

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RICHLIN SECURITY SERVICE :

4 COMPANY, :

5 Petitioner :

6 v. : No. 06-1717

7 MICHAEL CHERTOFF, :

8 SECRETARY OF HOMELAND :

9 SECURITY. :

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11 Washington, D.C.

12 Wednesday, March 19, 2008

13

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:05 a.m.

17 APPEARANCES:

18 BRIAN WOLFMAN, ESQ., Washington, D.C.; on behalf
19 of the Petitioner.

20 ANTHONY YANG, ESQ., Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf of
22 the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 06-1717, Richlin Security Service versus Chertoff.

Mr. Wolfman.

ORAL ARGUMENT OF BRIAN WOLFMAN
ON BEHALF OF THE PETITIONER

MR. WOLFMAN: Mr. Chief Justice, and may it please the Court:

The Federal Circuit affirmed an award of attorney fees under the Equal Access to Justice Act, or EAJA, to Petitioner Richlin Security Services Company, but it denied Richlin an award for paralegal services at market rates on the ground that statutory attorney fees do not include work done by paralegals.

The Federal Circuit was wrong because, as this Court has explained, the statutory term "attorney fees" -- and now I'm quoting -- "takes into account the work not only of attorneys but others whose labor contributes to the work product for which an attorney bills her client." Employing that reasoning the Court held, in Missouri versus Jenkins, that paralegal fees are compensable at market rates as attorney fees under 42 U.S.C. section 1988.

1 The question in this case is whether there
2 is any reason EAJA should be interpreted differently.
3 The answer is no. And, indeed, the only potentially
4 relevant difference between the two statutes -- that
5 EAJA requires fees to be awarded at prevailing market
6 rates, and section 1988 requires only that fees be
7 reasonable -- provides stronger support for market-based
8 recovery of paralegal fees under EAJA than it would
9 under section 1988.

10 JUSTICE GINSBURG: Mr. Wolfman, what about
11 the cap that's not present in 1988 and is present in
12 EAJA?

13 MR. WOLFMAN: Well, Justice Ginsburg, that
14 really is, when we get down to it, what the government's
15 argument boils down to. And I think the cap is
16 irrelevant for two reasons, both of which are important.
17 First, and let me -- let me first state the argument;
18 then I'll give you the answers.

19 But the argument that the government posits
20 is -- taking a lead from the Federal Circuit -- is that
21 paralegal services can't be compensable at market rates
22 under EAJA because then paralegal services would be
23 fully or largely compensable, while lawyers' fees to the
24 extent that they exceed the cap would not be. And again
25 there are two answers to that: First, the argument

1 incorrectly looks at EAJA from today's perspective when
2 lawyers' rates generally exceed the fee cap.

3 JUSTICE SCALIA: Excuse me. The paralegals'
4 rates would also be subject to the -- to the cap.

5 MR. WOLFMAN: Absolutely.

6 JUSTICE SCALIA: They couldn't go above the
7 cap.

8 MR. WOLFMAN: There is no question about
9 that because -- because, Your Honor, they are attorney's
10 fees.

11 JUSTICE SCALIA: Okay.

12 MR. WOLFMAN: That's our submission. But --
13 but the problem with looking at it at the current
14 vantage point, which is what the Federal Circuit
15 essentially did, is that at the time EAJA was enacted,
16 most lawyers --

17 JUSTICE STEVENS: May I just ask on that
18 last point, does the government agree that the
19 paralegals' fees are subject to a cap?

20 MR. WOLFMAN: Well, the government would
21 certainly agree that if there are attorney's fees, they
22 are subject to the cap. They are not willing to pay
23 above the cap for anything.

24 JUSTICE SCALIA: Indeed, would insist.

25 MR. WOLFMAN: Yes, indeed, Your Honor. But

1 at any rate --

2 JUSTICE STEVENS: But they do not agree with
3 the bottom line that they are subject to cap?

4 MR. WOLFMAN: Well, what they believe -- the
5 government --

6 JUSTICE STEVENS: -- attorney's fees.

7 MR. WOLFMAN: And I'm sure they can explain
8 this better than I can. But what the government's
9 position is, is that they are like an out-of-pocket
10 expense --

11 JUSTICE SCALIA: Right.

12 MR. WOLFMAN: -- reimbursable only at the
13 cost to the lawyer. That's an interesting question,
14 Your Honor, because one could -- one could posit a
15 situation 20, 30 years out from now, if EAJA were not
16 amended, where even the cost to the lawyer could exceed
17 the cap. So, in a way, the government's argument sort
18 of collapses upon itself. We -- we -- our submission is
19 they are all attorney's fees and they are all subject to
20 the cap. But let me go --

21 JUSTICE SOUTER: But you -- isn't that one
22 of the problems with your argument? Because there is
23 something very strange about capping paralegal fees at
24 the same amount that they would cap a lawyer's fees for,
25 regardless of what that amount is and when they were

1 setting it.

2 MR. WOLFMAN: Well, again, that's -- that's
3 -- I took to be Justice Ginsburg's question and let me
4 try to answer it. First, as I say, by -- by positing
5 that's a strange situation, which we don't agree with,
6 but even assuming it's a strange situation, again it
7 looks at the situation from today's perspective, not at
8 the time --

9 JUSTICE SOUTER: No, I'm looking at it from
10 the perspective of the original enactment on your theory
11 at that moment. These fees were legal fees, were
12 attorney fees, and they were capped at the same amount
13 that a lawyer's time was capped at. And that's just
14 odd.

15 MR. WOLFMAN: Well, I don't believe it's
16 odd. And, again, for two reasons: At that point --
17 again, you have to take the perspective where they are
18 at. Lawyers' fees and paralegal fees were really capped
19 at the same point, but all those fees were arrayed, by
20 and large, under the cap so that there would be
21 paralegal fees at a relatively low rate, junior
22 associates at a modest rate, and the senior partner's
23 closer to the cap.

24 JUSTICE SCALIA: Well, agent fees --

25 MR. WOLFMAN: By and large --

1 JUSTICE SCALIA: I mean, the problem exists
2 whether or not you make paralegal fees attorney's fees,
3 because agent fees are also subject to the same cap.

4 MR. WOLFMAN: That is true.

5 JUSTICE SCALIA: And agents were paid a good
6 deal less than that.

7 MR. WOLFMAN: That is true. That is another
8 argument that could be made. Agents, who are
9 individuals that are qualified by an administrative
10 agency, in essence, to practice law without the
11 supervision of a lawyer, they are also allowed fees
12 under the administrative part of EAJA, but not under
13 section 2412, which is the court part of EAJA.

14 JUSTICE KENNEDY: You began -- and it's not
15 just because of my notepad but because I'm interested --
16 you told Justice Ginsburg there are two reasons --

17 MR. WOLFMAN: Yes.

18 JUSTICE KENNEDY: -- why the government's
19 cap is wrong. And I'm not even sure you finished the
20 first one. What are the two reasons?

21 MR. WOLFMAN: I would love that opportunity,
22 Your Honor. The first, again, is, -- and let me come
23 back to this if I didn't get it out completely -- which
24 is that, again, it's looking at the -- at the problem,
25 if there is one from the -- the current-day perspective,

1 but what you had at the time, by and large, was that
2 lawyers' and paralegal rates would be arrayed below the
3 cap. It's just not something that would have been
4 within the contemplation of Congress. But let me --

5 JUSTICE STEVENS: But may I ask you this?

6 MR. WOLFMAN: Yes.

7 JUSTICE STEVENS: Supposing at the time the
8 statute was enacted, paralegals' fees were not generally
9 treated as lawyers' fees, but rather were disbursements,
10 does that make a difference?

