112TH CONGRESS
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HOUSE OF REPRESENTATIVES

REPORT
112–594

GOVERNMENT LITIGATION SAVINGS ACT

JULY 11, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 1996]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1996) to amend titles 5 and 28, United States Code, with respect to the award of fees and other expenses in cases brought against agencies of the United States, to require the Administrative Conference of the United States to compile, and make publically available, certain data relating to the Equal Access to Justice Act, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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19–006

The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Government Litigation Savings Act".

SEC. 2. MODIFICATION OF EQUAL ACCESS TO JUSTICE PROVISIONS.

(a) AGENCY PROCEEDINGS.—Section 504 of title 5, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (1)——

(i) by inserting after the first sentence the following: "Fees and other expenses may be awarded under this subsection only to a prevailing party who has a direct and personal interest in the adversary adjudication because of medical costs, property damage, denial of benefits, unpaid disbursement, fees and other expenses incurred in defense of the adjudication, interest in a policy concerning such medical costs, property damage, denial of benefits, unpaid disbursement, or fees and other expenses, or otherwise."; and

(ii) by adding at the end the following: "The agency conducting the adversary adjudication shall make any party against whom the adjudication is brought, at the time the adjudication is commenced, aware of the provisions of this section."; and

(B) in paragraph (3), in the first sentence—

(i) by striking "may reduce" and inserting "shall reduce"; and

(ii) by striking "unduly and unreasonably" and inserting "unduly or unreasonably";

(2) in subsection (b)(1)—

(A) in subparagraph (A)(ii), by striking "$125 per hour" and all that follows through the end and inserting "$200 per hour.);"; and

(B) in subparagraph (B)(ii), by striking "; except that" and all that follows through "section 601;" and inserting "except that—

"(I) the net worth of a party (other than an individual or a unit of local government) shall include the net worth of any parent entity or subsidiary of that party; and

"(II) for purposes of subclause (I)—

"(aa) a 'parent entity' of a party is an entity that owns or controls the equity or other evidences of ownership in that party; and

"(bb) a 'subsidiary' of a party is an entity the equity or other evidences of ownership in which are owned or controlled by that party;";

(3) in subsection (c)(1), by striking ", United States Code"; and

(4) by striking subsections (e) and (f) and inserting the following:

"(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 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 that may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman in a timely manner all information necessary for the Chairman to comply with the requirements of this subsection. 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, except that any version of the report made available to the public may not reveal any information the disclosure of which is contrary to the national security of the United States.

"(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 name of each party to whom the award was made.

"(2) The name of each counsel of record representing each party to whom the award was made.

"(3) The agency to which the application for the award was made.

"(4) The name of each counsel of record representing the agency to which the application for the award was made.

"(5) The name of each administrative law judge, and the name of any other agency employee serving in an adjudicative role, in the adversary adjudication that is the subject of the application for the award.

"(6) The amount of the award.

"(7) The names and hourly rates of each expert witness for whose services the award was made under the application.

"(8) 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, or the disclosure of which is contrary to the national security of the United States.

"(h) The Director of the Office of Management and Budget shall adjust the maximum hourly fee set forth in subsection (b)(1)(A)(ii) for the fiscal year beginning October 1, 2012, and for each fiscal year thereafter, to reflect changes in the Consumer Price Index, as determined by the Secretary of Labor.".

(b) COURT CASES.—Section 2412(d) of title 28, United States Code, is amended—

(1) by amending paragraph (1)(A) to read as follows: "(A) Except as otherwise specifically provided by statute, a court, in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, shall award to a prevailing party (other than the United States) fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in the civil action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. Fees and other expenses may be awarded under this paragraph only to a prevailing party who has a direct and personal interest in the civil action because of medical costs, property damage, denial of benefits, unpaid disbursement, fees and other expenses incurred in defense of the civil action, interest in a policy concerning such medical costs, property damage, denial of benefits, unpaid disbursement, or fees and other expenses, or otherwise.";

(2) in paragraph (1)(C)—

(A) by striking "court, in its discretion, may" and inserting "court shall"; and

(B) by striking "unduly and unreasonably" and inserting "unduly or unreasonably";

(3) in paragraph (2)—

(A) in subparagraph (A)(ii), by striking "$125" and all that follows through the end and inserting "$200 per hour.);";

(B) in subparagraph (B)(ii), by striking "; except that" and all that follows through "section 601 of title 5;" and inserting "except that—

"(I) the net worth of a party (other than an individual or a unit of local government) shall include the net worth of any parent entity or subsidiary of that party; and

"(II) for purposes of subclause (I)—

"(aa) a 'parent entity' of a party is an entity that owns or controls the equity or other evidences of ownership in that party; and

"(bb) a 'subsidiary' of a party is an entity the equity or other evidences of ownership in which are owned or controlled by that party;"; and

(4) by adding at the end the following:

"(5) The Director of the Office of Management and Budget shall adjust the maximum hourly fee set forth in paragraph (2)(A)(ii) for the fiscal year beginning October 1, 2012, and for each fiscal year thereafter, to reflect changes in the Consumer Price Index, as determined by the Secretary of Labor.

"(6)(A) The Chairman of the Administrative Conference of the United States shall report annually to the Congress 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 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 paragraph. 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, except that any version of the report made available to the public may not reveal any information the disclosure of which is contrary to the national security of the United States.

"(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.

"(7) 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 name of each party to whom the award was made.

"(B) The name of each counsel of record representing each party to whom the award was made.

"(C) The agency involved in the case.

"(D) The name of each counsel of record representing the agency involved in the case.

"(E) The name of each judge in the case, and the court in which the case was heard.

"(F) The amount of the award.

"(G) The names and hourly rates of each expert witness for whose services the award was made.

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

"(8) The online searchable database described in paragraph (7) may not reveal any information the disclosure of which is prohibited by law or court order, or the disclosure of which is contrary to the national security of the United States.

"(9) The Attorney General of the United States shall provide to the Chairman of the Administrative Conference of the United States in a timely manner all information necessary for the Chairman to carry out the Chairman's responsibilities under this subsection.".

(c) CLERICAL AMENDMENT.—Section 2412(e) of title 28, United States Code, is amended by striking "of section 2412 of title 28, United States Code," and inserting "of this section".

SEC. 3. GAO STUDY.

Not later than 30 days after the date of the enactment of this Act, the Comptroller General shall commence an audit of the implementation of the Equal Access to Justice Act for the years 1995 through the end of the calendar year in which this Act is enacted. The Comptroller General shall, to the extent practical, not later than 1 year after the end of the calendar year in which this Act is enacted, complete such audit and submit to the Congress a report on the results of the audit.

Purpose and Summary

H.R. 1996, the "Government Litigation Savings Act," revises provisions of the Equal Access to Justice Act ("the EAJA" or "the Act") relating to the award of attorney's fees and costs to prevailing parties in agency proceedings and civil actions against the Federal Government. The bill instaurates the Act's annual reporting requirements, which have not been fulfilled since Fiscal Year 1994, and makes other needed reforms to protect taxpayer dollars while ensuring that the EAJA is serving all legitimate beneficiaries.

Background and Need for the Legislation

A. The American Rule and Sovereign Immunity

Absent a specific statute authorizing fee-shifting, in the United States a party prevailing in litigation typically is not entitled to re-

cover attorney's fees from the losing party.[1] This is known as the American Rule, in contrast with the English Rule, which routinely allows fee-shifting between litigants. There are limited common law exceptions to the American Rule, such as the bad faith doctrine, which holds that "a Federal court may award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[2] Owing to the doctrine of sovereign immunity, however, these common law exceptions traditionally were inapplicable in litigation against the United States. Sovereign immunity prevents the United States from being sued or forced to pay out funds without its consent, which Congress can give in the form of a statute expressly waiving sovereign immunity for a particular purpose.[3] Section 2412 of Title 28, U.S. Code, formerly codified the rule that attorney's fees and costs were not recoverable from the United States.

