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# **Better Access to Justice, Better Access to Attorneys' Fees – The Procedural Implications of *Scarborough v. Principi***

**By Jamie H. Kim\***

*“And there is not a Member of this body who has not found on his or her doorstep citizens who have been wronged by their own Government. At worst, a career or a life may be ruined; at best, the individual has been wrongly accused and has had to incur great expense to clear his name.”<sup>1</sup>*

## **I. INTRODUCTION**

Big versus small, strong versus weak, and rich versus poor – these are three universal themes portrayed in our daily lives through means such as media, culture, and politics. A familiar antagonist in popular culture is the government – “venal, corrupt and hostile to justice”<sup>2</sup> – while its usual adversary is the individual man – the “wronged and powerless . . . who against all odds triumph[s] over

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1. 131 CONG. REC. S2731 (daily ed. Mar. 7, 1985) (statement of Sen. Bumpers).

2. Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 149 (2005) (describing how government is portrayed by mainstream directors in films such as *THE GRAPES OF WRATH* (20th Century Fox 1940) and *MR. SMITH GOES TO WASHINGTON* (Columbia Pictures 1939)).

faceless . . . wrongdoers.”<sup>3</sup> Yet, one must wonder how many wronged individuals actually attain such “triumph” when faced “against all odds.”

Imagine that you are a private citizen of modest means clearly and unjustly wronged by the government. Would you accept automatic defeat by those with more resources and more money? Or, rather, would you challenge or defend regardless of the time it will take and the costs you will undoubtedly incur? Naturally, time and money will weigh heavily in your decision. The good news, however, is that a law exists that says if you win your case against the government, a court can make the government pay your legal fees. So you agree to have your day in court, and you win your case. Then bad news arrives – your attorney tells you that he made a simple yet careless mistake in applying for the fees. Then worse news – he cannot fix his mistake and you must pay for the fees. Robbed of attorneys’ fees at the end of the long and arduous search for justice, have you really “triumphed?”

Conversely, place yourself in the position of the government. You just lost your case in court and are now preparing to pay the other party’s legal fees pursuant to a certain law. To your complete surprise, opposing counsel was careless and did not adhere to that law. What could be better than a situation where you, and in turn taxpayers, save some money?

In light of these two opposing views, who should bear the winning party’s fees? Interpreting the law one way, the private citizen will “triumph.” Interpreting the law another way, the government will “triumph.” Should the consequences be shouldered by the individual, who had no hand in his attorney’s careless mistake, or the government, who happened to get by on a technical error?

The Supreme Court’s ruling in *Scarborough v. Principi* (“*Scarborough*”)<sup>4</sup> addresses and answers these questions. The decision affects the protection Congress intended to give private citizens as potential litigants wronged by arbitrary government action.

This note examines the *Scarborough* decision and its implications. Part II reviews the foundations of the decision

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3. Mezey & Niles, *supra* note 2, at 111.

4. *Scarborough v. Principi*, 541 U.S. 401 (2004).

regarding a prevailing party recovering attorneys' fees from the government. Part III outlines the facts of the case. Part IV reports and analyzes the Court's majority and dissenting opinions. Part V examines the legal impact of the *Scarborough* decision, its impact on our federal government, and the broader impact it has on the nation and its people. And Part VI concludes the note.

## II. HISTORICAL BACKGROUND

In the United States, parties to a lawsuit must pay their own attorneys' fees.<sup>5</sup> This means that a prevailing party must expend monetary costs even when he wins his case. The United States is the only common law country to follow this procedure, hence it is coined the American Rule.<sup>6</sup>

In 1796, the United States Supreme Court first adopted the American Rule in *Arcambel v. Wiseman*.<sup>7</sup> The Court held that the general practice in the United States is for litigating parties to be

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5. Joseph J. Ward, Comment, *Corporate Goliaths in the Costume of David: The Question of Association Aggregation Under the Equal Access to Justice Act – Should the Whole Be Greater Than its Parts?*, 26 FLA. ST. U. L. REV. 151, 156 (1998).

6. Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 639 (1974) (describing the practices of awarding attorneys' fees to the prevailing party in ancient Rome, French civil practice, and early Sweden). The countervailing rule to the American Rule is the English Rule, which allows the prevailing party in a lawsuit to recover attorneys' fees from the losing party. *Id.* at 640. This practice is commonly referred to as "fee-shifting." The early American legal system followed the English Rule of fee-shifting, but abandoned it in the late 1700's. Valerie H. Philbrick, Comment, *Attorney Fees in Contract Disputes in Ohio: Nottingdale Homeowners' Association, Inc. v. Darby*, 51 OHIO ST. L.J. 561, 564 (1990). Legal scholars cite different reasons for the change. One theory is that the early colonists, having just separated themselves from British control, wanted to separate themselves of all British influences. *See id.* at 564. Another theory relates to distrust and hostility towards the early legal profession. Amid a newfound individualistic spirit, early laws were relatively straightforward and simple enough that anyone could understand them. *Id.* So early Americans may have felt no need for a rule that benefited an unnecessary profession since poor and rich alike could represent themselves. *Id.* Others suggest state legislatures simply forgot to increase the amounts of legal fees that could be recovered as inflation increased, leading to the recovery amounts eventually being forgotten. *Id.*

7. *Arcambel v. Wiseman*, 3 U.S. 306 (1796).

responsible for their own attorneys' fees absent express statutory authorization.<sup>8</sup>

The Supreme Court generally cites three reasons in support of the rule.<sup>9</sup> First, the uncertainty of litigation makes it unfair to penalize a losing party by assessing costs and fees for merely defending or prosecuting a lawsuit.<sup>10</sup> Second, the Court did not want to discourage the poor from vindicating their rights.<sup>11</sup> Third, separate claims for costs and fees might increase the time, expense, and difficulties of proof in any given case and would substantially burden the administration of justice.<sup>12</sup>

Like most other rules, the American Rule regarding attorneys' fees comes with exceptions. Initially, after the American Rule was adopted, there were three generally recognized common law exceptions – the common fund exception, the bad faith exception, and the private attorney general doctrine.<sup>13</sup> The common fund exception allowed someone who created, increased, or protected a common fund for the benefit of others to be reimbursed for his legal fees from the fund.<sup>14</sup> Under the bad faith exception, a prevailing

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8. *Id.*

9. In comparison, there are also substantial justifications for the English Rule. See *infra* notes 10-12.

10. See *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). Supporters of the English Rule counter that the only way to make a prevailing litigant whole is to hold the "losing party" liable for the expenses he caused. Philbrick, *supra* note 6, at 566.

11. See *Fleishmann Distilling*, 386 U.S. at 718. Supporters of the English Rule counter that it does not discourage the poor from seeking justice, but actually encourages parties to bring small, meritorious claims that normally would not be litigated due to lack of funds. Philbrick, *supra* note 6, at 566.

12. See *Fleishmann Distilling*, 386 U.S. at 718 (citing *Oelrichs v. Spain*, 82 U.S. 211, 231 (1872)). Supporters of the English Rule counter that it promotes the settling of civil disputes without having to resort to litigation, which reduces the size of court dockets. Philbrick, *supra* note 6, at 566.

13. Libbi J. Finelsen, *Litigation Issue: Attorneys' Fees*, 22 ENVTL. L. 1293, 1293 (1992). These three common law exceptions were in place before Congress enacted any statutory exceptions.

