NO. _____

IN THE
Supreme Court of the United States

RICHLIN SECURITY SERVICE COMPANY,
Petitioner,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A), may a prevailing party be awarded attorney fees for paralegal services at the market rate for such services, as four circuits have held, or does EAJA limit reimbursement for paralegal services to cost only, as the Federal Circuit panel majority below held?

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INTRODUCTION

Petitioner Richlin Security Service Company respectfully petitions this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Federal Circuit. The petition presents the question whether the services provided by paralegals working under the direction of an attorney are compensable as "attorney fees" at market rates under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 and 28 U.S.C. § 2412(d), as four circuits have held, or whether such services are recoverable only at cost, as the Federal Circuit held below.

This Court has held that paralegal services are compensable at market rates under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, if such services are generally billed separately to clients in the relevant legal market. *See Missouri v. Jenkins*, 491 U.S. 274, 285-89 (1989). The Court has also held repeatedly that similar provisions in federal fee-shifting statutes should generally be interpreted the same. *See, e.g., City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989). In light of the division among the courts of appeals, and the Federal Circuit's failure to follow *Jenkins*, the petition should be granted.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 472 F.3d 1370 (2006), and is reproduced in the appendix at 1a. The opinion of the Department of Transportation Board of Contract Appeals is reported at 2005 WL 1635099 (2005), and is reproduced at Pet. App. 25a. The Federal Circuit's supplemental opinion issued in response to petitioner's petition for rehearing is reported at 482 F.3d 1358 (2007), and is reproduced at Pet. App. 54a. The Federal Circuit's unreported order denying rehearing and rehearing en banc is reproduced at Pet. App. 57a.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on December 26, 2006. Pet. App. 1a. Petitioner filed a timely petition for rehearing en banc on January 8, 2007, which the Federal Circuit treated as a petition for panel rehearing and rehearing en banc and denied on April 3, 2007. Pet. App. 57a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Equal Access to Justice Act (EAJA) authorizes an award of fees and other expenses to certain parties who prevail in adversary administrative proceedings or in court against the United States.

5 U.S.C. § 504, the portion of EAJA that applies to adversary administrative proceedings, provides in relevant part:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.
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> * * *
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> (b)(1) For the purposes of this section –
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> (A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of

> the party's case, and reasonable attorney or agent fees. (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.)[1]

STATEMENT OF THE CASE

A. The Equal Access To Justice Act

In general, EAJA provides that "fees and other expenses" shall be awarded to eligible parties who have prevailed in adversary administrative adjudications and in litigation against the federal government, unless the agency adjudicator or court finds that the position of the United States "was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A). "Fees and other expenses" are defined to include "reasonable attorney or agent fees." 28 U.S.C. § 504(b)(1)(A); *see also* 28 U.S.C. § 2412(d)(2)(A) (defining "fees and other expenses" to include "reasonable attorney fees"). The amount of fees awarded "shall

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[1]The nearly identical portions of EAJA applicable to recovery of fees and other expenses incurred in court proceedings are codified at 28 U.S.C. §§ 2412(d)(1)(A), (d)(2)(A). Petitioner Richlin's fee application at issue here sought recovery for fees incurred in a proceeding before the Department of Transportation's Board of Contract Appeals and, thus, was filed under 5 U.S.C. § 504. In general, citations in this petition to provisions of section 504 are accompanied by citations to the corresponding provisions of section 2412(d).

be based on prevailing market rates," subject to a dollar per-hour cap, adjusted for increases in the cost of living. 5 U.S.C. § 504(b)(1)(A)(ii); 28 U.S.C. § 2412(d)(2)(A). A business is eligible for fees if its net worth does not exceed $7 million and it had 500 or fewer employees at the time that the action was filed. 5 U.S.C. § 504(b)(1)(B); 28 U.S.C. § 2412(d)(2)(B).

B. Administrative Proceedings

The merits of this litigation can be summarized briefly. Mistakes in contracts between petitioner Richlin Security Service Company and what was then the Immigration and Naturalization Service (and is now part of the Department of Homeland Security) resulted in the substantial underpayment of Richlin's employees. *See Richlin Sec. Serv. Co. v. Chertoff*, 437 F.3d 1296, 1297 (Fed. Cir. 2006). The underpayments were of such magnitude to a small business like Richlin that, before it won this litigation, Richlin had been unable to pay its employees what they were owed. *Id.* at 1298 (citing *Richlin Sec. Serv. Co. v. Rooney*, 18 F. App'x 843, 844-45 (Fed. Cir. 2001)). Following lengthy proceedings before both the Department of Transportation Board of Contract Appeals (the Board) and the Court of Appeals for the Federal Circuit, the Board awarded Richlin the amount of the additional wages, payroll taxes, and workers compensation premiums that Richlin was required to pay. Pet. App. 3a.

After prevailing on the merits, Richlin sought an award of attorney fees and other expenses under EAJA for the time spent over nearly nine years by its lawyers and paralegals before the Board. The Board found that Richlin met EAJA's size and net-worth limitations, 5 U.S.C. § 504(b)(1)(B), that it was a prevailing party, *see id.* § 504(a)(1), and that the government's position on the merits was not "substantially justified." *See id.* The Board awarded Richlin approximately $50,000 for work done by Richlin's lawyers. *See* Pet. App. 5a.

The Board did not, however, award Richlin fees at the $50 to $95 per hour market rates for paralegal services charged to Richlin over the course of the proceedings. It noted that EAJA does not "expressly provide for the reimbursement of paralegal services at the market rate," *id.* at 6a, and thus held that paralegal services are reimbursable only at the attorney's cost, even where, as is the case here, paralegal time is billed to the client at hourly market rates in the relevant legal market and not at the attorney's cost as an out-of-pocket expense. The Board took judicial notice of paralegal salaries in the Washington, D.C. area "as reflected on the internet" and awarded Richlin $35 per hour as the "reasonable cost to the [law] firm." *Id.* (quoting Board decision). The Board awarded approximately $10,600, representing approximately 300 hours of compensable paralegal time. *See id.*

C. Federal Circuit Proceedings

A divided panel of the Federal Circuit affirmed. The panel majority acknowledged this Court's ruling in *Missouri v. Jenkins*, 491 U.S. 274, 284-89 (1989), that, under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, paralegal services are a component of "attorney's fees" compensable at market rates, as long as those services are separately billed in the relevant market. The majority further acknowledged the Court's repeated admonition that "fee-shifting statutes' similar language is a 'strong indication' that they are to be interpreted alike." Pet. App. 13a (quoting *Zipes*, 491 U.S. at 758 n.2). The majority nevertheless distinguished EAJA from section 1988, largely on the ground that the former contemplates an award of "expenses," which could be said to include the cost to law firms of paralegals, while the latter does not. Pet. App. 15a, 19a. The court of appeals also relied on EAJA's per-hour rate cap for attorney fees as justification for limiting recovery for paralegal services,

noting that "it seem[ed] unlikely" that Congress would have capped paralegal and attorney services at the same level. Pet. App. 16a.

In so holding, the Federal Circuit majority expressly rejected the Eleventh Circuit's contrary decision in *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988), *aff'd on other issue*, *Comm'r, INS v. Jean*, 496 U.S. 154 (1990), which held that paralegal time is compensable at market rates under EAJA. *See* Pet. App. 12a-13a; *see also id.* at 55a.

Senior Circuit Judge Plager dissented on the ground that "the panel's position is at variance with established Supreme Court law," Pet. App. 20a-21a, relying on this Court's statement in *Jenkins* that a "'reasonable attorney's fee' cannot have been meant to compensate only work performed personally by members of the bar," but also the work of "others whose labor contributes to the work product for which an attorney bills her client." *Id.* at 21a (quoting *Jenkins*, 491 U.S. at 285); *see also id.* (pointing out that panel majority's rationale "echoes the view of the lone dissenter on this issue in *Jenkins*.").

Richlin petitioned for rehearing en banc. Invoking Federal Rule of Appellate Procedure 35(b)(1)(B), the petition explained that, in addition to the acknowledged conflict with the Eleventh Circuit, the Federal Circuit's ruling had also opened up a conflict with decisions of the Fourth, Eighth, and D.C. Circuits. The petition also noted that a Senate Judiciary Committee report that the panel majority had relied on did not, in fact, support its ruling, and that, in any event, the report was not genuine legislative history because it had accompanied a 1984 version of EAJA that was vetoed by President Reagan, not the 1985 version that was actually enacted.

The panel responded to the petition for rehearing in a supplemental opinion. Pet. App. 54a. The panel majority again acknowledged the direct conflict with the Eleventh Circuit's

decision in *Jean v. Nelson*. *See id.* at 55a. But it played down the significance of the rulings from the three other circuits, saying that although two of them expressly relied on *Jean* and all three referred to recovery for paralegal services "as fees," *id.*, they appeared to be deciding whether paralegal services are compensable at all, not whether they are fees compensable at market rates under EAJA. *Id.* As for the purported legislative history, the supplemental opinion acknowledged that the committee report relied on by the panel majority accompanied vetoed legislation, but held that because the President's veto related to issues other than the compensability of paralegal services, the "earlier legislative history" drafted by a different Congress in 1984 was "pertinent to the 1985 enactment on the issue presented here." *Id.* at 56a n.2. Senior Judge Plager dissented from the supplemental opinion "on the basis of his dissent from the original panel opinion." *Id.*

In an order accompanying its supplemental opinion, the Federal Circuit denied rehearing and rehearing en banc. Pet. App. 57a.

REASONS FOR GRANTING THE WRIT

A. The Federal Circuit's Decision Creates A Division Among The Federal Courts Of Appeals On An Important Issue Of Federal Law.

1. The panel majority below acknowledged that its decision directly conflicts with the Eleventh Circuit's decision in *Jean v. Nelson*, which held that EAJA authorizes recovery of market-rate attorney fees for paralegal services. 863 F.2d at 778. In so holding, the Eleventh Circuit expressly rejected the very argument adopted by the Federal Circuit below – the government's contention "that paralegal time is recompensable only at the actual cost to the plaintiffs' counsel." *Id.* Presaging this Court's efficiency rationale in *Missouri v. Jenkins*, the Eleventh Circuit explained that "[t]o hold otherwise would be

counterproductive because excluding reimbursement for such work might encourage attorneys to handle entire cases themselves, thereby achieving the same results at a higher overall cost." *Id.*; *see Jenkins*, 491 U.S. at 288 (compensating paralegal services is "not only permitted by § 1988, but also makes economic sense.").

As noted above, three other circuits – the Fourth, Eighth, and D.C. – have come to the same conclusion as the Eleventh: that paralegal services are compensable at market rates under EAJA. *See Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 974 (D.C. Cir. 2004); *Hyatt v. Barnhart*, 315 F.3d 239, 255 (4th Cir. 2002); *Miller v. Alamo*, 983 F.2d 856, 862 (8th Cir. 1993).[2]

The Federal Circuit's acknowledgment that the Fourth and Eighth Circuit decisions relied on *Jean* and that all three decisions referred to compensable paralegal services as "fees" is sufficient to demonstrate the deeper conflict among the circuits. After all, reliance on *Jean* necessarily embraces the notion that compensation should be based on market rates, since the efficiency created by market-rate recovery of paralegal services was *Jean*'s fundamental rationale. *See Jean*, 863 F.2d at 778. And, by referring to compensation for paralegal

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[2]*Miller* was decided under the Internal Revenue Code's counterpart to EAJA, 26 U.S.C. § 7430, which is analogous to EAJA in all relevant respects. Thus, *Miller* relied on EAJA precedents, *see* 983 F.2d at 861-62, and the Eighth Circuit has subsequently awarded fees for paralegal services under EAJA, as the Federal Circuit acknowledged in its supplemental opinion below. *See* Pet. App. 55a (citing *Stockton v. Shalala*, 36 F.3d 49, 50 (8th Cir. 1994)).

The Seventh Circuit has also stated unambiguously that "[f]ees for work done by paralegals can be awarded under the fee shifting provision of the EAJA," but that statement was dictum because fees were denied in their entirety on other grounds. *See Krecioch v. United States*, 316 F.3d 684, 687 (7th Cir. 2003).

services as "fees," the other three circuits were presumably relying on the part of EAJA that ties the proper method of calculating "fees" to "market rates," *see* 5 U.S.C. § 504(b)(1)(A) ("The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished . . ."), which is directly at odds with the Federal Circuit's basic holding that paralegal services are cost-based "expenses," *not* "fees."

The Federal Circuit majority nevertheless maintained that the decisions of the Fourth, Eighth, and D.C. Circuits stand only for the proposition that paralegal services are compensable on some basis, leaving the possibility that, in those circuits, such services may be compensable at cost only. If it were correct that some or all of these circuits concurred with the Federal Circuit, or had found paralegal services compensable but had not been clear on whether they were "fees," that would mean only that the circuit split was differently configured or more confused, neither of which would be a reason not to resolve it.

But the Federal Circuit was not correct. Analysis of the three circuit court decisions leaves no doubt that they conflict directly with the decision below. In *Miller*, the Eighth Circuit explicitly relied on *Jean*'s market-based rationale and explained that "[w]ork done by paralegals is compensable if it is work that would have been done by an attorney. If such hours were not compensable, then attorneys may be compelled to perform the duties that could otherwise be fulfilled by paralegals, thereby increasing the overall cost of legal services." 983 F.2d at 862 (citing *Jean*, 863 F.2d at 778). The court allowed the award "at a *rate* of $40 per hour," *id.* (emphasis added), which is language referring to market-based fees, not to the overhead cost for a paralegal. Likewise, in *Hyatt*, the Fourth Circuit held that "paralegal time" is compensable as "fees" under EAJA, also relying on *Jean*. *See* 315 F.3d at 255. In addition, both *Miller*

and *Hyatt* considered the fee applicant's claim for cost-based out-of-pocket reimbursement in parts of their opinions distinct from their discussions of paralegal services, thus underscoring that such services were considered a part of market-rate "fees," and not merely reimbursable at cost. *See Hyatt*, 315 F.3d at 256; *Miller*, 983 F.2d at 862.[3]

Finally, in *Role Models*, the D.C. Circuit rejected the government's claim that paralegal services are not compensable and expressly stated that "[t]his Circuit 'holds that paralegals and law clerks are to be compensated at their *market rates*.'" 353 F.3d at 974 (quoting *In re Donovan*, 877 F.2d 982, 993 n.20 (D.C. Cir. 1989)) (emphasis added). Indeed, the court analyzed at some length the "hourly rates" requested "for the non-lawyers, including the legal assistants and the law clerk" and cut those rates by 25% because the fee applicant had failed to provide evidence of "prevailing market rates," *id.* at 969-70, which would have made no sense if the court were treating paralegal services as awardable only at cost. And, as in *Miller* and *Hyatt*, the court analyzed the fee applicant's entitlement to out-of-pocket reimbursement in a portion of the opinion entirely separate from its discussion of paralegal fees. *See id.* at 974-75.

