



Administrative Conference of the United States

**REPORT OF THE CHAIRMAN
ON AGENCY AND COURT AWARDS IN FY 2010 UNDER
THE EQUAL ACCESS TO JUSTICE ACT**

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CHAIRMAN**

JANUARY 9, 2013

This report was prepared by the Office of the Chairman of the Administrative Conference of the United States. The views expressed do not necessarily reflect those of the Council, the members of the Conference, or its committees.

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Summary

The Equal Access to Justice Act, originally passed in 1980, included provisions for an annual report to Congress by the Chairman of the Administrative Conference of the United States (ACUS) on the amount of fees and other expenses awarded under the Act in connection with agency adjudications. The Act required an analogous annual report on awards in judicial proceedings, initially prepared by the Administrative Office of the United States Courts, but later transferred to the Department of Justice. Both reporting requirements were terminated by legislation enacted in 1995. Bills were introduced in the House and Senate in the 112th Congress that would have re-established both reporting requirements and assigned all such responsibilities to the ACUS Chairman. Following discussions between ACUS and congressional staff members, the Chairman volunteered to undertake compilation of available data for FY 2010.¹ The results follow. In general, agencies indicated that they do not track these payments and compilation of the data has been incomplete and inconsistent. Similar findings have also been reported by the Government Accountability Office.

Background

The Equal Access to Justice Act (EAJA) (Title II of Pub. L. 96-481, 94 Stat. 2325, as amended by Pub. L. 99-80, 99 Stat. 183; codified at 5 U.S.C. § 504 and 28 U.S.C. § 2412) provides for the award of attorneys' fees and other expenses to certain litigants who prevail against the United States in adversary administrative (agency) adjudications or civil court actions other than tort actions (but not including tax cases since 1983, which are covered under a separate attorneys' fee provision). An award will be denied if the United States shows that its

¹ ACUS undertook this project during 2011. At that time, FY 2010 was the most recent year for complete data.

position was substantially justified or that “special circumstances make an award unjust.”

EAJA assigned to the Chairman of the Administrative Conference of the United States (ACUS) two significant roles: (1) Under 5 U.S.C. § 504(c), each agency, after consultation with the Chairman, was required to establish uniform procedures for submission and consideration of applications for an award of fees and other expenses under the Act; and (2) under 5 U.S.C. § 504(e), the Chairman, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, was required to report annually to Congress on the amount of fees and other expenses awarded pursuant to the Act in agency adjudicative proceedings (but not, as noted below, in civil court actions) during the preceding fiscal year. These activities ceased when ACUS terminated all operations as of October 31, 1995, due to defunding of the agency by Congress. Legislation enacted in December 1995 terminated the reporting requirement.²

Model Rules. In partial fulfillment of its consultation responsibilities under the Act, ACUS issued a set of Model Rules for Implementation of the Equal Access to Justice Act in 1981 (46 FR 32900, June 25, 1981) and a revised set of Model Rules in 1986 (51 FR 16665, May 6, 1986). A quarter century later, even though the Model Rules have not been updated to reflect more recent amendments to the Act, the 1986 Revision still contains useful guidance, as noted most recently by the Bureau of Consumer Financial Protection when it issued an interim final rule to implement the Equal Access to Justice Act (77 FR 39117, June 29, 2012).

Annual Reports to Congress. In fulfillment of the reporting requirement on payments under EAJA for administrative proceedings, ACUS collected data from federal administrative

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

agencies for thirteen years and compiled annual reports that were submitted to Congress. The final report by ACUS was dated October 31, 1995, covering FY 1994.

EAJA also provided for analogous annual reports on payments in federal court proceedings. Those reports were prepared and submitted for many years by the Director of the Administrative Office of the United States Courts. However, this responsibility was transferred to the Attorney General by the Federal Courts Administration Act of 1992, Title V, § 502, Pub. L. 102-572. The final such report was prepared by the Department of Justice, also covering FY 1994.

