Michigan Law Review

Volume 92 | Issue 7

1994

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Recommended Citation

Matthew J. Fischer, *The Equal Access to Justice Act--Are the Bankruptcy Courts Less Equal than Others?*, 92 MICH. L. REV. 2248 (1994).

Available at: <https://repository.law.umich.edu/mlr/vol92/iss7/5>

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The Equal Access to Justice Act — Are the Bankruptcy Courts Less Equal than Others?

Matthew J. Fischer

INTRODUCTION

In 1980, Congress passed the Equal Access to Justice Act (EAJA),¹ which allows courts and agencies to award costs and fees, including attorney's fees, to parties who prevail in litigation against the federal government.² In the absence of another statute specifically providing for a fee award, the EAJA mandates such an award unless the court finds that the government's position was substantially justified or that special circumstances make such an award unjust.³ Prior to the enactment of the EAJA, the federal government was immune from statutory and common law fee-shifting provisions

1. Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, 94 Stat. 2321, 2325 (1980) (codified as amended at 5 U.S.C. § 504, 28 U.S.C. § 2412 (1988 & Supp. IV 1992)). The EAJA provides, in relevant part:

§ 2412 Costs and Fees

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in § 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. . . .

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award. . . .

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. . . .

(d)(2)(F) "court" includes the United States Court of Federal Claims and the United States Court of Veterans Appeals
28 U.S.C. § 2412 (1988 & Supp. IV 1992).

2. 5 U.S.C. § 504, 28 U.S.C. § 2412 (1988). A party "prevails" over the federal government when it obtains a favorable ruling or settlement, even if it does not "prevail" on all the issues in the litigation. H.R. REP. NO. 1418, 96th Cong., 2d Sess. 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4990. For two examples of prevailing parties in the bankruptcy context, see *infra* notes 23, 31.

3. 28 U.S.C. § 2412(d)(1)(A) (1988).

under the doctrine of sovereign immunity.⁴ The EAJA thereby puts the government on equal footing with nongovernment litigants potentially subject to fee-shifting. The EAJA grants fee-shifting authority to “any court having jurisdiction of such action.”⁵

Courts and commentators currently dispute whether the EAJA grants the federal bankruptcy courts authority to shift fees against the federal government.⁶ A split between the Tenth and Eleventh Circuits frames the controversy. The Tenth Circuit has held that Congress granted EAJA authority to the bankruptcy courts,⁷ whereas the Eleventh Circuit has ruled that bankruptcy courts are not “any court” within the meaning of the EAJA and thus cannot shift fees.⁸

The applicability of the EAJA to the bankruptcy courts is important because the federal government is either a lender or guarantor of more than \$870 billion in loans.⁹ In addition, the government assumes the role of creditor in many of its contractual relations by making progress or advance payments to contractors

4. See *Alyeska Pipeline Serv. Co. v. Wilderness Socy.*, 421 U.S. 240, 265-68 (1975). The statutory and common law exceptions to the “American rule” — that each party must bear its own legal expenses — are numerous. The American rule dictates that a prevailing litigant is not entitled to collect reasonable attorney’s fees from the loser. 421 U.S. at 247. Although the Supreme Court in *Alyeska* rejected the “private attorney general” exception to the American rule in cases involving the federal government, 421 U.S. at 265-68, the Court recognized the “common fund” and bad faith exceptions to the rule. 421 U.S. at 257-59. Other exceptions are established by statute, including Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1988); Title III of the Organized Crime Act, 18 U.S.C. § 2520(b)(3) (1988); the Clayton Act, 15 U.S.C. § 15(a) (1988); the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1988); the Voting Rights Act of 1965, 42 U.S.C. § 1973l(e) (1988); the Consumer Product Safety Act, 15 U.S.C. §§ 2060(c), (f), 2072(a), 2073 (1988); and the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988). For a general discussion of the American rule and its exceptions, see Fred B. Westfall, Note, *The Equal Access to Justice Act: How to Recover Attorneys’ Fees & Litigation Expenses from the United States Government*, 13 U. Tol. L. Rev. 149, 150-55 (1981).

5. 28 U.S.C. § 2412(a), (b) (1988) (emphasis added).

6. The law clearly permits bankruptcy courts to shift fees and costs against *private* litigants. See 11 U.S.C. § 362(h) (1988) (providing for award of fees for willful violation of a stay of actions against property); FED. R. BANKR. P. 7054 (providing for award of costs); FED. R. BANKR. P. 9011 (providing for sanctions including fees and costs); see also *infra* note 171.

7. *O’Connor v. U.S. Dept. of Energy*, 942 F.2d 771-74 (10th Cir. 1991); see also Charles R. Haywood, Note, *The Power of Bankruptcy Courts to Shift Fees under the Equal Access to Justice Act*, 61 U. Chi. L. Rev. 985 (1994). The Chicago Note was published immediately prior to publication of this Note; it reaches the same conclusion and addresses some of the arguments examined here.

8. *Gower v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136, 1139-40 (11th Cir.), cert. denied, 498 U.S. 981 (1990).

9. As of 1992, \$157 billion was owed to the United States under various direct lending programs. OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1994, at 51 (1993). The government also had guaranteed \$587 billion worth of outstanding loans as of 1992. *Id.* The federal government accounted for 18.2% of all lending in this country between 1987 and 1991. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 336, No. 518 (113th ed. 1993) (calculating this figure using a weighted average of each of the five years in question).

under long-term deals.¹⁰ The government also often takes title or a secured position in the goods being manufactured under contract, potentially leading to litigation if the contractor files for bankruptcy.¹¹ The likely bankruptcy of some percentage of government borrowers and contractors will continue to require the federal government to appear in the bankruptcy courts as an interested creditor.¹² The federal government, just like any other creditor, must file a proof of claim in bankruptcy to establish the priority of its liens.¹³

Furthermore, any time a party indebted to the government files for bankruptcy, potential litigation issues arise regarding compliance with the automatic stay, preference, and permanent injunction provisions of the bankruptcy code.¹⁴ The federal government, spe-

10. See, e.g., 10 U.S.C. § 2307 (1988) (authorizing military agencies to make advance payments under contracts if adequate security is obtained and the public interest is served); 41 U.S.C. § 255 (1988) (authorizing any executive agency to make advance payments under contracts if adequate security is obtained and the public interest is served); see also *United States v. Lindberg Corp.*, 882 F.2d 1158 (7th Cir. 1989) (enforcing the United States' title to work-in-progress inventory after manufacturer's insolvency); *In re American Pouch Foods, Inc.*, 769 F.2d 1190 (7th Cir. 1985), cert. denied, 475 U.S. 1082 (1986); *United States v. Wincom Corp. (In re Wincom Corp.)*, 76 B.R. 1 (Bankr. D. Mass. 1987). In addition, the government finances health care providers through the Medicare program by making interim payments to participating providers, 42 U.S.C. § 1395g(e) (1988); 42 C.F.R. § 413.64 (1992), as well as estimated advances for capital expenses. 42 C.F.R. § 412.116 (1992). The government sometimes makes overpayments which might lead to litigation if the provider files for bankruptcy. See, e.g., *University Medical Ctr. v. Sullivan (In re University Medical Ctr.)*, 973 F.2d 1065 (3d Cir. 1992).

11. The government sometimes sues the debtor for possession of the goods manufactured to date. See, e.g., *United States v. Wincom Corp. (In re Wincom)*, 76 B.R. 1 (Bankr. D. Mass. 1987); *United States v. Economy Cab & Tool Co. (In re Economy Cab & Tool Co.)*, 47 B.R. 708 (Bankr. D. Minn. 1985). Litigation may also arise between the government and other creditors of the debtor who claim the identical collateral. See, e.g., *United States v. Ansonia Brass & Copper Co.*, 218 U.S. 452 (1910); *First Natl. Bank of Geneva v. Biallas (In re Denalco Corp.)*, 51 B.R. 77 (Bankr. N.D. Ill. 1985), appeal dismissed for lack of jurisdiction, 57 B.R. 392 (N.D. Ill. 1986). Occasionally, the government becomes simultaneously involved in both types of suits. See, e.g., *United States Dept. of Energy v. Reynolds Mfg. Co. (In re Reynolds Mfg. Co.)*, 68 B.R. 219 (Bankr. W.D. Pa. 1986).

12. The increasing prevalence of bankruptcy filings may also increase participation by the federal government in bankruptcy adjudications. As of March 31, 1993, 1,197,589 bankruptcy cases were pending. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS, MARCH 31, 1993, at 6-7 (1993) [hereinafter WORKLOAD STATISTICS]. Although the number of cases filed during the 12 months ending on March 31, 1993, was 2.7% less than the prior 12 months, it was the first decrease in 10 years. *Id.* at 5-6 & tbl. 5. The number of cases filed annually has increased from 623,413 in 1989 to 939,935 in 1993, representing a 66.3% increase over 5 years. *Id.*

13. See 11 U.S.C. § 501 (1988). Although federal law determines the priority of any lien held by the federal government, a federal lien enjoys no automatic superiority to state liens held by other creditors. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979) (adopting state law to govern federal security interests).

14. See, e.g., *Gower v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136 (11th Cir.) (noting that bankruptcy court has jurisdiction over voidable preference action), cert. denied, 498 U.S. 981 (1990); *In re American Pouch Foods, Inc.*, 769 F.2d 1190 (7th Cir. 1985) (affirming government's relief from automatic stay), cert. denied, 475 U.S. 1082 (1986); *Inslaw, Inc. v. United States (In re Inslaw, Inc.)*, 76 B.R. 224 (Bankr. D.D.C. 1987) (referring to

cifically the Internal Revenue Service, is a frequent violator of the automatic stay¹⁵ and permanent injunction¹⁶ provisions of the bankruptcy code.¹⁷ The prevalence of federal lending and the increase in bankruptcy filings highlight the importance of a resolution to the question of the EAJA's applicability to the bankruptcy courts.¹⁸

This Note argues that the bankruptcy courts have authority under the EAJA to shift fees against the federal government. Part I discusses the relevant caselaw and examines the basis of the current controversy. Part II examines the statutory language, the legislative history, and the stated purposes of the EAJA and concludes that each of these aspects of the statute demonstrates a congressional intent to grant fee-shifting authority to the bankruptcy courts. Part III considers alternatives to finding bankruptcy court jurisdiction over EAJA disputes, rejecting each as inefficient and unnecessary. This Note concludes that courts should construe the EAJA consist-

injunctive powers of the bankruptcy court and implicating federal government for violation of automatic stay).

15. After a debtor files a bankruptcy petition, the automatic stay prohibits creditors from continuing or commencing any action to enforce judgments, collect debts, or perfect liens against the property of the debtor. 11 U.S.C. § 362(a) (1988). Some legal actions against the debtor are not prohibited, 11 U.S.C. § 362(b) (1988), and creditors may move to have the stay lifted for cause. 11 U.S.C. § 362(d) (1988).

16. The discharge of a debtor in bankruptcy acts as an injunction against commencement or continuation of collection actions with regard to discharged debts against the debtor or the debtor's property. See 11 U.S.C. § 524(a) (1988).

17. Due to an uncooperative computer, the IRS has not adequately controlled enforcement actions against tax debtors, a shortcoming that has resulted in numerous "opportunities" for the IRS to appear before the bankruptcy courts to try to explain its repeated violations of the bankruptcy code. One court observed:

In its more than two decade-long involvement as a practitioner, professor and judge in the bankruptcy system, this court has never encountered a more egregious flaunting of the bankruptcy system as that which it has seen by the IRS in this case. . . . This conduct has only been engaged in by those in charge of the IRS's computers.

Abernathy v. United States (*In re Abernathy*), 150 B.R. 688, 696 & n.10 (Bankr. N.D. Ill. 1993); see also *IRS v. Germaine* (*In re Germaine*), 152 B.R. 619, 629 (Bankr. 9th Cir. 1993) (letters and calls from IRS violating permanent injunction blamed on "computer error"); *Nichols v. IRS* (*In re Nichols*), 143 B.R. 104, 108 (Bankr. S.D. Ohio 1992) ("Multiple and egregious violations of the automatic stay go uncompensated, merely because the IRS is the violator."); *In re Solis*, 137 B.R. 121, 123 (Bankr. S.D.N.Y. 1992) (violation of automatic stay due to computer failure); *United States v. Fernandez* (*In re Fernandez*), 125 B.R. 317, 318 (Bankr. M.D. Fla.), *affd.*, 132 B.R. 775 (M.D. Fla. 1991), *revd.*, 94 T.N.T. 63-11 (M.D. Fla. 1994); *Cowart v. IRS* (*In re Cowart*), 128 B.R. 492, 497 (Bankr. S.D. Ga. 1990); *In re Price*, 103 B.R. 989, 992 (Bankr. N.D. Ill. 1989), *affd.*, 130 B.R. 259 (N.D. Ill. 1991); *In re Shafer*, 63 B.R. 194, 198 (Bankr. D. Kan. 1986); *In re Conti*, 50 B.R. 142, 144 (Bankr. E.D. Va. 1985); *In re Newlin*, 29 B.R. 781, 784 (E.D. Pa. 1983).

18. Despite the small decrease in bankruptcy filings, adversary proceedings are being brought faster than the bankruptcy courts can adjudicate them. As of March 31, 1993, 138,907 adversary proceedings were pending in the bankruptcy courts, a 24.1% increase from the prior year. WORKLOAD STATISTICS, *supra* note 12, app. tbl. F-8, at 85. In the 12 months prior to March 31, 1993, 100,412 adversary proceedings were filed and 73,449 were disposed of meaning there is over a one-year backlog in the bankruptcy courts for adversary proceedings. *Id.* See also *supra* note 12.

ently with its language, history, and purpose, and allow the bankruptcy courts to shift fees and costs against the federal government in appropriate cases.

I. THE CURRENT STATE OF THE CONTROVERSY

Although three circuit courts have decided cases presenting the issue of whether the bankruptcy courts may shift fees under the authority of the EAJA, only two have explicitly addressed the issue of jurisdiction.¹⁹ In *O'Connor v. United States Department of Energy*,²⁰ the Tenth Circuit held that bankruptcy courts could exercise EAJA power because they fall within the EAJA's jurisdictional grant to "any court." The Eleventh Circuit, however, concluded otherwise in *Gower v. Farmers Home Administration (In re Davis)*,²¹ holding that the bankruptcy courts cannot exercise EAJA power because they are not "courts of the United States" as defined in 28 U.S.C. § 451.²² This Part examines the position of each circuit in detail to set the stage for the comprehensive analysis of bankruptcy court jurisdiction under the EAJA in Part II.