Beyond opening up a 4-to-1 split among the courts of appeals, the Federal Circuit's decision is at odds with dozens of lower court decisions that reflect a general practice throughout

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[3]Moreover, the rate awarded in *Miller* – $40 per hour – and the time and place of the award underscore that *Miller* endorsed market-rate awards for paralegal services. *Miller* involved a dispute in Arkansas before 1991 (when the Eighth Circuit appeal was filed). The $35 per hour "cost" award affirmed by the Federal Circuit here was based on paralegal salaries in 2006 in Washington, D.C. It is not possible that the overhead cost of paralegal services in Arkansas before 1991 was greater than the overhead cost of such services in Washington, D.C. in 2006. Therefore, *Miller* must have involved a market-rate award.

the country: Market-rate EAJA fees are awarded for paralegal services when doing so mirrors billing practices in the relevant legal market.[4]

2. Taken together, the decisions of other federal courts render the Federal Circuit's ruling a distant outlier. Although the presence of one outlier is sometimes properly ignored in assessing whether this Court's review is warranted, this one should not be. Because of the Federal Circuit's caseload and the nature of the tribunals over which the Federal Circuit exercises precedential authority, its EAJA rulings have a very significant impact. The Federal Circuit's docket is weighted heavily toward cases involving the federal government. *See* U.S. Court of Appeals for the Federal Circuit, Adjudications by Merits Panels, by Category, FY 2006, *available at* http://www.fedcir.gov/pdf/ChartAdjudications06.pdf (about 60% of all Federal Circuit merits panel adjudications involve administrative or monetary claims by private parties against the federal government). Thus, not surprisingly, the Federal Circuit has issued reported decisions in literally dozens of EAJA cases involving a wide array of disputes between private parties and

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[4] *See, e.g., Colegrove v. Barnhart*, 435 F. Supp. 2d 218, 220-21 (W.D.N.Y. 2006); *Former Employees of Tyco Electronics, Fiber Optics Div. v. United States*, 350 F. Supp. 2d 1075, 1093-94 (C.I.T. 2004); *Samuel v. Barnhart*, 316 F. Supp. 2d 768, 780-82 (E.D. Wis. 2004); *Sorenson v. Concannon*, 161 F. Supp. 2d 1164, 1176 (D. Or. 2001); *DiGennaro v. Bowen*, 666 F. Supp. 426, 431 (E.D.N.Y. 1987) (noting that "EAJA awards have repeatedly been allowed for services rendered by paid law students, law clerks and paralegals assisting attorneys" and citing six reported cases); *Holden v. Bowen*, 668 F. Supp. 1042, 1048 (N.D. Ohio 1986) (awarding market rates and expressly rejecting argument to limit award to cost); *see also Bullfrog Films, Inc. v. Catto*, 815 F. Supp. 338, 343 n.8 (C.D. Cal. 1993) (noting that paralegal services are "routinely compensated under the EAJA"). *Contra Glick v. U.S. Civil Service Comm'n*, 567 F. Supp. 1483, 1486 n.5 (N.D. Ill. 1983).

the federal government.[5]

The Federal Circuit has appellate jurisdiction over federal administrative tribunals, such as (in this case) agency Boards of Contract Appeals, and over Article I courts, such as the Court of Federal Claims and the Court of Appeals for Veterans Claims (CAVC), which hears veterans' disability claims. *See* 28 U.S.C. § 1295(1)-(14) (listing types of appellate jurisdiction lodged in the Federal Circuit, including appeals from Court of Federal Claims, Merit Systems Protection Board, and agency Boards of Contract Appeals); 38 U.S.C. § 7292 (providing Federal Circuit jurisdiction over appeals from CAVC); *see also* 38 U.S.C. § 502 (providing judicial review in Federal Circuit of Department of Veterans Affairs regulations). Cases from all of those agencies and courts involve the federal government and all are potentially subject to EAJA.

To use one example, in 2006 alone, the CAVC disposed of 1152 EAJA applications, granting 1105 of them. *See* CAVC Annual Reports, *available at* www.vetapp.gov/documents/Annual_Reports.pdf. And, before the decision below, the CAVC regularly awarded fees for paralegal services at market rates – a practice that now will change unless the decision

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[5] *See, e.g., Scarborough v. Principi*, 541 U.S. 401 (2004) (review of Federal Circuit fee decision arising from veteran's disability claim); *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (2002) (defining "prevailing party" status in case arising from Board of Contract Appeals); *Jones v. Brown*, 41 F.3d 634 (Fed. Cir. 1994) (concerning authority of Court of Veterans Claims to award EAJA fees); *Essex Electro Engin'rs, Inc. v. United States*, 757 F.2d 247 (Fed. Cir. 1985) (concerning authority of Claims Court to award EAJA fees); *Olsen v. Dep't of Commerce*, 735 F.2d 558 (Fed. Cir. 1984) (concerning authority of Federal Circuit to award fees in Back Pay Act appeals from Merit Systems Protection Board).

below is reversed.[6]

The decision below is significant not only because it was issued by the Federal Circuit, with authority over large dockets of cases in which the federal government is a party, but also because the use of paralegals – billed at hourly market rates – is a nearly ubiquitous feature of modern law practice and has been for some time. *See Jenkins*, 491 U.S. at 289 & n.11 (noting that "[s]uch separate billing appears to be the practice in most communities today" and relying on survey of members of national paralegal association).[7] In sum, the Federal Circuit's decision will affect thousands of EAJA fee proceedings both in that court and in the many courts and administrative tribunals over which the Federal Circuit has appellate authority. Review is therefore warranted.

B. The Federal Circuit's Decision Is At Odds With This Court's Decision In *Missouri v. Jenkins* And The Text And Structure Of EAJA.

1. As explained above, in *Missouri v. Jenkins*, 491 U.S.

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[6]*See, e.g., Scarborough v. Nicholson*, 19 Vet. App. 253, 267 (Vet. App. 2005); *Perry v. West*, 11 Vet. App. 319, 331 (Vet. App. 1998); *Adams v. Gober*, 2000 WL 1784504 (Vet. App. 2000).

[7]*See also, e.g., Jacobs v. Mancuso*, 825 F.2d 559, 563 & n.6 (1st Cir. 1987); *Ramos v. Lamm*, 713 F.2d 546, 558-59 (10th Cir. 1983); Am. Bar Ass'n, *Model Guidelines for the Utilization of Paralegal Services* (2004), Guideline 8 & comment thereto, *available at* http://www.abanet.org/legalservices/paralegals/downloads/modelguidelines.pdf (authorizing lawyers to charge market-rate fees for paralegal services, relying in part on *Jenkins*); U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook – Paralegals and Legal Assistants* (2007), *available at* http://www.bls.gov/oco/pdf/ocos114.pdf (describing extensive use of paralegals in most facets of law practice and noting that employment for paralegals "is projected to grow much faster than the average for all occupations through 2014.").

274, the Court considered the compensability of paralegal services as "attorney's fees" under 42 U.S.C. § 1988. The Court first held that, in using the term "attorney's fee," Congress must have meant to compensate not only the work of members of the bar, but the work of others, including paralegals, whose services contribute to the lawyer's work product. *Jenkins*, 491 U.S. at 285. The Court then turned to the question of how those services should be "valuated." *Id.* Relying on its prior fee-shifting precedents holding that attorney fees are to be compensated at "market rate," *see id.* at 285-86 (citing, *e.g.*, *Blum v. Stenson*, 465 U.S. 886, 895 & n.11 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983)), the Court explained that "the prevailing 'market rate' for attorney time is not independent of the manner in which paralegal time is accounted for. Thus, if the prevailing practice in a given community were to bill paralegal time separately at market rates, fees awarded the attorney at market rates for attorney time would not be fully compensatory if the court refused to compensate hours billed by paralegals or did so only at 'cost.'" *Id.* at 286-87 (footnote omitted). Therefore, the Court held, "encouraging the use of lower cost paralegals rather than attorneys wherever possible, . . . 'encourages cost-effective delivery of legal services.'" *Id.* at 288 (quoting *Cameo Convalescent Ctr., Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir. 1984)).

Jenkins applies with full force to EAJA. First, the statutory term "attorney fees" used in EAJA is nearly identical to the term "attorney's fee" construed in *Jenkins*, and, as noted above, the Court has frequently held that similar or identical language in various fee-shifting statutes should generally be construed the same. *Dague*, 505 U.S. at 562; *Zipes*, 491 U.S. at 758 n.2; *see also* Pet. App. 13a n.7 ("The Supreme Court has repeatedly made clear that the various federal attorney's fees statutes should be construed to reach a uniform result.") (quoting *Sacco*

v. United States, 452 F.3d 1305, 1310 (Fed. Cir. 2006)). Moreover, EAJA states that "[t]he amount of fees awarded" "shall be based upon *prevailing market rates* for the kind and quality of the services furnished[,]" 5 U.S.C. § 504(b)(1)(A) (emphasis added); *accord* 28 U.S.C. § 2412(d)(2)(A), while 42 U.S.C. § 1988, the statute at issue in *Jenkins*, authorizes only "reasonable" attorney's fees. If anything, then, a Congress that explicitly required the use of "prevailing market rates" would have been more, not less, likely to have intended that compensation for paralegal services track the market than a Congress that desired only that a fee be "reasonable."

To be sure, if paralegal services have been billed at cost, then they should be reimbursed in that manner under EAJA. *See Jenkins*, 491 U.S. at 285. But if they are billed on an hourly, market-rate basis (as they almost invariably are in modern legal practice), they should be compensated at "prevailing market rates," as the statute provides and *Jenkins* instructs. The Federal Circuit's decision, on the other hand, runs headlong into EAJA's "market rate" language and *Jenkins* by providing that paralegal services must invariably be reimbursed at cost only, even when the market treats paralegal services otherwise.

2. The Federal Circuit majority departed from *Jenkins*' approach and focused on the fact that EAJA authorizes an award of "expenses," in particular on the notion that EAJA draws a distinction between "attorney fees," billed at market rates, and "expenses," billed at cost. *See, e.g.,* Pet. App. 19a ("[W]e hold that paralegal services are not recoverable as fees, but are only recoverable as expenses at the cost to the attorney."); Pet. App. 55a-56a ("[P]ayments for paralegal services under EAJA are not recoverable as 'attorney's fees' but are recoverable as 'expenses,' allowable only at cost."). And, with that purported distinction in mind, the court of appeals

distinguished *Jenkins* on the ground that, in contrast to EAJA's reference to "expenses," section 1988 refers only to "attorney's fees" and does not mention "expenses." *See id.* at 15a.

The Federal Circuit's analysis misreads EAJA's plain text. EAJA authorizes an award of "fees and *other* expenses." 5 U.S.C. § 504(a)(1) (emphasis added); *see also* 28 U.S.C. § 2412(d)(1)(A) (same). "Fees and other expenses" is defined to include "reasonable attorney . . . fees," the amount of which "shall be based upon prevailing market rates for the kind and quality of services furnished . . .." 5 U.S.C. § 504(b)(1)(A); *see also* 28 U.S.C. § 2412(d)(2)(A) (same). Thus, *all* awards under EAJA are awards of "expenses," including awards of "attorney fees." The Federal Circuit's dichotomy between "expenses" awarded at cost, on the one hand, and "attorney's fees" awarded at market rate on the other, is flatly at odds with the statute. Put another way, the term "expenses" cannot, as the Federal Circuit contemplated, mean only those items awardable at cost because that term includes fees, which are awardable at market rate. *See also Marek v. Chesny*, 473 U.S. 1, 9 (1985) (because section 1988 authorizes award of "attorney's fees *as part of* the costs," such fees are "costs" under that section and Federal Rule of Civil Procedure 68). For that reason, the Federal Circuit's reliance on the presence in EAJA of the term "expenses" simply begs the questions – questions already answered in *Jenkins* – as to whether the statutory term "attorney fees" includes paralegal services, and, if so, whether fees for such services may be awarded at market rates.[8]

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[8]Moreover, the panel's reliance on the absence of an express provision for the award of out-of-pocket "expenses" under section 1988 as a basis for distinguishing *Jenkins* overlooks that section 1988 has long been read to authorize recovery of out-of-pocket expenses. *See, e.g., W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 87 n.3 (1991) (noting that courts have (continued...)

3. The Court's decision in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), strongly supports the position that paralegal services are a part of "attorney fees" under EAJA and, thus, compensable at market rates. First, *Casey* makes clear that *Jenkins* was not, as the Federal Circuit suggested, motivated by an extratextual policy concern that if paralegal services were not shoehorned into "attorney's fees," there would be no basis under 42 U.S.C. § 1988 for recovering them at all because section 1988 does not refer to "expenses." *See* Pet. App. 15a. In holding that expert witness fees are not compensable "attorney's fees" under section 1988, *Casey* rejected the plaintiff's reliance on *Jenkins* as an instance where the Court "permit[ted the] . . . perception of the 'policy' of the statute to overcome its 'plain language.'" *Casey*, 499 U.S. at 99. Instead, the Court explained that *Jenkins* was not a freewheeling exposition of section 1988's policy, but a straightforward interpretation of the term "attorney's fees," which, the Court held, included law clerk and paralegal services because they "had traditionally been included in calculation of the lawyers' hourly rates." *Id.* That textual reading of the term "attorney's fees" in section 1988 is equally applicable to EAJA.

Second, *Casey* explained that a number of fee-shifting statutes expressly authorize an award of both attorney's fees and expert's fees, thus undermining the claim that section 1988's

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[8](...continued)
held that "'reasonable out-of-pocket expenses incurred by the attorney' [are] included in § 1988 'attorney's fee' award") (quoting *Northcross v. Board of Ed. of Memphis Schools*, 611 F.2d 624, 639 (6th Cir. 1979)); *Trs. of the Constr. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1257 (9th Cir. 2006); *Dowdell v. City of Apopka, Fla.*, 698 F.2d 1181, 1190-91 (11th Cir. 1983). Thus, if this Court in *Jenkins* had believed that paralegal expenses should be reimbursed at cost, it would have had ample basis to order them treated similarly to the out-of-pocket expenses routinely awarded as "attorney's fees" under section 1988.

reference to "attorney's fees" alone authorized an award of expert fees even though it did not mention them. The Court contrasted that situation with the paralegal services question decided in *Jenkins* on the ground that fee-shifting statutes do *not* single-out paralegal services for special treatment, and it noted that EAJA is no exception:

> We do not know of a single statute that shifts clerk or paralegal fees separately; and even those, *such as the EAJA*, which comprehensively define the assessable "litigation costs" make no separate mention of clerks or paralegals.

