

OPEN BOOK ON EQUAL ACCESS TO JUSTICE ACT

MAY 6, 2014.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany H.R. 2919]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2919) to amend titles 5 and 28, United States Code, to require annual reports to Congress on, and the maintenance of databases on, awards of fees and other expenses to prevailing parties in certain administrative proceedings and court cases to which the United States is a party, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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Purpose and Summary

H.R. 2919, the “Open Book on Equal Access to Justice Act,” reinstates tracking and reporting requirements of payments made by

the Federal Government under the Equal Access to Justice Act (EAJA). The bill requires every Federal agency to once again track EAJA payments and tasks the Administrative Conference of the United States (ACUS) with compiling the data. After compiling the data, the bill requires ACUS to submit an annual report to Congress and to establish an online searchable database to allow the public access to the data on EAJA payments. The current lack of any comprehensive reporting and record keeping regarding the actual use of EAJA in courts and administrative proceedings makes it difficult, if not impossible, for Congress to assess accurately the impact and effectiveness of EAJA.

Background and Need for the Legislation

Absent a specific statute authorizing fee-shifting, a party prevailing in litigation against the Federal Government is not entitled to recover attorneys' fees from the United States. This is because under the American rule parties to litigation must bear their own legal fees.¹ Although there are limited common law exceptions to the American rule, because of the doctrine of sovereign immunity these exceptions do not apply to the Federal Government without express statutory authorization. Despite the American rule, Congress has enacted several fee-shifting provisions permitting litigants to recover attorneys' fees against the United States, including the Endangered Species Act and Title VII of the Civil Rights Act of 1964. Additionally, Congress enacted EAJA to serve as a general fee-shifting statute in cases and adversarial administrative proceedings in which the United States is a party.

A. THE EQUAL ACCESS TO JUSTICE ACT

In October 1980, Congress passed, and the President signed into law, EAJA² as part of a broader small business assistance bill, "in response to widespread sentiment that administrative agencies were burdening small businesses with excessive regulation."³ As the Supreme Court has noted, EAJA was adopted with the "specific purpose" of "eliminat[ing] for the average person the financial disincentive to challenge unreasonable governmental actions."⁴ EAJA was re-enacted and made permanent in 1985.⁵

Civil litigation can become a war of attrition as parties strategically try to deplete one another's resources to force a settlement. Fundamentally, EAJA recognizes the enormous "disparity of resources between individuals, small businesses, and other organizations with limited resources and the Federal Government."⁶ Unlike any person or corporation, the Federal Government literally has thousands of attorneys at its immediate disposal (none of whom bill

¹ See, e.g., *Alyeska Pipelines Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant typically is not entitled to collect a reasonable attorney's fee from the loser.").

² 96 P.L. 481, 94 Stat. 2321 (Oct. 21, 1980) (EAJA was originally titled the "Small Business Equal Access to Justice Act").

³ John W. Finley III, "Unjust Access to the Equal Access to Justice Act: A Proposal to Close the Act's Eligibility Loophole for Members of Trade Associations," 53 *Wash. U. J. Urb. & Contemp. L.* 243, 247 (Winter 1998).

⁴ *Comm'r v. Jean*, 496 U.S. 154, 163 (1990).

⁵ 99 P.L. 80, 99 Stat. 183 (Aug. 5, 1985).

⁶ Christopher R. Kelley, "Attorney's Fee Awards for Unreasonable Government Conduct: Notes on the Equal Access to Justice Act," 2004 *Ark. L. Notes* 65, 66 (2004) (quoting H.R. Rep. No. 99-120, at 4 (1985)).

their time on an hourly basis). This imbalance could discourage a citizen from hiring counsel to challenge an abusive government policy or could induce a citizen to settle a capricious civil or administrative enforcement action on unfavorable terms. EAJA “is meant to discourage the Federal Government from using its superior litigating resources unreasonably—it is in this respect an ‘anti-bully’ law.”⁷ Consequently, EAJA “probably is the most important” and also “among the most litigated” of the Federal fee-shifting statutes.⁸

