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Health, Education, and
Human Services Division

B-278335

January 14, 1998

The Honorable William F. Goodling
Chairman, Committee on Education
and the Workforce
House of Representatives

The Honorable Harris W. Fawell
Chairman, Subcommittee on Employer-
Employee Relations
Committee on Education and
the Workforce
House of Representatives

Subject: Equal Access to Justice Act: Its Use in Selected Agencies

In 1980, the Congress passed the Equal Access to Justice Act (EAJA), recognizing that many individuals, businesses, and groups do not have the money, personnel, or expertise to defend against or seek review of unreasonable actions brought against them by the federal government. EAJA, which became effective October 1, 1981, was intended to help certain individuals, partnerships, corporations, and labor and other organizations by paying the attorneys' fees and other costs if the federal government brought an administrative or judicial action and lost because it was not substantially justified.¹ The act allows the prevailing party, other than the government, to apply for payment of fees through the federal agency that brought the action. Should the agency determine that it was justified in bringing the action and if it does not pay the fees, the prevailing party can appeal the agency's decision through the courts. When an agency does not have authority to award fees administratively, then the prevailing party can apply directly to the courts. EAJA does not apply if another federal law authorizes the payment of attorneys' fees and other expenses to the prevailing party.

¹The act applies to individuals whose net worth does not exceed \$2 million and to businesses and other organizations with no more than 500 employees and a net worth no greater than \$7 million at the time the action was initiated.

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Congressional interest in the use of the act since 1981, and consideration of whether additional legislation is needed, prompted your request that we review (1) the history of EAJA, (2) the extent of the use of EAJA governmentwide, and (3) the extent of the use of EAJA and the applicability of other similar legislation, generally referred to as "fee-shifting statutes," at the National Labor Relations Board (NLRB), the Department of Labor (DOL), and the Equal Employment Opportunity Commission (EEOC).² Because EAJA applies to both the administrative proceedings of federal agencies and civil litigation brought in the courts, you expressed interest in the use of EAJA through both avenues.

To respond to your request, we reviewed the historical and legislative background of EAJA and obtained information on the governmentwide use of EAJA and the applicability of other fee-shifting statutes. We obtained data on EAJA and held discussions with agency officials at NLRB, DOL, and EEOC. We also obtained data showing the number of applications to the agencies for payment of attorney's fees and other applicable expenses, the number of claims granted, and the amount of the awards. In addition, we identified other fee-shifting statutes applicable to programs and operations at NLRB, DOL, and EEOC.

We compared governmentwide data reported centrally with data provided to us by the three agencies, but where we found discrepancies in the comparison of these three agencies, we relied on data the agencies provided. Data for the other federal agencies are presented as reported to the central reporting units for both the administrative and legal proceedings. The governmentwide data available (fiscal years 1982-94) could not be independently validated because (1) the requirement to track EAJA activity and report it governmentwide has been eliminated and (2) some agencies' initial record-keeping practices were lax and most kept track only of fees paid. Our review was conducted between July and December 1997 in accordance with generally accepted government auditing standards.

In summary, EAJA was intended to reimburse individuals and small businesses with limited resources for attorneys' fees and other expenses when they prevail in both administrative and judicial proceedings involving the federal government, when the action by the government cannot be substantially justified. From its inception in fiscal year 1982 through fiscal year 1994 (the

²On September 10, 1997, you introduced H.R. 2449 to allow for the automatic recovery of attorneys' fees and costs by certain employers and labor organizations that prevail in actions that NLRB brought against them.

last year central reporting of governmentwide data was required), more than 6,200 applicants were awarded about \$34 million under EAJA's administrative and judicial processes for reimbursement of attorneys' fees and related expenses. Of the \$34 million, applications involving the Social Security Administration (SSA) accounted for at least 83 percent of the claims granted and 48 percent of the amounts awarded. EAJA cases may involve a wide range of issues, such as claims for benefits related to disability, concerns regarding occupational safety and health, or allegations of unfair labor practices by companies, unions, or employees. For example, NLRB awarded fees through its administrative process when it found that it was not substantially justified in alleging that a successor employer unlawfully refused to hire an employee of the predecessor because of his union activities. In another case, a court awarded EAJA fees when it found that NLRB was not substantially justified in its interpretation of the automatic renewal terms of a labor agreement.

From fiscal year 1982 through fiscal year 1997, at NLRB, 59 applicants received about \$1.5 million in attorneys' fees and related expenses; at DOL, 74 applicants were awarded about \$700,000; and at EEOC, 1 applicant was awarded \$264,328. At NLRB, no fee-shifting statutes other than EAJA apply to proceedings it administers. However, at DOL, eight other fee-shifting laws apply specifically to its proceedings, and at EEOC, four other fee-shifting statutes apply to its proceedings. This does not include fee-shifting statutes of general applicability, such as the Freedom of Information Act.

