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1. memo	Roberts to Fred F. Fielding, re draft SBA report (2 pp)	5/9/84	~~P5~~
2. memo	Fielding to Branden Blum, re draft SBA report (2 copies of 1 page)	5/9/84	~~P5~~ CLB 12/14/00

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Equal Access Legislation [1 of 2] OA ~~12661~~ 12657
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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].

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- 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 informetion 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

March 12, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Statement of Carolyn B. Kuhl Concerning the Reauthorization of the Equal Access to Justice Act on March 14, 1984

The Justice Department has provided us with a copy of testimony Deputy Assistant Attorney General Carolyn Kuhl proposes to deliver March 14 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee. The testimony supports reauthorization of the Equal Access to Justice Act, the statute that provides for the award of attorneys fees and expenses to private parties in litigation with the United States when the position of the United States is not "substantially justified."

Kuhl's testimony points out, however, no less than a dozen problems that have developed under the Act, and invites Congressional clarification to resolve these problems. The problems include (1) use of multipliers to exceed the $75/hour maximum in the Act, (2) confusion as to whether the agency position or only the position argued in court should be considered, (3) whether land condemnation cases should be covered, and if so how the prevailing party is to be identified in litigation over land valuation, (4) relationship of the Act to other fee-shifting statutes, (5) whether Social Security cases are covered by the Act, (6) whether agencies can seek review of fee determinations, (7) whether Tax Court cases are covered, (8) definition of "party," (9) definition of "final judgment," (10) authorization of interim fee awards, (11) whether the Act applies in cases in which statutes are declared unconstitutional, and (12) definition of "expenses."

The testimony objects to several provisions of H.R. 5059, a bill to reauthorize and amend the Equal Access to Justice Act introduced by Representative Kastenmeier, because the bill would expand litigation over fee awards and effectively limit the government's right to appeal excessive fee awards. I have reviewed the testimony and have no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

March 12, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

Orig. signed by FFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Statement of Carolyn B. Kuhl Concerning the Reauthorization of the Equal Access to Justice Act on March 14, 1984

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

FFF:JGR:aea 3/12/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

March 12, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
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cc: FFFielding/JGRoberts/Subj/Chron

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Subject: Statement of Carolyn B. Kuhl concerning the reauthorization of the equal access to justice act on March 14, 1984

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

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
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CUAT 18	Referral Note: D	841029		S	841031
	Referral Note:	/ /			/ /
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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

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5/81

DRAFT

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

MARCH 14, 1984

I am pleased to appear before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee to discuss the reauthorization of the Equal Access to Justice Act.

The Administration supports the reauthorization of the Equal Access to Justice Act. The passage of the Act arose from a perception that the cost of litigation deters some individuals and small businesses from challenging unreasonable government actions. Government accountability was to be promoted by providing for the award of attorneys' fees and expenses against the United States in certain administrative and judicial actions.

We are still in the early stages of evaluating the Act. We are just now beginning to have a sample of district court and court of appeals decisions on which to base our judgment of the way the Act is working. In my testimony I will comment on specific court decisions and problems we see with the Act.

1. Excessive Fee Applications and Use of Multipliers

We are concerned with the use of multipliers and other factors to increase the fees awarded above the $75-per-hour

level enacted by Congress for cases under section 2412(d). For example, in Action on Smoking and Health v. Civil Aeronautics Board, the D.C. Circuit increased the fees awarded above the statutorily authorized $75-per-hour figure by adding a factor of 10% for the quality of the representation and the result achieved. Other courts have granted multipliers which increase the hourly rate for fees by factors of 2 or 3, although the clear weight of authority is that such increases are not permitted. See Greater Los Angeles Council on Deafness v. KCET, No. 78-4175R (C.D. Calif. Feb. 11, 1982).

It is our view that such multipliers have no role to play in the Equal Access to Justice Act. These awards are contrary to the letter of the law since the EAJA provides for a maximum award of $75 per hour which may be increased only for changes in the cost of living and for factors such as the limited availability of counsel. In addition, such decisions encourage excessive fee requests and prolonged litigation over the level of the fees.

We believe that excessive fee awards hurt the public perception of the Act. If the view expressed in such cases were to prevail, the Act would become a form of subsidy for the private bar at the expense of the taxpayers. The spirit of the Act also has been undercut by the many excessive, badly

documented requests for fees. Such requests not only raise the specter of excessive awards, but also vastly increase the amount of time that must be spent to litigate the size of the fee request. Judge Gesell, of the Federal District Court for the District of Columbia, recently highlighted this problem in his opinion in Ashton v. Pierce, Civil Action 81-719 (D.D.C. Feb. 3, 1984):

> Lawyers who treat the EAJA as designed to compensate counsel in the same generous manner as some lawyers are compensated in private practice should take heed of the consequences. In passing this statute Congress clearly indicated that it did not intend to place such a heavy burden on the public purse. Failure to reach prompt and reasonable fee dispositions by settlement or efficient use of court proceedings may eventually jeopardize the golden goose. Congress, for its part, would do well to consider how the fee-setting process may be streamlined, perhaps through use of arbitration or promulgation of more definitive and simplified standards for passing on such fee requests. (slip opinion at pp 9-10)

It is our view that Congress should insist on the strict enforcement of the $75 standard. Penalties could be established for a failure to file sufficiently documented and reasonable fee requests. One way to deal with this problem is to include a provision requiring a court to deny all fees if it finds the initial amount sought to be unreasonably high or, perhaps,

substantially unjustified. Indeed, some courts have recognized that the denial of all fees is an appropriate remedy for overreaching. See e.g. Brown v. Stackler, 612 F.2d 1057 (7th Cir. 1980).

2. Definition of the Position of the United States

Under 2412(d), the United States may not be liable for fees if its position is "substantially justified". Courts have split on the question of whether they must consider the behavior of the agency that led to the litigation in order to determine whether the action of the United States was substantially justified or whether the court's inquiry is limited to the litigation before it. In our view, the parameters of the position of the United States should be restricted to the position taken by the government in the litigation. This view has been adopted by several courts, including the D.C. Circuit (Spencer v. NLRB, No. 82-1851 (D.C. Cir.,June 28, 1983)).

In most cases, because the United States is defending the agency's conduct, it makes no difference whether one considers the conduct of the agency before the trial or the position defended in court. However, looking to the position of the United States in litigation as the basis for the determination of substantial justification conserves judicial resources. The court has merely to review the arguments already made in the

case before it. If the court were required to consider agency conduct which was not the subject of the trial or argument before the court, the attorneys' fees proceeding could become essentially another trial.

Another significant advantage of considering "substantial justification" in the context of the agency's litigation posture is that it encourages settlement. Obviously, the government will be more likely to settle a case if it can dispose of the case without having to litigate the merits in an attorneys' fee proceeding. However, if the court must look behind the settlement and consider the agency's conduct, essentially the entire case will have to be tried.