Data Collection for Fiscal Year 2010

Several bills introduced in the 112th Congress would have re-established an annual reporting requirement for payments of fees and expenses under EAJA, and required the creation and maintenance of an online database accessible to the public.³ These bills would have assigned to ACUS the responsibilities for compilation of data, submitting a report, and creating and maintaining a database of payments under EAJA, covering both administrative agency cases and court cases. Because of the continuing congressional interest and the pending proposals to expand reporting of EAJA data, and as a result of a congressional request that ACUS resume collecting the information, the Chairman of ACUS volunteered to collect data for FY 2010 on both administrative hearings and court proceedings (despite the fact that the legal requirement to collect the data no longer exists).

Reporting Form and Data Request. To collect EAJA data for the reporting period of FY 2010, the Office of the Chairman designed a three-part short form (included with this report as an Appendix). Part A requested for agency administrative cases the number of applications for fees and expenses under EAJA pending at the beginning of the fiscal year, the number filed during the year, the number finally decided or settled during the year (indicating separately the number of decisions granting an award, settlements, and denials), and the number pending at the

³ See, for example, the Government Litigation Savings Act (H.R. 1996 and S. 1061), which would have extended ACUS reporting responsibility to include awards by both agencies and courts. The Act's reporting and related provisions were later incorporated, by amendment, into the Red Tape Reduction and Small Business Creation Act, H.R. 4078 (112th Cong. 2012), which the House passed in 2012. The Senate took no action on the bill.

end of the year. It also asked for the total dollar amount of all fees and expenses awarded during the fiscal year. Part B asked identical questions for court cases.

Unlike Parts A and B, which simply requested counts of cases and a single total dollar figure, Part C asked for information about each case for which an award was granted, through decision or settlement, during the fiscal year. The set of data requested was based on the kind of data specified in pending legislation on EAJA reporting. It included the name of the party seeking an award, the name of the agency, the name of the administrative law judge (or the court and the judge) hearing the case, the status of any appeal, the amount of the award, the hourly rates of attorneys and expert witnesses, the basis for the finding that the agency's position was not substantially justified, and (for court cases) any amounts paid from the Judgment Fund.⁴ ACUS staff anticipated that most responding agencies would have no more than a small number of cases to which Part C would be applicable. To avoid imposing an unreasonable burden on reporting agencies, the instructions for the form advised any agency reporting more than 25 cases to contact ACUS to discuss the form and content of a more abbreviated submission.

A preliminary memorandum was sent in April 2011 to the members of ACUS who represent federal government agencies, requesting identification of a person at the agency to whom a request for EAJA data should be addressed and asking to what extent the agency currently collects data about EAJA awards. A subsequent memorandum, accompanied by the data collection form, was sent in June 2011 by e-mail to each agency's EAJA contact (if a name had been supplied) and the agency's ACUS member, describing the EAJA data collection project and requesting submission of data. Agencies that had not previously submitted the name of an EAJA contact person also were asked again to do so. In addition, a few agencies that had been included in ACUS's EAJA reports prior to 1995, but which have no representation in ACUS now, were sent a similar request. Overall, these requests were sent to approximately fifty departments and agencies. Some non-responding agencies were sent follow-up messages by e-mail during the summer of 2011.

Agency Responses. Numerous agencies reported that they had no EAJA applications and

⁴ The Judgment Fund is funded by appropriations (managed by the Department of the Treasury) to pay final judgments and awards against the United States, compromise settlements, and interest and costs specified under various statutory provisions, when payment is not otherwise provided for. 31 U.S.C. § 1304.

therefore no awards during the reporting period. These agencies are listed in Table I. Over a period of several months, several other agencies submitted reporting forms as requested. Some of these agencies subsequently submitted revised forms. During this period, ACUS staff conferred by telephone with a number of agencies about the availability of EAJA data and how to report any special situations that might not fit neatly into the reporting form. Some agencies (notably the Department of Justice, in connection with EAJA claims that might have been filed against the Department) informed ACUS, in telephone conversations, that the requested data would be extremely difficult (or perhaps impossible) to assemble because those agencies do not have a system for either tracking or identifying EAJA claims. Some stated that the requested data could be assembled only through substantial expenditures of staff time and money.⁵

Follow-up Data Request. In an effort to conclude the FY 2010 EAJA data collection, the Office of the Chairman sent one more follow-up request to all non-responding agencies in