The 1960's and 1970's witnessed a dramatic increase in "public interest law" and lawsuits filed by citizen activists challenging governmental decisions. Courts partly enabled this by developing the "private attorney general doctrine," which allowed a plaintiff to "be awarded attorneys' fees when [through litigation] he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential."[4] The Supreme Court, however, cut back sharply on this trend in *Alyeska Pipeline,* holding that a specific statute authorizing fee-shifting was required before a court could award attorney's fees.[5]

Congress has waived the United States' sovereign immunity for attorney's fees in particular causes of action. "In about 200 statutes Congress has clearly put aside the American Rule and waived the Federal Government's sovereign immunity to permit the award of attorney's fees to prevailing parties other than the Federal Government."[6] Examples include the Civil Rights Acts of 1964 and 1968; the Voting Rights Act of 1975; the Organized Crime Control Act; the Freedom of Information Act; the Consumer Product Safety Act; and, the Civil Rights Attorneys Fees Awards Act of 1976.[7]

B. The Equal Access to Justice Act

In October 1980, Congress passed and the President signed the EAJA[8] (originally entitled the "Small Business Equal Access to Justice Act," and re-enacted permanently in 1985[9]) as part of a broader small business assistance bill, "in response to widespread sentiment that administrative agencies were burdening small busi-

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[1] *See 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] *Hall v. Cole,* 412 U.S. 1, 5 (1973) (citations omitted).

[3] *See, e.g., United States v. Chem. Found., Inc.,* 272 U.S. 1, 20 (1926).

[4] *La Raza Unida v. Volpe,* 57 F.R.D. 94, 98 (N.D. Cal. 1972).

[5] *See* 421 U.S. at 263.

[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, 65 (2004).

[7] *See* EQUAL ACCESS TO JUSTICE ACT, S. REP. NO. 96–253, at 4 (1979) (citing statutes).

[8] 96 P.L. 481, 94 Stat. 2321 (Oct. 21, 1980). *See generally* Lowell E. Baier, *Reforming the Equal Access to Justice Act,* 38 J. LEGIS. 1 (2012) (thorough discussion of the EAJA's legislative history and legislative suggestions to restore its original purpose of protecting ordinary citizens and small businesses from excessive or unreasonable government policies and enforcement actions).

[9] 99 P.L. 80, 99 Stat. 183 (Aug. 5, 1985).

nesses with excessive regulation."[10] The Supreme Court has noted that the EAJA was adopted with the "specific purpose" of "eliminat[ing] for the average person the financial disincentive to challenge unreasonable governmental actions."[11]

Civil litigation can become a war of attrition as parties strategically try to deplete one another's resources to force a settlement. Fundamentally, the EAJA recognizes the enormous "disparity of resources between individuals, small businesses, and other organizations with limited resources and the Federal Government."[12] Unlike any person or corporation, the Federal Government literally has thousands of attorneys at its immediate disposal, none of whom bills on an hourly basis. This could discourage a citizen from hiring counsel to challenge an abusive government policy or could induce a citizen to settle on unfavorable terms a capricious civil or administrative enforcement action. The EAJA "is meant to discourage the Federal Government from using its superior litigating resources unreasonably—it is in this respect an 'anti-bully' law."[13] Consequently, the EAJA "probably is the most important" and also "among the most litigated" of the Federal fee-shifting statutes.[14]

The EAJA is a one-way fee-shifting statute, allowing the recovery of attorney's fees and costs from the United States in certain circumstances. First, the EAJA makes the United States liable for attorney's fees to the same extent as any other party under a common law or statutory exception to the American Rule.[15] Thus, for example, if the United States litigates a case in bad faith, then the bad faith exception could be used to require the United States to pay the prevailing party's attorney's fees and costs. Second, the EAJA allows certain parties who prevail against the United States in any administrative adjudication or in any civil litigation (not just on certain claims brought under particular statutes) to recover attorney's fees if the position of the United States was not "substantially justified," unless "special circumstances make an award unjust."[16]

The EAJA puts the burden on the government to show that its position was substantially justified, and the Supreme Court has interpreted the EAJA's "substantially justified" standard as equivalent to reasonableness.[17] Only individuals with a net worth of less than $2 million, or organizations worth less than $7 million (except for tax-exempt 501(c)(3) organizations and cooperative associations under the Agricultural Marketing Act) and with fewer than 500 employees, can collect attorney's fees from the Federal Government under the EAJA.[18] Further, attorney's fees are capped at $125 per hour, unless "a special factor, such as the limited availability of

[10] 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).

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

[12] Kelley, note 6 *supra,* at 66 (quoting EQUAL ACCESS TO JUSTICE ACT AMENDMENTS, H.R. REP. NO. 99–120, at 4 (1985)).

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

[14] Kelley, note 6 *supra,* at 65.

[15] *See* 28 U.S.C. § 2412(b).

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

[17] *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.").

[18] 5 U.S.C. § 504(b)(1)(B); 28 U.S.C. § 2412(d)(2)(B).

qualified attorneys or agents for the proceedings involved, justifies a higher fee."[19] An award under the EAJA may be paid "from any funds made available to the agency by appropriation or otherwise."[20]

No reports have been made documenting EAJA payments government-wide since FY1994. The EAJA requires the Administrative Conference of the United States ("ACUS" or "the Conference") to report annually to Congress regarding fees paid out in administrative actions under Section 504. But ACUS was defunded in 1995 and lay dormant until it was re-appropriated in 2009. Its last report under Section 504 covered FY1994, although the Conference is now fully operational and is preparing a report for FY2010. The EAJA originally charged the Administrative Office of the U.S. Courts, changed to the Attorney General in 1992,[21] with filing a similar annual report under Section 2412, but that reporting requirement was repealed altogether in 1995.[22]

C. Necessary Reforms to the EAJA

The Subcommittee on Courts, Commercial and Administrative Law held a hearing on H.R. 1996, the "Government Litigation Savings Act," on October 11, 2011.[23] Testimony was received from Lowell Baier, President Emeritus of the Boone & Crockett Club and 2008 *Field & Stream* magazine Conservationist of the Year; Jeffrey Axelrad, Professorial Lecturer in Law at The George Washington University Law School and former Director of the U.S. Department of Justice Torts Branch (1978–2003); Jennifer Ellis, rancher and Chairman of the Western Legacy Alliance; and, Brian Wolfman, Visiting Professor at Georgetown University Law Center and Co-Director of the Institute for Public Representation.

i. Increasing transparency

To be sure, the EAJA has not lived up to initial cost projections, which were astronomical. The DOJ believed allowing the American Rule's common law exceptions to apply against the Federal Government would cost $250 million per year.[24] The CBO proffered the somewhat more modest estimate of $108 million in the first year, rising to $137 million by FY1982.[25] From FY1982 to FY1994, the last year for which reliable data is available, GAO reported that $34 million was paid out under the EAJA to 6,200 applicants.[26] The majority of these were small payments made in Social Security and veteran's benefits cases. But no comprehensive, reliable data is available since FY1995. The GAO has published three reports re-

[19] 5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A); *see also Pierce,* 487 U.S. at 572 (holding that the special factor exception in the EAJA "refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language.").

[20] 5 U.S.C. § 504(d); 28 U.S.C. § 2412(d)(4).

[21] Federal Courts Administration Act of 1992, 102 P.L. 572, § 502(B) (Oct. 29, 1992).

[22] Federal Reports Elimination and Sunset Act of 1995, 104 P.L. 66, § 1091(b) (Dec. 21, 1995).

[23] *Government Litigation Savings Act: Hearing before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary,* 112th Cong. (Oct. 11, 2011).

[24] *The Awarding of Attorneys' Fees in Federal Courts: Hearings before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary,* 95th Cong., at 73 (Apr. 26, 1978) (Statement of Paul Nejelski, Deputy Assistant Attorney General).

[25] S. REP. NO. 96–253, note 7 *supra,* at 10.