11 MR. WOLFMAN: That might have made a
12 difference, but that was not the case, Your Honor. In
13 fact, what the Court pointed out in Missouri versus
14 Jenkins, which was 1989, nine years later, paralegal
15 fees -- it appeared to be that they were separately
16 billed in about three-quarters of all law firms. In
17 1980 it was probably fewer. There was a transition
18 going on.

19 But let me give you the Court's response to
20 that problem in Missouri versus Jenkins, to the extent
21 that it is a problem. And what the Court said was,
22 whether they're separately billed or not, they were
23 subsumed within the lawyer's rates like other forms of
24 overhead. That's what the Court said in Missouri versus
25 Jenkins. And the question of how they are billed

1 doesn't -- doesn't inform the question of how you
2 interpret the term "attorney's fees." That's what the
3 Court said in Missouri versus Jenkins and what it
4 reaffirmed two years later in the West Virginia
5 Hospitals versus Casey.

6 Now, let me, if I could, get to the second
7 point which Justice Kennedy asked me about. The second
8 point is that the government's argument proves far too
9 much, because under the Federal Circuit's theory, which
10 the government has now adopted, the fees generated by
11 law firm associates would also not be compensable at
12 market rates because a much higher percentage of an
13 associate's billed rate would also fall below the cap as
14 compared to the senior partners in the firm. In other
15 words, it doesn't help explain the problem.

16 CHIEF JUSTICE ROBERTS: I'm sorry. Is your
17 point there that most associates are billed at less than
18 \$125 an hour?

19 MR. WOLFMAN: No. That's not my point, Your
20 Honor. My point is this: The -- the theory of the
21 government's argument is that you would -- you would be,
22 in essence, giving too much recovery to the lower -- to
23 the lower-billed billing agents, whether they be
24 paralegals, junior associates, and so forth. And it --
25 when you get up to the senior partners --

1 CHIEF JUSTICE ROBERTS: Too much money
2 proportionally.

3 MR. WOLFMAN: Proportionally.

4 CHIEF JUSTICE ROBERTS: Okay.

5 MR. WOLFMAN: Exactly. That's the argument.
6 In all events, some of those various individuals' rates
7 will be compensated under EAJA.

8 Our point is that it proves far too much
9 because the junior associates are much more like the
10 paralegals than the senior associates at the largest K
11 Street or Wall Street law firm. And my only point -- my
12 only submission -- point in that regard is that it shows
13 that the government's argument proves too much because
14 it illustrates that the government's concern and the
15 Federal Circuit's concern, the anomaly that they have
16 pointed out, has nothing to do with the statutory term
17 "attorney fees" and nothing to do with paralegals, per
18 se. It's the phenomenon that's at work is the fact that
19 the rate -- the hyperinflation in the legal services
20 market as a whole has outstripped EAJA. That's the
21 phenomenon on which the Federal Circuit, in truth, was
22 relying, even though they put it to the paralegal
23 question.

24 JUSTICE ALITO: If -- if paralegal charges
25 are not fees but are other expenses, what would be the

1 standard for determining the rate at which they would be
2 compensable? Would it necessarily be cost under this
3 statute or would it simply be what is reasonable?

4 MR. WOLFMAN: Well, that's -- that's an
5 excellent question. I think it, in part, undermines the
6 government's position because what happened here is that
7 the Federal Circuit and the Board of Contract Appeals
8 below said, well, it's cost to the lawyer, and we are
9 going to do an Internet search and we are going to find
10 what paralegal salaries are and divide it by the
11 requisite number of hours in any year. And we are going
12 to make it \$35 an hour, and we are going to determine
13 that's the cost to the law firm.

14 But, of course, that's -- that's not the
15 cost to the law firm. What about the overhead? What
16 about the rent, utilities, and so forth, what about
17 benefits? So what you would have is a very complex cost
18 analysis.

19 Now, you're suggesting, Your Honor, that we
20 could do it on some vague notion of reasonableness. But
21 the problem is that the -- the fee-shifting statutes
22 either look to market rate or actual cost. But what is
23 interesting about the actual cost argument here -- and
24 that's true across the entire range of fee-shifting
25 statutes -- and what's interesting about --

1 JUSTICE SCALIA: This problem is going to
2 exist anyway, isn't it? I mean, even if you don't cram
3 paralegals into the other expenses, there are going to
4 be other expenses that are in the other expenses.

5 MR. WOLFMAN: But --

6 JUSTICE SCALIA: You're going to have to
7 have this same problem -- and what about the overhead
8 and so forth?

9 MR. WOLFMAN: No, that is -- with respect,
10 Justice Scalia, that is not correct because the problem
11 here is -- and I'm using your words -- is that the
12 government is cramming a in-house professional
13 services -- service into a place where no court
14 virtually in the history of American jurisprudence has
15 ever put it. Out-of-pocket --

16 JUSTICE ALITO: Well, if -- if it's simply
17 reasonableness -- because I don't see anything in the
18 statute that says that all non-fee expenses are
19 compensable at cost -- if it's simply reasonableness,
20 would it be possible to say that what would be
21 reasonable would be a rate that preserves the ratio
22 between attorneys' fees and paralegal fees that existed
23 at the time when the statute was enacted so that you
24 wouldn't have the problem of attorneys being compensated
25 at the same rate as paralegals?

1 MR. WOLFMAN: Let me -- let me answer that
2 in two ways: If you were to preserve the ratio, then it
3 seems to me that the -- in many markets, the paralegals
4 are going to get right near the cap anyway or, you know,
5 between \$75 and \$100, because we know that many lawyers'
6 rates are well above the cap -- if you preserve that
7 ratio --

8 JUSTICE ALITO: No. No. If the ratio -- if
9 lawyers were -- I know that if lawyers were compensated
10 at \$125 an hour when this was enacted and paralegals
11 were compensated at \$75, then it would be a 2-1 ratio,
12 and you'd preserve that.

13 MR. WOLFMAN: Yes. You could do that, and
14 what you would have is just a static rate for all
15 players in the market, and there's no suggestion that
16 Congress intended that. After all, I using the term
17 "prevailing market rates" --

18 JUSTICE SCALIA: Am I to understand, you
19 claim that even if they are expenses, they should --
20 they should be paid for at market rate, don't you?

21 MR. WOLFMAN: Well, not quite market rate,
22 but this goes to -- I said I had two responses to
23 Justice Alito's question.

24 And the problem is that when we talk about
25 out-of-pocket expenses, again, which is where the

1 government is trying to shoe-horn the paralegal
2 services, we talk about out-of-pocket expenses for the
3 client, for the prevailing party. Expenses, whether
4 they are out-of-pocket expenses or attorney fees are --
5 are awarded to the prevailing party, and the cost faced
6 by the prevailing party is the cost to the prevailing
7 party, what it paid for the paralegal services.

8 Now, that will approximate the market rate,
9 no question about it. It might not always be synonymous
10 with it.

11 Justice Alito, I am not suggesting that
12 Congress could not have done it that way, but there is
13 no suggestion that it did. After all, in this statute,
14 compared to other fee-shifting statutes, it specifically
15 said it wants to work at the prevailing market rate.
16 And the only reason that in some markets for some
17 lawyers the -- the ceiling, the cap has become a floor
18 is because of hyperinflation in the legal services
19 market. It has nothing to do with the compensability of
20 paralegal services vis-a-vis junior associates, as I've
21 mentioned.

22 JUSTICE GINSBURG: Mr. Wolfman, if there's
23 any discretion in the district judge in setting the
24 amount of the fee, then why wouldn't it be appropriate
25 to say, now there's a cap for the lawyer is \$125 an

1 hour, but we know the true market rate for that lawyer
2 is \$200? Does it do the same thing with the paralegal?
3 The true market rate is X, and we're going to knock it
4 down so that it will match the knock-down for the
5 lawyer?