A. The Tenth Circuit Position — O'Connor

The Tenth Circuit, in *O'Connor v. United States Department of Energy*,²³ held that a bankruptcy court may shift fees under the

19. *O'Connor v. United States Dept. of Energy*, 942 F.2d 771 (10th Cir. 1991); *Gower v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136 (11th Cir. 1990), cert. denied, 498 U.S. 981 (1990). In *United States Small Business Admin. v. Esmond (In re Esmond)*, 752 F.2d 1106 (5th Cir. 1985), the Fifth Circuit remanded the case to the bankruptcy court in order to give the parties an opportunity to present their evidence on the issue of the government's alleged substantial justification for its position. 752 F.2d at 1109. The appellate court apparently presumed that bankruptcy courts have authority to shift fees under the EAJA because it remanded the case for an evaluation of a defense to the claim for fees. 752 F.2d at 1109. This decision lends some credence to the argument that the plain meaning of the statute is clear. See *infra* section II.A.1. The *Esmond* case, however, lends only nominal support because the *Esmond* court did not explicitly consider whether the bankruptcy courts have jurisdiction under the EAJA.

20. 942 F.2d 771 (10th Cir. 1991).

21. 899 F.2d 1136 (11th Cir.), cert. denied, 498 U.S. 981 (1990).

22. Section 451, titled "Definitions," provides:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

28 U.S.C. § 451 (1988). This definition excludes the bankruptcy courts, which are constituted by chapter 6 of title 28. See 28 U.S.C. §§ 81-144, 151-58 (1988).

23. 942 F.2d 771 (10th Cir. 1991). In *O'Connor*, the Department of Energy filed a motion to enforce a reorganization plan and, alternatively, to convert the bankruptcy from a chapter 11 reorganization to a chapter 7 liquidation. 942 F.2d at 772. The bankruptcy court denied the motion and awarded attorney's fees under the EAJA to the prevailing party, O'Connor. 942 F.2d at 772. The district court reversed the award, relying on *Gower v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136 (11th Cir.), cert. denied, 498 U.S. 981 (1990). See *infra* section I.B. The debtor appealed. 942 F.2d at 772.

EAJA because bankruptcy courts fall within the plain meaning of “any court”²⁴ and because the inclusion of bankruptcy courts furthers EAJA policies.²⁵ The *O'Connor* court relied on its interpretation of the “plain meaning” of the EAJA, invoking the general principle that “[a] court should venture into the thicket of legislative history only when necessary to determine ‘a statutory purpose obscured by ambiguity.’”²⁶ The *O'Connor* court held that the plain meaning of “any court” includes the bankruptcy courts.²⁷

The *O'Connor* court also noted that Congress could have modified the term “any court” if it had intended to limit the jurisdictional reach of the EAJA to a specific subset of courts.²⁸ The court reasoned that the unmodified use of *court* supported its view that the plain meaning of “any court” included the bankruptcy courts.²⁹ In further support of its textual analysis, the *O'Connor* court also stated that its conclusion comports with the general purpose of the EAJA, namely to encourage citizens to challenge unreasonable government action despite the high cost of litigation.³⁰

B. The Eleventh Circuit Position — In re Davis

In *Gower v. Farmers Home Administration (In re Davis)*,³¹ the Eleventh Circuit held that the bankruptcy courts lack authority under the EAJA to shift fees because they are not “any court” within the meaning of the EAJA.³² The *Davis* court relied on two

24. *O'Connor*, 942 F.2d at 773.

25. 942 F.2d at 774.

26. 942 F.2d at 773 (quoting *Burlington N. R.R. Co. v. Oklahoma Tax Commn.*, 481 U.S. 454, 461 (1987)).

27. 942 F.2d at 773.

28. 942 F.2d at 773.

29. 942 F.2d at 773-74.

30. 942 F.2d at 774.

31. 899 F.2d 1136 (11th Cir.), *cert. denied*, 498 U.S. 981 (1990). Davis, the debtor, borrowed \$985,000 from the Farmers Home Administration (FmHA) and subsequently filed bankruptcy. 899 F.2d at 1137. Gower, the trustee, tried to recover payments made to the FmHA as preferential transfers under § 547(b) of the bankruptcy code. 899 F.2d at 1137 (construing 11 U.S.C. § 547(b), (c) (1988)). The bankruptcy court found the FmHA's conduct misleading toward other creditors, ordered the return of the payments, and equitably subordinated FmHA's claims. 899 F.2d at 1137. The trustee was therefore a prevailing party and the bankruptcy court awarded EAJA fees. The FmHA appealed. 899 F.2d at 1138.

32. 899 F.2d at 1138-42. The court also held that a bankruptcy trustee is not a “party,” 899 F.2d at 1142-45, defined in the EAJA as:

- i) an individual whose net worth did not exceed \$2,000,000 at the time the civil action was filed, or
- ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed.

28 U.S.C. § 2412(d)(2)(B) (1988). Because the Eleventh Circuit held that the trustee is not a party, it found the trustee ineligible to receive an award. 899 F.2d at 1145. Although the dispute surrounding the proper definition of “party” within the EAJA is beyond the scope of

sources to support its denial of jurisdiction: the precedent of *Bowen v. Commissioner of Internal Revenue*³³ and the legislative history of the EAJA.³⁴

In *Bowen*, the Eleventh Circuit held that the tax courts did not have jurisdiction to award EAJA fees to a prevailing party, relying on cross-references within title 28 and the unique position of the tax courts under title 26.³⁵ The *Bowen* court first noted that the EAJA allowed recovery of the "costs" enumerated in section 1920 of title 28.³⁶ Section 1920 is entitled "Taxation of Costs" and partially codifies the equitable power of the federal courts.³⁷ The *Bowen* court then noted that section 1920 states that costs may be shifted by a "court of the United States,"³⁸ a term that is defined in 28 U.S.C. § 451.³⁹ The court reasoned that the EAJA's reference to the costs enumerated in section 1920 also incorporated section 1920's jurisdictional limitation to "courts of the United States" as defined by section 451.⁴⁰ Therefore, the *Bowen* court held that EAJA fees

this Note, this footnote addresses the issue briefly because the jurisdictional authority of the bankruptcy courts to shift EAJA fees is of practical importance only if bankruptcy trustees are "parties" eligible to receive EAJA awards. The *Davis* court held that a trustee in bankruptcy is not an eligible party to receive an EAJA award because the trustee did not fit comfortably into the court's conception of "organization." 899 F.2d at 1144. The Eleventh Circuit, however, subsequently limited that part of the *Davis* holding to Chapter 7 trustees. *In re Brickell Inv. Corp.*, 922 F.2d 696, 702-03 (11th Cir. 1991). Because, at a minimum, Chapter 11 debtors in possession are eligible parties to receive awards, it is important to establish the authority of the bankruptcy court to make EAJA awards.

The *Davis* court also argued that the difficulty in applying the EAJA's net-worth and number-of-employees tests, see 28 U.S.C. § 2412(d)(2)(B) (1988), to bankruptcy trustees militates towards finding trustees outside the definition of "party" under the EAJA. 899 F.2d at 1144 n.18. For the purposes of this Note, it is sufficient to recognize that the net-worth and number-of-employees tests apply only to parties seeking mandatory awards under § 2412(d) and not to those seeking discretionary awards under § 2412(b). See *American Hosp. Assn. v. Sullivan*, 938 F.2d 216, 219 (D.C. Cir. 1991).

For further analysis of the definition of "party" under the EAJA, see *National Truck Equip. Assn. v. National Highway Traffic Safety Admin.*, 972 F.2d 669 (6th Cir. 1992); *Love v. Reilly*, 924 F.2d 1492 (9th Cir. 1991); *American Assn. of Retired Persons v. EEOC*, 873 F.2d 402 (D.C. Cir. 1989); *Louisiana ex rel. Guste v. Lee*, 853 F.2d 1219 (5th Cir. 1988); *Unification Church v. INS*, 762 F.2d 1077 (D.C. Cir. 1985); 46 Fed. Reg. 32,900, 32,912 (1981); *Ralph V. Seep*, Annotation, *Who is "Party" Entitled to Recover Attorneys' Fees Under Equal Access to Justice Act* (28 U.S.C.S. § 2412(d)), 107 A.L.R. FED. 827 (1992).

33. 706 F.2d 1087 (11th Cir. 1983).

34. *Davis*, 899 F.2d at 1138-40.

35. *Bowen*, 706 F.2d at 1088.

36. *Bowen*, 706 F.2d at 1088. The EAJA provides, "judgment for costs, as enumerated in § 1920 of this title . . . may be awarded . . ." 28 U.S.C. § 2412(a) (1988).

37. 28 U.S.C. § 1920 (1988); see *Sprague v. Ticonic Natl. Bank*, 307 U.S. 161, 164-65 (1939). The equitable power of the federal courts also allows courts to award attorney's fees to a litigant. See *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (affirming an award of attorney's fees based on the "inherent power" of a federal court).

38. Section 1920 states, "A judge or clerk of any court of the United States may tax as costs the following . . . [listing costs]." 28 U.S.C. § 1920 (1988).

39. See *supra* note 22.

40. *Bowen*, 706 F.2d at 1088.

may be shifted only by courts listed in section 451,⁴¹ even though the EAJA contains no explicit reference to section 451. Because section 451 does not include the tax courts, the Eleventh Circuit concluded that the tax courts lack EAJA authority.⁴² In *Davis*, the court held that the analysis of *Bowen* applied “unambiguously” to bankruptcy courts, which are also not included in section 451.⁴³

In addition to the statutory cross-referencing analysis adopted from the *Bowen* opinion, the *Davis* court also relied on a portion of the legislative history of the EAJA to exclude the bankruptcy courts from EAJA jurisdiction.⁴⁴ The court quoted House Report 1418, which states:

Section 2412(b) [of the EAJA] permits a court in its discretion to award attorney fees and other expenses to prevailing parties in civil litigation involving the United States to the same extent it may award fees in cases involving other parties. The courts so empowered are those defined in section 451 of title 28, United States Code.⁴⁵

This document plainly appears to restrict the courts eligible to shift EAJA fees to those enumerated in section 451. The *Davis* court buttressed its statutory argument with this seemingly unequivocal legislative history to hold that the bankruptcy courts lacked jurisdiction to award fees under the EAJA.⁴⁶

The circuit split defines the current state of the law on the bankruptcy court jurisdiction issue. Because the Tenth Circuit refused to examine the legislative history in House Report 1418 that appears to limit EAJA jurisdiction to the “courts of the United States” listed in section 451, evidence that the Eleventh Circuit considered probative, the Tenth and Eleventh Circuits simply argue past each other. No other courts have directly addressed the issue of bankruptcy court jurisdiction under the EAJA.⁴⁷ As a result, the bank-

41. 706 F.2d at 1088.

42. 706 F.2d at 1088.

43. *Gower v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136, 1139 (11th Cir.), cert. denied, 498 U.S. 981 (1990).

44. *Davis*, 899 F.2d at 1139.

45. 899 F.2d at 1139 (quoting H.R. REP. NO. 1418, *supra* note 2, at 17, reprinted in 1980 U.S.C.A.N. at 4996) (alteration in original). This statement, although describing subsection (b) of § 2412, informs the analysis of subsection (d) because of the similarity in the phrasing of the jurisdiction granting language in each subsection. Subsection (b) grants fee shifting authority to “any court having jurisdiction of such action,” 28 U.S.C. § 2412(b) (1988), which is nearly identical to the grant of subsection (d), which provides authority to “any court having jurisdiction of that action,” 28 U.S.C. § 2412(d)(1)(A) (1988). According to this piece of legislative history, it seems that EAJA power, in both subsections (b) and (d), is limited to the “courts of the United States” enumerated in § 451 of title 28.

46. 899 F.2d at 1140.

47. One bankruptcy court has awarded EAJA fees without consideration of the jurisdiction question. *Hagan v. Heckler (In re Hagan)*, 44 B.R. 59 (Bankr. D. R.I. 1984). Another bankruptcy court reached the merits of an EAJA dispute without discussion of the jurisdiction question. *In re Parks*, 84-2 U.S. Tax Cas. (CCH) ¶ 9744 (Bankr. N.D. Ohio 1984). In *United States Small Business Admin. v. Esmond (In re Esmond)*, 752 F.2d 1106 (5th Cir.

ruptcy courts are left without clear or consistent guidance on this issue.

II. INTERPRETING THE EAJA

Part I concluded that the current disagreement in the courts over whether the EAJA grants the bankruptcy courts authority to shift fees against the federal government reflects fundamentally different approaches to the question. This Part provides a comprehensive assessment of the arguments on either side, arguing that the EAJA's text, legislative history, and purposes support the conclusion that the statute includes the bankruptcy courts.⁴⁸ Section II.A argues that the plain meaning of the statute's jurisdictional grant covers the bankruptcy courts. This section also considers and re-

1985), the Fifth Circuit assumed that the bankruptcy courts had jurisdiction to adjudicate EAJA disputes. *See supra* note 19.

Courts have addressed bankruptcy court jurisdiction under 26 U.S.C. § 7430, the tax counterpart to the EAJA, which allows courts to award litigation costs to parties that prevail against the federal government in connection with the determination, collection, or refund of any tax under title 26. 26 U.S.C. § 7430 (1988). The EAJA is the model for 26 U.S.C. § 7430, *United States v. Germaine* (*In re Germaine*), 152 B.R. 619, 625 n.6 (Bankr. 9th Cir. 1993), but § 7430 supplants the EAJA for cases arising under the tax law. 28 U.S.C. § 2412(e) (1988); *Grewe v. United States* (*In re Grewe*), 4 F.3d 299, 301 (4th Cir. 1993); *Germaine*, 152 B.R. at 625 n.6. The EAJA and § 7430 have been and should be interpreted consistently. *See Powell v. Commissioner of Internal Revenue*, 791 F.2d 385, 390 (5th Cir. 1986) ("Absent some compelling reason to read the analogous phrases in the two statutes differently, they should be interpreted consistently."). The main distinction in the respective grants of jurisdiction is that the EAJA grants jurisdiction to "any court," *see* 28 U.S.C. § 2412(d)(1)(A) (1988), while § 7430 allows only a "court of the United States" to shift fees. *See* 26 U.S.C. § 7430(c)(6) (1988).

One would therefore expect courts to be less likely to allow bankruptcy courts to award § 7430 fees than EAJA fees because bankruptcy courts are not "courts of the United States" as that term is defined in 28 U.S.C. § 451 (1988). Many courts, however, have interpreted § 7430 to include the bankruptcy courts within the "courts of the United States." *See Germaine*, 152 B.R. at 619; *Abernathy v. United States* (*In re Abernathy*), 150 B.R. 688 (Bankr. N.D. Ill. 1993); *Kreidle v. Department of Treasury, IRS* (*In re Kreidle*), 145 B.R. 1007 (Bankr. D. Colo. 1992); *In re Chambers*, 140 B.R. 233 (N.D. Ill. 1992). *But see In re Brickell Inv. Corp.*, 922 F.2d 696, 696-97 (11th Cir. 1991) (holding that the bankruptcy court was not able to shift fees under § 7430 because it was not a "court of the United States"); *United States v. Yochum* (*In re Yochum*), 156 B.R. 816 (D. Nev. 1993) (holding that the bankruptcy courts are not courts of the United States for the purposes of § 7430). Other courts have assumed without discussion that the bankruptcy courts have jurisdiction under § 7430. *See Graham v. United States* (*In re Graham*), 981 F.2d 1135, 1139 (10th Cir. 1992); *United States v. McPeck*, 910 F.2d 509 (8th Cir. 1990) (remanding to bankruptcy court for a factual determination under § 7430 and thus assuming authority without discussion); *In re Robidoux*, 116 B.R. 320 (D. Mass. 1990) (remanding to the bankruptcy court for a determination of whether the amount of a § 7430 award was appropriate); *Samore v. Olson* (*In re Olson*), 100 B.R. 458 (Bankr. N.D. Iowa 1989) (reaching the merits of a § 7430 claim without discussing jurisdiction), *aff'd*, 121 B.R. 346 (N.D. Iowa 1990), *aff'd*, 930 F.2d 6 (8th Cir. 1991).

