Collection: Roberts, John G.: Files
Folder Title: Equal Access to Justice Act (2 of 2)
Box: 23

WITHDRAWAL SHEET

Ronald Reagan Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	Roberts to Fred F. Fielding, re H.R. 5479 (2 pp)	11/5/84	~~P5~~
2. memo	David Stockman to the President, re H.R. 5479 (6 pp)	11/5/84	~~P5~~
3. memo	Phillip D. Brady to the President, re H.R. 2378 (partial of page 4; all of page 5)	7/31/85	~~P5~~ CO 12/14/00

COLLECTION: ROBERTS, JOHN G.: Files	dlb
FILE FOLDER: Equal Access Legislation [2 of 2] OA 12661	3/1/96

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA.
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statute [(b)(3) of the FOIA].
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(B)(6) of the FOIA]
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

THE WHITE HOUSE

WASHINGTON

November 5, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: H.R. 5479 -- Equal Access to Justice Act Amendments

Richard Darman has asked for comments on the above-referenced enrolled bill by close of business today. This bill would permanently reauthorize the Equal Access to Justice Act, which expired pursuant to a sunset provision on September 30, 1984, and also make several significant changes in the Act. The Act authorizes the award of attorneys fees and other expenses to parties prevailing in civil cases against the United States when the United States cannot prove that its position was "substantially justified."

Although the Administration supports permanent retroactive reauthorization of the Act, Justice, OMB, and most other agencies oppose this bill, primarily because of the change it would make in defining what the "position of the United States" is that must be "substantially justified." Under the former Act, "position of the United States" was the litigating position of the Government. This bill would provide that "position of the United States" refers to the justification for underlying agency action. Thus, a court considering a fee application under the Act would not simply consider whether the Government position articulated in court passed some "red-faced" test, but would have to conduct a collateral inquiry into why the agency took the action in the first place. It is inevitable that such an inquiry would precipitate discovery of the most sensitive sort into the agency deliberative process, with a likely chilling effect on the free exchange of ideas by agency personnel. Justice and other agencies also object to provisions in H.R. 5479 that would expand the availability of awards, liberally allow interest on awards, and prohibit agency review of fee determinations by agency administrative law judges. These other objections are clearly of less significance than the change in the definition of "position of the United States."

The Small Business Administration recommends approval of the bill, noting its importance to the small business community and stressing that the Act has proven far less expensive than critics predicted.

I agree with Justice, OMB, and the other agencies that disapproval of H.R. 5479 is warranted because of the change in the definition of "position of the United States." That change would dramatically expand the scope of attorneys fees litigation and compel intrusive inquiries into the agency decision-making process. It would require agency bureaucrats at every level to be as smart as the Justice Department lawyers who defend their decisions in court, since an improper justification for agency action at any level could be the basis for a fee award, even if the justification is corrected before trial.

To lessen the potential fall-out from disapproval, Justice recommends that the President issue a memorandum to department and agency heads, calling upon them to ensure that their positions are "substantially justified," and to accept and retain fee applications in the hope that the Equal Access to Justice Act will eventually be retroactively reauthorized. Justice refers to this memorandum in its proposed memorandum of disapproval, which appropriately focuses on objections to the change in the definition of "position of the United States." I have reviewed both proposed memoranda, and have no objections.

Attachments

THE WHITE HOUSE

WASHINGTON

November 5, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: H.R. 5479 -- Equal Access to Justice Act Amendments

Counsel's Office has reviewed the above-referenced enrolled bill, and has no objection to the recommendation that the President withhold his approval of this bill. I also have no objection to the proposed memorandum of disapproval or to the proposed memorandum for department and agency heads.

FFF:JGR:aea 11/5/84
cc: FFFielding/JGRoberts/SUbj/Chron

THE WHITE HOUSE

WASHINGTON

November 5, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: H.R. 5479 -- Equal Access to Justice Act Amendments

Counsel's Office has reviewed the above-referenced enrolled bill, and has no objection to the recommendation that the President withhold his approval of this bill. I also have no objection to the proposed memorandum of disapproval or to the proposed memorandum for department and agency heads.

FFF:JGR:aea 11/5/84
cc: FFFielding/JGRoberts/SUbj/Chron

ID # 244920 CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

JGR

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Richard Darman

☐ **MI Mail Report** **User Codes:** (A) ______ (B) ______ (C) ______

Subject: H.R. 5479 - Equal Access to Justice Act Amendments

ROUTE TO: ACTION DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOU	ORIGINATOR	84/11/05			/ /
	Referral Note:				
CUAT 18	D	84/11/05		S	84/11/05
	Referral Note:				COB
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:

- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:

- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: Memorandum of Disapproval Attached
Justice Dept. report attached also

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

Document No. 244980SS

WHITE HOUSE STAFFING MEMORANDUM

DATE: 11/5/84 ACTION/CONCURRENCE/COMMENT DUE BY: c.o.b. today, 11/5

SUBJECT: H.R. 5479 - EQUAL ACCESS TO JUSTICE ACT AMENDMENTS

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	MURPHY	☐	☐
MEESE	☐	✓	OGLESBY	✓	☐
BAKER	☐	✓	ROGERS	☐	☐
DEAVER	☐	✓	SPEAKES	☐	✓
STOCKMAN	☐	☐	SVAHN	✓	☐
DARMAN	☐ P	✓ SS	VERSTANDIG	✓	☐
FIELDING	✓	☐	WHITTLESEY	✓	☐
FULLER	✓	☐	ELLIOTT	✓	☐
HERRINGTON	☐	☐		☐	☐
HICKEY	☐	☐		☐	☐
McFARLANE	✓	☐		☐	☐
McMANUS	✓	☐		☐	☐

REMARKS:

Please provide any comments/recommendations on the bill and the draft disapproval memorandum by c.o.b. today, 11/5.

Thank you.

RESPONSE:

1984 NOV -5 AM 11: 12

Richard G. Darman
Assistant to the President
Ext. 2702

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

NOV 5 1984

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 5479 - Equal Access to Justice Act Amendments
Sponsors - Rep. Kastenmeier (D) Wisconsin and 12 others

Last Day for Action

November 9, 1984 - Friday

Purpose

To amend and authorize permanently the Equal Access to Justice Act.

Agency Recommendations

Office of Management and Budget	Disapproval (Memorandum of disapproval attached)
Department of Justice	Disapproval (Memorandum of disapproval attached)
Department of Transportation	Disapproval
Department of Labor	Disapproval
Department of the Treasury	Disapproval
Department of Housing and Urban Development	Disapproval
Department of Agriculture	Disapproval
Department of Defense	Disapproval
Office of Personnel Management	Disapproval
Commodity Futures Trading Commission	Disapproval
Securities and Exchange Commission	Disapproval
Federal Maritime Commission	Disapproval
Federal Home Loan Bank Board	Disapproval
National Labor Relations Board	Disapproval
National Transportation Safety Board	Disapproval
United States International Trade Commission	Disapproval
Occupational Safety and Health Review Commission	Disapproval
Federal Communications Commission	Defers
Department of Commerce	Defers

Department of Health and Human Services	Defers
Department of the Interior	Defers
Department of State	Defers
General Services Administration	Defers
Environmental Protection Agency	Defers
Department of Education	Defers
Administrative Office of the United States Courts	No objection
Small Business Administration	Approval
Administrative Conference of the United States	Approval
Department of Energy	No response

Discussion

H.R. 5479 would permanently authorize the Equal Access to Justice Act (EAJA), which expired on September 30, 1984. The EAJA permits awards of attorneys fees and other expenses to prevailing parties in civil judicial actions as well as adverserial administrative proceedings against the Federal government, where the government is unable to show that its conduct was "substantially justified." When the Act expired, the following were eligible to receive attorneys fees under the EAJA: individuals with assets under $1,000,000; businesses with assets under $5,000,000; and nonprofit groups without regard to size.

While the Administration supported the permanent authorization of the Act, H.R. 5479 would also amend the EAJA in a highly objectionable manner that would significantly expand those government actions for which attorney fees could be awarded. As the Department of Justice advises in its enrolled bill views letter recommending disapproval of H.R. 5479, this enrolled bill would (1) significantly increase the number of cases in which attorneys fees are awarded, (2) increase the complexity of the litigation surrounding the fee award, and (3) permit discovery into agency actions far beyond the scope of the position taken by the government in litigation.

The overriding objectionable provision of H.R. 5479 would define the "position of the United States" -- which is the basis for determining whether the government's actions have been "substantially justified" and, hence, whether a prevailing party will be awarded attorneys fees -- to include the "underlying action" which led to the litigation or adversary adjudication. This definition is a great deal broader than that supported by the Administration, which would have limited the "position of the United States" to the litigating position of the United States.

Other provisions in H.R. 5479 of concern to Federal agencies include:

-- Prohibiting agency review of fee award decisions made by adjudicative officers (e.g., administrative law judges);

-- Extending coverage of the EAJA to include proceedings before agency boards of contract appeals;

-- Broadening the scope of judicial review of fee award decisions made at the agency level;

-- Providing that interest would accrue on any fees and expenses awarded under the EAJA which have not been paid within 60 days of the date of the award; and

-- Amending the definition of an eligible "party" under EAJA to include local governments and to increase the net worth limitations from $1 million to $2 million for individuals, and from $5 million to $7 million for business entities such as partnerships or corporations.