6 MR. WOLFMAN: Well, the reason for that
7 is -- is that there -- there is no suggestion at all
8 that that's what was being contemplated in this statute.
9 And that may be the way that if you had seen this
10 phenomenon that's developed, which again is
11 hyperinflation in the legal services market, you might
12 have written it that way.

13 It's true that the courts have discretion.
14 There's always a reasonableness factor. But the
15 overriding factor is the market rate. The Congress said
16 "prevailing market rate." And to me, that would be
17 outside the bounds of any discretion that had been
18 afforded.

19 JUSTICE GINSBURG: But isn't it likely that
20 when Congress said that, it was not thinking of
21 paralegals.

22 MR. WOLFMAN: No. I think -- I don't think
23 -- with respect, I don't think that's the question.
24 Going back -- that takes us back to Missouri versus
25 Jenkins, and what the Court said there is that you have

1 this word "attorney's fee," and the way of thinking of
2 attorney's fees is to include everything that goes into
3 the labor of the attorney that ultimately gets billed to
4 the client and that paralegal services are an aspect of
5 that.

6 Two years later, in West Virginia University
7 Hospitals, the Court made -- made essentially the same
8 point again, which is that -- that at the time that all
9 these fee-shifting statutes were passed, paralegal
10 services, to the extent that they existed, were
11 traditionally subsumed within the lawyer's rate. And so
12 that once law firms started billing for them
13 separately --

14 CHIEF JUSTICE ROBERTS: I'm sorry.
15 "Traditionally subsumed in the lawyer's rate," are you
16 suggesting, when this statute was passed, they weren't
17 billed separately to the client?

18 MR. WOLFMAN: No. I'm not suggesting that.
19 I'm saying traditionally, well before they were passed,
20 they were subsumed to the market rate. There -- there
21 came to be a tradition, roughly in the '70s and early
22 '80s, for the separate billing. And what the Court held
23 emphatically in Missouri versus Jenkins was that the
24 separate billing didn't tell you anything about whether
25 there were attorney's fees.

1 Let me -- let me -- if I could extend my
2 answer a little bit. Appreciating what the government's
3 argument is here, the government's argument is that if
4 the paralegal fee, the paralegal services, are subsumed
5 within the lawyer's rate, if there were a law firm out
6 there that still didn't do the separate billing, that
7 would be compensable as an attorney's fees when billed
8 within the lawyer's rate. But if they're billed
9 separately under EAJA, the government's position is
10 they're not compensable at lawyers' rates.

11 JUSTICE SCALIA: Of course, that's no loss
12 to the government because when you put it into the
13 lawyer's rate, you hit the ceiling for the lawyer's rate
14 that much sooner.

15 MR. WOLFMAN: That is true --

16 JUSTICE SCALIA: It seems like that would be
17 --

18 MR. WOLFMAN: -- but that was not true in
19 1980.

20 JUSTICE SCALIA: Right.

21 MR. WOLFMAN: And that's the point we are
22 making here. And it's true that it may not be, in this
23 day and age --

24 JUSTICE SOUTER: I'm sorry. Why wasn't it
25 true in 1980? You simply mean in 1980 the two together

1 wouldn't have gotten as high as the cap?

2 MR. WOLFMAN: Absolutely. If you -- in most
3 markets for most lawyers -- we deal with this
4 extensively in our brief. We cite case after case to
5 this effect. And I think -- and I don't mean to be glib
6 here -- I think the way to put this, that in 1980 and
7 1985, that the statute covered virtually all lawyers'
8 fees rather comfortably on Main Street, if not
9 necessarily on K Street and Wall Street. I mean -- and
10 that's what the statute was for.

11 I know it's hard to appreciate that now,
12 when we see, you know, very high rates from the large
13 law firms, but put yourself back in that perspective,
14 which is -- in that vantage point, which we try to do in
15 our brief.

16 JUSTICE KENNEDY: Assume that our decision
17 will in part drive the market either way, what we do
18 will effect the way paralegals are used, the way billing
19 is done. If that is true, is there some utility in
20 simply following the EAJA so we give a consistent signal
21 to the market and then if Congress wants to change it,
22 it can? I mean --

23 MR. WOLFMAN: I'm not sure I understand the
24 question.

25 JUSTICE KENNEDY: Rather than follow EAJA, I

1 mean follow 1988, follow Jenkins. Follow Jenkins.

2 MR. WOLFMAN: Well, I certainly think
3 there's utility in doing that, and Congress can revisit
4 this. The difficulty is that Congress has not revisited
5 it. And Congress could revisit this and make -- I think
6 it's -- it is clear right now that the -- the purposes
7 of the statute are not being fully carried out because,
8 again, of the hyperinflation in legal services.

9 JUSTICE KENNEDY: Are there some
10 disutilities from an economic standpoint in having two
11 structures: Jenkins for one kind of cases, EAJA in the
12 other cases as the government wants?

13 MR. WOLFMAN: Is there some --

14 JUSTICE KENNEDY: Are there some
15 disadvantages to the system?

16 MR. WOLFMAN: I -- of course, we don't think
17 there are, but the -- to be candid, the -- the Federal
18 Circuit pointed to one purported disadvantage. The
19 Federal Circuit claimed that to the extent that there
20 was some incentive that would be driven by a contrary
21 decision, it would be that lawyers would shunt off more
22 work than is efficient to paralegals, and it's --

23 CHIEF JUSTICE ROBERTS: But that's -- I saw
24 that analysis. This Act only applies when the
25 government's position is not substantially justified.

1 People are not going to structure their billing
2 arrangements assuming the government's position is not
3 even going to be substantially justified.

4 MR. WOLFMAN: I certainly agree that it is
5 unlikely, but as we point -- very unlikely. I agree
6 with that, Mr. Chief Justice, but there is another point
7 that I would make that we cover quite extensively in our
8 brief, which is that -- which is that -- I think you
9 have to step back and think about that for a second,
10 what the Federal Circuit did.

11 The notion that lawyers are going to shunt
12 off work to paralegals that they wouldn't otherwise
13 have, there are -- runs head long into both economic and
14 ethical constraints on the profession. Economic,
15 because if that was occurring, i.e., people were --
16 lawyers were giving paralegals work that they could not
17 sensibly do, clients would, one, insist that work not be
18 allocated like that; or, two, take their business
19 elsewhere. That's the economic constraints. If, in
20 other words, the whole premise --

21 CHIEF JUSTICE ROBERTS: That point makes
22 some assumptions about the relative abilities, say, of
23 junior associates and senior paralegals, and I'm not
24 sure are well founded.

25 (Laughter.)

1 MR. WOLFMAN: Well, Mr. Chief Justice, I
2 will -- I believe that you have greater experience on
3 that than I do.

4 But I think the other answer to that is the
5 ethical constraints. Even if there weren't economic
6 constraints -- I mean, as we pointed out in our brief,
7 sure, the paralegal profession has become an impressive
8 one. They do a lot of things that lawyers used to do,
9 no question. But a lawyer can't shunt off work that
10 they can't handle because there are ethical constraints.

11 I can't, for instance, give a paralegal,
12 say, responsibility for -- principal responsibility for
13 writing an appellate brief. I could not or would not do
14 that because they can't do that, generally speaking,
15 because of their training and experience.

16 So I just think that just falls apart. And
17 as you say, Mr. Chief Justice, the fact that -- of the
18 substantial justification defense and other reasons as
19 well, it's unlikely -- and this gets back to Justice
20 Kennedy's questions -- unlikely that law firms will
21 structure their practices and businesses around this
22 problem.

