TESTIMONY OF BRIAN WOLFMAN ON H.R. 1996, THE "GOVERNMENT LITIGATION SAVINGS ACT," BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE JUDICIARY COMMITTEE OF THE U.S. HOUSE OF REPRESENTATIVES

Tuesday, October 11, 2011

Introduction

Good afternoon. I am Brian Wolfman. Thank you for inviting me to testify about H.R. 1996. As I will explain, H.R. 1996 would amend the Equal Access to Justice Act in ways that would harm the American public and undermine the enforcement of laws meant to advance our health, safety, and welfare. In short, H.R. 1996 should be rejected because it would eviscerate a law intended to protect Americans when they face unreasonable action by the federal government.

Since 2009, I have been Visiting Associate Professor of Law and Co-Director of the Institute for Public Representation (IPR) at Georgetown University Law Center. IPR is a law school clinic where students receive hands-on training in litigation, some of which involves the federal government. Prior to moving to Georgetown, I worked at Public Citizen Litigation Group for nearly 20 years, serving the last five years as its Director. At the Litigation Group, among other litigation,

we represented citizens and citizen groups challenging unreasonable or unlawful federal agency conduct — that is, conduct at odds with what this body, Congress, had instructed the agency to do. Finally, before I worked at the Litigation Group, I was a staff lawyer for a rural legal services program in Arkansas. There, my work included representing poor people wrongfully denied social security benefits by the federal government.[1]

As a result of my work in all three positions, I became familiar with what are known as federal fee-shifting statutes, such as the Equal Access to Justice, under which parties prevailing in litigation are awarded attorney's fees and, sometimes, other litigation expenses. I have litigated many issues under these statutes at all levels of the federal judiciary, including as lead counsel in four cases before the Supreme Court of the United States.[2]

The general purposes of fee-shifting statutes are threefold: to

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[1]Further biographical information and my resume is available at http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=FullTime&ID=1326&InfoType=Bio.

[2]*See Richlin Security Service Co. v. Chertoff*, 553 U.S. 571 (2008); *Scarborough v. Principi*, 541 U.S. 401 (2004); *Shalala v. Schaefer*, 509 U.S. 292 (1993); *Melkonyan v. Sullivan*, 498 U.S. 1023 (1991).

encourage the vindication of federal rights (such as those protected in our civil rights, open government, and environmental laws), by enabling citizens to hire lawyers; to provide the government additional incentives to obey federal law; and to fully compensate those whose rights have been violated. In the latter category, two types of cases come to mind: social security and veterans' disability cases against the federal government. In both situations, we want to encourage lawyers to handle these cases so that, when the government has wrongfully denied benefits, federal rights are vindicated and disabled citizens who have served our nation in the work place and in uniform receive the support they deserve.

In Part A below, I discuss the Equal Access to Justice Act's purposes in more detail. Part B reviews key provisions of the Act, both to illustrate how the Act operates and to provide background for understanding how, if enacted, H.R. 1996 would severely undermine the Act's purposes. In Part C, I review the specific provisions of H.R. 1996 and explain why the bill should be rejected, using examples of real-life cases that EAJA was meant to encourage, but that H.R. 1996 is aimed at eliminating.

A. The Purposes of the Equal Access to Justice Act

Generally, when a citizen prevails in litigation against the federal government, the Equal Access to Justice Act (EAJA) is the applicable fee-shifting statute.[3] Other, more specific fee-shifting statutes may apply, such as those under the Freedom of Information Act[4] or the Civil Rights Act's provisions barring employment discrimination.[5] But when no other statute applies, EAJA is the only possible recourse. Two prominent examples of cases where EAJA applies are suits against federal agencies for failing to obey statutory and regulatory mandates and to challenge arbitrary and capricious agency actions under the Administrative Procedure Act,[6] and cases involving disability claims by social security claimants and veterans.[7] A separate provision of EAJA applies to certain administrative adjudications before federal agencies.[8]

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[3] 28 U.S.C. 2412.

[4] 5 U.S.C. 552(a)(4)(E).

[5] 42 U.S.C. 2000e-5(k).

[6] 5 U.S.C. 706.

[7] 42 U.S.C. 405(g) (social security); 38 U.S.C. 7252 (veterans).

[8] 5 U.S.C. 504.