14. *Id.*; *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975) (providing background information on the common fund exception). This exception is typically applied in class action suits. See Tiana S. Mykkeltvedt, Note, *Common Benefit and Class Actions: Eliminating Artificial Barriers to Attorney Fee Awards*, 36 GA. L. REV. 1149, 1157-58 (2002) (setting forth the requirements to be awarded attorneys' fees in a common fund situation). The common fund exception

party was awarded attorneys' fees when the losing party willfully disobeyed a court order or acted in bad faith.<sup>15</sup> The third common law exception was the private attorney general doctrine, under which attorneys' fees were awarded to those persons who acted as "private attorneys general" in enforcing rights deemed to be important to the public.<sup>16</sup>

In its 1975 decision in *Alyeska Pipeline Service Company v. Wilderness Society*,<sup>17</sup> the Supreme Court held that federal courts cannot use the private attorney general doctrine to award attorneys' fees to prevailing parties.<sup>18</sup> The Court stated that only the federal

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was first established in *Trustees v. Greenough*, 105 U.S. 527 (1881), where a bondholder filed suit against the fund trustees on behalf of himself and other railroad bondholders. *Id.* at 528. His efforts resulted in successfully preserving most of the fund for the entire class. *Id.* at 529. The Supreme Court held that the bondholder who started the suit was entitled to attorneys' fees from the fund for two reasons. First, it would be unjust not to award fees since he advanced most of the legal expenses. *Id.* at 532. Second, the Court felt it was unfair that the other bondholders benefit without having incurred any time or expenses in the litigation. *Id.* Thus, the reasoning behind the common fund exception is based on unjust enrichment and equity principles. *Id.* at 535-36.

15. *Alyeska*, 421 U.S. at 258 (providing background information on the bad faith exception); *F.D. Rich Co. v. United States*, 417 U.S. 116, 129-30 (1974) (regarding this bad faith exception as one that the Court has long recognized). The Federal Rules of Civil Procedure contain a provision similar to this exception that states that when an attorney fails to conduct a reasonable inquiry into the merits of the case, the court may impose "an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." FED. R. CIV. P. 11(b)(2).

16. See *Finelsen*, *supra* note 13, at 1293. Thus, this exception encourages socially beneficial litigation. See *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1035-36 (D.C. Cir. 1974), *rev'd on other grounds sub nom. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

17. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

18. See *id.* at 241. In this case, environmental groups sued to prevent the issuance of permits that were required in the construction of the Trans-Alaska oil pipeline. *Id.* The Court of Appeals for the District of Columbia stated that the environmental groups had represented the statutory rights of all citizens and were entitled to attorneys' fees in order to encourage private parties to initiate litigation that benefits the public. *Morton*, 495 F.2d at 1035-36. The Supreme Court reversed, denying the group its attorneys' fees because no statute existed under which they could be awarded. See generally *Alyeska*, 421 U.S. at 267-69. As for the common fund and bad faith exceptions, however, the majority believed these were "unquestionabl[e] assertions of inherent power in the courts," thus, they were valid exceptions to the American Rule. See *id.* at 259. The dissent, however,

legislature had the authority to create exceptions to the American Rule by statute.<sup>19</sup>

Congress's response was both immediate and clear in its purpose. What followed the Court's ruling showed the legislature's belief that the availability of attorneys' fees to prevailing parties in justifiable situations was an essential element of our justice system. During the months following the *Alyeska* holding, Congress held a series of hearings to examine the Judiciary's authority to award reasonable attorneys' fees and related expenses.<sup>20</sup> Within about one year after the Court issued its ruling in *Alyeska*, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, a statutory exception granting courts discretion in awarding attorneys' fees to prevailing parties in an action or proceeding to enforce a provision of the Civil Rights Act of 1866.<sup>21</sup> More hearings followed over the next several years to expand attorneys' fees awards to prevailing parties, and currently there are over 200 federally created statutory exceptions to the American Rule.<sup>22</sup>

The Equal Access to Justice Act<sup>23</sup> (the "EAJA" or the "Act") was included in this legislation on October 21, 1980.<sup>24</sup> The Act

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criticized the majority by suggesting that if the majority held that the private attorney general doctrine was invalid because it was not authorized by Congress, then the common fund and bad faith exceptions should also be invalid since they are mere "equitable" exceptions also lacking statutory authority. *See id.* at 277-78 (Marshall, J., dissenting) (concluding that "the Court is willing to tolerate the 'equitable' exceptions to its analysis, not because they can be squared with it, but because they are by now too well established to be casually dispensed with").

19. *Alyeska*, 421 U.S. at 262.

20. *See* H.R. REP. NO. 96-1418, at 6 (1980), as reprinted in 1980 U.S.C.C.A.N. 4984, 4984 (citing three hearings before the 94th Congress on October 6, October 8, and December 3, 1975). These hearings and similar hearings that followed over the next several years "examined the restrictive effect of *Alyeska* on the courts' ability to make awards to private attorney generals and other prevailing parties." Ward, *supra* note 5, at 157-58.

21. Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2000)).

22. *See, e.g.*, 15 U.S.C. § 15(a) (2000 & Supp. 2001) (authorizing awards of three times the damages sustained and reasonable attorneys' fees to those persons injured by acts forbidden by the antitrust laws); 42 U.S.C. § 406(a) (2000 & Supp. 2005) (authorizing awards of reasonable attorneys' fees not in excess of 25% of the total past due benefits to represented social security benefits claimants who win a judgment under the Social Security Act).

23. 28 U.S.C. § 2412 (2000).

authorizes the payment of attorneys' fees to a prevailing party in an action against the United States and its federal administrative agencies.<sup>25</sup>

While the purpose behind the Act was to ensure general agency accountability,<sup>26</sup> Congress's original intent was more specific. In the House Report that addressed the EAJA's initial enactment, Congress proclaimed that there was evidence that federal administrative agencies filed actions against small businesses specifically because they did not have the resources to defend themselves adequately against the government.<sup>27</sup> Congress also feared that small businesses would fail to bring even the most meritorious suits against federal administrative agencies.<sup>28</sup> Congress even acknowledged that

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24. Equal Access to Justice Act, Pub. L. No. 96-481, §§ 201-208, 94 Stat. 2321, 2325-30 (1980) (codified as amended at 28 U.S.C. § 2412 (2000) and 5 U.S.C. § 504 (2000)). But the EAJA did not come into effect until October 1, 1981. § 208, 94 Stat. at 2330.

25. The EAJA was the first congressional waiver of the government's general immunity from attorneys' fee awards. Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act – A Qualified Success*, 11 YALE L. & POL'Y REV. 458, 458 (1993). The early history of federal sovereign immunity in the United States remains the subject of considerable debate. Some have suggested that the Constitution contains the principle of federal sovereign immunity. See, e.g., *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting) (sovereign immunity is "embodied in the Constitution"). Others believe that sovereign immunity is a common law principle borrowed from the days when "the [English] King could do no wrong." ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 9.2.1, at 611 (4th ed. 2003). Whatever the case, the presumption is that the federal government cannot be held liable for attorneys' fees, except where expressly authorized by statute. See *Natural Res. Def. Council, Inc. v. EPA*, 512 F.2d 1351, 1353 (D.C. Cir. 1975). The EAJA is a specific statutory waiver of sovereign immunity.

26. The EAJA is intended to level the playing field between private parties and the government. The United States Court of Appeals for the District of Columbia Circuit went so far as to describe the EAJA as an "anti-bully" law. *Battles Farm Co. v. Pierce*, 806 F.2d 1098, 1101 (D.C. Cir. 1986), *vacated by* 487 U.S. 1229 (1988).