23 The real problem, though, is not an attack
24 on the government fisc, as we point out in our brief.
25 The impact on the public fisc for rejecting the Federal

1 Circuit's decision would be negligible. It's worth
2 noting, though, that the Federal Circuit's decision
3 would have an impact on clients most affected by it.

4 Three groups comprise the great majority of
5 EAJA applicants: Small businesses like Richlin,
6 disabled veterans, and disabled Social Security
7 claimants. In all three situations, clients will lose
8 if paralegal services are awarded at the cost of those
9 services to their lawyers. For the latter two groups,
10 veterans and Social Security claimants, Federal law, in
11 fact, requires that EAJA -- that the EAJA fee be paid to
12 the claimant.

13 So, although it makes economic sense for
14 paralegals to work on significant aspects of Social
15 Security and veterans' cases -- and that's set out at
16 some length in the amicus brief of the National
17 Association of Legal Assistants -- the claimants will
18 lose those fees under the government's view of EAJA.

19 CHIEF JUSTICE ROBERTS: Is that pertinent --
20 is that pertinent on the cap questions we've been
21 discussing too? I mean, if you're representing a
22 disabled veteran, is the lawyer typically charging more
23 than \$125 an hour?

24 MR. WOLFMAN: No. This is how it works, and
25 that's why I said Federal law provides for this. And

1 let me give you the citations. They are also set forth
2 in footnote 2 of this Court's decision in Scarborough.

3 The way the Social Security and veterans
4 situations work -- and, again, they comprise the
5 majority of these cases -- is that the Federal law
6 allows the lawyer to take a contingent fee out of the
7 back benefits, not to exceed 20 and 25 percent of the
8 veterans' or Social Security claimants' back benefits,
9 respectively.

10 But then what Federal law also provides --
11 and the citations are Public Law 99-80 section 3 and
12 Public Law 102-572 section 506(c) -- Federal law
13 provides that to the extent that there is an EAJA fee,
14 the lawyer may not double-dip and has to send that fee
15 directly back to the client. So for these relatively
16 impecunious claimants, essentially chopping the
17 paralegal fee in third or in half or something like that
18 would have a real impact on claimants.

19 JUSTICE BREYER: I would not say no one
20 else, but not everyone else places the importance on
21 legislative history that I do, but I do. And I saw here
22 that the Senate Judiciary Committee considered all these
23 arguments, they wrote a report; and they sided with the
24 government.

25 MR. WOLFMAN: Well --

1 JUSTICE BREYER: And I know it was there,
2 but it doesn't matter to me it was on a bill that was
3 later not passed, and then unless there is something
4 different --

5 MR. WOLFMAN: Well --

6 JUSTICE BREYER: -- for that reason, because
7 in my own mind I'm thinking there were a group of people
8 on the committee, they went through the issue, they
9 reflected views of their principles, they work it out,
10 and unless something changed that makes me think that
11 isn't the working out of it, I would put a lot of weight
12 on it.

13 MR. WOLFMAN: Well -

14 JUSTICE BREYER: And now you're going to
15 tell me what there is, I hope.

16 MR. WOLFMAN: I'm certainly going to do
17 that, Justice Breyer. The first thing is -- and I do
18 want to point out for the benefit of the other members
19 of the Court that -- is that that piece of legislative
20 history accompanied vetoed legislation. But let me also
21 say that, and we explained this at some length both in
22 our opening and reply briefs, that the government relies
23 on a snippet saying that paralegals -- paralegal
24 services can be awarded, and then it says paren, at
25 cost. But there are a number of other aspects of that

1 same piece of legislative history that point in exactly
2 the opposite direction in terms of market rate recovery,
3 and in fact the Court cites -- excuse me, the committee
4 cites a case from the Sixth Circuit, the Northcross
5 case, in which paralegal services were awarded at market
6 rates.

7 CHIEF JUSTICE ROBERTS: And of course they
8 may mean -- may have meant costs to the client.

9 MR. WOLFMAN: And that is -- and that is my
10 next point, Mr. Chief Justice, which is that it said "at
11 cost," but at whose cost? And the problem here, is that
12 this piece of fee shifting statute and every other fee
13 shifting statute of which I am aware awards a fee to the
14 prevailing party. The purpose of the statute is not to
15 enrich the lawyers. The purpose of the statute is to
16 provide incentive for lawyers to handle cases on behalf
17 of clients. Unless the Court has any further questions,
18 I'll reserve the balance of my time.

19 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
20 Mr. Yang.

21 ORAL ARGUMENT OF ANTHONY YANG
22 ON BEHALF OF THE RESPONDENT

23 MR. YANG: Thank you Mr. Chief Justice, and
24 may it please the Court:

25 EAJA authorizes Federal agencies to award

1 two distinct categories of litigation expenses against
2 the United States: fees and other expenses. The most
3 natural reading of attorney's fees is one that embraces
4 an attorney's time, payments for an attorney's time,
5 whereas the broader term "other expenses" naturally
6 encompasses outlays that are paid by an attorney during
7 its representation of a client including the cost of
8 paralegals whose work may be necessary for the
9 preparation of a client's case.

10 Congress recognized this distinction between
11 attorney's fees and other expenses when it enacted EAJA
12 in 1980. The relevant Senate report, like EAJA's House
13 report, stated that the ceiling on "attorney's fees" --

14 CHIEF JUSTICE ROBERTS: You say the relevant
15 one was of course on a legislation that wasn't passed,
16 right?

17 MR. YANG: Actually this is even before EAJA
18 lacks the first time, this is upon EAJA's initial
19 enactment in 1980, there was a Senate report and a House
20 report and both have functionally identical language.
21 The Senate report states that quote, "attorney's fees
22 relates only to the compensation of lawyers themselves"
23 and then goes on to explain that costs connected with
24 their representation of a particular interest in a
25 proceeding is not affected by the limitation that is the

1 cap on attorney's fees. When Congress then re-enacted
2 EAJA after its repeal, Congress again made clear -- and
3 this is the report that, Mr. Chief Justice, you were
4 referring to -- made clear that the "other expenses" of
5 EAJA fees includes an attorney's out-of-pocket expenses,
6 and that those out-of-pocket expenses were illustrated
7 by the specific example of paralegal time being
8 reimbursed at cost.

9 JUSTICE GINSBURG: What is cost? Could you
10 -- one could say I'm going to look at the Internet and
11 come up with \$35 dollars an hour, or you could say in
12 the case of a paralegal there is a part of the overhead,
13 there is the fringe benefits -- so just giving the
14 hourly rate is deceptive of what the actual cost is to
15 the law firm, because the law firm has to add on to
16 determine what in fact it's paying for the paralegal,
17 the fringe benefits and part of the overhead.

18 MR. YANG: Justice Ginsburg, the government
19 agrees that more than simply salary would be
20 reimbursable at cost. And I think the appropriate way
21 to calculate cost in the context of paralegals would
22 be -- would parallel how the government calculates its
23 cost for attorneys when the government seeks attorney's
24 fees. And what the government does is it uses salary as
25 a baseline and then adds -- for the government 29 or

1 approximately 29 percent of salaries for other benefits.
2 And --

3 CHIEF JUSTICE ROBERTS: Well and it might be
4 quite different for private practitioner. Your benefits
5 for health care will probably cost you a lot less than
6 private practice and doesn't that make the paralegal
7 fees quite different than the other items of expenses
8 that are listed? You know, expert witnesses, you get a
9 bill, that's how much it costs the lawyer. Studies,
10 analysis, engineering reports, you don't have to figure
11 overhead benefits with respect to any of those. All of
12 a sudden you throw in another item, paralegal costs, you
13 put those under costs, and now you've got to go through
14 this elaborate calculation that is going to be not worth
15 it, almost, for a typical firm representing a small
16 client.