⁵ Contrasting statements by the Department of Justice and the Department of Commerce illustrate the difficulty in obtaining EAJA payment data. In response to a letter addressed to the Attorney General concerning payments under EAJA, signed by 3 senators and 20 House members and dated Nov. 2, 2009, the Department of Justice stated: “an individual agency is in the best position to track and report on any payments it makes under EAJA. . . . Because EAJA payments are made agency-by-agency and not by the Department, the Department does not track EAJA payments.” Letter from Assistant Attorney General Ronald Weich, Office of Legislative Affairs (April 27, 2010). In fact, the Department’s FY 1994 report on EAJA payments in court cases stated: “data were gathered from the Federal agencies, which submitted consolidated information on all EAJA cases for the Fiscal Year to the Justice Management Division.”

Although the Department of Commerce ultimately submitted EAJA data for FY 2010, its initial response to the ACUS data request explained that its diverse component bureaus and programs have 14 chief legal officers who manage their own legal databases, and therefore: “the only way to retrieve whatever EAJA data exists will be to . . . canvass the chief legal officers. Each of these, in turn, will undertake to search their own records for case specific data, retrieve the information, and report it to a central administrator for consolidation with all other components’ data, and delivery to ACUS.” The Department of Commerce’s initial response concluded: “By contrast to all this, the Department of Justice appears to be a richer source of accessible, consolidated EAJA information than DOC and other executive agencies, most of which—like DOC—do not have independent litigating authority.” Components of the Department of Homeland Security also noted the significant commitment of agency resources that would be needed to obtain the data requested and suggested that the Department of Justice would have fuller EAJA data on cases litigated in court.

For judicial proceedings, even when the Department of Justice litigates, the agency generally pays any EAJA award: “Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.” 28 U.S.C. § 2412(d)(4). *See also* Office of Legal Counsel, *Responsibility of Agencies to Pay Attorney’s Fee Awards under the Equal Access to Justice Act* (Oct. 16, 2007), available at <http://www.justice.gov/olc/2007/cienega-gardens-final.pdf>.

November 2012, asking for either submission of the data or a brief explanation of why the data could not be obtained. This effort resulted in a few more agency data submissions, but no documentation of reasons for non-submission.⁶

Data Limitations. As noted above, the data reporting form was designed to impose as small a burden on agency staffs as possible. In many instances, however, the agency submissions displayed a great variety of factors that required footnotes or explanations as to why individual cases did not fit into the simple categories for which ACUS requested numbers.⁷ In many instances, agencies reported that only partial data were available; therefore, such reports are apparently incomplete.⁸ For these reasons, the tables included in this report are not readily amenable to simple arithmetic summation to determine any government-wide totals that would accurately represent the overall payments of fees under EAJA.⁹

⁶ No data were submitted for this report by the Departments of Agriculture, Health and Human Services, Housing and Urban Development, Justice, and State, or by the Consumer Product Safety Commission, Federal Communications Commission, Federal Election Commission, Federal Maritime Commission, Federal Reserve Board, International Trade Commission, Merit Systems Protection Board, National Labor Relations Board, Office of Personnel Management, and Small Business Administration.

⁷ Examples included cases with partial settlements or denials, cases in which some aspects of the outcomes were pending on appeal, or dollar amounts that were adjusted or re-negotiated after the original outcome.

⁸ Partial availability might refer to an individual case or to the availability of information for only certain components of an agency or department. In some cases, the agency had no record of whether a fee award was authorized by EAJA or some other statute. Some agencies reported data for administrative cases, but had no information about court awards. These responses are similar to the information reported by the Government Accountability Office with respect to EAJA data for the Department of the Interior and the Department of Agriculture. *See* Government Accountability Office, *Limited Data Availability on USDA and Interior Attorney Fee Claims and Payments*, GAO-12-417R, Apr. 12, 2012, at 9.

⁹ GAO's recent EAJA report concluded: "Given the differences in attorney fee information available across the 10 agencies that provided information and Treasury and the [other limitations identified by GAO], it is difficult to comprehensively determine the total number of claims filed for attorney fees, who received payments, in what amounts, and under which statutes." *Id.* at 13.