[26] *See* United States General Accounting Office, *Equal Access to Justice Act: Its Use in Selected Agencies,* at 3 (GAO/HEHS–98–58–R Jan. 14, 1998).

garding EAJA payments made by particular agencies during this "blackout" period, but none is government-wide.[27] For its most recent report, only 10 of the 75 bureaus and agencies that GAO contacted within the U.S. Departments of Agriculture and the Interior could provide any data on EAJA payments for FY2000 to FY 2010. This ongoing, near-total lack of transparency is a glaring shortcoming of the current EAJA regime.

ii. Accounting for inflation and protecting taxpayer dollars

At the hearing, all witnesses (including Professor Wolfman) broadly agreed that the annual reporting requirement should be reinstated[28] and that the cap on attorney's fees and costs should be raised.[29] The $125 hourly cap was last increased in 1996, from $75;[30] the inflation-adjusted 2011 equivalent would be around $180.[31] The Subcommittee heard testimony that the "special factor" exception has overtaken the hourly cap and that courts regularly award attorney's fees far in excess of the cap.[32] The majority of witnesses urged eliminating the "special factor" exception altogether. Professor Wolfman allowed that if the cap were raised to $250 per hour, with an automatic mechanism to adjust it annually, then the special factor exception could be eliminated.[33] At the hearing, Professor Wolfman objected to requiring courts to reduce attorney's fees awarded under the EAJA "commensurate with pro bono hours,"[34] and to limiting EAJA awards to $200,000 per case or three cases annually.[35]

iii. Clarifying eligibility

Certain 501(c)(3) organizations routinely receive large awards under the EAJA. This is based on reliable (although, due to the annual reporting blackout since FY1994, not comprehensive) evidence, including the GAO's August 2011 report.[36] The GAO report revealed that EarthJustice received 32%—$4.6 million—of attorney's fees paid by the EPA during the period of time studied. The Natural Resources Defense Council and the Sierra Club combined to take another 41%.[37] Another recent study found that the U.S. Forest Service paid EAJA awards in 149 instances over a 7-year period (1999–2005), totaling over $6 million in attorney's fees and

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[27] *See id.;* United States Government Accountability Office, *Environmental Litigation: Cases Against the EPA and Associated Costs over Time* (GAO–11–650 Aug. 1, 2011); United States Government Accountability Office, *Limited Data Available on USDA and Interior Attorney Fee Claims and Payments* (GAO–12–417R Apr. 12, 2012).

[28] *See Government Litigation Savings Act,* note 23 *supra,* at 41–43 (Testimony of Jeffrey Axelrad); 50–51 (Testimony of Lowell Baier); 62–63 (Testimony of Jennifer Ellis); 96 (Testimony of Brian Wolfman).

[29] *See id.* at 34 (Testimony of Jeffrey Axelrad); 50 (Testimony of Lowell Baier); 60 (Testimony of Jennifer Ellis). *Cf. id.* at 91 (Testimony of Brian Wolfman).

[30] Contract with America Advancement Act of 1996, 104 P.L. 121, § 232(b) (Mar. 29, 1996).

[31] *Government Litigation Savings Act,* note 23 *supra,* at 77–78 (Testimony of Brian Wolfman).

[32] *See id.* at 39–40 (Testimony of Jeffrey Axelrad), 60–61 (Testimony of Jennifer Ellis); *see also Ctr. for Food Safety v. Vilsack,* 08–cv–00484–JSW, Dkt. No. 648, Report and Recommendations re: Plaintiffs' Motion for Attorneys' Fees (N.D. Cal. Oct. 13, 2011) (approving hourly rates of $650, $385, $450, and $410 for environmental attorneys under EAJA's special factor exception).

[33] *See Government Litigation Savings Act,* note 23 *supra,* at 101–02 ("I think if we were at $250 an hour and we had a reasonable inflation adjuster . . . And if you had a mandatory inflation adjuster, I am with you on this.").

[34] *Id.* at 86–91.

[35] *Id.* at 92–95.

[36] See *Environmental Litigation,* note 27 *supra.*

[37] *See* Ron Arnold, "Fed pays Big Green to sue the government," WASH. EXAMINER, Aug. 31, 2011, at 29.

costs.[38] Eighty three of these involved environmental organizations, accounting for approximately 70% of the EAJA award dollars.[39]

For example, in *Center for Food Safety v. Vilsack,* a case challenging the adequacy of an environmental review, the Center for Food Safety was awarded more than $2.6 million in attorney's fees,[40] with its lead counsel compensated at a rate of $650 per hour and assisting attorneys at $385 to $450 per hour.[41] The court specifically cited the attorneys' specialized knowledge in and experience with environmental issues as the "special factor" meriting fees in excess of the EAJA's statutory rate.[42]

The Subcommittee heard extensive testimony on the issue of eligibility for EAJA awards. Mr. Baier testified that the EAJA's legislative history shows it was meant to protect "private individuals and small businesses" from unreasonable regulatory and civil enforcement by the Federal Government.[43] Of the more than 200 other fee-shifting statutes, the EAJA is the only one that makes a special exception for 501(c)(3) corporations.[44] By reviewing court filings for cases marked "closed" between September 1, 2009, and August 31, 2010, Mr. Baier found that twenty environmental organizations collected $5.8 million in EAJA payments under Section 2412 in this 1-year period alone.[45] This figure does not include other EAJA payments that may have been made to such groups in administrative proceedings under Section 504. Mr. Baier specifically suggested that the law be improved so that "[i]n calculating the net worth of the litigant the net worth of all parent entities and wholly owned subsidiaries should be included, in order to prevent the use of small ephemeral or shell organizations to circumvent the net worth eligibility requirement."[46]

Mr. Baier and Ms. Ellis also argued that EAJA awards should be available only for cases challenging the substance of a governmental policy or decision, rather than challenges to the decision-making process.[47] As Ms. Ellis put it, "I have always understood that people can push their agendas in court. I just disagree with using my tax dollars to do it."[48]

Hearings

The Subcommittee on Courts, Commercial and Administrative Law held a legislative hearing on H.R. 1996, the "Government Litigation Savings Act," on October 11, 2011. Testimony was received from Lowell Baier, President Emeritus of the Boone & Crockett Club and 2008 *Field & Stream* magazine Conservationist of the Year; Jeffrey Axelrad, Professorial Lecturer in Law at The George Washington University Law School and former Director of the U.S. Department of Justice Torts Branch (1978–2003); Jennifer Ellis,

[38] Michael J. Mortimer & Robert W. Malmsheimer, *The Equal Access to Justice Act and US Forest Service Land Management: Incentives to Litigate?,* 109 J. FORESTRY 352, 354–55 (2011).
[39] *Id.*
[40] *Ctr. for Food Safety v. Vilsack,* No. 08–cv–00484–JSW, Dkt. No. 656, Order Adopting Report and Recommendations (N.D. Cal. Dec. 15, 2011); *see also id., appeal docketed,* No. 12–15323 (9th Cir. Feb. 17, 2012).
[41] *See* Report and Recommendations, note 32 *supra.*
[42] *Id.* at 14–18.
[43] *See Government Litigation Savings Act,* note 23 *supra,* at 49.
[44] *See id.* at 48 (Testimony of Lowell Baier).
[45] *Id.* at 52.
[46] *See id.* at 49.
[47] *See id.* at 48–49 (Testimony of Lowell Baier); 59–61 (Testimony of Jennifer Ellis).
[48] *Id.* at 55.

rancher and Chairman of the Western Legacy Alliance; and, Brian Wolfman, Visiting Professor at Georgetown University Law Center and Co-Director of the Institute for Public Representation.

Committee Consideration

On November 17, 2011, the Committee met in open session and ordered the bill H.R. 1996 favorably reported, with an amendment in the nature of a substitute from Mr. Coble, by a rollcall vote of 19 to 14, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 1996.

1. Amendment #3, offered by Mr. Scott, to strike the attorney's fee cap and instead provide for "reasonable" attorney's fees; to preserve the net worth exemption for 501(c)(3) corporations; and to strike the requirement that a party's net worth shall include the net worth of a parent entity or subsidiary of that party. Amendment not agreed to by vote of 14 to 18.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy			
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
(Vacant)			
Total	14	18	

2. Motion by Mr. Sensenbrenner to Table the Appeal of the Ruling of the Chair. The chairman ruled that it was not in order to consider further amendments following the committee's adoption of an amendment in the nature of a substitute that by unanimous consent was considered the base text for purposes of markup. Ms. Jackson Lee appealed this ruling, and Mr. Sensenbrenner moved to table Ms. Jackson Lee's motion.[49] Motion agreed to by vote of 19 to 13.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren			
Mr. Chabot	X		
Mr. Issa			
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Griffin	X		
Mr. Marino	X		
Mr. Gowdy			
Mr. Ross	X		
Ms. Adams	X		

[49] Despite the record vote occurring on the motion to table, the Committee notes that a ruling by the Chair that it is not in order to offer an amendment following a Committee's adoption of an amendment in the nature of a substitute which by unanimous consent was considered the base text for purposes of markup is not subject to appeal.

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Quayle	X		
Mr. Amodei	X		
Mr. Conyers, Jr., Ranking Member		X	
Mr. Berman			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Cohen		X	
Mr. Johnson		X	
Mr. Pierluisi		X	
Mr. Quigley			
Ms. Chu		X	
Mr. Deutch		X	
Ms. Sánchez		X	
(Vacant)			
Total	19	13	

3. Motion to report H.R. 1996, as amended, favorably to the House. Motion agreed to by vote of 19 to 14.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren			
Mr. Chabot	X		
Mr. Issa			
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Griffin	X		
Mr. Marino	X		
Mr. Gowdy			
Mr. Ross	X		
Ms. Adams	X		
Mr. Quayle	X		
Mr. Amodei	X		

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr., Ranking Member		X	
Mr. Berman		X	
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Cohen		X	
Mr. Johnson		X	
Mr. Pierluisi		X	
Mr. Quigley			
Ms. Chu		X	
Mr. Deutch		X	
Ms. Sánchez		X	
(Vacant)			
Total	19	14	

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. 1996, 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, June 26, 2012.