17 MR. YANG: Mr. Chief Justice, I'm not sure
18 that I agree with some of the premises that you had.
19 First, with respect to the analysis and reports and
20 such, those are not always things that are done outside
21 a law firm. The statutory text, in fact, allows the
22 reimbursement of costs for any study, analysis, report,
23 test or project; it's not limited to things that are
24 done outside of a firm. I mean also be --

25 CHIEF JUSTICE ROBERTS: Well, in most firms

1 an engineering report would be outside the --

2 MR. YANG: Well, that's an engineering
3 report, except for maybe, some intellectual property
4 firms but --

5 JUSTICE KENNEDY: It seems to me the
6 question is a valid one, that you're running away from
7 the question.

8 MR. YANG: Well --

9 JUSTICE KENNEDY: And I'll let you answer.
10 It suggests this further inquiry. Suppose that a solo
11 practitioner knows that a paralegal in another firm is
12 very good at this and he asks the other lawyer, may I
13 use your paralegal, and he just sends that lawyer the
14 bill. What -- how would that be billed under your view?

15 MR. YANG: Well, there is now two questions
16 in the air.

17 JUSTICE KENNEDY: They both -- they both
18 apply, they both apply to outside experts.

19 MR. YANG: Well, when a paralegal is
20 outsourced, which is your question, there is two
21 potential situations. One may be that the paralegal is
22 less expensive, and if that were the case you would
23 think that firms would normally outsource their
24 paralegals if it's less expensive to obtain them from
25 the outside than the inside.

1 CHIEF JUSTICE ROBERTS: Well, but that
2 wasn't Justice Kennedy's question. His was the
3 outsourced paralegal is better at a particular task.

4 MR. YANG: The outsourced paralegal is
5 better, it may be that the actual cost to the firm is
6 the cost that the firm pays for that paralegal to the
7 third party.

8 JUSTICE SOUTER: Well in that case it would
9 bill the paralegal in the same way it would bill, I take
10 it, the expense of, let's say, having water tested in a
11 pollution case. It would -- it would -- I take it it
12 would bill the client dollar for dollar what it had to
13 pay.

14 MR. YANG: In fact that's right --

15 JUSTICE SOUTER: And add --

16 MR. YANG: And not add profit on to that --
17 that paralegal as well.

18 JUSTICE SOUTER: They don't add a profit and
19 they don't add a profit on to -- to travel expenses and
20 things like that.

21 MR. YANG: Right.

22 JUSTICE SOUTER: And -- so if that is so, in
23 each case cost means cost to the client, and you're
24 coming up with a new category of expense, which is cost
25 to someone else, and why should there be a subcategory

1 of expense, in which cost does not mean cost to the
2 client when every other category of expense does mean
3 cost to the client?

4 MR. YANG: Justice Souter, every other
5 category does not mean cost to the client. In fact,
6 EAJA specifically provides for fees, but the fees are
7 based on the prevailing market rates for similar
8 services.

9 JUSTICE SOUTER: Because there is a separate
10 provision for fees.

11 MR. YANG: That's correct, Your Honor.

12 JUSTICE SOUTER: Yes.

13 MR. YANG: But in that context a client does
14 not incur any legal fees, have any obligation to pay any
15 fees, and courts routinely award EAJA fees when there
16 has been no cost to the client in fees, and similarly,
17 even if the client has an obligation to pay the cost in
18 those circumstances -- where for instance a firm is
19 providing pro bono services or a legal services
20 organization is providing pro bono services to a client,
21 the client does not have to incur or pay the costs.

22 The question is whether those costs have
23 been ultimately incurred and have been incurred at the
24 rate that the firm has incurred the cost on behalf of
25 the client.

1 JUSTICE STEVENS: At this discretion, let me
2 ask this question. Maybe it's the same question Justice
3 Kennedy asked, but I want to be sure of your answer.
4 Suppose you had independent firm of paralegals. I don't
5 know whether the market contains them, but it surely
6 could. A firm that they are all paralegals, and they
7 then bill the law firm at their own hourly rate, and
8 then the law firm in turn bills the client. In that
9 situation, would the market rate of the independent firm
10 of paralegals govern?

11 MR. YANG: It would be the rate that is
12 ultimately paid. If you're outsourcing the paralegals
13 it would be the rate paid by the firm for those
14 paralegals. Now it may also be, for instance --

15 JUSTICE STEVENS: Do I understand the
16 government's position that the -- the result would
17 different if a firm uses its own paralegals as opposed
18 to outsourcing?

19 MR. YANG: The result is not different, Your
20 Honor. The result is the same in the sense that the
21 firm's cost --

22 JUSTICE STEVENS: No. But under my example
23 they would be paying the market rate for paralegals, and
24 I think you say they could be reimbursed for that.

25 MR. YANG: It wouldn't necessarily be the

1 market rate. It may would be what they are paying,
2 which may well reflect the market rate.

3 JUSTICE STEVENS: Well, they are not market
4 to make business. I presume the paralegals would charge
5 the going rate.

6 MR. YANG: If they did.

7 JUSTICE STEVENS: I assume that they also
8 charged the market rate.

9 MR. YANG: It may be. But if it's the
10 market rate, there would presumably be no incentive for
11 a firm to outsource --

12 JUSTICE KENNEDY: But again, you're not
13 answering the hypothetical. Let's assume two cases:
14 Case A, you hire an outside paralegal at \$85 an hour.
15 He is outside, he is independent. He is just like the
16 expert engineer in the Chief Justice question, \$85 an
17 hour. Case two, it's your own paralegal. The
18 prevailing rate for which you charge general clients is
19 \$85 an hour.

20 Why should there be a difference?

21 MR. YANG: There should be a difference,
22 Your Honor, because with respect to outsourced firms,
23 there is no concern that a firm is going to add, well --
24 if the firm is only going to bill at its cost, the firm
25 is not going to add additional profit to the outsourced

1 paralegal.

2 So if, for instance, a firm paid \$85, under
3 our view the firm could not turn around and charge \$95
4 to the client. Likewise -- and the reason that this is
5 important under your context --

6 JUSTICE KENNEDY: But under your -- they
7 can't even charge \$85 an hour.

8 MR. YANG: Well, that's correct if their
9 cost, actual cost would be less in house. And the
10 reason that's important is because in EAJA, unlike
11 section 1988, there are several statutory differences.
12 One, EAJA provides for other expenses, so the term
13 "attorney's fees" is not the only terms that needs to be
14 construed by the court. Other expenses needs to be
15 construed in a manner that gives it meaningful effect.

16 And Congress recognized, again, in the
17 legislative history to the extent you could disagree on
18 the meaning of other expenses, Congress was very clear
19 both in 1980 and then again in 1984 that other expenses,
20 attorney's fees do not include things that attorneys pay
21 and only compensates attorneys for their own hourly
22 rate.

23 And the reason that the fee cap was
24 important is because EAJA, as this Court recognized in
25 Underwood, is not intended to be fully compensatory. If

1 the cap for --

2 JUSTICE GINSBURG: I know you said that a
3 few times and you have authority for it, but it seems to
4 me odd if you look at 1988 and if the attorney's fees
5 and costs -- and costs is very limited in the statute in
6 1920 -- and if you have attorney's fees and other
7 expenses, other expenses is a much larger category than
8 costs within 1988. So I -- I would think that, well,
9 EAJA is the more compensatory because it allows for more
10 items.