27. See Krent, *supra* note 25, at 465 n.32, 473 n.58; see also H.R. REP. NO. 96-1418, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988 ("In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue. This kind of truncated justice undermines the integrity of the decision-making process.").

28. See H.R. REP. NO. 96-1418 (1980), at 9, *as reprinted in* 1980 U.S.C.C.A.N. 4984, 4988. Congress found that private parties "may be deterred from seeking



"[w]hile the [influence] of the bureaucracy over all aspects of life has increased, the ability of most citizens to contest any unreasonable exercise of authority has decreased."<sup>29</sup> Thus, the prospect of fee awards for prevailing parties in suits against the government was intended not only to act as an incentive for the parties to such challenges, but also to deter wrongdoing in the first place. Accordingly, the EAJA was originally enacted as an attachment to a small business assistance bill to help small businesses against arbitrary government action.<sup>30</sup>

The originally enacted EAJA contained a sunset provision that limited the Act to an initial three-year trial run.<sup>31</sup> The EAJA expired on October 1, 1984. Immediately, Congress passed several amendments to make the EAJA permanent law.<sup>32</sup> Unfortunately, despite legislative and popular support for the bill, President Reagan vetoed the initiative on November 9, 1984, citing the bill as overbroad.<sup>33</sup>

Efforts to permanently re-enact the EAJA, however, continued. Congress passed new legislation, including changes responsive to the President's concerns that reinstated the EAJA retroactively to

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review of . . . unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings." Equal Access to Justice Act, Pub. L. No. 96-481, § 202(a), 94 Stat. 2321, 2325 (1980).

29. H.R. REP. NO. 96-1418, at 10.

30. Krent, *supra* note 25, at 465 n.32.

31. See § 203(c), 94 Stat. at 2327 ("Effective October 1, 1984, [the EAJA is] repealed . . .").

32. See H.R. REP. NO. 99-120, pt. 1, at 6 (1985), as reprinted in 1985 U.S.C.C.A.N. 132, 134-35.

33. See H.R. REP. NO. 99-120, pt. 1, at 6. President Reagan did not oppose the purpose behind EAJA, and he believed that a private party should be awarded attorneys' fees when they prevail against a federal agency. See Mary Thornton, *Reagan Signs Bill Expanding EPA Authority; Reauthorization of Equal Access to Justice Act Vetoed, CIA Funding Approved*, WASH. POST, Nov. 10, 1984, at A4. He simply thought that "Congress went too far in expanding the law not only to include official governmental litigation, but also to allow courts to look at an agency's justification for bringing a case." *Id.* President Reagan said this would lead to inefficient and wasteful litigation. *Id.*

October 1, 1984.<sup>34</sup> On August 5, 1985, President Reagan signed the bill that permanently re-enacted the EAJA into law.<sup>35</sup>

The final version of the EAJA<sup>36</sup> allows an award of attorneys' fees and other expenses to a prevailing party if six requirements are met. First, the claimant must qualify as a party.<sup>37</sup> Second, the claimant must have prevailed in an underlying civil action against the United States.<sup>38</sup> Third, the prevailing party must file a timely application for the award with the court.<sup>39</sup> Fourth, the government must be unable to demonstrate a substantial justification for its position.<sup>40</sup> Fifth, the government must be unable to demonstrate

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34. See Act of Aug. 5, 1985, Pub. L. No. 99-80, §6(a), 99 Stat. 183, 186 (codified as amended at 28 U.S.C. § 2412 (2000) and 5 U.S.C. § 504 (2000)).

35. See Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct* (pt. 1) 55 LA. L. REV. 217, 222 (1994).

36. 28 U.S.C. § 2412 (2000).

37. See 28 U.S.C. § 2412(d)(2)(B) (defining "party" as "an individual whose net worth did not exceed \$2,000,000 at the time the civil action was filed," or "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"). Tax-exempt organizations, 26 U.S.C. 501(c)(3) (2000 & Supp. 2005), and cooperative associations as defined in the Agricultural Marketing Act, 12 U.S.C. § 1141 (2000), however, are exempt from this definition and may be considered parties for purposes of the EAJA. See 28 U.S.C. § 2412(d)(2)(B). This definition of "party" reflects Congress's intent to provide fees only to those claimants who would otherwise be deterred from vindicating their rights in court by the high costs of litigation. See *supra* notes 26-30 and accompanying text.

38. See 28 U.S.C. § 2412(d)(1)(A).

39. See 28 U.S.C. § 2412(d)(1)(B). The application must show that the claimant is the prevailing party. 28 U.S.C. § 2412(d)(1)(B). The application must also include the amount sought and a statement that the position of the United States government in the underlying litigation was not substantially justified. 28 U.S.C. § 2412(d)(1)(B). To meet the timeliness requirement, the claimant must submit the application within thirty days of final judgment in the underlying litigation. 28 U.S.C. § 2412(d)(1)(B).

40. See 28 U.S.C. § 2412(d)(1)(A). If the government is able to make this showing, then the claimant cannot recover attorneys' fees.

special circumstances that would make the award of fees unjust.<sup>41</sup> Finally, the fee must be reasonable.<sup>42</sup>

These hurdles demonstrate the legislative strength behind the EAJA's permanent enactment. On account of that support, the EAJA provides for fees and costs in nearly every civil claim brought by or against the United States, including federal administrative agencies.<sup>43</sup> By affording such broad application, the EAJA represents an important exception to the American Rule on attorneys' fees.

### III. FACTS

In *Scarborough*, after prevailing in an underlying action, the petitioner applied for attorneys' fees and expenses under the EAJA.<sup>44</sup> The question before the Court was whether a timely EAJA application can be amended after the filing period has run to cure an initial failure to allege that the government's position in the underlying litigation lacked substantial justification.<sup>45</sup>

The petitioner, Randall C. Scarborough ("Scarborough"), served in the United States Navy from 1972 to 1975.<sup>46</sup> In 1976, the veteran sought disability benefits from the Department of Veterans Affairs<sup>47</sup>

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41. See 28 U.S.C. § 2412(d)(1)(A). If the government is able to make this showing, then the claimant cannot recover attorneys' fees.

42. 28 U.S.C. § 2412(d)(2)(A) (defining "fees and expenses" as "reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorneys' fees" generally based upon the market rates for such services furnished).

43. See 28 U.S.C. § 2412(d)(1)(A) (providing that a court may award attorneys' fees incurred by the claimant "in any civil action, including proceedings for judicial review of agency action, . . . in any court having jurisdiction of that action" (emphasis added)).

44. *Scarborough v. Principi*, 541 U.S. 401, 408 (2004).

45. *Id.* at 406.

