately succeeds in obtaining benefits from the Administration he may then apply for fees. This approach was cited with approval in the House Report accompanying the EAJA extension.\(^\text{47}\) Construing both the EAJA and the Social Security Act, the Report states that the remand decision is not a final judgment, nor is the agency decision after remand. Instead, the district court (which has retained jurisdiction) should enter an order affirming, modifying, or reversing the final decision of the Secretary of the Social Security Administration. Although fees are not to be awarded for the administrative proceedings, fees incurred during the court action which resulted in the remand could be compensated.\(^\text{48}\)

The courts also have had to determine whether a party should be awarded fees when it has prevailed on only some of its claims. In *Hensley v. Eckerhart*\(^\text{49}\) the Supreme Court addressed a similar issue under the Civil Rights Attorney's Fees Awards Act and explicitly stated that its holding would be applicable to other fee-

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\(^{44}\) 5 U.S.C. § 504(b)(1)(C). EAJA does not cover initial administrative proceedings in Social Security cases because these are not proceedings in which the United States "takes a position." If a claimant is denied benefits, he may request a reconsideration by the state agency which has made this determination pursuant to regulations of the Social Security Administration. 20 C.F.R. § 404.907 (1986). If his application is again denied, he may request a review by an administrative law judge. *Id.* § 404.929. At the review, the claimant may present witnesses or further evidence. *Id.* § 404.950. The Social Security Appeals Council will review an unfavorable decision on the claimant's request. *Id.* § 404.967. If the claim is still denied, the claimant may appeal to a federal district court within 60 days. *Id.* § 404.981. It is only at this stage that the Social Security Administration assumes an explicitly adversarial role to the claimant, as the earlier proceedings were part of a determination process in which the agency played an ostensibly neutral, information-gathering role.

\(^{45}\) Brown v. Secretary of Health and Human Servs., 747 F.2d 878 (3d Cir. 1984); Cook v. Heckler, 751 F.2d 240 (8th Cir. 1984).


\(^{48}\) *Id.* at 20, *reprinted in* 1985 U.S. CODE CONG. & AD. NEWS 132, 148.

\(^{49}\) 461 U.S. 424, 433 n.7 (1983).
shifting statutes. The Court held that where separate theories are presented and legal work can be allocated accordingly, fees should be awarded only for hours spent on the successful issue. However, where a common core of facts and related theories are presented, courts should not attempt to separate mechanically the winning issues from the losing issues.

The standard formulated in *Hensley* has been applied in EAJA cases. In an action challenging two similar sets of regulations governing smoking on aircraft, only one of which was resolved through litigation, the Court of Appeals for the District of Columbia Circuit concluded that the two actions were part of a single consolidated process and thus fees could be awarded for work done on both.

It is essential to look to the substance of the relief sought in evaluating whether a party has prevailed. In a not untypical scenario, the Environmental Defense Fund (EDF) petitioned for review of an Environmental Protection Agency (EPA) action delaying the implementation of previously announced reporting requirements for hazardous waste disposal sites. Before any hearing on the merits, EPA mooted the case by reinstating the requirements. This was the relief EDF had sought, though it was not obtained pursuant to a court order or formal settlement of the case. The court held that EDF was a prevailing party under EAJA, as its lawsuit had acted as the catalyst in prompting the agency's action.

When EAJA was reenacted, no substantive changes were made in the definition of prevailing party. However, condemnation actions stirred controversy in the courts. The legislative history explains a definitional amendment which establishes that the prevailing party is the party whose valuation of the property is closest to the trial court's ultimate award (the Act will not apply to settlement negotiations in this context). In its amendments to EAJA,

50. *Id.* at 435.
51. *Id.*
54. *Id.* at 919.
55. *Compare* United States v. 101.80 Acres of Land, 716 F.2d 714 (9th Cir. 1983) (EAJA does apply to condemnation cases), with United States v. 160 Acres of Land, 555 F. Supp. 84 (D. Utah 1982) (EAJA does not apply).
Congress also clarified and updated the eligibility limits for individuals and small businesses or other organizations.\textsuperscript{57}

