

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GARY E. GISBRECHT, BARBARA :

4 A. MILLER, AND NANCY SANDINE, :

5 Petitioners, :

6 v. : No. 01-131

7 JO ANNE B. BARNHART, :

8 COMMISSIONER OF SOCIAL :

9 SECURITY. :

10 - - - - - X

11 Washington, D.C.

12 Wednesday, March 20, 2002

13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States at

15 11:02 a.m.

16 APPEARANCES:

17 ERIC SCHNAUFER, ESQ., Evanston, Illinois; on behalf

18 of the Petitioners.

19 DAVID B. SALMONS, ESQ., Assistant to the Solicitor

20 General, Department of Justice, Washington,

21 D.C. (Pro Hac Vice); on behalf of the

22 Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ERIC SCHNAUFER, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	DAVID B. SALMONS, ESQ.	
7	On behalf of the Respondent	25
8	REBUTTAL ARGUMENT OF	
9	ERIC SCHNAUFER, ESQ.	
10	On behalf of the Petitioners	52
11		
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13		
14		
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16		
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24		
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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in case number 01-131, Gary Gisbrecht vs. Jo Anne Barnhart.

Spectators are admonished, do not talk until you get out of the courtroom. The Court remains in session. Mr. Schnaufer?

ORAL ARGUMENT OF ERIC SCHNAUFER
ON BEHALF OF THE PETITIONERS

MR. SCHNAUFER: Mr. Chief Justice, and may it please the Court: We are asking this Court to recognize a simple principle that a federal statute requires that an attorney fee be contingent on success in litigation, that when the court determines an attorney fee pursuant to that statute, an attorney fee should reflect the contingent nature of the fee, thus because 406(b) requires a contingent fee in Social Security cases, when the district court determined the reasonable fee pursuant to 406(b) that attorney fee must reflect the contingent nature of the fee.

QUESTION: Let me ask you a question about the limits of the extent of the prohibition, whatever is in 406(b). I think that can be read to deal only with the question where the attorney is seeking a recovery out of

1 the plaintiff's recovery.

2 MR. SCHNAUFER: Yes, Mr. Chief Justice, it's
3 possible to interpret the statute in a way that would not
4 criminalize charging a claimant a noncontingent fee,
5 however the existing practice in the bar is to take it as
6 prohibiting charging a noncontingent fee?

7 QUESTION: Well, there anything more
8 authoritative as the existing practice of the bar that
9 would lead to that conclusion?

10 MR. SCHNAUFER: I would direct the Court's
11 attention to the 406(b)(2) where it sets forth the
12 criminal penalties for violation of the statute. There is
13 only one appellate court to address whether or not a
14 noncontingent fee may be charged as the third circuit in
15 Coup, but it doesn't reach the issue. Also one district
16 court in Hutchinson cited in the amicus brief from the
17 claimants representatives addresses that.

18 No. I think even if the statute did not
19 require a contingent fee when there was no judgment
20 favorable to the plaintiff, I believe that the vast
21 majority of claimants would voluntarily choose to enter
22 into contingent fee agreements.

23 QUESTION: Because that's how they get counsel?

24 MR. SCHNAUFER: Absolutely. So even if the
25 statute didn't criminalize charging a noncontingent fee,

1 this would be the voluntary selection of the vast majority
2 of --

3 QUESTION: Well, if the statute, 406(b) reads
4 as though when there is a judgment favorable to the
5 claimant, the court may allow a reasonable fee. And could
6 apparently determine that fee any way it saw fit?

7 MR. SCHNAUFER: I believe this Court's decision
8 in Christenberg Garments is relevant. That case also
9 addresses whether the term, whether the court may award
10 attorney fees interpreting that the court did, the
11 attorney matter wasn't up to the court, that the court
12 would generally award the attorney fee in that fee
13 shifting context. So yes, there are situations in which a
14 different --

15 QUESTION: Well, it suggests perhaps that the
16 court would allow a fee, but it seems open-ended that it
17 will allow the court to determine the fee any way it wants
18 on the lodestar method or via, by some other method.

19 MR. SCHNAUFER: Justice O'Connor, I believe
20 the statute should be interpreted relative to the legal
21 context in which it was enacted in 1965, which additional
22 role of state courts rule on contingent fee agreements was
23 to decide where the agreed upon amount between the parties
24 was excessive or abusive.

25 QUESTION: That wasn't personal to any

1 statutory mandate, was it? Wasn't that that just the
2 supervisory power of the courts over fees?