EAJA is a one-way fee-shifting statute, allowing the recovery of attorneys’ fees and costs from the United States in certain circumstances. First, EAJA makes the United States liable for attorneys’ fees to the same extent as any other party under a common law or statutory exception to the American rule.⁹ Thus, for example, if the United States litigates a case in bad faith, then the common law bad faith exception to the American rule could be used, pursuant to EAJA, to require the United States to pay the prevailing party’s attorneys’ fees and costs. If a party prevails in litigation against the United States and is awarded attorneys’ fees under a court order or settlement under this provision in EAJA, the amounts generally are paid from the Treasury Department’s Judgment Fund.¹⁰

Second, EAJA allows certain parties who prevail against the United States in any civil litigation (other than cases sounding in tort) or in an administrative adjudication to recover attorneys’ fees unless the position of the United States was “substantially justified” or “special circumstances make an award unjust.”¹¹ EAJA puts the burden on the government to show that its position was substantially justified, and the Supreme Court has interpreted EAJA’s “substantially justified” standard as equivalent to reasonableness.¹² If attorneys’ fees are awarded under this provision in EAJA, the funds are to be paid “from any funds made available to the agency by appropriation or otherwise.”¹³

EAJA awards are not available to all prevailing parties in litigation and administrative proceedings against the United States. Only individuals with a net worth of less than \$2 million, organizations worth less than \$7 million with fewer than 500 employees, and tax-exempt 501(c)(3) organizations and cooperative associations under the Agricultural Marketing Act can collect attorneys’ fees from the Federal Government under EAJA.¹⁴ Furthermore, attorneys’ fees are capped at \$125 per hour, unless “a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.”¹⁵

⁷ *Battles Farm Co. v. Pierce*, 806 F.2d 1098, 1101 (D.C. Cir. 1986).

⁸ Kelley, *supra* note 6, at 65.

⁹ See 28 U.S.C. § 2412(b).

¹⁰ See 31 U.S.C. § 1304. The Judgment Fund is a permanent, indefinite appropriation that pays judgments against Federal agencies that are not otherwise provided for by other appropriations.

¹¹ See 28 U.S.C. § 2412(d); 5 U.S.C. § 504(a).

¹² See *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (“We are of the view, therefore, that as between the two commonly used connotations of the word ‘substantially,’ the one most naturally conveyed by the phrase before us here is not ‘justified to a high degree,’ but rather ‘justified in substance or in the main’—that is, justified to a degree that could satisfy a reasonable person.”).

¹³ 5 U.S.C. § 504(d); 28 U.S.C. § 2412(d)(4).

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

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

B. REPEALED EAJA REPORTING REQUIREMENTS

From 1981 through 1995, EAJA provided for government-wide reporting on payments of attorneys' fees and costs made pursuant to EAJA in two annual reports to Congress. One of the reports, compiled by ACUS, described administratively awarded payments.¹⁶ The second report described court-awarded payments and was issued initially by the Administrative Office of the U.S. Courts and later by the Attorney General.¹⁷ In 1995, Congress defunded ACUS and repealed the EAJA reporting requirements, thereby eliminating the statutory mechanism to oversee EAJA expenditures.¹⁸ ACUS was re-established in 2010, but the requirements to report on attorneys' fee payments have not been re-enacted. Accordingly, there has been no official government-wide accounting of EAJA payments since fiscal year 1994.

C. THE LEGISLATION

The Open Book on Equal Access to Justice Act, reinstates tracking and reporting requirements of payments made by the Federal Government under the Equal Access to Justice Act (EAJA). The bill requires every Federal agency to once again track EAJA payments and tasks the Administrative Conference of the United States (ACUS) with compiling the data. After compiling the data, the bill requires ACUS to submit an annual report to Congress and to establish an online searchable database to allow the public access to the data on EAJA payments. The current lack of any comprehensive reporting and record keeping regarding the actual use of EAJA in courts and administrative proceedings makes it difficult, if not impossible, for Congress to assess accurately the impact and effectiveness of EAJA.

Hearings

The Committee on the Judiciary held no hearings on H.R. 2919.

Committee Consideration

On February 5, 2014, the Committee met in open session and ordered the bill H.R. 2919 favorably reported, without amendment, by voice vote, a quorum being present.

¹⁶ 28 U.S.C. § 504.

¹⁷ The reporting requirement was transferred to the Attorney General by the Federal Courts Administration Act of 1992, Title V, § 502, Pub. L. No. 102-572.