Hon. LAMAR SMITH, 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. 1996, the "Government Litigation Savings Act."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Martin von Gnechten and Matthew Pickford, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1996—Government Litigation Savings Act.

As ordered reported by the House Committee on the Judiciary on November 17, 2011.

SUMMARY

H.R. 1996 would make several amendments to the Equal Access to Justice Act (EAJA), which allows plaintiffs to recover attorneys' fees and other costs from the Federal Government when they prevail in a case against the government. Specifically, the legislation would increase the cap on hourly attorney rates, restrict who is eligible to receive EAJA awards, and impose new reporting requirements on the Administrative Conference of the United States (ACUS).

Based on information from affected Federal agencies, CBO estimates that implementing H.R. 1996 would cost about $95 million over the 2013–2017 period, assuming appropriation of the necessary amounts. Enacting the legislation also could affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase in spending by those agencies would not be significant. Enacting the bill would not affect revenues.

H.R. 1996 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of State, local, or tribal governments.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 1996 is shown in the following table. The costs of this legislation fall within budget functions 750 (administration of justice), 800 (general government), and all other budget functions from which EAJA claims are paid.

By Fiscal Year, in Millions of Dollars

	2013	2014	2015	2016	2017	2013–2017
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	21	18	18	19	19	95
Estimated Outlays	20	19	18	19	19	95

BASIS OF ESTIMATE

CBO estimates that implementing H.R. 1996 would cost $95 million over the 2013–2017 period. That amount includes increased payments to reimburse attorneys' fees and the estimated costs of carrying out new reporting and auditing requirements by Federal agencies. For this estimate, CBO assumes that the bill will be enacted by the end of 2012, that the necessary amounts will be appropriated each year, and that spending will follow historical patterns for EAJA payments and litigation against the Federal Government.

Increased Payments for Attorneys' Fees

Generally, in the United States, parties involved in litigation pay their own attorneys' fees. However, under EAJA, parties that sue the Federal Government and prevail are entitled to repayment of attorneys' fees, subject to certain conditions. In general, EAJA allows smaller groups with limited resources to pursue claims against the Federal Government. Based on information provided by the affected agencies, CBO estimates that payments of attorneys' fees under EAJA from agencies' appropriations have totaled around $40 million annually in recent years.

Under EAJA, plaintiffs who successfully bring a civil action against the Federal Government through a statute that lacks what is known as a "fee-shifting provision" for attorneys' fees are entitled to repayment of attorneys' fees from the defendant agency's appropriation. Fee-shifting provisions require that payments to plaintiffs be paid through the Treasury's Judgment Fund. This legislation would affect only payments that are made from an agency's appropriation.

H.R. 1996 would make several changes that CBO estimates would increase discretionary spending for that subset of EAJA payments. Specifically, the bill would raise the cap for attorneys' fees, payable from agency appropriations, from $125 per hour to $200 per hour; it would prohibit reimbursements above the cap for special factors, such as cost-of-living adjustments as allowed under current law; and it would require the Office of Management and Budget to adjust the hourly cap to reflect changes in the Consumer Price Index. Based on information provided by the Departments of Justice (DOJ) and Veterans Affairs, the Environmental Protection Agency, the Social Security Administration, and various private-sector entities, CBO estimates that those changes would have a net cost of about $17 million annually, predominantly from increasing the cap on attorneys' fees for cases involving the Social Security Administration and the Department of Veterans Affairs.

The bill also would restrict the class of parties eligible for repayment and require judges to reduce awards in specified situations. Based on information provided by the affected agencies, CBO projects that those provisions would not have a significant impact on caseload or awards of attorneys' fees. The majority of cases that would be affected by the legislation currently meet the eligibility restrictions for plaintiffs required under the legislation.

Auditing and Reporting Requirements

The legislation also would require the ACUS to annually report EAJA fee payments made by all government agencies and to main-

tain an online searchable database of such payments. In addition, the Government Accountability Office (GAO) would be required to audit all EAJA payments since 1995. CBO estimates that those provisions would cost about $10 million over the 2013–2017 period.

PAY-AS-YOU-GO CONSIDERATIONS

The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. Enacting H.R. 1996 could affect direct spending by agencies not funded through the appropriation process, but CBO estimates that such effects would not be significant in any year.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

H.R. 1996 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of State, local, or tribal governments.

ESTIMATE PREPARED BY:

Federal Costs: Martin von Gnechten and Matthew Pickford
Impact on State, Local, and Tribal Governments: Elizabeth Cove Delisle
Impact on the Private Sector: Paige Piper/Bach

ESTIMATE APPROVED BY:

Theresa Gullo
Deputy Assistant Director for Budget Analysis

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. 1996 as amended will instaurate the annual reporting requirements of the Equal Access to Justice Act, and make other needed reforms to the EAJA.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1996 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. This section designates the bill as the "Government Litigation Savings Act."

Section 2: Modification of Equal Access to Justice Provisions. This section makes several amendments to the Equal Access to Justice Act, at 5 U.S.C. § 504 and 28 U.S.C. § 2412.

Section 2(a) amends 5 U.S.C. § 504 regarding EAJA payments made in administrative adjudications. Section 2(a)(1)(A)(i) requires EAJA filers to show a "direct and personal interest" in the action to be eligible for an award of attorney's fees and costs. Types of such a "direct and personal interest" are medical costs, property

damage, denial of benefits, unpaid disbursement, fees and costs incurred in defense of an adjudication, or a policy interest concerning such a direct and personal interest. In this respect the bill draws upon language suggested by the National Organization of Veterans' Advocates to ensure that the EAJA continues to protect everyone whom it was meant to protect.[50]

Section 2(a)(1)(A)(ii) requires agencies to apprise parties to an adjudication of the provisions of Section 504, to discourage someone without counsel from settling a vexatious adjudication for lack of resources to pay an attorney. Responding to concerns expressed at the legislative hearing that parties may increase their attorney's fees by prolonging the litigation,[51] Section 2(a)(1)(B) requires a reduction in the award if a party has "unduly or unreasonably protracted the final resolution of the matter in controversy."

Section 2(a)(2) raises the hourly cap to $200 and eliminates the special factor exception. Section 2(a)(4) requires the Director of the Office of Management and Budget to adjust the cap annually according to the Consumer Price Index. Professor Wolfman specifically objected to giving the Director any discretion in this regard, and urged that the annual inflation adjustment should be mandatory.[52] The bill directly addresses this point. Consistent with other of Professor Wolfman's concerns expressed at the Subcommittee hearing, the bill does not require courts to discount pro bono hours from an EAJA award, or impose an annual limit on the number or amount of awards a party can receive.

Section 2(a)(2)(B) of the bill would eliminate the net worth exemption for 501(c)(3)s and for farm co-ops. The National Council of Farmer Cooperatives has endorsed the Bill,[53] and the Committee is unaware that any farm co-op has ever benefitted from this exemption. To close this loophole once and for all, at Section 2(a)(2)(B) the bill specifies that a corporation's net worth includes resources available to the corporation from a parent or subsidiary. Section 2(a)(3) makes a clerical amendment to the U.S. Code.

Section 2(a)(4) expands the reporting requirement for the Administrative Conference of the United States under Section 504. The Conference is required to report to Congress annually, and a copy of the report will be published online. The public version of the report should redact information contrary to the national security of the United States, and should not reveal information that is sealed or subject to a nondisclosure agreement. The public, unredacted version of the report, however, should account for payments made in sealed cases. The Conference will maintain an online searchable database of payments made under this Section. The online database may not reveal any information the disclosure of which is contrary to the national security of the United States or the disclosure of which is prohibited by law or court order. Thus, the report will account for payments made in sealed cases without disclosing any other information from such sealed cases, but no information about sealed cases, including payments, should be available in the online database. The agencies must promptly provide the ACUS Chair-

[50] *See Government Litigation Savings Act,* note 23 *supra,* at 117–18.
[51] *See id.* at 61 (Testimony of Jennifer Ellis).
[52] *See id.* at 91–92, 102.
[53] *Id.* at 126.

man with all necessary information to fulfill this reporting requirement.