H.R. 5479 also specifies that the Act would become effective as of October 1, 1984, and apply to civil actions and adversary administrative adjudications pending on this date. An exception provides EAJA coverage retroactive to October 1, 1981, for certain proceedings before agency boards of contract appeals. Finally, the bill clarifies that EAJA awards may include fees incurred prior to October 1, 1981, in cases that were pending on this date.

Provisions of H.R. 5479 that are not objectionable would: (1) provide the United States and other parties with the right to appeal, to the appropriate court, fee award determinations made at the administrative level; (2) extend coverage of EAJA to land condemnation cases; (3) clarify that no fee award may be made until a final and unreversable decision is rendered by the court on appeal, or until the underlying merits of the case have finally been determined pursuant to the appeal; and (4) clarify that an award of attorneys fees under the EAJA should be used as an offset to reduce the payment that a Social Security beneficiary would otherwise owe an attorney in certain Social Security proceedings.

<u>Agency Views</u>

-- <u>Disapproval Recommendations</u>

While the agencies either support or do not object to a permanent extension of the EAJA, many oppose other amendments made by H.R. 5479 and have either recommended disapproval or deferred to the views of the Department of Justice. The Department of Justice, in its views letter recommending disapproval, states that "there is no reason to support an expansion of the program in a way that will increase the number of cases in which fees are awarded," as well as increase the complexity of the litigation surrounding the fee award. Justice believes this will result because of the requirement in H.R. 5479 that the courts consider the underlying agency action when determining whether or not to award fees, instead of only the government's litigation position in court. Justice believes that the government may be liable for fees even though it had a credible legal defense to the lawsuit, because the court would focus on the justification for the underlying agency action.

Justice is also concerned that a court's examination of an agency's prelitigation actions -- in order to determine whether the agency's position was reasonable -- may have a chilling effect on free discussions within an agency which occur prior to any final policy decision. The Department of Labor strongly agrees with Justice and notes that placing the focus of the fee determination on the underlying agency action would undermine an important remedial purpose of the EAJA -- to eliminate unnecessary litigation between the government and individuals or small businesses. Labor further advises that such determinations will almost inevitably be characterized by discovery requests for deliberative, pre-decisional communications that are normally privileged from discovery and exempt from mandatory disclosure under the Freedom of Information Act.

Finally, Justice advises that H.R. 5479 would weaken the effectiveness of legal defenses asserted by the government, and in certain types of cases would almost automatically result in awards against the government.

In addition to citing the concerns raised by Justice, several agencies have identified other problems with the bill. The Department of Housing and Urban Development opposes extension of the EAJA to boards of contract appeals proceedings, because this will significantly increase agency costs of such proceedings. In addition, the Department of Transportation opposes the retroactive application of the EAJA to these cases because there is "no constructive purpose to be served."

In opposing provisions which expand the number of parties eligible to receive EAJA awards, the Department of Commerce states that it knows of "no public rationale" for making Federal agencies potentially liable for additional fee awards. HUD also opposes including local governments within the definition of eligible party, viewing this as an unwarranted expansion of EAJA's coverage.

Commerce is also concerned about the amendment prohibiting agencies from reviewing the fee award decisions made by administrative law judges. Currently, agencies have broad authority to review and modify decisions of administrative law judges concerning both the merits of the case and the issue of fees, and Commerce does not believe this should be modified. The independent agencies strongly concur in the Commerce position, and the Commodity Futures Trading Commission, which is representative of this group, states that by prohibiting agency review of fee awards, H.R. 5479 completely "pervert(s) the orderly process prevailing in administrative proceedings for more than 40 years." The Commission notes that under settled principles of administrative law, adjudicative officers are limited to making initial or recommended decisions which are subject to review by the agency.

H.R. 5479 would also establish new standards for judicial review of fee awards which have been made or denied at the administrative level. In particular, the standard would be changed from "abuse of discretion" to "substantial evidence" on the record of the agency. As Commerce notes in its enrolled bill views letter, this change in the review standard would make it more difficult for the government to justify its failure to award attorneys fees.

-- Approval Recommendations

The Small Business Administration urges approval of H.R. 5479. SBA notes that small businesses consider the bill to be vital to their interests, and that the EAJA "has proven itself as an effective yet inexpensive...deterrent to unwarranted agency action." SBA asserts that the definition of "position of the United States" will only be significant in a limited number of circumstances and would ensure that EAJA applies to cases where the agency has acted improperly in prelitigation activities, although its litigation position was substantially justified. SBA believes that the new interpretations of the government's "position" will not deter settlement offers because "it will still be in the government's interest to settle tenuous... cases." SBA further advises that by creating the potential for liability when the underlying agency action is not justified, H.R. 5479 offers added incentives for agencies to resolve disputes before they reach the litigation stage.

The Administrative Conference of the United States also recommends approval of H.R. 5479, and states that awards under the EAJA "have been few and almost all have been quite modest."

Conclusion

H.R. 5479 makes substantive changes to the EAJA that significantly expand the scope of the Act and increase the potential for additional agency costs for both litigation and payment of attorneys fees. Although a number of objectionable provisions have been deleted from the bill as enrolled, a seriously objectionable provision expanding the definition of "position of the United States" remains. In its views letter, the Department of Justice advises that this alone warrants the disapproval of H.R. 5479. We agree, and note that the bill contains other objectionable provisions as previously discussed.

Disapproval of H.R. 5479 would not affect judicial and administrative proceedings commenced prior to October 1, 1984, thereby ensuring the availability of EAJA benefits for such cases.

This legislation would permanently reauthorize the EAJA and, if H.R. 5479 is approved, it would be extremely difficult to obtain any limiting reforms in the future. Accordingly, it is important that the standards for granting EAJA awards be kept within reasonable bounds, and not become a broad entitlement program for the benefit of the legal profession. While the cost of the EAJA has thus far been relatively modest, the last year indicates a trend of substantial growth in the number and amount of EAJA fee awards. Thus, changes to the EAJA such as those contained in the bill could over time result in significant budget outlays, and cause the Act to become a major source of revenue for lawyers.

OMB and Justice recommend that any memorandum of disapproval be accompanied by the release of a Presidential Memorandum to all agency heads that would emphasize the Administration's commitment to a prompt and retroactive reauthorization of the EAJA early next year, along with instructions that each agency review its procedures to ensure that their positions continue to be substantially justified. The Presidential Memorandum would also instruct each agency to accept and assist in the preparation of any fee applications that would be considered once the Act is reauthorized. Such a draft Presidential Memorandum is attached for your consideration and signature.

* * * * *

We have also prepared for your consideration a revised version of the memorandum of disapproval prepared by the Department of Justice. The revised memorandum indicates that, in addition to the seriously objectionable aspect of the bill identified by Justice, there are other objectionable provisions as well. The revised memorandum also reflects a willingness by the Administration to consider amendments other than a simple reauthorization of the Act, and advises that, concurrently with this memorandum of disapproval, you are issuing the aforementioned Presidential Memorandum.

H.R. 5479 passed both Houses by voice vote.

David A. Stockman
Director

Enclosures

MEMORANDUM OF DISAPPROVAL

I am withholding my approval of H.R. 5479, a bill "to amend section 504 of title 5, United States Code and section 2412 of title 28, United States Code, with respect to awards of expenses of certain agency and court proceedings, and for other purposes."

H.R. 5479 would permanently reauthorize and make a number of significant changes to the Equal Access to Justice Act. The Act allows the award of attorneys' fees to certain parties who successfully litigate against the government unless the government demonstrates that its position is substantially justified or that special circumstances exist which make a fee award unjust. Because the Equal Access to Justice Act expired on September 30, 1984, legislation is needed to reauthorize the Act.

I am firmly committed to the policies underlying the Equal Access to Justice Act, and will make the permanent and retroactive reauthorization of the Act a high legislative priority of the Administration in the next Congress. Where the federal government has taken a position in litigation which is not substantially justified, and thereby has caused a small business or individual to incur unnecessary attorneys' fees and legal costs, I believe it proper for the government to reimburse that small business or individual for those expenses. The Equal Access to Justice Act thus serves an important salutory purpose that should become a permanent part of our government. Unfortunately, H.R. 5479 makes certain changes to the Equal

Access to Justice Act that do not further the Act's basic purposes and that are inconsistent with fundamental principles of good government. The most objectionable of these provisions is the change the bill would make in the definition of "position of the United States." Under this changed definition, the Act would no longer apply only to the government's position taken in the administrative or court litigation, but would extend to the underlying agency action. This would result in needless and wasteful litigation over what is supposed to be a subsidiary issue, the award of attorneys' fees, and would further burden the courts, which would have to hear the claims in each case not once, but twice. In addition, this change could also undermine the free exchange of ideas and positions within each agency that is essential for good government.

For example, this change would require courts in making fee determinations to examine the conduct of an agency even where that conduct is not at issue in the court's review of the merits of the case before it. This would mean that a fee proceeding could result in an entirely new and subsidiary inquiry in the circumstances that gave rise to the original lawsuit. This inquiry not only could lead to far lengthier proceedings than required if the court is merely to examine arguments made in court, but also could lead to extensive discovery of how the underlying agency position was formulated, and who advocated what position and for what reasons at what time. In effect, every step of the agency decision-making process, at whatever level, could become the subject of litigation discovery. Such extensive discovery could inhibit free discussion within an agency prior to any final agency policy decision or action, for fear that any internal disagreements or reservations would be the subject of discovery and judicial inquiry.