¹⁸ Federal Reports Elimination and Sunset Act of 1995 (FRESA), Pub. L. No. 104-66, §§ 1091, 3003. According to ACUS, "[s]ection 3003(a)(1) of FRESA, enacted after ACUS ceased operations, provides: 'Subject to the provisions of paragraph (2) of this subsection and subsection (d), each provision of law requiring the submittal to Congress (or any committee of the Congress) of any annual, semiannual, or other regular periodic report specified on the list described under subsection (c) shall cease to be effective, with respect to that requirement, 4 years after the date of the enactment of this Act.' Subsection (c) reads: 'The list referred to under subsection (a) is the list prepared by the Clerk of the House of Representatives for the first session of the One Hundred Third Congress under clause 2 of rule III of the Rules of the House of Representatives (House Document No. 103-7).' That report (at page 153) expressly identifies ACUS' annual reporting requirement under 5 U.S.C. § 504(e). Thus ACUS' reporting requirement was repealed pursuant to FRESA and the related House Document No. 103-7. Section 504(e) of Title 5 was never amended by (or even mentioned in) section 3003(a)(1) of the 1995 Act. The editorial notes to § 504, though, do identify that section. The requirement that the Attorney General report annually on court awards under the Act was also repealed at the same time by section 1091 of Pub. L. 104-66." Administrative Conference of the United States, "Report of the Chairman on Agency and Court Awards in FY 2010 Under the Equal Access to Justice Act" (2013).

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 2919.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2919, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 27, 2014.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2919, the "Open Book on Equal Access to Justice Act."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226-2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 2919—Open Book on Equal Access to Justice Act.

As ordered reported by the House Committee on the Judiciary
on February 5, 2014.

H.R. 2919 would require the Administrative Conference of the United States (ACUS) to prepare a report each year on the amount

of fees and other expenses awarded by Federal courts to nonfederal entities when they prevail in a case against the United States. The bill also would require the ACUS to create an online searchable database containing information about cases in which fees and expenses were awarded by courts or Federal agencies. The ACUS is an independent agency that assists other agencies of the Federal Government in improving regulatory and other administrative procedures.

Based on information from the ACUS, CBO estimates that implementing H.R. 2919 would cost about \$1 million in fiscal year 2015 and less than \$500,000 each year thereafter, assuming appropriation of the necessary amounts. These funds would cover costs for additional ACUS staff, technological upgrades, and data collection by Federal agencies. Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 2919 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 2919 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 2919 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2919, will reinstate tracking and reporting requirements of payments made by the Federal Government under the Equal Access to Justice Act.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2919 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short Title.

Section 1 provides for the short title of the legislation, the “Open Book on Equal Access to Justice Act.”

Section 2. Modification of Equal Access to Justice Provisions.

Section 2 makes technical corrections to 5 U.S.C. § 504 and 28 U.S.C. § 2412 by striking two extraneous references to the “United States Code” in those sections and, more importantly, re-establishes and modifies the EAJA tracking and reporting requirements contained in 5 U.S.C. § 504 for EAJA awards made as part of agency adjudications and in 28 U.S.C. § 2412(d) for EAJA awards made in court cases.

Specifically, section 2(a) provides that each year, by March 31, the Administrative Conference of the United States (ACUS) is required to submit a report to Congress on the amount of attorneys’ fees and other expenses awarded during the preceding fiscal year in administrative proceedings. The report is to describe the number, nature and amount of the awards, the claims involved, and any other information that may aid Congress in evaluating the scope and impact of EAJA awards. In addition, ACUS is required to make the report and some additional data about EAJA awards available online in a searchable database. This information includes: the case name and number of the adversary adjudication, if available; a description of the claims in the adversary adjudication; the amount of the award; and the basis for the finding that the position of the agency concerned was not substantially justified.

Section 2(b), which applies to EAJA payments in court cases, mirrors section 2(a) and provides that ACUS is required to provide a report on EAJA payments made in litigated cases to Congress each year by March 31. The contents of the report and the information that ACUS is to provide online are the same as the information required under section 2(a) for administrative proceedings.

Additionally, both section 2(a) and 2(b) require that the online database created by ACUS may not reveal any information the disclosure of which is prohibited by law or court order. Moreover, the heads of Federal agencies are required to provide ACUS with the information needed to comply with the bill’s reporting requirements in a timely manner.