HISTORICAL AND LEGISLATIVE BACKGROUND OF EAJA

In the United States, each party to a lawsuit generally pays its own attorneys' fees. EAJA provided a significant exception to this rule when it was enacted in 1980. It was designed to restrain overzealous regulators at some federal agencies and to reimburse parties subjected to unreasonable government action. The law authorizes the payment of fees by the federal government in adversarial administrative hearings and civil court hearings when the government cannot show that its actions were substantially justified. It may be relied upon by individuals whose financial net worth amounts to no more than \$2 million and by businesses with up to 500 employees and a net worth no greater than \$7 million. However, it may not be used if another statute already provides for attorneys' fees. There are about 180 such federal statutes; some cover actions only at particular agencies, while some apply to all federal agencies. See enclosure I for more details on the background and legislative history of EAJA.

GOVERNMENTWIDE USE OF EAJA

Comprehensive data on the extent of the use of EAJA governmentwide are available only for fiscal years 1982 through 1994—the period during which the requirement to centrally report data governmentwide was in effect. During that time, the act required that agencies report data on EAJA use through administrative proceedings to the Administrative Conference of the United States. The Chairman of the Administrative Conference, along with the Chief Counsel for Advocacy of the Small Business Administration, reported annually to the Congress on the amount of fees and other expenses awarded. Agency officials, however, expressed concern about the accuracy and completeness of data centrally reported. The fiscal year 1994 report on agencies' administrative proceedings was the last report of the Administrative Conference, after which it did not receive funding; it ceased operations on October 31, 1995. EAJA required that the Administrative Office of the United States Courts report similar fiscal year data on EAJA use for court proceedings. The Federal Courts Administration Act of 1992 transferred the reporting responsibility for court litigation to the Department of Justice. The Federal Reports Elimination and Sunset Act of 1995 eliminated the requirement for governmentwide reporting of EAJA cases through court proceedings; the last report on EAJA use for court proceedings was for fiscal year 1994.

Data on governmentwide EAJA use showed that 6,246 applications were granted and \$34.1 million was awarded in attorneys' fees and other expenses during fiscal years 1982-94, counting proceedings through both the agencies' administrative process and through court litigation. During this time, the Administrative Conference of the United States and the Attorney General's Office in the Department of Justice reported that a total of 1,593 applications for attorneys' fees were filed with federal agencies, and 604 claimants were granted fees totaling about \$4.5 million through the administrative process. For fiscal years 1982-94, the Administrative Office of the United States Courts reported that a total of 6,773 applications for attorneys' fees were decided through the courts and 5,642 were granted fees totaling \$29.6 million. In fiscal year 1994, the most recent year for which data were available, 64 EAJA applications for attorneys' fees were filed in administrative proceedings and 12 were granted fees totaling about \$281,500. Also, in that year, 2,399 applications through judicial proceedings were decided and 2,179 were granted fees totaling about \$8.2 million.

The governmentwide data on EAJA use through federal agencies' administrative processes showed no discernible trends during fiscal years 1982 through 1994. Furthermore, no information was available to document reasons for

fluctuations in the total number of applications filed and granted and amounts paid to applicants from one fiscal year to another.

However, the EAJA data collected on court proceedings showed several interesting items. Specifically, for fiscal years 1982 through 1994, the Department of Health and Human Services (HHS), primarily SSA cases, accounted for about 85 percent of all applications submitted, about 92 percent of applications granted, and about 56 percent of the amounts paid. In fiscal year 1994, HHS and Department of Veterans Affairs (VA) cases together accounted for about 98 percent of the applications submitted, 98 percent of the applications granted, and 87 percent of the dollars paid. The SSA and VA cases, for the most part, both involved large numbers of claims for benefits associated with medical disabilities, which sets them apart from the types of cases that other federal agencies address. See enclosure II for a more detailed discussion of EAJA data governmentwide.

THE USE OF EAJA AND THE APPLICABILITY
OF OTHER FEE-SHIFTING STATUTES
AT NLRB, DOL, AND EEOC

Data on EAJA activity at NLRB, DOL, and EEOC showed that most EAJA applications had been filed and granted at NLRB. From fiscal year 1982 through fiscal year 1997, NLRB reported 285 applications filed under the agency's administrative process and 111 applications filed through the courts. Over this period, the agency reported granting 32 applications and awarding \$730,036 through its administrative process. Court litigation involving NLRB resulted in 27 cases granted and a total of \$729,833 awarded in fees and other expenses.

During fiscal years 1982 through 1997, DOL reported receiving through its administrative process 143 EAJA applications, granting 60, and awarding fees and expenses totaling \$373,246.³ In court litigation involving DOL, 34 applications were decided, 14 were granted, and the amount awarded totaled \$320,090 during this time period. EEOC does not have administrative authority to award EAJA fees. Adversarial proceedings at EEOC are litigated in the courts and EAJA applications are filed in and decided by the courts. EEOC does not keep records of court decisions of EAJA cases, but it does keep track

³In fiscal years 1995-97, DOL did not collect information on the numbers of applications received and decided; therefore, the totals for fiscal years 1982-97 are understated.

of amounts awarded by the courts. EEOC reported that the courts awarded fees to only one applicant totaling about \$264,000 during fiscal years 1982 through 1997. See enclosure III for further discussion of EAJA activity at NLRB, DOL, and EEOC.