Furthermore, the government must have the ability in litigation to raise and prevail on legal defenses which may not be directly related to the conduct of the agency. For example, the government must be able to argue in an appropriate case that the court does not have jurisdiction over the case or that the statute of limitations for a particular action has run. If the government must, despite the substantiality of such legal arguments, proceed to litigate the agency's conduct, part of the value of raising the legal defense -- that the government will not have to litigate the case in chief -- will be lost. Since the level of the fees may be in excess of the amount at risk in

the case, if the legal defenses cannot also serve as the basis of a determination that the government was substantially justified, and therefore not subject to a fees assessment, again the value of the legal defenses would be lessened.

Finally, in cases where the agency's conduct is subject to a deferential standard of review, allowing the court to look at the agency's underlying conduct would turn the statute into virtually an automatic fee-shifting device. If an agency's action is overturned by a court under a limited standard of review, the action is unlikely to be found to be substantially justified. On the other hand, the arguments made in court, taking into consideration the limited standard of review, might well be found to be substantially justified.

We recommend that the Committee state explicitly that the position of the United States is the position taken by the United States in court. This Act is a simple fee-shifting statute. Attorneys' fees proceedings should not become proceedings for a review of agency conduct beyond that allowed by the underlying substantive statute. To allow the courts to review the underlying agency action could allow the fee provision to swallow up the system of controls established under the substantive statute.

3. Standards for Land Condemnation Cases

Whether land condemnation cases are covered by the Equal Access to Justice Act is presently being argued in the courts. These are cases in which the United States acquires private property by eminent domain and the property owners litigate the amount to be paid as compensation. We have argued that the Act does not apply to condemnation proceedings because the government is always the prevailing party in a condemnation proceeding since it succeeds in acquiring the property, and there is another fee-shifting provision applicable to these cases. The fee-shifting provision applies where the government abandons the condemnation or the case fails. 42 U.S.C. 4654. Two courts of appeals, however, decided that the Equal Access to Justice Act applies to condemnation proceedings on the grounds that the existing fee-shifting provision is applicable only to a limited range of cases and that the legislative history indicates an intent that the Act apply to condemnation. In addition, the courts have reasoned that since most condemnation cases involve only the price that is to be paid, a party who obtains an award substantially greater than the government offered or for which the government admitted liability should be considered the prevailing party.

We urge the Committee to exclude condemnation proceedings from the coverage of the Act. Coverage of condemnation

proceedings by the Act could significantly reduce the rate at which these cases are handled without litigation, a significant factor since 80% of the cases are handled without litigation and fully 3% of the civil cases involving the United States are condemnation cases.

If the Committee determines that the cases should be covered, we urge the Committee to establish standards for determining when a party is a prevailing party in a condemnation proceeding. We would suggest that a party be regarded as a prevailing party when the amount it is awarded by the court lies at least half-way between the highest amount testified to on behalf of the government and the highest amount testified to on behalf of the opposing party. (This standard provides that the prevailing party is the one whose testimony is closer to the award; and, in the case in which the award is exactly in the middle, it gives the benefit to the landowner.) Adoption of this standard will eliminate litigation over who is the "prevailing party" that follows from ambiguous definitions given by the courts and will also insure that the Act does not encourage senseless litigation to achieve minor adjustments in the selling price simply to qualify for attorneys' fees. Should the Committee desire to take this course of action, the Justice Department stands ready to help in drafting an amendment to your bill.

4. Relationship of 28 U.S.C. 2412(b) to Other Fee-Shifting Statutes

In its decision in Premachandra v. Mitts, (No. 82-2441) (Feb. 9, 1984), the Eighth Circuit held that fees could be awarded under 2412(b) against the federal government on the ground that the cause of action was analogous to a cause of action under 42 U.S.C. 1983. Since a party suing under section 1983 would be eligible for fees under 42 U.S.C. 1988, the Eighth Circuit held that 28 U.S.C. 2412(b) made the federal government liable for fees in the analogous action. This interpretation of 2412(b) threatens to broaden that section so as to swallow up the fee-shifing provisions of 2412(d). For example, under section 1983, state officials can be sued generally for violation of an individual's constitutional rights when the officials act under color of state law. Under the Eighth Circuit's view, a federal case which alleges some deprivation of a constitutional right could be analogized to a 1983 action, allowing an automatic fee award in any case that alleges unconstitutional behavior by a federal agency. Moreover, the rule stated in Premachandra could extend 2412(b) to cover any case in which the federal action complained of could be analogized to behavior for which some other party could be rendered liable for fees.

Of course, the extent fees are awarded under 2412(b), and not 2412(d), the standards of 2412(d) would not be applicable. Thus, the government would not be able to defend against a fee application on the ground that the government's position is not substantially justified, nor would the limitation on the level of fees apply. In addition, creating federal liability by analogy would increase potential federal liability in ways limited only by the imagination of the courts.

In our view, the rule stated in the Premachandra case seriously distorts the careful balance Congress intended to establish between actions covered by 2412(b) and those covered by 2412(d). We urge the Committee to at least indicate in its report that 2412(b) does not apply in situations where the government's liability is by analogy.

5. Coverage of Social Security and Other Administrative Proceedings

The Senate bill (S. 919) would extend the coverage of the Act to proceedings before Boards of Contract Appeals and Social Security Administrative proceedings. We oppose both actions.

Social security proceedings are not now covered under the Act because they are not adversary proceedings. Social security proceedings are conducted by administrative law judges without government representation. If the Act is amended to cover such proceedings, the government may have to have a government lawyer prsent to insure that its interests are protected and its case made. Thus, the character of the administrative proceedings of the social security system could be radically changed by this proposed extension of the Act. As the Committee is aware, the social security system has had enough problems without having to deal with miscellaneous changes taken without consideration of the impact they will have on the entire system.

The application of the Act to Boards of Contract Appeals has been barred on the ground that the Act does not apply to proceedings not conducted under the Administrative Procedure Act. Given the vast number of contract proceedings, extension of the Act to Boards of Contract Appeals could significantly increase the costs of the Act as well as further complicate the heavy caseload borne by the Boards.

6. Agency Review of Fee Awards Made by Adjudicative Officers

There is uncertainty as to whether an agency may review an adjudicative officer's determination on the award of fees and

other expenses under the Act. Both the legislative history and the language of the Act are silent on the procedures an agency must follow after an adjudicative officer makes a decision. The Administrative Conference of the United States has promulgated model regulations for the Act which provide for agency review of the adjudicative officer's decision. However, others may read language in the Act to mean that the adjudicative officer's deicision is final and that there can be no agency review. Because the Act allows only the party suing the government to appeal an adjudicative officer's fee determination, this latter reading of the Act would mean that an agency would always be bound by an adjudicative officer's determination with regard to awards. We suggest that the Act be clarified either by providing that an agency may review an adjudicative officer's fee award determination, or by providing that the agency, too, may seek judicial review of the fee award determination.

We also oppose the provision in the Senate bill which would provide for de novo review of an agency's determination to award or deny fees. We see no reason to depart from the normal limited standard of review accorded agency determinations.