In addition, H.R. 5479 contains a provision which would require the United States to pay interest on any awarded attorneys' fees not paid within 60 days after the date of the award. As noted by the Comptroller General of the United States, this provision would give lawyers who have received awards under the Act more favorable treatment than any other group entitled to interest payments from the United States. I agree with the Comptroller General that to the extent any interest should be paid under the Act, it should be paid on the same basis as other interest payments made by the government on court judgments.

The Department of Justice, the Office of Management and Budget, and other concerned agencies have repeatedly expressed to the Congress their serious reservations about these and other provisions of H.R. 5479. I wholly support the prompt reauthorization of the Equal Access to Justice Act, and believe that the reauthorization should be retroactively effective to October 1, 1984. In light of the permanent nature of a reauthorization, such a reauthorization should include modifications and improvements in the Act, which the Administration is willing to explore with the Congress.

Concurrently with this memorandum, I am issuing a Presidential Memorandum to all agency heads concerning the Equal Access to Justice Act. This memorandum reaffirms my strong commitment to the policies underlying the Act, and instructs agency heads to review the procedures of their agencies to ensure that agency positions continue to be substantially justified. Special attention is to be given to those agency positions that affect small businesses. In addition, each agency is to accept and assist in the preparation of fee applications which can be considered once the Act is reauthorized.

I look forward to approving an acceptable reauthorization of the Equal Access to Justice Act early next year. For the reasons indicated, however, I am compelled to withhold my approval of H.R. 5479.

THE WHITE HOUSE

WASHINGTON

TO DEPARTMENT AND AGENCY HEADS

The authorities of the Equal Access to Justice Act (Title II of Public Law 96-481) expired on September 30, 1984, for all cases initiated after that date. While I strongly support the reauthorization of the Act, and have worked closely with the Congress to that effect, I have today withheld my approval of the recently passed bill (H.R. 5479) reauthorizing the Act because certain of its amendments are unacceptable to the Administration. It is my hope and expectation that an acceptable reauthorization of the Act will be passed by the Congress early next year, and that this reauthorization will apply retroactively to covered cases initiated on or after October 1, 1984.

Pending the reauthorization of the Equal Access to Justice Act next year, I am directing all agency heads to take the following actions.

First, agency heads shall ensure that the appropriate offices and personnel in their agencies understand that the Administration remains firmly committed to the policies underlying the Equal Access to Justice Act, and that the failure to obtain an acceptable reauthorization of the Act this year should in no way be interpreted as a reduction in that commitment. In this regard, agency heads shall again review the procedures used by their agencies to ensure that agency positions are "substantially justified" within the meaning of the Act. Special attention shall be given to those agency positions that affect small businesses.

Second, agencies shall accept and retain on file any applications for awards of fees and expenses pursuant to section 203 of the Act (5 U.S.C. 504), and shall continue to provide any appropriate assistance in making such applications. Agencies will not, of course, be in a position to rule on these applications until the Act is reauthorized, but otherwise shall continue to accept such applications, and provide necessary assistance, as if the Act were in force.

Third, as for awards relating to judicial proceedings under section 204 of the Act, agencies shall continue to accept and retain on file any demands for settlement of claims for such awards even though such claims (for cases initiated on or after October 1, 1984) cannot be filed in court until the Act is reauthorized. Once the Act is reauthorized, such claims shall then be reviewed by the agency in accordance with the terms of the reauthorized Act.

The above measures will ensure that the policies underlying the Equal Access to Justice Act will continue in effect until the Act is reauthorized, and that the protections afforded to litigants by the Act -- particularly to small businesses -- will not be denied during the period between the Act's expiration and its reauthorization.

Ronald Reagan

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 24, 1984

M E M O R A N D U M

TO: Fred F. Fielding
Counsel to the President
The White House

FROM: Robert A. McConnell
Assistant Attorney General
Office of Legislative and Intergovernmental Affairs

SUBJECT: H.R. 5479

On October 11, 1984, the House and Senate voted to pass H.R. 5479, a bill "To amend section 504 of title 5, United States Code and section 2412 of title 28 of the United States Code with respect to awards of expenses of certain agency and court proceedings." H.R. 5479 extends the provisions of the Equal Access to Justice Act which expired on October 1, 1984.

Throughout this session of Congress, there have been various proposals (S. 919, H.R. 5059) to extend the Equal Access to Justice Act. The Department has consistently objected to these proposals because they expanded the definition of the term "position of the United States" to include the agency action underlying the litigation in addition to the position argued in court. The Department made a concerted effort to advise the Congress of our objections to these measures. Unfortunately, our concerns were not satisfactorily addressed by Congress. Consequently, the Department recommends that the President veto H.R. 5479.

The following is a chronological summary of the Department's written communication to the Congress of our objections to these proposals. Also, there was significant verbal communication in both the House and the Senate.

April 14, 1983	J. Paul McGrath, Assistant Attorney General, Civil Division, testified before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee. In this testimony, Mr. McGrath outlined the Department's objections to S. 919.
July 6, 1983	The Department sent a letter to Senator Charles Grassley, Chairman, Subcommittee on Administrative Practice and Procedure, opposing a provision of S. 919 which required the courts to decide which agency shall pay an award.
March 14, 1984	Carolyn Kuhl, Deputy Assistant Attorney General, Civil Division, testified before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee. In her testimony Ms. Kuhl presented the Department's objections to H.R. 5059.
April 25, 1984	The Department's bill report on S. 919 was sent to Chairman Thurmond of the Senate Judiciary Committee. In this report, we suggested ways that the bill could be amended to address the Department's objections.
June 21, 1984	The Department sent a letter to Senator Baker, Majority Leader, United States Senate, advising him of the Administration's concerns about several provisions of the bill.
September 19, 1984	The Department sent a letter to Senator Domenici objecting to a compromise definition of "position of the United States".

cc: Thomas Donnelly, Jr.
Special Assistant to the President
for Legislative Affairs
The White House

Robert Kabel
Special Assistant to the President
for Legislative Affairs
The White House

Equal access

THE WHITE HOUSE

Office of the Press Secretary
(Santa Barbara, California)

For Immediate Release November 9, 1984

MEMORANDUM OF DISAPPROVAL

I am withholding my approval of H.R. 5479, a bill "to amend section 504 of title 5, United States Code, and section 2412 of title 28, United States Code, with respect to awards of expenses of certain agency and court proceedings, and for other purposes."

H.R. 5479 would permanently reauthorize and make a number of significant changes to the Equal Access to Justice Act. The Act allows the award of attorneys' fees to certain parties who successfully litigate against the government unless the government demonstrates that its position is substantially justified or that special circumstances exist that make a fee award unjust. Because the Equal Access to Justice Act expired on September 30, 1984, legislation is needed to reauthorize the Act.

I am firmly committed to the policies underlying the Equal Access to Justice Act and will make the permanent and retroactive reauthorization of the Act a high legislative priority of the Administration in the next Congress. Where the Federal government has taken a position in litigation that is not substantially justified, and thereby has caused a small business or individual to incur unnecessary attorneys' fees and legal costs, I believe it proper for the government to reimburse that small business or individual for those expenses. The Equal Access to Justice Act thus serves an important salutory purpose that should become a permanent part of our government. Unfortunately, H.R. 5479 makes certain changes to the Equal Access to Justice Act that do not further the Act's basic purposes and that are inconsistent with fundamental principles of good government. The most objectionable of these provisions is the change the bill would make in the definition of "position of the United States." Under this changed definition, the Act would no longer apply only to the government's position taken in the administrative or court litigation, but would extend to the underlying agency action. This would result in needless and wasteful litigation over what is supposed to be a subsidiary issue, the award of attorneys' fees, and would further burden the courts, which would have to hear the claims in each case not once, but twice. In addition, this change could also undermine the free exchange of ideas and positions within each agency that is essential for good government.

For example, this change would require courts in making fee determinations to examine the conduct of agency even where that conduct is not at issue in the court's review of the merits of the case before it. This would mean that a fee proceeding could result in an entirely new and subsidiary inquiry in the circumstances that gave rise to the original lawsuit. This inquiry only could lead to far lengthier proceedings than required if the court is merely to examine arguments made in court, but also could lead to extensive discovery of how the underlying agency position was formulated, and who advocated what position and for what reasons at what time. In effect, every step of the agency decision-making process, at whatever level, could become

MORE

(OVER)

the subject of litigation discovery. Such extensive discovery could inhibit free discussion within an agency prior to any final agency policy decision or action for fear that any internal disagreements or reservations would be the subject of discovery and judicial inquiry.

In addition, H.R. 5479 contains a provision that would require the United States to pay interest on any awarded attorneys' fees not paid within 60 days after the date of the award. As noted by the Comptroller General of the United States, this provision would give lawyers who have received awards under the Act more favorable treatment than any other group entitled to interest payments from the United States. I agree with the Comptroller General that to the extent any interest should be paid under the Act, it should be paid on the same basis as other interest payments made by the government on court judgments.

The Department of Justice, the Office of Management and Budget, and other concerned agencies have repeatedly expressed to the Congress their serious reservations about these and other provisions of H.R. 5479. I wholly support the prompt reauthorization of the Equal Access to Justice Act and believe that the reauthorization should be retroactively effective to October 1, 1984. In light of the permanent nature of a reauthorization, such a reauthorization should include modifications and improvements in the Act, which the Administration is willing to explore with the Congress.

