1988

Making Uncle Sam Pay: A Review of Equal Access to Justice Act Cases in the Sixth-Circuit, 1983-1987

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MAKING UNCLE SAM PAY: A REVIEW OF EQUAL ACCESS TO JUSTICE ACT CASES IN THE SIXTH CIRCUIT, 1983–1987

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I. INTRODUCTION

TRADITIONALLY, the "American rule" for the award of attorneys' fees has provided that parties will bear their own attorney costs absent the exceptional circumstances in which the losing party has acted in bad faith or the litigation has provided a substantial public benefit.[1] For successful parties in litigation against the federal government, the doctrine of sovereign immunity has precluded an award of attorneys' fees even if the "American rule" exceptions were met.[2] Only the express waiver of this immunity will allow a fee award for parties who prevail against the government in judicial or administrative proceedings.[3] Despite the existence of approximately 131 federal statutes authorizing fee awards to successful litigants, statutes waiving the federal government's sovereign immunity are very limited in both number and scope.[4]

In 1980, Congress took a bold step away from the traditional rule in enacting the Equal Access to Justice Act, 28 U.S.C. § 2412 (hereinafter EAJA). Passed on a three year experimental basis, the new statute provided for an award of fees and costs to parties who prevail against the federal government.[5] Congress generally qual-

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1. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

2. *Id.* at 267–69.

3. *Id.*

4. *See* Coulter v. Tennessee, 805 F.2d 146, 152–55 (6th Cir. 1986) (listing these statutes). The fee application in *Coulter* was pursuant to 42 U.S.C. § 2000e–5(k) (1982) arising out of a Title VII employment discrimination claim.

5. 28 U.S.C. § 2412(b); (d)(1)(A) (1982).

ified the circumstances under which fees and expenses can be awarded, limited the parties eligible to receive an award,[6] and imposed guidelines on hourly rates.[7]

In passing this new act, Congress was clearly concerned about the ability of parties of limited resources to "take on" the government in court or in administrative proceedings.[8] Congress expressed an intent to compensate those who successfully challenge unreasonable governmental action with the hope of curbing unjustified governmental activity.[9] Irrespective of Congress' good intentions, ambiguities in the statutory language and conflicting legislative history created difficulties for the courts in interpreting the EAJA's provisions.[10] In 1985, Congress reenacted the Act without a "sunset"

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6. 28 U.S.C. § 2412(d)(1)(A)(2)(B) (1982).

7. 28 U.S.C. § 2412(d)(1)(A)(2)(A) (1982).

8. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. . . . For many citizens, the cost of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process. . . . In these cases, it is more practical to endure an injustice than to contest it.

H.R. REP. NO. 1418, 96th Cong., 2d Sess. 5, 6, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4988.

9. The bill rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy. An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law. An adjudication, for example, may show that the policy or factual foundation underlying an agency rule is erroneous or inaccurate, or it may provide a vehicle for developing or announcing more precise rules. The bill thus recognizes that the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate [or] adjudicate has helped to define the limits of Federal authority.

Id. at 10.

By allowing a decision to contest Government action to be based on the merits of the case rather than the cost of litigating, S. 265 helps assure that administrative decisions reflect informed deliberation. In so doing, fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority.

Id. at 12.

10. *See generally* Comment, *The Waiver of Immunity in the Equal Access to Justice Act: Clarifying Opaque Language*, 61 WASH. L. REV. 217 (1986); Note, *The Equal Access to Justice Act in the Federal Courts*, 84 COLUM. L. REV. 1089 (1984).

provision.[11] In the new version, Congress amended certain provisions of the Act to broaden its application and to clarify the legislators' intent in response to judicial interpretations of the original EAJA.

Despite the recent admonition of the Supreme Court that a "request for attorneys' fees should not result in a second major litigation,"[12] the courts have been frequently called on to interpret the often ambiguous language of the EAJA. The U.S. Court of Appeals for the Sixth Circuit has not been spared this difficult chore. While the 1985 amendments have clarified some provisions of the Act and affected some major decisions in the Sixth Circuit, the recent changes have also left other previously settled areas in a state of flux. This article will review the Sixth Circuit's EAJA decisions from 1983–1987, focusing upon the areas most frequently subject to judicial interpretation.[13]

II. THE "SUBSTANTIALLY JUSTIFIED" TEST: WHAT DOES IT MEAN? WHERE IS IT HEADED?

Once a party has "prevailed"[14] in a case against the federal government, the EAJA provides that:

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11. The Equal Access to Justice Act Amendments, Pub. L. 99–80, (1985) (codified at 5 U.S.C. § 504 and 28 U.S.C. § 2412 (1982)) [hereinafter EAJA].

12. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Blum v. Stenson, 465 U.S. 886, 902 n.19 (1984).

13. A full review of the changes from the 1980 to 1985 enactments and their legislative history is beyond the scope of this article. For an excellent review of the history of the Act and some accurate predictions regarding the future problems still unresolved by the 1985 amendments, see Hill, *Equal Access to Justice Act—Paving the Way for Legislative Change*, 36 CASE W.L. REV. 50 (1985). Regarding the 1980 enactment's legislative history, see Note, *The Equal Access to Justice Act in the Federal Courts*, 84 COLUM. L. REV. 1089 (1984); Dods & Kennedy, *The Equal Access to Justice Act*, 50 UMKC L. REV. 48 (1981); Robertson & Fowler, *Recovering Attorneys' Fees from the Government Under the Equal Access to Justice Act*, 56 TUL. L. REV. 903 (1982).

14. Under the EAJA, litigants are "prevailing parties" if they "succeed on any significant issue in litigation which achieves some of the benefit the part[ies] sought in bringing the suit." Kreimes v. Department of Treasury, 764 F.2d 1186, 1188–89 (6th Cir. 1985) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), quoting Nadeau v. Helgemoe, 581 F.2d 275, 278–79 (1st Cir. 1978)). Settlement is clearly within the scope of this provision. *See* Trident Marine Const., Inc. v. District Eng'rs, 766 F.2d 974, 980 n.7 (6th Cir. 1985).

> [A] court shall award to a prevailing party other than the United States fees and expenses . . . incurred by the party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was *substantially justified* or that special circumstances make an award unjust. 28 U.S.C. § 2412(d)(1)(A) (emphasis added).[15]

The definition and application of "substantially justified" is the most commonly litigated issue in EAJA cases in the Sixth Circuit. Besides the ambiguity of the statutory language, the legislative history as to its meaning is conflicting.[16] Despite this lack of congressional clarity, prior to the 1985 amendments the majority of the circuits had concluded that the "substantially justified" threshold simply put the burden on the government to show that its position was "reasonable."[17] The Sixth Circuit followed the "reason-

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15. The EAJA also includes another discretionary section:

> [U]nless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought by or against the United States. . . . The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. § 2412(B) (1982).

The meaning of this provision has been the subject of debate and conflicting opinions, but has had only limited review in the Sixth Circuit. *See* Hall v. United States, 773 F.2d 703 (6th Cir. 1985). *See generally* Comment, *The Waiver of Immunity in the Equal Access to Justice Act: Clarifying Opaque Language*, 61 WASH. L. REV. 217 (1986).

16. Prior to the passage of the Act in 1980, the Senate Judiciary Committee rejected a proposed amendment that would have changed "substantially justified" to "reasonably justified." S. REP. No. 253, 96th Cong., 2d Sess. 8 (1980).

> MR. KASTENMEIER: What was your view, that "substantially" justified would be more difficult for the agency or department to meet, than "reasonable?"
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> SENATOR DeCONCINI [a sponsor of EAJA]: Yes, sir, that's correct, Mr. Chairman.

But see "[t]he test of whether the Government position is substantially justified is essentially one of *reasonableness in law and fact.*" H.R. CONF. REP. No. 96–1434, 96th Cong., 2d Sess. 22 (1980).

17. *See, e.g.*, Citizens Council v. Brinegar, 741 F.2d 584, 593 (3d Cir. 1984); Cornella v. Schweiker, 741 F.2d 170, 171 (8th Cir. 1984); White v. United States, 740 F.2d 836, 839 (11th Cir. 1984); Houston Agric. Credit Corp. v. United States, 736 F.2d 233, 235 (5th Cir. 1984); Foster v. Tourtellotte, 704 F.2d 1109, 1112 (9th Cir. 1983);

ableness" test early on in *Wyandotte Savings Bank v. NLRB*,[18] which relied upon some of the House Judiciary Committee comments on the Act.[19] Prior to the 1985 reenactment of the EAJA, every Sixth Circuit panel addressing the "substantial justification" question followed the "reasonableness" test.[20]

Since a majority of EAJA fee requests arise from social security appeal cases,[21] the judicial test for "substantial justification" has a tremendous impact upon the practice in this area.[22] Unfortunately, the difficulty of applying the already ambiguous statutory standard is exacerbated in social security litigation. When reviewing factual findings by the Secretary of Health and Human Services, the appellate court may only reverse if it finds that there is no "substantial evidence" to support the agency's findings.[23] While it

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Anderson v. Heckler, 756 F.2d 1011, 1013 (4th Cir. 1985). *But see* Spencer v. NLRB, 712 F.2d 539, 558 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984); United States v. Kemper Money Mkt. Fund, Inc., 781 F.2d 1268, 1280 (7th Cir. 1986) (concurring opinion); Ulrich v. Schweiker, 548 F. Supp. 63, 65 (D. Idaho 1982).

