How Should the Equal Access to Justice Act be Rebuilt?

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Under the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412, which had been on the books since 1980, courts were able to award attorney's fees to prevailing parties in non-tort, civil litigation against the United States. The idea was to help small businesses fight obstinate bureaucrats whose positions were not "substantially justified."

The American Bar Association testified in favor of reauthorization of the statute last year, and a bill expanding the statute passed overwhelmingly in Congress. But in a surprise move, President Reagan vetoed the renewal of the act last November.

The sticking point is the expansion—requiring the government to justify its underlying agency position. Sen. Charles E. Grassley, R-Iowa, will join in sponsoring renewal of the act, and he argues in favor of the expanded EAJA. The expired EAJA required the government to justify only its position in litigation, and White House lawyer Marshall Breger asserts that the original, narrower version of the EAJA is the proper approach.

Herewith is their debate.

Congress wants a wide-reaching EAJA

By Charles E. Grassley

The purposes behind the Equal Access to Justice Act are to deter unjustified government actions and to allow private parties to resist unjustified government actions.

With those purposes in mind, last year Congress passed a law to reauthorize the EAJA. In addition to a number of other clarifications, Congress adopted the view of three U.S. courts of appeals that to avoid a fee award, not only

Don't open a Pandora's box!

By Marshall Breger

Congress modified the American rule, which requires parties to bear their own litigation costs, when it passed the Equal Access to Justice Act in 1980. The act provided for the award of attorney’s fees to parties who prevail in lawsuits with the federal government, when the position of the government was not "substantially justified." Those eligible for such awards are individuals whose net worth does not
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must the government’s position in court be justified, but the underlying agency conduct that led to the litigation also must be justified.

**Definition of “position”**

How a court perceives the “position of the United States” normally makes no difference, because the Justice Department’s argument in court is usually that the agency action at the heart of the lawsuit is reasonable. Assume, however, that an agency has acted arbitrarily, and a party consults a lawyer. If negotiations with the agency fail to resolve the problem, the party may elect to file a legal action against the government. If the government lawyers (usually the Justice Department and agency lawyers) decide that the party’s case has merit, a settlement likely will be proposed. Because the government’s legal decision to settle a “bad” case was quite justified, limiting the definition of “position” means that the party here will bear the complete cost of correcting a government agency error, no matter how expensive it was to win relief.

To follow an interpretation that the “position of the United States” refers only to the government’s litigation stance is to imply that no matter how outrageously improper the agency action, and no matter how intransigently a wrong position has been maintained by the agency prior to the litigation, and no matter how many times the same agency repeats the same offense, the statute has no application as long as employees of the Department of Justice act reasonably when they appear in court. Congress certainly did not and does not now intend this result.

Although the Reagan administration expressed concerns that this new version of the EAJA could limit the government’s ability to raise legal defenses not directly related to the conduct of the agency, this fear is unfounded. Because the definition merely includes the underlying action and is not limited to only that “position,” Justice Department attorneys can continue to assert jurisdictional or technical defenses (statute of limitations or mootness). Should they succeed on the merits of the defense, the government likely will not be liable under the EAJA at all. If these arguments fall, they will be evaluated individually as to whether they represent a substantially justified litigation position.
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At issue

Grassley

Won't deter settlements

In addition, the administration claims that the new version of the EAJA would make it more difficult to settle cases. I disagree.

The EAJA will not deter settlement offers by the Justice Department, because it still will be in the government's interest to settle tenuous factual or legal cases. The extent of government liability that would be incurred on immediate surrender ordinarily would be minimal—that is, the private party's fees for preparing a complaint or answer and supporting papers. Only when the government conducts a vigorous defense of an untenable agency action will the award be large. In fact, the government would have an added incentive to resolve disputes before the point at which the plaintiff is entitled to go to court.

Further claims are made that the new EAJA will lead to skyrocketing costs and extensive discovery. Again I must disagree. Three courts of appeals, covering 19 states, have adopted this broader interpretation. In those states the government has not faced more frequent fee awards or been subject to unreasonable discovery by fee applicants.

Waiting for the SBA

Perhaps one of the best illustrations of the unfairness that results from the implementation of the administration view is Del Manufacturing Co. v. United States, 723 F.2d 980 (D.C. Cir. 1983), in which a small firm sought a contract with the Navy. Because of lengthy delays by the Small Business Administration in authorizing the firm to be eligible for the SBA's procurement program, the Navy cancelled its procurement request.

The firm sought to save the contract through informal negotiations with the Navy and SBA. When these efforts failed, the firm filed suit in federal court to enjoin the cancellation. On the day the suit was filed, an assistant U.S. attorney conceded the firm's claim that the contract should not have been cancelled and agreed that the Navy would forebear until SBA's expected authorization, which came shortly. The case was mutually dismissed later. The firm, as a "prevailing party," was then awarded EAJA fees of $4,275. In making the award, the district court evaluated the government actions prior to the litigation and found the combined actions of the agencies wholly unjustified. Because of the intervening decision in Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983), this district court decision was reversed.

I concur in Judge Wald's dissent in Del that this "interpretation that an immediate surrender in these circumstances is a substantially justified position for the United States such as to protect it from attorney's fee liability under the Equal Access to Justice Act seems to mock both the language and the purpose of the statutory scheme."

In conclusion, the new provisions of the EAJA do not expand the act; they clarify the intent of Congress in enacting the legislation in 1980. These clarifications should better protect those parties Congress has seen fit to include under the act's jurisdiction, further discourage unwarranted federal agency actions, and do these things at a minimum of cost to the taxpayer.

Breger

even when it settles the lawsuit before answering the complaint. The government may have to pay even when its procedural or jurisdictional defense was substantially justified.

Fee-seeking attorneys will likely engage in extensive discovery proceedings exploring tentative agency judgments. "Mini-trials" often will be necessary to review agency conduct not the subject of argument before the court. Agency officials may be asked to testify on internal decisional processes. All this would be required not to secure better "justice," but to assist attorneys seeking fee awards.

This fee-driven litigation ultimately will result, in the words of Justice William Brennan, in a "vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape." Hensley v. Eckerhart, 461 U.S. 424 (1983). It is for these reasons, among others, that President Reagan reluctantly vetoed the reauthorization of the Equal Access to Justice Act.

"Bright line" needed

One must be sympathetic to the concerns that led Congress to support the "underlying agency action" approach. Under the original act there were doubtless individuals who expended considerable financial resources to rectify improper or unauthorized agency action whose legal fees were not reimbursed. The search for perfect justice in specific cases, however, can have considerable systemic costs. A "bright line" is needed to ensure that the EAJA does not consume scarce judicial resources in incessant and drawn-out fee application hearings. Retaining the "litigation position" standard provides that "bright line."

The administration is firmly committed to the policies underlying the Equal Access to Justice Act and will strive to secure an acceptable authorizing vehicle to implement the act's purposes. The act continues to apply to suits brought before Oct. 1, 1984, and the president has ordered the heads of all executive departments and agencies to accept and retain on file applications for fees in cases filed after that date. We hope that any reauthorization of the EAJA will apply retroactively to the present interregnum. Vindicating the principles of equal access to justice, however, does not require that Congress consciously create a fee-dispute thicket.

(Charles E. Grassley, a Republican, is a U.S. senator from Iowa.)

(Marshall Breger, a lawyer and law professor, is special assistant to the president for public liaison.)
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