PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT *v.* UNDERWOOD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-1512. Argued December 1, 1987—Decided June 27, 1988

One of petitioner's predecessors as Secretary of Housing and Urban Development decided not to implement an "operating subsidy" program authorized by federal statute, which was intended to provide payments to owners of Government-subsidized apartment buildings to offset rising utility expenses and property taxes. Various plaintiffs, including respondent members of a nationwide class of Government-subsidized housing tenants, successfully challenged the decision in lawsuits in nine Federal District Courts. After two of the decisions were affirmed by Courts of Appeals, a newly appointed Secretary settled with most of the plaintiffs, including respondents. While the District Court was administering the settlement, Congress passed the Equal Access to Justice Act (EAJA), which authorizes an award of reasonable attorney's fees against the Government "unless the court finds that the position of the United States was substantially justified." Under the EAJA, the amount of fees awarded must "be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." The court awarded fees to respondents under the EAJA, concluding that the decision not to implement the operating-subsidy program had not been "substantially justified," and basing the amount of the award, which exceeded $1 million, on "special factors" justifying hourly rates in excess of the $75 cap. The Court of Appeals held that the District Court had not abused its discretion in concluding that the Secretary's position was not substantially justified, and that the special factors relied on by the District Court justified exceeding the $75 cap.

Held:

1. In reviewing the District Court's determination that the Secretary's position was not "substantially justified," the Court of Appeals correctly applied an abuse-of-discretion standard, rather than a *de novo* standard of review. Neither a clear statutory prescription nor a historical tradition requires this choice of standards. However, deferential, abuse-of-discretion review is suggested by the EAJA's language, which

requires a fees award "unless *the court finds* that" (rather than simply "unless") the United States' position was substantially justified, and by the statute's structure, which expressly provides an abuse-of-discretion standard for review of agency fee determinations. As a matter of sound judicial administration, the district courts are in a better position than the courts of appeals to decide the substantial justification question. Moreover, that question is multifarious, novel, and little susceptible of useful generalization at this time, and is therefore likely to profit from the experience that an abuse-of-discretion standard will permit to develop. Pp. 557–563.

2. The statutory phrase "substantially justified" means justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person. This interpretation of the phrase accords with related uses of the term "substantial," and is equivalent to the "reasonable basis both in law and fact" formulation adopted by the vast majority of Courts of Appeals. Respondents' reliance on a House Committee Report pertaining to the 1985 reenactment of the EAJA for the proposition that "substantial justification" means "more than mere reasonableness" is misplaced, since the 1985 Report is not an authoritative interpretation of what the 1980 statute meant or of language drafted by the 1985 Committee, which merely accepted the existing statutory phrase. Pp. 563–568.

3. The Court of Appeals correctly ruled that the District Court did not abuse its discretion in finding that the Government's position was not "substantially justified." Although "objective indicia" can be relevant to establishing "substantial justification," they are inconclusive in this case. The Government's willingness to settle the litigation and the stage in the proceedings at which the merits were decided are not reliable objective indicia here. Neither are views expressed by other courts on the merits, which provide some support on both sides. The Government's arguments on the merits of the underlying issue do not command the conclusion that its position was substantially justified. Pp. 568–571.

4. The District Court abused its discretion in fixing the amount of respondents' attorney's fees, since none of the reasons relied on by the court to increase the reimbursement rate above the statutory maximum was a "special factor" within the EAJA's meaning. Since the "special factor" formulation suggests that Congress thought that $75 an hour is generally sufficient regardless of the prevailing market rate, the "limited availability" factor must refer to attorneys "qualified for the proceedings" in some specialized sense, such as patent lawyers for patent proceedings, rather than just in their general legal competence. Similarly, in order to preserve the $75 cap's effectiveness, other "special factors"

must be such as are not of broad and general application. Thus, most of the factors relied on by the court—the "novelty and difficulty of issues," "the undesirability of the case," "the work and ability of counsel," "the results obtained," and "the contingent nature of the fee"—do not qualify since they are applicable to a broad spectrum of litigation and are little more than routine reasons why market rates are what they are. *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U. S. 711, distinguished. Pp. 571–574.