Concurrently with this memorandum, I am issuing a memorandum to all agency heads concerning the Equal Access to Justice Act. This memorandum reaffirms my strong commitment to the policies underlying the Act and instructs agency heads to review the procedures of their agencies to ensure that agency positions continue to be substantially justified. Special attention is to be given to those agency positions that affect small businesses. In addition, each agency is to accept and assist in the preparation of fee applications which can be considered once the Act is reauthorized.

I look forward to approving an acceptable reauthorization of the Equal Access to Justice Act early next year. For the reasons indicated, however, I am compelled to withhold my approval of H.R. 5479.

RONALD REAGAN

THE WHITE HOUSE,
November 8, 1984

# # #

THE WHITE HOUSE

Office of the Press Secretary
(Santa Barbara, California)

For Immediate Release November 9, 1984

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

The authorities of the Equal Access to Justice Act (Title II of Public Law 96-481) expired on September 30, 1984, for all cases initiated after that date. While I strongly support the reauthorization of the Act and have worked closely with the Congress to that effect, I have today withheld my approval of the recently passed bill (H.R. 5479) reauthorizing the Act because certain of its amendments are unacceptable to the Administration. It is my hope and expectation that an acceptable reauthorization of the Act will be passed by the Congress early next year and that this reauthorization will apply retroactively to covered cases initiated on or after October 1, 1984.

Pending the reauthorization of the Equal Access to Justice Act next year, I am directing all agency heads to take the following actions.

First, agency heads shall ensure that the appropraite offices and personnel in their agencies understand that the Administration remains firmly committed to the policies underlying the Equal Access to Justice Act and that the failure to obtain an acceptable reauthorization of the Act this year should in no way be interpreted as a reduction in that commitment. In this regard, agency heads shall again review the procedures used by their agencies to ensure that agency positions are "substantially justified" within the meaning of the Act. Special attention shall be given to those agency positions that affect small businesses.

Second, agencies shall accept and retain on file any applications for awards of fees and expenses pursuant to section 203 of the Act (5 U.S.C. 504) and shall continue to provide an appropriate assistance in making such applications. Agencies will not, of course, be in a position to rule on these applications until the Act is reauthorized, but otherwise shall continue to accept such applications and provide necessary assistance as if the Act were in force.

Third, as for awards relating to judicial proceedings under section 204 of the Act, agencies shall continue to accept and retain on file any demands for settlement of claims for such awards even though such claims (for cases initiated on or after October 1, 1984) cannot be filed in court until the Act is reauthorized. Once the Act is reauthorized, such claims shall then be reviewed by the agency in accordance with the terms of the reauthorized Act.

The above measures will ensure that the policies underlying the Equal Access to Justice Act will continue in effect until the Act is reauthorized and that the protections afforded to litigants by the Act -- particularly to small businesses -- will not be denied during the period between the Act's expiration and its reauthorization.

RONALD REAGAN

# # #

THE WHITE HOUSE

WASHINGTON

November 14, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: ABA Support for Equal Access to Justice Act Renewal

On October 16, 1984, the director of the Governmental Affairs Group of the American Bar Association, Robert D. Evans, wrote the President to urge him to sign H.R. 5479, the bill to reauthorize the Equal Access to Justice Act (EAJA). As you know, the President pocket vetoed this bill, the ten-day period expiring on November 9. In the memorandum of disapproval, however, the President objected not to reauthorization of the EAJA but to revisions made by H.R. 5479. Indeed, the President reiterated Administration support for the EAJA itself. It therefore seems appropriate to reply to Mr. Evans, noting that we support the EAJA and enclosing a copy of the memorandum of disapproval.

Attachment

THE WHITE HOUSE

WASHINGTON

November 14, 1984

Dear Mr. Evans:

Thank you for your letter of October 16, 1984 to the President. In that letter you urged the President to sign H.R. 5479, a bill to reauthorize and revise the Equal Access to Justice Act.

As you doubtless know, the President withheld his approval of H.R. 5479. As the President made clear in his memorandum of disapproval, however, his decision to do so was not based on opposition to the Equal Access to Justice Act itself. Indeed, the President reiterated his support for the Act, and expressed his hope that Congress would act promptly to reauthorize it retroactively. He also directed the heads of Federal departments and agencies to continue to accept applications for fee awards under the Act, so that such applications may be processed pursuant to the reauthorized Act. The President was compelled to withhold his approval from H.R. 5479 because that bill did not simply reauthorize the Equal Access to Justice Act but also made numerous ill-advised changes in its provisions.

I have enclosed for your information a copy of the memorandum of disapproval and the memorandum to the heads of Federal departments and agencies. Thank you for sharing your views on this matter with us.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

Robert D. Evans, Esquire
Director, Governmental Affairs Group
American Bar Association
1800 M Street, N.W.
Washington, D.C. 20036-5886

FFF:JGR:aea 11/14/84

bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 14, 1984

Dear Mr. Evans:

Thank you for your letter of October 16, 1984 to the President. In that letter you urged the President to sign H.R. 5479, a bill to reauthorize and revise the Equal Access to Justice Act.

As you doubtless know, the President withheld his approval of H.R. 5479. As the President made clear in his memorandum of disapproval, however, his decision to do so was not based on opposition to the Equal Access to Justice Act itself. Indeed, the President reiterated his support for the Act, and expressed his hope that Congress would act promptly to reauthorize it retroactively. He also directed the heads of Federal departments and agencies to continue to accept applications for fee awards under the Act, so that such applications may be processed pursuant to the reauthorized Act. The President was compelled to withhold his approval from H.R. 5479 because that bill did not simply reauthorize the Equal Access to Justice Act but also made numerous ill-advised changes in its provisions.

I have enclosed for your information a copy of the memorandum of disapproval and the memorandum to the heads of Federal departments and agencies. Thank you for sharing your views on this matter with us.

Sincerely,

Fred F. Fielding
Counsel to the President

Robert D. Evans, Esquire
Director, Governmental Affairs Group
American Bar Association
1800 M Street, N.W.
Washington, D.C. 20036-5886

FFF:JGR:aea 11/14/84

bcc: FFFielding/JGRoberts/Subj/Chron

ID# 248952

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: OCTOBER 18, 1984

NAME OF CORRESPONDENT: MR. ROBERT D. EVANS

SUBJECT: WRITES IN SUPPORT OF H.R. 5479, THE EQUAL ACCESS TO JUSTICE ACT

ROUTE TO: OFFICE/AGENCY (STAFF NAME)	ACTION: ACT CODE	ACTION: DATE YY/MM/DD	DISPOSITION: TYPE RESP	DISPOSITION: C D	DISPOSITION: COMPLETED YY/MM/DD
FRED FIELDING	ORG	84/10/18			/ /
REFERRAL NOTE:					
CUAT18	D	84/10/22		S	84/11/02
REFERRAL NOTE:					
DD		/ /			/ /
REFERRAL NOTE:					
		/ /			/ /
REFERRAL NOTE:					
		/ /			/ /
REFERRAL NOTE:					

COMMENTS:

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES:

MI MAIL USER CODES: (A) (B) (C)

*ACTION CODES:
*A-APPROPRIATE ACTION
*C-COMMENT/RECOM
*D-DRAFT RESPONSE
*F-FURNISH FACT SHEET
*I-INFO COPY/NO ACT NEC
*R-DIRECT REPLY W/COPY
*S-FOR-SIGNATURE
*X-INTERIM REPLY

*DISPOSITION CODES:
*A-ANSWERED
*B-NON-SPEC-REFERRAL
*C-COMPLETED
*S-SUSPENDED

*OUTGOING CORRESPONDENCE:
*TYPE RESP=INITIALS OF SIGNER CODE = A
*COMPLETED = DATE OF OUTGOING

REFER QUESTIONS AND ROUTING UPDATES TO CENTRAL REFERENCE (ROOM 75,OEOB) EXT. 2590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

American Bar Association

October 16, 1984

The President
The White House
Washington, D. C. 20500

Dear Mr. President:

There shall shortly be presented for your signature an enrolled enactment, H.R. 5479, legislation to reauthorize the Equal Access to Justice Act (EAJA). As you consider H.R. 5479, the American Bar Association wishes to let you know that we strongly support this very important legislation.

The ABA supported enactment of the EAJA in 1980. The EAJA established a statutory basis upon which small businesses, individuals, and other parties meeting specified eligibility standards can recover attorneys' fees and related litigation expenses when they prevail against the federal government in certain types of non-tort administrative and judicial proceedings. Fees may not be awarded under the Act if the government shows that its action was "substantially justified."

The EAJA has made it possible for small business owners and citizens of modest means to bring legal challenges to unjustifiable actions of the federal government. During the three years it has been in effect, it has proven to be a relatively modest but, nonetheless, beneficial mechanism for promoting fairness and common sense on the part of the government in administrative and litigation practices.

We urge you to sign this important legislation.

Sincerely,

Robert D. Evans

Robert D. Evans

RDE:afp

THE WHITE HOUSE

Office of the Press Secretary
(Santa Barbara, California)

For Immediate Release November 9, 1984

MEMORANDUM OF DISAPPROVAL

I am withholding my approval of H.R. 5479, a bill "to amend section 504 of title 5, United States Code, and section 2412 of title 28, United States Code, with respect to awards of expenses of certain agency and court proceedings, and for other purposes."

H.R. 5479 would permanently reauthorize and make a number of significant changes to the Equal Access to Justice Act. The Act allows the award of attorneys' fees to certain parties who successfully litigate against the government unless the government demonstrates that its position is substantially justified or that special circumstances exist that make a fee award unjust. Because the Equal Access to Justice Act expired on September 30, 1984, legislation is needed to reauthorize the Act.