3 MR. SCHNAUFER: Yes, the federal courts in the
4 early '60s, in 1965, doubted whether they even had the
5 authority to rule on the appropriateness of a contingent
6 fee. Congress clarified that by specifically providing
7 406(b) so the court, the district court would determine
8 the reasonableness of a 406(b) fee. I believe that the --

9 QUESTION: Well, you think the language of the
10 statute requires a contingent fee? At only reasonable fee
11 can be a contingent fee?

12 MR. SCHNAUFER: That any attorney fee has to be
13 contingent on success in the litigation that could be
14 different fee agreements. For example, a plaintiff may
15 agree to charge or to pay his or her attorney a flat fee
16 contingent on success in litigation or a specific hourly
17 fee contingent on success in the litigation or for
18 example, a complex formula based on the success in
19 litigation.

20 But the attorney fee in our view --

21 QUESTION: But you think that the implication
22 of this statute is that the court has to base it on the
23 agreement of the attorney and the attorney's client?

24 MR. SCHNAUFER: Yes. I believe the relevant
25 inquiry --

1 QUESTION: Because it done say that. I think
2 you are reading something in that isn't there. And you
3 are basing that on practice of lawyers at the time or
4 something?

5 MR. SCHNAUFER: But, Justice O'Connor. I
6 believe that clearly in 1965, Congress could not have
7 intended to adopt for this statute the lodestar method
8 given that the lodestar method had not been invented until
9 a decade or so later and not really adopted by this Court
10 until its decision in --

11 QUESTION: Well, before lodestar, there were
12 other descriptions for reasonable fees that depended on
13 hours, degree of difficulty, etcetera etc. I mean,
14 lawyers did that for decades.

15 MR. SCHNAUFER: Yes. Yes, Justice Kennedy, and
16 when a court was involved, the question would be whether
17 the agreed upon fee is reasonable or unreasonable, the
18 court would not itself in the context when there was an
19 existing fee, fee agreement determine what it felt was the
20 most appropriate fee, so the primary question when there
21 is a fee agreement and a fee request is whether the fee
22 request, the agreed upon fee is reasonable.

23 QUESTION: I think this is a very difficult
24 case because either way, we are going to be, I mean on
25 which circuits involved, we are going to be upsetting

1 standard arrangements, contingent fees in some cases. In
2 this case, in the Ninth Circuit, are you saying that the
3 fee, the fee the Ninth Circuit set was not reasonable?

4 MR. SCHNAUFER: Yes, Justice Kennedy. For
5 several reasons the attorney fee that the district courts
6 in Ninth Circuit set was not reasonable. First and
7 foremost, the district courts did not address the primary
8 question whether the agreed upon fee was a reasonable fee.
9 Second, the district court who decided, who ordered the
10 fees in *Gisbrecht*, *Miller* and *Sandine*, did not take into
11 account, did not have the attorney fees reflect the
12 contingent nature of the fee. The district courts awarded
13 in all three cases noncontingent hourly rates,
14 noncontingent fees when by law, the attorney fee must be
15 contingent on success.

16 QUESTION: Well, but, of course, that assumes
17 that you are correct here. But based on a standard of
18 fair compensation, was this unfair compensation?

19 MR. SCHNAUFER: Yes.

20 QUESTION: Quite without reference to your
21 statutory argument?

22 MR. SCHNAUFER: Yes. Because when an attorney
23 fee is contingent on success in the litigation, the
24 attorney fee should reflect the contingent nature of the
25 fee. In this case, even if there were not a prohibition

1 on charging noncontingent fee, the parties had freely
2 contracted that the attorney would be paid more taking
3 into account the risk of loss.

4 QUESTION: But it seems to me you have got to
5 get back to the statute and say why the statute should be
6 read the way you want it to. This isn't an ordinary
7 situation event or of a contingent fee say in a personal
8 injury case which the court may have supervision over in
9 the general sense. Here the court doesn't say that the
10 attorney shall enter into an agreement and the court shall
11 enforce it. It says the court may determine and allow as
12 part of its judgment a reasonable fee for such
13 representation. I think you have got to build from that
14 and say why you think that the amount of the contingencies
15 specified in your contract is the one that the court has
16 to follow.

17 MR. SCHNAUFER: Mr. Chief Justice, I believe
18 that the practice before 1965 is relevant. Attorneys were
19 entering into contingent fee agreements with their clients
20 to represent full representation in civil actions.
21 Congress in an act in 406(b), did not void those
22 agreements, did not say that attorneys should not charge a
23 contingent fee, but instead, chose to regulate the
24 contingent fee agreements.

25 If Congress had, if Congress had intended to

1 prohibit attorneys from engaging, from making contingent
2 fee agreements with their clients, force representation in
3 federal court, Congress really could have said so. I
4 think we have cited.