11 MR. YANG: Justice Ginsburg, under Jenkins'
12 rationale, Jenkins recognized that when there is not
13 another -- another box of other expenses, where in a
14 statute which was intended to be fully compensatory,
15 that attorney's fees necessarily must include
16 compensation for all types of costs that a lawyer might
17 incur in the presentation/representation of a client.
18 That works for Section 1988.

19 But if that rationale were applied to the
20 EAJA context, if attorney's fees were given the same
21 meaning in EAJA, there is little or no work for other
22 expenses to be done in the statute, because already
23 you've pushed all of those expenses into the box of
24 attorney's fees and --

25 CHIEF JUSTICE ROBERTS: Counsel, your --

1 this question only arises when the position of your
2 client was not substantially justified. Now under
3 those -- and it was designed, to some extent, to
4 penalize you because -- because of that fact. Why
5 should we adopt a construction that, in effect,
6 penalizes the client who has had to face the Federal
7 Government when the Federal Government's position was
8 not substantially justified? They are going to have to
9 pay the paralegal fees at market rates, but they are
10 only goes to get compensation at cost.

11 MR. YANG: Mr. Chief Justice, the reason
12 that you would adopt our construction is because
13 Congress is balancing more than the intent to provide
14 compensation for prevailing parties in EAJA. It was
15 also intending to balance the effect on the Federal fisc
16 and limit the government's exposure as a means of
17 passing the Act.

18 CHIEF JUSTICE ROBERTS: It's kind of a
19 stretch to suggest in a situation where they pass a law
20 that only applies to individuals or small businesses
21 where they put a cap in and so on, that another way that
22 we are going to prevent damage to the fisc was to treat
23 paralegal expenses as costs rather than at market rate.
24 I suspect that was not foremost in their mind.

25 MR. YANG: Well, Mr. Chief Justice, I think

1 the legislative history illustrates that, in fact,
2 paralegals and other costs --

3 CHIEF JUSTICE ROBERTS: Well, it assumes
4 that when they said "costs," that they meant costs to
5 the firm as opposed to costs to the client. And that, I
6 think, is entirely an open question.

7 MR. YANG: Well, the relevant page of the
8 legislative history in 1984 that you're talking about
9 explains that Congress wanted to adopt the views of the
10 Administrative Conference in its model rules, and goes
11 on to quote the Administrative Conference --

12 CHIEF JUSTICE ROBERTS: Not to belabor the
13 point it meant that the people who drafted the Senate
14 report may have meant that.

15 MR. YANG: Well, that's a problem with all
16 legislative history.

17 JUSTICE BREYER: I don't think it is a
18 problem with legislative history.

19 (Laughter.)

20 JUSTICE BREYER: I think that the people in
21 Congress who hired their staffs pay attention to what
22 the staffs say in precisely the same way that any other
23 executive --

24 CHIEF JUSTICE ROBERTS: Do we know what the
25 President's view was on that question when he signed the

1 legislation into law, which is what he was required to
2 do before it became law and which he did not do under
3 the prior bill?

4 MR. YANG: The President did not express a
5 view, but what we do know is that the legislative
6 history in 1984 dealt with language that was identical
7 to that ultimately passed by the Senate -- by Congress
8 and signed by the President. And that legislative
9 history explains and quotes the Administrative
10 Conference that says that what should be awarded is an
11 award of reasonable expenses of the attorney.

12 JUSTICE SCALIA: Do you know of any other
13 case where we used -- I mean it just gets worse and
14 worse. Do you know any other case where we've used the
15 legislative history of a vetoed bill to determine the
16 meaning of a later bill that was not vetoed?

17 MR. YANG: Yes, Justice Scalia.

18 JUSTICE SCALIA: Good. What is it?

19 MR. YANG: This Court has twice cited
20 unanimous opinions, the same report that we cite here,
21 one of which was in the Jean opinion. In fact, the
22 Court not only cited the Senate report, but also cited
23 the House report to the 1984 bill.

24 JUSTICE SCALIA: When was that?

25 MR. YANG: Jean?

1 JUSTICE SCALIA: Yes.

2 MR. YANG: Pardon my --

3 JUSTICE SCALIA: Never mind. Don't take --
4 don't waste your time.

5 JUSTICE BREYER: I mean that wouldn't be
6 surprising would it, that wouldn't be surprising because
7 you have, in fact, very complex bills that have 14
8 sections and section of the B bill could have been
9 vetoed -- been vetoed because of problem with Section 14
10 and repassed without Section 14, in which case the
11 legislative history for the other 13 sections would be
12 highly illuminating as to what they mean.

13 MR. YANG: In fact Congress recognized that,
14 Justice Breyer, when it re-enacted -- when it
15 readdressed the bill in 1985, the relative legislative
16 history specifically references the bill that existed
17 before that it was reported by --

18 JUSTICE BREYER: The question that I had in
19 respect to this statute is -- is that my impression and
20 here -- I'd like to know how they bill secretary's
21 times. I'd like to know how they bill rent. And my
22 thought is -- and I want to be either verified or told
23 I'm wrong and explain it, that when you have no cap, the
24 lawyer and the client want to shove everything possible
25 into the rubric attorney's fees, including the kitchen

1 sink, if the plumber is there in the kitchen of the law
2 firm.

3 (Laughter.)

4 JUSTICE BREYER: That's fine. No problem.
5 There is no other way to get paid for them.

6 But where you have a cap, you should shove
7 everything the other side, if expenses are going to be
8 paid for it, because that cap means that the lawyer will
9 not get his full pay back and therefore, the lower the
10 cap, the more you want to be sure it's covering only
11 that lawyer's time. And everything else goes into
12 expense so that you can pay the lawyer adequately and he
13 will recover his expenses elsewhere.

14 Was that the theory of this bill? Is there
15 any evidence that that was the theory? If you did it
16 that way, would anything get mixed up?

17 MR. YANG: Well, the theory of the bill was
18 that attorney's fees would be based at prevailing market
19 rates, and that prevailing market rates would embody a
20 certain set of costs that might be reimbursed. I would
21 think that the prevailing practice is not to bill
22 separately for the kitchen sink, but as the Court
23 explained in Missouri versus Jenkins, Missouri's
24 analysis would extend to your hypothetical, Justice
25 Breyer. It explains that reasonable attorney's fees had

1 to cover all kinds of costs, including the costs of
2 secretaries, messengers, librarians or janitors who
3 might well be cleaning the kitchen sink.

4 JUSTICE GINSBURG: Am I right that when this
5 language first came in -- this is in relation to Justice
6 Breyer's question -- there was no cap? When did the --
7 when was the cap put on?

8 MR. YANG: The cap in EAJA was imposed from
9 the very beginning.

10 JUSTICE GINSBURG: It was.

11 MR. YANG: Yes. It was. It was in the
12 Senate bill. It was -- it was removed by subcommittee,
13 reinserted by the full judiciary committee, passed the
14 Senate, came over to the House and continued on for
15 passage in 1980.

16 JUSTICE GINSBURG: It would be a lot of
17 weight to be put on three little words: "Billed at
18 cost." If you just read those words, you could be the
19 costs to the client, the cost to the law firm and then
20 you'd have to go to this further document, the
21 Administrative Conference document, it's rather thin I
22 think.

23 MR. YANG: Well, Justice Ginsburg, we are
24 relying not only on the 1984 but also on the 1980
25 legislative history, which although it does not

1 specifically refer to paralegals, explains that in
2 connection with the term "attorney's fees" and the
3 ceiling on attorney's fees -- and I'll quote again from
4 the Senate report, which was the first: Ceiling on
5 attorney's fees relates only to the compensation of
6 lawyers themselves. And then goes on to say: That does
7 not include other costs connected with their
8 representation of a particular interest in a proceeding.