18. 682 F.2d 119, 120 (6th Cir. 1982) (per curiam) (Engel, Merritt, Weick). Citations relevant to Sixth Circuit opinions will include the names of the panel, with the author italicized. District court judges sitting by designation appear in parentheses.

19. *Id.* at 120; H.R. REP. No. 96–1418, 96th Cong., 2d Sess. 10 (1980) *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4989.

20. Westerman, Inc. v. NLRB, 749 F.2d 14 (6th Cir. 1984) (*Phillips*, Edwards, Keith); Couch v. Secretary of HHS, 749 F.2d 359 (6th Cir. 1984) (per curiam) (Lively, Jones, Contie); Sigmon Fuel Co. v. TVA, 754 F.2d 162 (6th Cir. 1985) (*Contie*, Martin, Celebrezze); Trident Marine Constr., Inc. v. District Eng'r, 766 F.2d 974 (6th Cir. 1985) (*Martin*, Engel, Timbers); Tennessee Baptist Children's Home v. United States, 790 F.2d 534 (6th Cir. 1986) (*Krupansky*, Guy, Peck). Although the *Tennessee Baptist* case was actually decided after the 1985 amendments, the court did not address the effect of the re-enactment in affirming the district court's 1984 decision. Early on after passage of the Act, at least one district court in the Sixth Circuit suggested an even lower test than "reasonableness." Kerr v. Heckler, 575 F. Supp. 455, 458 (S.D. Ohio 1983).

21. *See* 2 LOBEL, CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 343 (1986).

22. Fees are also available under the social security statute, 42 U.S.C. § 406(b)(1) (1982), but such awards come out of a claimant's past-due benefits award. *See also* 20 C.F.R. § 404.1703 (1987).

23. 42 U.S.C. § 405(g) (1982). In Houston v. Secretary of HHS, 736 F.2d 365 (6th Cir. 1984), the court defined "substantial evidence" as "more than a mere scintilla of evidence. There must be 'such relevant evidence as a reasonable person might accept as adequate to support a conclusion.' Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 38 L.Ed. 842 (1971) (citing Consolidated Edison v. NLRB, 305 U.S.

would appear difficult, at least facially, to find factual "substantial justification" for a position which is not supported by "substantial evidence," the Sixth Circuit was quick to find that such a distinction exists. In a one page *per curiam* opinion, the court in *Couch v. Secretary of Health and Human Services* stated without explanation that: "The fact that this court finds a decision of the Secretary not supported by substantial evidence is not equivalent to a finding that the position of the United States was not substantially justified."[24]

Later, the Sixth Circuit further limited the availability of fees under the EAJA. In *Trident Marine Construction, Inc. v. District Engineer*,[25] the court addressed the issue of whether the "position" of the government under the EAJA referred to the underlying agency position or to the government's litigation position.[26] In this case of first impression in the Sixth Circuit, the *Trident* court found that the congressional intent was furthered by reviewing *only* the government's litigation position for "substantial justification."[27] The *Trident* court was particularly concerned that a broader test would result in automatic fee shifting in cases which overturned agency actions, "because the federal courts often review agency action to determine whether it is arbitrary or capricious or was not supported by substantial evidence."[28] The *Trident* decision on this issue joined a majority of the other circuits' decisions rendered prior to the 1985 amendments to the EAJA.[29]

197, 229, 59 S. Ct. 206, 216, 83 L.Ed. 126 (1938); Kirk v. Secretary of HHS, 667 F.2d 524 (6th Cir. 1981))." *Id.* at 366.

24. 749 F.2d 359, 360 (6th Cir. 1984) (Lively, Jones, Contie) (per curiam).

25. 766 F.2d 974 (6th Cir. 1985) (Engel, Martin, Timbers).

26. *Id.* at 978, 28 U.S.C. § 2412(d)(1)(A)(2)(D) (1982).

27. 766 F.2d at 979. The *Trident* court then applied the "reasonableness" test. *Id.*

28. 766 F.2d at 979 (citing 5 U.S.C. § 706 (1982), and noting the concerns of the Eleventh Circuit in Ashburn v. United States, 740 F.2d 843, 849 (11th Cir. 1984)). "After [a] court [has] concluded that the agency's action was arbitrary and capricious, and the prevailing party asked for attorney's fees, it would be hard for the court to then rule that the agency's action was nevertheless 'substantially justified.'" 766 F.2d at 979.

29. Ashburn v. United States, 740 F.2d 843, 849 (11th Cir. 1984); Boudin v. Thomas, 732 F.2d 1107, 1116 (2d Cir. 1984); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1487 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 105 (1984); Spencer v. NLRB, 712 F.2d 539, 557 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1908 (1984); Tyler Business Serv., Inc. v. NLRB, 695 F.2d 73, 75 (4th Cir. 1982); Broad Ave. Laundry and Tailoring v. United States, 693 F.2d 1387, 1390–91 (Fed. Cir. 1982). *But see* Iowa Express Distrib., Inc. v. NLRB, 739 F.2d 1305, 1309 (8th Cir. 1984), *cert.*

Thus, by 1985, the Sixth Circuit's standard in EAJA cases was to review only the government's "litigation position" using a test of "reasonableness." However, the ambiguity of the statutory term and the related judicial definition, as well as the inconsistency of the test's application, continued to create conflicts within and between the circuits. As one frustrated appellate judge aptly observed:

> As it stands today, "substantially justified" is too amorphous, too fluid, and too devoid of direction to guide the legal profession and the courts in cases where the claimant prevails because no substantial evidence in the record sustained the agency's position.[30]

A. The 1985 Amendments

The EAJA expired under its original sunset provision on October 1, 1984.[31] Congressional approval of a new version in 1984 resulted in a presidential veto.[32] Finally, in August, 1985, a reenactment of the EAJA was approved.[33] Congressional fears, expressed in 1980, that the Act would have a dramatic impact upon the treasury did not come to bear.[34] In fact, the low amount of expenditures was later

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denied, 105 S. Ct. 595 (1984); Rawlings v. Heckler, 725 F.2d 1192, 1196 (9th Cir. 1984); National Resources Defense Council, Inc. v. EPA, 703 F.2d 700, 707 (3d Cir. 1983).

30. Washington v. Heckler, 756 F.2d 959, 969 (3d Cir. 1985) (Aldisert, J., concurring).

31. EAJA § 204(c), 94 Stat. 2321, 2329.

32. *See* Memorandum of Disapproval of H.R. 5479, 20 WEEKLY COMP. PRES. DOC. 1814–15 (Nov. 8, 1984). *See also* Feldpausch v. Heckler, 763 F.2d 229, 232–33 (6th Cir. 1985), regarding the significance of this veto.

33. Equal Access to Justice Act Amendments, Pub. L. No. 99–80, 99th Congress (codified at 5 U.S.C. § 504 and 28 U.S.C. § 2412). The new provisions were applicable to pending cases and cases commenced after October 1, 1984. *Id.* at § 7. *See* Blackmon v. United States, 807 F.2d 70, 72–74 (6th Cir. 1986). See Hill, *supra* note 13, for a full discussion of the changes under the 1985 EAJA.

34. Between October 1, 1981 (the effective date of the Act) and October 1, 1984, approximately $3.9 million have been awarded under the Act.

> These awards are dramatically less than the $100 million annual costs estimated by the Congressional Budget Office (CBO) in 1981 and higher amounts predicted by the Justice Department. The most recent cost estimate by CBO was with respect to the H.R. 5479, and was considerably less than the one made in 1981.

H.R. REP. NO. 120, 99th Cong., 1st Sess, pt. 1, at 8 (1985), *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 132, 137 [hereinafter H.R. REP. NO. 120].

viewed by Congress as reflecting a problem with the courts in implementing the EAJA.[35]

Rejecting the narrow "litigation position" rule used in *Trident*,[36] the new amendments expressly included both the litigation position *and* the underlying agency action in defining the "position" of the government.[37]

Although the 1985 reenactment again used the same "substantial justification" language as the 1980 Act, the 1985 House Report strongly rejected the "reasonableness" test used by the majority of circuits, including the Sixth.[38] However, certain remarks of individ-

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35. *Id.* at 8–9.