7. Tax Cases

The Tax Equity and Fiscal Responsibility Act of 1982 enacted section 7430 of the Internal Revenue Code, which provides for

recovery of attorneys' fees in tax cases, including cases before the Tax Court. Section 7430 has been effective only for cases filed after February 28, 1983. Prior to its enactment, attorneys' fees could not be recovered in Tax Court cases, despite the fact that the vast majority of tax cases are brought in the Tax Court rather than in the district courts or the Claims Court.

In drafting 7430, the House Ways and Means Committee and the Senate Finance Committee took note of the special problems of the Tax Court, particularly the Court's severe backlog and the significant role of the stipulation process on which the Court relies heavily to expedite the hearing of cases.

Section 7430 differs from the Equal Access to Justice Act in that the burden of proof is on the taxpayer and the applicable standard is phrased in terms of reasonableness. This approach is tailored to the Tax Court's stipulation process, which is the backbone of practice before the Tax Court. Indeed, recently adopted Tax Court Rule 232(b) provides for a conference in 7430 proceedings, the purpose of which is the same as the stipulation conference -- to reach an agreement concerning the allegations supporting the claims for attorneys' fees. If the burden of

proof remains on the taxpayer, as it does for practically every substantive tax issue, taxpayers will have an incentive to work with government counsel in an effort to resolve issues pertaining to attorney fee awards expeditiously and with as little court involvement as possible. Accordingly, the Administration opposes the proposal contained in S. 919 to conform the burden of proof and standard in section 7430 to that of the Equal Access to Justice Act.

8. Definition of Party

We would also suggest that the Act be amended to conform the definition of the term "party" in 28 U.S.C. 2412(d)(2)(B) to the definition in 5 U.S.C. 504(b)(1)(B). These two provisions, which were intended to be identical, set the standards for the eligibility of individuals and small businesses to receive fee awards under sections 504 and 2412(d). Section 504(b)(1)(B) defines an eligible business as one that employs no more than 500 employees, if its net worth is less than $5 million. This is in conflict with the definition found in 2412(d)(2)(B), which can be read to say that any business with less than 500 employees, even if its net worth is more than $5 million, is eligible for a fee award. Because the Act's legislative history indicates that Congress meant for the two definitions to be the same, See H. Rep. No. 96-1418 at 18, S. Rep. 96-253 at 21, and

because section 504(b)(1)(B) appears to reflect congressional intent more closely than section 2412(d)(2)(B), we would suggest that section 2412(d)(2)(B) be amended to conform to section 504(b)(1)(B).

9. Meaning of the Term "Final Judgment"

The Act now provides that:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses.

28 U.S.C. 2412(d)(1)(B). It is unclear whether a "final judgment" occurs when the court enters an appealable order or when a party's right to appeal that order lapses. We favor the former interpretation. The party's right to appeal may not be exhausted for as long as 120 days after the court enters its final appealable order. Thus, if applications need not be filed until appeal rights are exhausted, cases may have to be kept open for as long as 5 months. Furthermore, requiring an early application for fees will help insure that the appeal of the merits of the case and the fees application may be heard together. In order to resolve this question, we believe that a precise definition of the term "final judgment" should be included in the statute. This is important since the thirty-day

deadline for filing the application is jurisdictional and cannot be waived. Wallis v. United States, (Ct. Cl. No. 453-79C).

10. Interim Fee Awards

Recently a serious question has developed concerning interim fee awards made pursuant to 2412. Pursuant to 2412(c)(2), any judgments entered under 2412(b) shall be paid "as provided in sections 2414 and 2517 of this title . . . ." If this reference to 2414 was intended only to identify the source of payment of such judgments (the judgment fund), then, arguably, the United States would be liable for the payment of interim fees to the same extent as any other party. If, however, the provisions of 2414 must be satisfied before payment can be made, then, pursuant to 2414, a judgment for interim fees can be paid only when all appellate action with respect to it is completed or when the right to seek further review no longer exists.

To further complicate this situation, the Ninth Circuit has ruled that an interim fee order is not appealable. In Paralyzed Veterans v. Smith, C.A. No. 79-1979 (C.D. Cal. 1983), the district court awarded interim attorney fees against the United States and the government immediately appealed, but the Ninth Circuit dismissed the appeal on the ground that the interim fee order was not appealable. GAO, at that juncture, interpreted

section 2414 to prohibit immediate payment because the merits of the fee award had not been reviewed on appeal and the government intended to seek such review when appropriate. Payment was finally made after the court indicated that it would find the Attorney General in contempt of court if prompt payment was not made by the government.

In order to avoid the government's having to pay interim fees before the award of such fees can be appealed, consideration should be given either to prohibiting the award of such fees against the government altogether or to specifically authorizing appeals from interim fee awards at the time the award is made.

11. Challenges to Constitutionality of Statutes

In at least two cases being handled by the Department of Justice, fees are being sought as a result of court holdings that certain statutes were unconstitutional. Since agencies ordinarily have no option but to implement the laws enacted by Congress, and since the Department of Justice similarly must ordinarily defend the constitutionality of all statutes, it appears inconsistent with the purpose of the Act to subject the government to a possible award of fees in such cases. An EAJA exception for cases in this category should be considered.

12. Definition of Expenses

In the course of litigating fee petitions, several questions have arisen with respect to the term "expenses" as used in 28 U.S.C. 2412(d). Under that section, a court may award "fees and other expenses," in addition to costs incurred by the party. It is unclear whether the definition of "fees and other expenses" in 2412(d)(2)(A) is meant to be all-inclusive or merely representative. If the definition is not all-inclusive, what other expenses are allowable? The Department of Justice is being confronted with attorney fee petitions which seek to recover for such items as attorney and witness transportation costs, hotels, secretarial overtime, and computer research -- expenses which traditionally are not recoverable. Congress should clarify this matter.

A few days ago, Chairman Kastenmeier introduced H.R. 5059, a bill to reauthorize the Equal Access to Justice Act with amendments. I will briefly comment on a few specific sections of the bill.

The bill defines "position of the United States" and "position of the agency" for the purpose of determining whether the government was substantially justified and, thus, whether

fees should be assessed. As discussed previously in this statement, we believe that "position of the United States" should be defined as the government's position in litigation. H.R. 5059 does not adopt this view. Rather, the bill adopts the position that the courts should scrutinize not only the acts but also the omissions of the agency leading to the administrative proceeding or the litigation. In our view, this language would result in vastly complicated fee litigation, including inquiry into what the agency hypothetically might have done as well as what it did do. Indeed, the fee inquiry here could be more extensive than the inquiry engaged in by the court in the case in chief. We would urge the Committee to drop the proposed amendment.

The bill requires the payment of interest on fee awards after 45 days from the date of the award. This provision would burden the government's right to appeal a fee determination. If it bears interest at all, interest should begin to run only after the award has become final and has been is affirmed on appeal in cases where an appeal is taken.

H.R. 5059 would define final judgment as the point at which the right to appeal is exhausted. As discussed previously, we believe this is too late in the proceedings for a fee application to be made.

Finally, while we applaud the inclusion of a right to appeal an administrative law judge's award of fees, as noted earlier, we believe that providing for de novo review in the courts will again complicate and lengthen the fees litigation. We see no reason why the normal deferential standard of review should not apply to these cases.