46. Steve Lash, *Court Considers Amendment to Fee Request*, CHI. DAILY L. BULL., Feb. 24, 2004, at 2.

47. The Department of Veterans Affairs is a cabinet department established in 1989. Facts About the Department of Veterans Affairs, <http://www1.va.gov/opa/fact/vafacts.html> (June 2005). It succeeded the Veterans Administration and is responsible for providing federal benefits to veterans. *Id.*

due to a renal disease.<sup>48</sup> A local office of Veterans Affairs, however, denied him those benefits because they claimed his disorder was unrelated to his military service in the Navy.<sup>49</sup>

Scarborough challenged that decision with the Board of Veterans' Appeals (the "Board").<sup>50</sup> In July 1998, the Board resolved that the regional office's decision "contained no clear and unmistakable error."<sup>51</sup> Scarborough appealed the Board's decision before the United States Court of Appeals for Veterans Claims ("CAVC"). On July 9, 1999, the CAVC reversed and granted Scarborough retroactive benefits for the period of 1975 to 1993.<sup>52</sup> The CAVC said that both the regional office and the Board failed to identify sufficient evidence in the record supporting the initial finding by the regional office that Scarborough's disorder was unrelated to his Navy service.<sup>53</sup>

Following this victory, Scarborough's attorney filed an application for attorneys' fees<sup>54</sup> under the EAJA.<sup>55</sup> The application

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48. See *Scarborough v. West*, 13 Vet. App. 530, 531 (2000) (per curiam), vacated, 536 U.S. 920 (2002). Togo D. West, Jr., was the Secretary of Veterans Affairs when Scarborough first filed his claim. West served as the Secretary from 1998 to 2000, when he was succeeded by Anthony J. Principi. Facts About the Department of Veterans Affairs, *supra* note 47.

49. See *West*, 13 Vet. App. at 531. Veterans Affairs argued that Scarborough's disease began in 1976 after his military discharge, but Scarborough insisted that he was diagnosed in 1975, when he had active military status. Tamika D. Hawkins, *On the Docket: Scarborough, Randall v. Principi, Anthony, Secy. of Veterans Affairs*, Medill School of Journalism, <http://www.medill.northwestern.edu/~secure/docket/mt/archives/000759.php> (June 23, 2004).

50. See *West*, 13 Vet. App. at 531. As a part of the Department of Veterans Affairs, the Board of Veterans Appeals is the administrative board that reviews decisions made by regional offices of the Department such as the one made against Scarborough in 1976. See Gateway to VA Appeals, <http://www.va.gov/vbs/bva/> (last visited Sept. 14, 2005).

51. *West*, 13 Vet. App. at 531.

52. Hawkins, *supra* note 49.

53. See Lash, *supra* note 46, at 2; see also *West*, 13 Vet. App. at 531 (The CAVC said that both decisions "failed to address the effect of the law existing at the time of the [regional office] decision regarding the presumption of sound condition.").

54. The application sought attorneys' fees of \$19,333.75 and costs of \$117.80. *Scarborough*, 541 U.S. at 409.

55. 28 U.S.C. § 2412 (2000).

was filed within the statutory deadline,<sup>56</sup> and its content satisfied all EAJA requirements<sup>57</sup> except that it failed to allege that the position of the United States<sup>58</sup> was not substantially justified.<sup>59</sup> On December 3, 1999, the Secretary of Veterans Affairs filed a motion to dismiss the application for lack of jurisdiction on the basis that Scarborough failed to include the required statement in his fee application.<sup>60</sup> In response, on December 9, 1999, Scarborough's attorney filed an amendment to the application, in which he included the allegation that the government's position lacked substantial justification in the underlying litigation.<sup>61</sup> Unfortunately for Scarborough and his attorney, the thirty-day filing period expired before the amended application was filed.<sup>62</sup> Thus, on June 14, 2000, the CAVC

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56. Scarborough's attorney actually filed two applications. He filed the first prematurely because the deadline to file post-decision motions had not yet expired, and the clerk at the CAVC returned it to the attorney. See *Scarborough*, 541 U.S. at 409. Once the CAVC issued a judgment noting that the time for filing post-decision motions had expired, the attorney filed a second application. *Id.* The second application, however, was also premature because the deadline to appeal the CAVC's judgment had not yet expired. *Id.* This time, though, the clerk at the CAVC kept the application until the deadline to appeal passed and filed it on October 4, 1999. *Id.*; see also *West*, 13 Vet. App. at 531 (Scarborough's attorney submitted the second premature application on August 19, 1999.). The second application is the one at issue in this case.

57. See *supra* text accompanying notes 36-42.

58. In this case, "United States" refers to the Secretary of Veterans Affairs, who was Anthony J. Principi at the time *Scarborough v. Principi* was decided. See 28 U.S.C. § 2412(d)(2)(C) (defining the term to include "any agency and any official of the United States acting in his or her official capacity"). Anthony J. Principi held this position from 2001 to 2005. Facts About the Department of Veterans Affairs, *supra* note 47. This note will interchange the words "United States," "government," and the "Secretary" when referring to such party, depending upon the context in which the term is used.

59. See *West*, 13 Vet. App. at 531. Both of the premature applications failed to include the required allegation. The application relevant in this case did, however, include all the other content requirements. It stated that Scarborough was the prevailing party pursuant to the July 9, 1999 remand order, his net worth did not exceed the two million dollars limit for filing under the EAJA, his attorney had represented him in the matter since August 1998, and the attorney had incurred fees and expenses during the course of representation. *Id.* A detailed description of fees and expenses was attached to the application. *Id.*

60. *Id.*

61. *Id.*

62. See *id.* at 532.

dismissed the fee application holding that it was “jurisdictionally deficient” and that the court lacked jurisdiction over it.<sup>63</sup>

Scarborough then appealed the CAVC’s decision before the Court of Appeals for the Federal Circuit.<sup>64</sup> On December 10, 2001, the Federal Circuit affirmed the CAVC’s holding.<sup>65</sup> The United States Supreme Court granted Scarborough’s petition for a writ of certiorari. On June 17, 2002, the Court vacated the Federal Circuit’s judgment and remanded it in light of *Edelman v. Lynchburg College*.<sup>66</sup> On remand, the Federal Circuit affirmed its earlier decision by distinguishing *Edelman*.<sup>67</sup> The Supreme Court again

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63. *Id.* In the majority opinion of *Scarborough v. Principi*, the Court states that the issue before the CAVC should not have been a question of jurisdiction, but the timing of the amendment. *Scarborough*, 541 U.S. at 413.

64. *Scarborough v. Principi*, 273 F.3d 1087, 1089 (Fed. Cir. 2001) (per curiam), *vacated*, 536 U.S. 920 (2002).

65. *Scarborough v. Principi*, 273 F.3d at 1089 (stating that the “EAJA must be construed strictly in favor of the Government” pursuant to the Supreme Court’s narrow construction of waivers of sovereign immunity). The Federal Circuit did, however, acknowledge that its decision conflicted with EAJA interpretations made by other circuit courts. In *Dunn v. United States*, the prevailing party submitted an EAJA application within the thirty-day deadline and subsequently supplemented it after the deadline had passed with an initially absent detailed description of the fees. *See Dunn v. United States*, 775 F.2d 99, 104 (3d Cir. 1985). The Third Circuit held that the lower court could consider the application on its merits if the government was not prejudiced. *See id.* In *Singleton v. Apfel*, the Eleventh Circuit also held that an EAJA application could be amended after the filing deadline had expired to include two initially absent allegations: that the applicant was qualified to apply for fees under the EAJA and that the government’s position in the underlying litigation was not substantially justified. *See Singleton v. Apfel*, 231 F.3d 853, 857 (11th Cir. 2000). The Federal Circuit maintained that the plain language of the statute should control and declared that the Third Circuit and Eleventh Circuit unjustifiably disregarded a primary tool of statutory interpretation. *See Scarborough v. Principi*, 273 F.3d at 1091.