Id. at 99-100 (emphasis added). Thus, *Casey* underscores that paralegal services are a part of "attorney fees" compensable at "prevailing market rates" under EAJA because, just like section 1988, EAJA "make[s] no separate mention of clerks or paralegals." *Id.*[9]

4. The Federal Circuit eschewed *Jenkins*' follow-the-market approach based in part on a Senate committee report that cited as an example of an "expense" paralegal time "billed at cost." *See* Pet. App. 19a (quoting S. Rep. No. 98-586, 98th Cong., 2d Sess. 15 (1984)). That reliance was misplaced for several reasons.

First, as explained above, the report's reference to paralegal services as an "expense" tells us nothing about whether those services should be valuated at market rates or at cost, since all items compensable under EAJA are "expenses." Moreover, the

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[9]The Federal Circuit majority acknowledged that, in *Casey*, the Court "reaffirmed its holding in *Jenkins* that paralegal services are included in § 1988's definition of attorney's fees." Pet. App. 11a. The majority quoted virtually all of the *Casey* opinion immediately before and after the blocked quotation reproduced above, *see id.*, but omitted the part most relevant to this case: the sentence that identified EAJA as a statute that, like section 1988, makes no separate mention of paralegal services and thus incorporates those services within the term "attorney fees."

report's reference to paralegal time "billed at cost" reflects only that if paralegal time is billed at cost in the marketplace, it should be compensated under EAJA on that basis. *See Jenkins*, 491 U.S. at 288 ("Nothing in § 1988 requires that the work of paralegals invariably be billed separately. If it is the practice in the relevant market not to do so, or to bill the work of paralegals only at cost, that is all that § 1988 requires."). But if paralegal time is billed on an above-cost hourly basis, then the market should control there as well. The Senate report does not address that scenario or purport to preclude that result.

In any event, the Federal Circuit majority's reliance on supposed "legislative history" fails for a more fundamental reason. The Senate report was prepared for a 1984 version of EAJA passed by the 98th Congress but vetoed by the President. *See* H.R. Rep. No. 99-120, pt. 1, at 6 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 134. Thus, the court of appeals erred in its original opinion in stating that "Congress acted to make EAJA permanent in 1984." Pet. App. 19a. In fact, as that court acknowledged later in its supplemental opinion, *id.* at 56a n.2, EAJA was made permanent by the 99th Congress in 1985, and "[n]o Senate Report was submitted with th[e] legislation." 1985 U.S.C.C.A.N. 132. The House committee report that accompanied the bill that was actually enacted in 1985 makes no mention of the treatment of paralegal services. *See id.* at 132-57.

If legislative history may ever serve as legitimate evidence of congressional intent, it may do so only because it is presumed to have been ratified by Congress and the President when the relevant legislation was enacted. *See* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 Vand. L. Rev. 1457, 1522 (2000); *cf. Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring). That plainly did not occur with respect to the 1984

report cited by the majority. The Federal Circuit's assertion that the Senate report is "pertinent" nonetheless because the President's veto reflected concern about a topic other than paralegal services and that the enacted 1985 legislation was otherwise "nearly identical" to the failed 1984 legislation, *see* Pet. App. 56a n.2, is a non sequitur: Its defense of the 1984 report does not attempt to justify how a committee report produced to accompany legislation voted on by one Congress could have been ratified by *another* Congress that did not produce that report, did not enact the legislation accompanying that report, and never referred to the relevant issue in its own legislative history.

5. Our position comports with *Jenkins*' view that relying on market forces "encourages cost-effective delivery of legal services," as Senior Judge Plager noted in dissent. Pet. App. 23a; *accord Miller*, 983 F.2d at 862; *Jean*, 863 F.2d at 778. The majority below claimed that this rationale does not apply to EAJA in light of EAJA's cap on hourly rates. Pet. App. 18a. In its view, if market rates are awarded for paralegal services, the cap will cause the EAJA rates of paralegals to approach those of lawyers, inducing overuse of paralegals and promoting inefficiency.

This argument founders on multiple fronts. First, the Federal Circuit's approach failed to recognize that the issue before it was one of statutory construction, not economic theory. And "[t]o interpret accurately" Congress's intent, a court should not read statutes "as if they were written today, for to do so would inevitably distort their intended meaning." *Goldstein v. California*, 412 U.S. 546, 564 (1973). Thus, the efficiency rationale should be evaluated not by asking what would promote perfect competition in today's legal economy, but what Congress meant in requiring use of "prevailing market rates" (subject to a dollar-per-hour cap) when it enacted and

reenacted EAJA in 1980 and 1985, respectively. In those days, market rates for paralegals were far below the EAJA cap – which was then $75 per hour plus adjustments from the date of enactment for increases in the cost of living. *See, e.g., Burt v. Heckler*, 593 F. Supp. 1125, 1133 (D.N.J. 1984) ($25 per hour for paralegal services); *Holden*, 668 F. Supp. at 1048 ($30 per hour); *DiGennaro*, 666 F. Supp. at 433 ($25 per hour and citing similar cases); *In re Chicken Antitrust Litig.*, 560 F. Supp. 963, 972, 975 (N.D. Ga. 1980) ($25 per hour). Thus, there is every reason to think that Congress believed that the use of paralegals was highly efficient and no reason to think that Congress was envisioning a world in which paralegal rates and (capped) lawyer rates had converged.[10]

Second, even today, in much of the country, paralegal rates are well below the EAJA inflation-adjusted cap (now about $160 per hour) at which lawyers' time is generally compensated. *See, e.g., Scarborough*, 19 Vet. App. at 267 (award for paralegal services at $60 per hour and lawyers' services at $133 to $155 per hour).

Finally, the panel majority erred in any event by focusing solely on the supposedly distorted incentives produced by the EAJA cap as opposed to market incentives more generally. Quite apart from EAJA, law firms use paralegals because doing so enables the firms to provide their overall product – legal services – at a lower overall cost to their clients. In cases subject to EAJA, if paralegal services are recoverable only at cost, all other things being equal, firms will be less likely to use paralegals, and more likely to use lawyers, than would be the

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[10]The efficiency rationale for use of paralegals was well understood at the time of EAJA's enactment. *See In re Chicken*, 560 F. Supp. at 977 ("The advent and widespread use of the paraprofessional has meant that the cost of effective legal counsel has been reduced and its availability enhanced without impairing the quality or delivery of legal services.").

case if paralegal services were compensable at market rates, undermining the efficiency that use of paralegals is intended to achieve. Thus, even if, in light of the cap, EAJA fees do not fully replicate the market, prohibiting market-rate recovery for paralegal services, as did the Federal Circuit, would further distort the market and promote the inefficiency rejected by this Court in *Jenkins*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 2007

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United States Court of Appeals for the Federal Circuit

2006-1055

RICHLIN SECURITY SERVICE COMPANY,
Appellant,

v.

Michael Chertoff,
SECRETARY OF HOMELAND SECURITY,
Appellee.

DECIDED: December 26, 2006

Before RADER, Circuit Judge, PLAGER, Senior Circuit Judge, and DYK, Circuit Judge.

Opinion for the court filed by Circuit Judge DYK. Dissenting opinion filed by Senior Judge PLAGER.

DYK, Circuit Judge.

Richlin Security Service Company ("Richlin") appeals a Department of Transportation Board of Contract Appeals ("Board")[1] decision that, under the Equal Access to Justice Act,

[1] The Department of Justice and later the Department of Homeland Security designated the Department of Transportation Board of Contract Appeals to hear and decide appeals from their contracting officers' final decisions arising under the Contract Disputes Act of 1978, Pub. L. No.

5 U.S.C. § 504 (2000) ("EAJA"), paralegal services may only be reimbursed at the cost to the attorney and not at the market rate. Richlin Sec. Serv. Co., DOTBCA No. 3034E and 3035E, 04-2 BCA ¶ 32,789 (2005). Because we agree that EAJA only permits reimbursement for paralegal services at cost, we affirm.

BACKGROUND

I

This is the fifth time this case has come before this court.[2] The previous decisions concerned two fixed-price contracts executed by Richlin and the then Immigration and Naturalization Service ("INS")[3] in April 1990 and August 1991. Richlin Sec. Serv. Co. v. Chertoff, 437 F.3d 1296, 1297 (Fed. Cir. 2006). Pursuant to the contracts, Richlin agreed to provide guard services for detainees at the Los Angeles International Airport. Id. As the result of a mutual mistake, the contracts misclassified Richlin's employees as "Guard I" rather than "Guard II" for purposes of the wage classification scheme of the Service Contract Act, 41 U.S.C. §§ 351 et seq. (2000). The error resulted in the underpayment of Richlin's employees. Id.

In February 1995, the Department of Labor determined that

95-563, 41 U.S.C. § 601 et seq. See 63 Fed. Reg. 16118, 16134 (Apr. 2, 1998); 68 Fed. Reg. 67868, 67884 (Dec. 4, 2003).

[2] Meissner v. Richlin Sec. Serv. Co., No. 97-1472, 1998 WL 228175 (Fed. Cir. May 7, 1998); Richlin Sec. Serv. Co. v. Rooney, No. 00-1134, 2001 WL 744463 (Fed. Cir. July 2, 2001); Richlin Sec. Serv. Co. v. Ridge, No. 03-1344, 2004 WL 1153349 (Fed. Cir. May 14, 2004); Richlin Sec. Serv. Co. v. Chertoff, 437 F.3d 1296 (Fed. Cir. 2006).

[3] INS was formerly part of the Department of Justice. Effective March 1, 2003, INS became a part of the Department of Homeland Security ("DHS"). 6 U.S.C. § 291 (2000). The Bureau of Immigration and Customs Enforcement within the DHS assumed the duties of the former INS.

Richlin's employees were entitled to back wages from Richlin. Id. Richlin then filed a claim against the government for over $1.5 million in back wages and associated taxes on the ground that the original contract price should have been higher to account for the increased wages and associated costs. Id. The contracting officer denied Richlin's claim, and Richlin appealed to the Board. Id. at 1297-98. The government resisted reformation of the contract and defended the subsequent appeals on the ground that Richlin bore the risk of misclassifying its employees. See Richlin Sec. Serv. Co., DOTBCA No. 3034E and 3035E, 04-2 BCA ¶ 32,789. After a series of appeals to the Board and this court, the Board awarded Richlin the amount of the additional wages, payroll taxes, and workers compensation premiums that Richlin was required to pay. Richlin Sec. Serv. Co., 02-2 BCA ¶ 31,876, 2002 WL 1042294 (DOTBCA 2002). We affirmed the Board's decision. Richlin Sec. Serv. Co. v. Ridge, No. 03-1344, 2004 WL 1153349 (Fed. Cir. May 14, 2004).

After this court affirmed, Richlin timely submitted an application for reimbursement of attorney's fees, expenses, and costs to the Board pursuant to EAJA. See Richlin Sec. Serv. Co. v. Ridge, No. 03-1344, 2004 WL 1153349 (Fed. Cir. May 14, 2004). This appeal concerns reimbursement under EAJA for paralegal services used in the course of the underlying cases (and in preparing the EAJA application).

II

Gilbert J. Ginsburg is an attorney who began representing Richlin in 1994 after the underlying case had been litigated for some time. Over the course of his representation, Ginsburg used paralegals and separately billed his client (Richlin) for their services at market rates. Between 1994 and May 23, 2003 (when Richlin filed its EAJA application), Ginsburg's paralegal billing rates increased from $50 per hour to $80 per hour to $95

per hour to $135 per hour.

EAJA provides:

> [a]n agency that conducts an adversary adjudication shall award, to a prevailing party . . . fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1) (emphasis added). Subsection 504(b)(1) defines the term "fees and expenses":

> "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.)

(emphasis added). To recover "fees and expenses," the prevailing party must submit an application to the agency within 30 days of "a final disposition." 5 U.S.C. § 504(a)(2). The application must include "an itemized statement from any attorney, agent, or expert witness representing or appearing in

behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." Id.

In the EAJA application, Richlin sought reimbursement for $51,793.75 in attorney's fees for work on the underlying cases and $14,225.00 in attorney's fees for preparing the EAJA application. Richlin also applied for reimbursement of paralegal services at the rate billed to Richlin for paralegal time, with the exception of services for the period after June 1, 2004 (when Ginsburg's billing rate for paralegals had increased to $135 per hour). Although it is unclear how Richlin computed the amount claimed for paralegal services, it appears that for services performed after June 1, 2004, Richlin capped the fee request at $95 per hour. Richlin ultimately sought reimbursement for $45,141.10 for 523.8 hours of paralegal time for work on the underlying cases. It also sought an additional $6,760.00 for 68.2 hours of paralegal work preparing the EAJA application.

III

On June 30, 2005, the Board issued a decision finding that "Richlin ha[d] established that it meets the size and net worth requirements for an EAJA award and . . . that Richlin was a prevailing party." The Board then concluded that the government's denial of Richlin's claim was not "substantially justified" under EAJA. See Richlin Sec. Serv. Co., DOTBCA No. 30334E and 3035E, 04-2 BCA ¶ 32,789. The Board found that the government's argument that Richlin bore the risk of the mutual mistake of misclassifying its employees was not substantially justified because the contracts expressly placed the risk of misclassification on the government. Accordingly, the Board held that Richlin was entitled to recover attorney's fees, awarding $43,313 in attorney's fees for the underlying cases and $7,126 in attorney's fees for the preparation of the EAJA application.

Regarding reimbursement for paralegal services, the Board

reasoned that EAJA does not expressly provide for the reimbursement of paralegal services at the market rate and that the common definition of "attorney" does not include paralegals. Moreover, the Board noted that EAJA's legislative history defines "expenses" to include "paralegal time (billed at cost)." S. Rep. No. 98-586, 98th Cong., 2d Sess., at 15 (Aug. 8, 1984). As there was no information in the record before the Board regarding the actual cost to Ginsburg of the paralegal services, the Board took "judicial notice of paralegal salaries in the Washington D.C. area as reflected on the internet." The Board awarded paralegal expenses at a rate of $35 per hour, which it found to be "a reasonable cost to the firm." Accordingly, for paralegal services in connection with underlying cases, the Board awarded $9,394. For services in connection with the EAJA application, the Board awarded $1,200.

Richlin timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(10) (2000).