Twelve other fee-shifting statutes apply at DOL and EEOC, but EAJA is the only fee-shifting statute applicable to proceedings at NLRB. Eight other fee-shifting statutes apply to proceedings administered by DOL. EEOC proceedings involve four fee-shifting statutes—two provide fee-shifting for both prevailing plaintiffs and defendants, while the two others provide fee-shifting for the prevailing plaintiffs only.

DOL did not have any data available on the number of claims or amounts awarded under the applicable fee-shifting statutes for its proceedings, but EEOC identified 116 cases that were litigated through the courts, and about \$1.2 million was awarded between March 1981 and February 1997 under other fee-shifting statutes applicable to its proceedings. According to EEOC officials, most of the cases in which attorneys' fees and costs were awarded were filed under title VII of the Civil Rights Act. Some of these awards involved pretrial disputes rather than adverse decisions on the merits. See enclosure IV for more details on other fee-shifting statutes applicable at NLRB, DOL, and EEOC.

AGENCY COMMENTS

We provided a draft of this correspondence for review and comment to officials at NLRB, DOL, and EEOC. The officials at the three agencies did not take issue with the contents of the draft correspondence; therefore, we have not included formal written comments as a separate enclosure. However, we have incorporated, where appropriate, technical comments and suggested clarification of certain statements the three agencies' officials provided during discussions with us.

As we arranged with your offices, unless you publicly announce the contents of this correspondence earlier, we plan no further distribution until 21 days from its date. We will then send copies to the appropriate House and Senate committees, the Chairman of the National Labor Relations Board, the Chairman of the Equal Employment Opportunity Commission, and the Secretary of Labor, and we will make copies available to others on request.

B-278335

Please contact me at (202) 512-7014 if you or your staff have any questions concerning this correspondence. Major contributors to this correspondence include Larry Horinko, Assistant Director, Jacqueline Harpp, Evaluator-in-Charge, and Julian Klazkin of the Office of General Counsel.

for *Cornelia M. Blanchette*
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Enclosures - 4

EQUAL ACCESS TO JUSTICE ACT BACKGROUND AND
LEGISLATIVE HISTORY

The Equal Access to Justice Act (EAJA) was enacted in 1980. EAJA became effective in 1981 for a 3-year period, but in 1985 it became permanent law. The act seeks to (1) encourage parties that are the subject of unreasonable federal government action to seek reimbursement for attorneys' fees and other costs, (2) restrain overzealous regulators, and (3) ensure that the government pays for the cost of refining and formulating public policy.⁴ The act's premise is that individuals, corporations, partnerships, and labor and other organizations did not seek review of or defend against unreasonable government actions because of the expense involved, which was compounded by the disparity in expertise and resources between the government and the individual or organization involved. EAJA was enacted to help ensure that administrative actions are based on informed deliberation and that decisions to contest such actions are based on the merits and not the cost of litigating.

Congressional interest in alleviating this perceived problem increased significantly in the 1970s and culminated in the enactment of EAJA in 1980. EAJA allows the prevailing party to collect attorneys' fees from the federal government (1) to the same extent fees would be available to a private plaintiff by statute or under the common law (for example, when a party acts in bad faith), (2) in adversarial agency adjudications (that is, those in which the agency takes a position through representation by counsel or otherwise in cases other than licensing and rate fixing), and (3) in civil court actions brought by or against the United States. Attorneys' fees may be paid generally only if the agency position was not substantially justified. EAJA's use has other limits. The law does not apply if another statute provides for the payment of attorneys' fees.⁵ Also, it is only available to individuals whose net worth does not exceed \$2 million and to organizations and corporations that have no more than 500 employees and a net worth of \$7 million or less. Although attorneys'

⁴According to some in the Congress, parties who choose to litigate an issue against the federal government help refine and formulate public policy by ensuring the legitimacy and fairness of the law being contested. Where policy changes are required, some believe that the costs should be borne by the government.

⁵As of December 1996, approximately 180 other federal laws provide for fee-shifting. These include title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act, which the Equal Employment Opportunity Commission (EEOC) administers. The Fair Labor Standards Act and the Labor Management Reporting and Disclosure Act are enforced by the Department of Labor (DOL) and also provide for fee-shifting. More general laws, such as the Freedom of Information Act and the Privacy Act, apply to all federal agencies.

fees were originally limited to \$75 per hour, the limit was raised to \$125 when EAJA was amended in 1996.⁶ In exceptional cases, higher fees may be allowed. The net worth and hourly fee restrictions of EAJA do not apply in cases in which attorneys' fees are authorized by other statutes or common law.

A standard of "substantially justified" was chosen because it balances the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights. When EAJA was being crafted, other standards were considered and rejected. For example, automatic awards to prevailing parties were considered but rejected because it was believed that this approach did not account for the reasonable and legitimate exercise of government functions and, therefore, might have a chilling effect on proper government enforcement efforts. A purely discretionary standard was also considered and rejected because it was thought to provide no direction for the agencies, and federal agencies are naturally reluctant to award fees against themselves. Finally, a standard awarding fees only when the government's action was held to be arbitrary, frivolous, unreasonable, or groundless was also rejected because it was thought to be too restrictive on parties claiming reimbursement for attorneys' fees.