As a last comment, I would like to emphasize again the Administration's support for the purposes of the Act. We should be careful, however, that these worthwhile goals of the Act are not undercut by inappropriate awards.

Thank you for the opportunity to appear before the Subcommittee this morning.

KASTENMEIER

98th CONGRESS
2d SESSION

H.R. 5059

(Original signature of Member)

HLC

To amend the Equal Access to Justice Act, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

March 7, 1984

Mr. KASTENMEIER introduced the following bill; which was referred to the Committee on _____

A BILL

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That (a) section 504(a)(1) of title 5, United States Code, is amended--

(1) by striking out ''as a party to the proceeding'', and

(2) by adding at the end thereof the following: ''The decision of the adjudicative officer on the application for fees and other expenses shall be the final administrative decision under this section.''.

(b) Section 504(b) of title 5, United States Code, is amended--

(1) by amending paragraph (2)(B) to read as follows:

''(B) 'party' means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $1,000,000 at the time the adversary adjudication was initiated, (ii) any owner of an unincorporated business, or any partnership, corporation, association, municipal corporation, unincorporated town, or organization, the net worth of which did not exceed $5,000,000 at the time the adversary adjudication was initiated, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C.

1141j(a)) may be a party regardless of the net worth of such organization or cooperative association if such organization or cooperative association had not more than 500 employees at the time the adversary adjudication was initiated, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the adversary adjudication was initiated; except that the adjudicative officer involved may adjust the net worth standards of $1,000,000 and $5,000,000 contained in this subparagraph, when appropriate, to reflect increases in the cost of living;'';

(2) in paragraph (1)(C)--

(A) by inserting ''(i)'' before ''an adjudication under'';

(B) by inserting before the semicolon at the end thereof the following: '', and (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607)''; and

(C) by striking out ''and'' at the end thereof;

(3) by striking out the period at the end of subparagraph (D) and inserting in lieu thereof '';

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of that Act (41 U.S.C. 607)''; and
by striking out ''and'' at the end thereof;
striking out the period at the end of
raph (D) and inserting in lieu thereof '';

and

y adding at the end thereof the following:
'position of the agency' includes, but is not
the actions and omissions of the agency
the adversary adjudication.''.

(c)(2) of title 5, United States Code, is
ollows:

atisfied with a determination of fees
under subsection (a) may, within 30
tion is made, petition for leave to
o the court of the United States
ew the merits of the underlying
ary adjudication. If the United
determination of fees and
tion (a), it may petition
tion to the court of the
o review the merits of
y adversary
petition for leave to
denial. The court's
this subsection
view of the

States Code, is

''(2) There are authorized to be appropriated to each agency for any fiscal year beginning on or after October 1, 1984, such sums as may be necessary to pay fees and other expenses awarded under this section.''.

(e) Section 504 of title 5, United States Code, is amended by adding at the end thereof the following:

''(f) If complete payment of the fees and other expenses awarded under this section is not made within 45 days after the final agency action making an award of such fees and other expenses, interest shall be paid on the amount remaining due. Such interest shall be computed at the rate the Secretary of the Treasury establishes for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611), and shall run from the date which is 46 days after the date of such award up to and including the date such payment is posted by certified or registered mail.''.

SEC. 2. (a) Section 2412 of title 28, United States Code, is amended--

(1) in subsections (a) and (b) by striking out ''or any agency and any official of the United States'' each place it appears and inserting in lieu thereof ''or any agency or official of the United States'';

(2) in subsection (d)(1)(A) by inserting '', including proceedings for judical review of agency

action,'' after ''in tort)'';

(b) Section 2412(d)(2) of title 28, United States Code, is amended--

(1) in subparagraph (B)--

(A) by amending clause (ii) to read as follows: ''(ii) any owner of an unincorporated business or any partnership, corporation, association, municipal corporation, unincorporated town, or organization the net worth of which did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) may be a party regardless of the net worth of such organization or cooperative association if such organization or cooperative association had not more than 500 employees at the time the civil action was filed, or''; and

(B) by striking out ''and'' at the end thereof and inserting in lieu thereof the following: ''except that the court may adjust the net worth standards of $1,000,000 and $5,000,000 contained in this subparagraph, when appropriate, to reflect increases in the cost of living; and'';

(2) by striking out the period at the end of subparagraph (C) and inserting in lieu thereof a semicolon; and

(3) by adding at the end thereof the following:

''(D) 'position of the United States' includes, but is not limited to, the actions and omissions of the agency which led to the litigation;

''(E) 'civil action brought by or against the United States' includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

''(F) 'court' includes the United States Claims Court; and

''(G) 'final judgment' means a judgment the time to appeal which has expired for all parties.''.

(c) Section 2412(d)(4)(B) of title 28, United States Code, is amended to read as follows:

''(B) There are authorized to be appropriated to each agency for any fiscal year beginning on or after October 1, 1984, such sums as may be necessary to pay fees and other expenses awarded under this subsection.''.

(d) Section 2412 of title 28, United States Code, is amended by adding at the end thereof the following:

''(f) If complete payment of the costs or fees and other expenses awarded under this section is not made within 45 days after the award of such costs or fees and other expenses, interest shall be paid thereafter on the amount remaining due. Such interest shall be computed at the rate the Secretary of the Treasury establishes for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611), and shall run from the date which is 45 days after the date of such award up to and including the date such payment is posted by certified or registered mail.''.

SEC. 3. The amendments made by the first section and section 2 of this Act shall take effect on October 1, 1984, and shall apply to any adversary adjudication, as defined in clauses (i) and (ii) of section 504(b)(1)(C) of title 5, United States Code (as amended by the first section of this Act), and any civil action described in section 2412 of title 28, United States Code (as amended by section 2 of this Act), which is pending on or commenced after October 1, 1984.

SEC. 4. Section 203(c) of the Equal Access to Justice Act (Public Law 96-481) is repealed.

SEC. 5. Section 204(c) of the Equal Access to Justice Act is repealed.

THE WHITE HOUSE

WASHINGTON

April 20, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Draft DOJ Report on S. 919, a Bill to Reauthorize the Equal Access to Justice Act and for Other Purposes

OMB has asked for our views by 3:00 p.m. today on a proposed Justice report on S. 919, a bill to reauthorize the Equal Access to Justice Act. The act authorizes awards of attorneys fees to parties in litigation with the Federal Government, when the position of the Government is determined not to have been "substantially justified." It is due to expire pursuant to a sunset provision.

Both through testimony and earlier reports, Justice has supported reauthorization of the act, with numerous suggested amendments to correct problems that have developed in the relatively brief period the act has been on the books. The proposed Justice report refers to this prior testimony, and stresses the need to (1) exclude non-adversary social security proceedings from the coverage of the act, (2) define "position of the United States" as the position ultimately argued in court rather than adopted by the agency, (3) allow interest on awards only after the Government has exhausted its right to appeal, (4) exclude Tax Court cases, which have unique attorneys fees rules, from the act, and (5) enact special rules for condemnation cases, which have been the subject of confused court decisions under the act.