DISCUSSION

We review the Board's interpretation of EAJA without deference. Brickwood Contractors, Inc. v. United States, 288 F.3d 1371, 1376 (Fed. Cir. 2002); Fanning, Phillips and Molnar v. West, 160 F.3d 717, 720 (Fed. Cir. 1998). As the Supreme Court has held repeatedly, EAJA constitutes a waiver of sovereign immunity and should be strictly construed. See, e.g., Ardestani v. Immigration and Naturalization Serv., 502 U.S. 129, 137 (1991). EAJA "lifts the bar of sovereign immunity for award of fees in suits brought by litigants qualifying under the statute, [but] does so only to the extent explicitly and unequivocally provided." Levernier Const., Inc. v. United States, 947 F.2d 497, 502 (Fed. Cir. 1991) (quoting Fidelity Construction Co. v. United States, 700 F.2d 1379, 1386 (Fed. Cir. 1983)). Thus, we must strictly construe EAJA's fee shifting

provision in favor of the government.

I

EAJA generally provides that a "prevailing party" may recover "fees and other expenses" where the position of the government was not "substantially justified." 5 U.S.C. § 504(a)(1). Subsection 504(b)(1)(A) defines "fees and other expenses" and provides that:

> "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees.

The question here is whether, under EAJA, amounts for paralegal services may be recovered at market rates as part of "fees" or whether they are recoverable only at cost as part of the recovery of "expenses."

As a preliminary matter, we note that EAJA provides that "'fees and expenses' includes the reasonable expenses of expert witnesses . . . and reasonable attorney or agent fees." 5 U.S.C. § 504(b)(1)(A) (emphasis added). Richlin does not appear to argue that paralegal services should be reimbursed on the theory that the statute allows recovery of any and all types of fees. Rather, Richlin argues that they are recoverable under the specific category of "attorney's fees." While Congress' use of the term "includes" does raise the possibility that Congress intended to permit reimbursement of other types of fees, we conclude that the statutory text compels a conclusion that EAJA permits only reimbursement of expert, agent, and attorney's fees.

Section 504(a)(2) outlines the requirements for submitting an EAJA application for "an award of fees and other expenses"

and requires "an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." This language (limiting the types of individuals who may file a statement to attorneys, agents, and experts) contemplates that attorney, agent and expert fees are the only categories of "fees." Moreover, EAJA caps the recovery of attorney and agent fees (capped at $125 per hour subject to a possible cost of living adjustment) and expert witness fees (capped at the highest rate that the agency pays expert witnesses). 5 U.S.C. § 504(b)(1)(A). It would be anomalous to cap the recovery of expert, agent, and attorney's fees and not cap other types of fees. The fact that only attorney, agent and expert fees are capped suggests that no other types of fees are to be awarded. See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2461 (2006) (discussed below). Finally, the legislative history does not suggest that Congress was concerned with any other types of fees. In a Senate report issued pursuant to the 1984 reauthorization of EAJA, Congress sought to clarify the definition of "fees and expenses." S. Rep. No. 98-586, 98th Cong., 2d Sess., at 15 (Aug. 8, 1984). The report noted that concern was expressed regarding whether "fees and expenses" included "reasonable out-of-pocket expenses." Id. In noting that out-of-pocket expenses were reimbursable, the Senate report stated that EAJA permitted "the award of 'reasonable expenses of the attorney, agent, or witness' as a separate item, if the attorney, agent, or witness ordinarily charges clients for such expenses." Id. (quoting 46 Fed. Reg. 32900, 32913 (June 25, 1981)). This again suggests that fees of witnesses, attorneys, and agents are the only fees that Congress contemplated. See Cook v. Brown, 68 F.3d 447, 450-51 (Fed. Cir. 1995). For these reasons, we conclude that paralegal services may not be reimbursed under EAJA as part of "fees" in general.

Richlin also does not argue that paralegal services should be reimbursed as part of "agent fees." "EAJA expressly recognizes two different and mutually exclusive types of representative, 'agents' and 'attorneys,' and authorizes recovery of agent fees only in agency, not court, proceedings." Cook, 68 F.3d at 451. According to the legislative history, "[a]n 'agent fee' may be awarded for the services of a non-attorney where an agency permits such agents to represent parties who come before it." H.R. Rep. No. 96-1418, at 14 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4993. There is no suggestion that the paralegals involved here were authorized to represent clients before the Board. Thus it is apparent that their services should not be reimbursed as "agent fees."

As paralegal services are neither recoverable under the general category of "fees" nor as "agent fees," we must consider whether they fall within the definition of "attorney's fees."

II

The Supreme Court has not addressed the issue of whether paralegal services are included in "attorney's fees" under EAJA. However, it has addressed the question under section 1988 of the Civil Rights Attorney's Fees Awards Act ("§ 1988"). 42 U.S.C. § 1988. Section 1988 provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." See also § 706(k) of Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 261, 42 U.S.C. § 2000e-5(k) (July 2, 1964) (containing identical language to § 1988). In Missouri v. Jenkins, 491 U.S. 274, 275 (1989), the Supreme Court considered whether a "reasonable attorney's fee" award under § 1988 should "compensate the work of paralegals and law clerks by applying the market rate for their work." The Supreme Court reasoned that the term "reasonable attorney's fee" could not "have been meant to compensate only for work performed

personally by members of the bar." Id. at 285. Rather, the Court found that the term "reasonable attorney's fee" refers to "a reasonable fee for the work product of the attorney." Id. This includes the work of those "whose labor contributes to the work product for which an attorney bills her client," including the work of paralegals. Id. The Court stated that "[w]e thus take as our starting point the self-evident proposition that the 'reasonable attorney's fee' provided for by statute should compensate the work of paralegals." Id.

After the Court determined that paralegal services were included in the definition of attorney's fees, it turned to the definition of "reasonable." Id. The Court noted that "[i]n determining how other elements of the attorney's fee are to be calculated, we have consistently looked to the marketplace as our guide to what is 'reasonable.'" Id. Thus, a reasonable fee under § 1988 "is one calculated on the basis of rates and practices prevailing in the relevant market"; "one that grants the successful civil rights plaintiff a fully compensatory fee"; and one that is "comparable to what is traditional with attorneys compensated by a fee-paying client." Id. at 286 (internal citations and quotation marks omitted).

The Court reasoned that to ensure that the fee is "fully compensatory," the reimbursement rate must depend on how attorneys in the community customarily bill for paralegal time. Id. at 286-87. On one hand, if the prevailing practice is to separately bill for paralegal time at the market rate, reimbursement at cost "would not be fully compensatory." Id. at 287. On the other hand, a fee award at the market rate "would be too high" if the prevailing practice was to bill for paralegal time at cost. Id. The Court held that reimbursement for paralegal services would depend on which of the two approaches prevailed in the community. Overall, the Court concluded that allowing reimbursement at the prevailing rate

would encourage the use of paralegals which "encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes." Id. at 288 (internal citations and quotation marks omitted).

Following the Supreme Court's decision in Jenkins, the Court in West Virginia Univ. Hospitals, Inc. v. Casey, 499 U.S. 83 (1991), considered whether § 1988 permits the recovery of "expert's fees" as part of a "reasonable attorney's fee." In holding that expert fees were not recoverable as attorney's fees under § 1988,[4] the Court reaffirmed its holding in Jenkins that paralegal services are included in § 1988's definition of attorney's fees. Id. at 99-100. The Court noted that, unlike statutes that separately shift expert fees, "[w]e do not know of a single statute that shifts clerk or paralegal fees separately." Id. at 99-100. The Court explained that "giving the losing argument the benefit of the doubt" the term "attorney's fees" in Jenkins was "genuinely ambiguous; and we resolved that ambiguity not by invoking some policy that supersedes the text of the statute, but by concluding that charges of this sort had traditionally been included in attorney's fees." Id. at 100.

Since West Virginia and Jenkins, neither the Supreme Court nor this court has considered the paralegal services issue under EAJA. In Levernier Constr., Inc. v. United States, 947 F.2d 497 (Fed. Cir. 1991), we held that a court cannot apply a cost of living adjustment (COLA) to the reimbursement of paralegal services under EAJA, 28 U.S.C. § 2412(d). In so holding, we assumed that "EAJA allows for the recovery of paralegal fees for whom the 'prevailing market rate' is less than

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[4] In response to the Supreme Court's decision in West Virginia, Congress amended § 1988 to permit the recovery of expert fees. Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079 (1991).

$75 per hour," but rejected the notion that there was any basis for a COLA adjustment even if paralegal services were recovered at the market rate.[5] Id. at 503. However, the issue of whether paralegal fees are "attorney's fees" was neither argued nor decided. Under such circumstances, Levernier's statement and the assumption on which it proceeded is not binding authority. Boeing N. Am., Inc. v. Roche, 298 F.3d 1274, 1282 (Fed. Cir. 2002) (stating that "under our established precedent we are not bound by" a prior panel decision where "the issue was neither argued nor discussed in [the] opinion"); see also United States v. County of Cook, Illinois, 170 F.3d 1084, 1088 (Fed. Cir. 1999); Nat'l Cable Television Ass'n, Inc. v. Am. Cinema Editors, Inc., 937 F.2d 1572, 1580 (Fed. Cir. 1991) (citing Webster v. Fall, 266 U.S. 507, 511 (1925)).

Richlin also seeks support from the Eleventh Circuit decision in Jean v. Nelson, 863 F.2d 759, 778 (11th Cir. 1988), aff'd on other grounds, Immigration and Naturalization Serv. v. Jean, 496 U.S. 154 (1990). While Jean concluded that paralegal services must also be included within "attorney's fees" under EAJA, there was no indication that the paralegal services issue was argued, and the Eleventh Circuit simply followed a previous Eleventh Circuit decision (which predated the Supreme Court's decision in Jenkins and West Virginia) holding that, under Title VII, paralegal expenses are reimbursable at the market rate. See Allen v. United States Steel Corp., 665 F.2d 689, 697 (5th Cir. 1982) (holding in a Title VII case that paralegal services are included in "attorney's fees" and are not "costs" under Fed. R. Civ. P. 54(d)). The Jean court's discussion of paralegal services was limited to a short paragraph that addressed neither the statutory language nor the purpose of

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[5] When Levernier was decided, the EAJA attorney's fee cap was $75. It has now increased to $125.

EAJA. Id. As we now discuss, we do not find the Jean decision persuasive.[6]

III

Both EAJA and § 1988 provide for the recovery of "attorney's fees," and the Supreme Court has generally stated that "fee-shifting statutes' similar language is a strong indication that they are to be interpreted alike." Indep. Fed. of Flight Attendants v. Zipes, 491 U.S. 754, 758 n.2 (1989) (internal citations and quotation marks omitted).[7] However, where, as here, there are differences in the surrounding language, structure and purpose of the statute, the Supreme Court has interpreted identical language in different statutes differently. For example, in United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213 (1996), the Supreme Court held that a payment to the IRS was a tax under Internal Revenue Code section 4971(a) but was a "penalty" for purposes of awarding priority status under the Bankruptcy Code, 11

[6] We also find unpersuasive the few Board of Contract Appeals' decisions that allow recovery of paralegal services at market rates. These decisions fail to consider the statutory language, purpose and legislative history of EAJA. See e.g., Kumin Assoc., Inc., 98-2 BCA ¶ 30,008 (LBCA 1998); Lamb Eng'g & Contr. Co., 98-2 BCA ¶ 30,075 (EBCA 1998); Adams Constr. Co., 98-1 BCA ¶ 29,479 (VABCA 1997); Spectrum Leasing Corp., 93-1 BCA ¶ 25,317 (GSBCA 1992).

[7] See also Marek v. Chesny, 473 U.S. 1, 8-9 (1985); Northcross v. Memphis Bd. of Education, 412 U.S. 427, 428 (1973); Sacco v. United States, 452 F.3d 1305, 1310 (Fed. Cir. 2006) ("The Supreme Court has repeatedly made clear that the various federal attorney's fees statutes should be construed to reach a uniform result.").

U.S.C. § 507(a)(7)(E) (1988).[8]

This principle has been applied in the area of fee-shifting statutes. In Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994), the Court considered the fee-shifting provision of the Copyright Act of 1976, 17 U.S.C. § 505, which provides that "the court may . . . award a reasonable attorney's fee to the prevailing party as part of the costs." The issue was whether the same standard applied to prevailing plaintiffs as to prevailing defendants. Id. at 520. The Court had previously interpreted identical language in § 706(k) of Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 8 Stat. 261, 42 U.S.C. § 2000e-5(k) (July 2, 1964), to require a more favorable standard for prevailing plaintiffs than for prevailing defendants. See Christiansburg Garmet Co. v. EEOC, 434 U.S. 412, 422 (1978). The Court nonetheless rejected that approach for the Copyright Act, reasoning that "the goals and objectives of the two Acts are . . . not completely similar." Fogerty, 510 U.S. at 524. While plaintiffs under Title VII can "ill afford to litigate their claims against defendants with more resources," both plaintiffs and defendants under the Copyright Act "can run the gamut from corporate behemoths to starving artists." Id. (internal citations and quotation marks omitted).

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[8] The Supreme Court has held that even identical language in the same statute may be interpreted differently. See SKF USA Inc. v. United States, 263 F.3d 1369, 1383 (Fed. Cir. 2001) ("there have been rare occasions when the Supreme Court itself has construed the same term differently in different sections of the same statute") (citing Dewsnup v. Timm, 502 U.S. 410, 417 (1992)); see also Dewsnup v. Timm, 502 U.S. 420, 417-18 (1992) (interpreting the term "allowed secured claim" in sections 506(a) and 506(d) of the Bankruptcy Code, 11 U.S.C. § 506, and holding that the two provisions need not be interpreted consistently because statutory text was ambiguous and the legislative history supported different interpretations).

Here too we conclude that the different statutes require different interpretations. Initially we note that the language of the two statutes is different in important respects. Under § 1988 the effect of denying "fee" recovery for paralegal services would likely have been to deny recovery entirely. Section 1988 provides for the recovery of only attorney's fees and costs, not expenses. In Jenkins, the majority did not dispute the dissent's contention that "[a]bsent specific statutory authorization" the recovery of costs is limited to those innumerated in 28 U.S.C. § 1920. 491 U.S. at 297. As paralegal expenses were not included in the list of "costs," paralegal services could not be awarded unless they were considered part of "fees." In this respect, EAJA differs from § 1988 by also providing for the recovery of "expenses."

Here also, as in Fogerty, we conclude that "the goals and objectives" of Title VII and the statute before us are not the same. The purpose of § 1988 was "to encourage litigation protecting civil rights" and "to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." Kay v. Ehrler, 499 U.S. 432, 436 (1991); see also Ortiz v. Regan, 980 F.2d 138, 140 (2d Cir. 1992) (stating that § 1988 "was designed to allow private individuals a meaningful opportunity to vindicate civil rights violations"). The underlying purpose of "civil rights statutes [is to] vindicate public policies 'of the highest priority' . . . yet 'depend[s] heavily upon private enforcement.'" Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. of Health and Human Res., 532 U.S. 598, 635 (2001) (quoting S. Rep. No. 94-1011, p. 2-3 (1976)). Thus, people "who bring meritorious civil rights claims, in this light, serve as 'private attorneys general.'" Id. at 635-36.

