

United States Senate

WASHINGTON, DC 20510

May 23, 2006

The Equal Access to Justice Reform Act: Fair Treatment for Small Businesses

Dear Colleague:

We recently introduced the "Equal Access to Justice Reform Act" (S. 2017). This bill would improve the existing Equal Access to Justice Act ("EAJA") statute and help small businesses that prevail in lawsuits against the government.

Enacted in 1980, EAJA provides for the recovery of reasonable attorneys' fees by small businesses, individuals of modest means, and small nonprofit organizations when they prevail in litigation with the federal government. Its purpose was to ensure that ordinary citizens would be able to defend themselves against federal actions. EAJA has failed to meet this goal. The bill we have sponsored is designed to strengthen EAJA, enabling it to accomplish its intended goal without unduly restraining federal agency actions.

Current law authorizes the award of attorneys' fees when a party prevails against the federal government. Yet, in practice, that simple notion is so riddled with exceptions that it generally provides false hope to small businesses and individuals that want to challenge federal action. The federal government may avoid the payment of attorneys' fees when it has lost its case by simply convincing a court or agency that its litigation position was "substantially justified." Such a claim initiates additional, time-consuming, risk-laden, and expensive litigation over the fee recovery itself, all of which provides a significant disincentive for individuals and small businesses to pursue the statutory remedy available to them. Further, EAJA currently caps hourly attorneys' fees at well below the market rate, creating an additional hurdle for small businesses and individuals, especially for complex litigation against the federal government.

Our bill would: (1) encourage settlement; (2) create a more efficient government; and (3) provide Congress with an excellent oversight tool to track fee awards. It eliminates the restrictive standard for recovery of attorneys' fees that requires the government's claims to be "not substantially justified" before a court may award fees.

While requiring agencies to be more accountable for their decisions, our bill would protect the health, safety, and welfare of small businesses and individuals throughout the United States. S. 2017 differs from the House version (H.R. 435) by exempting four agencies that have special responsibility for enforcing the labor laws from paying fees from their own appropriations.

Our proposal is supported by groups representing the entire political spectrum, from the American Civil Liberties Union and the Sierra Club to the Heritage Foundation and the American Conservative Union. There is good reason for this broad support. A well-intentioned statute, EAJA essentially has become a dead letter.

The Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia*, 532 U.S. 598 (2001), further exacerbated these problems. In that case, the Court held that the term "prevailing party" for all federal fee-shifting statutes, including EAJA, only applies if the litigant obtains a judgment in the litigant's favor rather than when the litigant achieves its objective through an out-of-court settlement or unilateral concession by the government. This creates an incentive for litigants to refuse accept settlements and concessions by the government, further clogging the federal courts. Our bill reverses the *Buckhannon* decision in cases covered by EAJA.

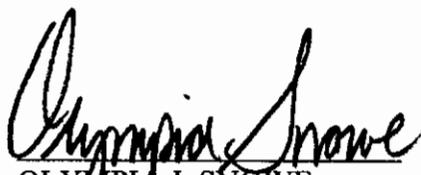
There are at least 100 federal-fee shifting statutes in the United States Code, and only EAJA includes the "substantial justification" defense and caps on attorneys' fees. It has become increasingly important to make the proposed changes to EAJA for small businesses. EAJA is frequently the only way for small businesses and individuals to afford counsel who will defend them against the government or assist them in pursuing claims for government benefits.

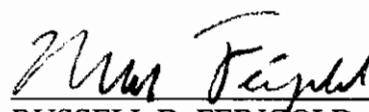
These reforms to EAJA will ensure that federal agencies will more carefully consider the implications of their actions against small businesses and individuals in the same way that they might when considering action against larger businesses with substantial financial and legal resources.

Our proposal removes flaws and strengthens EAJA. The changes will increase efficiency in EAJA litigation and help reduce delays in the federal courts by reducing the amount of EAJA-related litigation. Finally, by requiring most federal agencies to pay EAJA fees out of their appropriated funds rather than a general government account in the Treasury, our bill will force decision makers to critically assess their enforcement and litigation. Ultimately, the changes to EAJA will create a less burdensome and more efficient federal government.

For more information about this bill or to cosponsor, please contact Alex Hecht (Snowe) at 202-224-5175 or Bob Schiff (Feingold) at 202-224-5323.

Sincerely,


OLYMPIA J. SNOWE
United States Senator


RUSSELL D. FEINGOLD
United States Senator

ORGANIZATIONS SUPPORTING THE
EQUAL ACCESS TO JUSTICE REFORM ACT OF 2005
(H.R. 435 / S. 2017):

American Center for Law & Justice (ACLJ)
American Civil Liberties Union (ACLU)
American Conservative Union (ACU)
American Dental Association (ADA)
American Medical Association (AMA)
Association of Trial Lawyers of America (ATLA)
Chamber of Commerce of the United States (CHAMBER)
Heritage Foundation/Ed Meese (HERITAGE)
Home School Legal Defense Association (HSLDA)
Illinois State Bar Association (ISBA)
Leadership Conference on Civil Rights (LCCR)
National Association for the Advancement of Colored People (NAACP)
National Association of Manufacturers (NAM)
National Federation of Independent Business (NFIB)
Natural Resources Defense Council (NRDC)
Sierra Club (SIERRA)
Small Business EAJA Coalition (SBEAJC) (27 major trade associations,
representing *millions* of businesses)