EAJA was first enacted in 1980 for a three-year period beginning on October 1, 1981, based on Congress's finding that individuals, small businesses, and non-profit 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."[9] In light of the government's "greater resources," EAJA sought "to diminish the deterrent effect of seeking review of, or defending against, governmental action."[10] As the Supreme Court has explained, "[t]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions."[11] In addition, Congress wanted to "encourag[e] private parties to vindicate their rights and [thereby to] 'curb[] excessive regulation and the unreasonable exercise of Government authority.'"[12] In 1985,

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[9]Pub. L. No. 96-481, § 202(a), 94 Stat. 2321, 2325 (1980).

[10]*Id.* §§ 202(b), (c)(1), 94 Stat. at 2325.

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

[12]*Id.* at 164-65 (quoting H.R. Rep. No. 96-1418, at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4991).

Congress reenacted EAJA and made it permanent.[13]

One of the key insights of the legislators who gave birth to EAJA was recognition of a relationship between encouraging individuals and entities to challenge unreasonable governmental action and the positive effect that such challenges have in implementing public policy for the benefit of Americans generally. As this Committee put it:

> The bill rests 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. . . The bill thus recognizes that the expense of correcting error on the part of the government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of federal authority. 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.[14]

Because concern over unlawful and unreasonable government conduct is not the province of any party or ideology, historically, support for EAJA has been bi-partisan. Indeed, as the initial three-year experiment was coming to end in 1984, Congress voted unanimously to

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[13] Pub. L. No. 99-80, 99 Stat. 183 (1985).

[14] H.R. Rep. No. 96-1418, 96th Congress, 2nd Sess., *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988-89 (1980).

make EAJA permanent.[15]

Senator Charles Grassley explained his support for the legislation by noting that before "this landmark legislation" was enacted in 1980, small businesses "were faced with a Hobson's choice—either to fight unjustified Government enforcement or regulatory actions at great personal or financial cost, or to simply capitulate in the face of the meritless action."[16] Senator Howell Heflin made similar points:

> This law provides the average citizen with the resources to fight government overregulation. It further serves as a strong deterrent to arbitrary government action. . . As a former Chief Justice of the Supreme Court of Alabama, I fervently believe that everyone is entitled to his or her day in court. We cannot continuously subject the citizens of this great country to the demands of government regulations and massive resources of regulators without providing them with the resources to fight regulations which may be unjust. This legislation provides more than a forum — it makes justice more accessible.[17]

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[15]*See* H.R. Rep. No. 99-120, pt. 1, at 6 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 134.

[16]131 Cong. Rec. S6248-01 (May 15, 1985).

[17]131 Cong. Rec. S9991-02 (July 24, 1985). Similar examples of support for EAJA from both sides of the aisle abound. *See, e.g.,* 131 Cong. Rec. S9991-02 (July 24, 1985) (Sen. Thurmond); 131 Cong. Rec. S9991-02 (July 24, 1985) (Sen. Dole); 131 Cong. Rec. S15475-01 (Nov. 14, 1985) (Sen. Domenici); 141 Cong. Rec. S9880-01 (July 13, 1995) (Sen. Bond); 142 Cong. Rec. S3242-02 (March 29, 1996) (Sen. Bond); 142 Cong. Rec. S2309-01 (Mar. 19, 1996) (Sen. Murkowski); 131 Cong. Rec. S15475-01 (Nov. 12, 1985)

(continued...)

B. EAJA's Provisions

EAJA provides that "fees and other expenses" shall be awarded to eligible parties who have prevailed in court or in adversary administrative proceedings against the federal government, unless the court or agency adjudicator finds that the position of the United States "was substantially justified or that special circumstances make an award unjust."[18] An individual is eligible for fees if his or her net worth does not exceed $2 million, while a business is eligible if its net worth does not exceed $7 million and it had 500 or fewer employees when the action was commenced.[19] Certain charitable organizations and cooperatives are eligible regardless of size or net worth.[20] "Fees and other expenses" are defined to include "reasonable attorney or agent

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[17](...continued)
(Sen. Baucus); 131 Cong. Rec. H367-01 (Feb. 7, 1985) (Rep. Morrison); 131 Cong. Rec. S1151-01 (Feb. 6, 1985) (Sen. Bumpers).

[18]5 U.S.C. 504(a)(1); 28 U.S.C. § 2412(d)(1)(A).