I have reviewed the proposed report and have no objections. It is fully consistent with previously cleared Justice reports on this subject.

Attachment

THE WHITE HOUSE

WASHINGTON

April 20, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

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

SUBJECT: Draft DOJ Report on S. 919, a Bill to Reauthorize the Equal Access to Justice Act and for Other Purposes

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

FFF:JGRJ:aea 4/20/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

April 20, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft DOJ Report on S. 919, a Bill to Reauthorize the Equal Access to Justice Act and for Other Purposes

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

FFF:JGRJ:aea 4/20/84
cc: FFFielding/JGRoberts/Subj/Chron

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WHITE HOUSE
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Name of Correspondent: James Muer

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

Subject: Draft DOJ report on S. 919, 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
CUHOZC		ORIGINATOR	84/04/19			/ /
		Referral Note:				
CUAT 18		D	84/04/19		S	84/04/28 3:00pm
		Referral Note:				
CUAT 17			/ /			/ /
		Referral Note:				
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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
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X - Interim Reply

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

SPECIAL

April 19, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

Department of Justice
Department of Health and Human Services
Department of the Interior
Administrative Conference of the United States
Department of the Treasury
General Services Administration
Department of Transportation
Department of Housing and Urban Development
Department of Defense
Federal Labor Relations Authority
National Labor Relations Board
Small Business Administration

SUBJECT: Draft Justice report on S. 919, 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 3:00 P.M. Friday, April 20, 1984. (NOTE: This is similar to Justice statement on House version (H.R. 5059), which was circulated for comment 3/12/84, and subsequently cleared by OMB.)
Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.

Gregory Jones for
James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: C. Wirtz, P. Woodworth, K. Wilson, M. Esposito, R. Greene, B. Leonard, P. Szervo, F. Fielding

Office of the Assistant Attorney General Washington, D.C. 20530

Honorable Strom Thurmond
Chairman
Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for comments on S. 919, legislation now pending before the Judiciary Committee to amend and reauthorize the Equal Access to Justice Act. Assistant Attorney General J. Paul McGrath has testified twice before the Administrative Practice and Procedure Subcommittee on the operation of the Equal Access to Justice Act and on the original version of S. 919. These comments address the revised version of this legislation, which we understand will be considered by the full Judiciary Committee.

The Administration supports the reauthorization of the Equal Access to Justice Act (EAJA). The EAJA is still a relatively new act. We have previously raised with the Committee the need for certain technical amendments to the Act and we appreciate this opportunity to provide comments on the legislation now pending before the Committee.

Coverage of Social Secuirty Administrative Proceedings

S. 919 would extend the coverage of the EAJA to social security administrative proceedings. We oppose this action. Social security proceedings are now conducted before Administrative Law Judges without government representation (except under a very limited pilot program); they are not covered under the EAJA because they are not adversary proceedings. If the Act is amended to cover these proceedings, the government would probably be forced to have legal representation at the hearings to present its position and to deal with attorney fee issues. The result would be increasingly complex hearings and increased administrative expenses for the Social Security Administration (SSA). Furthermore, the

introduction of evidence and arguments concerning whether SSA's action was substantially justified and whether the fees requested are reasonable would lengthen and complicate the administrative hearing and would increase the complexity of the appeals process. This is not a result which is desirable from the standpoint of either the claimant or the Social Security Administration. A hearing which is supposed to be a nonadversarial, fairly simple proceeding will take on the characteristics of a formal trial.

Definition of Position of the United States

The bill would define the "position of the United States," for the purpose of determining whether the position taken by the United States is substantially justified, as including the agency action that led to the litigation. We oppose this provision and support language which would define the "position of the United States" as the position adopted by the United States in the litigation.

Although the courts have not taken a uniform view of the matter, several courts, including the United States Court of Appeals for the District of Columbia Circuit, have agreed with our position that the parameters of the position of the United States should be restricted to the position taken by the government in the litigation. In most cases it makes no difference whether the court considers the conduct of the agency before the trial or the position defended in court. But in several significant circumstances, discussed below, the purposes of the EAJA are better served by defining the "position of the United States" as the position taken by the government in litigation. The opinion of the D.C. Circuit in Spencer v. NLRB, F.2d (1983), also includes an excellent discussion of the practical reasons for adopting this definition.

In those cases in which the United States defends the case on the basis of arguments which are not directly related to the actions of the agency, or reaches a settlement of the case, the language in S. 919 invites the courts to examine the conduct of the agency even though those actions might not be brought before the court. This means that the fee proceeding could require a totally new inquiry into the circumstances that gave rise to the litigation, a potentially far lengthier proceeding than that required if the court is merely to examine the arguments made in court or the terms of the settlement. This is particularly the case given the use of the term "agency action" -- a term which is vague and could lead to an examination of more than just the final decision which led to the litigation.

The government must have the ability in litigation to raise and prevail on legal defenses which may not be directly related to the conduct of the agency. For example, the government must be able to argue in an appropriate case that the court does not have jurisdiction over the case or that the statute of limitations for a particular action has run. If the government must, despite the substantiality of such legal arguments, proceed to litigate the agency's conduct, part of the value of raising the legal defense -- that the government will not have to litigate the case in chief -- will be lost. Since the level of the fees may be in excess of the amount at risk in the case, if the legal defenses cannot also serve as the basis of a determination that the government was substantially justified, and, therefore, not subject to a fee assessment, again the value of the legal defense would be lessened. Similarly, with regard to settlement, the government will be more likely to settle a case if it can dispose of the case without having to litigate the actions of the agency in attorneys' fees proceedings. If the court must look behind the settlement and consider the agency's conduct, essentially the entire case will have to be tried.

Furthermore, in cases where the agency's conduct is subject to a deferential standard of review, allowing the court to look at the agency's underlying conduct would turn the statute into virtually an automatic fee-shifting device. For example, if a court has concluded that an agency action is "arbitrary and capricious" under the appropriate standard of review, the court would be hard pressed to conclude that the position of the United States was, nevertheless, "substantially justified". This conflicts with the original intent to adopt an intermediate standard for the allocation of fees. If, however, the review focuses on the litigating position of the United States, the standard would take better account of the reasonableness of the government's argument before the court.

We recommend that the Committee state explicitly that the position of the United States is the position taken by the United States in court. If the Committee decides that the agency's decision should be considered in determining substantial justification, then we would suggest using the phrase "the final agency decision which led to the litigation" instead of the phrase "underlying agency action" used in the bill. This permits a more focused inquiry by the court. Proceedings under the EAJA should not become proceedings for a review of agency conduct beyond that allowed by the underlying substantive statute. To allow the courts to review the underlying agency action could allow the fee provision to swallow up the system of controls established under the substantive statute.

The Senate bill provides for de novo review of an agency's decision granting or denying fees. While we support the provision clarifying the agency's right to appeal fee awards, we believe that providing a de novo review in the court will complicate and lengthen fee litigation. We see no reason why the normal deferential standard of review should not apply.