48. The importance of each of these methods of statutory interpretation is emphasized by the fact that the Supreme Court has recently relied on each one to interpret the EAJA. *See Ardestani v. INS*, 112 S. Ct. 515, 519-20 (1991) (relying on the plain language of the EAJA); *Sullivan v. Hudson*, 490 U.S. 877, 883 (1989) (relying on the legislative history as evidence of the EAJA's purpose); *Commissioner of the INS v. Jean*, 496 U.S. 154, 164-65 (1990) (relying on the purpose of EAJA).

jects arguments based on cross-references from the EAJA to other statutes. Section II.B argues that the EAJA's legislative history, though complicated, supports the plain meaning of the text. Finally, section II.C demonstrates that including bankruptcy courts within EAJA jurisdiction advances the purposes of the statute, which provides further evidence of congressional intent to include the bankruptcy courts.

A. *The Textual Meaning of the EAJA*

Any statutory construction must begin with the language of the statute.⁴⁹ The language of the EAJA provides in relevant part:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in *any court* having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.⁵⁰

Section II.A.1 discusses the language of the EAJA, concluding that "any court" plainly includes the bankruptcy courts. Section II.A.2 considers the argument based on a cross-reference to the definition of a "court of the United States" and concludes that the language of EAJA does not limit the statute's scope to those courts.

1. *The Plain Language of the EAJA*

According to the plain language of the EAJA, the bankruptcy courts should have the ability to shift fees against the federal government. The text of the EAJA grants jurisdiction over EAJA petitions to "any court." According to its plain and ordinary meaning, the term *court* means "[a] person or group of persons whose task is to hear and submit a decision on cases at law."⁵¹ By this definition, bankruptcy courts are courts and therefore should be covered by the EAJA's grant of authority to "any court."⁵²

In addition, the phrase "any court" is unmodified in the EAJA, even though Congress could have used the more restrictive "court of the United States" if Congress had intended "any court" to mean

49. *Ardestani v. INS*, 112 S. Ct. 515, 519 (1991) (quoting *United States v. James*, 478 U.S. 597, 604 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring))); *United States v. Turkette*, 452 U.S. 576, 580 (1981).

50. 28 U.S.C. § 2412(d)(1)(A) (1988) (emphasis added).

51. *O'Connor v. United States Dept. of Energy*, 942 F.2d 771, 773 (10th Cir. 1991) (quoting WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 320 (Anne H. Soukhanov et al. eds., 1984)).

52. See 942 F.2d at 773.

some subset of all federal courts.⁵³ Congress's failure to modify "any court" further indicates a broad textual grant of authority to any court properly adjudicating a civil action.

2. *Cross-References to the Definition of "Courts of the United States"*

An alternative textual analysis potentially conflicts with the result obtained by simply following the plain meaning of *court*. The Eleventh Circuit has relied on cross-references within title 28 to hold that the EAJA grants fee-shifting authority only to those courts listed in section 451 of title 28.⁵⁴ This statutory construction was introduced in *Bowen v. Commissioner*,⁵⁵ and followed in *Gower v. Farmers Home Administration (In re Davis)*.⁵⁶ The *Bowen* court transformed the EAJA's incorporation of the costs enumerated in section 1920 into an adoption of the jurisdictional requirement of section 1920.⁵⁷

The EAJA's reference to section 1920, however, does not support the inference that the EAJA incorporates section 1920's jurisdictional limitation. First, the EAJA states only that "a judgment for costs, as enumerated in section 1920 . . . may be awarded."⁵⁸ The EAJA makes no reference to section 1920's jurisdictional limit.⁵⁹

Second, this cross-referencing construction leads to an incongruous EAJA. The EAJA grants fee-shifting authority not only to "any court" with subject matter jurisdiction,⁶⁰ but also to "[a]n agency that conducts an adversary adjudication."⁶¹ It is unlikely that Congress intended to grant fee-shifting authority to the courts listed in section 451 as well as to all the agencies that conduct adversarial hearings yet intended to withhold that authority from the

53. See 942 F.2d at 773-74. Congress uses the phrase "court of the United States" to limit the term "courts" to those listed in 28 U.S.C. § 451 (1988). Cf. 2 U.S.C. § 130b(a)(2) (1988); 5 U.S.C. § 5537(c) (1988); 10 U.S.C. § 1408(a)(1) (1988); 28 U.S.C. §§ 373(f), 1920 (1988). The *O'Connor* court also noted that Congress could have modified "any court" with "constitutional" if Congress intended such a restriction. *O'Connor*, 942 F.2d at 773.

54. See *supra* section I.B.

55. 706 F.2d 1087 (11th Cir. 1983).

56. 899 F.2d 1136 (11th Cir.), *cert. denied*, 498 U.S. 981 (1990).

57. See *supra* notes 35-42 and accompanying text.

58. 28 U.S.C. § 2412(a) (1988) (emphasis added). The costs enumerated in § 1920 include fees of the clerk and court reporter, printing fees, witness fees, docket fees, and compensation for court-appointed experts. 28 U.S.C. § 1920 (1988).

59. See 28 U.S.C. § 2412 (1988). The Court of Appeals for the Federal Circuit noted this point in *Essex Electro Engineers, Inc., v. United States Dept. of Energy*, 757 F.2d 247 (Fed. Cir. 1985), stating, "[W]e construe [the EAJA reference to § 1920] as delineating the *kinds of costs* that can be awarded — not the *kinds of courts* having jurisdiction over EAJA applications." 757 F.2d at 251.

60. See 28 U.S.C. § 2412(d)(1)(A) (1988).

61. See 5 U.S.C. § 504(a)(1) (1988).

bankruptcy courts. To the contrary, the grant of authority to administrative agencies belies any congressional intent to limit EAJA jurisdiction to the supposedly more qualified and prestigious "courts of the United States." The inclusion of administrative agencies makes clear Congress's intent to provide comprehensive relief to citizens besieged by unreasonable government action.⁶²

Third, Congress would presumably have included important jurisdictional limitations to the EAJA in the EAJA itself, rather than squirrel them away in section 1920. Careful examination of the EAJA subsections exposes the tenuous nature of the link between section 1920's jurisdictional limitation and the EAJA. The passage of the EAJA altered the existing law,⁶³ extending the common law exceptions to the American rule to the federal government by creating subsection (b) of section 2412.⁶⁴ In addition, the EAJA provides in section 2412's new subsection (d) that if the nongovernment party prevails, the government must demonstrate that its actions were substantially justified in order to avoid paying that party's litigation costs.⁶⁵ On the other hand, in amending subsection (a) of section 2412, the EAJA merely restates the law prior to the EAJA, under which courts could transfer costs other than attorney's fees as an exercise of equitable power.⁶⁶ The reference to section 1920 in the new subsection (a) simply distinguishes the costs a court could shift against the government under section 2412 prior to the EAJA from the new fee-shifting authority granted by the EAJA. Subsections (b) and (d) do not refer to section 1920.⁶⁷ If Congress intended section 1920 to do more than just enumerate the kind of costs that could be transferred under subsection (a) of section 2412 — that is, if Congress intended actually to limit the definition of "any court" in subsections (b) and (d) — these subsec-

62. The *Davis* court recognized the incongruity of including administrative agencies but excluding bankruptcy courts, but held itself bound to this construction by the *Bowen* holding. *Gower v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136, 1140 n.7 (11th Cir.), cert. denied, 498 U.S. 981 (1990).

63. See H.R. REP. NO. 1418, *supra* note 2, at 17-19, reprinted in 1980 U.S.C.C.A.N. at 4996-98.

64. 28 U.S.C. § 2412(b) (1988); see H.R. REP. NO. 1418, *supra* note 2, at 9, reprinted in 1980 U.S.C.C.A.N. at 4987.

65. 28 U.S.C. § 2412(d) (1988); see H.R. REP. NO. 1418, *supra* note 2, at 9-10, reprinted in 1980 U.S.C.C.A.N. at 4987-88; H.R. CONF. REP. NO. 1434, 96th Cong., 2d Sess. 25-26, reprinted in 1980 U.S.C.C.A.N. 5003, 5014-15.

66. 28 U.S.C. § 2412(a) (1988); see H.R. REP. NO. 1418, *supra* note 2, at 17, reprinted in 1980 U.S.C.C.A.N. at 4996 ("Section 2412(a) preserves the law of the existing section 2412 . . ."). The prior law was stated in 28 U.S.C. § 2412 (1976), and interpreted in *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1334-35 (1st Cir. 1973) (stating that § 2412 waives the government's sovereign immunity with respect to costs but not attorney's fees).

67. See 28 U.S.C. § 2412(b), (d) (1988).

tions would likely include the same reference to section 1920 found in subsection (a).

The reference to the costs enumerated in section 1920 was taken from the statute that the EAJA replaced and was preserved in section 2412(a). The predecessor statute, An Act to Provide for Judgments for Costs Against the United States,⁶⁸ stated, "costs, as enumerated in section 1920 of this title . . . may be awarded . . . in any court having jurisdiction of such action."⁶⁹ The legislative history to the EAJA's predecessor even more clearly demonstrates that Congress intended the reference to section 1920 only to enumerate the costs that could be awarded under the statute, not to attach the restrictive jurisdiction of section 1920. The Senate Report states: "The costs which are referred to in this bill are listed in section 1920 of title 28, United States Code"⁷⁰ As in the EAJA, no mention is made of section 1920 with respect to jurisdiction.⁷¹

This analysis demonstrates that in order to argue that the jurisdictional requirement of section 1920 limits section 2412(b) and 2412(d), one must presume that Congress meant to limit EAJA jurisdiction indirectly — by first attaching the jurisdiction of section 1920 to section 2412(a) and then extending the supposed jurisdictional limit of subsection (a) to subsections (b) and (d). A simpler interpretation of the reference to section 1920 — and one better supported by the textual and historical record — is that it provides a shorthand delineation of the types of costs courts have historically been able to award to preserve equitable treatment of all parties. The argument put forth by the Eleventh Circuit that the bankruptcy courts lack EAJA authority because they are not listed in section 451 is therefore incorrect because it conflicts with the plain meaning of the EAJA, it leads to incongruous results, and it rests on a strained interpretation of the statutory structure.

Although the text of the EAJA plainly appears to grant the bankruptcy courts the authority to shift fees, courts and commentators disagree as to the sufficiency of a purely textual approach. The Supreme Court, for example, recently looked beyond the plain meaning of a statute to its "purposes and origins" in order to determine its meaning.⁷² Others, however, including most notably Jus-

68. Act of July 18, 1966, Pub. L. No. 89-507, 80 Stat. 308, *amended by* Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, 94 Stat. 2321, 2325 (1980).

69. Act of July 18, 1966, Pub. L. No. 89-507, 80 Stat. 308, 308, *amended by* Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, 94 Stat. 2321, 2325 (1980).

70. S. REP. NO. 1329, 89th Cong., 2d Sess. 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2527, 2529.

71. *Id.*, *reprinted in* 1966 U.S.C.C.A.N. 2527.

72. See *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 455 (1989). The Court, faced with a dispute over the meaning of the word "utilized" in the Federal Advisory

tice Scalia, argue that textual plain meaning is a sufficient method for statutory analysis.⁷³ Because courts are sometimes reluctant to rely solely on the plain meaning of a statute,⁷⁴ and in order to avoid the skepticism that exclusive reliance on plain meaning sometimes engenders,⁷⁵ the next two sections examine the history and purposes of the EAJA.

B. *The Legislative History of the EAJA*

Congress has amended the EAJA several times since enacting it in 1980.⁷⁶ This section investigates the legislative history of both the original passage of the EAJA and the subsequent amendments which affect the EAJA's definition of "any court," and concludes that Congress originally intended to grant EAJA jurisdiction to the bankruptcy courts and that subsequent amendments did not undermine that intent. This section reconciles the broad language of the EAJA, granting fee-shifting authority to "any court" having subject matter jurisdiction over the substantive issue before the court, with House Report 1418 which stipulates that "[t]he courts so empowered [to exercise EAJA authority] are those defined in section 451 of title 28, United States Code."⁷⁷ Section II.B.1 discusses the legislative history behind the passage of the EAJA in 1980, and section II.B.2 considers the subsequent amendments to the EAJA.

Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. (1988 & Supp. V 1993)), noted that "reliance on the plain language of [the statute] alone is not entirely satisfactory." 491 U.S. at 452 (quoting Washington Legal Foundation v. United States Dept. of Justice, 691 F. Supp. 483, 488 (D.D.C. 1988)). The Court then considered the context of the statute's enactment and its legislative history as provided in congressional committee reports. 491 U.S. at 455-62.

73. See *Union Bank v. Wolas*, 112 S. Ct. 527, 534 (1991) (Scalia, J., concurring). Justice Scalia wrote,

I join the opinion of the Court . . . which respond[s] persuasively to the legislative-history and policy arguments made by respondent. It is regrettable that we have a legal culture in which such arguments have to be addressed (and are indeed credited by a Court of Appeals) [T]he plain text of the statute should have made this litigation unnecessary and unmaintainable.

112 S. Ct. at 534.

74. See *Wolas*, 112 S. Ct. at 530-33; *Public Citizen*, 491 U.S. at 455; *United States v. American Trucking Assns.*, 310 U.S. 534, 543-44 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'").

75. One commentator has written:

Judges also frequently command respect for the statutory text by declaring that its "plain meaning" must govern. However, we encounter the formula often in contexts where it seems invoked to avoid acknowledging judges' policy preferences. We are entitled to regard it with some skepticism as a reliable canon of judicial self-restraint.

JAMES W. HURST, *DEALING WITH STATUTES* 51 (1982).

76. See Act of Oct. 29, 1992, Pub. L. No. 102-572, §§ 301(a), 502(b), 506(a), 106 Stat. 4491, 4511, 4512, 4513; Act of Aug. 5, 1985, Pub. L. No. 99-80, §§ 2, 6, 99 Stat. 183, 184-86, 186; Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 292(c), 96 Stat. 324, 574.