I am firmly committed to the policies underlying the Equal Access to Justice Act and will make the permanent and retroactive reauthorization of the Act a high legislative priority of the Administration in the next Congress. Where the Federal government has taken a position in litigation that is not substantially justified, and thereby has caused a small business or individual to incur unnecessary attorneys' fees and legal costs, I believe it proper for the government to reimburse that small business or individual for those expenses. The Equal Access to Justice Act thus serves an important salutory purpose that should become a permanent part of our government. Unfortunately, H.R. 5479 makes certain changes to the Equal Access to Justice Act that do not further the Act's basic purposes and that are inconsistent with fundamental principles of good government. The most objectionable of these provisions is the change the bill would make in the definition of "position of the United States." Under this changed definition, the Act would no longer apply only to the government's position taken in the administrative or court litigation, but would extend to the underlying agency action. This would result in needless and wasteful litigation over what is supposed to be a subsidiary issue, the award of attorneys' fees, and would further burden the courts, which would have to hear the claims in each case not once, but twice. In addition, this change could also undermine the free exchange of ideas and positions within each agency that is essential for good government.

For example, this change would require courts in making fee determinations to examine the conduct of agency even where that conduct is not at issue in the court's review of the merits of the case before it. This would mean that a fee proceeding could result in an entirely new and subsidiary inquiry in the circumstances that gave rise to the original lawsuit. This inquiry only could lead to far lengthier proceedings than required if the court is merely to examine arguments made in court, but also could lead to extensive discovery of how the underlying agency position was formulated, and who advocated what position and for what reasons at what time. In effect, every step of the agency decision-making process, at whatever level, could become

MORE

(OVER)

the subject of litigation discovery. Such extensive discovery could inhibit free discussion within an agency prior to any final agency policy decision or action for fear that any internal disagreements or reservations would be the subject of discovery and judicial inquiry.

In addition, H.R. 5479 contains a provision that would require the United States to pay interest on any awarded attorneys' fees not paid within 60 days after the date of the award. As noted by the Comptroller General of the United States, this provision would give lawyers who have received awards under the Act more favorable treatment than any other group entitled to interest payments from the United States. I agree with the Comptroller General that to the extent any interest should be paid under the Act, it should be paid on the same basis as other interest payments made by the government on court judgments.

The Department of Justice, the Office of Management and Budget, and other concerned agencies have repeatedly expressed to the Congress their serious reservations about these and other provisions of H.R. 5479. I wholly support the prompt reauthorization of the Equal Access to Justice Act and believe that the reauthorization should be retroactively effective to October 1, 1984. In light of the permanent nature of a reauthorization, such a reauthorization should include modifications and improvements in the Act, which the Administration is willing to explore with the Congress.

Concurrently with this memorandum, I am issuing a memorandum to all agency heads concerning the Equal Access to Justice Act. This memorandum reaffirms my strong commitment to the policies underlying the Act and instructs agency heads to review the procedures of their agencies to ensure that agency positions continue to be substantially justified. Special attention is to be given to those agency positions that affect small businesses. In addition, each agency is to accept and assist in the preparation of fee applications which can be considered once the Act is reauthorized.

I look forward to approving an acceptable reauthorization of the Equal Access to Justice Act early next year. For the reasons indicated, however, I am compelled to withhold my approval of H.R. 5479.

RONALD REAGAN

THE WHITE HOUSE,
November 8, 1984

# # #

THE WHITE HOUSE

Office of the Press Secretary
(Santa Barbara, California)

For Immediate Release November 9, 1984

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

The authorities of the Equal Access to Justice Act (Title II of Public Law 96-481) expired on September 30, 1984, for all cases initiated after that date. While I strongly support the reauthorization of the Act and have worked closely with the Congress to that effect, I have today withheld my approval of the recently passed bill (H.R. 5479) reauthorizing the Act because certain of its amendments are unacceptable to the Administration. It is my hope and expectation that an acceptable reauthorization of the Act will be passed by the Congress early next year and that this reauthorization will apply retroactively to covered cases initiated on or after October 1, 1984.

Pending the reauthorization of the Equal Access to Justice Act next year, I am directing all agency heads to take the following actions.

First, agency heads shall ensure that the appropraite offices and personnel in their agencies understand that the Administration remains firmly committed to the policies underlying the Equal Access to Justice Act and that the failure to obtain an acceptable reauthorization of the Act this year should in no way be interpreted as a reduction in that commitment. In this regard, agency heads shall again review the procedures used by their agencies to ensure that agency positions are "substantially justified" within the meaning of the Act. Special attention shall be given to those agency positions that affect small businesses.

Second, agencies shall accept and retain on file any applications for awards of fees and expenses pursuant to section 203 of the Act (5 U.S.C. 504) and shall continue to provide an appropriate assistance in making such applications. Agencies will not, of course, be in a position to rule on these applications until the Act is reauthorized, but otherwise shall continue to accept such applications and provide necessary assistance as if the Act were in force.

Third, as for awards relating to judicial proceedings under section 204 of the Act, agencies shall continue to accept and retain on file any demands for settlement of claims for such awards even though such claims (for cases initiated on or after October 1, 1984) cannot be filed in court until the Act is reauthorized. Once the Act is reauthorized, such claims shall then be reviewed by the agency in accordance with the terms of the reauthorized Act.

The above measures will ensure that the policies underlying the Equal Access to Justice Act will continue in effect until the Act is reauthorized and that the protections afforded to litigants by the Act -- particularly to small businesses -- will not be denied during the period between the Act's expiration and its reauthorization.

RONALD REAGAN

# # #

THE WHITE HOUSE

WASHINGTON

January 10, 1985

MEMORANDUM FOR THE FILES

FROM: JOHN G. ROBERTS JGR

SUBJECT: Article for ABA Journal on the Subject of Equal Access to Justice Act

By telephone conversation yesterday I advised Breger that our office had no objection to the article, but that he must obtain clearance from the Department of Justice (Associate Deputy Attorney General Roger Clegg).

ID # ______________ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) __/__/__

Name of Correspondent: Marshall Breger

☐ **MI Mail Report** **User Codes: (A)** ______ **(B)** ______ **(C)** ______

Subject: Article for ABA Journal on the subject of the Equal Access to Justice Act

ROUTE TO: Office/Agency (Staff Name)	ACTION: Action Code	Tracking Date YY/MM/DD	DISPOSITION: Type of Response	Code	Completion Date YY/MM/DD
Cutton	ORIGINATOR	85/01/09			/ /
	Referral Note:				
CUAT 18	R	85/01/09		S	85/01/09
	Referral Note:				COB
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: ______________________________

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

THE WHITE HOUSE

WASHINGTON

January 9, 1984

MEMORANDUM FOR FRED F. FIELDING
COUNSEL TO THE PRESIDENT

FROM: MARSHALL BREGER MB
SPECIAL ASSISTANT TO THE PRESIDENT
FOR PUBLIC LIAISON

I have been asked by the ABA Journal to prepare a short comment on the veto of the Equal Access to Justice Act for publication in the March issue. I am forwarding a copy of the draft for your approval and clearance. I need a response today, if possible, as the ABA deadline is pressing. Mike Horowitz has read a substantially similar draft.

Thank you for your immediate attention to this matter.

Attachment

EQUAL ACCESS TO JUSTICE ACT

DRAFT

JANUARY 9, 1985

MARSHALL BREGER

Congress modified the "American Rule," requiring parties to bear their own litigation costs when it passed the Equal Access to Justice Act (EAJA) in 1980. The Act provided for the award of attorney fees to individuals and small businesses who prevail in lawsuits with the federal government, when the position of the government was not "substantially justified" and so long as the party's net worth does not exceed one million dollars at the time the suit is filed. Since 1981, the Act has provided almost three and a half million dollars in court-awarded fees to small businesses that were the objects of unjustified government action. The fact that government agencies know that they may be held accountable in law has forced them to better review agency action and refine agency procedures. Because the EAJA reflected the sound principle that individuals and small business ought not be precluded from challenging unreasonable government actions because of financial constraints, the Administration enthusiastically supported reauthorization of the Act in 1984.

Unfortunately, the reauthorization which passed Congress last fall created significant administrative problems for our judicial system. The original Act provided that "a court (or agency) shall award to a prevailing party other than the United States, fees and expenses...incurred by that party in any civil action brought by or against the United States..unless the court (or adjudicative officer of the agency) finds the position of the

United States was substantially justified". The reauthorization act called for courts to assess the underlying agency action in evaluating whether attorneys fees should be awarded. The Administration, however, follows Spencer v. NLRB, 712 F. 2d 539 (DC 1983) in believing that it is the government's litigation position that should be assessed in determining whether a fee award is justified.This means that if the government's legal arguments in the lawsuit were not substantially justified, then the government must pay attorneys fees.

The difference is not mere metaphysical cavil. Adoption of the "underlying agency action" theory will open a Pandora's box of unnecessary fee-oriented litigation. Under the underlying agency action theory, the government may have to pay attorneys fees even where it settles the lawsuit before answering the complaint. The government may have to pay even where its procedural or jurisdictional defense was substantially justified.

Further, fee-seeking attorneys will likely engage in extensive discovery proceedings exploring tentative agency judgments. "Mini-trials" will often be necessary to review agency conduct not the subject of argument before the Court. Agency officials will be required to testify on internal decisional processes. All this would be required not to secure better "justice," but to assist attorneys seeking fee awards.