Section 2(b) makes analogous changes to 28 U.S.C. § 2412, regarding EAJA payments made by agencies in civil lawsuits. Section 2(b)(1) requires EAJA filers to show a "direct and personal interest" in the civil case to be eligible for an award of attorney's fees and costs. Types of such a "direct and personal interest" are medical costs, property damage, denial of benefits, unpaid disbursement, fees and costs incurred in defense of a case, or a policy interest concerning such a direct and personal interest.

This is consistent with the EAJA's original purpose of awarding attorney's fees and costs to private individuals and small businesses that have been personally and unreasonably wronged by the Federal Government. Fundamentally, a plaintiff's eligibility for an EAJA award should be narrower than his or her standing to sue. Under the bill, to receive an EAJA award a party must have a particular kind of "direct and personal interest" in the case. An organization may be eligible for an award under the EAJA if the organization itself, as an entity, has a "direct and personal interest" of the type listed in the bill. Although an organization may have standing to sue on behalf of one of its members, an organization should not receive an EAJA award in such a case. Rather, one of the organization's members who has standing and who has a "direct and personal interest" in the governmental policy or decision of the type described in the bill, would have to bring the suit to be eligible for an EAJA award. A "direct and personal interest" does not include a case predicated on an alleged failure in the government's decision-making process, such as allegedly failing to follow the Administrative Procedure Act or an alleged deficiency in conducting a regulatory flexibility or environmental impact analysis. A party may receive an EAJA award only if the governmental policy or decision resulting from this decision-making process affects the party's "direct and personal interest" of the type listed in the bill. This should limit EAJA awards to cases challenging the *substance* of a governmental policy or decision that directly and personally affects the party's interest of the type listed in the bill, rather than challenges related to the *procedure* the government should follow to make a policy or decision.

This is consistent with the plain language of Sections 504 and 2412, which do not allow attorney's fees to be awarded if the government's "position" was "substantially justified." This language was intended to limit all EAJA payments as a cost-control mechanism, and it indicates that awards should be made only in cases challenging an actual governmental decision, not an alleged flaw in the decision-making process. Section 2(b) makes this limitation more explicit.

Section 2(b)(2) requires courts and agencies to reduce the award if a party has "unduly or unreasonably protracted the final resolution of the matter in controversy." Section 2(b)(3) raises the hourly cap on attorney's fees to $200 per hour; eliminates the "special faction" exception to the cap; and, removes the net worth exemptions for 501(c)(3)s and farm co-ops. As in Section 2(a)(2)(B), under Section 2(b)(3) all funds available to a corporation count toward its net worth, including funds of a parent or subsidiary. Section 2(b)(4) re-

quires the OMB Director annually to adjust for inflation the hourly cap on attorney's fees.

Like the Section 504 reporting requirements, Section 2(b)(4) charges ACUS with reporting annually to Congress regarding payments made under Section 2412, and requires agencies and the Attorney General to support ACUS in meeting this responsibility. (The Attorney General formerly was required to make this annual report, but that requirement was repealed in 1995.) The Attorney General also must make available to ACUS information about EAJA payments made from the Judgment Fund, and in its report ACUS should clearly identify all such payments as originating from the Judgment Fund. The Conference is willing and able to assume these responsibilities. Section 2(c) makes a clerical amendment to the U.S. Code.

Section 3. GAO Study. Section 3 requires the GAO to audit EAJA payments over the last 15 years, when no annual reports regarding EAJA payments were conducted. Given that during this period of time EAJA payments were not documented systematically and many of the relevant files are not electronic, conducting a truly comprehensive audit would cause the GAO to incur tremendous expenses. The bill requires the GAO to provide Congress with as much information as practical regarding EAJA payments made during the "blackout" period.

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)(1) 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 was substantially justified or that special circumstances make an award unjust. *Fees and other expenses may be awarded under this subsection only to a prevailing party who has a direct and personal interest in the adversary adjudication because*

of medical costs, property damage, denial of benefits, unpaid disbursement, fees and other expenses incurred in defense of the adjudication, interest in a policy concerning such medical costs, property damage, denial of benefits, unpaid disbursement, or fees and other expenses, or otherwise. 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. *The agency conducting the adversary adjudication shall make any party against whom the adjudication is brought, at the time the adjudication is commenced, aware of the provisions of this section.*

* * * * * * *

(3) The adjudicative officer of the agency [may reduce] *shall reduce* the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which [unduly and unreasonably] *unduly or unreasonably* protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

(b)(1) For the purposes of this section—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of [$125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);] *$200 per hour.);*

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated[; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of

subsection (a)(4), a small entity as defined in section 601;] *except that—*

(I) the net worth of a party (other than an individual or a unit of local government) shall include the net worth of any parent entity or subsidiary of that party; and

(II) for purposes of subclause (I)—

(aa) a "parent entity" of a party is an entity that owns or controls the equity or other evidences of ownership in that party; and

(bb) a "subsidiary" of a party is an entity the equity or other evidences of ownership in which are owned or controlled by that party;

* * * * * * *

(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.

[(f) 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.]

(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 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 that may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman in a timely manner all information necessary for the Chairman to comply with the requirements of this subsection. 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, except that any version of the report made available to the public may not reveal any information the disclo-

sure of which is contrary to the national security of the United States.

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

(2) The name of each counsel of record representing each party to whom the award was made.

(3) The agency to which the application for the award was made.

(4) The name of each counsel of record representing the agency to which the application for the award was made.

(5) The name of each administrative law judge, and the name of any other agency employee serving in an adjudicative role, in the adversary adjudication that is the subject of the application for the award.

(6) The amount of the award.

(7) The names and hourly rates of each expert witness for whose services the award was made under the application.

(8) 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, or the disclosure of which is contrary to the national security of the United States.

(h) The Director of the Office of Management and Budget shall adjust the maximum hourly fee set forth in subsection (b)(1)(A)(ii) for the fiscal year beginning October 1, 2012, and for each fiscal year thereafter, to reflect changes in the Consumer Price Index, as determined by the Secretary of Labor.

* * * * * * *

SECTION 2412 OF TITLE 28, UNITED STATES CODE

§ 2412. Costs and fees

(a) * * *

* * * * * * *

(d)(1)⟦(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States 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.⟧ *(A) Except as otherwise specifically provided by statute, a court, in any civil action (other than cases sounding in tort), including pro-*

ceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, shall award to a prevailing party (other than the United States) fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in the civil action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. Fees and other expenses may be awarded under this paragraph only to a prevailing party who has a direct and personal interest in the civil action because of medical costs, property damage, denial of benefits, unpaid disbursement, fees and other expenses incurred in defense of the civil action, interest in a policy concerning such medical costs, property damage, denial of benefits, unpaid disbursement, or fees and other expenses, or otherwise.

* * * * * * *

(C) The ⟦court, in its discretion, may ⟧ *court shall* reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which ⟦unduly and unreasonably⟧ *unduly or unreasonably* protracted the final resolution of the matter in controversy.

* * * * * * *

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of ⟦$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);⟧ *$200 per hour.);*

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed⟦; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of Title 5;⟧ *except that*—

(I) the net worth of a party (other than an individual or a unit of local government) shall include the net worth of any parent entity or subsidiary of that party; and

(II) for purposes of subclause (I)—

(aa) a "parent entity" of a party is an entity that owns or controls the equity or other evidences of ownership in that party; and

(bb) a "subsidiary" of a party is an entity the equity or other evidences of ownership in which are owned or controlled by that party;

* * * * * * *

(5) The Director of the Office of Management and Budget shall adjust the maximum hourly fee set forth in paragraph (2)(A)(ii) for the fiscal year beginning October 1, 2012, and for each fiscal year thereafter, to reflect changes in the Consumer Price Index, as determined by the Secretary of Labor.

(6)(A) The Chairman of the Administrative Conference of the United States shall report annually to the Congress 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 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 paragraph. 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, except that any version of the report made available to the public may not reveal any information the disclosure of which is contrary to the national security of the United States.

(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.

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

(B) The name of each counsel of record representing each party to whom the award was made.

(C) The agency involved in the case.

(D) The name of each counsel of record representing the agency involved in the case.

(E) The name of each judge in the case, and the court in which the case was heard.

(F) The amount of the award.

(G) The names and hourly rates of each expert witness for whose services the award was made.

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

(8) The online searchable database described in paragraph (7) may not reveal any information the disclosure of which is prohibited by law or court order, or the disclosure of which is contrary to the national security of the United States.