[19]5 U.S.C. 504(b)(1)(B); 28 U.S.C. 2412(d)(2)(B).

[20]*Id.*; 5 U.S.C. § 504(b)(1)(B). Originally, the net-worth limits for individuals and businesses were $1 million and $5 million, respectively. *See* Pub. L. No. 96-481, §§ 203(a)(1), 204(a), 94 Stat. at 2326, 2328. The current eligibility limits were set in 1985, over 25 years ago. *See* Pub. L. No. 99-80, §§ 1, 2, 99 Stat. at 185.

fees."[21]

Congress has enacted "well over 100" fee-shifting statutes,[22] but EAJA is unlike almost all of the other fee-shifting statutes in two critical respects.

First, under EAJA, to obtain a fee it is not enough for the plaintiff to prevail in the litigation or administrative proceeding, as it is under virtually all other fee-shifting statutes.[23] Rather, under EAJA, the government can defeat a fee award entirely if it can show that, despite having lost the case, its position on the merits of the case was "substantially justified."[24] The government is substantially justified, and thus immune from fee liability, where it can show that its position had a reasonable basis in law and fact.[25] Put the other way around, even when the government loses its case — that is, even when the

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[21]28 U.S.C. 504(b)(1)(A); *see also* 28 U.S.C. 2412(d)(2)(A) (defining "fees and other expenses" to include "reasonable attorney fees").

[22]*Marek v. Chesny*, 473 U.S. 1, 43 (1985) (Brennan, J., dissenting) (appendix including list of federal fee-shifting statutes).

[23]*See, e.g.,* 42 U.S.C. 1988 (civil rights cases); 42 U.S.C. 2000e-5(k) (employment discrimination cases); 5 U.S.C. 552(a)(4)(E) (Freedom of Information Act cases).

[24]28 U.S.C. 2412(d)(1)(A).

[25]*See Pierce v. Underwood*, 487 U.S. 552, 563-68 (1988).

government takes unlawful action against one or more of its citizens — it does not have to pay a fee unless the positions it took in court or before an administrative tribunal were unreasonable. This is a powerful defense, and dozens upon dozens of reported cases (and many more unreported cases) deny winning plaintiffs EAJA fees on substantial-justification grounds.[26] In light of the substantial-justification defense, no rational litigant or lawyer would bring a frivolous or marginal case in the hope of obtaining a fee.

Second, under EAJA, prevailing parties cannot recover their attorney's fees at market rates. Under almost all other fee-shifting statutes, prevailing parties are awarded attorney's fees at market rates, which are calculated by multiplying the number of hours reasonably spent on the case by the hourly rate the lawyer could command in the relevant market if he or she charged fees to private,

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[26] *See, e.g., Cody v. Caterisano*, 631 F.3d 136 (4th Cir. 2011); *Fruitt v. Astrue*, 418 Fed. Appx. 707 (10th Cir. 2011); *Hardesty v. Astrue*, 2011 WL 2133651 (7th Cir. 2011); *Cruz v. Comm'r Social Sec.*, 630 F.3d 321 (3rd Cir. 2010); *Hill v. Gould*, 555 F.3d 1003 (D.C. Cir. 2009); *Lord v. Napolitano*, 324 Fed. Appx. 115 (2d Cir. 2009); *Senville v. Madison*, 331 Fed. Appx. 848 (2d Cir. 2009); *Sardo v. Dep't Homeland Sec.*, 284 Fed. Appx. 262 (6th Cir. 2008); *Beeks v. Comm'r Social Sec.*, 424 Fed. Appx. 163 (3d Cir. 2007); *Taucher v. Brown-Hruska*, 396 F.3d 1168 (D.C. Cir. 2005); *Davidson v. Veneman*, 317 F.3d 503 (5th Cir. 2003); *Oro Vaca, Inc. v. Norton*, 55 Fed. Appx. 433 (9th Cir. 2003) (alternative holding).

fee-paying clients.[27] But EAJA limits fees to $125 per hour, adjusted for increases in the cost of living since enactment of the $125 per hour rate in 1996.[28]