REQUIREMENTS FOR CLAIMING ATTORNEYS' FEES UNDER EAJA

EAJA requires that each federal agency establish uniform procedures for the submission and consideration of applications for fees and expenses after consultation with the Chairman of the Administrative Conference of the United States. The act further provides that, if a court reviews the agency's administrative proceeding, an award for fees and other expenses may be made only through the courts. The application or claim for fees under EAJA must be made to the same federal agency in which the hearing was held within 30 days of the final disposition of the case or, in the case of a court review, directly to the court. The application should include a statement that the applicant is the prevailing party and that the position of the government was not substantially justified. Also, the application must include a statement that the applicant is eligible to receive an award under EAJA. The application should include the amount of fees being requested along with an itemized statement from attorneys, agents, or expert witnesses showing the actual time spent and the rate at which fees and other expenses were computed. When the application is complete, the federal agency reviews it to determine eligibility and whether the

⁶This amendment also authorized the payment of fees to parties who do not prevail if the demand by the government is unreasonable and substantially in excess of the amount awarded by the court or adjudicative officer.

agency will deny, grant, or seek to settle the claim for fees. The agency may reduce or deny an award to the extent that the prevailing party unreasonably delayed the proceedings. Generally, fees and other expenses awarded under EAJA may be paid from any funds made available to the agency by appropriation or other sources.

Applicants can appeal agencies' decisions to the courts within 30 days of an agency's disposition of the applicant's claim. In cases in which fee applications are first submitted to the courts, they must include the same type of information required in applications to agencies. Fees and expenses awarded through the courts are also paid from the agency's appropriations.

EAJA DATA GOVERNMENTWIDE

Detailed information on EAJA applications for and reimbursement of attorneys' fees and related expenses was compiled from all federal government agencies and reported to the Congress during fiscal years 1982-94. After fiscal year 1994, centralized agency reporting on EAJA was no longer required and, as a result, the collection of such data within the agencies varied widely. According to governmentwide reports prepared during fiscal years 1982-94, about 8,400 applications for reimbursement of fees and expenses were filed, more than 6,200 were granted, and about \$34 million was awarded. Applications involving SSA accounted for at least 83 percent of the claims granted and about 48 percent of the amounts awarded.

EAJA ORIGINALLY REQUIRED
GOVERNMENTWIDE REPORTING

EAJA originally provided for governmentwide reporting on use and cost. It required that the Chairman of the Administrative Conference of the United States, consult with the Chief Counsel for Advocacy of the Small Business Administration and report annually to the Congress on the amount of fees and other expenses awarded administratively by federal agencies during each fiscal year. The report was to describe the number, nature, and amounts of the awards, the claims involved, and any other relevant information deemed necessary to aid the Congress in evaluating the scope and effect of EAJA awards. Each agency was required to provide the chairman with data necessary to meet the reporting requirements. For judicial proceedings, EAJA required the Director of the Administrative Office of the United States Courts to annually report on EAJA court activity on the same elements that federal agencies were required to report.

The Federal Courts Administration Act of 1992 eliminated the requirement that the Director of the Administrative Office of the United States Courts submit an EAJA report annually to the Congress and transferred the reporting responsibility to the Attorney General at the Department of Justice. To effect a smooth transition of the reporting responsibility to the Department of Justice, the Administrative Office of the United States Courts continued to collect EAJA data on court cases with the goal of completing the transition to Justice by the end of fiscal year 1993. The final report of the Administrative Office of the United States Courts covered data for fiscal year 1992.

REQUIRED EAJA GOVERNMENTWIDE REPORTING
ENDED AFTER FISCAL YEAR 1994

The last governmentwide reporting on both administrative and court proceedings was in fiscal year 1994. For administrative proceedings, the Chairman of the Administrative Conference of the United States maintained responsibility for reporting data annually to the Congress on agencies' EAJA activity until October 31, 1995. On that date, the Chairman submitted a final report covering fiscal year 1994 data and reported that the Administrative Conference had not received an appropriation for fiscal year 1996 and ceased operations. As a result, no other annual reports were submitted to the Congress, and some agencies maintained only data needed to serve specific needs, such as amounts awarded.

In December 1995, the Federal Reports Elimination and Sunset Act of 1995 was enacted, repealing the Attorney General's reporting requirement for EAJA. The Attorney General's report on court litigation for fiscal year 1995 activity was prepared in draft in July 1996, but because this act eliminated the need to submit the report to the Congress, the report was not put into final form. As a result, the annual report submitted by the Attorney General in fiscal year 1994 was the last report on governmentwide court litigation.

GOVERNMENTWIDE DATA ON EAJA
IN FISCAL YEARS 1982-94

Administrative Process

Between fiscal years 1982 and 1994, 1,593 applications were filed through federal agencies' administrative processes, and the agencies granted 604 of the applications and awarded about \$4.5 million in attorneys' fees and expenses. As table II.1 shows, the number of applications filed and granted varied from year to year and no discernible trends were evident. Likewise, the amounts awarded during this period varied yearly. No information was available to explain the differences in the number of claims and amounts awarded. Because agencies could not always act on all applications filed during a fiscal year, a backlog developed during fiscal year 1982 and continued over the years these data were collected and reported. As of fiscal year 1994, the last year data were provided governmentwide on agencies' administrative proceedings, 375 cases were backlogged at agencies.