(9) The Attorney General of the United States shall provide to the Chairman of the Administrative Conference of the United States in a timely manner all information necessary for the Chairman to carry out the Chairman's responsibilities under this subsection.

(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 title (as in effect on October 1, 1981).

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Dissenting Views

INTRODUCTION

H.R. 1996, the "Government Litigation Savings Act," would prohibit certain groups and individuals seeking to protect important rights and interests threatened by governmental action from recovering attorneys' fees under the Equal Access to Justice Act (EAJA).[1] The bill accomplishes this objective in several respects. First, the bill requires a plaintiff to have a direct and personal interest in his or her claim for relief, and thus would deny attorneys' fees for some claims which are currently eligible for fee recovery. Second, H.R. 1996 would cap the attorneys' fee rate at $200 per hour, a rate that may be inadequate to obtain legal representation in certain legal markets or for complex litigation. Third, the bill prevents fee recovery for many non-profit groups. Taken as a whole, these changes threaten to undermine the ability of various groups to obtain legal representation. In essence, H.R. 1996 has a single objective: to prevent access to justice for some individuals, small businesses, and non-profit organizations by eliminating their eligibility to recover their legal fees and expenses when they challenge government action.

Citing these problems and other concerns presented by the bill, Access for All, Alliance for Justice, American Civil Liberties Union, American Association for Justice, Center for Biological Diversity, Center for Food Safety, Center for Law & Social Policy, Defenders of Wildlife, Earthjustice, Endangered Species Coalition, Equal Jus-

[1] Pub. L. No. 96–481, title II, 94 Stat. 2321, 2325 (1980) (codified as amended at 5 U.S.C. § 504, 28 U.S.C. § 2412). EAJA became permanent in 1985. Pub. L. No. 99–80, 99 Stat. 183 (1985).

tice Society, Law Foundation of Silicon Valley, Legal Aid Service of Broward County, Oregon Wild, People for the American Way, National Consumer Law Center, National Senior Citizens Law Center, National Disability Rights Network, National Employment Lawyers Association, National Fair Housing Alliance, National Legal Aid & Defender Association, National Health Law Program, National Treasury Employees Union, Natural Resources Defense Council, Oceana, Public Citizen, Rocky Mountain Wild, Sargent Shriver National Center on Poverty Law, Sierra Club, Western Environmental Law Center, and WildEarth Guardians oppose H.R. 1996.[2]

For these reasons, and those discussed below, we respectfully dissent and urge our colleagues to reject this unnecessary and flawed legislation.

THE EQUAL ACCESS TO JUSTICE ACT

Enacted in 1980, EAJA provides for the award of fees and expenses to certain litigants who prevail against the United States in adversary adjudications or civil actions. Congress expressly found that EAJA was necessary because "certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings."[3] Congress also wanted EAJA to be based on "the premise that a party who chooses to litigate an issue against the government is not only representing his or her own vested interest but is also refining and formulating public policy. . . . Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable government action *and* also bear the costs of vindicating their rights."[4]

When EAJA was reenacted on a permanent basis in 1985, President Reagan expressed strong support for the legislation. He said:

> I am pleased to be able to approve H.R. 2378, a bill to extend the Equal Access to Justice Act. I support this important program that helps small businesses and individual citizens fight faulty government actions by paying attorneys' fees in court cases or adversarial agency proceedings where the small business or individual citizen has prevailed and where the government action or position in the litigation was not substantially justified.[5]

When no other fee-shifting statute applies, a party prevailing against the United States is entitled to an award of fees and expenses under EAJA. Unlike other fee shifting statutes,[6] however,

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[2] Letter Opposing the "Government Litigation Savings Act" (H.R. 1996) (Nov. 16, 2011), *available at* http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/RnIGroups111116.pdf; Letter from Collen M. Kelley, National President of the National Treasury Employees Union to Representative Howard Coble, Chair of the Subcommittee on Courts, Commercial and Administrative Law and Representative Steve Cohen, Ranking Member of the Subcommittee on Courts, Commercial and Administrative Law (Nov. 29, 2011), *available at* http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/NTEU111129.pdf.

[3] Pub. L. No. 96–481, § 202(a), 94 Stat. 2325 (1980).

[4] H.R. Rep. No. 96–1418, *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988–89 (1980) (emphasis added).

[5] President's Statement on Signing the Bill Extending the Equal Access to Justice Act (Aug. 5, 1985), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=38973#axzz1a1eqZfZq.

[6] *See, e.g.,* 42 U.S.C. § 1988; 42 U.S.C. § 2000e–5(k).

EAJA does not automatically award fees and expenses. If the United States can show that its position was "substantially justified" or when special circumstances would make an award unjust, then fees and expenses are not awarded.[7] "This is a powerful defense, and dozens upon dozens of cases (and many more unreported cases) deny winning plaintiffs EAJA fees on substantial-justification grounds."[8]

EAJA caps attorneys' fees at $125 per hour, unless the court or administrative agency determines "that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys [] for the [proceedings] involved, justifies a higher fee."[9] Most other fee-shifting statutes award fees at market rates.[10]

A fee award may be reduced or denied when the party seeking it has caused undue delay.[11] When fees and costs are awarded, the funds are paid "from any funds made available to the agency by appropriation or otherwise."[12]

An individual is eligible for an award if his or her net worth is not more than $2 million, while sole proprietors, corporations, partnerships, local governmental units, and public or private organizations with a net worth of not more than $7 million and having not more than 500 employees are eligible.[13] Regardless of net worth, tax-exempt organizations under 26 U.S.C. § 501(c)(3) and agricultural cooperatives under 12 U.S.C. § 1141j(a) with not more than 500 employees are also eligible.[14]

For a period of time, the Administrative Conference of the United States (ACUS) was directed to report annually to Congress on the amount of attorneys' fees and expenses awarded in agency adjudications under the Act to help Congress evaluate the scope and impact of EAJA. The report provided information about individual awards and the proceedings in which they were made.[15] That directive ended in 1998,[16] although by then, ACUS had ceased operations.

DESCRIPTION AND BACKGROUND OF H.R. 1996

On May 25, 2011, Representative Cynthia Lummis (R-WY) introduced H.R 1996. H.R. 1996 substantially expands a bill that Rep-

[7] 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A). The term "substantially justified" has been interpreted to mean "justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988).

[8] *The Government Litigation Savings Act: Hearing on H.R. 1996 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. 76 (2011) [hereinafter H.R. 1996 Hearing] (written statement of Brian Wolfman, Visiting Associate Professor of Law and Co-Director of the Institute for Public Representation at Georgetown University Law Center).

[9] 5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A).

[10] Most attorneys' fees awards under other statutes are calculated, for example, by multiplying the number of hours spent in the adjudication or case by the hourly market rate. *See* Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983).

[11] 5 U.S.C. § 504(a)(3); 28 U.S.C. § 2412(d)(1)(C).

[12] 5 U.S.C. § 504(d); 28 U.S.C. § 2412(d)(2)(A).

[13] 5 U.S.C. § 504(b)(1)(B); 28 U.S.C. § 2412(d)(2)(B).

[14] *Id.*

[15] Report of the Chairman of the Administrative Conference of the United States on Agency Activity under the Equal Access to Justice Act, Oct. 1, 1993-Sept. 30, 1994 2 (1995) (citing 5 U.S.C. § 504(e)).

[16] Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 104–66, title III, § 3003, 109 Stat. 734 (1995).

resentative Lummis introduced in the last Congress.[17] This prior legislation, H.R. 4717, required ACUS and the Attorney General to issue annually online reports on the amount of fees and costs awarded under EAJA, the history of the proceedings, and the parties involved in those controversies. It also required a GAO audit of EAJA awards for the years since 1995.

In contrast, H.R. 1996 is much more comprehensive than its predecessor. In addition to the reporting requirements, H.R. 1996 includes several problematic provisions based on unsupported criticisms of EAJA.

H.R. 1996 contains two principal provisions that could prevent access to justice for individuals, small businesses, and non-profit organizations. Those provisions include:

- a requirement that claimants demonstrate a "direct and personal interest" in the action to be eligible to recoup attorneys' fees and expenses.[18] Under current law, EAJA does not include such limiting language. As a result of this amendment, the awarding of fees and expenses in challenges in which plaintiffs are presently eligible could be barred.
- a cap on attorneys' fees at $200 per hour.[19] Under current law, a judge or adjudicator may adjust the attorneys' fee rate under EAJA based on special circumstances, such as the complexity of the case. This amendment could hinder the ability of certain parties to obtain competent legal representation.