The purpose of EAJA is narrower. EAJA was enacted because "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." H.R. Rep. No. 96-1418, at 10 (1980). In other words, the purpose of EAJA is to "diminish[] the deterrent effect of the cost of seeking review of agency action." Sullivan v. Hudson, 490 U.S. 877, 878 (1989).[9] Thus the purpose of EAJA is not to reimburse all of the costs of the prevailing party but to reimburse costs only when the government's position was not substantially justified and even then to provide only for partial reimbursement. Since the purpose of EAJA was not to make the prevailing party whole, it is consistent with that purpose to disallow full reimbursement for paralegal fees.

Indeed, it would be inconsistent with the purpose of EAJA to reimburse paralegal fees at the full hourly rate charged to the client limited only by the statutory cap on attorney's fees. When enacted in 1980, EAJA included a $75 cap on attorney's fees. In 1996 Congress raised the cap to $125. Pub. L. No. 104-121, § 231, 110 Stat. 847, 862 (Jan. 3, 1996). Given that attorney's fees generally far exceed paralegal fees, it seems unlikely that Congress would have capped paralegal services at the same level as attorney's fees. It also seems unlikely that Congress would have set the maximum fee for paralegals as high as $75

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[9] See, e.g., Abbs v. Principi, 237 F.3d 1342, 1349 (Fed. Cir. 2001) ("Congress enacted the EAJA to diminish the costs of litigating against the government."); Krecioch v. United States, 316 F.3d 684, 686 (7th Cir. 2003) ("The purpose of the EAJA is to eliminate the financial disincentive for people to challenge unreasonable governmental actions."); Sec. & Exch. Comm'n v. Price Waterhouse, 41 F.3d 805, 809 (2d Cir. 1994) ("The provisions of the EAJA, despite its somewhat misleading name, are designed to compensate victims of unjustified litigation by the Government from some of the burdensome expenses and costs to which they were subjected by the Government's taking of unreasonable positions." (emphasis in original)).

per hour (the equivalent of about $185 in today's dollars)[10] – a level that likely exceeded the then-current billing rate for paralegal services[11] – given the overall desire to cap allowable fees below market rates.

A similar structural feature led the Supreme Court in Arlington Central School District Board of Education, 126 S. Ct. at 2461, to conclude that expert witness fees were not recoverable under the Individuals with Disabilities Education Act ("IDEA"). IDEA directs that "in any action or proceeding brought under this section, the court in its discretion, may award reasonable attorney's fees as part of the costs" to the parents of "a child with a disability" who is the "prevailing party." 20 U.S.C. § 1415(i)(3)(B). The respondents argued that the Supreme Court should interpret "costs" to include expert costs. Arlington, 126 S. Ct. at 2459. In holding that "costs" do not include expert costs, the Court noted that the statute, in sections 1415(i)(3)(C)-(G), "contains detailed provisions that are designed to ensure that [attorney's fees] awards are indeed reasonable."[12] Id. at 2460. "The absence of any comparable

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[10] See U.S. Dept. of Labor, Bureau of Labor Statistics, Consumer Price Index: September 2006 (Oct. 18, 2006).

[11] Five years after EAJA was enacted (when EAJA's statutory cap was still $75 per hour), paralegals' time appeared to have been billed at an average hourly rate of $44 in metropolitan areas with populations over one million. Brief for Respondents, Missouri v. Jenkins, 491 U.S. 274 (1989) (No. 88-64) (citing a 1986 "Survey of Law Firm Economics" that contains 1985 data); see also In re Agent Orange Product Liability Litigation, 818 F.2d 226, 231 (2d Cir. 1987) (citing national hourly rates for attorney's from 1980-1984 as $150 for partners and $100 for associates).

[12] Subsection 1415(i)(3)(C) states that "[f]ees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No

provisions relating to expert fees strongly suggests that recovery of expert fees is not authorized." Id. As the structure of EAJA also contains restrictions to ensure that the award of attorney's fees are reasonable but no comparative provision with respect to paralegal fees (and the attorney's fees cap provides no meaningful limit on paralegal fees), the Supreme Court's decision in Arlington supports the view that Congress did not intend to include paralegal services within the definition of attorney's fees under EAJA.

The allowance of paralegal fees without a meaningful cap would, moreover, create a perverse incentive. If the attorney did the work himself, he would be limited to $125 per hour – likely far less than his market rate. If he referred the work to a paralegal, he could recover at or near the full market rate for paralegals. The effect would be to encourage lawyers to refer work to paralegals so that full fee recovery could be obtained. This would create a different incentive than the one relied on by the Supreme Court in Jenkins. There the Court concluded that allowing paralegal fee recovery would result in the more efficient performance of legal services by allowing lawyers to use paralegals at a lower hourly rate in accordance with their normal practice. See Jenkins, 491 U.S. at 288. Here treating paralegal fees as attorney's fees would distort the normal allocation of work and result in a less efficient performance of legal services.

Finally, there is also no legislative history supporting the

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bonus or multiplier may be used in calculating the fees awarded under this subsection." Subsections 1415(i)(3)(D) and (E) provide that no fees will be awarded for certain legal services, including services performed after certain settlement offers, unless the parent was "substantially justified in rejecting the settlement offer." Subsections 1415(i)(3)(F) and (G) list the conditions for when the award of attorney's fees should be reduced, e.g. when the parent "unreasonably protracted the final resolution of the controversy."

award of paralegal fees at market rates. Quite the contrary, the legislative history of EAJA supports the conclusion that paralegal services are expenses and not fees (or costs). When Congress acted to make EAJA permanent in 1984, the Senate report accompanying the bill clarified the meaning of "fees and expenses." S. Rep. No. 98-586, 98th Cong., 2d Sess., at 15 (Aug. 8, 1984). The Senate report stated that "though no language change takes place, clarification of the term [fees and expenses] is necessary" because there was a dispute about whether "fees and expenses," as listed in the statute, is exclusive or whether it included other reasonable expenses. Id. The Senate report clarified that the term "fees and expenses" is inclusive and permits the reimbursement of all "reasonable expenses." The report then stated that "[e]xamples of the type of expenses that should ordinarily be compensable include paralegal time (billed at cost)." Id. This language strongly suggests that Congress did not intend to include paralegal expenses in the definition of "attorney's fees," but rather intended that paralegal fees be billed as expenses limited to the attorney's cost.

CONCLUSION

For these reasons, we hold that paralegal services are not recoverable as fees, but are only recoverable as expenses at the cost to the attorney. Richlin does not challenge the Board's $35 per hour cost figure. Accordingly, we affirm the Board of Contract Appeals' award.

AFFIRMED

COSTS

No costs.

United States Court of Appeals for the Federal Circuit

2006-1055

RICHLIN SECURITY SERVICE COMPANY,
Appellant,

v.

Michael Chertoff,
SECRETARY OF HOMELAND SECURITY,
Appellee.

PLAGER, Senior Circuit Judge, dissenting.

The EAJA statute uses the phrase "reasonable attorney . . . fees" to describe one element of the award that can be made under this fee-shifting statute.[1] Other than noting that such fees shall be based upon prevailing market rates, the statute itself is of little help in answering the question of whether and how an award for paralegal services may be compensated. In my view our role is not to pick an answer we prefer and distinguish away any law that is inconsistent with that answer. Rather, there is law on point that guides our decision and, in the absence of clear Congressional direction, provides an answer that is consistent and defensible as a matter of law. Accordingly I respectfully dissent.

First, the panel's position is at variance with established

[1] 5 U.S.C. § 504(b)(1)(A).

Supreme Court law. The same question now before us was before the Court in Missouri v. Jenkins: does a fee-shifting statute that provides for "a reasonable attorney's fee" authorize "compensating the work of . . . paralegals . . . at the market rates for their services, rather than at their cost to the attorney." 491 U.S. 274, 284 (1989). Just as EAJA does not address the question in express terms, neither does section 1988 of the Civil Rights Attorney's Fees Awards Act (42 U.S.C. § 1988), the statute at issue in Jenkins. Nevertheless, the Supreme Court's answer to the question of whether fees for paralegals were included under the statute was an unequivocal yes. It is of course obvious that the statutes involved—EAJA in our case and § 1988 in the Jenkins case—are part of different statutory programs with different statutory purposes, but the underlying policy of the fee-shifting provisions is the same: to encourage the vindication of legal rights that otherwise might not be vindicated.

With regard to the scope of the phrase "reasonable attorney's fee," the Supreme Court explained:

> Clearly, "a reasonable attorney's fee" cannot have been meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of . . . others whose labor contributes to the work product for which an attorney bills her client.

Id. at 285. The position taken by the panel majority in this case, that 'reasonable attorney fees' do not include the work of others who contribute to the work product of the attorney, echoes the view of the lone dissenter on this issue in Jenkins: "[T]he statute itself simply uses the very familiar term 'a reasonable attorney's fee,' which to those untutored in the court's linguistic

juggling means a fee charged for services rendered by an individual who has been licensed to practice law." Id. at 296 (Rehnquist, C.J., dissenting). Whether linguistic juggling or not, the Supreme Court's position on the meaning of the phrase 'attorney's fees' in these fee-shifting statutes leaves little doubt as to how the phrase is to be understood.[2]

Second, in a case decided by this court in 1991, Levernier Construction, Inc. v. United States, 947 F.2d 497 (Fed Cir. 1991), one of the issues before the court was whether, in an award made under EAJA, a cost of living adjustment (COLA) could be applied to paralegal fees awarded at market rates. The court denied the award of the COLA. The court could have reached that result either by concluding that an award of paralegal fees at market rates was not available under EAJA, as the panel here concludes, or by concluding that, even though paralegal fees were awardable, the EAJA statute did not authorize an upward adjustment by way of a COLA. The court did the latter: "[A]lthough the EAJA allows for the recovery of paralegal fees for whom the 'prevailing market rate' is less than $75 per hour [the fee cap at that time], neither the cap on those fees nor the fees themselves may be augmented by a COLA." Id. at 503. Though not analyzed in detail because the Government apparently conceded it, the court thus expressly addressed the issue of paralegal fees and stated its conclusion regarding it.

We can argue over the weight to be given to that conclusion. Though the issue was not argued by the parties, it necessarily was before the court. That predicate issue had to be decided before the COLA question could be; the consequence was to approve the award of paralegal fees, though without the

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[2] Seven of the eight justices who heard the case, including the two who dissented in part, joined the decision on paralegal fees.

COLA. This is not a passing dictum on which the case could be distinguished. I agree that an issue opined about that is not presented by the facts of the case, and neither argued nor discussed, is not a holding binding on later panels. The panel majority is of the view that whether the issue in Levernier was sufficiently or properly analyzed to their satisfaction is a question they should decide. My view is that for now Levernier stands as the law of this circuit, and, if it is to be ignored, especially in light of the Supreme Court's position, that should be done by the court en banc, and not summarily by a panel decision.

Third, and finally, there are sound policy reasons for following Levernier and for adopting the Supreme Court's take of the case, even if we thought we had a choice. As the Court noted, by encouraging the use of lower cost paralegals rather than attorneys wherever possible, permitting market-rate billing of paralegal hours encourages cost-effective delivery of legal services and, by reducing the spiraling cost of rights litigation, furthers the policies underlying such rights-vindicating statutes.[3]3 See Jenkins, 491 U.S. at 288. This is the view of our sister circuit who addressed this same question both in the civil rights context and in the EAJA context, and concludes as I do,[4] and of the several Board of Contract Appeals decisions that allow recovery of paralegal services at market rates.[5]

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[3] The question of whether caps should be imposed on the fees, and any "anomalies" that may result therefrom, is a question of legislative policy, not judicial rationalizing.

[4] Jean v. Nelson, 863 F.2d 759, 778 (11th Cir. 1988).

[5] See e.g., Kumin Assocs., Inc., 98-2 BCA ¶ 30,008 (LBCA 1998) (citing and following Levernier); see also maj. op. at 13 n.6 (and cases cited therein).

Consistent with established law I would reverse the Board decision, and remand for the Board to determine whether local billing practices support a fee award for the paralegal services at market rates (see the discussion of this point in Jenkins, 491 U.S. at 285-87), and what the award amount should be.

UNITED STATES
DEPARTMENT OF TRANSPORTATION
BOARD OF CONTRACT APPEALS
WASHINGTON, D.C.

Docket Nos. 3034E, 3035E
Contract No. WRO-06-90, WRO-03-91

RICHLIN SECURITY SERVICES CO.,
Appellant

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent

Gilbert J. Ginsberg, Esq., Washington, D.C.,
Counsel for the Appellant

Reginald T. Blades, Esq., Washington, D.C.,
Counsel for the Government

OPINION BY ADMINISTRATIVE JUDGE
FENNESSY ON RICHLIN'S APPLICATION
FOR ATTORNEY FEES AND EXPENSES

Richlin Security Services, Inc., submitted a timely application for attorney fees and expenses in the amount of $172,642.60 pursuant to the Equal Access to Justice Act. 5 U.S.C. § 504. Richlin subsequently amended its application reducing the amount claimed to $134,823.34.

I. Background

The underlying adversary adjudication has been the

subject of numerous opinions by this Board and the United States Court of Appeals for the Federal Circuit. Therefore, the following background is provided to place the present application in context.

The contracts in dispute were between Richlin and the Immigration and Naturalization Service (INS) for guard services. Richlin submitted a $1,568,477.12 certified claim for increased costs associated with the parties' misclassification of Richlin's employees as Guard I rather than Guard II, which commanded a higher rate of pay. In our entitlement decision we granted the appeal in part and denied it in part. We held that reformation of the contract price was appropriate because of the parties' mistake. However, we also held that, to prevent bestowing a windfall upon Richlin, the reformation could not be completed until Richlin had liquidated and satisfied its liability for the unpaid wages. The denial was "without prejudice to make further claim at such time as Richlin's liability for back wages becomes liquidated and satisfied." *Richlin Security Services Co.*, 98-1 BCA ¶ 29,651 (DOTBCA 1997) *(Richlin I).* Throughout this proceeding Richlin appeared before the Board *pro se.*

The Government appealed that decision and the Court of Appeals affirmed it on May 7, 1998. *Messiner v. Richlin Security Services Co.*, 155 F.3d 566 (Fed. Cir. 1998) *(Richlin II).*

While the appeal of *Richlin I* was still pending, in March 1998, Richlin wrote to the Board requesting completion of the reformation. The Government opposed the request. After the Court affirmed *Richlin I*, Richlin again wrote to the Board requesting the Board to issue an award in the amount of $1,568,477.12. The Government again opposed the request. The Board denied the request by letter dated June 17, 1998, because the original entitlement decision required Richlin to liquidate

and satisfy its obligations by paying the wages to its former employees and to submit a new claim to the contracting officer for the amount paid.