36. 766 F.2d 974, 978 (6th Cir. 1985).

37. 28 U.S.C. § 2412(d)(2)(D) (1985) provides:

> 'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings.

Id. The House Report explained the reasons behind this amended provision:

> Part of the problem in implementing the Act has been that agencies and courts are misconstruing the Act. Some courts have construed the 'position of the United States' which must be 'substantially justified' in a narrow fashion which has helped the Federal Government escape liability for awards. H.R. 2378 clarifies both of these points. When the escape clause was originally written, it was understood that 'position of the United States' was not limited to the government's litigation position but included the action—including agency action—which led to the litigation. However, courts have been divided on the meaning of 'position of the United States.' H.R. 2378 clarifies that the broader meaning applies.

H.R. REP. No. 120, *supra* note 34, at 8–9. *See also* Johnson v. Meese, 654 F. Supp. 265, 266–67 (E.D. Mich. 1986). "Thus to avoid having fees assessed against it, the government must show that its pre-litigation conduct, as well as its litigation position, was substantially justified." *Id.*

38. The House Report said: Another problem which has developed in the implementation of the Act has been the fact that courts have been divided on the meaning of 'substantial justification.' Several courts have held correctly that 'substantial justification' means more than merely reasonable. Because in 1980 Congress rejected a standard of 'reasonably justified' in favor of 'substantially justified,' the test must be more than mere reasonableness.

> Especially puzzling, however, have been statements by some courts that an administrative decision may be substantially justified under the Act even if it must be reversed because it was arbitrary and capricious or was not supported by substantial evidence. Agency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been

ual congressmen appeared to temper portions of the House Report and left the congressional intent as to the meaning of "substantial justification" less than crystal clear.[39]

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substantially justified under the Act. Only the most extraordinary special circumstances could permit such an action to be found to be substantially justified under the Act.

H.R. REP. No. 120, *supra* note 34, at 9–10. *See also* Hirschey v. FERC, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring, sharply criticizing this House Report).

39. Representative Kindness, a co-sponsor of the bill and a member of the House Judiciary Committee, rejected the language of the House Report regarding the meaning of "substantial justification:"

> This gratuitously authoritarian over-statement appears to be the only error I found in the report. I wish I could have known about it or that it could have been discovered sooner than it was, but the filing deadline for the report was approaching within the hour, practically speaking, when the error was discovered. At least, however, Mr. Speaker, we can clarify the point in the record of these proceedings.
>
> The committee report statement should not be interpreted to be the position of the committee on the point it seeks to describe and should not be interpreted to suggest that a finding of an agency action that was not supported by substantial evidence would automatically entitle a prevailing party to fees or would establish a presumption of entitlement to fees. Of course, the Government has the burden of demonstrating substantial justification under the Equal Access to Justice Act. Substantial justification is a different and a lesser standard than the substantial evidence standard applied in a review of administrative proceedings. The Government may still prove that the position was substantially justified even if the court does not believe that the case on the merits was supported by 'substantial evidence on the record as a whole.'

131 CONG. REC. H4763 (daily ed. June 24, 1985) (statement of Rep. Kindness). Representative Kastenmeier also noted:

> Now, I do not understand the committee report to suggest that a finding that an agency action that was not supported by substantial evidence would automatically entitle the prevailing party to fees and expenses or would establish a legal presumption of entitlement to fees.
>
> The committee recognizes the close relationship between the concepts and the fact that a finding that Government action was not supported by substantial evidence should be accorded significant weight.
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> Of course, the government has the burden of proof of demonstrating substantial justification. Substantial justification is a different standard than the position it took was substantially justified. Proving it is not intended to be so difficult that the Government may only avoid fees by prevailing in the litigation.

Id. (statement of Rep. Kastenmeier).

The interpretive value of the remarks of individual legislators, even the sponsors of a particular bill, which conflict with committee reports is questionable. *See* Garcia v. United States, 469 U.S. 70, 76 (1984); Consumer Product Safety Comm'n v. GTE

In light of the new amendments and legislative history, some federal circuits began to shift from their previous position and redefine "substantial justification" as meaning something more than "reasonableness."[40] Other circuits, however, reiterated their previous "reasonableness" test after analyzing the 1985 amendments to the EAJA.[41]

The 1985 amendments left the federal district courts in the Sixth Circuit in a quandary as to the continued viability of the *Trident* "reasonableness" test.[42]

Recently, in *Riddle v. Secretary of Health and Human Services*,[43] the Sixth Circuit squarely addressed its own "reasonableness" test in light of the 1985 reenactment. The EAJA fee petition in *Riddle* arose out of a social security disability claim denied by the Department of Health and Human Services. Mr. Riddle successfully appealed the denial in the federal district court but his subsequent motion for fees and costs under the EAJA was denied.[44] The majority in *Riddle* thoroughly analyzed the 1985 legislative history of the EAJA and found that there was clear legislative intent to reject the "reasonableness" test.[45] The *Riddle* majority went on to hold that "[i]n order to be substantially justified, the government's position must have *more* than a 'reasonable basis' in law and fact."[46]

Sylvania, Inc., 447 U.S. 102, 118 (1980); Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979); Weinberger v. Rossi, 456 U.S. 25, 35 n.15 (1982).

40. *See* Gavette v. Office of Personnel Management, 808 F.2d 1456 (Fed. Cir. 1986) (en banc); FEC v. Rose, 806 F.2d 1081 (D.C. Cir. 1986); Devine v. National Treasury Employees Union, 805 F.2d 384 (Fed. Cir. 1986); L.G. Lefler, Inc. v. United States, 801 F.2d 387 (Fed. Cir. 1986); Lee v. Johnson, 799 F.2d 31 (3d Cir. 1986); United States v. 1,378.65 Acres of Land, 794 F.2d 1313 (8th Cir. 1986); Keely v. Merit Sys. Protection Bd., 793 F.2d 1273 (Fed. Cir. 1986); Haitian Refugee Center v. Meese, 791 F.2d 1489, *vacated in part on other grounds*, 804 F.2d 1573 (11th Cir. 1986).

41. Russell v. National Mediation Bd., 775 F.2d 1284 (5th Cir. 1985); Pullen v. Bowen, 820 F.2d 105, 108 (4th Cir. 1987); United States v. Yoffe, 775 F.2d 447 (1st Cir. 1985); Phil Smidt & Son, Inc. v. NLRB, 810 F.2d 638 (7th Cir. 1987).

42. *See* Weber v. Weinberger, 651 F. Supp. 1379, 1386–89 (W.D. Mich. 1987). *Compare* Holden v. Heckler, 615 F. Supp. 686 (N.D. Ohio 1985) *with* Johnson v. Meese, 654 F. Supp. 265, 267 (E.D. Mich. 1986).

43. 817 F.2d 1238 (6th Cir.) (*Jones*, Edwards, Engel dissenting), *vacated*, 823 F.2d 164 (1987) (en banc).

44. *Id.* at 1238–40.

45. *Id.* at 1243.

46. *Id.* at 1244 (emphasis in original).

The court noted, however, that this "standard in no way equates the 'substantial evidence' test with the 'substantially justified' test."[47]

In the *Riddle* dissent, Judge Engel strongly argued that the precedent of *Trident* cannot be overturned by the subsequent 1985 legislative history given that the "substantial justification" provision of the EAJA had remained the same as it was in the 1980 version of the Act.[48] The dissent questioned the value of the House Report relied upon by the majority and criticized their decision as further confusing an already muddied area.[49] In urging that the *Trident* "reasonableness" test continue to be used despite its shortcomings the dissent concluded that: "[p]erhaps it is enough to say to the majority that we would 'rather bear those ills we have, than fly to others that we know not of.' Shakespeare, *Hamlet*, III. 1.81–82."[50] The *Riddle* decision was vacated when the government's petition for rehearing *en banc* was granted on July 9, 1987.[51]

Thus, at least through the end of 1987, the "substantial justification" quagmire created by equally ambiguous statutory language and judicial definition left little direction for the district courts and practitioners in this important area.[52]

III. The Standard Of Appellate Review

In *Westerman, Inc. v. NLRB*,[53] the Sixth Circuit first addressed the appropriate standard of appellate review of lower court or administrative agency decisions applying the "substantial justification" test under the EAJA.[54] In *Westerman*, the petitioner-company

47. *Id.*

48. *Id.* at 1244. The dissent cited Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979), in support of this legislative history analysis. *But see* Bell v. New Jersey, 461 U.S. 773 (1983); Shipbuilding Seatrain Corp. v. Shell Oil Co., 444 U.S. 572 (1980); Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980); United States v. Stauffer Chem. Co., 684 F.2d 1174, 1187 (6th Cir. 1982); Feldpausch v. Heckler, 763 F.2d 229, 232 (6th Cir. 1985).