77. H.R. REP. NO. 1418, *supra* note 2.

1. *Enactment of the EAJA*

Understanding the historical context of the enactment of the EAJA is crucial to understanding the statute's relationship to the bankruptcy courts. When Congress enacted the EAJA in 1980,⁷⁸ the Bankruptcy Reform Act of 1978 (BRA) controlled the jurisdiction of the bankruptcy courts.⁷⁹ Congress passed the EAJA during a statutory "transition period" between the old bankruptcy system and the system created by the BRA.⁸⁰ Different sections of the BRA became effective at varying points throughout the transition period.⁸¹ Congress repealed the BRA before it became fully effective.⁸² Section 241 of the BRA gave the bankruptcy courts all the jurisdiction of the district courts with respect to title 11 cases and proceedings.⁸³ This "pass-through" jurisdiction was in place when the EAJA was enacted in 1980.⁸⁴ It is undisputed that a district

78. Public Law 96-481, which included the EAJA, was enacted on October 21, 1980. *See* 126 CONG. REC. 29227 (1980).

79. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2668 (codified at 28 U.S.C. §§ 1471-1482 (Supp. IV 1980)).

80. Some provisions of the BRA were effective immediately upon enactment, *see* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 402(d), 92 Stat. 2549, 2682, while the effective date of other sections was as late as April 1, 1984, *see* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 402(b), 92 Stat. 2549, 2682. The interim period is known as the "transition period." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 404(b), 92 Stat. 2549, 2683.

81. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 402, 92 Stat. 2549, 2682 (providing the different effective dates for the different BRA sections).

82. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 113, 98 Stat. 333 (codified at scattered sections of 11 U.S.C. and 28 U.S.C.).

83. Section 241 of the BRA defined the jurisdiction of the bankruptcy courts as follows:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise *all of the jurisdiction* conferred by this section on the district courts.

Bankruptcy Reform Act of 1978, § 241, 28 U.S.C. § 1471 (Supp. IV 1980) (amended 1984) (emphasis added).

84. Section 241 of the BRA was not effective until April 1, 1984. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 402(b), 92 Stat. 2549, 2682. The bankruptcy courts, however, were allowed to exercise the increased jurisdiction of their successors for cases commenced during the transition period as follows:

(a) All cases commenced under title 11 of the United States Code during the transition period shall be referred to the [transition] United States bankruptcy judges. The [transition] United States bankruptcy judges may exercise in such cases the jurisdiction and powers conferred by subsection (b) of this section on the [new] courts of bankruptcy. . . .

(b) During the transition period, the amendments made by section [] 241 . . . of this Act shall apply to the [transitional] courts of bankruptcy . . . the same as such amendments apply to the [new] United States bankruptcy courts established under . . . this Act.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 405(a)(b), 92 Stat. 2549, 2685. Section 241 was to give the new bankruptcy courts power, in title 11 cases, to exercise all jurisdiction conferred on the district courts. *See supra* note 83 and accompanying text. Section 405, by

court may exercise EAJA authority in a case related to title 11.⁸⁵ Therefore, when Congress granted the district courts the power to shift fees under the EAJA in 1980, the bankruptcy courts, by way of the pass-through jurisdiction of section 241 of the BRA, were also vested with jurisdiction under the EAJA.⁸⁶

Although this analysis of the enactment of the EAJA seems to indicate that Congress granted the bankruptcy courts EAJA authority simultaneously with the district courts, the language of House Report 1418, which limits the courts eligible to shift EAJA fees to those listed as courts of the United States in 28 U.S.C. § 451,⁸⁷ seems to indicate a contrary intent to exclude the bankruptcy courts. A narrow focus on House Report 1418 may be misleading, however, as two other committee reports and a conference report submitted to the full Congress on the EAJA do not include any reference to section 451.⁸⁸ In its report, the House Committee on Small Business stated, "The subsection [2412(d)(1)] applies to *all* civil actions except tort actions and those already covered by existing fee-shifting statutes."⁸⁹ Nearly identical language appears in the Senate report from the Committee on the Judiciary.⁹⁰ Most significantly, the Conference Report⁹¹ on the EAJA states that "the [EAJA] specifically allows for the payment of attorney fees, (in addition to costs as previously listed) to the prevailing party in *any*

applying § 241 to the existing bankruptcy courts during the transition period, thereby gave them the power to exercise jurisdiction conferred on the district courts in title 11 cases.

85. See *Gower v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136, 1141 (11th Cir. 1990).

86. Before the BRA was repealed, only two cases in the bankruptcy courts discussed the EAJA. *Hagan v. Heckler (In re Hagan)*, 44 B.R. 59 (Bankr. D.R.I. 1984); *In re Parks*, 84-2 U.S. Tax Cas. (CCH) ¶ 9744 (Bankr. N.D. Ohio 1984). In *Hagan*, the court awarded EAJA fees to the prevailing party without discussing jurisdiction. In *Parks*, the court refused to make an award because the petitioner was not a prevailing party. Interestingly, the government party did not contest the bankruptcy court's jurisdiction in either case, nor did either bankruptcy court raise the jurisdiction issue sua sponte.

87. 28 U.S.C. § 451 (1988); see H.R. REP. NO. 1418, *supra* note 2, at 17, *reprinted in* 1980 U.S.C.C.A.N. at 4996; see *supra* notes 44-45, 77, and accompanying text.

88. H.R. CONF. REP. NO. 1434, 96th Cong., 2d Sess. 25 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5003, 5014; H.R. REP. NO. 1005, 96th Cong., 2d Sess., pt. 1 (1980); S. REP. NO. 253, 96th Cong., 1st Sess. (1979).

89. H.R. REP. NO. 1005, *supra* note 88, at 18 (emphasis added).

90. S. REP. NO. 253, *supra* note 88, at 20.

91. Courts often place particular emphasis on Conference Committee reports when interpreting the meaning of statutes. See, e.g., *Zajac v. Federal Land Bank of St. Paul*, 909 F.2d 1181, 1182 (8th Cir. 1990) ("The conference committee's report . . . represents the final statement of terms agreed to by both houses. Next to the statute itself it is the most persuasive evidence of congressional intent." (internal quotation marks omitted)); *Cohn v. United States*, 872 F.2d 533, 534 (2d Cir. 1989) ("Since the conference report sets forth the final agreement of both houses, it is entitled to great weight in determining congressional intent."), *cert. denied*, 493 U.S. 848 (1989); see also Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 201 (1983) ("Conference committee reports . . . are considered particularly weighty.").

civil action with the United States.”⁹² The Conference Report also states that the “bill requires a *Federal* Court to award to a prevailing party other than the United States in a civil action involving the United States fees . . . and other expenses.”⁹³ Significantly, Congress did not modify “civil action” and used “federal court” rather than “court of the United States.” Because bankruptcy courts are federal courts⁹⁴ and bankruptcy actions are civil actions,⁹⁵ the language of these three reports includes the bankruptcy courts among those able to adjudicate EAJA petitions.

The language of these reports conflicts with House Report 1418’s apparent limitation of “any court” to those courts enumerated in section 451.⁹⁶ One obvious resolution of this conflict is that the single statement in House Report 1418 simply does not represent the true intent of Congress regarding EAJA jurisdiction.⁹⁷ Yet even if House Report 1418 accurately reflects Congress’s intent, and only courts listed in 28 U.S.C. § 451 were granted EAJA jurisdiction, Congress still likely intended to include the bankruptcy courts. The reference to “court of the United States” in House Report 1418 was made at a time when section 451 was scheduled to be amended to include the bankruptcy courts.⁹⁸ Prior to the enactment of the BRA, section 451, in pertinent part, provided:

The term “court of the United States” includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court cre-

92. H.R. CONF. REP. NO. 1434, *supra* note 88, at 25, *reprinted in* 1980 U.S.C.C.A.N. at 5014 (emphasis added).

93. *Id.* (emphasis added).

94. Because bankruptcy courts are created by Congress and governed by title 28 of the U.S. Code, *see* 28 U.S.C. §§ 151-158 (1988), they are federal courts.

95. The narrower of two Supreme Court constructions of “civil action” in the EAJA is “a proceeding in a court.” *Sullivan v. Hudson*, 490 U.S. 877, 894 (1989) (White, J., dissenting). The majority in *Hudson* would include proceedings before an administrative law judge on remand from a district court as a “civil proceeding.” *Hudson*, 490 U.S. at 892. *See also* 28 U.S.C. § 1334(b) (1988) (“[T]he district courts shall have original but not exclusive jurisdiction of all *civil* proceedings arising under title 11.” (emphasis added)).

96. *See supra* notes 44-45, 77 and accompanying text.

97. In fact, additional evidence indicates that Congress did not intend to limit EAJA jurisdiction to the “courts of the United States.” The House Judiciary Committee amended the long title of the Bill to read “An Act to provide for the payment by the United States of certain fees and cost incurred by prevailing parties in Federal agency adjudications and in civil action in *courts of the United States*.” H.R. REP. NO. 1418, *supra* note 2, at 18, *reprinted in* 1980 U.S.C.C.A.N. at 4999 (emphasis added). The Conference Committee, however, adopted the Senate bill, rather than the version the House Judiciary Committee reported on in House Report 1418. H.R. CONF. REP. NO. 1434, *supra* note 88, at 20-21, *reprinted in* 1980 U.S.C.C.A.N. at 5009-10. The Senate bill was entitled “Equal Access to Justice Act.” *Id.*

98. When Congress referred to § 451 in the EAJA’s legislative history in 1980, the BRA amendment adding the bankruptcy court to § 451 was already on the books, although it had not yet become effective. *See* 28 U.S.C. § 451 (Supp. IV 1980) (including the amended version of § 451).

ated by Act of Congress the judges of which are entitled to hold office during good behavior.⁹⁹

The BRA amended section 451 to add the “ ‘bankruptcy courts, the judges of which are entitled to hold office for a term of 14 years.’ ”¹⁰⁰ The amendment to section 451 was scheduled to go into effect on April 1, 1984.¹⁰¹ Thus, even if House Report 1418 properly describes Congress’s intent with respect to the scope of EAJA authority,¹⁰² the bankruptcy courts, in their own right, would automatically assume EAJA authority in less than three years once the BRA had been fully implemented.¹⁰³ In the meantime, bankruptcy courts would exercise all the power of the district court by virtue of the pass-through jurisdiction that was applicable during the transition period.¹⁰⁴ Because the bankruptcy courts, in practice, could exercise EAJA authority without an explicit grant of jurisdiction during the transition period, a specific congressional grant of authority was simply unnecessary.

2. *Effect of Subsequent Events on the EAJA*

Whatever the apparent intent of the Congress that originally passed the EAJA, three subsequent events arguably shed light on current congressional intent with respect to the jurisdiction of bankruptcy courts under the EAJA. First, in 1984, Congress repealed section 241 of the BRA, eliminating both the jurisdictional pass-through from the district courts to the bankruptcy courts and the addition of the bankruptcy courts to the definition of the “courts of the United States” in section 451 of title 28.¹⁰⁵ The repeal of section 241 thereby eliminated the explicit statutory source of bankruptcy court authority over the EAJA. Second, in 1985, Congress amended the EAJA’s definition of “court” to include the U.S. Claims Court.¹⁰⁶ Third, in 1992, Congress again amended the EAJA’s definition of “court,” this time to include the U.S. Court of Veterans Appeals.¹⁰⁷ Congress did not take advantage of either opportunity to address the scope of the EAJA with respect to the bankruptcy court. Section II.B.2.a argues that the repeal of the BRA did not deprive the bankruptcy courts of EAJA authority.

99. 28 U.S.C. § 451 (1976) (current version at 28 U.S.C. § 451 (1988)).

100. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 213, 92 Stat. 2549, 2661.

101. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 402(b)-(d), 92 Stat. 2549, 2682.

102. It is not clear that House Report 1418 represents the best indication of Congress’s intent. See *supra* notes 87-97 and accompanying text.

103. See *supra* notes 99-101 and accompanying text.

104. See *supra* notes 78-86 and accompanying text.

105. See *infra* section II.B.2.a.

106. See *infra* section II.B.2.b.

107. See *infra* section II.B.2.c.

Sections II.B.2.b and II.B.2.c argue that the 1985 and 1992 amendments to the EAJA definition of "court" do not preclude the inclusion of the bankruptcy court.

a. *The repeal of the BRA.* Congress repealed the BRA in response to the Supreme Court's plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*¹⁰⁸ The *Marathon* Court held unconstitutional the bankruptcy courts' jurisdictional authority under BRA section 241. Because the Court also held that the unconstitutional portion of the jurisdictional grant was inseparable from the remainder of section 241, it struck down the entire section.¹⁰⁹ Congress responded with the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA).¹¹⁰ This section demonstrates that neither the Court's decision in *Marathon* nor the terms of the BAFJA undermine bankruptcy court authority under the EAJA.

The Supreme Court invalidated the BRA in *Marathon* on the ground that bankruptcy courts cannot adjudicate questions of private rights.¹¹¹ The *Marathon* plurality noted, however, that matters involving public rights could be adjudicated by federal tribunals that lacked Article III protections.¹¹² The government creates a public right when it waives its sovereign immunity and consents to be sued,¹¹³ as it did in passing the EAJA. EAJA applications are complaints against the government in an area where Congress has full authority to waive sovereign immunity. EAJA applications

108. 458 U.S. 50 (1982). For discussion of the congressional repeal of the BRA, see Beeline Engg. & Constr., Inc. v. D'Espies, P.A. (*In re Beeline Engg. & Constr., Inc.*), 154 B.R. 790, 791 (S.D. Fla. 1993); Nieves v. Melendez (*In re Melendez*), 153 B.R. 386, 389 (Bankr. D. Conn. 1993); Walter J. Taggart, *The New Bankruptcy Court System*, 59 AM. BANKR. L.J. 231, 232-37 (1985).

109. *Marathon*, 458 U.S. at 87 n.40.

110. Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified at scattered sections of 11 U.S.C. and 28 U.S.C.).

111. 458 U.S. at 83-84. In *Marathon*, the debtor, the Northern Pipeline Construction Co. sued the Marathon Pipeline Co. in the bankruptcy court to recover damages for breach of contract and warranty. The Court found no applicable exception to the general rule that the judicial power of the United States must be exercised by an Article III tribunal. *Marathon*, 458 U.S. at 70-71. The Supreme Court later stated its holding in *Marathon* as follows:

The Court's holding . . . establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to appellate review.

Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 584 (1985).

112. One of the exceptions to the general rule that the judicial power of the United States must be exercised by an Article III tribunal is that Congress may assign questions of public rights to non-Article III bodies. *Marathon*, 458 U.S. at 67-70; *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929).