Such fee-driven litigation will ultimately result in a "vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape..." Hensley v. Eckerhart, 102 S. Ct. 1933, 1941 (1983). It is for this reason, among others, that the President reluctantly vetoed the reauthorization of the Equal Access to Justice Act.

One cannot deny that under the original Act, there were occasions where citizens had to expend considerable financial resources to rectify improper or unauthorized agency action before litigation commenced. The search for perfect justice has its costs, however. A "bright line" is needed to ensure that the EAJA does not consume scarce judicial resources in incessant and drawn-out fee application hearings. Retaining the litigation position standard provides such a "bright line".

The Administration is firmly committed to the policies underlying the Equal Access to Justice Act and will strive to secure an acceptable authorizing vehicle to implement the Act's purposes. The President has ordered the heads of all Executive departments and agencies to accept and retain on file applications for fee awards under the Act. Our hope is that Congress will pass an acceptable reauthorization act that would apply retroactively to the present interregnum. Vindicating the principles of equal access to justice does not require that Congress consciously create a [illegible] thicket.

THE WHITE HOUSE

WASHINGTON

April 25, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Testimony Relating to the Reauthorization of the Equal Access to Justice Act

Counsel's Office has reviewed the above-referenced testimony, and finds no objection to it from a legal perspective.

ID # CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Carolyn Kuhl

☐ **MI Mail Report** **User Codes: (A)** ______ **(B)** ______ **(C)** ______

Subject: DOJ Testimony relating to the reauthorization of the Equal access to Justice act

ROUTE TO: **ACTION** **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	85/04/25			/ /
	Referral Note:				
CUAT 18	R	85/04/25		S	85/04/29
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:
- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments:

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

STATEMENT

OF

CAROLYN B. KUHL
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

BEFORE

THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE

OF THE

HOUSE JUDICIARY COMMITTEE

CONCERNING

THE REAUTHORIZATION OF
THE EQUAL ACCESS TO JUSTICE ACT

ON

APRIL 30, 1985

Thank you, Mr. Chairman. I appreciate having this opportunity to testify before the Subcommittee on the reauthorization of the Equal Access to Justice Act. The Administration has been working with the Congress for two years now in an effort to reauthorize the Equal Access to Justice Act and to solve problems which have arisen in the program. I testified a little more than a year ago before this Subcommittee and discussed at some length our suggestions for improvements in the Act. The Administration has reviewed the provisions of H.R.   and, I am pleased to say, endorses that bill.

As you are aware, President Reagan vetoed the reauthorization bill passed in the last Congress, notwithstanding his strong support for the underlying program. In his veto message, the President expressed his concern with several provisions of the bill which passed Congress. The importance of these concerns was emphasized by the fact that the legislation would have permanently reauthorized the Act, which meant that we would not be revisiting these issues for some time to come.

The first issue raised in the President's veto message was the inclusion of a definition of "position of the United States" which would require the court to look not only at the position taken by the United States in the litigation, but also at the "underlying agency action" to determine whether the position taken by the United States in the litigation was substantially justified and, thus, whether fees should be awarded. The President expressed his concern that this new definition would vastly increase and complicate litigation over attorneys' fees and would result in extensive discovery into the internal decision-making processes of the agencies -- something which could have a chilling effect on the free flow of ideas so very important to responsible decision making.

Under the definition included in the bill which the President vetoed, fee litigation could be vastly increased because the court would not merely look at the position taken by the United States in the litigation along with the accompanying evidence and legal arguments submitted in the trial of the case, but would have to consider additional evidence relevant to the agency action which underlay the position taken in the litigation. The fee proceeding could involve substantially new litigation into the reasonableness of government conduct -- an inquiry which could differ substantially from that undertaken in the case in chief, depending on the facts and legal issues involved in each case. In addition, this inquiry could result in discovery into internal agency deliberations to determine whether agency personnel disagreed with a particular decision, on the grounds that this evidence is relevant to the determination of whether the agency's action was substantially justified.

H.R.   would adopt language defining "position of the United States," for the purposes of section 2412, to mean the position taken in the litigation and the agency action, or failure to act, upon which the civil action is based. Under this definition, the agency action which forms the basis of the litigation could be considered in determining whether the United States should pay attorneys' fees. We regard this definition as directing the courts to look only at the agency action which was the subject of the lawsuit, and not to permit the courts to look at other agency actions which were not judicially reviewable or were not the subject of the underlying lawsuit. This represents a significant concession by the Administration in that it permits the courts to consider agency actions which, while the basis of the lawsuit, were not considered in court because the case was settled or because it was argued on purely legal motions. At the same time, we believe the definition will prevent the courts from expanding the fee proceeding into a trial of new aspects of the agency's conduct. The courts would consider the action, whether it be a regulation or an enforcement action, which brought the parties to court. They could not expand the fee proceeding to include aspects of the agency's "underlying action" which were not reviewable by the court in the case in chief. The bill adopts a similar definition for section 504.

In addition, the bill includes language amending section 504 and section 2412, making it clear that the determination of whether the United States is substantially justified will be made on the basis of the record made in the agency proceeding or the court proceeding for which fees are sought. This language is intended to prevent new evidentiary proceedings that prolong the fee consideration and make a whole new inquiry into the agency's action. Under this provision, the court would decide the substantial justification question based on the record before it as argued in the pleadings, including affidavits filed by both sides.

We support the provision in the bill that would clarify the agency's right to review decisions of Administrative Law Judges awarding or denying fees. We believe this provision recognizes the relationship of the Administrative Law Judge to the agency. Most decisions by Administrative Law Judges are subject to agency review. We see no reason to single out this area for different treatment. To illustrate the problems answered by this section, if an agency reverses the underlying decision of the Administrative Law Judge, the agency certainly should be able to reverse an award of fees which may have followed that decision.

We support the provision in H.R. 5479 establishing a definition for "prevailing party" in land condemnation cases, and ask that the provision be included in this legislation. This clarification will simplify litigation over fees in land condemnation cases. The definition fairly balances the rights of the landowners with those of the government in these cases.

Again, let me say that the Administration is firmly committed to the policies of the Equal Access to Justice Act and I am pleased to be able to announce the Administration's support for this bill.

THE WHITE HOUSE

WASHINGTON

May 10, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Draft Justice Report on H.R. 2223, a Bill to Reauthorize the Equal Access to Justice Act

Counsel's Office has reviewed the above-referenced draft report, and finds no objection to it from a legal perspective.

ID # CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: James C. Murr

☐ **MI Mail Report** **User Codes: (A)** ______ **(B)** ______ **(C)** ______

Subject: Draft Justice Report on H.R. 2223, a bill to reauthorize the Equal Access to Justice Act

ROUTE TO: **ACTION** **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU HOLL	ORIGINATOR	85/05/09			/ /
	Referral Note:				
CUAT 18	R	85/05/09		S	85/05/10 COB
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:
- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:
- Type of Response = Initials of Signer
- Code = "A"
- Completion Date = Date of Outgoing

Comments:

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

May 9, 1985

LEGISLATIVE REFERRAL MEMORANDUM

TO:

SEE DISTRIBUTION ATTACHED

SUBJECT: Draft Justice report on H.R. 2223, (as reported by the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice) a bill to reauthorize the Equal Access to Justice Act

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than COB May 10, 1985.

(Note: Full committee markup is tentatively scheduled for 5/15/85.)

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure
cc: C. Wirtz
F. Fielding

K. Wilson
A. Meyer

P. Szervo
R. Greene

DISTRIBUTION

Department of Housing and Urban Development (Ed Murphy) 755 7240
Department of the Interior -Linda Moore (343-6706)
Department of the Treasury - Art Schissel (566-8523)
Department of Transportation - John Collins (426-4694)
Department of Health & Human Services - Don Hirsch (245-7750)
Department of Defense - Werner Windus (697-1305)
Department of Labor - Seth Zinman (523-8201)
Small Business Administration - Janine Perrignon (653-6545)
General Services Administration - Ted Ebert (566-1250)
Environmental Protection Agency - Stead Overman (382-5200)

Federal Labor Relations Authority
National Labor Relations Board

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DRAFT

Honorable Hamilton Fish, Jr.
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Fish:

The House Judiciary Committee will shortly be taking up H.R. 2223, a bill to reauthorize the Equal Access to Justice Act. On behalf of the Administration, I want to express our strong support for this bill as reported by the Subcommittee on Courts, Civil Liberties and the Administration of Justice, and urge you to support the bill and to resist additional amendments.

The bill is a delicately balanced compromise between various parties, including the Administration, with strong views on many of the issues dealt with in the bill. Any amendments risk upsetting that balance and, therefore, put in jeopardy the reauthorization of the program.

We are particularly concerned with an amendment dealing with remands in social security cases, which was defeated in subcommittee, as well as two amendments which apparently were drafted, but were not offered in subcommittee. The first of these two would have extended the Equal Access to Justice Act to social security administrative proceedings. The second amendment would have permitted new discovery into the substantial justification question in EAJA cases. The Administration strongly opposes all of these amendments.

The first amendment, to automatically treat a party who obtains a remand in a social security case as a prevailing party eligible for fees, ignores the nature of a remand in a case. Cases are remanded by the courts to the Social Security Administration for a variety of reasons, with varying effects on the final result. In many cases a remand may not be the final decision in the case, but merely another procedural step that does not determine the result in the case. Whether a party is a prevailing party as the result of a remand should be determined on the basis of the circumstances of each case.

