

Oppose the “Government Litigation Savings Act”: H.R. 1996, S. 1061

The Equal Access to Justice Act (“EAJA”), signed into law by President Carter and permanently funded by President Reagan, addresses the disparity in resources available when the “little guy” is up against the federal government in a legal action. *See* 5 U.S.C. § 504; 28 U.S.C. § 2412. It awards costs of litigation and attorney’s fees when a citizen, non-profit organization, or small business wins a case involving the federal government AND can show that the federal government’s position was not “substantially justified.” 28 U.S.C. § 2412(d)(1)(B). Because this standard is difficult to achieve, it precludes fees even in some cases where the plaintiff prevails. For three decades, veterans, seniors, the disabled, small businesses, and groups from across the ideological spectrum have relied on EAJA to challenge illegal government actions.

The “Government Litigation Savings Act” (H.R. 1996/S. 1061) would prohibit those seeking to enforce important rights – such as free speech, gun rights, pollution protections, religious freedoms, and other civil rights – from recovering attorney’s fees under EAJA. By barring the recovery of fees for *pro bono* (free) representation, H.R. 1996/S. 1061 would also make it harder for seniors, veterans, and many others to obtain volunteer legal help in cases where their benefits have been wrongly denied. In addition, H.R. 1996/S. 1061 would do the following:

Prevent Parties from Challenging Unjust Decisions Made by the Federal Government

Before EAJA was enacted, prevailing parties in civil litigation involving the *federal government* could not recover legal fees, while prevailing parties in civil litigation involving another private party could do so in certain circumstances. H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. at 9. In enacting EAJA, Congress sought to eliminate this disparity by holding the federal government accountable to the same extent as private parties. *See id.* H.R. 1996/S. 1061 would make the federal government less accountable by hindering the public’s ability to challenge government decisions. This is especially troubling considering the fact that the federal government has much greater resources and expertise than the average litigant. *See* H.R. Rep. No. 96-1418, at 9-10. Indeed, in enacting EAJA, the House expressed concern that the federal government’s resources and expertise are so great, that, without EAJA, the government “can in effect coerce compliance with its position,” thereby establishing precedent “on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views.” *Id.*

Prohibit EAJA Fees for Pro Bono Representation

H.R. 1996/S. 1061 would eliminate one of the major incentives for lawyers to represent individuals in benefits and other claims by denying EAJA awards where an attorney provides his or her services *pro bono* (i.e., free of charge). Section 2(a)(2). Currently, attorneys are willing to take cases against the government even when their clients cannot afford to pay them because they know they might get paid under EAJA *if they win* and can show that the government’s position was not “substantially justified.” Under this proposed provision of H.R. 1996/S. 1061, those unable to pay an attorney up-front, including veterans, seniors, and disabled individuals who rely on *pro bono* help to obtain wrongfully denied benefits, would lose representation.

Prevent Parties from Ensuring the Federal Government Follows Congress’s Directions

EAJA is not a tool to subvert the will of Congress. Rather, it simply furthers the goals established by Congress by helping to ensure that the laws Congress enacts are faithfully implemented. H.R. 1996/S. 1061 will prevent equal access to the courts for parties seeking to enforce the laws Congress has created.

Bar EAJA Awards When Important, Non-Monetary Principles Are At Stake

Because H.R. 1996/S. 1061 restricts EAJA awards to those with a “direct and personal monetary interest in the civil action, including because of personal injury, property damage, or unpaid agency disbursement,” it would bar fee recovery for those who seek *non-monetary* relief, such as those

individuals seeking to enforce their Constitutional rights to religious freedom and free speech or a statutory right to accommodation for people with disabilities. *See* Sec. 2(a)(1)(A).

Prevent Parties from Enforcing Laws that Benefit the Public

This bill's limitation of EAJA fees to those with a "direct and personal monetary interest" in the suit also prevents non-profit groups from enforcing federal laws that provide a wide range of public benefits. *See* Sec. 2(a)(1)(A). For example, H.R. 1996/S. 1061 would prohibit environmental organizations from collecting attorney's fees when they sue the government to enforce federal laws that protect the public health, including ones that ensure we have clean air to breathe and clean water to drink. Additionally, it would prevent organizations that bring cases on behalf of individuals with mental, physical, and sensory disabilities whose rights are being curtailed, as well as other vulnerable populations, from recovering legal fees. Although H.R. 1996/S. 1061 is being pushed by those who oppose what they consider to be "frivolous" lawsuits by liberal groups, conservative groups also use EAJA in suits, such as those to protect religious freedoms and gun rights and challenge reverse discrimination and environmental regulations.

Contradict Congress's Intent in Enacting EAJA

One of Congress's main objectives in enacting EAJA was to compensate private parties who are litigating in order to vindicate public interests, such as non-profit groups. *See* H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. at 9. The rationale behind this was that, since the benefits of the litigation would accrue to the public at large, the parties should not have to shoulder the entire cost and burden of the litigation on their own. *See* S. Rep. No 91-1196, 91st Cong., 2d Sess. 38 (1970). H.R. 1996/S. 1061 directly conflicts with this objective by preventing parties that litigate in order to benefit the public from recovering attorney's fees. *See* Sec. 2(a)(1)(A).

For more information, please contact:

- Joseph W. Steinberg, Alliance for Justice, at joe@afj.org or (202) 822-6070
- Marty Hayden or Joan Mulhern, Earthjustice, at mhayden@earthjustice.org or jmulhern@earthjustice.org or (202) 667-4500
- Rebekah Diller, Brennan Center for Justice at NYU School of Law, at Rebekah.Diller@nyu.edu or (646) 292-8321
- Richard Cohen, National Organization of Veterans' Advocates, Inc., at rich@wvjustice.com or (202) 587-5708