Payment of Interest on Fee Awards

The Senate bill would require the payment of interest on fee awards not paid within 60 days from the time of the award. We are concerned that this provision will affect the government's right to appeal a decision awarding fees by charging interest on the amount of the award for the entire period of the appeal. We recommend that if the judgment is to bear interest at all, interest should begin to run after the period for appeal has run without an appeal or, if appealed, after the award has been affirmed on appeal.

Attorney Fees in Tax Court Cases

The Senate bill would amend the existing fee provisions passed as part of the Tax Equity and Fiscal Responsibility Act of 1982 to reflect the standards of the Equal Access to Justice Act. The fees provisions have been effective only for cases filed after February 28, 1983. Prior to its enactment, attorneys' fees could not be recovered in Tax Court cases, despite the fact that the vast majority of tax cases are brought in the Tax Court rather than in the district courts or the Claims Court.

Section 7430 of the Tax Equity and Fiscal Responsibility Act differs from the Equal Access to Justice Act in that the burden of proof is on the taxpayer and the applicable standard is phrased in terms of reasonableness. This approach is tailored to the Tax Court's stipulation process, which is the backbone of practice before the Tax Court. Indeed, recently adopted Tax Court Rule 232(b) provides for a conference in 7430 proceedings, the purpose of which is the same as the stipulation conference -- to reach an agreement concerning the allegations supporting the claims for attorneys' fees. If the burden of proof remains on the taxpayer, as it does for practically every substantive tax issue, taxpayers will have an incentive to work with government counsel in an effort to resolve issues pertaining to attorney fee awards expeditiously and with as little court involvement as possible. We oppose the proposal to change the burden of proof and standard in section 7430 to conform to the Equal Access to Justice Act. We believe that the new tax provisions should be given a chance to work. We have no evidence now that they will

not operate fairly. Moreover, the EAJA was not intended to apply to the areas covered by other fee-shifting statutes in recognition of the fact that such provisions are usually tailored to meet special circumstances.

Attorney Fees in Condemnation Cases

We believe that consideration should be given to the question of whether the EAJA applies to land condemnation cases and, if so, what standard should be utilized to determine who the prevailing party is. Land condemnation cases are cases in which the United States acquires private property by eminent domain and the property owners litigate the amount to be paid. It is our opinion that the Act does not apply to condemnation proceedings because the government is always the prevailing party in a condemnation proceeding, since it succeeds in acquiring the property, and there is another fee-shifting provision applicable to these cases. However, whether or not the EAJA applies to these cases is still being litigated. We urge the Committee to exclude these cases from the Act. Coverage of condemnation proceedings by the EAJA could significantly reduce the rate at which these cases are handled without litigation, a significant factor since 80% of the cases are handled without litigation and fully 3% of the civil cases involving the United States are condemnation cases. If parties believe that by continuing to litigate cases they might qualify for fees, they will be less willing to settle.

If the Committee determines that the cases should be covered, we urge the Committee to establish standards for determining when a party is a prevailing party in a condemnation proceeding. We would suggest that a party be regarded as a prevailing party when the amount it is awarded by the court lies at least half-way between the highest amount testified to on behalf of the government and the highest amount testified to on behalf of the landowner. (This standard provides that the prevailing party is the one whose testimony is closer to the award and, in the case in which the award is exactly in the middle, it gives the benefit to the landowner.) Adoption of this standard will eliminate litigation over who is the "prevailing party," which follows from ambiguous definitions given by the courts, and will also insure that the Act does not encourage senseless litigation to achieve minor adjustments in the selling price simply to qualify for attorneys' fees.

We suggest the following amendment:

> 'prevailing party' in the context of eminent domain proceedings is a party who obtains a

final judgment, exclusive of interest, which is at least as close to the highest valuation attested to at trial on the property owner's behalf as it is to the highest valuation attested to at trial on the government's behalf.

Coverage of Boards of Contract Appeals Proceedings

The application of the EAJA to Boards of Contract Appeals has been barred on the grounds that the Act does not apply to proceedings not conducted under the Administrative Procedures Act. We oppose extending EAJA coverage to such proceedings. Given the vast number of contract proceedings, extension of the EAJA to Boards of Contract Appeals could significantly increase the costs of the EAJA as well as further complicate the heavy caseload borne by the Boards by adding another issue to be resolved.

The Office of Management and Budget advises us that they have no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT A. McCONNELL
Assistant Attorney General

THE WHITE HOUSE

WASHINGTON

May 9, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Draft SBA Report on S. 919 Reauthorization of the Equal Access to Justice Act

OMB has asked for our views as soon as possible on a proposed letter from the SBA Chief Counsel for Advocacy to Chairman Thurmond concerning S. 919, the bill to reauthorize and amend the Equal Access to Justice Act. The Equal Access to Justice Act, subject to a sunset provision, authorizes the award of attorneys fees against the United States when the position of the United States is determined not to have been substantially justified. S. 919 reauthorizes the Act, but also significantly expands its scope. The Department of Justice has presented the Administration's views on this subject, supporting reauthorization of the Act but objecting to the expansion in its coverage.

The views of the SBA Chief Counsel for Advocacy contradict those of the Administration with respect to the changes proposed in S. 919. The SBA supports expanding the coverage of the Act on the ground that such expanded coverage is necessary to prevent Federal agencies from "bullying" small businesses. In his letter the Chief Counsel for Advocacy notes that his statutory obligation is to present the views of small business to Congress and the agencies, and that his views are not those of the Administration. The Chief Counsel's views were previously presented on March 14, 1984, in testimony before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice. According to Branden Blum, OMB let that testimony through because it contained a disclaimer noting it was not the Administration position. So far as I have been able to determine, the testimony was not reviewed by our office.

I do not approve of the practice of permitting the SBA to present views contrary to those of the Administration, particularly on what is perceived to be such important legislation. I have no doubt that the President has the authority to direct the SBA not to send this report. The SBA is established "under the general direction and supervision of the President," 15 U.S.C. § 633, and while the Chief Counsel is directed to "represent the views and

interests of small businesses," 15 U.S.C. § 634(e), he can do so within the confines of Administration policy. The Office of Legal Counsel, in an exhaustive memorandum concerning the litigating authority of the SBA Chief Counsel for Advocacy (February 27, 1984), concluded that the Chief Counsel could not present views as amicus curiae contrary to those of the Administration, as articulated by the Department of Justice. The logic of that memorandum was grounded in the view that the SBA must be subject to Presidential control to avoid grave separation of powers problems. The same logic would seem to apply to SBA testimony before Congress.

This is, however, not the ground on which to do battle with the SBA, in light of the testimony delivered on March 14 making the same points as this proposed report. The attached draft memorandum for your signature does alert OMB that we have the authority to compel the SBA to comply with Administration policy. OMB should be aware of this authority for future reference.

Attachment

THE WHITE HOUSE

WASHINGTON

May 9, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

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

SUBJECT: Draft SBA Report on S. 919
Reauthorization of the Equal
Access to Justice Act

Counsel's Office has reviewed the above-referenced draft report of the Chief Counsel for Advocacy of the Small Business Administration (SBA). Obviously, I disagree with the substance of the report, which is directly contrary to the cleared Administration position as presented by the Department of Justice. The report notes that it is not presenting the views of the Administration.