Specifically, an administrative tribunal authorized by regulation to do so, may award fees above the statutory cap if "an increase in the cost of living … justifies a higher fee."[29] Courts and authorized administrative tribunals generally award cost-of-living adjustments as a matter of course when market rates exceed the unadjusted statutory cap.[30] Because the cost of legal services has greatly outstripped inflation generally, the inflation-adjusted fee cap — currently about

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[27]*See, e.g., Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

[28]*See* Pub. L. No. 104-121, §§ 231-233, 110 Stat. 847,862-64 (1996). Prior to 1996, the unadjusted fee cap was $75 per hour. The increase from $75 per hour to $125 per hour reflected the increase in the cost of living between EAJA's original October 1, 1981, effective date and the increase's March 1996 effective date. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Consumer Price Index, All Urban Consumers, available at ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (showing 66.7% cost-of-living increase from October 1981 through March 1996).

[29]5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A).

[30]*See, e.g., Meyer v. Sullivan*, 958 F.2d 1029, 1033-35 (11th Cir. 1992); *Johnson v. Sullivan*, 919 F.2d 503, 504-05 (8th Cir. 1990) (citing cases); *see also Pierce v. Underwood*, 487 U.S. 552, 571-72 (1988) (noting repeatedly that the fee cap is "adjusted for inflation").

$180 per hour — is far below hourly legal fees in most legal markets.[31]

Courts and authorized administrative tribunals also may award fees above the cap — whether inflation-adjusted or not — based on the presence of a "special factor, such as the limited availability of qualified attorneys for the proceedings involved."[32] The Supreme Court has held that this statutory formulation 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."[33] Following the Supreme Court's lead, this basis for enhancement generally has been rejected by the lower courts and has been employed only rarely in cases involving certain complex legal specialities.[34] Even in the rare circumstance where a court recognizes a speciality that might qualify for rate

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[31] *See* Adjusted Laffey Matrix, available at http://laffeymatrix.com/see.html (showing current attorney fee rates in the District of Columbia, ranging from $166 per hour for paralegals and law clerks to $734 per hour for lawyers with 20 or more years of experience); *see also, e.g.*, *Gautreaux v. Chicago Hous. Auth.*, 491 F.3d 649, 660 (7th Cir. 2007) (rates up to $400 per hour).

[32] 5 U.S.C. 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A).

[33] *Pierce*, 487 U.S. at 572.

[34] *See Scarborough v. Nicholson*, 19 Vet. App. 253 (Vet. App. 2005) (reviewing case law).

enhancement, to receive a rate above the statutory cap, the fee applicant must show that legal services could not have been obtained at the capped rate.[35]

In sum, unlike fee applicants under other fee-shifting statutes, the vast majority of EAJA fee applicants are limited to the inflation-adjusted statutory cap, and, even in the rare circumstance where the statutory cap is exceeded, EAJA fees are not awarded at market rates. Thus, as with the substantial-justification defense, in light of EAJA's below-market rates, neither litigants nor lawyers would bring marginal cases in the hope of receiving EAJA fees.

C. Section-by-Section Review of H.R. 1996

In Part A, I explained that EAJA seeks to curb unlawful government conduct by encouraging citizens, citizen groups, and small businesses to oppose unreasonable governmental conduct. In Part B, I explained how EAJA works and showed that, in light of EAJA's unique characteristics — in particular, the government's substantial-justification defense and EAJA's below-market fee rates — EAJA is less

[35] *See, e.g., Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991).

susceptible to abuse than any other federal fee-shifting statute. This part of my testimony reviews the provisions of H.R. 1996 and shows that their enactment would undermine EAJA's purposes and harm the American public.

1. Requirement of "direct and personal monetary interest"

Under H.R. 1996, to be a "prevailing party" and be eligible to obtain an EAJA fee, the fee applicant must have "a direct and personal monetary interest in the civil action [or in the administrative adjudication], including because of personal injury, property damage or unpaid agency disbursement." The purpose of this provision is to eliminate EAJA eligibility for the most important cases — those that seek non-monetary injunctive relief by challenging unlawful government regulations and conduct that affect the public on an on-going basis.

Take, for instance, the situation of veterans who all too often get into legal disputes with the Department of Veterans Affairs over their entitlement to benefits for service-related disabilities. To be sure, EAJA is vitally important to the individual veteran whose benefits have been

unlawfully denied.[36] But EAJA may be even more important to the thousands or tens of thousands of veterans whose benefits requests are never processed or mishandled because the Department of Veterans Affairs has systematically delayed issuing benefit rulings or misapplied disability regulations.[37] H.R. 1996 would make it impossible to obtain fees in cases brought by non-profit veterans groups challenging such illegal conduct, thus discouraging the filing of these important cases and unfairly requiring the plaintiffs to bear all of their legal costs when those types of cases are brought.