III. POSITION OF THE UNITED STATES

EAJA provides fee awards to prevailing parties in nontort civil actions against the United States unless the position of the United States was substantially justified or special circumstances would make the award unjust. In construing the term "position of the United States" the courts did not have the benefit of interpretations under earlier analogous fee-shifting statutes. This is due to the unique nature of EAJA in abrogating sovereign immunity. A split in the circuits developed over whether evaluating the position of the United States meant scrutiny of its litigation arguments or the actions which precipitated the litigation. The statute and its legislative history were ambiguous on this point. For cases brought under the section authorizing fees in "any civil action," several courts interpreted the term "civil action" to imply that only the litigation position should be considered.\textsuperscript{58} The District of Columbia Circuit, in \textit{Spencer v. NLRB},\textsuperscript{59} thoroughly analyzed the competing considerations and made an important preliminary assumption: in most cases there would not be a significant difference between the two as the government's litigation position would essentially be a defense asserting the reasonableness of the agency's underlying action. The court relied heavily on the fact that Congress had considered and rejected imposing an automatic fee award when the government was the losing party.\textsuperscript{60} The court reasoned that Congress did not want to deter the government from making any reasonable argument in defense of its actions. Therefore, if technical defenses such as laches, mootness, or lack of jurisdiction could have prevailed, an award of fees was not warranted, even though the court had found against the government on the merits.\textsuperscript{61}

\textsuperscript{57} Eligibility was expanded to include individuals with a net worth of $2 million or less and businesses with a net worth of $7 million or less. Businesses also must have no more than 500 employees. The requirements are imposed when adjudication is commenced. Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80, § 1(c)(B), 99 Stat. 183, 183 (1985) (amending 5 U.S.C. § 504(b)(1)(B)); \textit{id.} § 2(c) (amending 28 U.S.C. § 2412(d)(2)(B)). The definition of party was also expanded to include units of local government which met the net worth and employee limits for businesses. Tax exempt organizations under 26 U.S.C. 505(c)(3) are exempt from the net worth limits. \textit{id.}

\textsuperscript{58} \textit{E.g.}, \textit{Tyler Business Servs. v. NLRB}, 695 F.2d 73, 75 (4th Cir. 1982).


\textsuperscript{60} \textit{id.} at 550.

\textsuperscript{61} \textit{id.} at 555.
Although a majority of the courts addressing the issue adopted the litigation position theory,\textsuperscript{62} commentators were almost unanimous in their support of the minority or underlying action view.\textsuperscript{63} The courts which adopted the underlying action approach looked to the Act's definition of "United States" for their statutory construction argument. The definition encompassed "any agency and any official of the United States acting in his or her official capacity."\textsuperscript{64} More fundamentally, these courts found that a broader view was more consistent with EAJA's purpose and goals as reflected in its legislative history. To deter abuses, the government should have "the burden of proving that its action giving rise to the litigation was substantially justified."\textsuperscript{65}

Congress explicitly ratified this broader interpretation in its 1985 amendments to EAJA.\textsuperscript{66} Language was added providing, "[T]he 'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based . . . ."\textsuperscript{67} The House Report accompanying the new legislation stated that this definition was "consistent with the original Congressional intent and the underlying purposes of the statute."\textsuperscript{68} The Committee expressly rejected the \textit{Spencer} holding.\textsuperscript{69}

Although President Reagan had previously vetoed a similar version, expressing a preference for the litigation position formulation,\textsuperscript{70} Congress, working with the Department of Justice, limited

\textsuperscript{62} See, e.g., Ashburn v. United States, 740 F.2d 843, 849 (11th Cir. 1984); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1487 (10th Cir. 1984), cert. denied, 469 U.S. 825 (1985); Tyler Business Servs. v. NLRB, 695 F.2d 73, 75 (4th Cir. 1982); Broad Avenue Laundry & Tailoring v. United States, 693 F.2d 1387, 1390-91 (Fed. Cir. 1982).


\textsuperscript{65} Dougherty v. Lehman, 711 F.2d 555, 561 (3d Cir. 1983).


\textsuperscript{67} Id. § 2(c)(2)(B), 99 Stat. 183, 185 (1985) (amending 28 U.S.C. 2412(a) (Supp. III 1985)).


\textsuperscript{69} Id.

the discovery that would be available in fee proceedings. This limitation alleviated the administration's concern that fee litigation would become an excuse for wide-ranging examination of unrelated agency actions.

IV. DETERMINATION OF "SUBSTANTIALLY JUSTIFIED"

The bulk of the litigation arising under EAJA has revolved around determining when the government's position can be deemed substantially justified, thus precluding a fee award to a prevailing private litigant. The courts appear to have been unable to develop helpful standards for analysis of this question.