66. *Scarborough v. Principi*, 536 U.S. 920 (2002). In *Edelman*, the Court upheld an Equal Employment Opportunity Commission regulation that allowed a timely filed employment discrimination charge filed under Title VII of the Civil Rights Act of 1964 to add, after the filing deadline, an initially absent required verification. *See Edelman v. Lynchburg College*, 535 U.S. 106, 122 (2002). The Court explained that Title VII permitted this “relation back.” *Id.*

67. *Scarborough v. Principi*, 319 F.3d 1346 (Fed. Cir. 2003), *rev’d*, 541 U.S. 401 (2004). This majority represented two of the three Federal Circuit judges, whereas the court’s first opinion regarding this matter was *per curiam*. *See supra* note 64. The Federal Circuit distinguished *Becker* and *Edelman* with three points. First, the court recognized Title VII, which was the statute at issue in *Edelman*, as a

granted Scarborough's petition for writ of certiorari, and reversed and remanded the Federal Circuit's decision in favor of Scarborough.<sup>68</sup>

#### IV. ANALYSIS

##### *A. Majority Opinion*

Justice Ginsburg delivered the majority opinion for the Court.<sup>69</sup> In the introduction and Part I.A of the opinion, the Court provided background information on the EAJA, and the EAJA requirements that are specifically relevant to this case.<sup>70</sup> The Court noted that the EAJA departs from the American Rule on attorneys' fees.<sup>71</sup> The Act authorizes the payment of attorneys' fees to a prevailing party in an action against the United States absent a showing by the government that its position in the underlying litigation was substantially justified.<sup>72</sup> Particular to this dispute, the Court explained that the EAJA requires that the prevailing party apply for such fees "within thirty days of final judgment in the action." This application must include an allegation that "the position of the United States<sup>73</sup> was not

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remedial scheme in which laypersons often initiate the process, whereas the EAJA is directed to attorneys who do not need the same "paternalistic protection." *Scarborough v. Principi*, 319 F.3d at 1353. Second, the court observed that the respective timeliness and verification requirements at issue in *Becker* and *Edelman* appear in separate statutory provisions, while the EAJA's thirty-day filing deadline and content requirements are detailed in the same statutory provision. *Id.* Third, the Federal Circuit discussed the importance of the allegation as an EAJA requirement. The court stated that the allegation was distinguishable from the verification requirement in *Edelman* and the signature requirement in *Becker* because it was "not simply a tool to weed out frivolous claims, but rather . . . one portion of the basis of the award itself." *See id.*

68. *Scarborough*, 541 U.S. at 423.

69. *Id.* at 404. Justice Ginsburg was joined in her opinion by Chief Justice Rehnquist and Justices Stevens, O'Connor, Kennedy, Souter, and Breyer. *Id.* at 403.

70. *See id.* at 404-08.

71. *Id.* at 404.

72. *Id.* at 405.

73. This note will interchange the words "United States," "government," and the "Secretary" when referring to such party, depending upon the context in which the sentence is used. *See supra* note 58.

substantially justified.”<sup>74</sup> The Court noted that the congressional purpose behind the EAJA’s enactment was “to eliminate the barriers that prohibit small businesses and individuals from securing vindication of their rights in civil actions and administrative proceedings brought by or against the Federal Government.”<sup>75</sup>

In Part II of the majority opinion, the Court developed its analysis. First, it clarified that the question before the Court, whether Scarborough was time barred from being awarded attorneys’ fees under the EAJA, “[did] not concern the federal courts’ ‘subject matter jurisdiction.’”<sup>76</sup> The Court pointed out that the EAJA does not describe what kinds of cases a court is competent to adjudicate,<sup>77</sup> but, rather, relates only to post-judgment proceedings ancillary to the case already within that court’s jurisdiction.<sup>78</sup> Here, the CAVC already had complete jurisdiction over the case.<sup>79</sup> More particularly, the issue presented a “question of time.”<sup>80</sup> So the issue before the Court

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74. *Scarborough*, 541 U.S. at 405. The EAJA also requires that the application include a showing that the applicant is a prevailing party, a showing that the applicant is eligible to receive an award, and a statement of the amount sought. See 28 U.S.C. § 2412(d)(1)(B) (2000).

75. *Scarborough*, 541 U.S. at 406 (quoting H.R. REP. NO. 96-1005, at 9 (1980)).

76. *Scarborough*, 541 U.S. at 413. The Court probably addressed this issue first because, in the underlying litigation, the Court of Appeals for Veterans Claims (“CAVC”) granted the Respondent’s motion to dismiss Scarborough’s initial defective application for lack of subject matter jurisdiction.

77. *Id.* at 414.

78. *Id.* The EAJA authorizes a court to award fees incurred “in any civil action” brought against the United States “in any court having jurisdiction of that action.” 28 U.S.C. § 2412(d)(1)(A) (2000). Thus, an application for fees is proper when filed in a court in which the prevailing party has already won its case.

79. See *Scarborough*, 541 U.S. at 413 n.3. In July 1998, the Board of Veterans Appeals (“Board”) denied Scarborough’s claim for disability benefits. *Id.* The CAVC has exclusive jurisdiction to review decisions of the Board. 38 U.S.C. § 7252(a) (1994). Scarborough appealed that decision before the CAVC and prevailed in July 1999. *Scarborough*, 541 U.S. at 413 n.3; see also *supra* notes 50-53 and accompanying text (The CAVC held that the Board had no evidence to support their denial of benefits.). Thus, the CAVC had exclusive jurisdiction over Scarborough’s case before his attorney applied for fees in 1999.

80. *Scarborough*, 541 U.S. at 413.



was *when*, not *whether*, the EAJA required Scarborough to allege that “the position of the United States [was] not substantially justified.”<sup>81</sup>

Next, the Court characterized the nature of the required statement. It noted that all of the other EAJA requirements for the application’s contents are things the applicant must *show*,<sup>82</sup> but the required statement imposes no burden of proof on the fee applicant.<sup>83</sup> As such, the Court concluded that the required statement here is “nothing more than an allegation or pleading requirement.”<sup>84</sup>

The Court felt the nature of the required statement justified applying the relation back doctrine,<sup>85</sup> which allowed Scarborough’s late statement to date back to the original defective application filed before the deadline had expired. The Court supported its position by comparing the missing required statement in this case to the missing requirements from *Becker v. Montgomery*<sup>86</sup> and *Edelman v. Lynchburg College*.<sup>87</sup> In *Becker*, the litigant timely filed a notice of appeal but forgot to sign his name as required under Federal Rule of Civil Procedure 11(a).<sup>88</sup> The Court allowed the litigant to add his signature to the notice after the filing deadline had passed because there was “no genuine doubt...about who [was] appealing, from what judgment, [and] to which appellate court.”<sup>89</sup> Similarly, the Court in *Scarborough* noted that the required statement does not serve to give the government any kind of notice.<sup>90</sup> In *Edelman*, a professor filed

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81. *Id.*

82. *Id.* at 414. The applicant must show that he is a prevailing party, that he is eligible to receive such an award of attorneys’ fees, and the amount sought. 28 U.S.C. § 2412(d)(1)(B) (2000).

83. *Scarborough*, 541 U.S. at 414. The burden of proof is on the government to establish that its position was substantially justified. *Id.*

84. *Id.*

85. The relation back doctrine is now codified as Federal Rule of Civil Procedure 15(c), which allows for an amendment of a pleading to relate back to the date of the original pleading. *See* FED R. CIV. P. (15)(c).

86. *Becker v. Montgomery*, 532 U.S. 757 (2001).