Richlin then engaged Gilbert J. Ginsberg, Esq., who negotiated a contract with DOL establishing $636,818.72 as the amount due Richlin's employees, providing for the distribution of the funds by DOL or Mr. Ginsberg, and stating that the contract "liquidated and satisfied" Richlin's obligations to its employees. On September 22, 1998, a DOL wage specialist, Richlin's president, Ms. Linda Santos, and Mr. Ginsberg executed the contract.

On October 6, 1998, Mr. Ginsberg entered his appearance before the Board and on October 26 he submitted a request to complete the reformation based upon the Richlin/DOL agreement. The Government opposed the request upon the grounds that the Court of Appeals decision was final and did not order a remand to the Board for completion of the reformation. Therefore, the Government argued that the Board lacked jurisdiction to complete the reformation.

We denied Richlin's request finding that the entitlement decision required Richlin to liquidate and satisfy its obligations and submit a new claim to the contracting officer once the amount of the obligations was determined. We also found that the Richlin/DOL agreement did not "liquidate and satisfy" Richlin's wage obligations. *Richlin Security Services Co.*, 99-1 BCA ¶ 30,219 (DOTBCA 1999) *(Richlin III).* Richlin moved for reconsideration and we denied the motion. *Richlin Security Services Co.* 99-2 BCA ¶ 30,562 (DOTBCA 1999) *(Richlin IV).*

Richlin appealed that decision and placed evidence before the Court that Richlin could not afford to pay its former employees without first obtaining the funds from the INS. Based upon that evidence and the Richlin/DOL contract, the Court reversed and remanded the matter to the Board finding

that the Richlin/DOL contract did liquidate and satisfy Richlin's obligations and that the Board had the responsibility to direct the completion of the reformation. *Richlin Security Services Co. v. Rooney*, 18 Fed. Appx. 843 (Fed. Cir. 2001) *(Richlin V).* We do not know whether the Government raised the jurisdictional issue mentioned in its opposition to Richlin's request for completion of the reformation because the Court did not address that issue. However, the Court's decision and remand reflect a belief that we did in fact possess jurisdiction to complete the reformation.

On remand, Richlin posited alternative methods for computing its claim of approximately $1.5 million, inclusive of the $636,818.72 in wages. Because Richlin wished to distribute the unpaid wages immediately, it asked the Board to make an interim award of $636,818.72, the gross amount due Richlin's former employees pursuant to the agreement with DOL. The Board granted the request. *Richlin Security Services Co.*, 02-2 BCA ¶ 31,876 (DOTBCA 2002) *(Richlin VI).* Thereafter, the Board issued a decision finding that, in addition to the gross wages, an award would be made for payroll taxes and workmen's compensation premiums in the amount for which Richlin may be liable once the unpaid wages were distributed. We denied all other elements of the claim. However, we were unable to make the award until Richlin established the actual amount of payroll taxes and insurance for which it was liable. *Richlin Security Services, Inc.* 03-2 BCA ¶ 32,302 (DOTBCA 2002). *(Richlin VII).*

Richlin appealed that decision. While the appeal was pending Richlin submitted its EAJA application on May 23, 2003. We discuss the procedural history of the EAJA application below.

The Court of Appeals affirmed *Richlin VII. Richlin Security Services* v. *Ridge*, 2004 WL 1153349 (Fed. Cir. May

14, 2004). *(Richlin VIII)*.

In the meantime the wages were distributed and the parties submitted additional briefs on the remaining quantum issues. The Board issued an opinion awarding the payroll taxes Richlin owed[1] and denying Contract Disputes Act interest. *Richlin Security Services, Inc.*, 2004 WL 1638067 (DOTBCA 2004). *(Richlin IX)*.[2]

II. The EAJA Application

The Board received Richlin's application on May 23, 2003, following our decision in *Richlin VII.* We stayed the application pending the Court's decision of the appeal of *Richlin* VII. Richlin twice supplemented the application and submitted corrections to the second supplement. The Government answered the application and Richlin then moved to withdraw it without prejudice to filing it in the Court of Appeals. We granted the motion, in part, dismissing the fees and expenses incurred in connection with the Court of Appeals action. Otherwise we denied the motion. *Richlin Security Services, Inc.*, 04-2 BCA ¶ 32,789 (DOTBCA 2004). Thereafter, Richlin submitted an amended application.

A. Motion to Strike

Richlin submitted with the amended application an affidavit from Ms. Linda Santos expressing her opinions of the Department of Justice (DOJ) attorneys who represented the Government and an affidavit from Mr. Ginsberg describing his activities with the Department of Labor to secure and execute

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[1] Richlin was not required to pay workmen's compensation premiums on the distributed wages.

[2] We understand that Richlin has appealed that decision (*Richlin IX*) to the Court of Appeals.

the Richlin-DOL agreement, addressing the Government's position on settlement, and berating the Board's docketing system.

The Government has moved to strike these affidavits upon the ground that Richlin relied upon them as evidence. The Government has noted that both the EAJA and the Board's rules require that EAJA awards be made on the basis of the administrative record. 5 U.S.C. § 504 (a) (1); Board EAJA Rule No. 14 (a).

The motion to strike the affidavits is granted. They address matters not before this Board, do not constitute a part of the administrative record, and are irrelevant to the EAJA application.

B. Eligibility

Pursuant to the EAJA, an eligible party who prevails against the United States in an adversary adjudication is entitled to recover attorney fees and expenses if the position of the Government was not substantially justified. To be eligible for an EAJA award, an applicant must establish that she is a "party" as defined in the statute by being (1) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (2) an owner of an unincorporated business or a partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed. *Fields v. U.S.*, 64 F.3d 676 (Fed. Cir. 1995). Richlin has established that it meets the size and net worth requirements for an EAJA award and the Government does not dispute that Richlin was a prevailing party.

C. Substantial Justification

The Government contends that its position was

substantially justified and that Richlin therefore is not entitled to an award of fees and expenses. The Government's position is considered to be substantially justified for the purpose of denying an EAJA award if the position had a reasonable basis in law and fact. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Thus, the Government must be justified to a degree that would satisfy a reasonable person. *Id.* The Government bears the burden of proving that its position was substantially justified. *Heifer v. West*, 174 F.3d 1332, 1336 (Fed. Cir. 1999); *Community Heating & Plumbing Co., Inc. v. Garrett*, 2 F.3d 1143, 1145 (Fed. Cir. 1993).

While the Government's position on different issues may be more or less justified, "the EAJA – like other fee shifting statutes – favors treating a case as an inclusive whole rather than as atomized line-items." *Comm'r v. Jean*, 496 U.S. 154, 161-62 (1990). Whether the Government's position is substantially justified requires a "single finding" that "operates as a one-time threshold for fee eligibility." *Id.* at 160.

In this case, the Government, relying upon *Collins International Service Company v. United States*, 744 F.2d 812 (Fed. Cir. 1984), denied Richlin's claim and defended the appeals upon the ground that Richlin bore the risk of misclassifying its employees.

In *Collins*, the DOL wage determination listed positions that bore only a loose correlation to the work required by the solicitation. The Court found that the contractor bore the risk of misclassifying its employees because the contract provided that Collins was required to classify employees not listed in the wage determination so as to provide a "reasonable relationship" to the wages listed in the DOL determination.

The Government's reliance upon Collins was misplaced because the facts of Richlin's case are inapposite to those in *Collins*. In an attempt to fit Richlin within the scope of Collins,

the Government identified a contract provision which stated:

> This procurement is subject to the requirements of the Service Contract Act of 1965, as amended. Any questions regarding the extent of the obligation of the Contractor under the Act should be addressed to the U. S. Department of Labor.

According to the Government, this provision squarely placed the risk of misclassifying employees upon Richlin. However, that provision did not control these appeals because there was no evidence that Richlin had any questions regarding its Service Contract Act obligations. Rather, another provision in which the Government expressly stated that the contracts required Guard I services placed the risk of misclassification upon the Government.

Because the Government had asserted that the contract required Guard I services and because Richlin's bid price was clearly based upon Guard I wages rather than Guard II wages, we found a mutual mistake of fact warranting reformation of the contract price. Given the distinguishing facts in *Richlin*, the Government was not substantially justified in denying Richlin's claim.

III. Quantum

A. Fees Incurred Prior to Mr. Ginsburg's Notice of Appearance

The appeal was commenced on August 30, 1996. Our decision on entitlement was issued on March 20, 1997. Richlin achieved 100% success in the entitlement phase of this litigation. However, no counsel made an appearance on Richlin's behalf in the appeals during that phase of the proceeding. Consequently, Richlin is not entitled to fees and expenses for the entitlement phase of the litigation when it appeared *pro se* before the Board. *Naekel v. Department of*

Transportation, 845 F.2d 976, 981 (Fed.Cir. 1988).

Nevertheless, in the original application Richlin included $8,691.09 in attorney fees and $919.58 in expenses incurred by Epstein, Becker & Green from August 1994 through August 1996, prior to Mr. Ginsburg's appearance. In the amended application, Richlin has removed all but a limited amount of the fees incurred prior to Mr. Ginsburg's appearance on October 6, 1998. Richlin now seeks fees and expenses incurred by Mr. Ginsburg beginning June 24, 1998, before he entered his appearance but after the Court of Appeals had affirmed our entitlement decision. Richlin seeks fees for 18.55 hours of attorney time for work performed between June 24 and October 6, 1998. The question is whether Richlin may recover those fees.

Our authority to award fees and expenses is governed by 5 U.S.C. § 504(a)(l), which provides that:

> An agency that conducts an adversary adjudication shall award to a prevailing party other than the United States fees and other expenses incurred by that party in connection with that proceeding . . .

Id. Section 504 (b)(l)(c) defines an adversary adjudication as, among other things, "any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C.§ 605) before an agency board of contract appeals . . ."

The Government contends that Richlin is not entitled to any fees incurred outside of the adversary adjudication. In support of its position the Government relies upon *Naekel v. Department of Transportation, supra.* There the Court held that the EAJA did not authorize an award of attorney fees for the time a party acted *pro se*. While we agree that a party may not recover fees when acting *pro se*, we believe that the fees claimed in this instance, while incurred prior to Mr. Ginsberg's

appearance, are within our EAJA authority to award fees incurred in connection with an adversary adjudication.

We are guided by the decision of the Court of Appeals in *Levernier Construction, Inc. v. United States*, 947 F.2d 497 (Fed. Cir 1991). *Levernier Construction* involved an EAJA claim for consultant costs incurred to prepare a claim to the contracting officer. The Claims Court allowed the costs even though they had been incurred before the action in that court had been commenced. The Court of Appeals reversed focusing on the language of 28 U.S.C. § 2412(d)(l)(A), the judicial counterpart to our EAJA authority.

Section 2412(d)(l)(E) authorizes the award of fees incurred "in any civil action" including an appeal by a party, other than the United States, from a contracting officer's decision pursuant to a contract disputes clause or the Contract Disputes Act. 41 U.S.C § 601 *et. seq*. Section 2412(d)(l)(A) provides that a civil action includes proceedings for judicial review of agency action. The Court in *Levernier Construction* construed those provisions to mean that "at its earliest, EAJA coverage may begin after the decision of and in pursuit of an appeal from the decision of the contracting officer." *Levernier Construction, Inc. v. United States* at 502. Further, the Court, construing the EAJA narrowly, recognized that "fees incurred for legal and factual research preparatory to Claims Court litigation" are allowable. *Id.* at 501, *citing Cox Construction Co. v. United States*, 19 Cl. Ct. 29, 33-34, n. 2 (1989).

Applying this reasoning to the case before us, the EAJA provisions applicable to Board proceedings permits award of fees and expenses incurred "in connection with" an adversary adjudication. 5 U.S.C § 504(a)(l). The fees claimed for the work performed by Mr. Ginsberg prior to his appearance were incurred in pursuit of the quantum phase of Richlin's appeal from the contracting officer's decision. The billing records

reflect that, from June 24 to October 6, 1998, the fees claimed were for time spent by Mr. Ginsberg for familiarizing himself with the case and negotiating the Richlin/DOL contract in an attempt to liquidate and satisfy Richlin's Service Contract Act obligations. Three weeks after Mr. Ginsberg's appearance, Richlin, by counsel, again asked the Board to complete the reformation according to the Richlin/DOL contract. Thus, the fees were incurred "in connection with" the Board proceeding and are recoverable.

B. Fees Incurred to Manage the Escrow Account

The Richlin/DOL contract was executed on September 22, 1998. Therefore, with the exception of status reports to the Board, fees and expenses incurred thereafter in connection with that agreement were incurred to implement it by distributing wages and managing the escrow account. Richlin contends that it is entitled to attorney fees for that work because the Court remanded the matter to the Board "for completion of the reformation by the procedure established in Richlin's contract with the DOL with payment advanced by INS to the escrow account." *Richlin Security Service Company v. Rooney*, 18 Fed. Appx. 843 (Fed. Cir. 2001) (unpublished).

The Government argues that Richlin is not entitled to fees for managing the escrow account and disbursing the wages and related taxes. The basis for the argument is that, in our quantum decision, we denied the fee claimed by Richlin for work performed by Richlin's president, Mrs. Linda Santos, and two employees to locate former employees, and for work performed by Mr. Ginsburg for administering the escrow account.[3] The Court of Appeals affirmed stating: "On this

[3] *Richlin Security Services Co.*, 04-2 BCA ¶ 32,670 (DOTBCA 2004)

record we see no reason to burden the government with the costs of escrow services provided by Richlin's counsel." *Richlin Security Services v. Ridge*, 99 Fed. Appx. 906 (Fed. Cir. 2004) (unpublished).

The Court of Appeals has stated that:

> . . . Expenses of an attorney that are not incurred or expended *solely* or *exclusively* in connection with the case before the court or which expenses the court finds to be unreasonable or unnecessary in the pending litigation cannot be awarded under the EAJA.

Oliveire v. United States, 827 F.2d 735, 744 (Fed. Cir. 1987) (emphasis added).