Finally, section 2(c) makes two clerical amendments to 28 U.S.C. § 2412 and section 2(d) establishes an effective date for the reporting and online database creation requirements.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * *

PART I—THE AGENCIES GENERALLY

* * * * *

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

* * * * *

§ 504. Costs and fees of parties

(a) * * *

* * * * *

(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28[, United States Code].

* * * * *

[(e) The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necessary for the Chairman to comply with the requirements of this subsection.]

(e)(1) The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report to the Congress, not later than March 31 of each year, on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information that may aid the Congress in evaluating the scope and impact of such awards. The report shall be made available to the public online.

(2)(A) The report required by paragraph (1) shall account for all payments of fees and other expenses awarded under this section that are made pursuant to a settlement agreement, regardless of whether the settlement agreement is sealed or otherwise subject to nondisclosure provisions.

(B) The disclosure of fees and other expenses required under subparagraph (A) does not affect any other information that is subject to nondisclosure provisions in the settlement agreement.

(f) The Chairman of the Administrative Conference shall create and maintain online a searchable database containing the following information with respect to each award of fees and other expenses under this section:

(1) *The case name and number of the adversary adjudication, if available, hyperlinked to the case, if available.*

(2) *The name of the agency involved in the adversary adjudication.*

(3) *A description of the claims in the adversary adjudication.*

(4) *The name of each party to whom the award was made.*

(5) *The amount of the award.*

(6) *The basis for the finding that the position of the agency concerned was not substantially justified.*

(g) *The online searchable database described in subsection (f) may not reveal any information the disclosure of which is prohibited by law or court order.*

(h) *The head of each agency shall provide to the Chairman of the Administrative Conference in a timely manner all information requested by the Chairman to comply with the requirements of subsections (e), (f), and (g).*

[(f)] (i) No award may be made under this section for costs, fees, or other expenses which may be awarded under section 7430 of the Internal Revenue Code of 1986.

* * * * *

SECTION 2412 OF TITLE 28, UNITED STATES CODE

§ 2412. Costs and fees

(a) * * *

* * * * *

(d)(1) * * *

* * * * *

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, [United States Code,] or an adversary adjudication subject to chapter 71 of title 41, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

* * * * *

(5)(A) *The Chairman of the Administrative Conference of the United States shall submit to the Congress, not later than March 31 of each year, a report on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in each controversy, and any other relevant information that may aid the Congress in evaluating the scope and impact of such awards. The report shall be made available to the public online.*

(B)(i) *The report required by subparagraph (A) shall account for all payments of fees and other expenses awarded under this subsection that are made pursuant to a settlement agreement, regardless of whether the settlement agreement is sealed or otherwise subject to nondisclosure provisions.*

(ii) *The disclosure of fees and other expenses required under clause (i) does not affect any other information that is subject to nondisclosure provisions in the settlement agreement.*

(C) *The Chairman of the Administrative Conference shall include and clearly identify in the annual report under subparagraph (A), for each case in which an award of fees and other expenses is included in the report—*

(i) any amounts paid from section 1304 of title 31 for a judgment in the case;

(ii) the amount of the award of fees and other expenses; and

(iii) the statute under which the plaintiff filed suit.

(6) *The Chairman of the Administrative Conference shall create and maintain online a searchable database containing the following information with respect to each award of fees and other expenses under this subsection:*

(A) The case name and number, hyperlinked to the case, if available.

(B) The name of the agency involved in the case.

(C) The name of each party to whom the award was made.

(D) A description of the claims in the case.

(E) The amount of the award.

(F) The basis for the finding that the position of the agency concerned was not substantially justified.

(7) *The online searchable database described in paragraph (6) may not reveal any information the disclosure of which is prohibited by law or court order.*

(8) *The head of each agency shall provide to the Chairman of the Administrative Conference of the United States in a timely manner all information requested by the Chairman to comply with the requirements of paragraphs (5), (6), and (7), including the Attorney General of the United States and the Director of the Administrative Office of the United States Courts.*

(e) *The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) [of section 2412 of title 28, United States Code,] of this section of costs enumerated in section 1920 of [such] this title (as in effect on October 1, 1981).*

* * * * *