Table II.1: EAJA Applications Filed and Amounts Awarded in Agencies' Administrative Processes, Fiscal Years 1982-94

Fiscal year	Number of applications		Amount awarded
	Filed	Granted	
1982	103	0	0
1983	88	8	\$ 35,934
1984	146	13	121,944
1985	56	11	200,096
1986	128	21	107,141
1987	267	30	214,321
1988	210	281	513,796
1989	102	56	577,077
1990	104	34	963,624
1991	128	48	433,642
1992	97	57	734,434
1993	100	33	346,495
1994	64	12	281,517
Total	1,593	604	\$4,530,027

Court Process

From fiscal year 1982 through 1994, the courts decided 6,773 applications, granting 5,642 and awarding \$29.6 million in fees and expenses under EAJA, as shown in table II.2. Records on EAJA court activity included data from the U.S. Courts of Appeals, Court of International Trade, U.S. Claims Court, and U.S. District Courts. The Department of Health and Human Services (HHS) generally had the largest number of applications decided in each fiscal year. Most of these addressed disability benefits under the Social Security Act. The Department of Veterans Affairs (VA) had the second largest number of applications reported in fiscal year 1994, as shown in table

II.3, which gives a general indication of EAJA activity by agency for the last fiscal year data were centrally reported.

Table II.2: Court Decisions on Applications for EAJA Awards for All Federal Agencies, Fiscal Years 1982-94

Fiscal year ^a	Number of applications		Amount awarded
	Decided ^b	Granted	
1982	33	12	\$ 703,916
1983	133	52	1,717,094
1984	377	157	1,270,682
1985	562	407	1,851,300
1986	657	555	2,533,126
1987	482	387	3,844,431
1988	498	402	1,994,299
1989	503	413	1,850,906
1990	412	371	2,179,350
1991	281	253	1,233,487
1992	273	222	1,261,822
1993	263	232	1,001,181
1994 ^c	2,399	2,179	8,178,762
Total	6,773	5,642	\$29,620,368

^aData reported before fiscal year 1992 varied by time period, first covering October 1, 1981, through June 30, 1982. Subsequent years through 1991 appear to cover July through June.

^bNumbers represent totals for decisions rendered by U.S. Courts of Appeals, U.S. Court of International Trade, U.S. Claims Court, and U.S. District Courts.

^cThe large increase in applications and awards in fiscal year 1994 was attributed to a change in data collection methods. Most of this increase was caused by SSA cases.

Table II.3: Court Decisions on Agency Applications for EAJA Awards, Fiscal Year 1994

Agency	All applications decided	Applications granted	Amount awarded
Department of Defense	21	21	\$ 468,321
Department of Energy	1	1	51,458
Department of Health and Human Services	2,206	2,013	6,583,523
Department of Housing and Urban Development	1	1	6,899
Department of Justice	2	2	36,960
Department of Labor	3	1	990
Department of Transportation	2	2	157,449
Department of the Treasury	5	3	190,519
Department of Veterans Affairs	143	128	491,240
Federal Deposit Insurance	3	1	21,380
Federal Election Commission	2	1	54,610
National Aeronautics and Space Administration	1	0	0
National Labor Relations Board	5	2	35,000
Railroad Retirement Board	2	2	62,787
Securities and Exchange Commission	2	1	17,627
Total	2,399	2,179	\$8,178,763

EAJA ACTIVITY AT NLRB, DOL, AND EEOC

The implementation of EAJA at NLRB, DOL, and EEOC showed varying numbers of applications filed and decided since EAJA was enacted. NLRB had the largest numbers of EAJA applications, while EEOC had the fewest between fiscal years 1982 and 1997. Our review of the programs administered at the three agencies shows that fee-shifting laws other than EAJA may be relied on at DOL and EEOC but not at NLRB.

NLRB

NLRB is an independent federal agency created in 1935 by the Congress to administer the National Labor Relations Act, the basic law governing relations between labor unions and business enterprises engaged in interstate commerce. NLRB has two principal functions under the act: (1) to determine and implement, through secret ballot elections, the free democratic choice by employees as to whether they wish to be represented by a union in dealing with their employers and, if so, by which union, and (2) to prevent and remedy unlawful acts, called unfair labor practices, by employers or unions or both. NLRB has five board members and a general counsel. The president appoints board members to 5-year terms and the general counsel to a term of 4 years. The offices of the board and the general counsel are in Washington, D.C. Thirty-three regional and other field offices across the country and in Puerto Rico, under the supervision of the general counsel, implement the act. NLRB enforcement efforts are initiated by the filing of a "petition" to conduct representation elections or the filing of a "charge" of an unfair labor practice.