Beyond veterans cases, suits challenging unlawful regulatory conduct often protect Americans' health and safety. A few examples help illustrate my point. In the 1990's, Congress passed a series of laws to enhance safety in the commercial trucking industry, to protect the truck drivers themselves as well as the driving public that shares the

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[36] *See* Annual Report, United States Court of Appeals for Veterans Claims, October 1, 2009 to September 30, 2010, at 3 (over 2600 EAJA awards in veterans benefits cases in fiscal year 2010), available at http://www.uscourts.cavc.gov/documents/FY_2010_Annual_report_June_27_2011.pdf.

[37] *See, e.g., Military Order of Purple Heart of USA v. Secretary of Veterans Affairs*, 580 F.3d 1293 (Fed. Cir. 2009); *Paralyzed Veterans of America v. Secretary of Veterans Affairs*, 345 F.3d 1334 (Fed. Cir. 2003); *Disabled American Veterans v. Gober*, 234 F.3d 682 (Fed. Cir. 2000).

roads with commercial rigs. Congress required the Department of Transportation to issue by specified dates certain safety regulations — rules concerning truck drivers' hours of service, driver training, and background checks for new truck drivers, to name a few. By 2003, when a suit was filed against the Department, not a single rule had been issued, even though some were a decade or more overdue.[38]

After the suit was filed, the Department agreed to issue all of the delayed safety rules according to a court-enforced schedule. Thereafter, the Department issued the rules, two of which were challenged as unlawful. The first challenged rule concerned minimum training standards for entry-level drivers of commercial vehicles, including heavy trucks and buses. Instead of requiring entry-level truck and bus drivers to receive training in topics such as backing up, shifting, changing lanes, parking, controlling skids, and driving on mountainous roads — the operational skills and knowledge necessary to safely operate a commercial vehicle — the rule required drivers to receive training in only four tangential areas of driver qualifications: medical

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[38] *See In re Citizens for Reliable and Safe Highways,* No. 02-1363 (D.C. Cir.) (petition available at http://www.citizen.org/documents/Petition%20Final.pdf).

qualifications, hours-of-service requirements, driver wellness, and whistleblower protection. Recognizing that the agency had flouted Congress's intent, the United States Court of Appeals for the D.C. Circuit held that the agency's final rule was arbitrary and capricious, in part because the government's own studies showed that a rule that actually required new drivers to learn how to drive would save lives *and* money by eliminating costly truck accidents caused by untrained drivers.[39] The agency has since issued a lawful rule, and new truck drivers are required to undergo meaningful training, providing significant protection to the American driving public.

In the suit over the other truck safety rule, the Department of Transportation had been directed to issue regulations to curb truck-driver fatigue, in light of mounting evidence that tired truckers were the cause of an increasing number of fatal truck crashes and serious crash-related injuries. The Department's rule — issued years late — actually *increased* the number of daily and weekly hours a commercial truck driver could lawfully drive. Truck drivers and safety

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[39] *See Advocates for Highway and Auto Safety v. Federal Motor Carrier Safety Admin.*, 429 F.3d 1136 (D.C. Cir. 2005).

organizations sued, seeking invalidation of the rule and instructions to the agency to issue new regulations that would take exhausted truck drivers off the road.

This litigation was difficult and hard-fought. The federal agency's docket on the rule included more than 56,000 entries, and the issues — involving studies about sleep deprivation, a complex cost-benefit analysis, and difficult legal questions — could not be mastered overnight. So, as you might imagine, the plaintiffs needed skilled lawyers on their side. In the end, the government's position was rejected not once, but twice, by the Court of Appeals for the D.C. Circuit.[40] Only after those two defeats and the briefing of a third appeal, did the government agree to issue rules consistent with Congressional directives. H.R. 1996 would allow the government to impose all the legal costs of this litigation on the plaintiffs, even though it was the government that failed — and failed miserably and repeatedly — to obey the law.