As a legal matter the President has the authority to prevent SBA from submitting this report. The SBA is "under the general direction and supervision of the President," 15 U.S.C. § 633(a), and that authority extends to requiring SBA to represent the interests of small businesses within the confines of established Administration policy.

I do not, however, recommend asserting that authority in this instance. The substance of this draft report has already been presented to Congress, when the Chief Counsel for Advocacy testified on March 14, 1984 before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice. Given the March 14 testimony, it would make little sense to block this report.

FFF:JGR:aea 5/9/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 9, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft SBA Report on S. 919
Reauthorization of the Equal
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FFF:JGR:aea 5/9/84
cc: FFFielding/JGRoberts/Subj/Chron

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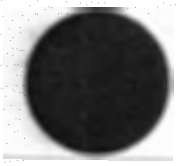

Name of Correspondent: James Muse

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Subject: Draft SBA report on S. 919, Reauthorization of the Equal Access to Justice Act

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CLHOL	ORIGINATOR	84/05/08			/ /
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CLRAT 18	D	84/05/08		S	84/05/09 10:00 AM
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5/81

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

SPECIAL

May 8, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

Department of Justice
Department of Transportation
Department of Defense
Department of the Treasury
General Services Administration
Department of Health and Human Services
Department of Housing and Urban Development

SUBJECT: Draft SBA report on S. 919, Reauthorization of 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

May 9, 1984 10:00 AM

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: C. Wirtz F. Seidl R. Greene P. Szervo
P. Woodworth F. Fielding

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: S. 919 -- Reauthorization of the Equal Access to Justice Act (EAJA)

Dear Mr. Chairman:

This letter supports re-authorization of the Equal Access to Justice Act and the improvements to it made by S. 919, currently before your committee. As Chief Counsel for Advocacy in the Small Business Administration, I am directed to present the views of small business to Congress and the Agencies. Consequently this letter represents the views of the Office of Advocacy, not those of the Administration. The Department of Justice has communicated its views separately. This letter reflects positions stated in my earlier testimony to a House Judiciary subcommittee on this issue. (Enclosed).

In addition to making EAJA a permanent regulatory reform, S. 919 makes several important changes that clarify the law's coverage and improve its effectiveness. My recent testimony addresses three of these improvements: clarification of the term "position of the United States", extension of EAJA coverage to agency boards of contract appeals and coverage of tax cases. I would like to here address the first of these issues in more detail, because of its fundamental impact on the law's efficacy.

The EAJA provides that "a court [or agency] shall award to a prevailing party other than the United States, fees and other expenses ... incurred by that party in any civil action brought by or against the United States ... unless the court [or adjudicative officer of the agency] finds the position of the United States was substantially justified." Having reviewed the decisional law interpreting EAJA over the past three years, it is my view that both the litigation position and the underlying agency conduct must be substantially justified under the law. Thus, I strongly support S. 919's language on this issue.

The reasons for this view are manifold. First, the purpose of EAJA is to provide an incentive for parties aggrieved by unjustified government activity to take action to vindicate their rights, as well as to deter arbitrary agency action. The EAJA's legislative history is replete with references to administrative abuses that Congress sought to limit. The government excesses aimed at are not those of the Justice Department litigating the case, but are rather the unjustified agency actions that led to the lawsuit. To award fees only for actions in court eliminates the Act's impact on agency behavior.

Second, to focus solely on the government's litigation position (as some courts have done) frustrates another Congressional desire to have a party that receives a favorable settlement be considered a prevailing party and recover fees. The references to settlements makes plain that "position of the United States" must have been meant to include not only the litigation position, which will likely be determined by the Justice Department, but also the agency position which made the lawsuit necessary. See, Natural Resources Defense Council v. U.S.E.P.A., 703 F.2d 700, 708 (3rd Cir. 1983).

Third, although it is true that Congress referred to the litigating position of the United States during its discussion of the "substantial justification" question ("Where the government can show that its case had a reasonable basis in law and fact, no award will be made"), Congress never contemplated situations in which the litigation position is essentially an "apology" for its administrative action forcing the litigation. Making the government pay a private party's legal fees in situations where the party's lawsuit forced immediate surrender will make government administrators more careful and would reduct the incidence of less innocent "mistakes". See, Spencer v. N.L.R.B., 712 F.2d 539 (D.C. Cir 1983). When considering EAJA, Congress repeatedly stated its intent to remove the specter of high litigation costs from the decision to contest unjustified government action. The decision to contest is adversely affected if, after legal fees are expended by a small business to mount the action, the government can avoid attorney fees by granting most of what the challenging party wants. To do so puts the small business in precisely the position it was in before EAJA.

Fourth, the definition of "position" adopted in S. 919 will not preclude Justice Department litigators from asserting legal defenses unrelated to the agency's conduct. The bill merely includes the underlying agency action; it is not limited to that position alone. Should the government succeed on the merits of its jurisdictional defense, it may not be liable for EAJA fees at all. If this argument fails, it will be individually evaluated as to whether it represented a substantially justified litigation position.

Finally, to suggest that the term "position of the United States" is limited only to the government's litigation stance, ignores a defined term in the law

> "(C) 'United States' includes any agency and any official of the United States acting in his or her official capacity."

28 U.S.C. §2412(d)(2)(C). This definition clearly includes the pre-litigation activity.

I hope you and the members of the Committee find these comments useful. Please do not hesitate to contact me if I can be of further assistance.

Yours very truly,

Frank S. Swain
Chief Counsel for Advocacy

Enclosure

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

STATEMENT OF FRANK S. SWAIN
CHIEF COUNSEL FOR ADVOCACY
U.S. SMALL BUSINESS ADMINISTRATION

Before The Subcommittee on Courts,
Civil Liberties and the Administration of Justice
Committee on the Judiciary
U.S. House of Representatives

March 14, 1984

Reauthorization of the Equal Access to Justice Act

Mr. Chairman, I am pleased to testify here today in support of the reauthorization of the Equal Access to Justice Act (EAJA). EAJA is an important regulatory reform initiative of the 96th Congress and is vital to the small business community. As you well know, the EAJA will expire in October unless reauthorized by this session of Congress. It is a law well worth being reauthorized and made permanent. At the outset, I must emphasize that the views I am presenting are those of the Office of Advocacy and not those of the Administration. The Administration's views will be presented by the Department of Justice.

The EAJA gives only one specific role to the Office of Advocacy: to consult with the Administrative Conference of the United States on their annual report on the Act. This has been regularly occurring. However, in our larger role as a small business advocate, we have engaged in numerous activities to enhance the Act's implementation.

THE OFFICE OF ADVOCACY'S REPORT ON THE EAJA

The latest of these is the Office of Advocacy's Report on the Equal Access to Justice Act, which we release today. The Report contains a digest of reported Federal court opinions

interpreting the Act, as well as an index to aid in finding legal authority on some of the Act's key issues. Among its other contents, the Report contains a survey of those states that have followed Congress' lead by enacting "Equal Access" laws aimed at unjustified state government action. It is our hope that the Report, which will be updated quarterly by the Office of Advocacy, will be a useful reference tool for small businesses and their counsel, as well as for federal and state legislators.