49. 817 F.2d at 1249.

50. *Id.*

51. 823 F.2d 164 (1987) (en banc).

52. In the EAJA decision in Pierce v. Underwood, 761 F.2d 1342, *amended*, 802 F.2d 1107 (9th Cir. 1986), the Supreme Court has granted certiorari, 107 S. Ct. 2177, No. 86–1512 (1987). The Ninth Circuit applied a "reasonableness" test in affirming a district court award of $1,129,450.00 for fees and costs. 761 F.2d at 1346–47.

53. 749 F.2d 14 (6th Cir. 1984) (Edwards, Keith, *Phillips*).

54. In Citizens Coalition for Block Grant Compliance, Inc. v. City of Euclid, 717

applied for attorneys' fees under the EAJA based upon its successful defense in an unfair labor practice proceeding.[55] An administrative law judge reviewed the fee application and found that, although the general counsel for the NLRB was incorrect in his allegations against the company, the general counsel's position was still "substantially justified."[56] The Board adopted this finding and the company appealed.[57] In reviewing the record and findings below, the *Westerman* court held that the Board did not "abuse its discretion" in denying the fee request.[58]

Subsequently, the Sixth Circuit carefully clarified the EAJA standard of review in distinguishing between a lower court's factual findings and its evaluation of a losing party's legal position. In adopting the rule of the D.C. Circuit, the court in *Sigmon Fuel Co. v. Tennessee Valley Authority*,[59] held that:

> This court has recently held that the proper standard of review in this type of case is whether the district court abused its discretion. *Westerman, Inc. v. NLRB*, 749 F.2d 14 at 17 (6th Cir. 1984). In this context, however, the term 'abuse of discretion' takes on a special meaning. *Spencer v. NLRB*, 712 F.2d 539, 565 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936, 104 S. Ct. 1908, 80 L. Ed. 2d 457 (1984). With respect to findings based upon the district judge's assessment of the probative value of the evidence, a highly deferential standard of review such as the clearly erroneous standard is in order. *Id.* at 564–65. With respect to the district court's evaluation of the government's legal argument a *de novo* standard is appropriate. *Id.* at 563–65.[60]

This standard has been consistently followed in subsequent EAJA cases in the Sixth Circuit.[61]

F.2d 964, 967 (6th Cir. 1983) (*Martin*, Phillips, Peck), the Sixth Circuit applied the "clearly erroneous" standard under FED. R. CIV. P. 52(a) in reviewing a lower court's determination that the appellant was not a "prevailing party" under the EAJA, 28 U.S.C. § 2412(d)(1)(A) (1982).

55. 749 F.2d at 15.

56. *Id.* at 16.

57. The appeal was pursuant to 5 U.S.C. § 504(c)(2) (1982).

58. 749 F.2d at 17.

59. 754 F.2d 162 (6th Cir. 1985) (Martin, Contie, Celebrezze).

60. 754 F.2d at 166–67.

61. *See* Kreimes v. Department of Treasury, 764 F.2d 1186, 1191 (6th Cir. 1985); Trident Marine Constr., Inc. v. District Eng'r, 766 F.2d 974, 980 (6th Cir. 1985). In reviewing the federal Freedom of Information Act's fee award provision which has a

The *Sigmon* court's use of a *de novo* standard of review of the government's legal position does not find any direct support in recent Supreme Court cases reviewing attorney fee awards under other fee-shifting statutes commonly analogized to in EAJA cases.[62] It should be noted, however, that unlike the EAJA, these other statutes do not have a "substantial justification" threshold nor do they distinguish between a losing party's legal and factual positions.[63]

IV. THE PROCEDURAL CASES

On the purely procedure issues, the Sixth Circuit has a split record, deciding twice for the government and twice for fee petitioners since 1983. In *Kitchen Fresh v. NLRB*,[64] the court held that winning the right to a hearing on union election objections is a procedural victory only, that does not make a petitioner a "prevailing party" on the merits for the purpose of getting fees.[65]

In *Feldpausch v. Heckler*,[66] the court held that a fee petition is timely if it is filed within thirty days of the expiration of the time for appeal, rather than within thirty days of judgment. The court's interpretation thus allowed what otherwise would have been a

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"substantially prevailed" threshold, the Sixth Circuit has also applied the *Sigmon* fact versus legal position distinction. *See* American Commercial Barge Lines, Co. v. NLRB, 758 F.2d 1109, 1111 (6th Cir. 1985) (Keith, *Kennedy*, Phillips); 5 U.S.C. § 552(a)(4)(E) (1982).

62. *See* 42 U.S.C. §§ 1988, 2000e–(5)k (1982); Hensley v. Eckerhart, 461 U.S. 424 (1983); Blum v. Stenson, 465 U.S. 886 (1984); Evans v. Jeff D., 475 U.S. 717 (1986); City of Riverside v. Rivera, 477 U.S. 561 (1986).

63. *See supra* note 62. In other contexts, the Supreme Court and the Sixth Circuit have held that "mixed questions of law and fact" are "freely reviewable by the appellate court." Blackburn v. Foltz, 828 F.2d 1177, 1181 (6th Cir. 1987) (habeas corpus review) (citing Strickland v. Washington, 466 U.S. 668, 698 (1984) and Meeks v. Bergen, 749 F.2d 322, 327 (6th Cir. 1984)). *See also* Miller v. Fenton, 474 U.S. 104, 114 (1985) (discussion of the importance of the fact/law distinction on appellate review).

64. 729 F.2d 1513 (6th Cir. 1984) (per curiam) (Lively, Engel, Celebrezze).

65. *See* Hanrahan v. Hampton, 446 U.S. 754, 758–59 (1980) (procedural or evidentary rulings are not enough to get fees under 42 U.S.C. 1988). *See also* Hewitt v. Helms, 107 S. Ct. 2672 (1987); Ruckelshans v. Sierra Club, 463 U.S. 680 (1983). For a more complete discussion of what it takes to be a prevailing party, see Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

66. 763 F.2d 229 (6th Cir. 1985) (*Peck*, Engel, Krupansky).

time-barred petition to proceed.[67] However, in *Allen v. Secretary of Health and Human Services*,[68] the court barred a tardy fee petition. In that case a social security disability claimant, who had lost in the district court, won a reversal in the Sixth Circuit in 1981. The case was remanded, but no final judgment was requested or entered by the district court until 1984. On appeal the panel held that a fee petition filed within thirty days of the 1984 judgment came too late when the final decision on the *merits* was the Sixth Circuit's opinion of 1981.

Finally, in *Blackmon v. United States*,[69] the court had to decide whether the original EAJA or the amended Act should apply to a case pending when the 1985 amendments took effect. Under the 1985 Act, fees *would* be awarded because the Department of Labor's administrative position was not justified. But under the original Act, as interpreted in *Trident*,[70] fees would *not* be awarded because the government's litigation position was justified. The court denied fees, holding that where only the fee petition was pending at the time of the 1985 amendments, the original EAJA controlled.[71]

V. Calculating The Fee Award

If the EAJA has the potential to force a virtual second round of litigation on the issue of liability for fees, the statute further complicates a lawyer's life by making the amount of fees to be awarded a contested issue as well. That is, when a trial court decides that fees should be paid to a prevailing party, its job is far from over. The court must then decide how much should be paid, and to whom. In the past few years the *calculation* of fee awards has been litigated at least as vigorously and as often as the threshold issue of whether fees should be awarded at all.

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67. The 1985 EAJA amendments corrected this ambiguity in the original law, and made explicit when a fee petition must be filed. The amended Act adopted the approach taken in *Feldpausch*. *See* 28 U.S.C. § 2412(d)(1)(B) (1985).

68. 781 F.2d 92 (6th Cir. 1986) (*Milburn*, Guy, (Woods)).

69. 807 F.2d 70 (6th Cir. 1986) (*Wellford*, Boggs, (DeMascio)).

70. 766 F.2d 974 (6th Cir. 1985).

71. This issue has gone different ways in different circuits. *Compare* Russell v. National Mediation Bd., 775 F.2d 1284 (5th Cir. 1985) *with* Tongol v. Donovan, 762 F.2d 727 (9th Cir. 1985). *See also* the discussion in *Blackmon*, 807 F.2d at 72–75.

A. Introduction: The Non-EAJA Attorneys' Fees Case

Most federal fee-shifting statutes require a court to award "reasonable" attorneys' fees, without a cap.[72] In order to understand how the EAJA differs from these laws, it is useful to review briefly how fees are calculated in the non-EAJA context.