EAJA is also important in cases challenging violations of

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[40] *Owner-Operator Indep. Drivers Ass'n v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007); *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004).

environmental laws and regulations. Take, for instance, a case involving the wild and scenic McKenzie River, known for the prized trout and salmon fisheries that made the McKenzie River drift boat famous. In relicensing two dams that were originally constructed without fish passage on the River, the Federal Energy Regulatory Commission (FERC) refused to abide by the Interior Department's prescriptions for fish ladders despite the plain language of the governing statute requiring it to incorporate those prescriptions. A federal court of appeals held that FERC violated the law by failing to heed the expert wildlife agency, which required modifications that, in the end, sustained the thriving fishery.[41]

In each of these cases, EAJA held out the only hope of an attorney's fee for the plaintiffs. And even in those cases, under EAJA, the plaintiffs would not receive a market-rate fee, and the government could, if it chose, avoid a fee altogether if it could show the court that its position on the merits had been substantially justified. As it turned out, in two of the three cases truck safety cases, the government agreed

[41] *See American Rivers v. F.E.R.C.*, 187 F.3d 1007 (9th Cir. 1999).

to pay a modest fee. In the McKenzie River case, the plaintiffs received less than $50,000 in fees.

Make no mistake: The purpose of this provision is to render EAJA inapplicable in cases like the ones described above, where EAJA is most needed. In each case, under H.R. 1996, no fee would be available because the suits sought injunctive relief, not "monetary" relief in which the plaintiff had a "direct and personal interest." The Committee should reject this provision.

2. Elimination of Attorney's Fees for "Pro Bono" Hours

H.R. 1996 would amend 5 U.S.C. 504(a)(3) and 28 U.S.C. 2412(d)(1)(C) to include what I will call the "no-pro-bono provision." Under it, administrative tribunals and courts are required to "reduce the amount to be awarded under [EAJA], or deny an award, commensurate with pro bono hours and related fees and expenses... ." The term "pro bono" is short for the Latin phrase "pro bono publico," meaning, literally, "for the public good." With regard to legal services, the term generally refers to work performed by attorneys free of charge or at a reduced rate for people or charitable organizations unable to

afford market-rate services.[42]

At a minimum, this provision of H.R. 1996 would eliminate all fees in the cases discussed in the previous section of this testimony, where the lawyers worked for non-profit organizations or private law firms and took cases on a pro bono basis, with no payment from their clients. The no-pro-bono provision is a very bad idea because citizens and citizen groups that hire pro bono lawyers are exactly the parties for whom EAJA was designed. They cannot afford to pay for legal services and may only be able to hire lawyers if there is some chance of a fee down the road if they show that the government acted unreasonably.

To repeat Senator Grassley's admonition: We need EAJA to prevent our citizens from facing "a Hobson's choice—either to fight unjustified Government enforcement or regulatory actions at great personal or financial cost, or to simply capitulate in the face of the

[42] *See* Law.com Legal Dictionary, definition of "pro bono," available at http://dictionary.law.com/Default.aspx?selected=1624 ("legal work performed by lawyers without pay to help people with legal problems and limited or no funds, or provide legal assistance to organizations involved in social causes such as environmental, consumer, minority, youth, battered women and education organizations and charities.")

meritless action."[43] The no-pro-bono provision will put citizens in the very Hobson's Choice that Senator Grassley was trying to avoid when he urged his colleagues to support EAJA.

Equally if not more troubling is the serious prospect that the no-pro-bono provision will discourage the representation of veterans and social security disability claimants. A 1998 GAO Report found that, in 1994, cases involving the Department of Health and Human Services (social security disability cases) and the Department of Veterans Affairs (veterans disability cases) involved 98 percent of EAJA applications submitted and 87 percent of the dollars paid in EAJA awards.[44] Though current data is not available, similar patterns likely persist. As the Social Security Administration explains, that agency "is one of the largest administrative judicial systems in the world" and "issues more than half a million hearing and appeal dispositions each

[43] 131 Cong. Rec. S6248-01 (May 15, 1985).