A. Legislative History and Early Judicial Interpretation

The single suggestion to emerge from the legislative history of the original Act was that Congress did not intend for fees to be awarded automatically to all prevailing parties. The drafters were concerned with forestalling the United States from advancing "novel but credible" theories in support of its official actions. Interpretive language from the legislative history was congruent with standards for evaluating legal arguments in other contexts: "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." Although this is not an especially discriminating standard, virtually all the circuits adopted some form of the reasonableness test for determining whether the government's position had been substantially justified. The District of Columbia Circuit found that the drafters had rejected the term.

71. Language added to 5 U.S.C. § 504(a)(1) provided: "Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought." Similar language was added to 28 U.S.C. 2412(d)(1)(B):

Whether or not the position of the United States was substantially justified shall be determined on the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

72. Memorandum of Disapproval, supra note 70, at 1815.


74. Id.

75. Id. at 10, reprinted in 1980 U.S. Code Cong. & Ad. News at 4989.

76. Matthews v. United States, 713 F.2d 677 (11th Cir. 1983); Dougherty v. Lehman, 711 F.2d 555 (3d Cir. 1983); Hoang Ha v. Schweiker, 707 F.2d 1104 (9th Cir. 1983).
"reasonably justified"; the court alternatively held that the government's position had to be slightly more than reasonable.\textsuperscript{77} Comparatively, the United States Court of Appeals for the Third Circuit interpreted the substantial justification standard as "a middle ground between an automatic award of fees to a prevailing party and an award made only when the government's position was frivolous."\textsuperscript{78}

The courts were concerned—sometimes explicitly, often sub silentio—with the potentially limitless liability EAJA seemed to promise. The Congressional Budget Office had predicted $100 million in annual costs under the original Act. However, between October 1, 1981 (the effective date of the Act), and October 1, 1984 (the sunset date), less than $4 million was awarded.\textsuperscript{79}

B. The Amendments

The House Report accompanying the amendments contained some clarifying language as to the meaning of "substantially justified," though the Act itself remained unchanged. The Committee on the Judiciary agreed with the minority of courts which had held that substantial justification means more than merely reasonable.\textsuperscript{80} Although this indicates a preference for a more rigorous standard for the government, the Committee expected that due to the variety of factual contexts and legal issues involved in EAJA cases, the determination of what is "'substantially justified' will be decided on a case-by-case basis."\textsuperscript{81}

The Report did provide some guidance in the area of review of agency action. The Committee found puzzling the holdings of certain courts that an administrative decision may be substantially justified under the Act even when it was reversed because it was arbitrary and capricious or not supported by substantial evidence.\textsuperscript{82} This statement prompted disagreement on the floors of the House and Senate during deliberations on the bill. Those who spoke against this interpretation were concerned that it seemed to propose automatic awards, which Congress had clearly rejected.\textsuperscript{83}

\textsuperscript{77} Cinciarelli v. Reagan, 729 F.2d 801, 804 (D.C. Cir. 1984).
\textsuperscript{78} Dougherty v. Lehman, 711 F.2d 555, 563 (3d Cir. 1983) (citation omitted).
\textsuperscript{80} Id. at 9, reprinted in 1985 U.S. Code Cong. & Ad. News at 137-38.
\textsuperscript{81} Id. at 10, reprinted in 1985 U.S. Code Cong. & Ad. News at 138.
\textsuperscript{82} Id.
Senator Thurmond stated that the standard for substantial evidence for review on the merits and the standard for substantial justification in considering fee awards were separate, with the latter being easier for the government to meet. 84

Neither the Committee nor its critics adequately considered the variety of contexts in which review of agency action takes place. "Arbitrary and capricious" and "lack of substantial evidence" are not synonymous. Each is a term of art in the provisions of a category of statutes. A court must ascertain exactly what type of review is authorized before standards for assessing substantial justification can be superimposed. Under the Social Security Act, for instance, appeals from adverse decisions at the agency level are on the record; no de novo hearings are held. 85 The reviewing court must determine whether the evidence, as reflected in the record, has been evaluated according to legal standards. These standards are derived from the statute itself, 86 the Secretary's regulations, 87 and from controlling precedent. 88 A court's finding of "no substantial evidence" tracks the language of the statute. However, in reality such a determination usually means that the Secretary, in denying benefits, has acted contrary to established legal standards, not that there was no evidence to support the agency finding. Under an interpretation of substantially justified, such a finding should entitle the prevailing claimant to fees for work completed at the court level. For example, pertinent regulations require that the Social Security Administration must follow a specified, sequential procedure in evaluating disability claims. One of the steps in this process requires a determination of whether the claimant's impairments are severe, taking into account his physical and mental