To award fees in a non-EAJA case the trial court must determine the appropriate hourly rate and multiply it by the number of hours reasonably expended on the successful claims.[73] The resulting figure is referred to as the lodestar.[74] Until 1984 the general practice of the federal courts was to calculate the lodestar, and then to adjust it up or down to account for a variety of factors such as the level of success obtained, the degree of expertise required, the quality of the work performed, etc.[75] This "adjustment" to the lodestar usually took the form of a percentage multiplier, and in practice it often resulted in substantial increases to the fee award. However, because the standard to be applied in setting the percentage was a vague one, there was little uniformity to fee awards when the lodestar was adjusted by a multiplier.[76]

By 1984 the Supreme Court had become convinced that the use of multipliers was producing windfalls for attorneys, and was largely unnecessary. Where lower courts awarded fees at competitive rates, and then tacked on a multiplier for especially good work, the Court balked. In *Blum v. Stenson*,[77] a unanimous Court reversed a fifty percent enhancement to the lodestar. The Court held that the complexity of the case or the novelty of the issues should not normally be considered as grounds for adjusting a fee award,

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72. *See, e.g.*, 42 U.S.C. § 1988 (1982); 42 U.S.C. § 2000e(k) (1982) (Title VII). *See also* the statutes catalogued in Coulter v. Tennessee, 805 F.2d 146, 152 (6th Cir. 1986) (Appendix A).

73. *See* Blum v. Stenson, 465 U.S. 886, 888 (1984) ("The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.").

74. *See* Library of Congress v. Shaw, 106 S. Ct. 2957, 2960 n.1 (1986).

75. The factors to be considered for an adjustment of the lodestar (up or down) derive from Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

76. *Compare* Underwood v. Pierce, 761 F.2d 1342 (9th Cir. 1985), *modified*, 802 F.2d 1107 (1986), *cert. granted*, 107 S. Ct. 2177 (1987) (disallowing a multiplier of 3.5 on top of rates of $80–$120 an hour) *with* LaDuke v. Nelson, 762 F.2d 1318 (9th Cir. 1985) (affirming the use of a 20 percent multiplier on top of rates of $100–$125 an hour), *vacated and remanded*, 796 F.2d 309 (1986).

77. 465 U.S. 886 (1984).

because those factors are already subsumed into the number of hours expended or the hourly rate allowed. As long as the trial court tailors the hourly rate to the case (and the counsel) before it, the lodestar itself should be presumptively reasonable, and no post-lodestar adjustment should be required.

The Sixth Circuit had reached a similar conclusion five years earlier in *Northcross v. Board of Education of Memphis City Schools*.[78] In that case the court said:

> We conclude that an analytical approach, grounded in the number of hours expended on the case, will take into account all of the relevant factors and will lead to a reasonable result. The number of hours of work will automatically reflect the 'time and labor involved,' 'the novelty and difficulty of the question,' and 'preclusion of other employment.' The attorney's normal billing rate will reflect 'the skill requisite to perform the legal service properly,' 'the customary fee,' and the 'experience, reputation and ability of the attorney.' Adjustments upward may be made to reflect the contingency of the fee, unusual time limitations and the 'undesirability' of the case.[79]

Northcross was a non-EAJA case, and although it foreshadowed what the Supreme Court would do, it may not have gone far enough.[80]

Last term, in *Pennsylvania v. Delaware Valley Citizens' Council*,[81] the Court suggested that even the risk of non-payment (the contingency factor) might normally be included in the reasonable rate to be charged, so that so-called "contingency enhancers" (for most cases) should be disfavored.[82] In 1986, in *City of Riverside v.*

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78. 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

79. *Id.* at 642–43. The factors referred to are the *Johnson* factors listed *infra* at note 127 and accompanying text.

80. One issue that remains in non-EAJA cases is to what extent the reasonable hourly rate should be limited by (or increased by) the attorney's actual billing rate. *See* Webb v. Maldonado, 108 S. Ct. 480, 480 (1987) (White, J., dissenting from denial of certiorari). *See also* Kelley v. Metropolitan County Bd. of Educ., 773 F.2d 677 (6th Cir. 1985) (en banc), *cert. denied*, 474 U.S. 1083 (1986).

81. 107 S. Ct. 3078 (1987).

82. The *Delaware Valley* plurality opinion by Justice White held that "enhancement for the risk of non-payment should be reserved for exceptional cases where the need and justification for such enhancement are readily apparent and are supported by evidence in the record and specific findings by the courts." *Id.* at 3088. In any case the plurality would limit risk enhancement to one-third of the lodestar, and then only upon a showing that without an adjustment the plaintiff would have

Rivera,[83] the Supreme Court upheld a fee award under 42 U.S.C. § 1988 even though the award greatly exceeded the amount of the plaintiffs' recovery. The Court approved hourly rates of $125 despite counsels' inexperience, in part because of the quality of the work and the uncertainty of recovery. Thus, in the non-EAJA context, what used to be tacked on as a post-lodestar *percentage* enhancement is now more likely to be incorporated into the lodestar itself as an adjustment to the hourly rate.

B. The EAJA Attorneys' Fees Case

In an EAJA case, the calculation of the fee award is slightly different. The pertinent text of the EAJA reads as follows:

> The amount of fees awarded under this subsection shall be based upon the prevailing market rates for the kind and quality of the services furnished, except that . . . (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.[84]

The Act uses mandatory language ("shall be based") and ties the amount of fees to "prevailing market rates," only with a cap. The statutory cap is not absolute, however, as it can be adjusted upward where the court determines that an "increase in the cost of living or a special factor, . . . justifies a higher fee."[85] The Act itself thus raises three questions for a trial court in setting the rate: (1) what is the

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had "substantial difficulties in finding counsel in the . . . relevant market." *Id.* at 3089.

As the swing vote, Justice O'Connor found (as did the dissent) that Congress did not intend to foreclose contingency enhancers in fee-shifting statutes, but she nevertheless voted to reverse the enhancer as applied in this case. Justice O'Connor would tie risk enhancers to the way a particular *market* compensates for contingency, so that the adjustment would apply to contingent cases as a class, and would thereby eliminate arbitrary adjustments to the lodestar on a case by case basis. *Id.* at 3090.

For the Sixth Circuit's latest word on contingency enhancers, see Conklin v. Lovely, 834 F.2d 543, 553–54 (6th Cir. 1987) (*Milburn*, Norris, Keith) (upholding the district court's use of a contingency enhancement but remanding in light of *Delaware Valley* for findings as to the amount and necessity of a 100% risk-multiplier).

83. 477 U.S. 561 (1986).

84. 28 U.S.C. § 2412(d)(2)(A) (1982).

85. *Id.* Although the Act uses the term "fee," it is really only the *rate* that will be susceptible to adjustment, as percentage enhancements to the lodestar become an endangered species.

prevailing market rate for the kind and quality of legal services rendered; (2) does an increase in the cost of living justify a higher fee; and (3) do any special factors justify a higher fee?

1. Establishing the Prevailing Market Rate

Not surprisingly, the calculation of the prevailing market rate in an EAJA case closely tracks the calculation of the "reasonable" rate in a non-EAJA case. In both cases the court's goal is to figure out what lawyers in the district generally get paid for the type of work performed. In making that determination, obviously a trial court should not alter the hourly rates just because the losing party is a federal agency (in the EAJA case) as opposed to a state official or a private party (in the non-EAJA case). Since litigating against the federal government often takes more resources, involves higher risks, and requires more specialized expertise than other kinds of litigation, it would be surprising if the prevailing market rates in EAJA cases averaged out to be substantially *less* than the rates determined to be "reasonable" under other fee-shifting statutes.

On the other hand, the EAJA's "prevailing market rate" *should* be somewhat lower as a rule. As noted above, in determining what is a "reasonable" rate under other fee-shifting statutes, the lower courts have been instructed by the Supreme Court to include in that rate the factors that previously were added as post-lodestar percentage multipliers. Thus, in a non-EAJA case the "reasonable" rate awarded is likely to be calculated by determining *first* the approximate market rate for the kind of litigation heard, and then by adjusting that hourly rate upward for factors like special expertise, contingency, superb results, *etc.*, all as tailored to the specifics of the case and the attorneys before the court. But under the EAJA, only the more general "prevailing market rate for the kind and quality of the services furnished" is relevant. The purpose of determining the prevailing market rate in the EAJA context is not to award fees at that rate, but to see if the market rate exceeds $75 an hour. If it does, then the court must go on to determine if the cost of living or other special factors warrant an increase in the rate to be paid.