[44] GAO, "Equal Access to Justice Act: Its Use in Selected Agencies," HEHS-98-58R, at 5 (Jan. 14, 1998), available at http://archive.gao.gov/paprpdf1/159815.pdf.

year."[45] This massive adjudicatory system leads, in turn, to large numbers of civil actions seeking judicial review of agency decisions, all of which are subject to EAJA. Moreover, the U.S. Court of Appeals for Veterans Claims, which adjudicates veterans disabilities claims, has granted more than 2,500 EAJA applications in each of the last three years.[46]

Although in some veterans disability cases, lawyers may receive a fee of up to 20% of the veterans past-due benefits,[47] I have been informed by the Executive Director of the National Veterans Legal Services Program that approximately one-half of all veterans disability cases are handled entirely pro bono by members of the private bar and veterans assistance organizations, with EAJA the only possible source of a fee. EAJA serves as a substantial incentive in recruiting lawyers to take on pro bono representation of veterans, and, thus, the no-pro-bono

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[45]Social Security Online, Hearings and Appeals, available at http://www.ssa.gov/appeals/.

[46]Statistical reports of the U.S. Court of Appeals for Veterans Claims, including data on the number of EAJA applications filed, granted, and denied, are available at http://www.uscourts.cavc.gov/annual_report/.

[47]*See* 38 U.S.C. 5904.

provision will affirmatively harm veterans who have been wrongfully denied disability benefits after serving our country.

As in the veterans context, the Social Security Administration may withhold a percentage of a claimant's past-due benefits as a fee.[48] Having handled social security disability cases, however, I know from personal experience that the private bar and non-profit legal services organizations often provide services on a pro bono basis, with EAJA serving as the only potential basis for a fee. Moreover, under the Supplemental Security Income, or SSI, program,[49] which governs disability claims for people living in poverty, the Social Security Administration is barred from withholding a fee from the claimant's past-due benefits.[50] In those cases, claimants are unable to hire lawyers on account of their poverty, and lawyers must provide their services pro bono, with EAJA providing the only possibility that the lawyer will be paid. In sum, the no-pro-bono provision would prove a disaster for social security claimants.

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[48] *See* 42 U.S.C. 406.

[49] *See* 42 U.S.C. 1381 *et seq.*

[50] *See Bowen v. Galbreath*, 485 U.S. 74 (1988).

For all of these reasons, the Committee should reject H.R. 1996's no-pro-bono provision.

3. Adjustments and Limits on Fee Rates and Amounts

H.R. 1996 would amend EAJA to limit the amounts that may be awarded. In general, these amendments would undermine EAJA's purposes and should be rejected.

First, H.R. 1996 would amend 5 U.S.C. 504(b)(1)(A)(ii) and 28 U.S.C. 2412(d)(2)(A)(ii) to raise the nominal fee cap from $125 per hour to $175 per hour. Although that would appear generous, it does no more than approximate the current inflation-adjusted fee cap, which, as noted above (at 11-12), is about $180 per hour. The real concern here, however, is that future cost-of-living increases would be at the discretion of the Director of the Office of Management and Budget, rather than mandatory. As explained earlier (at 11 & note 30), in recognition of the huge gulf between the EAJA fee cap and market rate fees, courts have granted cost-of-living fee adjustments as a matter of course. Granting OMB discretion *not* to adjust fees for increases in the cost of living means that EAJA fee recoveries could suffer further

erosion, undermining EAJA's purpose of attracting competent counsel to challenge unreasonable governmental conduct.

Second, H.R. 1996 would repeal EAJA's "special factor" enhancement, which, as discussed above (11-13), authorizes fee rates above the normal EAJA cap for cases that demand expertise in highly specialized areas of the law, and then only where the plaintiff can show that attorneys could not be retained in the relevant market at the regular EAJA rate. Eliminating this safety valve will make it difficult for plaintiffs to find lawyers willing to challenge unreasonable government actions in some instances, and it should therefore be rejected.

Third, H.R. 1996 would add 5 U.S.C. 504(a)(5) and 28 U.S.C. 2412(d)(1)(E), to provide that no individual or entity may be awarded fees of more than $200,000 in any one civil action or administrative proceeding and that no party may receive an EAJA award for more than three civil actions or administrative adjudications initiated in the same calendar year. These provisions are irrational and should be rejected.