9 And when Congress did that, it specifically
10 recognized that it was taking a different approach than
11 that taken in other fee-shifting statutes. The very
12 next sentence explains that the committee notes that
13 this section is not intended to limit or affect the
14 computation of reasonable attorney's fees under any
15 other provision of law, and gave as an example the Civil
16 Rights Act. That is section 1988.

17 So Congress knew from the very beginning
18 that its treatment of attorney's fees as being limited
19 only to attorneys and the larger more capacious category
20 of other expenses, capturing all other costs that an
21 attorney might incur in the representation of a client
22 was one that was both different from other statutes, and
23 one that was intended by Congress. And it's not
24 reflected not only by the legislative history, but again
25 by fee caps.

1 The fee caps I believe you started here were
2 specifically designed and set by reference to attorney's
3 rates, the exceptions to the fee caps -- again
4 specifically reference attorneys. There is an exception
5 that you can exceed the fee cap when there is a limited
6 availability of the attorneys qualified at the
7 proceedings involved. And it would be anomalous in that
8 context where Congress has paid particular attention to
9 the billing rates of attorneys, set the cap based on
10 attorney's rates with no reference to paralegals to
11 assume --

12 JUSTICE STEVENS: May I go back --

13 MR. YANG: -- that Congress intended --

14 JUSTICE STEVENS: May I go back to the
15 point, because I think you were cut off before you went
16 into the full legislative history. I'm still concerned
17 about the argument that even if they are not fees but
18 rather costs, that the costs should be those that are
19 billed to the client. And you think there is some
20 conclusive answer in the legislative history that that's
21 not the case.

22 MR. YANG: Well, the legislative history
23 when you -- again, if you look to what Congress was
24 talking about, both the Administrative Conference rules
25 and the quotation of the Administrative Conference rules

1 --

2 JUSTICE STEVENS: Which took place when?

3 MR. YANG: This was in 1984.

4 JUSTICE STEVENS: At that time were they
5 billing paralegal's fees at cost to the client? Was
6 it --

7 MR. YANG: In fact, Your Honor, there was a
8 dispute that the legislative history speaks to the
9 controversy that evolved regarding the -- whether other
10 expenses of the term would include more than what was
11 specifically enumerated in the statute. And what we
12 cite to in our brief as a footnote at page 28, footnote
13 12, there was a dispute. Several courts had concluded
14 that paralegals were reimbursed at cost. In fact, the
15 Northcross decision, which the committee reports,
16 specifically references -- concluded that it was costs
17 to the attorney, as this Court recognized in Jenkins.
18 Footnote seven of Jenkins discusses the Northcross
19 decision and explains that Northcross awarded
20 out-of-pocket expenses for attorney's fees at the cost
21 to the attorney.

22 And so, when you take that controversy which
23 had evolved regarding how you compensate these other
24 expenses -- and specifically paralegal expenses -- along
25 with Congress' statement that it intended to compensate

1 out-of-pocket expenses incurred with connection to a
2 case, the model rules and Northcross when you combine
3 that with the statement that paralegals are to be
4 compensated at cost, seems clear to us that Congress is
5 intending that in contrast to attorney's fees, which
6 have a profit element embedded in them and a profit
7 element capped by the fee cap that Congress imposed in
8 1980 -- that when read together, it seems fairly clear
9 to us that Congress intended --

10 JUSTICE STEVENS: Every expense that's
11 reimbursed at cost has a profit element in it for
12 whoever performed the service.

13 MR. YANG: But when it's within the control
14 of the firm --

15 JUSTICE STEVENS: Business or otherwise.

16 MR. YANG: -- within the control of the
17 firm, there is a particular danger that the firm can
18 inflate its own costs. Whereas when it's going out to
19 the market, of course, it's not going to control the
20 profits.

21 CHIEF JUSTICE ROBERTS: Well, maybe this is
22 the same question Justice Breyer asked, but I haven't --
23 I didn't grasp the answer. Under your system it would
24 make sense for lawyers to charge separately for
25 photocopy services, telephone services, so on because

1 then they are not going to be subject to the attorney
2 fee cap. And they may think, look, the difference
3 between cost and market rate is relatively small; the
4 difference between our hourly rate and \$125 is large.

5 MR. YANG: You're asking about the
6 incentives that firms might have.

7 CHIEF JUSTICE ROBERTS: Well, I'm just
8 saying if we adopt your position, isn't it going to be,
9 I guess, worse for your client because firms will, as
10 I've been told firms sometimes do, charge separately for
11 things at a higher rate than their cost? They will
12 charge higher rate for photocopy services because they
13 try to factor into it overhead and things like than
14 cost.

15 MR. YANG: Overhead profit. We don't
16 believe it's actually going to change any practices,
17 because ultimately, when you're looking at what costs
18 are reimbursable under EAJA, it has to be costs that are
19 not traditionally already paid for in the attorney's
20 fees. So you have to look not to the practice of the
21 specific firm that's at issue, you have to look at the
22 prevailing practice.

23 CHIEF JUSTICE ROBERTS: Well, I would say --
24 I would say that it's now traditional for firms to
25 charge, say, more for their photocopy services than it

1 cost them.

2 MR. YANG: Well, if that's the case under
3 our reading, of course, we would -- we would say that
4 that is -- that is not a type of expense that was
5 contemplated by EAJA, because Congress already provided
6 for profits that attorneys get from representing a party
7 within the attorney fee and cap that.

8 The whole idea of a cap is to limit the
9 reimbursement that a firm might get from EAJA below what
10 the prevailing market rates for the services would be.
11 If the -- the prevailing market rates were below the
12 cap, the cap never comes into play. The only reason for
13 that cap is to limit compensation below market rates.
14 And it would be anomalous to allow --

15 JUSTICE STEVENS: But the cap doesn't apply
16 to expenses, does it?

17 MR. YANG: I didn't catch you.

18 JUSTICE STEVENS: The cap does not apply to
19 reimbursement expenses at cost?

20 MR. YANG: Precisely, because in our view
21 expenses are at cost and it is not -- you don't have the
22 same danger of having firms imbedding profit within
23 their own rate.

24 JUSTICE STEVENS: It seems to me just the
25 opposite just as the Chief Justice suggests. It seems

1 to me you're creating an incentive for the firms to --
2 to charge as much as they can -- I mean, under market
3 rates for everything under the -- under the time of the
4 lawyer himself.

5 MR. YANG: But again, and under our view if
6 they were to -- if a firm were to charge, say, 50 cents
7 for a photocopy and it only cost 10 or 15 cents for that
8 photocopy, under our view the firm would only be
9 reimbursed for our for the 15 cents. The not an
10 incentive to bill the client for anything more --

11 JUSTICE STEVENS: No, because other costs
12 reasonably interpret to include overhead. It's not just
13 the paper and the accounting time.

14 MR. YANG: Overhead, we don't believe, is
15 fairly attributable to a particular case. And, in fact,
16 Congress was specific about this particular point on
17 overhead in the legislative history.

18 CHIEF JUSTICE ROBERTS: Well, I think you
19 missed my point. It was even if you're right, 50 cents
20 and they can only charge 15 cents, they have an
21 incentive to separately charge for photocopying, because
22 they get the 15 cents, and otherwise it's going to --
23 they are going to lose it over the cap if you say no
24 that's part of the attorney's fees.