In fee litigation the moving party has the burden of proving what the lodestar rate should be.[86] In an EAJA case, the fee petitioner

86. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). "Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *See also* Webb v. Board of Educ. of Dyer County, 471 U.S. 234, 242 (1985).

must show what the prevailing market rate is for the kind and quality of services provided.[87] Such proofs usually take the form of exhibits attached to the fee petition, or the petitioner can request an evidentiary hearing. The documentation might include bar surveys of regional billing rates, affidavits or testimony of local lawyers who practice in the relevant substantive field, or statements from experts who are familiar with the case or who have reviewed the file and can comment on the legal work performed. A thorough fee petition will include what other courts in the district have awarded in similar cases, favorable past awards to the petitioning lawyer for similar work, and the lawyer's normal billing rates for the same sort of litigation (as at least one example of the rate the "market" is paying). If the case is handled by a litigation team, it may be necessary to submit evidence on the prevailing market rates not just for lead counsel, but for the specific lawyers (or team members) in light of the role they played in the litigation.[88]

Based on the evidence and any counter-evidence supplied by the government, the court should be able to set an hourly figure (or a range of figures) for the "prevailing market rate."[89] In an EAJA case, where the prevailing market rate is less than $75 an hour, the court should award fees at the market rate and need not trouble itself further. In that situation counsel are not penalized by the statutory cap, and they therefore have no right under the statute to seek a higher fee. For example, in *Bunn v. Bowen*,[90] the district court determined that for individual social security appeals in eastern Carolina the prevailing market rate was $60–$70 an hour. The court paid that rate, holding that because the prevailing market rate was less than $75 an hour, cost of living or other special factors do not come into play at all. Conversely, where the prevailing market rate is greater than $75 an hour, the court must decide whether or not the statutory cap should be exceeded. The capped

87. 28 U.S.C. § 2412(d)(2)(A) (1982).

88. *See, e.g.*, Berman v. Schweiker, 531 F. Supp. 1149 (N.D. Ill. 1982), *aff'd*, 713 F.2d 1290 (7th Cir. 1983) (allowing fees for law students who worked on the case at the rate they were paid by the firm).

89. In fee litigation how a lawyer is paid has no bearing on the initial rate calculation. The rate is the same whether the petitioning lawyer is from a private firm that shares profits or is from a publicly funded neighborhood Legal Services office. *See* Blum v. Stenson, 465 U.S. 886 (1984).

90. 637 F. Supp. 464 (E.D.N.C. 1986).

rate can be exceeded only if an increase in the cost of living or a special factor justifies a higher fee.

2. Adjusting for Increases in the Cost of Living

Because inflation has been a fact of life since the passage of the EAJA, courts have routinely granted cost of living increases.[91] Evidence must be submitted showing the precise increase in the cost of living from the effective date of the EAJA (October, 1981) to the date of the fee award. Since the figures are usually taken from the government's own statistical reports,[92] defendants opposing the petition will often have no choice but to concede the accuracy of the numbers. Once the rise in the cost of living has been established, most courts simply pay that indexed rate, provided that the indexed rate is less than the prevailing market rate previously determined by the court.[93]

The one issue that may be contested is whether or not the entire fee award should be paid at the same indexed rate. For example, when litigation has lasted several years, the government can argue that fees should be paid at an annualized rate: $75 an hour for work done in 1981, $75 plus the first year's cost of living index for work done in 1982, *etc.* However, as a rule, courts have refrained from breaking down attorneys' fees by year because to do so further complicates an already complex calculation.[94]

In addition, for lengthy litigation, it seems unfair to pay 1981 rates when that payment is not received until, say, seven years later. The term "prevailing market rate" describes what it will cost *today* for legal services *today* assuming payment *today* (often in the form of a retainer up front).[95] Most courts have therefore assumed

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91. *See, e.g.*, Continental Webb Press, Inc. v. NLRB, 767 F.2d 321 (7th Cir. 1985) ($82.95 hourly rate); Sanchez v. Heckler, 603 F. Supp. 280 (D. Colo. 1985) ($88.50 hourly rate).

92. *See, e.g.*, U.S. BUREAU OF THE CENSUS, 1986 STATISTICAL ABSTRACT OF THE UNITED STATES (TABLES) (106th ed. 1986).

93. As noted, fees under the EAJA should never exceed the prevailing market rate, and cannot exceed the $75 an hour cap unless the cost of living or special factors justify a higher rate. 28 U.S.C. § 2412(d)(2)(A) (1982).

94. *See* Action on Smoking and Health v. CAB, 724 F.2d 211, 219 (D.C. Cir. 1984).

95. If lawyers in 1981 had set their rates based on payment in 1988, presumably the 1981 "prevailing market rate" would have been considerably higher than what it was based on payment *in 1981*. *See* Natural Resources Defense Council v. EPA, 703

that the EAJA's cost of living index was intended to compensate attorneys for the delay in payment, and have awarded fees for the entire litigation based on the prevailing market rate and the rise in the cost of living *at the time the fees are awarded.*[96]

The Supreme Court has not addressed this issue in the EAJA context. However, in *Library of Congress v. Shaw*,[97] the Court held that in a Title VII case a thirty percent enhancement to the fee award on account of the delay in payment was in reality a forbidden award of interest against the government.[98] Where waivers of sovereign immunity (such as fee-shifting statutes) are to be strictly construed anyway, the Court said that the general rule that interest cannot be awarded against the government provided "an added gloss of strictness"[99] that required reversal of the delay enhancer. However, because the EAJA explicitly allows an adjustment for increases in the cost of living, arguably the text of Section 2412(d)(2)(A) is a sufficient express waiver of federal sovereign immunity to permit an enhancement for delay, whether one calls the add-on a delay adjustment, a cost of living increase, or interest.[100]

F.2d 700, 713 (3d Cir. 1983) (one purpose of the cost of living factor in the statute was to serve as an inducement against the government dragging its feet in litigation). *See also* Action on Smoking and Health v. CAB, 724 F.2d 211, 219 ("by specifying inflation as a 'special factor,' Congress indicated its concern that lawyers receiving fees at different times obtain equivalent value").

96. The District of Columbia Circuit reached the same conclusion using a slightly different theory, asserting that delay in payment is itself a "special factor" that can justify a higher fee:

> We recognize that there is arguably a question whether we should limit the fees for the hours billed each year by the adjusted statutory maximum applicable *for that year*, or rather limit them only by the *current* statutory maximum. We will adopt the latter approach, in order to compensate petitioner for delay, as we are authorized to do under the "special factor" criterion in the EAJA.

Hirschey v. FERC, 777 F.2d 1, 5 (D.C. Cir. 1985).

97. 106 S. Ct. 2957 (1986).

98. *Shaw* was a case in which fees were sought against the federal government under Title VII, 42 U.S.C. § 2000e–5(k) (1982). The question for the Court was whether Congress intended to waive the United States' immunity from interest in making it liable "the same as a private person." 106 S. Ct. at 2964. The Court held that it did not; therefore absent an express waiver for interest, any delay premium (no matter how it is calculated) against the federal government is barred. *Id.*

99. 106 S. Ct. at 2963.

100. The reversal of the delay enhancer in *Shaw* does not mean that delays in payment cannot be factored in to a fee award against states or private parties. In

a. The Effect of the 1985 Amendments on the Cost of Living Adjustment

In 1985, when the EAJA was amended, the $75 an hour limit was not changed.[101] As a result, since 1985 the government has argued that by reenacting the EAJA without changing the $75 hourly figure, Congress intended to devalue the statutory cap on attorneys' fees and reset it at $75 an hour in 1985 dollars.

In *Chipman v. Secretary of Health and Human Services*,[102] the Sixth Circuit seemed to accept the government's claim. *Chipman* was a social security disability denial appealed to the district court by an individual claimant. The magistrate reversed the Secretary and ordered that benefits be paid. The district court granted the plaintiff's request for attorneys' fees under the EAJA, but refused to award fees in excess of $75 an hour. On appeal, a panel of the Sixth Circuit held that:

> Plaintiff's first argument is that the district court erred in refusing to augment the $75 statutory hourly rate by a factor representing a rise in the cost of living since the enactment of the EAJA. In this regard, we

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Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S. Ct. 3078 (1987), decided a year after *Shaw*, the Court's plurality opinion said:

> First is the matter of delay. When plaintiffs' entitlement to attorney's fees depends on success, their lawyers are not paid until a favorable decision finally eventuates, which may be years later, as in this case. Meanwhile, their expenses of doing business continue and must be met. In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value. *See e.g., Sierra Club v. Environmental Protection Agency*, 769 F.2d 796, 809–10 (D.C. Cir. 1985); *Louisville Black Police Officers Organization, Inc. v. City of Louisville*, 700 F.2d 268, 276, 281 (6th Cir. 1983). Although delay and the risk of nonpayment are often mentioned in the same breath, adjusting for the former is a distinct issue that is not involved in this case. We do not suggest, however, that adjustments for delay are inconsistent with the typical fee-shifting statute.

Id. at 3081–82. *See also* Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir. 1982), *cert. denied*, 461 U.S. 956 (1983). By citing *Sierra Club*, (a case in which fees were awarded against a federal agency under the Clean Water Act, 42 U.S.C. § 7607(F) (1982)), the Court seems to have forgotten *Shaw*, suggesting that even without an express waiver of sovereign immunity for "interest," adjustments for delay in payment may be permissible when they are simply merged into (and thus disguised by) the *current* prevailing hourly rate.