113. 458 U.S. at 67-69.

therefore qualify as public rights which may be adjudicated by non-Article III bodies, including the bankruptcy courts.¹¹⁴

In *Marathon*, the Court also ruled that the unconstitutional aspects of BRA section 241 were not severable from the remainder of the Act.¹¹⁵ This effectively invalidated the entire BRA. Thus, due to *Marathon*'s invalidation of section 241 in its entirety, including the "pass through" jurisdiction from the district courts to the bankruptcy courts, the bankruptcy courts no longer exercised power identical to the district courts in title 11 cases.¹¹⁶ The Supreme Court left the onus on Congress to reconstitute the bankruptcy courts.¹¹⁷

Congress passed the BAFJA to remedy the constitutional deficiencies of the BRA identified by the Court in *Marathon*.¹¹⁸ Under the BAFJA, the bankruptcy court would have jurisdiction over title 11 cases but would not be a "court of the United States."¹¹⁹ The BAFJA took effect June 27, 1984.¹²⁰

Although the Eleventh Circuit held, in effect, that the BAFJA's elimination of "court of the United States" status for the bankruptcy courts removed EAJA jurisdiction from the bankruptcy courts,¹²¹ it is likely that Congress was completely unaware that the BAFJA amendments affected the EAJA. Even if congressional researchers examined every statutory cross-reference to section 451

114. See Anthony M. Sabino, "And Unequal Justice for All"—*Bankruptcy Court Jurisdiction Under the Equal Access to Justice Act*, 22 MEM. ST. U. L. REV. 453, 483 (1992).

115. The Court stated:

As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under Title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and the adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis.

Marathon, 458 U.S. at 87 n.40. Justices Rehnquist and O'Connor concurred in this analysis to create a six-justice majority for this position. 458 U.S. at 91-92.

116. Recall that §§ 241 and 405 had granted the bankruptcy courts all the jurisdiction held by the district courts in cases under title 11. See *supra* notes 78-86 and accompanying text.

117. 458 U.S. at 88. The Court stayed its ruling until October 4, 1982, to allow Congress to create a new bankruptcy system. *Marathon*, 458 U.S. at 88. The Court later extended the stay to December 24, 1982. 459 U.S. 813 (1982).

118. Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. LEGIS. 1, 1 (1985).

119. The BAFJA contained a section which provided, "Section 402(b) of the [BRA] is amended by striking out 'shall take effect June 28, 1984' and inserting in lieu thereof 'shall not be effective.'" Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 113, 98 Stat. 333, 343. The BRA amendment to § 451 was thereby canceled.

120. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 122(c), 98 Stat. 333, 346.

121. *Gower v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136 (11th Cir.), cert. denied, 498 U.S. 981 (1990).

of title 28 — which the BRA had amended to include the bankruptcy courts — before amending that section in the BAFJA, they would not have been directed to the EAJA because the EAJA itself contains no cross-reference to section 451.¹²² Furthermore, the legislative history of the BAFJA gives no indication that Congress was aware that the enactment of the BAFJA affected other statutes.¹²³ Absent clear evidence that Congress intended wide-reaching effects in other statutes when it replaced section 1471 of the BRA, one should not conclude that Congress intended for the BAFJA to take EAJA authority from the bankruptcy courts.¹²⁴

It is important to recognize that the issue is not whether the bankruptcy courts are appropriately considered “courts of the United States” as defined in section 451. The real question is whether the bankruptcy courts can exercise EAJA authority.¹²⁵ The questions are distinct. The group of courts included in section

122. See 28 U.S.C. § 2412 (1988). Recall that the Eleventh Circuit linked the EAJA to section 451 through the EAJA’s reference to costs enumerated in section 1920. See *supra* notes 33-43 and accompanying text.

123. See STATEMENTS OF LEGISLATIVE LEADERS, reprinted in 1984 U.S.C.C.A.N. 576-606; H. CONF. REP. NO. 882, 98th Cong., 2d Sess. (1984) (setting out text of BAFJA without analysis).

124. The notion that a change in prior law should not be presumed absent an express intent to make a change is a familiar one. See, e.g., *United States v. Jordan*, 915 F.2d 622, 627 (11th Cir.) (“It is a cardinal rule of statutory construction that implying the repeal, either in whole or by a narrowing in scope, of one statute by the passage of a subsequent statute is disfavored and should be condoned only when Congress’ intent to repeal is manifest.” (citations omitted)), *cert. denied*, 499 U.S. 979 (1990). In the bankruptcy context, courts often interpret the 1978 bankruptcy code to preserve the law of the prior system except in areas in which Congress expressly indicated that a change was intended. See, e.g., *Dewsnup v. Timm*, 112 S. Ct. 773, 779 (1992); *United Sav. Assn. v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 380 (1988). Because there is considerable ambiguity regarding the current law, as demonstrated by the split between the Tenth and Eleventh Circuits, and because there is no direct evidence that Congress intended a change in the scope of the EAJA when it passed BAFJA, the pre-BAFJA regime of bankruptcy court authority over EAJA questions should continue.

125. Some commentators, however, consider the § 451 question crucial. See, e.g., Sabino, *supra* note 114, at 483-84. But the courts that consider the current language of § 451 determinative for the purposes of the EAJA and its sister statute, 26 U.S.C. § 7430 (1988), make the mistake of failing to consider § 451 in its historical context. Ninth Circuit caselaw demonstrates the confusion that may be wrought by this error. In *Perroton v. Gray* (*In re Perroton*), 958 F.2d 889 (9th Cir. 1992), the Ninth Circuit held that a bankruptcy court was not a “court of the United States” as defined within § 451 of title 28 for the purpose of ruling on an *in forma pauperis* petition. *Perroton*, 958 F.2d at 896. Later, in *IRS v. Germaine* (*In re Germaine*), 152 B.R. 619 (Bankr. 9th Cir. 1993), a Ninth Circuit Bankruptcy Appellate Panel held that the bankruptcy courts were “court[s] of the United States” for the purpose of ruling on a 26 U.S.C. § 7430 petition to shift fees. *Germaine*, 152 B.R. at 626-27. The *Germaine* panel distinguished *Perroton* on the grounds that the definition of the phrase “court of the United States” included in title 28 did not apply to § 7430 of title 26. Because § 7430 was based on the EAJA, see *supra* note 47, which is included in title 28, this reasoning appears suspect. To complicate matters further, a federal district court in the Ninth Circuit has ruled that bankruptcy courts may not shift fees under § 7430. *United States v. Yochum* (*In re Yochum*), 156 B.R. 816 (D. Nev. 1993). The *Yochum* court stated it was not bound by the Bankruptcy Appellate Panel decision in *Germaine* and believed the decision in *Perroton* compelled its result. *Yochum*, 156 B.R. at 818 & n.2.

451 is a subset of those courts eligible to shift fees under the EAJA, as demonstrated by the inclusion of the United States Court of Claims and the United States Court of Veterans Appeals,¹²⁶ even though those courts are not listed in section 451.¹²⁷ If Congress's intent in passing the EAJA was to grant authority to the bankruptcy courts *only* because they were expected to be "courts of the United States" and enjoyed the equivalent of district court jurisdiction under the BRA and were therefore qualified to exercise EAJA power, then it is true that the *Marathon* decision and the enactment of BAFJA would have stripped the bankruptcy courts of EAJA power. If, however, Congress intended to grant EAJA authority to the bankruptcy courts regardless of their status as "courts of the United States," then the limitation in House Report 1418 is merely descriptive rather than defining, as section 451 was meant to include the bankruptcy courts. In that case, the developments catalyzed by *Marathon* should not alter the original intent of Congress, which was to give the bankruptcy courts EAJA power.¹²⁸

The EAJA itself provides convincing evidence that Congress did not believe that only the "courts of the United States" as defined in section 451 were qualified to enforce the EAJA. Beyond granting fee-shifting power "in any civil action" to "any court having jurisdiction of that action,"¹²⁹ the statute also grants fee-shifting authority to "[a]n agency that conducts an adversary adjudication."¹³⁰ An agency that conducts an adversary adjudication is not a "court of the United States."¹³¹ Congress's willingness to allow EAJA fee shifting by administrative agencies strongly suggests that fee-shifting authority should not depend upon status as a "court of the United States."

The inclusion of agency adjudicative bodies among those empowered to shift fees also demonstrates that, for EAJA purposes, there is no substantive significance in section 451's list of courts. One need not be appointed by the President and confirmed by Congress for a life term to be judicially qualified to enforce the

126. See 28 U.S.C. § 2412(d)(2)(F) (Supp. IV 1992).

127. See 28 U.S.C. § 451 (1988).

128. See *supra* section II.B.1. Absent the ruling in *Marathon*, the bankruptcy courts would have exercised EAJA power both during the transition period as a result of the pass-through jurisdiction from the district courts included in § 241 of the BRA, see *supra* notes 78-86 and accompanying text, and after the full enactment of the BRA in 1984, due to the jurisdiction granted in § 241 as well as the proposed amendment to 28 U.S.C. § 451. See *supra* notes 100-01 and accompanying text.

129. Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, § 204, 94 Stat. 2321, 2328 (1980) (codified at 28 U.S.C. § 2412(d)(1)(a) (1988)).

130. Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, § 203, 94 Stat. 2321, 2325 (1980) (codified at 5 U.S.C. § 504 (1988)).

131. See 28 U.S.C. § 451 (1988) (providing separate definitions of agency and court of the United States).

EAJA. By allowing non-Article III administrative agencies to adjudicate EAJA claims, Congress has effectively stated that EAJA issues are matters of public rights, eligible to be decided by non-Article III courts.¹³²

b. *The 1985 amendments to the EAJA.* In 1985, Congress amended the EAJA's definition of "court" to include the U.S. Claims Court.¹³³ One commentator, relying on the doctrine of *expressio unius est exclusio alterius* — the expression of one thing is the exclusion of another¹³⁴ — suggests that courts should interpret the inclusion of the Claims Court in the 1985 amendment to exclude the bankruptcy courts.¹³⁵ Courts should reject this argument for three reasons. First, the language of the 1985 amendment simply does not lend itself to interpretation under *expressio unius*. The 1985 amendment to the EAJA definition of *court* provides that the EAJA definition of *court includes* the Claims Court.¹³⁶ According to the Supreme Court, "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."¹³⁷ Therefore, *expressio unius* ought not apply to an illustrative list signaled by the operative verb *includes*. The 1985 amendment to include the Claims Court — a non-Article III court — in the EAJA definition of *court* represented an "illustrative application of the general principle"¹³⁸ that EAJA's refer-

132. See *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 67-70 (1982) (holding that Congress may create administrative bodies with authority to adjudicate "public rights" but not "private rights").

133. Act of Aug. 5, 1985, Pub. L. No. 99-80, § 2(c), 99 Stat. 183, 185 (codified at 28 U.S.C. § 2412(d)(2)(f) (1988)).

134. "Under [*expressio unius*], if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded." BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

135. Sabino, *supra* note 114, at 485-86. Professor Sabino, after concluding that "[t]here appears to be enough elasticity in the statutory scheme to include the bankruptcy courts in the definition of 'courts of the United States,'" *id.* at 485, states that the only logical conclusion to be drawn from Congress's failure to amend the EAJA to include the bankruptcy courts "is that Congress did not intend to imbue the bankruptcy court with jurisdiction under the EAJA." *Id.* at 485-86. Section II.A of this Note showed that the original intent of Congress was to include the bankruptcy courts, a point with which Sabino seemingly agrees. See *id.* at 463 n.61 (citing Reuben B. Robertson & Mary C. Fowler, *Recovering Attorneys' Fees from the Government Under the Equal Access to Justice Act*, 56 TUL. L. REV. 903, 904 n.7 (1982) (noting that the pre-BAFJA version of § 451 was to include the bankruptcy courts)). Relying on the 1985 amendment to the EAJA, Sabino then argues, however, that the subsequent intent and actions of Congress stripped EAJA authority from the bankruptcy courts. Sabino, *supra* note 114, at 485-86; see also *Gower v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136, 1139 n.7 (11th Cir.) ("Congress's failure to make any similar clarifying amendment with regard to the Tax Court or the bankruptcy courts supports the continuing vitality of *Bowen*."), *cert. denied*, 498 U.S. 981 (1990).

136. After the 1985 amendment, the EAJA provided, "'court' includes the United States Claims Court." 28 U.S.C. § 2412(d)(2)(F) (1988).

137. *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941); *cf.* 11 U.S.C. § 102(3) (1988).

138. See *supra* text accompanying note 137.

ence to “any court” plainly includes non-Article III courts. Thus a court need not be listed in section 451 as a “court of the United States” to exercise EAJA authority properly.¹³⁹

Second, the *expressio unius* doctrine should not apply given the EAJA’s legislative background. The doctrine assumes that all alternatives not elected were considered and rejected,¹⁴⁰ an assumption that cannot be supported in this case. Although some commentators criticize the use of the doctrine on this ground generally,¹⁴¹ its use is especially questionable in this instance, because the legislative history indicates that the 1985 amendment was a particularized response to confusion concerning the scope of EAJA jurisdiction in the Claims Court,¹⁴² not a comprehensive review of EAJA jurisdiction. No general principle applicable to the bankruptcy courts should be drawn from such specific action.¹⁴³

Third, and perhaps most importantly, the legislative history to the 1985 amendment states that the amendment is merely a clarification, rather than a change, in the existing law.¹⁴⁴ The legislative history indicates that Congress used the 1985 amendment to respond to misinterpretations of the EAJA,¹⁴⁵ suggesting that the 1985 amendment was a legislative interpretation of the EAJA rather than an act of lawmaking that might support an *expressio*

139. See also *supra* notes 126-32 and accompanying text.

140. Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 813 (1983) (*expressio unius* “would make sense only if all omissions in legislative drafting were deliberate”).

141. See, e.g., Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 874 (1930) (“The first comment on [*expressio unius*] is that it is not true. . . . [*Expressio unius*] illustrates one of the most fatuously simple of logical fallacies”); Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2109 n.182 (1990) (“[The *expressio unius*] canon is a questionable one in light of the dubious reliability of inferring specific intent from silence.”).

142. H.R. REP. NO. 120, 99th Cong., 1st Sess., pt. 1, at 17-18 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 146 (citing *Bailey v. United States*, 721 F.2d 357 (Fed. Cir. 1983) (noting the government’s withdrawal of its objection on appeal to the Claims Court’s authority to hear the EAJA dispute in light of the decision in *Ellis v. United States*, 711 F.2d 1571 (Fed. Cir. 1983))); see also *Ellis*, 711 F.2d at 1573-75 (holding that the non-Article III Claims Court inherits EAJA authority from its Article III predecessor, the Court of Claims).

143. One commentator has noted that legislatures often respond discretely to particular problems:

A legislature typically acts only when and as someone presses it to act. Hence it is likely to deal at one point of time with less than the whole, potential extent of the issues or choices it confronts. Thus, legislative intent may emerge in full definition only through a succession of acts.

HURST, *supra* note 75, at 61.

144. H.R. REP. NO. 120, *supra* note 142, at 17-18, reprinted in 1985 U.S.C.C.A.N. at 146; see also Charles E. Grassley, *Congress Wants a Wide Reaching EAJA*, ABA J., Mar. 1985, at 40, 44 (“[T]he [1985 amendments to] the EAJA do not expand the act; they clarify the intent of Congress in enacting the legislation in 1980.”).