25 MR. YANG: I guess you're right to some

1 extent there would be incentive to shift out costs even
2 though there would be less of an incentive than shifting
3 out costs plus profit. But the reason that -- that
4 the -- the reason that we think that that's a bit
5 different is because, again, Congress intended for the
6 profit making part of a -- an attorney's compensation to
7 come out of attorney's fees, and then are capped. And
8 there is very little incentive to -- to shift out fees
9 unless the market itself is already doing that. And if
10 the market itself is already billing for photocopies,
11 then that's what you're going to get. Even if you
12 didn't separately charge for photocopies as part of your
13 rate, you could bill under EAJA. The market is
14 providing for photocopies being billed separately, you
15 can simply submit a request for photocopies.

16 JUSTICE SCALIA: When you have a -- you can
17 submit it a letter. I've looked in your brief, I can't
18 find this Jean case that you mentioned on use of veto.
19 I have a certain morbid interest in it.

20 (Laughter.)

21 MR. YANG: It's at 496 U.S. 154. And
22 it's -- I believe it's cited, it's Commissioner, INS
23 versus Jean. And I apologize if it's not there, but I
24 thought it was. Yes. No. That's right.

25 JUSTICE GINSBURG: I'd like to go back to a

1 question that Justice Kennedy asked of Mr. Wolfman.
2 Isn't there -- doesn't it make sense to take a word like
3 "attorney's fees" and like the word "discrimination," we
4 have many different anti-discrimination statutes, but
5 there has been an attempt to give that word
6 "discrimination" the same meaning in all those statutes.
7 And here the term attorney's fees, if it means that
8 includes all of them, in terms of 1988, why not say
9 every time attorney's fees comes up, that's what it's
10 going to mean?

11 MR. YANG: As a general rule, in
12 fee-shifting statutes that are like Section 1988, that
13 is in fact the rule. But the rule that similar words
14 are given a similar meaning readily yields when there is
15 indication that Congress did not intend the same to
16 apply here, and in fact for instance in the Fogerty
17 versus Fantasy case, the Court specifically rejected the
18 approach of adopting the understanding of reasonable
19 attorney's fees applied in other fee-shifting statutes,
20 because it found that the policy and legislative history
21 of the Copyright Act required or at least suggested that
22 Congress intended something else.

23 And here, not only do we have a different
24 legislative history, we have fundamentally different
25 statutory text. There is a second category of other

1 expenses that must be given meaning in conjunction with
2 attorney's fees. It did not --

3 JUSTICE ALITO: Well on that point, does the
4 statute say that all non fee expenses are compensable at
5 cost? Or are you arguing that the work that's done by
6 paralegals is a study or analysis project?

7 MR. YANG: It's either a, it can be a study
8 or analysis or at least analogous to that type of a -- a
9 --

10 JUSTICE ALITO: Which is it, is it a study
11 analysis or project? That seems like a strange way of
12 describing it.

13 MR. YANG: It can be -- it can be a project,
14 for instance in this case, the paralegal compiled the
15 relevant information regarding how much wages needed to
16 be developed, repaid on the merits of the case, how much
17 taxes needed to be reimbursed. That could be understood
18 as a project, particularly when Congress has modified it
19 with any, the word "any" before.

20 CHIEF JUSTICE ROBERTS: Counsel, there are
21 occasions, aren't there, when the government is entitled
22 to attorney's fees?

23 MR. YANG: There are occasions.

24 CHIEF JUSTICE ROBERTS: Do you know how you
25 bill paralegal times -- time in those situations?

1 MR. YANG: We often don't bill them
2 separately.

3 CHIEF JUSTICE ROBERTS: You often don't bill
4 them separately.

5 MR. YANG: I -- I asked this question. I
6 have not been able to determine that we have ever billed
7 paralegal time separately. Normally, like every other
8 litigant in a normal fee-shifting statute that would
9 provide for attorney's fees, and again, just the way the
10 government calculates it, it is based on overall costs
11 per benefit, ends up some percent of salary. There is
12 an attorney fees that benefits -- percentage and a small
13 overhead charge as well. For the attorney's fees, not
14 separately for paralegals.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr. Yang.
16 Mr. Wolfman, you have four minutes remaining.

17 REBUTTAL ARGUMENT OF BRIAN WOLFMAN,
18 ON BEHALF OF THE PETITIONER

19 MR. WOLFMAN: Thank you, Mr. Chief Justice.

20 I want to start where the discussion left
21 off. It harkens back to some things that Mr. Yang said
22 towards the beginning of his argument. He said that,
23 that if the Federal Circuit weren't affirmed, that there
24 would be no meaning to the term "other expenses," but
25 that's just not so; it would begin to lose its meaning.

1 It means things like travel, long distance
2 phone, copying, the types of things we think of as
3 out-of-pocket expenses. The problem here is they are
4 shoe-horning a -- the government is shoe-horning what is
5 always conceived of as an in-house professional service
6 as an out-of-pocket expense, and it just does not fit
7 there.

8 Let me turn to the legislative history and
9 I'd like to do two things with that before I close. The
10 first is, let's presuppose that it should be given some
11 weight, as Justice Breyer has suggested, and the problem
12 is that it just doesn't bear the weight that the
13 government gives the report. If you look at -- and this
14 is discussed at length at page 12 of our reply brief --
15 let's turn for instance to the administrative conference
16 report. Here's what it says. It's a 46 Federal
17 Register 32913. It says that: With regard to expenses,
18 they should be compensable whenever the lawyer, quote,
19 "ordinarily charges clients separately for such
20 expenses." That's the situation today with paralegal
21 expenses.

22 Then it's true that the ACUS, the
23 administrative conference, did not issue a hard and fast
24 rule with respect to paralegal expenses. But that of
25 course is because the market wasn't uniform at that time

1 as it is today. Today it's nearly ubiquitous that
2 paralegal services are -- are separately billed. But
3 listen to what the court said --said: Indeed, we
4 decline to issue because, quote, "practices with respect
5 to charging clients for paralegal time vary depending on
6 locality and field of practice."

7 But that statement reflects exactly our
8 position. That the rule the Court embraced in Jenkins
9 is that the compensability of paralegal services should
10 replicate prevailing practices in the market.

11 Now let me just end by -- by -- on this
12 note. If, there is also the question raised about
13 whether you should give any weight to this -- this
14 report at all. We say that you should not for the
15 reasons, essentially in Justice Scalia's last question
16 on that topic; but we do -- we do talk about why the
17 Jean decision use of that report does not wear the
18 weight that the government gives us, and that's on pages
19 13 and 14 of our brief, our reply brief. And the reason
20 is, is because in Jean, no one brought to the Court's
21 attention in any of the briefs the problem that the --
22 that legislative history accompanied vetoed legislation.
23 It was never brought to the Court's attention. In the
24 Scarborough case three years ago, neither the majority
25 opinion nor the dissent cited that report.

1 CHIEF JUSTICE ROBERTS: Well, but I think
2 Justice Breyer is correct, isn't he, that there was no
3 reason for the Senate to sort of redo a report that they
4 had already done on a bill that was substantially
5 identical?

6 MR. WOLFMAN: That might be true in some
7 circumstances, but that's not what happened in 1985.
8 There was an extensive House report accompanying that
9 legislation. There was no Senate report. The House
10 report --

11 CHIEF JUSTICE ROBERTS: There was no Senate
12 report because they had done it just the previous year.

13 MR. WOLFMAN: I think not, Your Honor.
14 There were some other things taken up in the House
15 report and the House report, quite extensive, says
16 nothing; it's silent on the question of paralegal
17 services.

18 Look, let me just say as I close -- may I
19 answer the question?

20 Let me just say as I close that -- that if
21 the Court wishes to look at that report, at the very
22 best for the government, it's a wash. Thank you very
23 much.

24 CHIEF JUSTICE ROBERTS: Thank you, Counsel,
25 the case is submitted.

1 (Whereupon, at 11:06 a.m., the case in the
2 above-entitled matter was submitted.)

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