101. 28 U.S.C. § 2412(d)(2)(A) (1982).

102. 781 F.2d 545 (6th Cir. 1986) (*Milburn*, Guy, (Woods)).

> think it is important that the $75 statutory rate is a ceiling and not a floor. Moreover, we note that Congress in reenacting 28 U.S.C. § 2412(d) on August 5, 1985, did not raise the $75 maximum hourly rate despite the rise in the cost of living since its original enactment in 1980. . . . [A]ccordingly, we do not believe the district court abused its discretion in determining that the fees awarded should not exceed $75 per hour even though the cost of living may have indeed risen since the enactment of the EAJA.[103]

From the text of the panel's opinion the court's precise holding is unclear. Reading narrowly, one could argue that the panel held only that the district court did not abuse its discretion in awarding fees at $75 an hour, and that all else is *dicta*.[104] Reading broadly, one could argue that the panel held that cost of living increases must run only from 1985, because Congress *intended* to set the cap (at $75 an hour) in 1985 dollars.

Chipman was argued in December, 1985, and decided in January, 1986, just a few months after the EAJA was renewed, and at a time when only one other circuit had looked at the 1985 amendments.[105] Now at least four other circuits have addressed the issue of the effect of the 1985 amendments on the cost of living adjustment.[106] Without exception, all have declined to follow the *Chipman* rationale.

The argument against *Chipman* is straightforward. As noted earlier, because the EAJA was a Congressional experiment it had a built-in sunset provision, expiring on October 1, 1984. When the EAJA was in its dotage, Congress took up H.R. 5479. "The primary

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103. *Id.* at 547.

104. As noted above, if the prevailing market rate did not exceed $75 an hour, then the district court in *Chipman* would have been correct in denying a cost of living increase.

105. The only court of appeals opinion to pre-date *Chipman* on this issue was Hirschey v. FERC, 777 F.2d 1 (D.C. Cir. 1985). From the text of *Chipman* it is unclear if the Sixth Circuit panel was aware of *Hirschey* since the case was not cited.

106. Hirschey v. FERC, 777 F.2d 1, 5 (explicitly rejecting the government's argument that the EAJA cap was "re-set" in 1985, and allowing cost of living increases back to 1981); Sierra Club v. Secretary of the Army, 820 F.2d 513, 521–22 (1st Cir. 1987) (holding that the government's argument ignores basic principles of statutory construction and would lead to incongruous results); Allen v. Bowen, 821 F.2d 963, 967 (3d Cir. 1987) (holding that "*Chipman* fails to analyze the legislative history of Public Law 99–80, and is not persuasive," and awarding fees at the rate of $87.35 an hour based on cost of living increases since 1981); Trichillo v. Secretary of HHS, 823 F.2d 702 (2d Cir. 1987) (rejecting *Chipman* and awarding fees at $88 an hour based on the retroactive cost of living increases since 1981).

purpose of [H.R. 5479 was] to extend and make permanent those provisions of the EAJA which [would] expire on October 1, 1984."[107] The bill passed both Houses unanimously, but not until October 11, 1984, ten days after the original Act had expired (except for pending cases). The President then vetoed the bill.

With the EAJA defunct, new legislation had to include provisions to *revive* the original Act in addition to amending it. In June, 1985, H.R. 2378 was introduced and the bill passed Congress that summer. On the floor of the Senate, Senator Domenici described the revival and repeal provisions as follows:

> These provisions are essential to insure that no party is denied the protection of the Act solely because of the failure of the President to approve the bill last year. It is our intent that the protection afforded by the EAJA be deemed continuous from the date of its first enactment.[108]

Based on the House and Senate Reports and the statements from the floor,[109] the Third Circuit found that Congress did not mean to reset the $75 hourly rate in 1985 dollars. In *Allen v. Bowen*,[110] it reviewed the EAJA's roller coaster ride to reenactment and concluded that:

> [T]he legislative history disclosed that Congress' original, unanimous intent, prior to the President's veto, was simply to repeal the sunset provisions, and thus provide uninterrupted coverage by the Act. Once the President vetoed H.R. 5479, a mechanism had to be devised so as to provide, as Senator Domenici observed, "'continuous protection' from the date of [the EAJA's] first enactment." . . . [T]his was achieved, Congress thought, by the rather clear language of H.R. 2378, which provided that the attorneys' fees sections shall be effective on or after the date of the enactment of this Act, "as if they had not been repealed." Pub.L. No. 99–80, 99 Stat. 183, 186 (Aug. 5, 1985), codified at 28 U.S.C. § 2412.[111]

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107. *See* 130 CONG. REC. H9298 (daily ed. Sept. 11, 1984) (statement of Rep. Kastenmeier).

108. 131 CONG. REC. S9997 (daily ed. July 24, 1985).

109. In discussing this issue while on the District of Columbia Circuit, now Justice Scalia complained that House and Senate Reports and statements on the floor are increasingly unreliable, often having much to do with the advocacy of interested parties and little or nothing to do with true Congressional intent. 777 F.2d at 7–8 (Scalia, J., concurring).

110. 821 F.2d 963 (3d Cir. 1987).

111. *Id.* at 966–67.

In *Sierra Club v. Secretary of the Army*,[112] the First Circuit agreed, saying that to accept the government's argument would be, "in effect, to conclude that the statute was amended by implication," which is disfavored.[113] The First Circuit also found that the government's interpretation "would work to defeat the EAJA's manifest purpose . . . [t]o induce administrators to behave more responsibly in the future. . . . [I]f the escalator were rigged to bypass several floors, its usefulness as a deterrent device would be considerably curtailed."[114]

The Second Circuit covered essentially the same ground and reached the same conclusion in *Trichillo v. Secretary of Health and Human Services*.[115] It noted that cases brought a few days apart could result in lawyers getting paid thirty percent more under the old Act than under the renewed Act. In fairly strong language the *Trichillo* court pointed out that "to adopt the [government's] position would be to sanction absurd results. . . . [The] interpretation [of 2412(d)] hawked by the government [is] paradoxical [and] would make very little sense".[116]

In light of the decisions of the First, Second, Third, and D.C. Circuits, the Sixth Circuit's conclusion in *Chipman*—that the cost of living adjustment can run only from October, 1985, forward—is clearly wrong. *Chipman* should therefore be read narrowly or should be overruled *en banc*.[117]

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112. 820 F.2d 513 (1st Cir. 1987).

113. *Id.* at 522. *See also* United States v. Weldon, 377 U.S. 95 (1964). The First Circuit also quoted hornbook law against the government position:

> [P]rovisions of the original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law. . . .

820 F.2d at 522 (quoting I-A C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION § 22.33 (4th ed. 1985)).

114. 820 F.2d at 522–23. *See also* Jackson v. Heckler, 629 F. Supp. 398 (S.D.N.Y. 1986) (the Secretary's interpretation defeats the purpose behind a cost of living adjustment).

115. 823 F.2d 702 (2d Cir. 1987).

116. *Id.* at 706–07 (citing Sierra Club v. Secretary of the Army, 820 F.2d 513, 523 (1st Cir. 1987)). *See also* Ford v. Bowen, 663 F. Supp. 220 (N.D. Ill. 1987) (government's position is "absurd" and "implausible"). A district court within the Sixth Circuit also has refused to follow *Chipman* in light of the rejection of that case by the other circuits. Holden v. Bowen, 668 F. Supp. 1042 (N.D. Ohio 1986) (awarding a cost of living increase up to $94 an hour retroactive to 1981).

117. The few courts that have followed *Chipman* have done so virtually without

b. Chipman's Implications

The *Chipman* court's holding on the cost of living adjustment may not have been its worst mistake. It is an unfortunate but true phenomenon that a catchy phrase in an appellate opinion has a way of being repeated, often without analysis and regardless of its truth. The *Chipman* panel's aphorism that ". . . the $75 statutory rate is a ceiling and not a floor" is a prime example of the genre. That line has been picked up by a number of courts,[118] invariably to limit the rate at which fees are awarded. In fact, the $75 an hour figure is neither a ceiling nor a floor. As noted above, the ceiling set by the explicit language of the EAJA is $75 *plus* the rise in the cost of living *and* any special factor adjustment, up to the prevailing market rate.[119] The prevailing market rate is thus the ceiling according to the law.