To be sure, EAJA-eligible cases do not often incur more than

$200,000 in fees or other expenses, particularly given the substantially below-market fee rates generally required by EAJA. Nor do many plaintiffs file more than three EAJA-eligible cases in a calendar year. But some cases are necessarily lengthy and complex, requiring thousands of hours of work, and, logically, in those cases, the fee awarded should be commensurate with the work required. After all, EAJA already demands that the administrative tribunal or court award only "reasonable" fees,[51] the attorneys' time and rates requested must be itemized and explained,[52] and the decision maker may reduce the fee whenever the prevailing party has unreasonably drawn out the case.[53]

Moreover, a party may be required to file multiple cases in a calendar year. In one of my EAJA cases, the plaintiff, a small business that provided security services for the Department of Homeland Security, succeeded in showing that the government had breached its contract to provide services at Los Angeles International Airport. After

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[51] 5 U.S.C. 504(b)(1)(A); 28 U.S.C. 2412(d)(2)(A).

[52] 5 U.S.C. 504(a)(2); 28 U.S.C. 2412(d)(1)(B).

[53] 5 U.S.C. 504(a)(3); 28 U.S.C. 2412(d)(1)(C).

about a decade of litigation, with the government fighting tooth and nail, the client obtained an EAJA fee.[54]

Assume that this client had provided similar services at five other airports in California and that the government had breached contractual provisions in those five contracts, requiring the filing of five additional cases. Under the amendment sought by H.R. 1996, if all six cases were initiated at the same time, EAJA fees would be available in only three of them. That makes no sense. Assuming the client prevailed and was otherwise eligible under EAJA's strict requirements, fees should be forthcoming because the government's unreasonable behavior triggered the need for all six cases. Under H.R. 1996, however, the client either would have to drop three cases, wait for the next calendar year to initiate the cases (assuming that they would still be timely), or prosecute all the cases despite the possibility that EAJA fees would not be available in some of the cases. In short, a provision aimed at undermining the rights of individuals or groups who need EAJA the most because their rights have been violated repeatedly is nonsensical

[54] *See Richlin Security Service Co. v. Chertoff*, 553 U.S. 571 (2008).

and should be rejected.

4. Net-Worth Limit for Charitable Organizations.

As noted earlier (at 8), an individual is eligible for EAJA fees if his or her net worth does not exceed $2 million, while a business is eligible if its net worth does not exceed $7 million and it had 500 or fewer employees when the action was commenced.[55] Non-profit charities are not subject to the limits applicable to for-profit businesses. And for good reason. Although the $7 million limit has remained the same since 1985 and should be adjusted upward to account for inflation, once a for-profit business reaches a certain size, it can be expected to cover its costs, including its legal costs. A charity, on the other hand, is expected to dedicate its resources to its mission and to maintain adequate reserves so that, when fundraising becomes difficult (as it has for many charities in recent years), it can continue to serve that mission. Thus, as Congress wisely recognized in 1980 and 1985, EAJA's eligibility caps should not apply to non-profit organizations, such as veterans organizations that represent disability claimants and

[55] 5 U.S.C. 504(b)(1)(B); 28 U.S.C. 2412(d)(2)(B).

organizations that seek to advance consumer health and safety, environmental protection, or civil rights.

5. Administrative Conference Reports and GAO Study

H.R. 1996 requires the Administrative Conference of the United States to issue annual reports on the number, nature, and amounts of EAJA awards in courts and administrative tribunals. It also requires a audit report by the General Accountability Office on EAJA implementation for the years 1995 through the end of the year in which H.R. 1996 is enacted.

Neither of these reports are objectionable in themselves, and they may provide useful information by identifying agencies whose unlawful conduct tends to give rise to EAJA awards. The requirement that the reports issued by the Administrative Conference be available online and contain searchable databases of EAJA awards is sensible.

But the Administrative Conference reports and the GAO study are odd features of *this* legislation. Presumably, they appear in H.R. 1996 because its proponents believe that they do not have enough data about how EAJA operates, including especially in the period from 1995 to the present. Given this lack of data, one would think that the

Committee would have required that the data be collected *first*, deciding later whether to amend EAJA to deal with concerns, if any, revealed by the data. But the Committee has taken a different and, in my judgment, misguided approach, by making assumptions about the uses (and supposed abuses) of EAJA and the costs of EAJA awards and seeking drastic EAJA amendments *before* Congress has received the comprehensive data that the Administrative Conference reports and the GAO study would provide. That puts the cart well before the horse.

For this reason, as well as the many others discussed above, I urge the Committee to reject H.R. 1996.