145. See H.R. REP. NO. 120, *supra* note 142, at 9, reprinted in 1985 U.S.C.C.A.N. at 137 (“Part of the problem in implementing the Act has been that agencies and courts are misconstruing the Act.”).

unius analysis. Moreover, in 1985, no confusion or conflicting caselaw existed concerning the applicability of the EAJA to the bankruptcy courts.¹⁴⁶ Because Congress merely sought to clarify existing law and no dispute had arisen concerning the bankruptcy courts' jurisdiction, there was no reason for Congress to address the issue in the 1985 amendment.

c. *The 1992 amendment to the EAJA.* As with the 1985 amendment to the EAJA, the 1992 amendment to the definition of *court* does not support the exclusion of the bankruptcy courts from EAJA jurisdiction. The 1992 amendment includes the U.S. Court of Veterans Appeals in the EAJA definition of *court*.¹⁴⁷ Although the 1992 amendment appears to provide additional support for the *expressio unius* argument, the amendment provides no more evidence of a congressional intent to exclude the bankruptcy courts from EAJA authority than does the similar 1985 amendment. In the legislative history of the 1992 amendment, Congress again emphasized that the amendment was a response to a particular court opinion,¹⁴⁸ and that the amendment was merely a clarification of existing law.¹⁴⁹

The 1992 EAJA amendment was a response to *Jones v. Derwinski*,¹⁵⁰ in which the U.S. Court of Veterans Appeals held that it lacked authority to award EAJA fees because Congress did not intend for the court to have EAJA authority.¹⁵¹ As with the bankruptcy courts, however, the plain meaning of "any court" in the EAJA's jurisdictional provision indicates that the statute should have covered the Court of Veterans Appeals.¹⁵² The legislative history of the 1992 amendment underscores this point by emphasizing that the amendment was merely a clarification of existing law, not a

146. Prior to 1986, only five opinions discuss the EAJA in the context of the bankruptcy courts. Not one of those cases suggests that the bankruptcy courts are ineligible to exercise EAJA authority. See *United States Small Business Admin. v. Esmond* (*In re Esmond*), 752 F.2d 1106 (5th Cir. 1985) (remanding to bankruptcy court for a determination of propriety of EAJA award); *Hagan v. Heckler* (*In re Hagan*), 44 B.R. 59 (Bankr. D.R.I. 1984) (exercising EAJA power); *In re Parks*, 84-2 U.S. Tax Cas. (CCH) ¶ 9744 (Bankr. N.D. Ohio 1984) (reaching the merits of EAJA dispute); *In re Newlin*, 29 B.R. 781 (E.D. Pa. 1983) (affirming EAJA award by bankruptcy court); see also *In re Conti*, 50 B.R. 142, 147 (Bankr. E.D. Va. 1985) (stating, in dicta and although no EAJA petition was before the court, that it would be appropriate for the bankruptcy court to award EAJA fees).

147. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 506(a), 106 Stat. 4506, 4513.

148. See *Jones v. Derwinski*, 2 Vet. App. 231 (Ct. Vet. App. 1992) (holding the Court of Veterans Appeals unable to shift fees under the EAJA), *vacated sub nom. Jones v. Principi*, 985 F.2d 582 (Fed. Cir. 1992) (vacating judgment in light of the 1992 EAJA amendment).

149. H.R. REP. NO. 1006, 102d Cong., 2d Sess. 25 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3921, 3934 ("[The amendment] amends EAJA and clarifies that it applies to the Court of Veterans Appeals.").

150. 2 Vet. App. 231 (Ct. Vet. App. 1992).

151. *Jones*, 2 Vet. App. at 233-34.

152. See *supra* section II.B.1.

change in law.¹⁵³ The House Judiciary Committee, by classifying the amendment as a clarification rather than a change in law, suggests that the amendment is an example of the proper interpretation of the meaning of “court” within the EAJA.¹⁵⁴ Thus once again, the *expressio unius* doctrine should not apply because no evidence of a comprehensive review of the scope of the EAJA exists. To the contrary, Congress again opted for a narrow solution rather than considering other possible ambiguities in EAJA jurisdiction,¹⁵⁵ even though the circuit split regarding bankruptcy jurisdiction had developed.¹⁵⁶ Endowing this process with the presumption of careful consideration and exclusion of all other possible amendments makes little sense in light of the actual record.

The better explanation of the 1985 and 1992 amendments is that they are examples of Congress’ clarifying the existing law by correcting court decisions that took the wrong path. As such, both the 1985 and 1992 amendments may be categorized as legislative interpretations of the EAJA that serve to emphasize the broad reach of the EAJA.

C. Purposes of the EAJA

Examining the purposes of the EAJA provides further support for the conclusion that the bankruptcy courts have fee-shifting authority — a conclusion already reached through textual analysis and a review of the legislative history. This section examines four purposes of the EAJA — encouraging private litigants to assert their legal rights against the government despite the government’s overwhelming resource advantage, providing for equality among litigants, establishing a check on government power, and encouraging a testing ground for government positions¹⁵⁷ — and concludes that

153. H.R. REP. NO. 1006, *supra* note 149, at 25 (1992), *reprinted in* 1992 U.S.C.C.A.N. at 3934.

154. *See id.*

155. *See supra* note 143.

156. The speed with which Congress passed the amendment and the fact that the legislative history consists of only one paragraph relevant to the EAJA suggests that Congress did not comprehensively review the scope of the EAJA in conjunction with the 1992 amendment. Only slightly more than seven months passed between the decision in *Jones v. Derwinski*, 2 Vet. App. 231, 231 (Ct. Vet. App. 1992), decided March 13, and the enactment of the amendment on October 29, 1992. Federal Courts Administration Act of 1992, Pub L. No. 102-572, 106 Stat. 4506. The relevant legislative history is included in H.R. REP. NO. 1006, *supra* note 149, at 25, *reprinted in* 1992 U.S.C.C.A.N. at 3934.

157. According to the EAJA,

“position of the United States” means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings

....

granting EAJA authority to bankruptcy courts furthers each of these purposes.

1. *Reducing the Deterrent Effect of Government Resources on the Average Litigant*

Bankruptcy court jurisdiction under the EAJA is consistent with the EAJA's purpose of providing a check on the coercive potential of the government's tremendous resources. In enacting the EAJA, Congress voiced specific concern that the government bureaucracy, with its greater resources and expertise, could practically coerce other litigants to comply with its regulatory or litigation position.¹⁵⁸ The EAJA provides, "It is the purpose of this title — (1) to diminish the deterrent effect of seeking review of, or defending against, governmental action"¹⁵⁹ The Supreme Court has summarized the statute's deterrent rationale as follows:

"For many citizens, the costs of securing vindication of their rights and the inability to recover attorneys fees preclude resort to the adjudicatory process. . . . When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it." The EAJA was designed to rectify this situation.¹⁶⁰

Congress was particularly concerned that small businesspersons were being forced to submit to the government due to the costs of establishing their rights against a bigger, better financed, more experienced adversary.¹⁶¹ In congressional debate, Senator Goldwater said: "[T]his glaring inequity of current law is an encouragement to governmental arbitrariness. What hope does a small citizen or business have to challenge all the resources of the mighty Federal Government when even if he wins the administrative or judicial decision, his legal fees virtually leave him in bank-

28 U.S.C. § 2412(d)(2)(D) (1988). Essentially, this means that both the litigation position as well as prelitigation conduct comprise the "position of the United States." See *Cummings v. Sullivan*, 950 F.2d 492, 496 (7th Cir. 1991).

158. See H.R. REP. NO. 1418, *supra* note 2, at 10, reprinted in 1980 U.S.C.C.A.N. at 4988 ("Thus, at the present time, the Government with its greater resources and expertise can in effect coerce compliance with its position.").

159. Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, § 202(c), 94 Stat. 2321, 2325 (1980).

160. *Sullivan v. Hudson*, 490 U.S. 877, 883 (1989) (quoting S. REP. NO. 253, *supra* note 88, at 5).

161. Four members of Congress spoke in favor of the EAJA because small businesses were being forced toward bankruptcy while attempting to establish their rights against the government. 126 CONG. REC. 28,643 (1980) (statements of Rep. Smith, Rep. Railsback, and Rep. McDade); 126 CONG. REC. 28,653 (1980) (statement of Rep. Symms). The concern for small businesses is also evident throughout the report of the House Committee on Small Business. H.R. REP. NO. 1005, *supra* note 88, at 5-8, 11.

ruptcy?"¹⁶² Senator Baldus echoed this sentiment, stating, "[I]t is a terrifying prospect now of fighting a court case, winning, and yet, going bankrupt."¹⁶³ In short, Congress recognized the vulnerability of the small business and provided a remedy for situations in which the taxpayer would be economically defeated even when legally victorious. It is illogical to assume that Congress intended to protect citizens from being driven to the brink of bankruptcy, only to abandon them at the threshold of title 11.¹⁶⁴

The filing of a bankruptcy petition does not obviate the need for EAJA protection. If the bankruptcy is in the reorganization stage, the debtor in possession has all the same motivations and influences as a prebankruptcy owner involved in a district court case,¹⁶⁵ except that the debtor has fewer resources with which to work. The likelihood of acquiescence to an unreasonable government position is even greater in bankruptcy than in administrative hearings or other civil actions in federal court because the nongovernment party typically has fewer resources than litigants in other civil actions to withstand the economic pressure inherent in litigating against the government.¹⁶⁶ The economic condition of the debtor only magnifies the government's coercive power. The presence, in the bankruptcy courts, of the precise danger that Congress expressly sought

162. 125 CONG. REC. 21,438 (1979) (statement of Sen. Goldwater).

163. 126 CONG. REC. 28,654 (1980) (statement of Rep. Baldus).

164. *Cf. Sullivan v. Hudson*, 490 U.S. 877 (1988). In *Sullivan*, the Court awarded EAJA fees to a Social Security claimant for expenses incurred in an administrative proceeding in which the United States was not represented by an attorney, 490 U.S. at 892-93, notwithstanding the fact that the EAJA only allows for an award of fees in administrative hearings when the position of the United States is represented by counsel or otherwise. 5 U.S.C. § 504(b)(1)(C) (1988). In support of its holding, the Court reasoned that "we find it difficult to ascribe to Congress an intent to throw the Social Security claimant a lifeline that it knew was a foot short." 490 U.S. at 890. It is equally difficult to ascribe such a congressional intent regarding a bankrupt claimant, especially in light of the concern for small business repeatedly expressed in the congressional debate. *See supra* notes 161-63 and accompanying text.

165. The debtors in possession "bring to the bankruptcy court their old allegiances and antagonisms, as well as their business judgment and experience." JAMES J. WHITE & RAYMOND T. NIMMER, *BANKRUPTCY* 64 (2d ed. 1992). This is not to say that the actual prefiling disputes the debtor in possession may have had with the government will be adjudicated by the bankruptcy court. Those disputes will likely be postponed by the automatic stay. *See* 11 U.S.C. § 362 (1988). The debtor in possession faced with a bankruptcy dispute against the federal government is, however, subject to the same pressures that Congress believed were deterring citizens from asserting their legal rights. *See* H.R. REP. NO. 1418, *supra* note 2, at 5, *reprinted in* 1980 U.S.C.A.N. at 4984.

166. Although the debtor enjoys some procedural advantages, such as the automatic stay, *see* 11 U.S.C. § 362 (1988), that are designed to reduce the economic pressure inherent in bankruptcy, the automatic stay does nothing to reduce the pressure inherent in a violation of the stay, an action to lift the stay, or an objection to the debtor's use of cash collateral by the government. *See* 11 U.S.C. § 363 (1988). Application of the EAJA would encourage a debtor to litigate these issues, confident that if the government acted without substantial justification, the debtor will not suffer a loss solely by asserting its rights.

to prevent through the EAJA¹⁶⁷ emphasizes the need to interpret the EAJA correctly to resolve this situation.

2. *Placing Litigants on Equal Footing*

In enacting the EAJA, Congress sought to remove the federal government's sovereign immunity with respect to attorney's fees.¹⁶⁸ Before Congress passed the EAJA in 1980, courts could not shift fees against the United States without explicit statutory authority.¹⁶⁹ The government was therefore immune to many statutory fee-shifting laws and common law exceptions to the American rule to which its citizens were subject. Congress enacted the EAJA specifically to put the government on equal footing with other litigants already subject to fee-shifting rules.¹⁷⁰

Absent EAJA authority the bankruptcy courts have the power to award fees and costs when appropriate, but not against the federal government.¹⁷¹ By enacting the EAJA, Congress changed this

167. See *O'Connor v. United States Dept. of Energy*, 942 F.2d 771, 774 (10th Cir. 1991) (noting that a grant of EAJA authority to the bankruptcy court is congruous with the EAJA purpose of encouraging individuals to challenge government action).

168. The EAJA provides: "It is the purpose of this title . . . (2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the 'American Rule' respecting the award of attorney fees." Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, § 202(c), 94 Stat. 2321, 2325 (1980).

169. The text of 28 U.S.C. § 2412 in 1976 was as follows:

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in § 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action.

28 U.S.C. § 2412 (1976). For an interpretation of that section, see *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 265-68 (1975) (holding that pre-EAJA § 2412 barred fee awards against the federal government unless the award was expressly authorized by statute). Some of the statutory exceptions to the American rule are listed in *supra* note 4.

170. See 28 U.S.C. § 2412(b) (1988).

171. Without EAJA authority, bankruptcy courts would be prevented from shifting fees and costs against the federal government in situations in which they could shift fees and costs against a private litigant. These limitations arise in at least four contexts. First, bankruptcy rule 7054 allows courts to shift costs to prevailing parties unless prohibited by law. See *FED. R. BANKR. P. 7054(b)*. The opposite presumption applies to the federal government, as costs may be shifted against the federal government only to the extent permitted by law. *Id.* One bankruptcy court has even held that costs available under rule 7054 include attorney's fees. See *In re Roco Corp.*, 37 B.R. 770, 775 (Bankr. D. R.I. 1984). Bankruptcy rule 7054 mirrors federal rule of civil procedure 54. Civil procedure rule 54, like bankruptcy rule 7054, allows courts to shift costs, but not against the United States unless there is a specific statutory authorization. *FED. R. CIV. P. 54(d)*. The EAJA and its 1966 predecessor, Act of July 18, 1966, Pub. L. No. 89-507, 80 Stat. 308 (codified at 28 U.S.C. § 2412 (1976)), provide the statutory basis for an award of costs, see 28 U.S.C. § 2412(a) (1988), and fees, see 28 U.S.C. § 2412(b) (1988). Therefore, without EAJA power, the bankruptcy courts are unable to put the federal government on equal footing with other litigants.