Charges of unfair labor practices constitute a major segment of NLRB's workload. NLRB's general counsel investigates charges filed and determines whether a formal complaint is warranted that may lead to a board decision. NLRB employs administrative law judges (ALJ) to hear and decide cases in which formal complaints have been issued. The ALJs' decisions may be appealed to the board by filing exceptions; if no exceptions are filed, the ALJs' orders become orders of the board. NLRB has no independent statutory power of enforcement of its decisions and orders. However, the board may seek enforcement in the U.S. courts of appeals, and parties to board cases may also seek judicial review. Certain types of cases, such as those in which the board seeks an injunction, must be first heard in the district courts.

EAJA at NLRB

In fiscal year 1995, NLRB received more than 200,000 inquiries relating to employment or other labor relations concerns, which may or may not relate to unfair labor practices. During the same year, NLRB received more than 34,000 charges that the agency investigated. Such charges may result in dismissals, withdrawals, or

settlements before the agency issues a formal complaint against employers or unions. Employers and unions may seek fees under EAJA if they prevail in whole or in a discrete part of a case in which NLRB has issued a complaint against them. NLRB reported issuing more than 3,000 formal complaints based on its investigation of charges in fiscal year 1995. Complaints may be settled or withdrawn or they may result in trials and decisions from the agency's ALJs or actions that go directly to the board for decisions. NLRB reported that 531 cases went to trial and resulted in decisions from ALJs in fiscal year 1995. While the potential universe of EAJA claims at NLRB thus numbers in the thousands, the number of cases in which a respondent prevails in whole or part is considerably smaller. Smaller still is the number of respondents who prevail and who also meet the financial eligibility requirements for recovering EAJA fees. However, since the data that the agency gathers in determining whether it has jurisdiction to issue a complaint may differ significantly from the data it gathers to determine EAJA eligibility, according to NLRB, it is not feasible to estimate the precise number of entities actually eligible to recover EAJA fees.

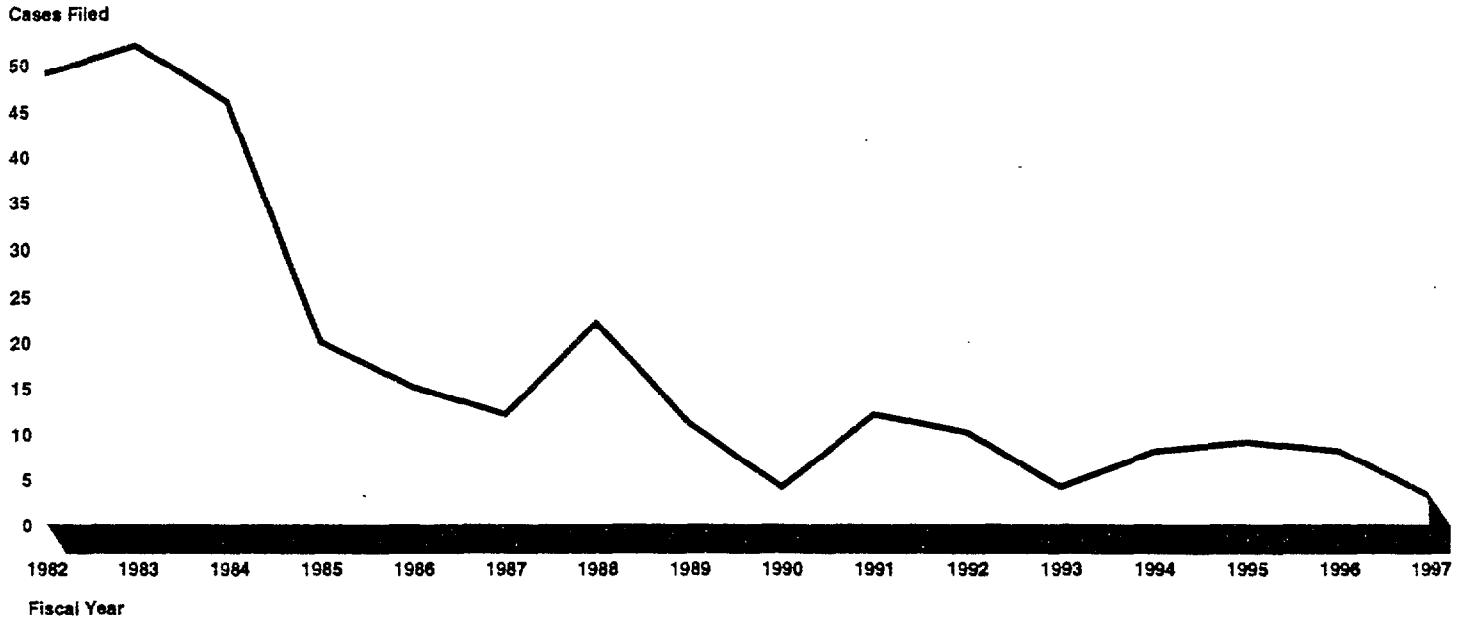
According to NLRB officials, when an EAJA application is filed it is referred to an ALJ for disposition. If the EAJA claim is not first settled, the ALJ's decision constitutes a recommendation to the board, which makes the final decision to grant, deny, or settle EAJA cases. The ALJs' decisions can be appealed to the board and the board's decisions can be appealed to a circuit court. In some cases, EAJA claims must be filed directly in a circuit court or a district court.