Table I. Agencies Reporting No EAJA Applications or Awards in FY 2010
Commodity Futures Trading Commission
Defense: Department of the Air Force
Defense: TRICARE Management Activity
Department of Education
Equal Employment Opportunity Commission
Federal Deposit Insurance Corporation
Federal Energy Regulatory Commission
Federal Housing Finance Agency
Federal Labor Relations Authority
Federal Trade Commission *
General Services Administration **
National Archives and Records Administration
National Credit Union Administration
Nuclear Regulatory Commission
Office of Government Ethics
Office of Management and Budget
Postal Regulatory Commission
Railroad Retirement Board
Surface Transportation Board

Notes to Table I:

* 1 application for fees received; still pending at end of FY 2010.

** GSA's response stated that the only administrative cases to which GSA is a party that are subject to EAJA are cases before the Civilian Board of Contract Appeals. That Board's submission did not include any GSA cases.

Table II displays a summary of EAJA awards during the FY 2010 reporting period that were reported by departments and agencies.

Table II. Summary of EAJA Awards Reported by Agencies *

Agency	Agency Administrative Cases				Court Cases				Comments
	Decisions to Award	Settlements	Denials	Payments	Decisions to Award	Settlements	Denials	Payments	
Armed Services Board of Contract Appeals **	3	2	5	N/A	0	0	0	\$0.00	3 awards – Amounts not known. 2 settlements – No EAJA award.
Civilian Board of Contract Appeals **	0	0	1	\$0.00	0	0	0	\$0.00	
Department of Commerce **	0	0	0	\$0.00	0	5	0	\$266,250.00	
Department of Defense **									Only the listed components of DOD reported EAJA cases in FY 2010. Data unavailable for some components.
Department of the Army	0	1	N/A	\$76,021.76	2	1	N/A	\$335,854.71	Data on denials unknown.
Defense Intelligence Agency	0	1	N/A	\$6,058.40	0	0	N/A	\$0.00	Data on denials unknown.
Defense Logistics Agency	0	1	0	\$139,555.80	0	0	0	\$0.00	
Department of Energy **	0	0	0	\$0.00	0	1	0	\$365,000.00	
Department of Homeland Security **									DHS cannot be certain the data are complete or that all payments reported were under EAJA.
Customs and Border Protection	0	0	0	\$0.00	6	4	N/A	\$649,873.35	Includes Judgment Fund payments.
Immigration and Customs Enforcement	0	0	0	\$0.00	10	11	N/A	\$845,647.76	Includes Judgment Fund payments.
Citizenship and Immigration Services	0	0	0	\$0.00	27	31	N/A	\$799,584.71	Includes Judgment Fund payments.
Department of the Interior **	0	0	3	\$0.00	1	13	0	\$1,213,187.43	The court award case remains open on appeal.

Department of Labor **	1	0	2	\$11,586.59	1	0	0	\$18,122.60	
Department of Transportation **	3	2	0	\$83,147.98	0	0	0	\$0.00	Data discrepancy: possibly 2 decisions + 3 settlements.
Department of the Treasury **									
Alcohol and Tobacco Tax and Trade Bureau	1	0	0	\$4,354.13	1	0	0	\$23,048.23	
Internal Revenue Service	0	0	0	\$0.00	0	1	0	\$8,300.00	
Office of Comptroller of the Currency	0	0	1	\$0.00	0	0	0	\$0.00	
Department of Veterans Affairs					2828			\$15,491,218.69	Unknown if individual decisions were by agency or court. Figures may include non-EAJA payments.
Environmental Protection Agency **	0	0	0	\$0.00	0	3	0	\$484,178.00	
Federal Mine and Safety and Health Review Commission **	1	0	0	\$11,586.59	0	0	0	\$0.00	
Occupational Safety and Health Review Commission	0	0	2	\$0.00	0	0	0	\$0.00	
Securities and Exchange Commission **	0	0	0	\$0.00	0	3	1	\$651,844.09	
Social Security Administration				N/A	3309	N/A	100	\$23,207,324.00	No data available for agency cases or settlements of court cases.

Notes to Table II:

* For information about data quality, see the discussion above under “Data Limitations.”

** The department or agency submitted further details on the individual cases, on file at ACUS.

N/A = Unknown or Not Available.