Second, bankruptcy courts can impose sanctions of costs and attorney's fees against a litigant or its attorney for a violation of bankruptcy rule 9011. See *FED. R. BANKR. P. 9011*. Bankruptcy rule 9011 incorporates civil procedure rule 11. See *FED. R. CIV. P. 11*; see, e.g., *In re Rainbow Magazine, Inc.*, 136 B.R. 545 (Bankr. 9th Cir. 1992). Bankruptcy rule 9011 ap-

system in the federal courts,¹⁷² declaring that “there appears to be no justification for exempting the United States” from exceptions

plies to “[e]very petition, pleading, motion and other paper served or filed in a [bankruptcy] case . . . on behalf of a party represented by an attorney, except a list, schedule, [or] statement.” FED. R. BANKR. P. 9011. Despite the pervasive effect of rule 9011 on nongovernment litigants, bankruptcy courts may not sanction the federal government under rule 9011 because the rule is not sufficiently explicit to waive sovereign immunity. See *Graham v. United States* (*In re Graham*), 981 F.2d 1135, 1140 (10th Cir. 1992).

Third, the bankruptcy code provides that collection efforts regarding discharged debts are permanently enjoined. 11 U.S.C. § 524(a) (1988). Debtors may recover damages, including attorney’s fees, if the injunction is violated. *Kimco Leasing, Inc. v. Knee*, 144 B.R. 1001, 1003 (N.D. Ind. 1992); *In re Rosteck*, 85 B.R. 73 (Bankr. N.D. Ill. 1988). Section 106 of the bankruptcy code, the general waiver of sovereign immunity, does not waive immunity with respect to damage suits resulting from a governmental violation of the permanent injunction. 11 U.S.C. § 106 (1988); see also *IRS v. Germaine* (*In re Germaine*), 152 B.R. 619, 623 (Bankr. 9th Cir. 1993) (holding that 26 U.S.C. § 7430 (1988), the EAJA’s sister statute, did waive sovereign immunity).

Finally, the bankruptcy courts cannot put the government on equal footing with respect to violations of the automatic stay. See 11 U.S.C. § 362 (1988). The Bankruptcy Code provides that an individual injured by a willful violation of the automatic stay may recover, among other things, costs and attorney’s fees incurred because of the violation. See 11 U.S.C. § 362(h) (1988).

Courts are split regarding whether the general waiver of sovereign immunity in bankruptcy code § 106 applies to § 362(h). Some courts hold that the general waiver is applicable, see *United States v. Bulson* (*In re Bulson*), 117 B.R. 537, 541 (Bankr. 9th Cir. 1990); *Price v. United States* (*In re Price*), 130 B.R. 259, 267-68 (N.D. Ill. 1991), while others contend that sovereign immunity bars a monetary award under § 362(h). See *United States v. Academy Answering Serv., Inc.* (*In re Academy Answering Serv., Inc.*), 100 B.R. 327, 329-30 (N.D. Ohio 1989); *Davis v. IRS*, 136 B.R. 414, 415 (E.D. Va. 1992) (holding that Congress waived the government’s sovereign immunity in § 106, but only to the extent of the government’s claim against the estate; actual money damages are precluded).

The Supreme Court has emphasized that § 106 is not a complete waiver of sovereign immunity. *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011 (1992); *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989). Waivers of sovereign immunity must be “unequivocally expressed,” *Nordic Village*, 112 S. Ct. at 1014, and are to be strictly construed. 112 S. Ct. at 1015. The Court has not clarified the specific question of whether a § 362(h) claim for damages resulting from a violation of the automatic stay against the federal government is precluded by sovereign immunity. Differing interpretations of *Nordic Village* have led to opposite results. See *Pinkstaff v. United States* (*In re Pinkstaff*), 974 F.2d 113, 115 (9th Cir. 1992) (sovereign immunity is waived by 11 U.S.C. § 106(a)); *University Medical Ctr. v. Sullivan* (*In re University Medical Ctr.*), 973 F.2d 1065, 1068 (3d Cir. 1992) (sovereign immunity is waived by 11 U.S.C. § 106(a)); *Quillen v. United States*, 160 B.R. 776, 777 (W.D. Va. 1993) (sovereign immunity bars recovery of fees against the United States); *Nichols v. IRS* (*In re Nichols*), 143 B.R. 104, 105-07 (Bankr. S.D. Ohio 1992) (§ 106 only waives sovereign immunity if the government has filed a proof of claim against the estate); *In re Stuber*, 142 B.R. 435, 438-39 (Bankr. D. Kan. 1992) (sovereign immunity bars recovery of fees against the United States); *Taborski v. United States*, 141 B.R. 959, 964 (N.D. Ill. 1992) (sovereign immunity is waived by 11 U.S.C. § 106(a)); *Toti v. United States* (*In re Toti*), 141 B.R. 126, 131-33 (Bankr. E.D. Mich. 1992) (sovereign immunity bars recovery of fees against United States), *revd. on other grounds*, 149 B.R. 829 (E.D. Mich. 1993).

One court has resolved this problem by relying on the EAJA. See *In re Schafer*, 146 B.R. 477 (D. Kan. 1992). The court held that EAJA § 2412(b) was a waiver of sovereign immunity that allowed a bankruptcy court to award attorney’s fees to a prevailing debtor even though § 106 provided no such waiver. *Schafer*, 146 B.R. at 481. The *Schafer* court cited *O’Connor* as binding Tenth Circuit precedent to support bankruptcy court jurisdiction over the EAJA, but did not acknowledge the circuit split. 146 B.R. at 481.

172. H.R. REP. NO. 1418, *supra* note 2, at 9, reprinted in 1980 U.S.C.C.A.N. at 4987 (noting that the United States should be held to at least the same standards in litigation as private parties).

to the American rule.¹⁷³ This reasoning applies as much to the bankruptcy courts as to other federal courts.

The EAJA purpose of eliminating the federal government's sovereign immunity with respect to litigation costs is also consistent with the waiver of sovereign immunity in the bankruptcy code.¹⁷⁴ When the government acts as a litigant rather than in its sovereign capacity, there is no need to extend sovereign immunity.¹⁷⁵ Congress's decision to hold government parties to the same standards as other litigants¹⁷⁶ recognizes that government parties that act without substantial justification, like the Farmers Home Administration in *Davis*,¹⁷⁷ or the IRS,¹⁷⁸ have no special right to immunity based on their status as governmental units. The reasons for removing the federal government's sovereign immunity with respect to attorney fees are therefore as compelling in the bankruptcy court as in other federal courts vested with EAJA jurisdiction.

3. *Deterrence of Unjustified Government Action*

Congress enacted the EAJA in part to deter unjustified government action in bringing and litigating lawsuits.¹⁷⁹ Including the

173. *Id.*

174. See 11 U.S.C. § 106 (1988).

175. The Supreme Court has held the EAJA is subject to a narrow interpretation as a waiver of sovereign immunity. *Ardestani v. INS*, 112 S. Ct. 515, 520-21 (1991). Of course, the corollary to the general rule concerning waivers of immunity is that a court should not construe a waiver more narrowly than Congress intended it. *Ardestani*, 112 S. Ct. at 520. As demonstrated earlier, when the EAJA was passed, Congress intended for the bankruptcy courts to exercise EAJA jurisdiction. See *supra* section II.B.1. Therefore, the rule requiring a narrow construction of the EAJA does not exclude the bankruptcy courts from EAJA jurisdiction.

Additionally, some have argued the doctrine of sovereign immunity is inapplicable to the EAJA. See Thomas W. Holm, Note, *Aliens' Alienation from Justice: The Equal Access to Justice Act Should Apply to Deportation Proceedings*, 75 MINN. L. REV. 1185, 1217-19 (1991); Arlene S. Ragozin, Comment, *The Waiver of Immunity in the Equal Access to Justice Act: Clarifying Opaque Language*, 61 WASH. L. REV. 217, 238-41 (1986). Because the purpose of the rule requiring a narrow construction of waivers of sovereign immunity is to protect public funds and allow for discretion in legitimate government action, and because the EAJA reflects the legislature's judgment regarding the proper balancing of both those factors, the EAJA should not be subject to the rule requiring narrow construction of waivers of sovereign immunity. See *Ardestani*, 112 S. Ct. at 525-26 (Blackmun, J., dissenting).

176. See *supra* notes 172-73 and accompanying text.

177. The claim of the Farmers Home Administration in *Davis* was equitably subordinated because the agency's conduct toward other creditors was "at best, misleading." *Gower v. Farmers Home Admin.* (*In re Davis*), 899 F.2d 1136, 1137 (11th Cir.), cert. denied, 498 U.S. 981 (1990).

178. The IRS is a frequent violator of the bankruptcy code. See *supra* note 17.

179. See H.R. REP. NO. 1418, *supra* note 2, at 14, reprinted in 1980 U.S.C.C.A.N. at 4993; 126 CONG. REC. 28,845 (1980) (statement of Sen. Dominici) ("So I am quick to admit that, while it is a bill intended to recompense the average American and the small businessman for legal fees, it is also a bill which will begin to put some skids under arbitrary regulation and rulemaking."); see also June Carbone, *The Misguided Application of Traditional Fee Doctrine to the Equal Access to Justice Act*, 26 B.C. L. REV. 843, 874 (1985) ("In its methodology, the

bankruptcy courts within EAJA jurisdiction serves this purpose. At the time the EAJA was passed, Congress was concerned that government agencies sometimes abused their power.¹⁸⁰ By putting these government entities at risk for their opponent's attorney's fees,¹⁸¹ Congress hoped to curb the unreasonable exercise of government authority. This continues to be an important goal in bankruptcy, where excessive litigation often channels the estate's resources to the attorneys, rather than to creditors and the debtor.¹⁸²

4. Testing Government Action

Prior to the enactment of the EAJA, Congress perceived that many government positions went unchallenged due to the high cost of litigating against the government.¹⁸³ As a result, the government repeatedly asserted these positions although they were never legitimated through a hearing.¹⁸⁴ Congress was not only concerned about untested government arguments; it also believed that, too

Act pays greater attention to the deterrent effect on federal agencies than to the vindication of any single interest.”).

180. See H.R. REP. NO. 1418, *supra* note 2, at 10, reprinted in 1980 U.S.C.C.A.N. at 4988 (“[T]here is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue.”); S. REP. NO. 253, *supra* note 88, at 5 n.1; 126 CONG. REC. 28,649 (1980) (statement of Rep. Smith) (“The horror stories of Government actions brought without substantial justification are legion.”); see also *Commissioner v. Jean*, 496 U.S. 154, 165 (1990) (noting that Congress passed the EAJA partially due to a concern that government agencies were exercising their authority unreasonably).

181. Mandatory awards under EAJA § 2412(d) of fees and expenses incurred by the prevailing party are paid by the agency over which the private party prevailed. 28 U.S.C. § 2412(d)(4) (1988). The assignment of responsibility for the fees under subsection (d) to the department which lost the case was a late alteration to the bill to increase its deterrent effect. See 126 CONG. REC. 28,845 (1980) (statement of Sen. Domenici) (stating that the earlier version provided for payment from a general fund); National Legal Aid and Defender Assn., *Commentary: The Equal Access to Justice Act*, 15 CLEARINGHOUSE REV. 1021, 1021 (1982) (“Awards made under section 2412(d) . . . should be paid directly by the agency from its unrestricted appropriation.”). Discretionary awards under §§ 2412(a) and 2412(b) are paid by the General Accounting Office. 28 U.S.C. §§ 2412(c), 2414 (1988).

182. Delay increases the administrative expenses generated by the bankruptcy estate. All actual and necessary expenses of maintaining the estate are administrative, see 11 U.S.C. § 503 (1988), and are paid before creditors and the debtor receive any funds. See 11 U.S.C. § 507 (1988). Therefore, delay prevents maximal distribution of the estate, which is a goal of the bankruptcy system. See WHITE & NIMMER, *supra* note 165, at 52.

183. See H.R. REP. NO. 1418, *supra* note 2, at 9, reprinted in 1980 U.S.C.C.A.N. at 4988 (noting that “it is more practical to endure an injustice than to contest it” if the cost of contesting is high).

184. See *id.* (“Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views.”); S. REP. NO. 253, *supra* note 88, at 7 (“By allowing a decision to contest Government action to be based on the merits of the case rather than the cost of litigating, [the EAJA] helps assure that administrative decisions reflect informed deliberation.”). Although the danger of ill-conceived legal precedent is slim in the bankruptcy context because agencies do not have rulemaking power in that arena, there is a risk of institutional precedent, where a course of conduct may be established without informed deliberation. See *id.* at 7.

often, government decisions to litigate went unchallenged.¹⁸⁵ Without the threat of challenges by citizens, governmental power was only limited by its own discretion. Congress believed this was an insufficient check on government authority.¹⁸⁶ The citizens who do challenge the government and force litigation thereby provide a type of public service, especially when the government's position is unjustified.¹⁸⁷ Granting the bankruptcy courts the ability to shift fees under the EAJA will help test and thereby improve the quality of government positions in bankruptcy cases.

III. ALTERNATIVES TO BANKRUPTCY COURT JURISDICTION UNDER THE CURRENT EAJA

Three possible alternatives to bankruptcy court jurisdiction over EAJA petitions exist. First, bankruptcy courts could forward proposed findings of fact and conclusions of law concerning EAJA petitions to the district courts for final judgment.¹⁸⁸ Second, bankruptcy courts could obtain the consent of the parties to exercise EAJA power.¹⁸⁹ Third, Congress could again amend the EAJA definition of *court*.¹⁹⁰

This Part argues that none of these options provides a solution preferable to interpreting the EAJA accurately according to its language, history, and purposes. Section III.A argues that forwarding proposed findings of fact and conclusions of law regarding the EAJA issue to the district court is inefficient, expensive, and runs counter to the purposes of the EAJA. Section III.B argues that having the bankruptcy court request the consent of the parties to the courts' exercise of EAJA authority is unworkable in practice.

185. Congress amended the EAJA in 1985 to state: "[P]osition of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." Act of Aug. 5, 1985, Pub. L. No. 99-80, § 2(c)(2), 99 Stat. 183, 185 (codified at 28 U.S.C. § 2412(d)(2)(D)). The House Judiciary explained the amendment as follows: "[T]he definition of 'position of the United States' . . . necessarily includes an evaluation of the facts that led the agency to bring the action against the private party . . ." H.R. REP. NO. 120, *supra* note 142, at 13, *reprinted in* 1985 U.S.C.C.A.N. at 141. The legislative history to the enactment of the EAJA in 1980 also indicates a desire to include the decision to bring suit within the realm of EAJA regulation. *See* H.R. REP. NO. 1418, *supra* note 2, at 11, *reprinted in* 1980 U.S.C.C.A.N. at 4989-90.

186. One report states, "This kind of truncated justice undermines the integrity of the decisionmaking process." H.R. REP. NO. 1418, *supra* note 2, at 10, *reprinted in* 1980 U.S.C.C.A.N. at 4988; *see also* S. REP. NO. 253, *supra* note 88, at 5.