87. *Edelman v. Lynchburg Coll.*, 535 U.S. 106 (2002).

88. *Becker*, 532 U.S. at 759.

89. *Id.* at 767.

90. *Scarborough*, 541 U.S. at 416. From the moment Scarborough filed his fee application, the government already knew who the applicant was, what he was requesting, and that it had the burden to prove that its position in the underlying litigation was substantially justified. *Id.* at 416-17.

an employment discrimination charge under Title VII of the Civil Rights Act of 1964.<sup>91</sup> He was required to include a form verifying by oath or affirmation the charge of discrimination but failed to do so.<sup>92</sup> The Court in *Edelman* determined that the professor's late verification could relate back because the purpose behind the requirement was to stop litigants from litigating irresponsibly.<sup>93</sup> The *Scarborough* Court stated that the required statement also served to ward off any irresponsible litigation by obligating the fee applicant to examine the government's position and to determine whether or not it was substantially justified before applying for attorneys' fees under the EAJA.<sup>94</sup> Thus, in light of *Becker* and *Edelman*, the Court reasoned that the relation back doctrine should also apply to Scarborough's case.

Another reason the Court used the relation back doctrine was because of who would specifically benefit from its application. The Court emphasized that allowing the amendment benefits the applicant directly, not his attorney, because the lawyer's statutory contingency fee would be reduced dollar for dollar by an EAJA award.<sup>95</sup>

The Court then addressed the government's contention that the relation back doctrine is only for pleadings.<sup>96</sup> It explained that, while Scarborough conceded that Rule 15(c) of the Federal Rules of Civil

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91. *Edelman*, 535 U.S. at 110.

92. *Id.*

93. *See id.* at 118. The Court believed that if the signature in *Becker*, which was decided prior to *Edelman*, could be related back, then it was reasonable for the verification to relate back to the Title VII discrimination charge. *Id.* at 122.

94. *Scarborough*, 541 U.S. at 415. In allocating the burden of pleading to the applicant, Justice Ginsburg argued that Congress intended to dispel any assumption that the government must pay fees each time it loses. *Id.* Thus, the burden to plead is merely a means to get the fee applicant to "think twice" before applying for attorneys' fees under the EAJA. *Id.* In other words, if the applicant truly believes that the government's position in the underlying case was *not* substantially justified, the applicant should go ahead and apply for fees; but, if the applicant believes the government's case *may have been* substantially justified, the applicant should probably not apply for such fees. *Id.*

95. *Id.* at 417.

96. *Id.* The government argued that the relation back doctrine does not apply to fee applications because Rule 15(c), which is the codified version of the doctrine, permits the relation back of amendments to the "original pleading." FED. R. CIV. P. 15(c).

Procedure<sup>97</sup> is directed only to pleadings, the Court has previously applied the doctrine to non-pleadings.<sup>98</sup> The Court also argued that it applied the relation back doctrine before the doctrine was first described by the Advisory Committee in the Federal Rules of Civil Procedure.<sup>99</sup> In fact, the Court noted that the relation back doctrine “has its roots in the former federal equity practice and a number of state codes.”<sup>100</sup> The Court further explained that Scarborough’s amended application “arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth” in the initial application, which is required by the relation back doctrine.<sup>101</sup> So the Court determined that the initially absent allegation was not “beyond repair” and could relate back to the amended EAJA application.<sup>102</sup>

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97. Rule 15(c) is the codified version of the relation back doctrine.

98. See *Becker*, *supra* notes 88-89 and accompanying text; see also *Edelman*, *supra* notes 91-92 and accompanying text.

99. The government conceded that the relation back doctrine was not invented by the federal rule-makers. The Supreme Court applied the doctrine well before the Federal Rules became effective in 1938. See *N.Y. Cent. & Hudson River R.R. v. Kinney*, 260 U.S. 340, 346 (1922) (holding that an amendment that merely expanded the allegations in support of the cause of action already alleged in the original complaint was not affected by the intervening lapse of time); see also *Seaboard Air Line Ry. v. Renn*, 241 U.S. 290, 293-94 (1916) (holding that an amendment that merely expanded the original complaint could relate back to the commencement of the suit); see also *Mo., Kan. & Tex. Ry. v. Wulf*, 226 U.S. 570, 575-76 (1913) (holding that the plaintiff may relate back an amendment where the plaintiff sues as a personal representative on the same cause of action under a federal statute instead of as a sole beneficiary of the deceased under a state statute because that is not the same as beginning a new action).

100. *Scarborough*, 541 U.S. at 418 (quoting CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1496 (2d ed. 1987 & Supp. 2004)). Justice Ginsburg cited Federal Equity Rule 19, which authorizes a court, in furtherance of justice, to permit a process, proceeding, pleading, or record to be amended at any time, and Illinois and Washington statutes that permit the same. *Scarborough*, 541 U.S. at 418 n.5.

101. FED. R. CIV. P. 15(c)(2).

102. *Scarborough*, 541 U.S. at 418-19. Regardless of whether or not the relation back doctrine applies, however, Scarborough argued that the thirty-day filing deadline should not apply to the required statement. The EAJA includes the deadline requirement and the other content specifications in one sentence:

A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount

The Court then proceeded to address the government's contention that the EAJA's "waiver of sovereign immunity from liability for fees is conditioned on the fee applicant's meticulous compliance with each and every requirement . . . within thirty days of final judgment."<sup>103</sup> The Court disagreed.<sup>104</sup> First, it pointed out that the Federal Circuit had previously ruled that an EAJA application may be amended after the filing deadline to show that the applicant was eligible to receive the award.<sup>105</sup> Second, the Court pointed out that its own prior decisions recognized that, in general, statutory deadlines to file should apply to the government in the same way they apply to private parties because it would amount "to little, if

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sought, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

28 U.S.C. § 2412(d)(1)(B) (2000). The allegation requirement is mentioned in the following sentence. *Id.* ("The party shall also allege that the position of the United States was not substantially justified."). Scarborough pointed out that Congress separated these sentences intending to limit the time deadline to all the other requirements except the allegation requirement. *See Scarborough*, 541 U.S. at 419 n.6. Scarborough further supported his argument by comparing the two sentences and concluding that the sentence containing the allegation requirement is structured differently from the first sentence. *Id.* Scarborough said the fact that Congress required the party to "allege" rather than "show" that the government's position was not substantially justified indicates that the allegation requirement is separate from the time deadline. *Id.* The Court, however, did not further explore this issue since it already found that the relation back doctrine applies. *Id.* The dissent argued that the Court should have considered this. *See infra* notes 114-21 and accompanying text.

103. *Scarborough*, 541 U.S. at 419-20. The government believed the failure to include the required allegation in the fee application before the thirty-day filing deadline was a fatal omission. *Id.* at 420.