Future Reporting

At the end of the 112th Congress, in December 2012, bills were pending that would have re-established annual reporting requirements for payments under EAJA, as well as requiring creation and maintenance of a public online database for EAJA payments. The current report, covering FY 2010, is intended to serve as a baseline for understanding the present level of EAJA payments, to the extent that agencies are now able to identify such information. At this time, the principal limitations on the availability of EAJA data are: (1) the widespread absence of agency tracking systems for this purpose; (2) the costs in terms of dollars and staff time to retrieve EAJA data; and (3) the absence of any statutory requirement that agencies track EAJA payments.

The Office of the Chairman of the Administrative Conference expects to continue its communications with relevant congressional staff with respect to potential legislative action in this area and has offered to give technical assistance on reporting provisions. At this time, however, ACUS will await either new statutory requirements or other instruction from Congress before it continues collection of EAJA data.

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Equal Access to Justice Act (EAJA) Data Report Form – FY 2010

Name of Agency: _____

Name of Person Preparing Report: _____

E-Mail Address: _____ Telephone Number: _____

Data submitted on this form will be used by the Office of the Chairman of the Administrative Conference of the United States (ACUS) to prepare a report to Congress on the amount of fees and other expenses awarded during the preceding fiscal year, as provided under the Equal Access to Justice Act (5 USC 504). Please submit data on applications and awards for both agency administrative proceedings and court proceedings involving the reporting agency, to the extent that such information can be located in the agency’s records. The “reporting period” consists of the 12 months from October 1, 2009 through September 30, 2010.

Note that Part C requires a separate response for each individual case in which an award was granted, through decision or settlement, during the reporting period. If the agency is reporting more than 25 cases, please contact David Pritzker at ACUS (dpritzker@acus.gov or 202-480-2093) for further information on how to submit the requested data.

Part A – Aggregate Data for FY 2010 – Agency Cases

1. Number of applications for fees and expenses under EAJA that were:

a. Pending on October 1, 2009	
b. Filed during the reporting period	
c. Finally decided or settled during the reporting period	
d. Pending at the end of the reporting period	

2. Number of applications for fees and expenses under EAJA that were terminated during the reporting period by:

a. Decision granting an award	
b. Settlement	
c. Denial of an award	

3. Total amount of fees and expenses awarded during the reporting period under 2.a and 2.b _____



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Part B – Aggregate Data for FY 2010 – Court Cases

4. Number of applications for fees and expenses under EAJA that were:

a. Pending on October 1, 2009	
b. Filed during the reporting period	
c. Finally decided or settled during the reporting period	
d. Pending at the end of the reporting period	

5. Number of applications for fees and expenses under EAJA that were terminated during the reporting period by:

a. Decision granting an award	
b. Settlement	
c. Denial of an award	

6. Total amount of fees and expenses awarded during the reporting period under 5.a and 5.b _____

Part C – Individual Awards Granted During FY 2010

Please submit a separate copy of Part C (or the Continuation Sheet for Part C) for each case in which an award was granted, through decision or settlement, during the reporting period.

7. Check one, as applicable:

Agency decision _____ Agency settlement _____ Court decision _____ Settlement of court case _____

8. Name of the party seeking the award of fees and other expenses	
9. Agency to which the application for award was made	
10. Name(s) of ALJ(s) or judge(s) hearing the case	
11. If decision was appealed, status of the appeal	
12. Amount of the award	
13. Hourly rates of attorneys and expert witnesses stated in the application	
14. Basis for the finding that the agency's position was not substantially justified	
15. (Court cases only) Name of court	
16. (Court cases only) Any amounts paid from 31 USC 1304 for a judgment in the case	



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Equal Access to Justice Act (EAJA) Data Report Form – FY 2010

CONTINUATION SHEET FOR PART C

Part C – Individual Awards Granted During FY 2010

Please submit a separate copy of Part C (or the Continuation Sheet for Part C) for each case in which an award was granted, through decision or settlement, during the reporting period.

7. Check one, as applicable:

Agency decision _____ Agency settlement _____ Court decision _____ Settlement of court case _____

8. Name of the party seeking the award of fees and other expenses	
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11. If decision was appealed, status of the appeal	
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14. Basis for the finding that the agency's position was not substantially justified	
15. (Court cases only) Name of court	
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