84. Id. at 9993 (statement of Sen. Thurmond).
85. 42 U.S.C. § 405(b) (1982).
86. See, e.g., id. at § 423(d)(1) (Supp. III 1985) (The Social Security Act defines "disability" as: "[T]he inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . .").
87. See, e.g., 20 C.F.R. § 404.1505(a) (1986) (Social Security Administration regulation requiring: "To meet this definition, you must have a severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy.").
88. See, e.g., Brady v. Heckler, 724 F.2d 914, 920 (11th Cir. 1984) ("'[A]n impairment can be considered as 'not severe' only if it is a slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience.'" (citation omitted)).
ability to perform "basic work activities." In reviewing a denial of benefits, a North Carolina district court found that the administrative law judge's (ALJ) findings were "wholly conclusory" and that "[i]n failing to indicate the weight given to relevant evidence presented" and to "properly consider some of plaintiff's uncontradicted medical evidence, the ALJ violated unambiguous and consistent precedent."

The court did not substitute its own evidentiary conclusions for that of the representative of the Secretary of Health and Human Services. Rather, it found that the ALJ had not followed the jurisdiction's controlling guidelines which specified how the record evidence was to be evaluated. Because appeals of disability determinations constitute a considerable proportion of the federal caseload, almost all possible types and combinations of evidence are covered by precedents. Other common fact patterns with clear standards to be applied include the weight to be assigned the treating physician's findings, the need to consider subjective claims of pain, and the duty to consider various impairments collectively rather than in isolation.

Courts have not hesitated to hold that a demonstrated failure to follow these requirements precludes a finding that the government's position was substantially justified for EAJA purposes. Indeed, at least within this context, some courts have held that the government's position is not substantially justified when a denial of benefits is unsupported by substantial evidence. However, other courts continue to hold that the absence of "substantial evidence does not equate to a finding that the [Secretary's] position in the litigation was not substantially justified," while further noting, somewhat paradoxically, that the administrative record may be "so deficient that the government may not reasonably rely on it" in supporting a denial of benefits.

A closer question arises when the court remands the case for further factual inquiries. If the claimant is ultimately successful, the inquiry may focus on the apparent need for additional evidence.

89. 20 C.F.R. § 404.1520 (1986).
91. See, e.g., Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986); Wiggins v. Schweiker, 679 F.2d 1387 (11th Cir. 1982).
Though such cases are often guided by precedents, case-by-case inquiry will be warranted. Reviewing courts, impatient with inadequate development of the record, have occasionally awarded interim benefits to claimants. This equitable power could be applied to interim fee applications as well. However, the general rule, in accordance with traditional "prevailing party" analysis, is that fees are not awarded until a final decision after remand is entered.

In cases not involving routinized application of precedents to Social Security claims, the determination of substantial justification provides an opportunity to ascertain how judges view the judicial process. Although opinions are often written to portray both sides, in many cases only the winning side is adequately aired. If a court denies fees in a case where the government has lost on the merits, however, it will be in the anomalous position of praising the strengths of an ultimately losing argument. Prior to the recent amendments, the majority of circuits examined the government's litigation position when analyzing its claims to substantial justification. The amendments make clear, of course, that the underlying action is henceforth to be considered. This will not, however, eliminate in all circumstances the need for analysis of the litigation position. It will be necessary in many cases to evaluate both positions; in some cases, however, only one or the other will be at issue.