The Court's remand instruction does not render the INS liable for attorney fees incurred by Mr. Ginsburg to perform the Richlin/DOL contract. That agreement was voluntarily entered into by Richlin, Mr. Ginsburg, and DOL. The INS was not a party to the agreement. The agreement provided in pertinent part:

> The parties agree that payment from the Immigration and Naturalization Service (INS) or from the Judgment fund will be sent directly to professor Ginsburg, as Escrow Agent, for deposit into professor Ginsburg's escrow account. Professor Ginsburg will then issue checks to each employee in the amount set forth in Attachment 1 before any other funds are disbursed. . . . *At the option of DOL, Professor Ginsburg, as Escrow Agent, will pay directly to DOL the full amount due the employees* . . . .

Richlin Security Services Co., 03-2 BCA ¶ 32,301 (DOTBCA 2002) at 159,818 (emphasis added). Thus, the Richlin/DOL contract left it to DOL to decide whether Mr. Ginsburg or DOL would disburse the funds to the employees.

There is no provision in the contract between Richlin and the INS for the arrangement between DOL, Richlin and Mr. Ginsburg. Nor are we aware of any regulatory or statutory provision delegating DOL's enforcement obligations of the Service Contract Act to a non-Government entity. The applicable regulations make DOL responsible for the enforcement of that Act. Specifically, the regulation provides:

> So much of the accrued payments due either on the contract or on any other contract . . . between the same contractor and the Government may be withheld in a deposit fund as is necessary to pay the employees . . . The Act further provides that on order of the Secretary (or authorized representatives) any compensation which the head of the Federal agency or the Secretary has found to be due shall be paid directly to the underpaid employees from any accrued payments withheld. *In order to effectuate the efficient administration of this provision of the Act, such withheld funds shall be transferred to the Department of Labor for disbursement to the underpaid employees* . . . .

29 C.F.R. § 4.187 (emphasis added).

Pursuant to this regulatory scheme, the funds DOL found to be due Richlin's underpaid employees were to have been transferred from the INS to DOL for distribution to the employees. Thus, there was no requirement for Richlin to incur any attorney fees in order for its Service Contract Act obligations to be enforced. The distribution of wages and the administration of the escrow account by Mr. Ginsburg was an undertaking unnecessary to and beyond the scope of the Board's proceedings. Therefore, we deny attorney fees and expenses incurred for that work.

C. Fees Incurred In Connection With Tax Lien

The Government argues that Richlin is not entitled to fees incurred for representing Richlin before the IRS to remove a tax lien imposed because of Richlin's belated payment of payroll taxes. In our quantum decision, we denied the tax penalty as an element of the reformed price because Richlin would not have incurred it had it not sought a partial award of the wages and distributed them prior to completion of the quantum phase of the litigation. The Court of Appeals affirmed. *Richlin Security Services v. Ridge*, 99 Fed. Appx. 906 (Fed. Cir. 2004). Mr. Ginsburg's representation of Richlin in connection with the tax lien was, like the administration of the escrow account, unnecessary to and beyond the scope of the Board's proceeding. The fees and expenses incurred in the performance of that work were not incurred solely and exclusively in connection with the Board's proceeding. *Oliveire v. United States*, 827 F.2d at 744. Therefore, we deny EAJA fees incurred in relation to the tax lien.

D. Fees In Excess of the Statutory Limitation

Pursuant to the EAJA, attorney fees are limited to $125 absent an agency regulation authorizing a cost of living adjustment. 5 U.S.C. § 504(b)(l)(A). In both its original application and in its amended application, Richlin added a cost of living adjustment to the statutory limit. The Government has consistently opposed the cost of living adjustment noting that there is no applicable regulation authorizing such an adjustment. In its reply to the Government's answer to Richlin's amended application, Richlin finally acknowledged that the Government's position was correct and again amended the amended application to eliminate $6,745.70 for the claimed cost of living adjustment. Richlin is not entitled to a cost of living adjustment and is limited to attorney fees at the statutory rate of $125.

E. Paralegal Expenses

Richlin seeks paralegal expenses for 523.80 hours performed in pursuit of the underlying appeals for a total of $45,785.10. Mr. Ginsburg's billing rates for paralegal work were $50.00 per hour, 80.00 per hour, $95 per hour and $135.00 per hour at various times during the 7 years of his representation of Richlin. We are uncertain how Richlin calculated the sum claimed for paralegal expenses because it did not provide us with that computation. It appears that it used an average billing rate to calculate the paralegal expenses.

In response to the Government's answer to the amended application, Richlin claims to have reduced to $95 the amount claimed for paralegal expenses in excess of $95 per hour. Therefore, Richlin reduced its claim for paralegal fees by $644.00. There is no evidence that Richlin reduced the amount claimed when its billing rate was less than $95.

No where in its application or amended application did Richlin identify the cost to Mr. Ginsburg's firm of the paralegal services.

The EAJA does not address the basis on which an award for paralegal expenses is to be made. While some boards of contract appeals have allowed recovery of paralegal expenses at the rate billed to the client, we have found that, pursuant to EAJA, paralegal expenses are recoverable at the cost to the firm rather than at the billed rate. *Golden West Environmental Services*, 05-1 BCA ¶ 32,869 (DOTBCA 2005); *accord* Hassling Construction Company, Inc., 03-2 BCA 32,325 (PSBCA 2003); *Valenzuela Engineering, Inc.*, 01-2 BCA ¶ 31,477 (ASBCA 2001); *Walks Construction*, 95-2 BCA ¶ 27,889 (ASBCA 1995) at 139,135-36; *Francis Paine Logging*, 92-3 BCA ¶ 25,043 (AGBCA *1992); Akcon, Inc.*, 91-3 BCA ¶ 24,147 (ENGBCA 1991); *Gracon Corp.*, 90-1 BCA ¶ 22,550 (IBCA 1990); *Ashton v. Pierce*, 580 F. Supp. 440, 443 (D. D.C.

1984).

> The EAJA provides:
>
> (A) "Fees and expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary to the preparation of a party's case, and reasonable attorney or agent fees. (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert services paid by the agency involved and (ii) attorney or agent fees shall not be awarded in excess of $125 unless the agency determines by regulation that an increase in the cost of living or a special factor . . . justifies a higher fee.).

5 U.S.C. § 504(b) (1). From the parenthetical in the foregoing it is evident that the requirement that fees be based upon the prevailing market rate pertains to expert witness expenses, attorney and agent fees rather than paralegal fees. This interpretation is supported by the legislative history of the EAJA.

The House Judiciary Committee Report on the Senate bill, S.265, from which the EAJA was derived, explained that "[a]n 'agent fee' may be awarded for the services of a non-attorney where an agency permits such agents to represent parties who come before it" H.R.Rep. No. 1418, 96th Cong., 2d Sess. 14, *reprinted in* 1980 U.S.C.C.A.N. 4984, 4993. Congress thus identified "agent fees" as fees for representation by an authorized nonlawyer. Implicitly, then, Congress understood "attorney fees" to mean fees for representation by persons who are qualified generally to appear as a legal representative in

administrative or judicial proceedings, presumably by virtue of their formal training and licensure to practice of law.

A basic principle of statutory interpretation is that undefined terms have their ordinarily understood meaning. *Jones v. Brown*, 41 F.3d 634, 638 (Fed.Cir.1994); *Best Power Technology Sales Corp. v. Austin*, 984 F.2d 1172, 1177 (Fed.Cir.1993). The ordinary meaning of the term "attorney" is consistent with our interpretation of the EAJA.

Black's Law Dictionary states that "[i]n its most common usage . . ., unless a contrary meaning is clearly intended, [attorney] means 'attorney at law', 'lawyer' or 'counselor at law'." Black's Law Dictionary 128 (6th ed.1990). An "attorney at law" is a "[p]erson admitted to practice law in his respective state and authorized to perform both civil and criminal legal functions for clients . . ." *Id.* There is no indication that Congress intended "attorney" to be defined, for the purpose of the EAJA, other than as "attorney at law," i.e., someone formally trained and licensed in the general practice of law. *Cook v. Brown*, 68 F.3d 447 (Fed. Cir. 1995).

Paralegal employees are neither expert witness, attorneys, nor agents. Rather, paralegal services are akin to the study, analysis, or project referenced in the Act as among the expenses which may be reasonably necessary for the preparation of a party's case. The Act expressly states that these services are to be reimbursed at cost. As stated in *Walsky supra*,

> . . . the United States Senate found it necessary to clarify the meaning of "fees and expenses" because of inconsistent judicial interpretation. Insofar as pertinent, the Senate report provided as follows: 'Examples of the types of expenses that should ordinarily be compensable include paralegal time (billed at cost) . . . Senate Report No. 98-586, 98th Congress, 2d Session, at 14 (August 8, 1984).

Walsky Construction, 95-2 BCA ¶ 27,889 (ASBCA 1995) at 139, 135-36.

We recognize that some courts have awarded paralegal expenses at the rate billed to the client pursuant to other fee shifting statutes under the rationale that paralegal work would otherwise be performed by an attorney at a higher rate. Even though the fee shifting statutes did not expressly include paralegal expenses, they were considered subsumed in the provision for attorney fees. *Missouri v. Jenkins*, 491 U.S. 274 (1989); *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991); *Miller v. Adamo*, 983 F.2d 856 (8th Cir. 1993). Because statutes other than the EAJA were involved in those cases, the legislative history of the EAJA was not at issue. In *Jean v. Nelson*, 863 F.2d 759 (11th Cir. 1988) *aff'd sub. nom. Commissioner v. Jean*, 496 U.S. 154 (1990), which involved the application of the EAJA, the Government argued that the paralegal expense should be reimbursed at cost. However, the court awarded paralegal expenses at the rate billed to the client relying upon dictum from a civil rights case. The court did not address the legislative history of EAJA.

Lacking information concerning the cost to the firm, we are left with the option of denying paralegal expenses entirely, e.g. *Keno & Sons Construction Co.*, 99-1 BCA ¶ 30,273 (ENGBCA 1999), *H. E. Johnson Co. Inc.*, 99-1 BCA ¶ 30,264 (ASBCA 1999), or assigning what the Board believes is a reasonable cost to the firm.[4] We find that $35 per hour is a reasonable cost to the firm having taken judicial notice of

[4] Even if the billing rate were the appropriate measure of paralegal expenses, Richlin's mere allegation that its clients pay its paralegal billing rate fails to establish that its rate was the prevailing market rate in the area over the period of the litigation. *See, e.g. Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 970 (D.C.Cir. 2004).

paralegal salaries in the Washington D.C. area as reflected on the internet.

F. Apportionment

An award of fees and expenses is not automatic upon an applicant surmounting the size, prevailing party, and substantial justification thresholds. The Supreme Court and the Federal Circuit have instructed that the amount of fees to be awarded is a matter for the Board's discretion. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *Neal & Company v. United States*, 121 F.3d 683 (Fed. Cir. 1997); *Chiu*, 948 F.2d 711 (Fed. Cir. 1991). When an applicant has achieved only partial or limited success in the underlying case, it is appropriate to apportion the fee award, taking into account the degree of success obtained. *Hensley v. Echerhart* at 436. Moreover, to the extent that an applicant engaged in conduct that unduly and unreasonably protracted the final resolution of the dispute, it is appropriate to reduce the amount claimed. 5 USC § 504(a)(3).

Having determined that Richlin passes the threshold eligibility standards for an EAJA award and that the Government's position was not substantially justified, we examine whether the amount of the fees claimed is warranted. The starting point for determining the amount of a reasonable EAJA award is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. However, other considerations may warrant the upward or downward adjustment of the award depending upon the degree of success achieved. *Hensley v. Eckerhart*, 461 U.S. at 434; *Comm'r v. Jean*, 496 U.S. 154, 163 n. 10 (1990). "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley v. Eckerhart*, 461 U.S. at 440. In such circumstances we may attempt to identify specific hours that should be eliminated or simply reduce the EAJA award to account for the limited

success. *Id.* at 436-37. In exercising this discretion we examine whether the degree of success makes the hours expended a satisfactory basis for making a fees award. Id. at 434.

As noted above, Richlin is entitled to EAJA fees and expenses only for the quantum phase of the appeals. The purpose of the quantum phase was to complete the reformation of the contract price due to the misclassification of guards. The purpose and function of the reformation of a contract is to make it reflect the true agreement of the parties on which there was a meeting of the minds. *American President Lines, Ltd. v. United States*, 821 F.2d 1571, 1582 (Fed.Cir.1987); *Highway Products, Inc. v. United States*, 208 Ct. Cl. 926 (1976). Throughout the quantum phase, Richlin persisted in arguing for inclusion of certain elements in the reformed price without making even the slightest showing that they were necessary to fairly reform the contract price.

Richlin offered alternative methods for computing the amount of the reformation, both of which approximated the $1,500,000, of its original claim. One method was a price comparison between the disputed contracts and a follow-on contract. The other was a cost calculation. We rejected both approaches for lack of proof and found that the $636,818.70 in wages determined by DOL plus the associated payroll taxes of $64,930.72 were the only costs appropriate for inclusion in the reformed contract price. Thus, of the approximately $1,500,000 claimed under either computation, Richlin was only able to prove that $701,748 was the proper amount of the reformation.

To reach that determination, the Board found it necessary to hold multiple telephone conferences and to request multiple briefs and documentation from Richlin in order to obtain necessary information and clarification of Richlin's position. Therefore, the hours claimed for attorney fees are excessive considering the results achieved.

G. Documentation

A party seeking an EAJA award must include with its application "an itemized statement from any attorney, agent, or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." 5 U.S.C § 504(a)(2). The party seeking the award must provide adequate documentation of the number of hours worked and the nature of the work performed. *Williams v. Alioto*, 625 F.2d 845, 849 (9th Cir.1980), *cert. denied*, 450 U.S. 1012 (1981). Counsel must conscientiously keep records and time sheets which "should identify the general subject matter of his [her] time expenditures." *Hensley*, 461 U.S. at 424. To be compensated for attorney fees, applicants must provide sufficient detail "to permit the [Board] to make an independent determination whether or not the hours claimed are justified." *National Association of Concerned Veterans* v. *Secretary of Defense, 675* F.2d 1319, 1327 (D.C.Cir.1982). "Only by knowing the specific task performed can the reasonableness of hours required for any individual item be judged." *Naporano Iron & Metal Company v. United States*, 825 F.2d 403, 404 (Fed. Cir. 1987).

Richlin's documentation supporting the fees claimed does not always describe the work with enough specificity to enable the Board to determine with precision whether certain billed hours were incurred solely in connection with the Board proceedings or were incurred to manage the escrow account, disburse wages, represent Richlin before the IRS on the tax lien, or to prosecute Richlin's appeals before the Court. For example, throughout the billing documents there are numerous entries for "telephone conference with Linda," or "telephone conference with Linda Santos." When these entries appear during the periods Mr. Ginsburg was managing the escrow account and distributing wages, or representing Richlin before the IRS or the

Court of Appeals, there is no basis for determining the subject matter of these conferences.