THE WHITE HOUSE

WASHINGTON

July 18, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS JGR
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: SBA Draft Report on H.R. 2378, a Bill to Reauthorize the Equal Access to Justice Act, and for Other Purposes

Counsel's Office has reviewed the above-referenced draft report, and has no objection to it being submitted as the views of the SBA Chief Counsel for Advocacy.

ID # CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING

☐ H - INTERNAL

☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: James Miller

☐ **MI Mail Report** **User Codes: (A)** ______ **(B)** ______ **(C)** ______

Subject: SBA draft report on H.R. 2378, a bill to reauthorize the Equal Access to Justice Act, and for other purposes

ROUTE TO: / ACTION / DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	85/07/18			/ /
	Referral Note:				
CUAT 18	R	85/07/18		S	85/07/18
	Referral Note:				12N
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:

- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:

- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments:

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

SPECIAL

July 18, 1985

LEGISLATIVE REFERRAL MEMORANDUM

TO: Department of Justice - Jack Perkins (633-2113)

Department of the Treasury - Carol Toth (566-8523)

Department of Health and Human Services - Frances White (245-7760)

SUBJECT: SBA draft report on H.R. 2378, a bill to reauthorize the Equal Access to Justice Act, and for other purposes.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than

NOON TODAY, JULY 18, 1985.

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: C. Wirtz, F. Fielding, A. Curtis, A. Meyer, P. Szervo, R. Greene, P. Jacobs

SBA

Now pending before the Senate is H.R. 2378, the reauthorization of the Equal Access to Justice Act (EAJA). A companion bill, S. 1138, has been introduced in the Senate by Senators Charles Grassley, Pete Domenici, Dennis DeConcini and others, and authorizes reimbursement of attorneys fees to small businesses and individuals who successfully defend civil actions brought by federal government agencies. As Chief Counsel for Advocacy of the Small Business Administration, I urge you to support this legislation which is an important regulatory reform initiative and vital to the small business community.

Before the EAJA, small businesses, faced with unjustified Federal agency actions, were confronted with a difficult choice--to comply without question to government regulatory enforcement which they believed improper, or challenge the government, often at a cost exceeding the fine or penalty imposed. The record under EAJA has proven it to be an important incentive to small businesses facing unjustified federal agency actions.

Perhaps of greater importance, it has been an incentive to federal agencies to more carefully select their cases and not pick on small firms because they are easy targets unlikely to defend themselves. During the three years that the EAJA was in effect, legitimate agency enforcement policies were not hampered nor were courts and agencies clogged with frivolous claims for relief.

The EAJA was first enacted in 1980 with a sunset of October 1, 1984. H.R. 2378 would permanently reauthorize the statute and was passed by the House on June 24, 1985. The bill now pending before the Senate is widely supported by the small business community and the Administration. We urge the swift passage of the bill.

Yours very truly,

Frank S. Swain
Chief Counsel for Advocacy

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release August 5, 1985

STATEMENT BY THE PRESIDENT

I am pleased to be able to approve H.R. 2378, a bill to extend the Equal Access to Justice Act. I support this important program that helps small businesses and individual citizens fight faulty government actions by paying attorneys' fees in court cases or adversarial agency proceedings where the small business or individual citizen has prevailed and where the government action or position in the litigation was not substantially justified.

It was with great regret that I vetoed the bill to extend this program that passed at the end of the last session of the Congress. I am pleased that the Congress has corrected the problems I perceived in that bill.

On the important definition of the position of the United States or position of the agency, this bill would allow the court or the agency to look at the agency action that is the basis of the litigation or the agency proceeding, in addition to the position taken by the United States in the court or in the formal agency proceeding, to the extent these differ, in determining whether the position of the United States was substantially justified. I note that the bill strictly limits the court's or the agency's fee inquiry to the agency action that is at issue in the litigation or proceeding and does not permit the examination of any other agency conduct. I note further that the Congress has specifically instructed the courts to base the fee inquiry on the record made in the litigation or agency proceeding for which fees are sought and not to engage in additional discovery or evidentiary proceedings in considering the question of substantial justification. I believe these changes take care of my concerns that the fee proceeding not become another trial and that fee proceedings not involve matters not at issue in the principal litigation. It is with these understandings that I sign this bill.

In addition, it is my understanding in signing this bill that the Congress recognized the important distinction between the substantial justification standard in the fee proceeding and a court's finding on the merits that an agency action was arbitrary and capricious or not supported by substantial evidence. The substantial justification standard is a different standard, and an easier one to meet, than either the arbitrary and capricious or substantial evidence standard. A separate inquiry is required to determine whether, notwithstanding the fact that the government did not prevail, the government's position or action was substantially justified.

The Equal Access to Justice Act was never intended to create an automatic fee award every time the government loses a case. The current bill is true to that principle.

# # # #

THE WHITE HOUSE

WASHINGTON

August 1, 1985

MEMORANDUM FOR DAVID L. CHEW
STAFF SECRETARY

FROM: JOHN G. ROBERTS JGR
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 2378 -- Equal Access to Justice Act Amendments

Counsel's Office has reviewed the above-referenced enrolled bill, and finds no objection to it from a legal perspective. We have also reviewed the signing statement proposed by the Department of Justice. We have no objection to that signing statement, and concur in the Justice recommendation that it be issued.

ID # 303045 CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

- ☐ O - OUTGOING
- ☐ H - INTERNAL
- ☐ I - INCOMING

Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: D. Chew

☐ **MI Mail Report** **User Codes:** (A) ______ (B) ______ (C) ______

Subject: Enrolled Bill H.R. 2378 - Equal access to Justice act amendments

ROUTE TO: Office/Agency (Staff Name)	ACTION: Action Code	ACTION: Tracking Date YY/MM/DD	DISPOSITION: Type of Response	DISPOSITION: Code	DISPOSITION: Completion Date YY/MM/DD
CUHall	ORIGINATOR	85/07/31			/ /
	Referral Note:				
Cuat 18	R	85/07/31		S	85/08/01
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:

- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:

- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments:

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

Document No. 3030 645

WHITE HOUSE STAFFING MEMORANDUM

DATE: 7/31/85 ACTION/CONCURRENCE/COMMENT DUE BY: August 1st

SUBJECT: Enrolled Bill H.R. 2378 - Equal Access to Justice Act Amendments

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☑	LACY	☐	☐
REGAN	☐	☑	McFARLANE	☐	☑
STOCKMAN	☐	☐	OGLESBY	☑	☐
BUCHANAN	☑	☐	ROLLINS	☑	☐
CHAVEZ	☑	☐	RYAN	☐	☐
CHEW	☐P	☑SS	SPEAKES	☐	☑
DANIELS	☐	☐	SPRINKEL	☐	☐
FIELDING	☑	☐	SVAHN	☑	☐
FRIEDERSDORF	☑	☐	THOMAS	☐	☐
HENKEL	☐	☐	TUTTLE	☐	☐
HICKEY	☐	☐	______	☐	☐
HICKS	☐	☐	______	☐	☐
KINGON	☑	☐	______	☐	☐

REMARKS: Please give your recommendations to my office by August 1st. Thanks.

1985 JUL 31 PM 3:37

RESPONSE:

David L. Chew
Staff Secretary

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

Received SS

1985 JUL 31 PM 3:01

JUL 31 1985

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 2378 - Equal Access to Justice Act Amendments
Sponsors - Rep. Kastenmeier (D) Wisconsin and 15 others

Last Day for Action

August 7, 1985 - Wednesday

Purpose

To amend and authorize permanently the Equal Access to Justice Act.

Agency Recommendations

Office of Management and Budget	Approval
Department of Justice	Approval (Language for signing statement attached)
Small Business Administration	Approval (Signing statement attached)
Department of Agriculture	Approval
Department of Health and Human Services	Approval
Administrative Conference of the United States	Approval
Department of Transportation	No objection
Department of the Treasury	No objection(Informally)
Department of Housing and Urban Development	No objection(Informally)
Department of Labor	No objection
Department of Energy	No objection
Environmental Protection Agency	No objection
Department of Commerce	Defers(Informally)
Department of State	Defers
Department of Education	Defers(Informally)
Department of the Interior	Defers(Informally)
Office of Personnel Management	Defers [illegible]
General Services Administration	Defers
Department of Defense	Does not recommend veto

Discussion

H.R. 2378 would permanently authorize the Equal Access to Justice Act (EAJA), which expired on September 30, 1984. The EAJA permits awards of attorneys fees and other expenses to prevailing parties in civil judicial actions as well as adversarial administrative proceedings against the Federal government, where the government is unable to show that its conduct was "substantially justified."

At the end of the 98th Congress you disapproved H.R. 5479, legislation which would have reauthorized the EAJA, because of two objectionable amendments it would have made. The most troublesome of the amendments would have expanded agency actions subject to review and resulted in needless litigation concerning fee award determinations. Under H.R. 5479, the EAJA would not only have applied to the government's position taken in the court or administrative proceeding, but would have been extended to the "underlying agency action." This would have resulted in needless and extensive litigation over what should have been a subsidiary issue, the award of attorneys fees. In effect, had this amendment been enacted, every step of the agency decision-making process would have become subject to discovery in litigation. Another objectionable provision of H.R. 5479 would have authorized the payment of interest for unpaid fee awards on terms more favorable than those for interest payments made by the government on court judgments.