Taken together, these two provisions will significantly impact the ability of individuals, small businesses, and non-profit organizations to recoup their legal fees and expenses when they are vindicating their rights against Federal governmental actions. A more detailed section-by-section analysis of the reported legislation follows:

Section 1. Short Title. Section 1 sets forth the bill's short title as the "Government Litigation Savings Act."

Section 2. Modification of Equal Access to Justice Provisions. Section 2(a)(1) amends 5 U.S.C. § 504, which governs the awarding of fees and costs in administrative adjudications. Section 2(a)(1) narrows the category of who is eligible to receive EAJA awards. As amended, section 504(a)(1) requires that a prevailing party, in order to receive an award of fees and expenses, must have a "direct and personal interest in the adversary adjudication because of medical costs, property damage, denial of benefits, unpaid disbursement, fees and other expenses incurred in defense of the adjudication, interest in a policy concerning such medical costs, property damage, denial of benefits, unpaid disbursement, or fees and other expenses, or otherwise." This revision will disqualify currently eligible parties. This subsection also amends section 504(a)(3) to require, as opposed to the current law's permissive standard, the adjudicator to reduce awards based on an unduly or unreasonable party.

Section 2(a)(2) amends section 504(b)(1)(A) to increase the hourly fee award from $125 to $200, but it also prevents the awarding of

[17] H.R. 4717, 111th Cong. (2010).
[18] H.R. 1996, § 2(a)(1)(A)(i).
[19] H.R. 1996, § 2(a)(2).

higher fees under certain circumstances.[20] The cap may hinder a party's ability to obtain legal representation in high cost legal markets or when complex litigation is expected. This subsection also requires in section 504(b)(1)(B) the adjudicator to determine the net worth of a party's eligibility to meet the net worth exclusion, and to include in its calculation the net worth of subsidiaries and parent companies. This provision is intended to bar more groups from being eligible to recover attorneys' fees under EAJA.

Section 2(a)(4) requires ACUS to submit a detailed report to Congress, and publish an annual, publicly-available online report of the amount of fees and costs awarded under EAJA. The report is intended to provide a record that tracks how much the government pays in fees and costs to parties in adjudication against the government. The last substantial government report on EAJA fees was conducted in 1995.[21] This subsection also requires the Office of Management and Budget (OMB) to adjust annually the fee cap to reflect changes in the Consumer Price Index.[22]

Section 2(b)(1) amends 28 U.S.C. § 2412, which governs the awarding of fees and costs when the United States Government is a party in a Federal court. The subsection narrows the category of who is eligible to receive EAJA awards by requiring that in section 2412(d)(1)(A), for a prevailing party to receive an award of fees and expenses, the party must have a "direct and personal interest in the civil action because of medical costs, property damage, denial of benefits, unpaid disbursement, fees and other expenses incurred in defense of the civil action, interest in a policy concerning such medical costs, property damage, denial of benefits, unpaid disbursement, or fees and other expenses, or otherwise." This language mirrors the language proposed in Section 2(a)(1).

Section 2(b)(2) amends section 2412(d)(1)(C) to require, as opposed to the current law's permissive standard, the court to reduce awards based on an unduly or unreasonable party. Section 2(b)(3) amends section 2412(d)(2)(A) and (B) in identical fashion as section 2(a)(2) of the bill. Section 2(b)(4) amends 28 U.S.C. § 2412 to require the OMB to adjust annually the fee cap to reflect changes in the Consumer Price Index. Section 2(b)(4) also amends 28 U.S.C. § 2412 to require ACUS to submit a detailed report to Congress, and publish an annual, publicly-available online report of the amount of fees and costs awarded under EAJA. The purpose of the report is to provide a record of how much the government pays in fees and costs to plaintiffs who sue the government in court.

Section 3. GAO Study. Section 3 requires the Comptroller General to begin an audit of the implementation of the Equal Access to Justice Act since 1995 through the end of the calendar year in which H.R. 1996 is enacted.

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[20] *The Government Litigation Savings Act: Markup of H.R. 1996 Before the H. Comm. on the Judiciary,* 112th Cong. 20 (2011) [hereinafter H.R. 1996 Markup] (statement of Representative Howard Coble, Chair of the Subcommittee on Courts, Commercial and Administrative Law of the Committee on the Judiciary) ("The [manager's] amendment raises the cap of hourly fees to $200 and eliminates the special factor exemption which the subcommittee learned courts are interpreting very loosely.").

[21] ACUS report, *supra,* note 15.

[22] H.R. 1996 Markup, *supra,* note 20 (statement of Subcommittee Chair Coble) (". . . the [manager's] amendment replaces the word 'may' with the word 'shall' and requires the Director [of the OMB] to make this adjustment every year following the Consumer Price Index.")

CONCERNS WITH H.R. 1996

I. H.R. 1996 LACKS ANY EVIDENTIARY SUPPORT WARRANTING THE AMENDMENT OF EAJA

H.R. 1996 amends EAJA to restrict eligibility for awards in the absence of any evidentiary support warranting such amendment. While supporters of H.R. 1996 contend that fees and expenses awarded under EAJA are astronomical and too common, the facts are to the contrary.

First, EAJA has a very high threshold with respect to potential claimants. Under EAJA, a party may recover fees from the government *only* if the party is the prevailing party *and* the government cannot prove that its position was "substantially justified."[23] This standard is not required in typical fee-shifting statutes and ensures that prevailing plaintiffs do not automatically recover legal costs.[24] The threshold would seem to contain the prevalence of EAJA awards.

Second, there is no official data on the total amount of fees and expenses awarded under EAJA. Since 1995, the Federal Government has not prepared a comprehensive report on such amounts.[25] Neither has there been a report detailing to whom and in what types of challenges courts and adjudicators have awarded fees and expenses under EAJA since then. As Representative Lummis, the sponsor of the legislation, acknowledged for the Subcommittee's legislative hearing, "it is this lack of transparency that [H.R. 1996] seeks in part to correct."[26]

An audit and annual reporting of EAJA, as required in H.R. 1996, would help Congress determine how the Act has been implemented, and thus, whether there is any need for Congress to amend it. The value of Congress having concrete data on the awards of fees and expenses under EAJA cannot be understated. As one academic testified, "The ability of Congress to perform its oversight of EAJA depends on the availability of information concerning agency payments predicated on the act. Currently this information is largely unavailable."[27] In fact, "[i]n order for Congress to evaluate the success or failure of [EAJA] historic data must be gathered."[28]

Still, proponents of H.R. 1996 urge Congress to substitute estimates of the amount of fees and expenses awarded under EAJA for actual data, presumably because they do not approve of some of the awards going to certain groups. Some assert that over the last decade, more than $37 million has been awarded under EAJA, which

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[23] 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A).

[24] H.R. 1996 Hearing, *supra* note 8, at 76 (written statement of Wolfman).

[25] *Id.* at 2 (statement of Subcommittee Chair Coble) ("The bottom line is, there has been no government-wide accounting of EAJA payments. . . . We don't know how much money is going out the door, we don't know if the EAJA is helping those for whom it was created to help. . . .") Although the GAO has published additional reports focusing on EAJA awards in certain agencies, *see, e.g.,* U.S. Gen. Accounting Office, Equal Access to Justice Act: Its Use in Selected Agencies (GAO/HEHS–98–58–R, Jan. 14, 1998), there is no comprehensive data since the 1995 ACUS report, *supra,* note 15.

[26] H.R. 1996 Hearing, *supra* note 8, at 23 (written statement of Representative Cynthia Lummis). "Since [1995], the Congress and the country have been in the dark of the costs of EAJA, which is why [H.R. 1996] reinstates the reporting requirement beginning with an audit of prior reported years." *Id.* at 45 (testimony of Lowell Baier, President Emeritus of the Boone and Crockett Club).

[27] *Id.* at 34 (testimony of George Washington University Law School Professor Jeffrey Axelrad).

[28] *Id.* at 63 (written statement of Jennifer Ellis, Chair of the Western Legacy Alliance).

they acknowledge is an estimate.[29] Another proponent contends that even though "there has been no accounting of this money . . . the smallest of estimates [places it] in the hundreds of millions of dollars."[30] Others cite anecdotal evidence or informal research purportedly showing that millions of dollars were awarded under EAJA in support of lawsuits that a handful of environmental groups filed.[31] Still others claim, without having any supportive data, that EAJA purportedly incentivizes and finances frequent and unnecessary environmental protection litigation.[32] These estimates far exceed the $34.1 million that the General Accounting Office calculated had been awarded during the fiscal years 1982 to 1994.[33] And these assertions also do not reflect the typical types of recipients who had received awards from 1980 to 1994, which were mostly veterans and Social Security recipients.[34] Congress can and should wait for more credible reports.