104. *Id.*

105. *See Bazalo v. West*, 150 F.3d 1380, 1383-84 (Fed. Cir. 1998) (holding that a timely filed EAJA application may be amended after the thirty-day filing deadline has passed to meet an additional requirement of eligibility for attorneys' fees if it would not prejudice the government). On remand before the Federal Circuit for the second time, Chief Judge Mayer issued a dissenting opinion in the *Scarborough* case stating that *Bazalo* controls and is not distinguishable as the majority had argued. *See Scarborough v. Principi*, 319 F.3d 1346, 1355-56 (Fed. Cir. 2003) (Mayer, C.J., dissenting), *rev'd*, 541 U.S. 401 (2004).

any, broadening of the congressional waiver.”<sup>106</sup> Notwithstanding these prior decisions, the Court thought that a more yielding reading of the EAJA provision was justified because it was sufficiently similar to other fee-shifting statutes for prevailing parties applicable to lawsuits between private litigants.<sup>107</sup>

Finally, the Court argued that its holding would not unfairly prejudice the government.<sup>108</sup> The Court conceded that if it did unfairly prejudice the government, then the relation back doctrine would not apply in the case.<sup>109</sup> The government, however, did not raise the issue, and the Court, on its own examination, found that the government would not incur any unfair prejudice.<sup>110</sup>

Therefore, the Court held that Scarborough’s timely fee application could be amended after the thirty-day filing deadline had expired, which would cure his initial failure to include the allegation that the government’s position in the underlying litigation lacked substantial justification.<sup>111</sup> The Court reversed the Federal Circuit’s

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106. *Scarborough*, 541 U.S. at 421 (quoting *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990)). The Court discussed two cases in support. The first, *Irwin v. Department of Veterans Affairs*, involved equitable tolling, “[t]he doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired.” BLACK’S LAW DICTIONARY 579 (8th ed. 2004). The Court held that equitable tolling could apply in Title VII employment discrimination claims against the government as “a realistic assessment of legislative intent.” *Irwin*, 498 U.S. at 95. The *Scarborough* Court believed the same was true of the case before it since, in enacting the EAJA, Congress expressed that “at a minimum, the [government] should be held to the same standards in litigating as private parties.” *Scarborough*, 541 U.S. at 421 n.9 (quoting H.R. REP. NO. 96-1418, at 9 (1980), as reprinted in 1980 U.S.C.C.A.N. 4984, 4987). Second, in *Franconia Associates v. United States*, 536 U.S. 129 (2002), the Court refused to interpret the statute of limitations in an unduly restrictive way for claims filed against the government under the Tucker Act. *Scarborough*, 541 U.S. at 421.

107. *Scarborough*, 541 U.S. at 422. This point dismissed the government’s argument that *Irwin* and *Franconia* were distinguishable because they involved awards under private litigation whereas the EAJA authorized awards of attorneys’ fees under rules that had no private litigation analogue. See *id.* at 421-22.

108. *Id.* at 423.

109. *Id.* at 422.

110. See *id.* Further, the EAJA has a built-in check for such unfair prejudice inflicted on the government. *Id.* at 422-23 (quoting the EAJA provision that disallows fees where “special circumstances make an award unjust”).

111. *Id.* at 423.

ruling and remanded the case for consideration and determination of Scarborough's EAJA application on the merits.<sup>112</sup>

### *B. Dissenting Opinion*

Justice Thomas delivered the Court's dissenting opinion.<sup>113</sup> He began by criticizing the Court's application of the relation back doctrine. Justice Thomas felt that the majority should have first answered whether the thirty-day deadline even applied to the requirement that a fee applicant must allege that the government's position in the underlying litigation was not substantially justified.<sup>114</sup>

The dissent interpreted the EAJA as applying the thirty-day deadline to the required allegation and thought this was a "better reading of the text."<sup>115</sup> The EAJA provides its requirements in two separate sentences.<sup>116</sup> The first sentence imposes the thirty-day filing deadline; additionally, it requires the applicant to show that he is a prevailing party, show that he is eligible to receive an award under the EAJA, and specify the amount he seeks.<sup>117</sup> In the second sentence, the EAJA requires that the applicant "shall also" make the allegation that the government was not substantially justified in the underlying litigation.<sup>118</sup> The dissent turned to the dictionary, and found that "also" is defined as "likewise" or "in like manner."<sup>119</sup> Justice Thomas concluded that the filing deadline from the first sentence applied to the required allegation referenced in the second sentence.<sup>120</sup> Moreover, he believed that "it [was] quite natural to

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112. *Id.* The Federal Circuit issued an order dated June 15, 2004 for the CAVC to consider the merits of the application. *Scarborough v. Principi*, 18 Vet. App. 434 (2004).

113. *Scarborough*, 541 U.S. at 423 (Thomas, J., dissenting). Justice Thomas was joined in his opinion by Justice Scalia. *Id.*

114. *See id.*

115. *Id.* at 424.

116. 28 U.S.C. § 2412(d)(1)(B) (2000).

117. *Scarborough*, 541 U.S. at 424.

118. *Id.*

119. *Scarborough*, 541 U.S. at 424 n.1 (quoting Webster's Ninth New Collegiate Dictionary and Black's Law Dictionary).

120. *Scarborough*, 541 U.S. at 424.

read [the statute] as applying the . . . deadline to all of its requirements.”<sup>121</sup>

Because the dissent concluded that the deadline did apply to the required allegation, it thought that the next question before the Court should have been whether the relation back doctrine was correctly applied in Scarborough’s particular case.<sup>122</sup> The dissent found that the EAJA did not specifically allow for Scarborough’s amended application to relate back to the time of his initial filing, and that the Court was wrong to validate such an application.<sup>123</sup> In support, the dissent pointed out that the statute’s text makes no mention of the doctrine, and argued that the scope of the government’s waiver of sovereign immunity should have been strictly construed because the EAJA requirement for filing a timely fee application was a condition on the waiver.<sup>124</sup> The dissent criticized the Court’s distortion of *Irwin*’s scope in leading to different conclusions.<sup>125</sup> Justice Thomas urged that *Irwin* only narrows the scope of the government’s waiver in limited circumstances, such as where the government is sued to the same extent and in the same manner as private parties, which did not extend to Scarborough’s situation since there was no “readily identifiable private-litigation equivalent” to the EAJA.<sup>126</sup> Because Scarborough failed to include the required allegation, his application failed to meticulously comply with all EAJA requirements; as such, the dissent concluded that application of the relation back doctrine was barred.<sup>127</sup> Accordingly, Justice Thomas respectfully dissented from the Court’s opinion.<sup>128</sup>

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121. *Id.* The dissenting opinion also cites several federal regulations that follow this reading of the statute. *See id.* at 425 n.3.

122. *Id.* at 425-26.

123. *Id.* at 426.

124. *Id.*; *see also* *Ardestani v. INS*, 502 U.S. 129, 137 (1991) (“Any [waiver of sovereign immunity] must be strictly construed in favor of the United States.”).

125. *Scarborough*, 541 U.S. at 427.

126. *Id.* Instead, the dissent said the EAJA authorized fee awards against the government when there was no basis for recovery under the rules for private litigation. *Id.*

127. *Id.*

128. *Id.*

## V. IMPACT

The aftermath of the Supreme Court's ruling in *Scarborough v. Principi* is not likely to be far reaching. In the end, the decision given by the Court will probably have no great effect on the instances of arbitrary action by administrative bodies or in encouraging private parties to challenge such action. The decision does, however, extend previous Supreme Court precedent and reinforces the use of equity principles in interpreting fee-shifting statutes where legislative purpose and intent prevail over a plain language approach.<sup>129</sup> Further, the decision may protect an underlying interest in public confidence in our justice system.