Applications for EAJA fees and expenses may be filed with NLRB or the courts; however, data were not readily available on the number of cases filed with the courts. NLRB maintained data on the number of applications filed with the agency and the number of applications decided by the courts that showed a total of 348 applications decided, 59 claims granted, and about \$1.5 million awarded in attorneys' fees and expenses.

Applications Filed and Decided at NLRB

During fiscal years 1982 through 1997, NLRB reported receiving 285 EAJA applications and the agency decided 234 of these claims, granting 32 claimants attorneys' fees and expenses totaling \$730,036. Figure III.1 illustrates EAJA applications filed between fiscal years 1982 and 1997. Table III.1 shows the board's decisions during the same period.

Figure III.1: Number of EAJA Cases Filed With NLRB in Fiscal Years 1982-97



Source: NLRB annual reports, fiscal years 1982-97.

Table III.1: Board Decisions on EAJA Applications at NLRB, Fiscal Years 1982-97

Fiscal year	Number of applications		Amount of fees and expenses awarded
	Decided	Granted	
1982	17	0	0
1983	37	0	\$ 23,941 ^a
1984	35	3	39,226
1985	26	2	69,153
1986	31	6	126,620
1987	7	1	126,766
1988	8	5	106,042
1989	24	3	40,534
1990	12	1	14,415
1991	5	0	28,400 ^a
1992	9	3	60,822
1993	4	0	0
1994	2	2	31,900
1995	7	3	36,553
1996	8	1	11,319
1997	2	2	14,345
Total	234	32	\$730,036

^aAlthough NLRB records showed these as fees and expenses awarded, NLRB officials explained that they were probably not amounts awarded by NLRB but (1) may have represented settlements or cases decided by ALJs and not appealed to NLRB but became orders of NLRB or (2) were applications that were granted in one fiscal year but paid in another.

Court Decisions

NLRB's EAJA activity in the courts included three cases decided in fiscal years 1988, 1995, and 1997 totaling \$33,050 in amounts awarded through the district courts and 111 applications decided in the circuit court of appeals. Table III.2 shows the number of EAJA applications decided by the circuit court, the number granted, and the amounts awarded during fiscal years 1982 through 1997.

Table III.2: Circuit Court of Appeals Decisions of NLRB EAJA Applications, Fiscal Years 1982-97

Fiscal year	Number of applications		Amount of fees and expenses awarded
	Decided	Granted	
1982	8	0	0
1983	11	1	\$ 16,490
1984	16	0	0
1985	12	1	13,264
1986	9	3	43,652
1987	7	1	25,000
1988	5	2	70,952
1989	6	2	43,957
1990	6	1	150,000
1991	3	2	32,532
1992	5	4	107,428
1993	4	3	100,423
1994	4	2	35,500
1995	0	0	0
1996	8	0	0
1997	6	3	57,585
Total	111	24	\$696,783

DOL

DOL's mission is to foster, promote, and develop the welfare of U.S. wage earners; improve their working conditions; and advance their opportunities for profitable employment. Established as a department in 1913, DOL administers and enforces a variety of federal labor laws guaranteeing workers' rights to workplaces free from safety and health hazards, a minimum hourly wage and overtime pay, unemployment insurance, and workers' compensation. DOL also protects workers' pension rights; provides for job training programs; helps workers find jobs; and tracks changes in employment, prices, and other national economic measurements. DOL is headed by the Secretary of Labor, who is nominated by the president and confirmed by the Senate. DOL consists of 26 offices headquartered in Washington, D.C., that are responsible for carrying out its mission through more than 1,000 field offices across the country.

Our review of the myriad laws governing DOL's varied functions showed that some programs and activities are subject to other fee-shifting legislation that may have affected the extent to which EAJA claims occur at DOL. Enclosure IV names other fee-shifting statutes applicable to DOL's programs and activities.

EAJA at DOL

Available data on EAJA activity at DOL showed that 177 applications were filed or decided, 74 claims were granted, and \$693,336 was awarded in both administrative and court proceedings during fiscal years 1982-97. Data on EAJA applications came primarily from data reported governmentwide for fiscal years 1982-94 as DOL officials reported that its records of EAJA activity before 1991 were not readily available. Also, in fiscal years 1995-97, DOL collected information only on applications granted and amounts of fees and expenses awarded.

Administrative Process

DOL reported that 143 applications had been filed through the administrative process and 60 applications were granted and awards totaled \$373,246, as shown in table III.3.

Table III.3: Administrative Decisions on Applications for EAJA Awards for DOL, Fiscal Years 1982-97

Fiscal year	Number of applications		Amount awarded ^a
	Filed	Granted ^a	
1982	10	0	^b
1983	17	12	^b
1984	22	3	\$ 23,839
1985	8	6	28,443
1986	4	1	8,392
1987	13	9	25,886
1988	12	6	18,830
1989	15	5	10,162
1990	13	3	16,907
1991	6	4	25,449
1992	3	1	15,230
1993	5	3	38,152
1994	15	0	0
1995	^c	6	159,647
1996	^c	^c	^c
1997	^c	1	2,309
Total	143^d	60	\$373,246

^aNumber of applications granted and amount awarded may represent totals from other than the current year.