The *Chipman* panel also reached the following questionable conclusion:

> . . . Congress has expressed clearly its intention that prevailing market rates are relevant only up to $75 per hour. Therefore, customary rates above $75 per hour cannot support a claim in excess of the statutory maximum rate.[120]

These statements invert the structure of the EAJA and, at the least, are misleading. Unless prevailing rates are above $75 an hour, there can be no cause for an upward adjustment. Prevailing market rates over $75 an hour may not literally "support a claim" in excess of the statutory cap, but they trigger the inquiry into whether or not

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analysis—each simply reiterating the government's argument (as *Chipman* did) or citing *Chipman* as authority. *See, e.g.*, Johnson v. Meese, 654 F. Supp. 270, 272 (E.D. Mich. 1987); McKinnon v. Bowen, 664 F. Supp. 195 (E.D. Pa. 1986); Trahan v. Regan, 625 F. Supp. 1163, 1168 (D.D.C. 1985) (citing *Chipman*, although apparently no cost of living increase was ever requested). One court has reached the same conclusion as *Chipman* but not with the same result. In Barry v. Heckler, 638 F. Supp. 444, 448 (N.D. Cal. 1986), the court denied a cost of living increase, holding that such an increase could only run from August 5, 1985. At the same time, however, the court granted a lodestar rate of $150 an hour, based on "special factors"—counsel's expertise, the contingent nature of the case, and the defendant's bad faith.

118. *See supra* note 117. *See also* Lee v. National Flood Ins. Program, 812 F.2d 253 (5th Cir. 1987).

119. See 28 U.S.C. § 2412(d)(2)(A) (1982).

120. 781 F.2d at 547 (citing Action on Smoking and Health v. CAB, 724 F.2d 211, 216–17 (D.C. Cir. 1984)).

a cost of living or other special factor adjustment should be made.[121] When the prevailing market rate exceeds the statutory cap, a lawyer should expect to argue, and certainly should expect a court to rule, whether or not increases in the cost of living or special factors justify a higher fee, up to the prevailing market rate. To the extent that *Chipman* appears to bar the argument and foreclose a decision, it should be clarified, or overruled.

Finally, there is the risk that the language of *Chipman*, when combined with the Sixth Circuit's restrictive awards in non-EAJA cases, will be misinterpreted by the district courts within the circuit. For example, in *Johnson v. Meese*[122] a district court in Detroit held that *Chipman* would limit the rate to the statutory cap "even if customary hourly rates for attorneys of similar experience [were] in the $100–$200 hour range."[123] Relying on *Chipman* and restrictive language in *Coulter v. State of Tennessee*,[124] the district court in *Johnson* refused to award fees at a rate above $75 an hour. Since *Chipman* may be bad law, and *Coulter* was a non-EAJA case in which the Sixth Circuit properly railed against windfalls *on top of* "reasonable" fees, the *Johnson* district court's reliance on these

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121. *See* Haitian Refugee Center, Inc. v. Smith, 644 F. Supp. 382, 388–89 (S.D. Fla. 1984), *aff'd*, 791 F.2d 1489, *modified*, 804 F.2d 1573 (11th Cir. 1986):

> The statute . . . expressly states that the starting point is to be the prevailing market rate. When that rate exceeds $75.00 per hour then the inquiry turns to whether a rate higher than $75.00 is justified.

Chipman's citation to Action on Smoking and Health v. CAB, 724 F.2d 211 (D.C. Cir. 1984), is similarly suspect. In *Action on Smoking and Health*, the District of Columbia Circuit properly held that the mere fact that the prevailing rate is above $75 an hour does not entitle the plaintiffs' lawyers to be paid at that market rate. But in *Action on Smoking and Health*, because the market rate exceeded the cap, the court went on to enhance the fee award for the combined effects of the rise in the cost of living and the other special factors that justified an increase. *Id.* at 219–20.

122. 654 F. Supp. 270 (E.D. Mich. 1987). The authors were counsel in this case, so the discussion that follows may have to be discounted for sour grapes.

123. *Id.* at 273.

124. 805 F.2d 146 (6th Cir. 1986) (*Merritt*, Lively, Wellford). Interestingly, despite the harsh comments in this Title VII case, the panel affirmed the district court's award of fees. *Id.* at 152. The district court had granted what it determined to be "reasonable fees" in the local market for the type of work performed. The lawyer was paid at rates ranging from $85 to $110 an hour. *Id.* at 148. On appeal the Sixth Circuit acknowledged that under Title VII's fee provisions, "plaintiff is entitled to recover fees based on their reasonable worth, i.e., market value." *Id.* at 150 (quoting Perkins v. State Bd. of Educ., No. 77–3552, slip op. at 3–4 (M.D. Tenn. Nov. 4, 1980)).

cases to limit the rate at which fees could be awarded under the EAJA was probably wrong.

3. Increasing the Rate for Special Factors

The EAJA specifically allows for increases to be awarded where special factors justify a higher fee.[125] This is exactly as it should be, because unlike other fee-shifting statutes, the EAJA does not award fees at (presumptively reasonable) normal market rates. In an EAJA case, the artificially low statutory rate does not and cannot include a premium for complexity, contingency, expertise, or other factors. As a result, for specialized, complex, or contingent litigation (where the prevailing market rate is likely to be high), absent a special factor adjustment, the unadjusted statutory rate would pay far below what attorneys could reasonably expect to be paid in the marketplace for the same work. The statutory enhancement simply closes the gap between the (indexed) capped rate and what lawyers would earn in the marketplace or would win under other fee-shifting statutes, thus guaranteeing that able attorneys will take cases against the federal government.

In looking at what special factors justify a higher fee, most courts in EAJA cases have used the factors listed in *Johnson v. Georgia Highway Express, Inc.*,[126] in addition to the one factor cited in the statute itself. The listed "special factor," given by way of example, is "the limited availability of qualified attorneys." The *Johnson* special factors to be considered include the following:

(1) The time and labor required.
(2) The novelty and difficulty of the questions.
(3) The skill requisite to perform the legal service properly.
(4) The preclusion of other employment by the attorney due to acceptance of the case.
(5) The customary fee.
(6) Whether the fee is fixed or contingent.
(7) Time limitations imposed by the client or the circumstances.
(8) The amount involved and the results obtained.
(9) The experience, reputation, and ability of the attorneys.
(10) The "undesirability" of the case.

125. 28 U.S.C. § 2412(d)(2)(A) (1982).

126. 488 F.2d 714, 717–19 (5th Cir. 1974).

(11) The nature and length of the professional relationship with the client.
(12) Awards in similar cases.[127]

Obviously, some of the *Johnson* factors may not apply even in the EAJA context. For example, the time and labor required and the novelty and difficulty of the questions should be subsumed into the fee petition (the number of hours) in an EAJA case in the same way that they are subsumed into the fee petition in a non-EAJA case. However, where in a non-EAJA case all of the remaining factors are used to determine the appropriate "reasonable" hourly rate, in an EAJA case these factors are used to determine if the statutory (capped) rate should be raised. Thus, when litigating a case against the federal government for which the "prevailing market rate" is high, "special factors" may justify an increase in the indexed statutory rate, to move it closer to the rate at which attorneys would be paid in the marketplace or would be awarded fees under other fee-shifting statutes.

VI. CONCLUSION

The 1985 EAJA amendments clarified a number of issues that had been ambiguous under the original Act and that had divided the circuit courts of appeal. However, even under the revised Act, several issues remain unresolved in the Sixth Circuit, and some new problems have been created. The pending decision *en banc* in *Riddle v. Secretary of Health and Human Services*[128] will determine if the court will continue to use a test of "reasonableness" in deciding the "substantial justification" of the government's position, or if something more than "reasonableness" will be required.[129]

In calculating fee awards the court may have to review *Chipman v. Secretary of Health and Human Services*[130] to clarify if cost of living increases may be paid retroactive to 1981. The court may also

127. *Id.* at 717–19. As noted above, in a non-EAJA case, where reasonable billing rates are used, the *Johnson* factors will be reflected in the normal billing rate or the number of hours expended, and therefore will not support a claim for a multiplier or a "quality adjustment." In an EAJA case, however, the artificially low statutory rate takes into account none of the factors, which is why the Act permits an adjustment.

128. 817 F.2d 1238 (6th Cir.), *vacated*, 823 F.2d 164 (1987) (en banc).

129. A decision by the Supreme Court in Underwood v. Pierce, 107 S. Ct. 2177 (1987) (granting certiorari), may pre-empt *Riddle* if the Court decides to reach the issue of the standard to be applied in EAJA cases.

130. 781 F.2d 545 (6th Cir. 1986).

have to decide under what circumstances the $75 an hour cap on fees can be exceeded, and how fee awards in the district courts can be made more uniform, especially in contingent cases. If the Sixth Circuit follows the lead of other circuits, then generally lawyers who win cases against the federal government should not expect to get paid at full market rates or at rates comparable to what they would be awarded under other fee-shifting statutes. Nevertheless, where prevailing market rates are higher than the statutory cap, lawyers who are entitled to fees under the EAJA should expect to get a full cost of living increase from 1981 forward, plus *some* upward adjustment for the special factors contemplated by the Act.