761 F. 2d 1342 and 802 F. 2d 1107, affirmed in part, vacated in part, and remanded.

SCALIA, J., delivered the opinion of the Court, in Part I of which all participating Members joined, in Parts II and IV of which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, in Part III of which REHNQUIST, C. J., and WHITE, STEVENS, and O'CONNOR, JJ., joined, and in Part V of which REHNQUIST, C. J., and STEVENS, J., joined, and WHITE and O'CONNOR, JJ., joined except as to the last three lines. BRENNAN, J., filed an opinion concurring in part and concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 574. WHITE, J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR, J., joined, *post*, p. 583. KENNEDY, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Merrill argued the cause for petitioner. On the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Lauber, Charles A. Rothfeld, William Kanter, John S. Koppel*, and *Gershon M. Ratner*.

Mary S. Burdick argued the cause for respondents. With her on the brief was *Richard A. Rothschild*.*

JUSTICE SCALIA delivered the opinion of the Court.

Respondents settled their lawsuit against one of petitioner's predecessors as Secretary of Housing and Urban Devel-

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*Briefs of *amici curiae* urging affirmance were filed for Battles Farm Co. et al. by *Gerald Goldman* and *Thomas D. Goldberg;* for the National Organization of Social Security Claimants' Representatives by *Robert E. Rains* and *Nancy G. Shor;* for the San Francisco Lawyers' Committee for Urban Affairs et al. by *Marilyn Kaplan;* for the Small Business Foundation of America, Inc., et al. by *David Overlock Stewart;* and for Vernice Dubose et al. by *Dennis J. O'Brien* and *William H. Clendenen, Jr.*

opment, and were awarded attorney's fees after the court found that the position taken by the Secretary was not "substantially justified" within the meaning of the Equal Access to Justice Act (EAJA), 28 U. S. C. § 2412(d). The court also determined that "special factors" justified calculating the attorney's fees at a rate in excess of the $75-per-hour cap imposed by the statute. We granted certiorari, 481 U. S. 1047 (1987), to resolve a conflict in the Courts of Appeals over important questions concerning the interpretation of the EAJA. Compare *Dubose* v. *Pierce*, 761 F. 2d 913 (CA2 1985), cert. pending, No. 85–516, with 761 F. 2d 1342 (CA9 1985) *(per curiam)*, as amended, 802 F. 2d 1107 (1986) (case below).

I

This dispute arose out of a decision by one of petitioner's predecessors as Secretary not to implement an "operating subsidy" program authorized by § 236 as amended by § 212 of the Housing and Community Development Act of 1974, Pub. L. 93–383, 88 Stat. 633, formerly codified at 12 U. S. C. §§ 1715z–1(f)(3) and (g) (1970 ed., Supp. IV). The program provided payments to owners of Government-subsidized apartment buildings to offset rising utility expenses and property taxes. Various plaintiffs successfully challenged the Secretary's decision in lawsuits filed in nine Federal District Courts. See *Underwood* v. *Pierce*, 547 F. Supp. 256, 257, n. 1 (CD Cal. 1982) (citing cases). While the Secretary was appealing these adverse decisions, respondents, members of a nationwide class of tenants residing in Government-subsidized housing, brought the present action challenging the Secretary's decision in the United States District Court for the District of Columbia. That court also decided the issue against the Secretary, granted summary judgment in favor of respondents, and entered a permanent injunction and writ of mandamus requiring the Secretary to disburse the accumulated operating-subsidy fund. See *Underwood* v. *Hills*, 414 F. Supp. 526, 532 (1976). We stayed the Dis-