^bData were not provided.

^cIn fiscal years 1995-97, DOL did not collect information on EAJA applications filed.

^dThis represents the total for fiscal years 1982-94.

Court Process

DOL reported that 34 applications were decided through the courts between fiscal years 1982 and 1997, of which 14 were granted, and amounts awarded totaled \$320,090. DOL did not maintain data showing the number of applications filed through the courts for fiscal years 1995-97. Table III.4 shows applications the courts decided between fiscal years 1982 and 1997.

Table III.4: Court Decisions on Applications for EAJA Awards Involving Labor, Fiscal Years 1982-97

Fiscal year ^a	Number of applications		Amount awarded
	Decided	Granted	
1982	3	1	\$ 12,930
1983	3	2	23,408
1984	10	3	66,643
1985	4	0	0
1986	3	3	63,955
1987	1	0	0
1988	2	1	40,000
1989	2	0	0
1990	1	1	40,000
1991	0	0	0
1992	1	0	0
1993	0	0	0
1994	3	1	990
1995	^b	1	2,500
1996	^b	0	0
1997	^b	1	69,664
Total	34^c	14	\$320,090

^aData reported before fiscal year 1992 varied by time period, first covering October 1, 1981, through June 30, 1982. Subsequent years through 1991 appear to cover July through June.

^bIn fiscal years 1995-97, DOL did not collect information on EAJA applications decided.

^cThis represents the total for fiscal years 1982-94.

EEOC

EEOC was created by title VII of the Civil Rights Act of 1964 and became operational July 2, 1965. EEOC is responsible for enforcing equal employment opportunity laws and regulations designed to eliminate discrimination based on race, color, religion, sex, national origin, disability, or age in hiring, promoting, firing, setting wages, testing, training, apprenticeship, and all other terms and conditions of employment. EEOC conducts investigations of alleged discrimination, makes determinations based on gathered evidence, attempts conciliation when it finds that discrimination has taken place, files lawsuits, and conducts voluntary assistance programs for employers, unions, and community organizations. EEOC also has adjudicatory and oversight responsibility for all compliance and enforcement activities relating to employment opportunity among federal employees and applicants, including discrimination against individuals with disabilities.

EEOC is composed of five commissioners appointed by the president, with the consent of the Senate, for 5-year staggered terms. The president designates a chairman and a vice chairman. The president also appoints the general counsel for a 4-year term. EEOC operates through 50 field offices, each of which processes charges.

EAJA at EEOC

EEOC does not have administrative authority to award fees under EAJA. Parties seeking fees under EAJA must apply to the courts. EEOC does not keep records on EAJA cases decided by the courts. Between fiscal years 1982 and 1997, EEOC identified only one EAJA court case, for which attorneys' fees and costs totaling \$264,328 were paid. This case emanated from a decision under the Age Discrimination in Employment Act.

OTHER FEE-SHIFTING STATUTES THAT MAY APPLY

EAJA does not apply to all agency hearings. It does not apply when other fee-shifting statutes already provide for fees in a given situation. Nor does it apply to rate making, licensing, or nonadversarial hearings. The Congressional Research Service identified about 180 different fee-shifting statutes other than EAJA as of December 1996. Some fee-shifting statutes apply only to certain federal agencies, while other fee-shifting statutes, such as the Freedom of Information Act and the Privacy Act apply to all federal agencies. Our review showed that 12 fee-shifting statutes apply to DOL and EEOC. No fee-shifting statutes other than EAJA applied to proceedings before NLRB.

Eight other fee-shifting statutes apply to DOL proceedings. However, DOL does not maintain data showing the number of cases filed and granted or amounts paid under these statutes. EEOC proceedings involve four other fee-shifting statutes, two of which provide for fee-shifting only to the prevailing plaintiffs. Some courts have held that EAJA would still be available to the prevailing defendants other than the federal government. EEOC identified 116 cases filed under fee-shifting statutes other than EAJA, and the amounts paid out totaled about \$1.2 million in attorneys' fees and costs between March 1981 and February 1997. Table IV.1 shows the fee-shifting statutes applicable to the agencies we reviewed.

Table IV.1: Other Fee-shifting Statutes Applicable at DOL, EEOC, and NLRB, December 1997

Agency	Statute
Department of Labor	Black Lung Benefits Act Employee Polygraph Protection Act Employee Retirement Income Security Act Fair Labor Standards Act Family and Medical Leave Act Federal Coal Mine Health and Safety Act of 1969 Labor Management Reporting and Disclosure Act Longshore and Harbor Workers' Compensation Act
Equal Employment Opportunity Commission	Age Discrimination in Employment Act of 1967 ^a Americans With Disabilities Act of 1990 Civil Rights Act of 1964, title VII Equal Pay Act of 1963 ^a
National Labor Relations Board	None

^aFees for prevailing plaintiffs only.

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