Moreover, an EAJA applicant is required to exercise billing judgment. The prevailing party must make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, and the courts and boards reviewing fee petitions must exclude hours "not reasonably expended." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). That is, a party should not seek from the Government fees which would not be properly billed to a client. Here there is no indication that any billing judgment has been exercised, particularly with respect to applicant's need to provide multiple additional briefs to support its position.

IV. Award

A. Attorney Fees and Expenses – The Appeals

Richlin's amended application is divided into two parts – the fees and expenses incurred in connection with underlying appeals and those incurred to prepare the EAJA application. With respect to the underlying appeals, Richlin claims attorney fees in the amount of $58,539.45. As stated above, these fees were computed using a cost of living adjustment factor causing the fees to exceed the statutory limit of $125. The amended application, as further amended by Richlin's response to the Government's answer, seeks paralegal expenses in the amount of $45,785.10, at a billing rate of $95 per hour.

After a careful review of Richlin's billing statements, we have denied or reduced the award for fees and paralegal expenses where the nature of the services charged were not properly included in the EAJA application. For example, we have denied or reduced the fee award where the work involved disbursing wages and managing the escrow account, where there are telephone conferences with individuals whose role in

the appeals before the Board is unknown, where the representation involved the tax lien imposed by the Internal Revenue Service, where the work pertained to the possibility of obtaining relief in the Court of Federal Claims by Congressional reference, where the work involved representation before the Court of Appeals[5], where the work was clerical or administrative in nature, and where we determined that the work was unnecessary or unreasonable.

Based upon the foregoing, in connection with the underlying appeals, we award $43,312.50 in legal fees and $9,394.00 in paralegal expenses at the rate of $35.00 per hour as the reasonable cost to the firm.

Applicant claims other expenses for the underlying appeals in the amount of $2,866.06. The documentation for this amount consists of monthly statements for telephone/fax; messenger service, postage, duplicating, meals, parking, taxis, computer research, filing fee,[6] outside secretarial service, postage for mailing W-4 and W-2 forms, computer programs for running W-2 forms and for printing W-2 forms and envelopes, postage for mailing checks to former employees, and Federal Express for delivering checks to former employees. Otherwise, there is no detail of how the expenses pertained to the underlying appeals.

As with fees and paralegal expenses, where the billing records reflect expenses incurred in connection with

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[5] Although the reason stated by Richlin for submitting the amended application was to remove the fees incurred in the Court of Appeals action, the documentation supporting the amended application continued to include some charges for that work.

[6] We assume that the fee pertains to the Court of Appeals action as the Board does not have a filing fee.

distributing wages and managing the escrow account, we have denied them. These expenses amount to $586.81. We also have denied the $2.00 filing fee. Those sums amount to approximately 20% of the claimed expenses. However, expenses were undoubtedly incurred in connection with telephone conferences with individuals whose role in the appeals is unknown, where the representation involved the tax lien, and where we determined that the work was unnecessary or unreasonable, such as work on additional briefing needed to put forth and clarify Richlin's position. Because of the lack of detail in the billing documents we are unable to determine with precision the amount of expenses that were reasonably incurred in connection with the appeals. Therefore, we deny an additional 30% of the amount claimed by way of a jury verdict to account for unsupported, unnecessary, and unreasonable expenses. We award $ 1,433.00 as reasonable expenses incurred in connection with prosecuting the appeals. Our denial of 50% of the claimed other expenses corresponds with our denial of 50% of the combined total of attorney fees and paralegal expenses claimed by Richlin.

B. Attorney Fees and Expenses – The EAJA Application

Richlin seeks attorney fees of $19,347.40, paralegal expenses of $7,748.00, and other expenses of $636.33 for the preparation the EAJA application. Attorney fees incurred in the preparation of an EAJA application are compensable. *Schuenemeyer v. United States*, 776 F.2d 329, 333 (Fed. Cir. 1985).

The Board received the EAJA application on May 23, 2003, within 30 days after the Government's right to appeal *Richlin VII* had expired. However, Richlin had appealed the adverse portions of *Richlin VII*. The Government moved to dismiss the application because the appeal rendered it

prematurely filed. Richlin never responded to the motion and the Board did not act on it. Rather the Board stayed proceedings pending the Court's decision.

After the Court affirmed *Richlin VII* (*Richlin VIII*), and both parties submitted written notice that they would not petition the Supreme Court for a writ of certiorari, we resumed proceedings on the EAJA application.

After Richlin twice supplemented its EAJA application, and submitted errata to the supplement, the Government answered the application. Richlin then moved to withdraw the application without prejudice to filing it in the Court of Appeals. The basis for that motion, taken from the Government's answer, was that Richlin had incorrectly included in its application fees and expenses incurred in connection with an appeal to the Court. We granted the motion in part, dismissing the fees and expenses incurred in connection with the Court of Appeals action. Otherwise we denied the motion. *Richlin Security Services, Inc.*, 04-2 BCA ¶ 32,789 (DOTBCA 2004).

The Board, planning to deduct incorrectly included fees based upon Richlin's supporting documentation, did not direct the submission of a corrected application. Nevertheless, appellant requested time to amend its application. On January 14, 2005, Richlin submitted the amended application. Rather than simply eliminating the improper fees and expenses, Richlin essentially submitted a new application substantially expanding its arguments. The original application was 9 pages while the amended application was 21 pages. In addition to excluding most charges incurred in connection with the Court of Appeals action, Richlin also excluded fees and expenses incurred long before Mr. Ginsburg represented Richlin before the Board. Richlin provided different documentation to support the amended application. The Government answered the

application on March 29, 2005. Richlin replied on April 29, 2005, further amending its application by acknowledging that it was not entitled to a cost-of-living adjustment.

Richlin made several missteps in connection with its EAJA application. It originally claimed $8,691.09 fees and $919.58 in expenses for the law firm of Epstein, Becker & Green for the period beginning August 1994 through August 1996 despite the fact that the Board did not even receive Richlin's appeals until August 30, 1996. When Richlin filed its original application in May 2003, it was a well-established principle that a party may recover attorney fees only after the receipt of a contracting officer's decision and in pursuit of an appeal from such decision. *Levernier v. United States*, 947 F.2d 497, 502 (Fed. Cir. 1991); *Tele-Sentry Sec.*, *Inc. v. General Services Admin.*, 93-2 BCA ¶ 25,816 (GSBCA 1993). Moreover, a party may not recover fees and expenses when appearing before the Board *pro se. Naekel v. Department of Transportation*, 845 F.2d 976,981 (Fed. Cir. 1988); *accord, Foremost Mechanical Systems, Inc. v. General Services Admin.*, 99-1 BCA ¶ 30,352 (GSBCA 1999); *Jay-Brant General Contractors*, 98-1 BCA ¶ 29,687, 29687, (ENGBCA 1998); *Fanning, Phillips & Molnar*, 97-2 BCA ¶ 29,008 (VABCA 1997); *Labco Const.*, *Inc.*, 95-2 BCA 27,677 (AGBCA 1995); *Zinger Const. Co.*, 1993 WL 11586 (ASBCA 1993).

Richlin also included in its original application fees incurred in connection with its appeal to the Court. Richlin did not cite any authority for the theory that the Board possessed jurisdiction to make an EAJA award for fees and expenses incurred in a court proceeding and the EAJA does not support that theory. 5 U.S.C § 504. When Richlin submitted its original application it had long been established that administrative tribunals lacked authority to award EAJA fees and expenses incurred before the Court of Appeals for the Federal Circuit.

Phillips v. General Services Administration, 924 F.2d 1577, 1581 (Fed. Cir. 1991); *Oliveira v. United States*, 827 F.2d 735,744 (Fed. Cir. 1987); Olsen v. *Department of Commerce, Census Bureau*, 735 F.2d 558, 561 (Fed.Cir. 1984). *Herman B. Taylor v. General Services Administration*, 01-2 BCA P 31,491 (GSBCA 2001); *Hardrives Inc.*, 96-1 BCA ¶ 27.935 (IBCA 1996); *Gilroy-Sims & Associates v. General Services Administration*, GSBCA 11778-C, 93-1 BCA ¶ 25,547; *Sysorex Information Systems. Inc. v. Department of the Treasury*, 93-1 BCA ¶ 25,428 (GSBCA 1992) (full Board).

The Board dismissed the improperly included Court of Appeals fees and expenses at Richlin's request. Nevertheless, Richlin included some of the Court of Appeals fees and expenses in its amended application.

In both the original application and in the amended application, Richlin included a cost-of-living adjustment (COLA). However, the EAJA prohibits an administrative tribunal from awarding a cost of living adjustment absent a regulation providing for one. 5 USC § 504(b)(l)(A). This was also a well-established principle when Richlin submitted its application. *Akon, Inc.* 91-3 BCA ¶ 24,147 (ENGBCA 1991); *Patten Company*, 90-3 BCA ¶ 23,002 (ASBCA 1990); *Coastal, Inc.*, 89-2 BCA ¶ 21,876 (PSBCA 1989); *James W. Sprayberry Construction*, 89-2 BCA ¶ 21,797 (IBCA 19898); *OK'S COMPANY*, 89-2 BCA ¶ 21,751, (AGBCA 1989); *Berkley Construction Co., Inc.*, 88-3 BCA ¶ 20,941 (VABCA 1988). We are not aware of any regulation authorizing fees in excess of the statutory limit of $125. Richlin finally acknowledged this principle in its reply to the Government's answer to the amended application and again amended the application accordingly.

In light of the foregoing, and because Richlin found it expedient to submit a totally new EAJA application, we deny

all fees and expenses incurred up to October 29, 2004, the date we issued our decision on Richlin's motion to withdraw the application.

From that date forward, Richlin seeks fees for 113.8 hours of attorney work ($14,225 at $125 per hour), paralegal expenses for 68.2 hours of work ($2,387 at $35 per hour), and $164.95 in other expenses for compiling the amended application. However, Richlin's amended application still contained unnecessary errors. Further, the Board did not request an amended application and much of the work associated with the preparation of the amended application was redundant, having been addressed in the original application. Therefore, we award as a jury verdict 50% of the fees and expenses incurred after October 29, 2004. We award $7,125.50 for attorney fees, $1,199.50 for paralegal expenses, and $82.46 for other expenses as the fair and reasonable amount for the services rendered to prepare the EAJA application.

Decision

The EAJA application is granted in part. We award a total of $50,425.00 in attorney fees, $10,587.50 in paralegal expenses, and $ 1,515.46 in other expenses. Otherwise the application is denied.

Eileen P. Fennessy
Deputy Chief Administrative Judge
Vice Chairman

Concur:
James L. Stern
Chief Administrative Judge
Chairman

Jeri Kaylene Somers
Administrative Judge

Date: June 30, 2005

United States Court of Appeals for the Federal Circuit

06-1055

RICHLIN SECURITY SERVICE COMPANY,
Appellant,

v.

Michael Chertoff,
SECRETARY OF HOMELAND SECURITY,
Appellee.

DECIDED: April 3, 2007

ON PETITION FOR REHEARING.

Before RADER, Circuit Judge, PLAGER, Senior Circuit Judge, and DYK, Circuit Judge.

Opinion for the court filed by Circuit Judge DYK. Senior Judge PLAGER dissents.

DYK, Circuit Judge.

Our original panel opinion determined that the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, allows recovery for paralegal services as part of "expenses" and not as part of "attorney's fees," and accordingly that recovery was limited to costs and was not available at market rates. Richlin Sec. Serv. Co. v. Chertoff, 472 F.3d 1370, 1381 (Fed. Cir. 2006).

In our decision, we declined to follow the contrary decision of the Eleventh Circuit in Jean v. Nelson, 863 F.2d 759, 778 (11th Cir. 1988), aff'd on other grounds, Immigration & Naturalization Serv. v. Jean, 496 U.S. 154 (1990). In a petition for rehearing, Richlin claims for the first time that several other circuits have adopted the Jean approach and that our decision is in conflict with those circuits as well. See Role Models Am., Inc. v. Brownlee, 353 F.3d 962, 974 (D.C. Cir. 2004); Hyatt v. Barnhart, 315 F.3d 239, 255 (4th Cir. 2002); Miller v. Alamo, 983 F.2d 856, 862 (8th Cir. 1993); see also Stockton v. Shalala, 36 F.3d 49, 50 (8th Cir. 1994). While two of the decisions cite to Jean[1] and all refer to recovery of paralegal "fees," the cases appear to have involved the issue of whether payments for paralegal services were recoverable at all, and did not directly address whether they are "attorney's fees" or "expenses" under EAJA. See Role Models Am., 353 F.3d at 974 ("The government opposes any recovery for the legal assistants, arguing that a party may not recover fees for work done by non-attorneys."); Hyatt, 315 F.3d at 255 ("Although fees for paralegal time may be recoverable under the EAJA, such fees are only recoverable to the extent they reflect tasks traditionally performed by an attorney and for which the attorney would customarily charge the client."); Miller, 983 F.2d at 862 ("Work done by paralegals is compensable if it is work that would have been done by an attorney.").

In any event, we see nothing in those cases to alter our conclusion that payments for paralegal services under EAJA are not recoverable as "attorney's fees" but are recoverable as

[1] See Hyatt, 315 F.3d at 255; Miller, 983 F.2d at 862.

"expenses," allowable only at cost.[2]

The petition for rehearing is denied.

Senior Judge PLAGER dissents on the basis of his dissent from the original panel opinion.

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[2] Richlin also points out for the first time that the legislative history cited in our original opinion at 472 F.3d at 1381, see S. Rep. No. 98-586, 98th Cong., 2d Sess., at 15 (Aug. 8, 1984), did not relate directly to the EAJA amendment adopted in 1985. The cited legislative history related to a version of EAJA that was enacted by Congress in 1984 but that was vetoed by President Reagan primarily because the president objected to the bill's definition of "position of the United States." See H.R. Rep. 99-120, pt. 1, at 6 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 134. Congress enacted a new version in 1985, which clarified the "position of the United States" definition. See Pub. L. 99-80 (Aug. 6, 1985). Otherwise, the 1985 legislation was nearly identical to the bill passed by Congress in 1984, and the earlier legislative history is therefore pertinent to the 1985 enactment on the issue presented here.

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A petition for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 10, 2007.

FOR THE COURT,
/s Jan Horbaly
Clerk

Dated: 04/03/2007

cc: Brian Wolfman
Reginald T. Blades, Jr.

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(BCA - 3034, 3035)

FILED April 3, 2007