trict Court's judgment pending appeal. *Sub nom. Hills* v. *Cooperative Services, Inc.*, 429 U. S. 892 (1976). The Court of Appeals for the Second Circuit similarly stayed, pending appeal, one of the eight other District Court judgments against the Secretary. See *Dubose* v. *Harris*, 82 F. R. D. 582, 584 (Conn. 1979). Two of those other judgments were affirmed by Courts of Appeals, see *Ross* v. *Community Services, Inc.*, 544 F. 2d 514 (CA4 1976), and *Abrams* v. *Hills*, 547 F. 2d 1062 (CA9 1976), vacated *sub nom. Pierce* v. *Ross*, 455 U. S. 1010 (1982), and we consolidated the cases and granted the Secretary's petitions for writs of certiorari to review those decisions, *Harris* v. *Ross*, 431 U. S. 928 (1977). Before any other Court of Appeals reached a decision on the issue, and before we could review the merits, a newly appointed Secretary settled with the plaintiffs in most of the cases. The Secretary agreed to pay into a settlement fund $60 million for distribution to owners of subsidized housing or to tenants whose rents had been increased because subsidies had not been paid. The present case was then transferred to the Central District of California for administration of the settlement.

In 1980, while the settlement was being administered, Congress passed the EAJA, 28 U. S. C. § 2412(d), which as relevant provides:

> "(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . , incurred by that party in any civil action . . . brought by or against the United States . . . , unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
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> "(2) For the purposes of this subsection—
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> "(A) 'fees and other expense' includes . . . reasonable attorney fees (The amount of fees awarded under this

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

The District Court granted respondents' motion for an award of attorney's fees under this statute, concluding that the Secretary's decision not to implement the operating-subsidy program had not been "substantially justified." The court determined that respondents' attorneys had provided 3,304 hours of service and that "special factors" justified applying hourly rates ranging from $80 for work performed in 1976 to $120 for work performed in 1982. This produced a base or "lodestar" figure of $322,700 which the court multiplied by three-and-one-half (again because of the "special factors"), resulting in a total award of $1,129,450.

On appeal, the Court of Appeals for the Ninth Circuit held that the District Court had not abused its discretion in concluding that the Secretary's position was not substantially justified. 761 F. 2d, at 1346. The Court of Appeals also held that the special factors relied on by the District Court justified increasing the hourly rates of the attorneys, but did not justify applying a multiplier to the lodestar amount. It therefore reduced the award to $322,700. *Id.*, at 1347–1348; see 802 F. 2d, at 1107.

We granted the Secretary's petition for certiorari on the questions whether the Government's position was "substantially justified" and whether the courts below properly identified "special factors" justifying an award in excess of the statute's $75-per-hour cap on attorney's fees.

II

We first consider whether the Court of Appeals applied the correct standard when reviewing the District Court's deter-

mination that the Secretary's position was not substantially justified. For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for "abuse of discretion"). The Ninth Circuit treated the issue of substantial justification as involving the last of these; other Courts of Appeals have treated it as involving the first. See *Battles Farm Co.* v. *Pierce*, 257 U. S. App. D. C. 6, 11–12, 806 F. 2d 1098, 1103–1104 (1986), cert. pending, No. 86–1661; *Dubose* v. *Pierce*, 761 F. 2d, at 917.

For some few trial court determinations, the question of what is the standard of appellate review is answered by relatively explicit statutory command. See, *e. g.*, 42 U. S. C. § 1988 ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee"). For most others, the answer is provided by a long history of appellate practice. But when, as here, the trial court determination is one for which neither a clear statutory prescription nor a historical tradition exists, it is uncommonly difficult to derive from the pattern of appellate review of other questions an analytical framework that will yield the correct answer.[1] See Rosen-