C. Post-Amendments Judicial Interpretations

Most courts have moved swiftly to modify their holdings on the issue of agency versus litigation position. However, some courts have not adequately understood the clear statutory command that the agency position must be substantially justified if fees are to be denied. Unfortunately, one of the rare cases to misread the amendments is also one of the relatively rare cases involving more than the average estimated award of $5,000 to $6,000. In Battles Farm Co. v. Pierce, the District of Columbia Circuit stated that the EAJA is "designed to encourage small private plaintiffs and de-

96. See, e.g., Bradley v. Heckler, 785 F.2d 954 (11th Cir. 1986) (party awarded attorney's fees for receiving a ruling from a United States magistrate requiring the Secretary of Health and Human Services to render a decision on benefits or a permanent injunction would issue); see also Hyatt v. Heckler, 807 F.2d 376 (4th Cir. 1986) (EAJA fees awarded for class relief entitling over 2,000 claimants to reconsideration after Supreme Court remand).
97. See supra note 46 and accompanying text.
99. 806 F.2d 1098 (D.C. Cir. 1986).
fendants to persevere against or resist the U.S. government if the government takes an unjustified litigating position.”100 As authority the court cited Spencer and the 1980 enactment, incongruously adding that the Act “may have assumed an additional purpose as a result of a recent amendment . . . that requires the government to also justify its administrative position.”101

The Battles Farm litigation involved a challenge to a policy implemented by the Secretary of Housing and Urban Development in the late 1970’s. The Secretary declined to make congressionally authorized subsidy payments to low-income housing project owners. The National Housing Act102 had created the operating subsidy program to stabilize the rent charged to tenants at thirty percent of their incomes.103 One part of the legislation created a “rental reserve fund” for the subsidies. Another section authorized the Secretary to “make, and contract to make” such subsidy payments. Believing she had discretion to decide that the resources were better spent on other programs, the Secretary refused to make distributions from the fund.104 The project owners challenged both the refusal to make initial payments to which they were assertedly entitled and the refusal to enter into a long-term contract for such payments. After a district court decision in favor of the owners on the payments issue, but for the Secretary on the long-term contract issue, the litigation was held in abeyance pending possible Supreme Court consideration of other circuits’ cases raising the same issues.105 Following congressional action eliminating the program, but before any Supreme Court hearing, these cases were settled.106

The Battles Farm appeal was reactivated in 1982.107 The Secretary no longer contested the subsidy payment issue. He108 did, however, defend the amount awarded against Battles Farm’s contention that it should have been calculated based on the higher rentals that would have been charged had the subsidies been made.

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100. Id. at 1101 (emphasis added).
101. Id. at n.9.
103. Battles Farm Co. v. Harris, 703 F.2d 1292 (D.C. Cir. 1983).
104. Battles Farm Co. v. Pierce, 806 F.2d 1098 (D.C. Cir. 1986).
106. Underwood v. Pierce, 761 F.2d 1342, 1344 (9th Cir. 1985).
107. Battles Farm, 806 F.2d at 1100.
108. When the Battles Farm litigation commenced in 1976, Carla Hills was Secretary of the Department of Housing and Urban Development. Samuel R. Pierce, Jr. was Secretary when the attorney’s fees appeal was argued in 1986.
rather than on the rent actually charged during the period when subsidies were wrongfully withheld.\textsuperscript{109} The Secretary also defended the district court's rejection of the long-term contract claims.\textsuperscript{110} The District of Columbia Circuit agreed with Battles Farm on the calculation of retroactive subsidies,\textsuperscript{111} but affirmed the district court on the long-term contract issue.\textsuperscript{112} On Battles Farm's ensuing application, the district court awarded attorney's fees, determining that the Secretary's position had not been substantially justified.\textsuperscript{113}

The District of Columbia Circuit reversed.\textsuperscript{114} The court considered only the litigation position, despite acknowledging that the merits of the Secretary's decision on the rental reserve fund issue had been decided contrary to precedent. The long-term contract issue, however, was just as decidedly a winner for the Secretary as the basic subsidy issue had been a loser. The district court had found that the two issues were interrelated, but that the rental reserve fund issue was central to the case. Because the government had "made an admission of insubstantiality" on this issue, $152,063.60 in fees were awarded.\textsuperscript{115}

In reversing, the District of Columbia Circuit turned this interrelatedness against Battles Farm, holding that because the government was justified in defending against one unreasonable claim, its entire litigating position was justified. The court stated that the result would probably have been similar had the Secretary's actions been under scrutiny instead of its litigation strategy. However the court offered little analysis in support of this dicta. The court also noted that the "parties . . . stated that the 1985 revision of the EAJA has no bearing on the issues in this case."\textsuperscript{116} This error by Battles Farm's attorneys appeared to compound their earlier error in continuing to argue the worn long-term contract issue.