The Memorandum of Disapproval accompanying H.R. 5479 indicated support for the prompt reauthorization of the EAJA during the 99th Congress if the Administration's objections were addressed satisfactorily. H.R. 2378 reflects a compromise between the Administration and Congress and contains provisions that alleviate the concerns raised in the Memorandum of Disapproval.

Major Provisions of H.R. 2378

In addition to permanently authorizing the EAJA, H.R. 2378 amends the EAJA in a number of ways. The bill defines the "position of the United States" or "position of the agency" -- which is used to determine whether the Federal government's actions have been "substantially justified" and, therefore, whether a prevailing party will be awarded attorneys fees -- to include the actions or omissions of the agency which form the basis of the litigation. This definition in H.R. 2378 is broader than that originally supported by the Administration, which would have limited the "position of the United States/agency" to the litigating position of the United States.

H.R. 2378, however, satisfactorily addresses the Administration's concern over the broadened definition by limiting the scope of the court's inquiry concerning whether an agency's position is "substantially justified" to evidence contained in the record for the administrative or civil action for which fees are sought. For fee award determinations in civil proceedings, the court may also consider the record of an earlier administrative proceeding upon which the civil action is based. The House Judiciary Committee report on the bill indicates that by limiting the inquiry to the information contained as part of the record, H.R. 2378 is designed to prevent the fee proceeding from becoming a lengthy trial of new aspects of the agency's conduct. The House colloquy on this point also indicates that the effect of the definition of "substantially justified" will be to limit discovery in EAJA fee proceedings.

With respect to the Administration's other principal concern with last year's disapproved bill, H.R. 2378 also provides that interest will accrue on fees and any expenses for civil proceedings awarded under the EAJA when an appeal is taken. Previously, no interest payments were authorized by EAJA on any fee awards. Interest would be paid on the amount of the award as affirmed, and will be computed from the date of the award through the day before the date of the affirmance. Unlike last year's bill, however, this provides for interest payments to be made on the same basis as other interest payments made by the government on court judgments.

Finally, several agencies in their enrolled bill views letters last year on H.R. 5479 objected to language stating that fee award decisions of adjudicative officers would be the final administrative decisions, thereby precluding agency review of such decisions. H.R. 2378 does not include this objectionable provision, and instead authorizes the agency head to review fee award determinations in administrative proceedings.

Other Provisions

In addition, H.R. 2378 would:

-- clarify that no fee award may be made until a final and unreviewable decision is rendered by the court on appeal, or until the underlying merits of the case have finally been determined pursuant to the appeal;

-- amend the definition of an eligible "party" under the EAJA to include local governments, and to increase the net worth limitations from $1 million to $2 million for individuals, and from $5 million to $7 million for organizations, local governments, associations, and business entities. (The bill also clarifies that such organizations may not have more than 500 employees.);

-- extend coverage of the EAJA to include land condemnation cases and proceedings before agency boards of contract appeals. (The Departments of Transportation and State both express concern about extending EAJA coverage to boards of contract appeals proceedings; neither Department, however, objects to approval of H.R. 2378.);

-- give non-Federal parties the right to appeal, to the appropriate court, fee award determinations made at the administrative level, and allow the court to modify a determination only if it was unsupported by substantial evidence. Under current law, such parties can appeal only if allowed by the courts, and the courts can modify the fee determinations only if the agency has abused its discretion. In short, appeals and judicial changes to agency fee determinations are made easier. The court determination on any appeal, however, must be based solely on the factual record made before the agency or court;

-- permit attorneys to seek recovery for fees and expenses in certain civil judicial cases under both the Social Security Act and the EAJA, but prevent double recoveries by requiring attorneys to refund to the claimant the amount of the smaller fee; and

-- clarify that for cases pending on October 1, 1981, awards may be made for fees and expenses incurred before such date.

H.R. 2378 also specifies that the Act would become effective upon enactment and apply to civil actions and adversary administrative adjudications pending on or commenced after this date. An exception would revive actions for fee awards in those cases under the Contract Disputes Act, pending on or commenced after October 1, 1981, which were dismissed for lack of jurisdiction. H.R. 2378 also provides that actions commenced during the gap -- October 1, 1984, through the date of enactment of this bill -- in the coverage of the EAJA shall be governed by the provisions of the EAJA as amended by this bill.

Finally, H.R. 2378 contains an amendment concerning the authorization of appropriations for attorneys fees awarded pursuant to the EAJA. Prior to its expiration in 1984, the EAJA provided that fees and other expenses awarded shall be paid from specific appropriations made for such purposes or from the Judgment Fund (a fund used to pay awards against the government when such payment is so authorized). Justice advises informally that Congress has never appropriated any monies specifically for EAJA awards and the amendments clarify that future awards will be paid from agency appropriations as has been the practice to date.

Conclusion

In the Memorandum of Disapproval accompanying H.R. 5479 from the last Congress, you indicated support for the prompt reauthorization of the EAJA, without the objectionable provisions in H.R. 5479 and with other appropriate amendments. As enrolled, H.R. 2378 addresses the Administration's major concerns with last year's bill and represents a compromise negotiated by the Department of Justice and supported by the Administration.

ID # 303045 CU

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: D. Chew

☐ **MI Mail Report** **User Codes:** (A) ______ (B) ______ (C) ______

Subject: Possible signing statement to accompany H.R. 2378 - Equal access to justice act amendments

ROUTE TO: ACTION DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHall	ORIGINATOR	85/08/01			/ /
	Referral Note:				
Cust 18	R	85/08/01		S	85/08/01
	Referral Note:				COB
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments:

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

Document No. 303045

WHITE HOUSE STAFFING MEMORANDUM

DATE: 8/1/85 ACTION/CONCURRENCE/COMMENT DUE BY: c.o.b. TODAY

SUBJECT: POSSIBLE SIGNING STATEMENT TO ACCOMPANY H.R. 2378 - EQUAL ACCESS TO JUSTICE ACT AMENDMENTS

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	✓	LACY	☐	☐
REGAN	☐	✓	McFARLANE	☐	☐
STOCKMAN	☐	☐	OGLESBY	✓	☐
BUCHANAN	✓	☐	ROLLINS	☐	☐
CHAVEZ	☐	☐	RYAN	☐	☐
CHEW	☐ P	✓ SS	SPEAKES	☐	✓
DANIELS	☐	☐	SPRINKEL	☐	☐
FIELDING	✓	☐	SVAHN	✓	☐
FRIEDERSDORF	✓	☐	THOMAS	☐	☐
HENKEL	☐	☐	TUTTLE	☐	☐
HICKEY	☐	☐	Clerk	☐	✓
HICKS	☐	☐		☐	☐
KINGON	✓	☐		☐	☐

REMARKS:

Yesterday, we staffed OMB's enrolled bill memo re H.R. 2378. Attached for your comments/edits is draft language prepared by Justice to be part of a possible signing statement. Do you concur such a statement should be issued? Do you have any edits?

RESPONSE:

1985 AUG -1 AM 9:36

David L. Chew
Staff Secretary
Ext. 2702

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 26, 1985

Honorable David Stockman
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Stockman:

This is in response to your request for an enrolled bill report on H.R. 2378, a bill to amend section 504 of Title 5, United States Code, and section 2412 of Title 28, U.S.C., with respect to awards for expenses of certain agency and court proceedings, and for other purposes. The Department of Justice recommends that the bill be approved by the President.

The Department suggests that the following language be used in the signing statement:

> I am pleased to be able to approve H.R. 2378, a bill to extend the Equal Access to Justice Act. I support this important program which helps small businesses and individual citizens fight faulty government actions by paying attorneys fees in court cases or adversarial agency proceedings where the small business or individual citizen has prevailed and where the government action or position in the litigation was not substantially justified.
>
> With great regret I vetoed the bill passed by the Congress at the end of the last session extending this program. I am pleased that the Congress has corrected the problems I perceived in that bill.

This bill would, on the important definition of the position of the United States or position of the agency, allow the court or the agency to look at the agency action which is the basis of the litigation or the agency proceeding, in addition to the position taken by the United States in the court or in the formal agency proceeding, to the extent these differ, in determining whether the position of the United States was substantially justified. I note that the bill strictly limits the court's or the agency's fee inquiry to the agency action which is at issue in the litigation or proceeding and does not permit the examination of any other agency conduct. I note further that Congress has specifically instructed the courts to base the fee inquiry on the record made in the litigation or agency proceeding for which fees are sought and not to engage in additional discovery or evidentiary proceedings in considering the question of substantial justification. I believe these changes take care of my concerns that the fee proceeding not become another trial and that fee proceedings not involve matters not at issue in the principal litigation. It is with these understandings that I sign this bill.

In addition, it is my understanding in signing this bill that Congress recognized the important distinction between the substantial justification standard in the fee proceeding and a court's finding on the merits that an agency action was arbitrary and capricious or not supported by substantial evidence. The substantial justification standard is a different standard, and an easier one to meet, than either the arbitrary and capricious or substantial evidence standard. A separate inquiry is required to determine whether, notwithstanding the fact that the government did not prevail, the government's position or action was substantially justified.

The Equal Access to Justice Act was never intended to create an automatic fee award every time the government loses a case. The current bill is true to that principle.

Again, we recommend that the President approve H.R. 2378 and use the language set out above in his signing statememt.

Very truly yours,

PHILLIP D. BRADY
Acting Assistant Attorney General