### A. Judicial Impact

The most certain impact of the decision in *Scarborough* is its precedence. The opinion reiterates the rationale used in the Supreme Court cases *Becker v. Montgomery*<sup>130</sup> and *Edelman v. Lynchburg College*,<sup>131</sup> while also extending application of the relation back doctrine to fee-shifting statutes such as the Equal Access to Justice Act<sup>132</sup> ("EAJA"). Applications for awards under fee-shifting statutes missing a non-fatal requirement will be considered on its merits once amended, rather than dismissed pursuant to a mechanical application of the rules.<sup>133</sup>

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129. See e.g., *Becker v. Montgomery*, 532 U.S. 757, 763-68 (2001) (holding that the requirement related back since it did not serve a notice-giving function); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 112-15 (2002) (holding that the requirement related back since its purpose was to stop irresponsible litigation); *Dunn v. United States*, 775 F.2d 99, 103-04 (3d Cir. 1985) (holding that the requirement related back since the government would not be prejudiced); *Singleton v. Apfel*, 231 F.3d 853, 858 (11th Cir. 2000) (holding that the requirement related back since the government's interests in finality and reliance were not burdened).

130. *Becker v. Montgomery*, 532 U.S. 757 (2001). See *supra* notes 88-90 and accompanying text.

131. *Edelman v. Lynchburg Coll.*, 535 U.S. 106 (2002). See *supra* notes 91-93 and accompanying text.

132. 28 U.S.C. § 2412 (2000).

133. At the time the author wrote this note, several cases addressing the issue of relating back amendments made after the filing deadline had passed were



The *Scarborough* decision also reinforces the use of equity principles, legislative purpose, and legislative intent in relating back certain statutory requirements, rather than a strict interpretation of the language. The Court recognized that there is a difference between a fatally defective requirement and a non-fatal requirement, and that a non-fatal requirement did not hinder Congress' purpose and intent behind the EAJA.<sup>134</sup> By extension, the Court also relied on equitable principles when it considered that allowing Scarborough's application to relate back to the initial filing benefited the applicant directly, and not his attorney, and that the government would not incur unfair prejudice due to the Court's decision.

### *B. Administrative Impact*

The impact that the *Scarborough* decision will have on federal administrative agencies will not be extremely significant. The opinion addresses a proceeding for attorneys' fees ancillary to an underlying proceeding where the government had already lost. Thus, the decision provides agencies with little additional incentive to decrease arbitrary action.

*Scarborough* sends a strong message that the Court respects the legislative intent behind the EAJA and is not willing to allow minor technicalities to hinder that purpose. Administrative agencies would be foolish not to heed the guidance that it gives. Some agencies may choose to ensure that their actions are reasonable and fair against private parties before litigation occurs. While it is certainly unreasonable for an administrative agency to rely on opposing counsel's mistake in releasing them from the legal duty to pay the

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decided subsequent to the *Scarborough* decision. These courts discussed the decision in *Scarborough* as precedent. *See, e.g.,* Townsend v. Comm'r of Soc. Sec., 415 F.3d 578, 581-83 (6th Cir. 2005) (holding that the EAJA time limitation for fee applications is subject to equitable tolling); Save Our Creeks v. City of Brooklyn Park, 682 N.W.2d 639, 643-44 (Minn. Ct. App. 2004) (holding that a corporate pleading lacking an attorney's signature may be amended to add the attorney's signature and the amendment may relate back to the date of the original pleading).

134. Congress intended the EAJA to encourage wronged individuals to file meritorious claims against federal administrative agencies, and ultimately, to decrease arbitrary action by these agencies. *See supra* notes 26-30 and accompanying text.

prevailing party's attorneys' fees, administrative bodies, aware of how courts treat such matters, may be more likely to adjust their actions and decisions.

### C. Social Impact

The Court's decision serves to assist and protect citizens wronged by arbitrary government action. To the average American, however, the *Scarborough* decision will probably provide no additional incentive to challenge the government. Realistically, the average reasonable litigant will not consider the possibility and resulting consequences of their attorney's mistakes, whether procedural or substantive. Thus, this decision is not likely to result in a significant increase in claims against arbitrary government action.

On the other hand, the case may serve to increase public confidence in our judicial system. Deflecting the burden and consequences of the attorney's non-fatal mistake away from the litigant might seem fair and just to the public because it protects the private litigant from his attorney's careless mistakes. The general rule regarding the attorney-client relationship is that the client is charged with his counsel's negligent acts since he is presumed to have voluntarily chosen the attorney as his representative or agent.<sup>135</sup> Still, from the client's point of view, to punish him for his attorney's negligent failure to include a pleading requirement that is clearly and unambiguously set forth in a statute is grossly unfair. Although the agency relationship exists, a client in such a position would feel that it stops short of the attorney's negligent actions over which he, the litigant, has absolutely no control.<sup>136</sup> Had the *Scarborough* Court allowed the Department of Veterans' Affairs to use the technicality of that non-fatal mistake to their advantage, the petitioner would have been left with the decision to either pay out of his own pocket<sup>137</sup> or

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135. See *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-97 (1993).

136. In *Pioneer*, the Supreme Court determined that an attorney's "excusable neglect" was a question of equity where the court must take into account the surrounding circumstances, including whether the mistake was within the reasonable control of the client. *Id.* at 395.

137. In the typical case of individuals seeking past-due benefits from the government, attorneys are paid a contingent fee based on a percentage of the

sue his attorney for malpractice. To leave the petitioner with these two options contradicts the congressional intent behind the EAJA.<sup>138</sup> This decision precludes the burden from falling on the attorney to not take away from the seriousness of his mistake, but rather so that the wronged private citizen will endure no more of a burden than necessary. Thus, the Court in *Scarborough* seeks to render justice at the minimum cost to the parties, which the average American should appreciate.

## VI. CONCLUSION

The Supreme Court's ruling in *Scarborough v. Principi* may not have a significant or far reaching impact in regard to its administrative implications, but it will affect subsequent court decisions and may affect public confidence in our judiciary system. Our nation is comprised of many more individuals seeking to vindicate their rights than just Mr. Scarborough, and many more government agencies than the Department of Veterans' Affairs. Decisions subsequent to *Scarborough* will continue to reflect the importance of congressional purpose and intent in applying the relation back doctrine to non-fatal mistakes.<sup>139</sup> The decision may also inspire citizens to use the law to stop administrative agencies from overreaching their powers. If there is less agency misconduct against private parties, potential litigants will have fewer claims to pursue. The result will benefit everyone involved – agencies will spend less time and less of their already limited resources in defending themselves in court, fewer litigants will step foot inside a courtroom, and courts will have lighter caseloads. On the other hand, even if administrative agencies do not act less arbitrarily against private parties and courts continue to see a steady load of actions

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benefits. See Sisk, *supra* note 35, at 335 n. 763. If the individual is not awarded attorneys' fees under the EAJA, his attorney would most likely receive a contingent fee. The contingency, however, decreases a client's benefits by the amount of the attorneys' fees, reducing the amount of benefits that the client takes home. Dowdy v. Bowen, 636 F. Supp 591, 594 (W.D. Mo. 1986).

138. Congress intended the EAJA to encourage individuals wronged by arbitrary government action to bring lawsuits against the government. See *supra* notes 26-30 and accompanying text.

139. See *supra* note 133.

against the government, the *Scarborough* decision, at minimum, seeks to protect the private party from the unfortunate and careless mistakes of his attorney. Either way, the private party is better protected, sustaining Congress' intent behind the EAJA's enactment. The degree to which the decision will deter agency overreaching and create stronger incentives for a private party to file suit against the government remains to be seen. What is more certain is that decisions rendered by courts and the potential boost in public confidence in our judicial system in light of *Scarborough v. Principi* will secure a better "triumph" for the individual private citizen.