\textit{Essex Electro Engineers, Inc. v. United States}\textsuperscript{117} is another case which "fails to focus attention on the unjustified government activity which formed the basis of the litigation."\textsuperscript{118} This inherent flaw

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\textsuperscript{109} Battles Farm, 806 F.2d at 1100.\\
\textsuperscript{110} \textit{Id.}\\
\textsuperscript{111} Battles Farm Co. v. Harris, 703 F.2d at 1295 (D.C. Cir. 1983).\\
\textsuperscript{112} \textit{Id.} at 1297.\\
\textsuperscript{113} Battles Farm, 806 F.2d at 1101. The district court's opinion is unreported.\\
\textsuperscript{114} \textit{Id.} at 1099.\\
\textsuperscript{115} \textit{Id.} at 1102.\\
\textsuperscript{116} \textit{Id.} at n.16.\\
\textsuperscript{117} 757 F.2d 247 (Fed. Cir. 1985).\\
\end{flushleft}
illustrated the need for the new amendments. In Essex the plaintiff engineering company prevailed in its bid protest suit.\textsuperscript{119} The Court of Claims had concluded that the underlying agency action was irrational because the Federal Aviation Administration (FAA) and the General Accounting Office (GAO) had incorrectly determined that Essex's bid was ambiguous. Specifically, the court determined that the FAA and GAO had irrationally and unfairly refused to consider literature Essex had offered showing compliance with contract specifications.\textsuperscript{120} On the EAJA application, the Federal Circuit considered only the litigation stance and stated that the "merits of the agency decision constitute only one factor in evaluating the justification for the government's litigating position in court."\textsuperscript{121} Because the government expressly based two of its three arguments on the correctness of the agency's action, the only position that could reasonably be justified was a general, factually unsupported claim that agency determinations "should be accorded strong deference."\textsuperscript{122} 

Better reasoning is found in a post-amendments case from the Third Circuit. In \textit{Brinker v. Guiffrida},\textsuperscript{123} the court carefully examined the agency actions, the litigation theories, the applicable regulations, and the actual policy at issue in a coverage dispute under a residential crime insurance policy issued by the Federal Emergency Management Agency. The appellate court found that, in denying fees, the district court had improperly focused on the litigation position. Though the district court's analysis was arguably correct under the current regulations, the litigation position was advanced too late in the proceedings and did not adequately justify the agency's initial action.\textsuperscript{124} 

In making substantially justified determinations, courts may do well to emulate the analysis employed by those circuits which adopted the underlying action or totality of the circumstances approach. For example, in a case analogous to \textit{Battles Farm} and decided just prior to the reenactment of EAJA, the Ninth Circuit employed a totality of the circumstances analysis to determine that the Secretary's position was not substantially justified. The

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\item \textsuperscript{119} Essex Electro Engineers, Inc. v. United States, 757 F.2d 247, 249 (Fed. Cir. 1985).
\item \textsuperscript{120} Id. at 250.
\item \textsuperscript{121} Id. at 253.
\item \textsuperscript{122} Id. at 250.
\item \textsuperscript{123} 798 F.2d 661 (3d Cir. 1986).
\item \textsuperscript{124} Id. at 668.
\end{itemize}
The court cited the prior adverse decisions of several district courts as relevant to this question.\footnote{125} The United States Court of Appeals for the Eleventh Circuit also has provided a model for careful analysis of the government's position. In \textit{Haitian Refugee Center v. Meese},\footnote{126} the court awarded fees for a successful challenge to Immigration and Naturalization Service (INS) deportation procedures. The court found that the government had been justified in certain jurisdictional defenses,\footnote{127} and assumed without deciding that the government was also correct in its due process and equal protection arguments.\footnote{128} However, the court found that these justified positions were immaterial "when it was clear from the caselaw that the plaintiffs would prevail on the [alternative] basis of the INS violating its own regulations."\footnote{129}

Although the amended EAJA did not provide a clear statutory definition of the standard for finding the government's position substantially justified, the Federal Circuit has noted the House Report's approval of a test "slightly more stringent than 'reasonably justified.'"\footnote{130} In a reinstatement and back pay dispute the court found that the government was not substantially justified in relying on a precedent which, in turn, had been decided prior to the implementation of directly controlling regulations issued by the Air Force.\footnote{131} Although the court credibly analyzed the competing strengths of the arguments in support of the government's position, the case illustrates the difficulties encountered in applying the substantially justified standard. Further indication that "substantially justified" is a purely individual determination is found in the split between the circuits over whether adverse precedent from outside the particular circuit will support a finding that the position of the United States was not substantially justified.\footnote{132}

