# SUPREME COURT OF THE UNITED STATES

No. 02–1657

RANDALL C. SCARBOROUGH, PETITIONER *v.* ANTHONY J. PRINCIPI, SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[May 3, 2004]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

Without deciding that the statutorily mandated 30-day deadline "even applies to the 'not substantially justified' allegation requirement," *ante,* at 16–17, n. 5, the Court, nonetheless, applies the relation-back doctrine to cure the omitted no substantial justification allegation in petitioner's Equal Access to Justice Act (EAJA) fee application. The Court should have first addressed whether, as a textual matter, the no substantial justification allegation must be made within the 30-day deadline. I conclude that it must. The question then becomes whether the judicial application of the relation-back doctrine is appropriate in a case such as this where the statute defines the scope of the Government's waiver of sovereign immunity. Because there is no express allowance for relation back in EAJA, I conclude that the sovereign immunity canon applies to construe strictly the scope of the Government's waiver. The Court reaches its holding today by distorting the scope of *Irwin* v. *Department of Veterans Affairs,* 498 U. S. 89 (1990), and by eviscerating that case's doctrinal underpinnings.

## I

In my view, the better reading of the text of the statute is that the 30-day deadline applies to the no substantial justification allegation requirement. The first sentence of 28 U. S. C. §2412(d)(1)(B) states that "[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 . . . which shows": (1) the applicant's status as a prevailing party; (2) that the applicant is eligible to receive fees under §2412(d)(2)(B); and (3) the itemized amount sought. The second sentence of §2412(d)(1)(B) provides: "The party shall also allege that the position of the United States was not substantially justified." *Ibid.* In stating that the applicant "shall *also*" make the no substantial justification allegation, the second sentence links the allegation requirement with the timing and other content requirements of the first sentence.[1] Indeed, there is only one deadline expressly contained in the provision. That 30-day deadline imposes a limitation on a set of requirements that petitioner must satisfy in order to receive an EAJA fee award. Immediately following the deadline is another sentence that requires the petitioner to make the no substantial justification allegation. Taking the provision as a whole, it is quite natural to read it as applying the 30-day deadline to all of its requirements.[2] And, this reading is confirmed by

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[1] "Also" is defined as "likewise," Webster's Ninth New Collegiate Dictionary 75 (1991), or "in like manner," Black's Law Dictionary 77 (6th ed. 1990).

[2] Several Courts of Appeals explicitly require an applicant to include the no substantial justification allegation in an EAJA fee application. See Federal Court of Appeals Manual: Local Rules 344–345 (West 2004) (CA2 "Local Form for EAJA Fee Application"); *id.,* at 1474–1475 (CA Fed. form "Application for Fees and Other Expenses Under the [EAJA]"); *id*., at 244–245 (CA1 Rule 39(a)(2)(D) (2004) ("The application shall . . . identify the specific position of the United States that the

numerous federal agency regulations,[3] which have interpreted a nearly identical EAJA provision allowing for fees in adversary adjudications conducted before federal agencies.[4]

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party alleges was not substantially justified")); *id.*, at 699 (CA5 Rule 47.8.2(a) (2004) ("The application . . . must identify the position of the United States or an agency thereof that the applicant alleges was not substantially justified")); *id.*, at 1103 (CA9 Rule 39–2.1 (2004) ("The application . . . shall identify the position of the United States Government or an agency thereof in the proceeding that the applicant alleges was not substantially justified")).

[3] See, *e.g.*, 49 CFR §6.17 (2003) ("The application shall . . . identify the position of an agency or agencies in the proceeding that the applicant alleges was not substantially justified"); 40 CFR §17.11 (2003) ("The application shall . . . identify the position of EPA in the proceeding that the applicant alleges was not substantially justified"); 15 CFR §18.11 (2003) ("The application shall . . . identify the position of the Department [of Commerce] . . . that the applicant alleges was not substantially justified"); 34 CFR §21.31 (2003) ("In its application for an award of fees and other expenses, an applicant shall include . . . [a]n allegation that the position of the Department [of Education] was not substantially justified, including a description of the specific position"); 24 CFR §14.200 (2003) ("An application for an award of fees and expenses under the Act shall . . . identify the position of the Department [of Housing and Urban Development] or other agencies that the applicant alleges was not substantially justified"); 39 CFR §960.9 (2003) ("The application shall . . . identify the position of the Postal Service in the proceeding that the applicant alleges was not substantially justified").

[4] See 5 U. S. C. §504(a)(2) ("A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified").

## II

Because I conclude that the no substantial justification allegation must be made within the 30-day deadline, the question becomes whether the relation-back doctrine should apply here. The EAJA requirement for filing a timely fee application with the statutorily prescribed content is a condition on the United States' waiver of sovereign immunity in §2412(d)(1)(A). See *Ardestani* v. *INS,* 502 U. S. 129, 137 (1991). As such, the scope of the waiver must be strictly construed. See, *e.g., Irwin*, 498 U. S., at 94; *United States* v. *Nordic Village, Inc.,* 503 U. S. 30, 34 (1992) (stating that a waiver of sovereign immunity "must be construed strictly in favor of the sovereign" and "not enlarge[d] . . . beyond what the language requires" (internal quotation marks omitted)); *Library of Congress* v. *Shaw,* 478 U. S. 310, 318 (1986) (same); *Lehman* v. *Nakshian,* 453 U. S. 156, 161 (1981) ("[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied" (internal quotation marks omitted)). Since the relation-back doctrine relied upon by the Court is not present in the text of the statute, under a simple application of the sovereign immunity canon, petitioner is not entitled to "relate-back" his allegation beyond the 30-day deadline.

The only way the Court avoids this straightforward conclusion is by applying *Irwin*. *Ante*, at 18–19. Although *Irwin* does perhaps narrow the scope of the sovereign immunity canon, it does so only in limited circumstances. In particular, where the Government is made subject to suit to the same extent and in the same manner as private parties are, *Irwin* holds that the Government is subject to the rules that are "applicable to private suits." 498 U. S., at 95. The Court in *Irwin*, addressing equitable tolling, explained that "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling,'" and that "[o]nce Congress has made . . . a waiver

[of sovereign immunity], . . . making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Ibid.* (citations omitted). The Court determined that "[s]uch a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Ibid.*

Notwithstanding *Irwin*'s limited scope, the Court concludes: "*Irwin*'s reasoning would be diminished were it instructive only in situations with a readily identifiable private-litigation equivalent." *Ante*, at 19. The existence of this "private-litigation equivalent," however, formed the very basis for the Court's holding in *Irwin*.

I agree with the Government that there is "no analogue in private litigation," Brief for Respondent 39, for the EAJA fee awards at issue here. Section 2412(d) authorizes fee awards against the Government when there is no basis for recovery under the rules for private litigation.[5] *Irwin*'s analysis simply cannot apply to a proceeding against the Government when there is no analogue for it in private litigation. Accordingly, I would apply the sovereign immunity canon to construe strictly the scope of the Government's waiver and, therefore, against allowing an applicant to avoid the express statutory limitation through judicial application of the relation-back doctrine. For these reasons, I respectfully dissent.

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[5] Compare 28 U. S. C. §2412(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 . . . incurred by that party in any civil 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") with §2412(b) ("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").