[1] JUSTICE WHITE suggests, *post*, at 583–585, that since the "substantial justification" question does not involve the establishment of "historical facts," Congress would have expected it to be reviewed *de novo*. We disagree. From the given that the issue is not one of fact, one can confidently conclude that Congress would *not* have expected, on the basis of the case law, that a clearly-erroneous standard of review would be applied, but not that it would have expected review *de novo* rather than review for abuse of discretion. See, *e. g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U. S. 235, 257 (1981) (abuse-of-discretion standard applied to dismissal on *forum non conveniens* grounds); *Gulf Oil Co.* v. *Bernard*, 452 U. S. 89, 103 (1981) (order under Fed. Rule Civ. Proc. 23(d)); *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U. S. 1, 10–11 (1980) (certification under Fed. Rule Civ. Proc. 54(b)). It is especially common for issues involving what can broadly be labeled "supervision of litigation," which is the sort of issue presented here, to be given abuse-of-discretion review. See, *e. g.*, *Hensley* v. *Eckerhart*, 461 U. S. 424, 437 (1983) (attorney's fees); *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U. S. 639, 642 (1976) (dis-

berg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L. Rev. 635, 638 (1971) (hereinafter Rosenberg). No more today than in the past shall we attempt to discern or to create a comprehensive test; but we are persuaded that significant relevant factors call for an "abuse of discretion" standard in the present case.

We turn first to the language and structure of the governing statute. It provides that attorney's fees shall be awarded "unless *the court finds* that the position of the United States was substantially justified." 28 U. S. C. § 2412(d)(1)(A) (emphasis added). This formulation, as opposed to simply "unless the position of the United States was substantially justified," emphasizes the fact that the determination is for the district court to make, and thus suggests some deference to the district court upon appeal. That inference is not compelled, but certainly available. Moreover, a related provision of the EAJA requires an administrative agency to award attorney's fees to a litigant prevailing in an agency adjudication if the Government's position is not "substantially justified," 5 U. S. C. § 504(a)(1), and specifies that the agency's decision may be reversed only if a reviewing court "finds that the failure to make an award . . . was unsupported by substantial evidence." § 504(c)(2). We doubt that it was the intent of this interlocking scheme that a court of appeals would accord more deference to an agency's determination that its own position was substantially justified than to such a determination by a federal district court. Again, however, the inference of deference is assuredly not compelled.

We recently observed, with regard to the problem of determining whether mixed questions of law and fact are to be treated as questions of law or of fact for purposes of appellate review, that sometimes the decision "has turned on a determination that, as a matter of the sound administration of jus-

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covery sanctions); see generally 1 S. Childress & M. Davis, Standards of Review §§ 4.1–4.20, pp. 228–286 (1986).

tice, one judicial actor is better positioned than another to decide the issue in question." *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985). We think that consideration relevant in the present context as well, and it argues in favor of deferential, abuse-of-discretion review. To begin with, some of the elements that bear upon whether the Government's position "*was* substantially justified" may be known only to the district court. Not infrequently, the question will turn upon not merely what was the law, but what was the evidence regarding the facts. By reason of settlement conferences and other pretrial activities, the district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government. Moreover, even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record, not just to determine whether there existed the usual minimum support for the merits determination made by the factfinder below, but to determine whether urging of the opposite merits determination was substantially justified.

In some cases, such as the present one, the attorney's fee determination will involve a judgment ultimately based upon evaluation of the purely legal issue governing the litigation. It cannot be assumed, however, that *de novo* review of this will not require the appellate court to invest substantial additional time, since it will in any case have to grapple with the same legal issue on the merits. To the contrary, one would expect that where the Government's case is so feeble as to provide grounds for an EAJA award, there will often be (as there was here) a settlement below, or a failure to appeal from the adverse judgment. Moreover, even if there is a merits appeal, and even if it occurs simultaneously with (or goes to the same panel that entertains) the appeal from the