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\item 125. Underwood v. Pierce, 761 F.2d 1342, 1346 (9th Cir. 1985).
\item 126. 791 F.2d 1489 (11th Cir. 1986).
\item 127. \textit{Id.} at 1498.
\item 128. \textit{Id.} at 1499.
\item 129. \textit{Id.} at 1500 (citing Matthews v. United States, 713 F.2d 677, 683 (11th Cir. 1983)).
\item 131. \textit{Id.} at 331.
\item 132. \textit{Compare} Hoang Ha v. Schweiker, 707 F.2d 1104, 1106 (9th Cir. 1983) (government justified in litigating case in circuit which had not decided the issue, although another circuit had decided "virtually identical" case adversely), \textit{with} Martin v. Heckler, 748 F.2d 1027 (5th Cir. 1984) (government not justified in making argument rejected in another circuit).
\end{footnotes}
V. WHICH VERSION IS APPLICABLE?

One of the first well-reasoned opinions to construe the 1985 amendments was Russell v. National Mediation Board.¹³³ In its earlier decision on the merits, the United States Court of Appeals for the Fifth Circuit held that the National Mediation Board had "breached its clear statutory mandate by not 'progressing' Russell's application for investigation into the representational dispute."¹³⁴ This decision came in the face of strenuous assertions by the Board that the court did not have jurisdiction to review its actions under the Railway Labor Act.¹³⁵ The panel agreed that review should be limited, but found the action to be reviewable under precedents listing exceptions to the blanket "no jurisdiction" rule.¹³⁶ Russell, as prevailing party, applied to the district court for fees under the original EAJA. The district court denied the application and a different panel of the Fifth Circuit affirmed, explicitly joining the majority of circuits which had adopted the litigation position theory.¹³⁷ The court initially denied rehearing en banc on August 5, 1985, but when EAJA was reenacted as amended that same day, the mandate was withdrawn and the parties were invited to submit briefs on the applicability of the new statute.¹³⁸

From careful examination of the legislative history, the court determined that the clarifying amendments would apply to the case.¹³⁹ The government argued that only the original EAJA applied as the merits of the case had been disposed of before the enactment of the 1985 measure. The amendments provided that they would be applied to "cases pending" without any indication as to the qualification of a case in which only the fee application was pending.¹⁴⁰ The legislative history was also ambiguous. The

¹³³. 775 F.2d 1284 (5th Cir. 1985).
¹³⁵. Id. at 1336. The district court had granted the government's summary judgment motion on this ground.
¹³⁶. Id. at 1336-40.
¹³⁸. Russell, 775 F.2d at 1285.
¹³⁹. Id. at 1286-87.
¹⁴⁰. Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80, § 7(a), 99 Stat. 183, 186 (1985) provides: "Except as otherwise provided in this section, the amendments made by this Act shall apply to cases pending on or commenced on or after the date of the enactment of this Act."
court cited *Bradley v. School Board*, 416 U.S. 696 (1974), an analogous Supreme Court case which held that the Education Amendments of 1972, 86 Stat. 235, 369 (1972), repealed by Education Amendments of 1978, Pub. L. No. 95-561, § 617(b)(2), 92 Stat. 2268 (1978), authorized federal courts to award reasonable attorney's fees in school desegregation cases. In *Bradley*, the Court held that the new statute would apply to cases commenced before its effective date, relying on "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." The Eighth and Fifth Circuits had employed this same principle, holding that the original EAJA controlled cases in which a fee application was the only matter pending at enactment. Although this position was criticized for failing to strictly construe a waiver of sovereign immunity, the Fifth Circuit applied the *Bradley* rule to the new amendments, finding that the legislative history supported this interpretation. The court further found:

[T]he clarifying amendments . . . do not waive sovereign immunity in the same sense that the original EAJA did; the original Act created a new liability where none previously had existed, while the portion of the new Act with which we are concerned—the definition of "position of the United States"—merely "clarifies" the EAJA, consistent with the original Congressional intent and the underlying purposes of the statute.

Predictably, those courts which took a contrary position on the applicability of the original EAJA also held that the clarifying amendments will not apply to cases in which the merits have already been decided. This is not in accord with Congress' intent to expand the liability of the government for fees where agency actions are not justified.