5 QUESTION: But it doesn't say anything in
6 (b)(1)(a) about contingent fees, does it?

7 MR. SCHNAUFER: No. (B)(1)(a) reflects that
8 the attorney be must be contingent upon a favorable
9 judgment.

10 QUESTION: Well, if you get a favorable
11 judgment --

12 MR. SCHNAUFER: Right.

13 QUESTION: You can get a fee.

14 MR. SCHNAUFER: Yes.

15 QUESTION: Which isn't quite the same thing.

16 MR. SCHNAUFER: We believe that the purpose of
17 the statute expressed by Congress is fully implemented by
18 our view.

19 QUESTION: Let me -- I'm having trouble
20 following your argument. And one reason is because I am
21 using the words differently than apparently you are. I
22 understand we are in a universe where you are only going
23 to get paid under this statute if you win. Am I right
24 about that.

25 MR. SCHNAUFER: Yes.

1 QUESTION: All right, so we all assume in that
2 sense every fee is contingent.

3 MR. SCHNAUFER: Yes.

4 QUESTION: But then I thought we were trying to
5 distinguish within that universe between some circuits
6 that say the way we should calculate that is by looking to
7 what they call the lodestar, and other circuits that say
8 the way we calculate it is we look to the agreement and if
9 the agreement is for 25 percent of the recovery, that's
10 where we start. Am I right?

11 MR. SCHNAUFER: Yes, Justice --

12 QUESTION: All right. Now what is it that we
13 are trying to decide? Are we trying to decide whether --
14 what is it that you see us trying to decide within that
15 universe?

16 MR. SCHNAUFER: Well, there are significant
17 variations of the lodestar method. The government now
18 proposes that the lodestar method be the lodestar method
19 from the fee shifting context, not taking into account the
20 contingent nature.

21 QUESTION: All right. As far as I can see, the
22 Ninth Circuit says we start with the lodestar, but then it
23 can be adjusted for 12 factors. Number six of which is
24 what I would call the contingent fee, namely, the one 25
25 percent of the judgment written into the contract which is

1 what I will use the word contingent to refer to, and so
2 you have the Ninth Circuit says first the lodestar
3 adjusted for that, and then some other circuits say first
4 start with 25 percent contingency, but adjust it if that
5 isn't reasonable. Now, that's how I was seeing it. Now,
6 am I right?

7 Correct me if I'm not.

8 MR. SCHNAUFER: Justice, I believe there are
9 variations.

10 QUESTION: And there are some variations, but
11 those are the two basic things. All right. As between
12 those two basic things, what is it you want us to say.

13 MR. SCHNAUFER: We ask the court to, to specify
14 that when a district court determines a reasonable fee
15 under 406(b) it should start by asking first the question
16 what is the agreed upon amount and is the agreed upon
17 amount --

18 QUESTION: Okay. You said circuits start with
19 the 25 percent contract and adjust, rather than the
20 circuits that say start with the lodestar and adjust.
21 Okay. And the statute says may. And now why should we do
22 what you want rather than letting the Ninth Circuit free
23 to do it the way it wants?

24 MR. SCHNAUFER: I believe, Justice Breyer, that
25 there could be possible, you could allow different

1 circuits to do things in different ways, but the interest
2 is in uniform federal law. I believe that the method, the
3 traditional method of determining contingent fee is best
4 served, best serves the purpose of the act. Hence the
5 lodestar calculation is generally an expensive,
6 time-consuming endeavor best suited to complex litigation.
7 Social Security cases only take generally 30, 40 or 50
8 hours to accomplish.

9 If attorney fee litigation using, trying to
10 proof up the Hensley hourly rate is required, then
11 attorneys will have to spend five, maybe 10, in this case
12 much more hours trying to collect a compensatory fee.

13 QUESTION: Mr. Schnauffer, can I ask you this
14 question? As I understand it, 406(a) provides that for
15 representation before the agency, the agency shall
16 prescribe a maximum fee. Is -- is -- am I correct in
17 that.

18 MR. SCHNAUFER: Yes. Justice Scalia.

19 QUESTION: So the agency sets a fee and it
20 doesn't matter what the parties have agreed to before the
21 agency. They can agree to whatever they like. The agency
22 says this is the maximum fee. Why would Congress in B
23 adopt a totally different regime for representation before
24 the courts? As a, you know, before the agency, your
25 agreement with your lawyer doesn't make any difference,

1 but before the courts basically what governs is your
2 agreement with the lawyer. I don't know why they would do
3 that?

4 MR. SCHNAUFER: Justice Scalia, I believe that
5 the statute does not say. That the statute does not
6 require the agency to ignore an agreement between a
7 plaintiff or a claimant and his or her attorney when
8 determining a fee for administrative work. In fact, if
9 you take a look at the regulations --

10 QUESTION: Well, it requires them to ignore it
11 if it goes beyond what the agency determines is the
12 maximum amount that ought to be charged.