PURPOSES OF THE EAJA

The Equal Access to Justice Act has filled a real void for small businesses seeking to vindicate their legal rights against the government. Congress recognized the vast disparity of resources that presents itself when small businesses are forced to defend themselves against unjustified government enforcement actions. Before EAJA, small businesses harmed by unjustified agency actions were too often left with a "Hobson's choice": they either succumbed to the government's position or challenged it in court and faced monumental litigation expenses

in both money and time away from their livelihood. It would do little good for a small business to prevail in litigation against the Federal Government and then find itself in financial distress.

In addition to encouraging small businesses to vindicate their legal rights, Congress hoped that the threat of a fee award would force agency regulators to carefully consider their actions in advance. Government enforcement actions must be sensible and uniform, without regard to the size of the business regulated. Small businesses should not be targets of enforcement, simply because an agency considers them to be an easy mark.

THE RESULTS OF THE EAJA TO-DATE

Two years of experience with EAJA presents a mixed picture as to the effectiveness of the current law. On the one hand this law is not fulfilling the fears of its opponents. It has neither strained the Federal budget nor crippled legitimate agency enforcement. The courts and agencies are not clogged with frivolous EAJA claims for attorney's fees. Additionally, EAJA may well have deterred countless unjustified government actions, while providing fee recoveries in dozens of cases.

On the other hand, the 1982-83 statistics reported by the Administrative Office of the U.S. Courts show that EAJA petitions succeeded in about 40 percent of the cases, resulting in awards of $1.7 million. Of the 52 fee awards made last year, nearly one-half went to individuals who successfully overturned adverse social security benefits determinations. A far lower number of the awards actually went to small businesses. At the Federal agency level, the success rate for small business is even lower. In two years, there have been only eight fee awards made by agencies, roughly four percent of the number of EAJA applications filed. The awards made represent less than $40,000 in attorney fees.

Undoubtedly, the success of a fee-shifting statute such as EAJA cannot be measured simply by the number and amount of awards. Yet these figures are revealing when compared to a 1980 Congressional Budget Office cost estimate of over $100 million per year. Moreover, the two year experience also suggests that certain clarifications and improvements should be made by Congress to enhance the law's effectiveness.

"POSITION OF THE UNITED STATES"

For example, the courts and agencies have not been uniform in their interpretation of EAJA, in part because one of the law's crucial terms: "the position of the United States" is ambiguous. The government's "position" has been held by some courts to refer to the underlying agency action that precipitated the litigation. Other courts have held it to mean only the government's conduct of the case once it reaches the courtroom stage.

In practice, which theory is used can make a real difference. A court's evaluation of only the government's litigation position can yield unjust results. In one very recent case, a small business was forced to file suit in Federal court to enjoin an unjustified cancellation of its government contract with the Department of the Navy. On the very day the suit was filed, the government attorney agreed that the contract would not be cancelled. The contract was thereafter awarded to the small business and the suit mutually dismissed. Yet an appellate court denied an EAJA award, finding the government's surrender at the outset of the case "entirely reasonable.".

The court did not speak to the small business' argument that were it not for its hiring an attorney to go into court in the first place, the agencies would not have changed their decision.

In another case a judge refused to award fees against the Internal Revenue Service on these facts: the taxpayer had moved and the IRS sent a deficiency notice to the old address, even though the taxpayer had informed the IRS of the current address. The taxpayer filed suit to enjoin collection of the penalty tax. After checking further and discovering that the taxpayer had indeed filed the proper change of address forms, the IRS dropped its pursuit of the deficiency. The judge denied EAJA fees to the taxpayer who was forced to seek court relief because the IRS "litigation position" of dropping the case was reasonable, even though the IRS initial action of pursuing the deficiency was obviously unjustified.

There interpretations of the term "position of the United States" make little policy sense. The Committee bill astutely recognizes and corrects this problem. When the original agency mistake costs a small business or citizen money to litigate, the agency should be obliged to pay attorney's fees to

prevailing parties, even when the government surrenders at the outset of the case. This forces the bureaucracy to be more careful in its policy and enforcement initiatives, before a small business has to spend attorney's fees in opposition.

AGENCY REVIEW OF ADJUDICATIVE OFFICERS' DECISIONS

Another issue in need of clarification concerns the availability and scope of agency review of an adjudicative officer's fee determination. As you know, Mr. Chairman, this Committee made a change in earlier versions of EAJA, which had the agency deciding for itself whether its position was "substantially justified".

This Committee, in making the change, clearly spelled out that the "adjudicative officer" -- rather than the agency -- will make the fee determination.

However, some controversy has arisen in several pending NLRB cases on this issue. The General Counsel of the NLRB believes the Board retains jurisdiction to review all issues decided by the administrative law judge. The Committee bill resolves this matter, consistent with the 1980 change.

AGENCY BOARDS OF CONTRACT APPEALS

Two other issues are worthy of the Committee's attention. As you know, the Act as currently worded does not expressly apply to proceedings before agency boards of contract appeals. Last February, the Court of Appeals for the Federal Circuit held EAJA inapplicable in contracts board cases.

Yet this same court recognized that EAJA applies in direct contract suits in the former Court of Claims -- now called the Claims Court. This inconsistent application of EAJA disturbs the alternative remedies established by the Contracts Disputes Act of 1978. The Contract Disputes Act allows a government contractor the option of either appealing an adverse agency contract decision to the agency board, or filing suit in the Claims Court.

However, if a prevailing contractor can recover litigation expenses only in the Claims Court, there is no incentive to use the agency board remedy. This result is inconsistent with the Contract Disputes Act's purpose of prompt and efficient resolution of contract disputes.

I strongly support the Committee bill language to make EAJA applicable to agency boards of contract appeals.

EAJA AND TAX CASES

Last, we urge EAJA's applicability in tax cases. Under current law, the Internal Revenue Service enjoys an exemption from EAJA, granted it by the attorney fee provisions of the Tax Equity and Fiscal Responsibility Act (TEFRA). TEFRA places the burden of proving that the IRS's position was unreasonable on the private party. This is inimical to the principles of EAJA. Moreover, TEFRA limits recovery of litigation costs to $25,000, another provision not found in EAJA.

As witnessed by an earlier example I gave, IRS enforcement actions can have a great capacity to be arbitrary. There is no valid reason to exempt this agency from the deterrent effect of the Equal Access to Justice Act. Although I recognize that there may be jurisdictional problems for this Committee to affect the tax laws, I urge the Committee to resolve these problems and to fully apply the EAJA to the Internal Revenue Service.

CONCLUSION

In conclusion Mr. Chairman, I appreciate having the opportunity to address the Committee on the reauthorization of the Equal Access to Justice Act. The clarifications found in the Committee bill, and as I've outlined today, will make the EAJA even more effective. We urge speedy approval of this legislation.