144. United States for Heydt v. Citizens State Bank, 668 F.2d 444, 446 (8th Cir. 1982); Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd., 679 F.2d 64, 67-68 (5th Cir. 1982).
146. Russell, 775 F.2d at 1288.
VI. COMPUTING THE FEE AWARD

In recent years, there has been considerable debate over how best to calculate attorney's fees awards. Most of the fee-shifting statutes prior to EAJA left the determination of a reasonable fee to the courts. EAJA, however, set a maximum cap of $75 per hour. In awards under the Civil Rights Attorney's Fees Act, the courts have developed a standard whereby "exceptional" work is compensated at correspondingly higher rates, and awarded fees are multiplied by a variable related to the risk factor or other circumstances of the case. Several circuits have disapproved the use of a multiplier in EAJA cases, however, as it would conflict with the clear congressional intent to limit the fee to the statutory cap.

As originally enacted, EAJA provided that a fee could be increased under special circumstances such as an increase in the cost-of-living index. The amendments did not alter these provisions and several recent cases have increased awarded fees to parallel documented cost-of-living increases.

Although the courts possess limited discretion to alter the hourly rate, they are not statutorily constrained in assessing the reasonableness of the hours claimed. In Gavette v. Office of Personnel Management, the Federal Circuit disallowed hours claimed for a planned proposal to the Equal Employment Opportunity Commission. In United Church Board for World Ministries v. Securities and Exchange Commission, the District Court for the District of Columbia held, "Lawyers claiming fees from the government must exercise 'billing judgment'," and a court "'must make appro-

149. See, e.g., 2 M. Derfner & A. Wolf, COURT AWARDED ATTORNEY FEES § 16.01 (1985). The most common method is time-based, with various factors influencing the hourly rate.

150. 5 U.S.C. § 504(b)(1)(A)(ii) (1982); 28 U.S.C. § 2412(d)(2)(A)(ii) (1982). Both sections allow agency or court adjustments to the $75 cap. Higher fees are justified if they correspond to an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys.


153. See supra note 150.


155. No. 84-1286, slip op. (Fed. Cir. Apr. 16, 1986).

156. Id.


propriate reductions if a fees application contains unreasonably expended hours.'"

The court disallowed fees to a law professor who acted as co-counsel. The hours were deducted because of insufficient documentation, improper crediting of work performed at the agency level, and for claimed hours which the court found unreasonable considering the professor's "limited role in [the] litigation."

Although the amendments to the Act did not make major changes in computation of fees, they did clarify that the awards are to come from agency funds rather than the Treasury. Presumably, this will further deter unjustified agency actions in accordance with original and reaffirmed congressional intent.

Two other technical amendments may be important in individual cases and are in accord with the thrust of the new amendments to expand the relief available to parties contesting government actions. The filing time for fees is within thirty days from when an order becomes final. If the government appeals a fee award and loses, a new provision authorizes the payment of interest on the fees from the date they were awarded until the date of affirmance.

VII. CONCLUSION

In awarding fees under the new Act, courts will continue to exercise considerable discretion in interpreting its open-ended provisions. It is important that the Act's original intent be carefully considered in close cases. Courts deciding whether to award fees to litigants who prevail against the government should consider the original purposes of EAJA: to counterbalance conditions tending to deter private citizens from challenging unjustified governmental actions and to provide an incentive for the United States to act responsibly and fairly in the first instance. Clearly, a finding of bad faith should not be a prerequisite to finding that the government's position was not substantially justified. The presumption should be almost the opposite. Only if the government can show that it was relying in good faith on a controlling judicial precedent or a

159. *Id.*
160. *Id.* at 501.
162. *Id.* § 2(c)(2)(D) (amending 28 U.S.C. § 2412(d)(2)).
163. *Id.* § 2(e)(f) (amending 28 U.S.C. § 2412 (1982)).
well-supported statutory interpretation should a finding of substantial justification preclude a successful litigant from recovering fees.

In addition to the original intent, the strong bipartisan support for an expanded, permanent version should also aid in judicial construction of EAJA. Every amendment to the Act was in the direction of more, not less, liability for the federal government. The accompanying House Report, based on careful study of the earlier version will have important persuasive value in the areas of its coverage. Although the most optimistic claims for EAJA as a weapon against government abuse are inherently unprovable, it will continue to be an effective mechanism for providing a voice for the public interest in the vital arenas of administrative agencies and federal courts.