attorney's fee award, the latter legal question will not be precisely the same as the merits: not what the law now is, but what the Government was substantially justified in believing it to have been. In all the separate-from-the-merits EAJA appeals, the investment of appellate energy will either fail to produce the normal law-clarifying benefits that come from an appellate decision on a question of law, or else will strangely distort the appellate process. The former result will obtain when (because of intervening legal decisions by this Court or by the relevant circuit itself) the law of the circuit is, at the time of the EAJA appeal, quite clear, so that the question of what the Government was substantially justified in believing it to have been is of entirely historical interest. Where, on the other hand, the law of the circuit remains unsettled at the time of the EAJA appeal, a ruling that the Government was not substantially justified in believing it to be thus-and-so would (unless there is some reason to think it has changed since) effectively establish the circuit law in a most peculiar, secondhanded fashion. Moreover, the possibility of the latter occurrence would encourage needless merits appeals by the Government, since it would know that if it does not appeal, but the victorious plaintiff appeals the denial of attorney's fees, its district-court loss on the merits can be converted into a circuit-court loss on the merits, without the opportunity for a circuit-court victory on the merits. All these untoward consequences can be substantially reduced or entirely avoided by adopting an abuse-of-discretion standard of review.

Another factor that we find significant has been described as follows by Professor Rosenberg:

> "One of the 'good' reasons for conferring discretion on the trial judge is the sheer impracticability of formulating a rule of decision for the matter in issue. Many questions that arise in litigation are not amenable to regulation by rule because they involve multifarious, fleet-

ing, special, narrow facts that utterly resist generalization—at least, for the time being.

. . . . . .

"The non-amenability of the problem to rule, because of the diffuseness of circumstances, novelty, vagueness, or similar reasons that argue for allowing experience to develop, appears to be a sound reason for conferring discretion on the magistrate. . . . A useful analogue is the course of development under Rule 39(b) of the Federal Rules of Civil Procedure, providing that in spite of a litigant's tardiness (under Rule 38 which specifies a ten-day-from-last-pleading deadline) the trial court 'in its discretion' may order a trial by jury of any or all issues. Over the years, appellate courts have consistently upheld the trial judges in allowing or refusing late-demanded jury trials, but in doing so have laid down two guidelines for exercise of the discretionary power. The products of cumulative experience, these guidelines relate to the justifiability of the tardy litigant's delay and the absence of prejudice to his adversary. Time and experience have allowed the formless problem to take shape, and the contours of a guiding principle to emerge." Rosenberg 662–663.

We think that the question whether the Government's litigating position has been "substantially justified" is precisely such a multifarious and novel question, little susceptible, for the time being at least, of useful generalization, and likely to profit from the experience that an abuse-of-discretion rule will permit to develop. There applies here what we said in connection with our review of Rule 54(b) discretionary certification by district courts: "because the number of possible situations is large, we are reluctant either to fix or sanction narrow guidelines for the district courts to follow." *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U. S. 1, 10–11 (1980). Application of an abuse-of-discretion standard to the present question will permit that needed flexibility.

It must be acknowledged that militating against the use of that standard in the present case is the substantial amount of the liability produced by the District Judge's decision. If this were the sort of decision that ordinarily has such substantial consequences, one might expect it to be reviewed more intensively. In that regard, however, the present case is not characteristic of EAJA attorney's fee cases. The median award has been less than $3,000. See Annual Report of the Director of the Administrative Office of the U. S. Courts, Fees and Expenses Awarded Under the Equal Access to Justice Act, pp. 99–100, Table 29 (1987) (351 of 387 EAJA awards in fiscal year 1986–1987 were against the Department of Health and Human Services and averaged $2,379). We think the generality rather than the exception must form the basis for our rule.

In sum, although as we acknowledged at the outset our resolution of this issue is not rigorously scientific, we are satisfied that the text of the statute permits, and sound judicial administration counsels, deferential review of a district court's decision regarding attorney's fees under the EAJA. In addition to furthering the goals we have described, it will implement our view that a "request for attorney's fees should not result in a second major litigation." *Hensley* v. *Eckerhart*, 461 U. S. 424, 437 (1983).