Unfortunately, however, supporters of H.R. 1996 do not want Congress to wait for more credible information. Notwithstanding the lack of such evidence, proponents of H.R. 1996 want Congress *first* to substantively change EAJA, and *then* to collect concrete data,[35] which they believe undoubtedly will support the changes. "When reporting requirements were dropped we believe that the ATM card type use of the EAJA began. Without proof positive of this phenomenon, rhetoric and supposition will rule over the debate regarding reform. This critical component will lend undeniable proof for substantive and equitable reforms of EAJA."[36] As one witness testified at the Subcommittee hearing, "I find it odd people are complaining about a paucity of data, but they are willing to change the substantive law of EAJA without having the data. That puts the cart before the horse."[37]

H.R. 1996 clearly does put the cart before the horse. Nevertheless, the Majority is determined to push legislation based on anecdotal evidence that will substantively undermine the ability of individuals, small businesses, and certain non-profits to challenge government action.

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[29] *Id.* at 123 (letter from various groups supporting H.R. 1996 to Howard Coble, Chair of the Subcommittee on Courts, Commercial and Administrative Law, and Steve Cohen, Ranking Member of the Subcommittee on Courts, Commercial and Administrative Law) (Oct. 11, 2011).

[30] Karen Budd-Falen, Americans for Prosperity—Oregon, Attorneys Fees Reform Passes the U.S. House Judiciary Committee, *available at* http://www.americansforprosperity.org/112111-attorneys-fees-reform-passes-us-house-judiciary-committee.

[31] *See, e.g.,* Richard Pollock, Activist 'Green' Lawyers Billing U.S. Millions in Fraudulent Attorney Fees (Mar. 4, 2010), *available at* https://westernlegacyalliance.org/eaja-abuse-home-page/activist-green-lawyers-billing-u-s-millions-in-fraudulent-attorney-fees.

[32] H.R. 1996 Markup, *supra,* note 20, at 15 (statement of Representative Lamar Smith, Chair of the Committee on the Judiciary) ("Certain frequent litigants . . . are financing their lawsuits with large awards of attorney's fees paid under the act."); *Id.* at 20 (Statement of Subcommittee Chair Coble) ("Certain ideologically oriented [groups] have used the act to finance ideological oftentimes and policy-driven litigation against the Federal Government.").

[33] U.S. Gen. Accounting Office, Equal Access to Justice Act: Its Use in Selected Agencies 4 (GAO/HEHS–98–58–R, Jan. 14, 1998).

[34] H.R. 1996 Markup, *supra,* note 20, at 14 (statement of Committee Chair Smith) ("The annual reports filed from 1980 to 1994 showed that most awards under the act were modest sums paid to veterans and Social Security recipients.").

[35] H.R. 1996 Hearing, *supra* note 8, at 96–97 (written statement of Wolfman).

[36] *Id.* at 63 (written statement of Ellis).

[37] *Id.* at 94 (testimony of Wolfman).

II. H.R. 1996 WILL MAKE IT MORE DIFFICULT FOR SMALL BUSINESSES, INDIVIDUALS, AND NON-PROFIT ORGANIZATIONS TO FIND LEGAL REPRESENTATION

H.R. 1996 will make it significantly more difficult for small businesses, individuals, and non-profits to secure competent legal representation in their challenges against the Federal Government. This legislation needlessly caps the fee rate at which parties may recoup their legal fees. Capping the fee rate "will make it difficult for plaintiffs to find lawyers willing to challenge unreasonable government actions in some instances."[38]

Under EAJA, plaintiffs can recover attorneys' fees at a rate of $125 per hour if the government does not prove it was "substantially justified" in bringing or defending the action.[39] While some courts have adjusted upward the cap for cost of living purposes, the rate is still less than half of the amount most private attorneys' charge.[40] In very limited circumstances, plaintiffs may recover attorneys' fees in excess of the statutory rate if they show that the attorney possessed specialized knowledge and skills developed through a practice area, which were needed in the litigation and not available elsewhere at the statutory rate.[41]

As stated earlier, EAJA is unlike most other fee-shifting statutes for two reasons. Under EAJA, prevailing parties do not recover their attorneys' fees at market rates.[42] Further, EAJA awards are not automatic because the United States can still show that it was "substantially justified" in bringing or defending the case.[43] Because of these two differences, "in light of EAJA's below-market rates, neither litigants nor lawyers would bring marginal cases" in the expectation of receiving EAJA fees.[44]

H.R. 1996 sets a new rate at $200 per hour, which is an increase of $75 from current law, but it eliminates the possibility of upward adjustment.[45] Because even $200 would be insufficient to hire a "good lawyer" in Idaho,[46] capping the fee rate at $200 across the entire country may have the effect of "dissuading small businesses from having the opportunity to go to court and get their attorneys fees paid."[47] Further, "[b]y eliminating the possibility of increased fees for specialization, [H.R. 1996] creates yet another hurdle that will make it more difficult to find competent legal representation to enforce complex environmental laws."[48]

Representatives Bobby Scott (D-VA) and Hank Johnson (D-GA) offered an amendment at the full committee markup to amend the attorneys' fee rate in the bill from the arbitrary $200 per hour to a "reasonable attorneys' fee" rate, which would mirror most other

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[38] *Id.* at 92 (written statement of Wolfman).
[39] *See* 28 U.S.C. § 2412(d)(2)(A).
[40] *See* Thangaraja v. Gonzales, 428 F.3d 870, 876–77 (9th Cir. 2005).
[41] *See* Love v. Reilly, 924 F.2d 1492, 1496 (9th Cir. 1991).
[42] H.R. 1996 Hearing, *supra* note 8, at 76 (written statement of Wolfman).
[43] *Id.* at 75.
[44] *Id.* at 79.
[45] H.R. 1996, 112th Cong. § 2(a)(2), 2(b)(3) (2011).
[46] H.R. 1996 Hearing, *supra* note 8, at 98 (2011) (testimony of Ellis) (". . . I have to hire an intervening attorney that usually costs, for a good one right now, $400 an hour.").
[47] *Id.* at 25 (statement of Representative Steve Cohen, Ranking Member of the Subcommittee on Courts, Commercial and Administrative Law of the Committee on the Judiciary).
[48] *Id.* at 21 (written statement of John Conyers, Jr., Ranking Member of the Committee on the Judiciary).

fee-shifting statutes.[49] As Representative Scott noted, by imposing the arbitrary cap, for example, in a complex case, "you could have the anomaly of one side being able to afford an attorney at the going rate for that kind of case, and the other side is stuck with this arbitrary limit."[50] Thus, the arbitrary cap "is not fair to our veterans and senior citizens who may not be able to bring an attorney willing to take their case with such a cap."[51] The judge or adjudicator, who is more familiar with the complexity of the case and the local legal market, could better determine the appropriate attorneys' fee rate. If the award is inappropriate, the appellate court can always revisit it.[52] Unfortunately for our veterans, senior citizens, small businesses, and others who EAJA was intended to benefit, the amendment was defeated 14 to 18.

By capping the rate at which parties may recoup their attorneys' fees, H.R. 1996 will make it more difficult for many to obtain legal representation.

CONCLUSION

H.R. 1996 is irresponsible legislation that will have a devastating impact on access to justice for individuals, small businesses, and non-profit organizations. It amends the Equal Access to Justice Act without definitive data that the Act needs or should be amended. For all of these reasons, we respectfully dissent.

JOHN CONYERS, JR.
HOWARD L. BERMAN.
JERROLD NADLER.
ROBERT C. "BOBBY" SCOTT.
MELVIN L. WATT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
MAXINE WATERS.
HENRY C. "HANK" JOHNSON, JR.
JUDY CHU.
TED DEUTCH.

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[49] H.R. 1996 Markup, *supra,* note 20, at 33 (statement of Representative Jerrold Nadler) ("Of the 200-plus fee-shifting statutes, between 150 and 160 of them use reasonable attorney's fees as their standard, as the amendment would seek to do.").
[50] H.R. 1996 Markup, *supra,* note 20, at 27 (statement of Representative Bobby Scott).
[51] *Id.* at 29 (statement of Representative Hank Johnson).
[52] *See id.* at 33 (statement of Representative Nadler).