187. S. REP. NO. 253, *supra* note 88, at 5-6. In passing the EAJA, Congress expressed a belief that those entities that provide this service and thereby help define the limits of federal authority should not bear the cost of providing such an important service alone. H.R. REP. NO. 1418, *supra* note 2, at 10, *reprinted in* 1980 U.S.C.C.A.N. at 4988-89.

188. *See Gower v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136, 1140-41 (11th Cir.), *cert. denied*, 498 U.S. 981 (1990); *see also* 28 U.S.C. § 157(c)(1) (1988).

189. *Davis*, 899 F.2d at 1141-42.

190. *See Sabino*, *supra* note 114, at 487-89.

Section III.C argues that simply waiting for Congress again to amend the EAJA definition of *court* is unfaithful to the statute and confuses the roles of the judiciary and the legislature. This Part concludes that the lack of acceptable substitutes for direct bankruptcy jurisdiction over EAJA applications provides the final indication that Congress likely intended to include bankruptcy courts within the EAJA's jurisdictional grant.

A. *Forwarding Proposed Findings of Fact and Conclusions of Law to the District Court for Approval*

The Eleventh Circuit in *Gower v. Farmers Home Administration (In re Davis)*¹⁹¹ suggested that the bankruptcy courts may forward EAJA petitions to the district court according to the procedure provided by 28 U.S.C. § 157.¹⁹² Under this procedure, bankruptcy courts may forward proposed findings of fact and conclusions of law to the district court for de novo review. The procedure permits the district court, an Article III court unquestionably vested with EAJA jurisdiction, to issue the final order regarding the fee application.¹⁹³ This suggestion mirrors the system currently used when "noncore"¹⁹⁴ disputes arise before the bankruptcy

191. 899 F.2d 1136 (11th Cir.), *cert. denied*, 498 U.S. 981 (1990).

192. 899 F.2d at 1140-44; *see* 28 U.S.C. § 157(b) (1988).

193. 899 F.2d at 1141.

194. *See* 28 U.S.C. 157(c) (1988). In a "noncore" proceeding, absent consent of the parties to bankruptcy court adjudication, 28 U.S.C. § 157(c)(2) (1988), the bankruptcy court hears the case, but does not decide it. The bankruptcy court submits proposed findings of fact and conclusions of law to the district court for de novo review of any finding to which one of the parties objects, 28 U.S.C. § 157(c)(1) (1988). The district court then enters final judgment, 28 U.S.C. § 157(c)(1) (1988).

The *Davis* court refers to the EAJA application as a noncore proceeding, 899 F.2d at 1140-41. This holding coincides with the *Davis* court's finding that bankruptcy courts may not award EAJA fees, but the conclusion that EAJA applications are not core proceedings is not perfectly obvious. At least two courts have held that a request for fees under the EAJA's sister statute, 26 U.S.C. § 7430 (1988), is a core matter. *See Kreidle v. Department of Treasury, IRS (In re Kreidle)*, 145 B.R. 1007, 1010 (Bankr. D. Colo. 1992) (relying on 28 U.S.C. § 157(b)(2)(O) (1988)); *In re Chambers*, 140 B.R. 233, 238 (N.D. Ill. 1992) (relying on 28 U.S.C. § 157(b)(2)(B) (1988)). Furthermore, the courts which have awarded EAJA fees must have considered the application a core matter. *See, e.g., O'Connor v. United States Dept. of Energy*, 942 F.2d 771 (10th Cir. 1991) (reversing denial of fees on jurisdictional grounds); *United States Small Business Admin. v. Esmond (In re Esmond)*, 752 F.2d 1106 (5th Cir. 1985) (remanding to bankruptcy court for a determination of the appropriateness of an EAJA award). Given the language of 28 U.S.C. § 157(b)(2)(O), which designates "other proceedings affecting the liquidation of the assets of the estate" as core matters, and the fact that EAJA petitions surely affect asset liquidation, the reasoning of the *Kreidle* court seems to give the correct result.

Another way to consider the problem is to recognize that the distinction between core and noncore is Congress's attempt to rectify the jurisdiction problem exposed in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). *See* Robert L. Ordin & Michael L. Cook, *Bankruptcy Jurisdiction Under the Bankruptcy Amendments and Federal Judgeship Act of 1984*, in *BANKRUPTCY LITIGATION MANUAL* 1, 73 (Michael L. Cook ed., 1991). For a discussion of *Marathon*, *see supra* notes 108-19 and accompanying text. As demonstrated earlier, there is no constitutional objection to the bankruptcy court adjudicat-

courts.¹⁹⁵

Such a procedure presents two difficulties. First, it requires an adjudication by a court that is one step removed from the parties and the administration of the case. A court ruling on an EAJA application must exercise considerable judgment. Courts may not shift fees if the position of the United States was "substantially justified"¹⁹⁶ or if "special circumstances make an award unjust."¹⁹⁷ A district court may not be able to perform an effective de novo review without firsthand information. The bankruptcy court, on the other hand, is intimately familiar with the totality of the case, including the legal positions and conduct of the parties. The bankruptcy court is therefore the best judicial body to determine whether an award is warranted. As a result, the de novo review performed by the district court may amount to little more than a rubber stamp of the bankruptcy court's proposed findings.¹⁹⁸ In such an instance, the procedure serves no purpose but to increase the legal costs. This result conflicts with one of the purposes of the EAJA — to reduce the deterrent effect of legal fees on the average citizen's willingness to litigate against the federal government.¹⁹⁹

Second, requiring the district court to repeat the work of the bankruptcy court misuses judicial resources. Even if the district court engages in a pro forma review of the bankruptcy court's findings, the procedure under section 157 of the bankruptcy code consumes judicial resources.²⁰⁰ The federal district courts are already overburdened²⁰¹ and should not be saddled with additional respon-

ing EAJA questions. See *supra* notes 111-14 and accompanying text. Therefore, EAJA petitions should be considered core matters that bankruptcy courts can hear directly.

195. See generally DAVID G. EPSTEIN ET AL., *BANKRUPTCY* 865-66 (1992).

196. 28 U.S.C. § 2412(d)(1)(A) (1988).

197. 28 U.S.C. § 2412(d)(1)(A) (1988).

198. See WHITE & NIMMER, *supra* note 165, at 97 ("In practice, one suspects de novo review will be pro forma."); Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 681-82 (1985) ("In practical terms, however, the nonarticle III court's proposed findings and conclusions will be the findings and conclusions. 'Consider' and 'review' will disintegrate into rubber stamped acceptances of the bankruptcy court's findings and conclusions.").

199. See H.R. REP. NO. 1418, *supra* note 2, at 5, reprinted in 1980 U.S.C.C.A.N. at 4984 ("The bill rests on the premise that certain [parties] may be deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved."); 125 CONG. REC. 21,436 (1979) (statement of Sen. Dole) ("Ironically, it appears that American Justice has become too costly for the average American budget.").

200. On the notoriously complex nature of bankruptcy jurisdiction, see Steven W. Rhodes, *Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases*, 67 AM. BANKR. L.J. 287, 299-302 (1993).

201. As of March 31, 1993, 220,633 civil cases were pending before the district courts, slightly less than the 228,468 cases which were terminated in the 12 prior months combined. WORKLOAD STATISTICS, *supra* note 12, at 2. The number of suits pending before the district courts was virtually unchanged from March 31, 1992. *Id.* at 19. Thus, the district courts face approximately a full year's backlog of civil cases. For an analysis of the district court's criminal caseload, see *infra* note 202.

sibilities better handled by the bankruptcy courts. Furthermore, because of the busy schedules of the district courts, it is conceivable that a request from a bankruptcy court for a *de novo* review could linger indefinitely, particularly because under the mandate of the Speedy Trial Act civil suits are relegated to second priority.²⁰² In addition, district courts rarely want to hear bankruptcy disputes.²⁰³ The resulting delay and aggravation to the courts caused by forwarding proposed findings to the district courts²⁰⁴ ill serves the purposes of the EAJA²⁰⁵ and the bankruptcy system.²⁰⁶

It is true that the bankruptcy system must tolerate the additional expenses of this noncore adjudication process when the bankruptcy court lacks constitutional authority to accommodate the mandate of *Marathon* that "the power to adjudicate 'private rights' must be vested in an Art[icle] III court."²⁰⁷ But no such constitutional requirement exists with respect to EAJA motions.²⁰⁸ Because Congress gave the bankruptcy courts EAJA authority in 1980,²⁰⁹ there is no reason to endure the additional expense of forwarding EAJA petitions to the district courts.

B. *Obtaining the Consent of the Parties to Adjudication by the Bankruptcy Court*

Relying on the consent of the parties to bankruptcy court jurisdiction over EAJA petitions is an unworkable solution because a government party, in furtherance of its self-interest, will likely never give its consent.²¹⁰ The EAJA requires the losing federal agency to pay the litigation expenses of a prevailing nongovernment party unless the government can prove that its position was

202. Speedy Trial Act, 18 U.S.C. §§ 3161-64 (1988) (requiring expedited procedures for criminal trials). As of March 31, 1993, 46,358 criminal cases were pending in the district courts. WORKLOAD STATISTICS, *supra* note 12, at 34. During the prior twelve months, 43,698 criminal cases were terminated, *id.*, suggesting a backlog of a full year.

203. DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 21 (1992). In fact, the district courts' distaste for bankruptcy cases is one of the reasons the bankruptcy courts were created as a separate judicial body in the BRA. H.R. REP. NO. 595, 95th Cong., 2d Sess. 14 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 5976.

204. One commentator identifies this procedure as a cause of expense and delay in bankruptcy proceedings. See Rhodes, *supra* note 200, at 299-302.

205. See *supra* section II.C.

206. See *supra* note 182 and accompanying text.

207. Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 77 (1982).

208. See *supra* notes 111-14 and accompanying text.

209. See *supra* section II.B.1.

210. Even the proponents of this view admit that it is unlikely to be used. Professor Sabino writes, "while it is debatable whether any federal agency would consent to such an exercise by the bankruptcy court, it is, nevertheless, feasible." Sabino, *supra* note 114, at 487. In enacting the EAJA, however, Congress certainly intended that parties who litigate and prevail against the government, when the government has no substantial justification for its position, have more than a "feasible" remedy.

substantially justified.²¹¹ Therefore, a government party that consents to bankruptcy court jurisdiction incurs additional risk for the litigation costs of the opposing party, but receives no reward. With nothing to gain, the government party would be foolish to consent to the exercise of EAJA jurisdiction by the bankruptcy court.²¹² This alternative is untenable because it places the power to consent to bankruptcy court authority with a party that will only harm itself by exercising such authority.

C. Amending the EAJA Definition of Court

A third alternative is a congressional amendment to the EAJA to include the bankruptcy courts within the EAJA definition of *court*. Anthony Sabino argues that Congress should again amend the EAJA to include the bankruptcy court within its definition of *court*,²¹³ following the amendments that included the Claims Court and the Court of Veterans Appeals.²¹⁴ He reasons that "Congress created the EAJA, thus, it is best suited to modify the EAJA to address new dynamics in its application."²¹⁵

Although amending the EAJA's definition of *court* to include the bankruptcy court would obviously solve the problem of the EAJA's jurisdictional scope with respect to the bankruptcy courts, the prospect of amendment does not alleviate the courts' responsibility to interpret the law as it is written. Congress cannot be expected to address every new dynamic in the application of each law it has enacted.²¹⁶ Congress' failure to respond to the circuit split on the issue of bankruptcy court jurisdiction over the EAJA may simply be the result of a need to focus on more pressing matters.

211. See 28 U.S.C. § 2412(d)(5) (1988). The government party bears the burden of proof on this issue. *Gutierrez v. Sullivan*, 953 F.2d 579, 584-85 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2064 (1993); *Cummings v. Sullivan*, 950 F.2d 492, 494-95 (7th Cir. 1991).

212. The government party might be willing to consent to an EAJA adjudication in return for some other advantage, such as a factual stipulation or waiver of procedural right. The EAJA, however, was passed to mitigate the effect of the government's inherent, yet coercive litigation advantages, see S. REP. NO. 253, *supra* note 88, at 5, and to encourage adjudications on the merits. H.R. REP. NO. 1418, *supra* note 2, at 10, *reprinted in* 1980 U.S.C.C.A.N. at 4988. The EAJA represents an attempt to improve citizens' access to the court system. See S. REP. NO. 253, *supra* note 88, at 7. The possibility of a government party using access to this supposedly access-creating Act as a bargaining chip violates the purpose of the EAJA.

213. Sabino, *supra* note 114, at 488.

214. See *supra* notes 133, 147 and accompanying text.

215. Sabino, *supra* note 114, at 488.

216. As the Supreme Court has observed, "Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962)). For a general discussion of the meaning of congressional inaction, see William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

Courts must interpret the EAJA currently before them, and as this Note has demonstrated, the text, history, and purposes of the statute all indicate that bankruptcy courts already have the authority to shift fees against the federal government.

CONCLUSION

Congress enacted the EAJA to increase access to the court system by encouraging litigants to challenge unreasonable government positions. The bankruptcy courts are not immune to unreasonable government positions. The coercive nature of an adversary with the vast resources of the United States weighs heavily on a party trying to salvage its estate or contract rights in the bankruptcy court. The chance to assert one's rights without the additional expense of litigation encourages parties to assert their rights. Bankruptcy court authority over EAJA petitions serves the purposes of the EAJA.

In addition, the language of the statute that grants authority to "any court" having subject-matter jurisdiction firmly supports bankruptcy court authority over the EAJA. The confounding history of the EAJA, the Bankruptcy Reform Act of 1978, the transition period, *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, the Bankruptcy Amendments and Federal Judgeship Act of 1984, and the subsequent amendments to the EAJA's definition of "court" create considerable ambiguity, particularly with respect to the EAJA's legislative history. A careful examination of each event within its historical context, however, leads to the single conclusion that Congress intended the bankruptcy courts to have EAJA power. By examining the history of the EAJA, this Note has reconciled the seeming direct contradiction between the language of the EAJA and its legislative history. The reconciliation points to bankruptcy court jurisdiction over EAJA petitions.

It is true that Congress has remained silent on the issue, despite a controversy in the courts. This silence, however, does not indicate congressional opposition to bankruptcy court authority. In fact, Congress has not subsequently refuted its original extension of EAJA power to the bankruptcy courts. The arguments that rely on Congress's silence to exclude the bankruptcy courts from EAJA authority simply misinterpret Congress's actions since the EAJA's enactment.

Finally, alternative ways for bankruptcy litigants to recover their fees if they prevail against the government are implausible due to their expense and impracticability. The very existence of these proposals suggests that even those who believe the EAJA does not grant the bankruptcy courts the ability to shift fees believe that litigants *should* be able to recover their fees in the bankruptcy courts. Instead of looking elsewhere, however, courts need only rely upon

the text, history, and purposes of the EAJA itself to recognize the authority of bankruptcy courts to shift fees and costs against the United States.