13 MR. SCHNAUFER: Yes, Justice Scalia. In that
14 way 406(b) and 406(a) are the same. To the extent that
15 any agreement between an attorney and the Social Security
16 claimant is inconsistent with the statute provision that
17 agreement is void. The long-standing provision --

18 QUESTION: What about the provision at the
19 administrative level that does refer to an agreement?
20 This is, what is it, (a)(2), an agreement --

21 MR. SCHNAUFER: Yes.

22 QUESTION: It controls with a cap of \$4,000 at
23 the agency level.

24 MR. SCHNAUFER: Yes, Justice Ginsburg. The
25 statute there is elucidative of Congress' acknowledgment

1 and lass the agency's acknowledgment of the capacity of
2 Social Security claimants to contract with their attorneys
3 for representation in federal court. We are not asking
4 specifically for the court to adopt the presumption, the
5 conclusive presumption in 406(a)(2), instead, we maintain
6 that the attorney has the ability, has the burden as the
7 fee applicant to establish the reasonableness of the fee.
8 That is somewhat different than the more lenient rules of
9 406(a)(2).

10 QUESTION: May I ask, just a question of what
11 this fee is composed of. Say the claimant loses at all
12 three levels of the administrator, the administrative
13 level, then wins in court. Do the hours before the agency
14 count and then would they be computed differently because
15 the 406(a) --

16 MR. SCHNAUFER: Justice Ginsburg, it depends on
17 whether or not the claimant was represented during the
18 administrative proceedings. If the claimant was
19 represented during the administrative proceedings, then
20 the claimant's attorney can apply to the agency for
21 compensation for their services after the --

22 QUESTION: After winning in court, so they
23 would be completely different.

24 MR. SCHNAUFER: Yes. They are dual
25 entitlement. The attorney with seek both 406(b) fees from

1 the court, for the court work, and 406(a) fees from the
2 agency for the agency work.

3 QUESTION: I believe there is another scheme I
4 think that's more adhered than this Social Security
5 scheme. For veterans' benefits purposes, you are probably
6 familiar with the provision that provides for filing an
7 agreement and then if there is, when they reach such an
8 agreement, the total fee payable to the attorney may not
9 exceed 20 percent of the total amount of any past due
10 benefits awarded. That's an express scheme for filing of
11 an agreement and the agreement enforceable.

12 MR. SCHNAUFER: Yes, Justice Ginsburg. I
13 believe that Congress does, has addressed specifically on
14 occasion when a court, when the court should look to an
15 agreement or the agency should look to the agreement to
16 determine a reasonable fee. However, I believe that in
17 the context of the legal context in 1965, Congress would
18 have understood that a district court determining a
19 reasonable fee for representation in court for the --
20 would look first to whether or not there was a contract
21 between the attorney and the claimant and whether or not
22 the agreement upon amount was reasonable. That would be
23 the method by which the judge would be expected to
24 proceed. The judge would not be expected to determine
25 independently a lodestar amount or try to determine a

1 reasonable fee. If the fee agreed to between the attorney
2 and the client was reasonable, then that fee would be
3 approved.

4 QUESTION: So you are saying this is a more --
5 this same statute came later, but that essentially, that
6 they operate the same way?

7 MR. SCHNAUFER: Yes, but with important
8 differences. The 406(a)(2) administrative fees creates a
9 presumption in favor of the reasonableness of the fee. We
10 are saying that the attorney has the burden under 406(b)
11 to prove the reasonableness of the fee. We are not
12 suggesting that there is any presumption that the fee
13 requested or that 25 percent is a reasonable fee. The
14 attorney has to prove that the reasonable fee is the
15 agreed upon fee. Of course, it's important in many cases
16 the attorney will not request the full agreed upon fee but
17 oftentimes will request much less.

18 For example, in the case of Anderson that this
19 court denied cert on, the request was not for the full
20 amount of the contract, but for significantly less. I
21 believe the attorneys have a strong interest in not
22 making, requesting inordinately large fees from the court
23 because one, it would be improper, unreasonable, two, the
24 government would be likely to object, and three, the court
25 would be unlikely to award it and so attorneys generally

1 are going to make a fee request to the court under 406(b),
2 they are going to be within the raping of reasonableness.

3 QUESTION: If you place an objection to the
4 lodestar method, you said this becomes a litigation that
5 is embarrassingly longer than the litigation over the
6 client itself.

7 MR. SCHNAUFER: Justice Ginsburg, our objection
8 to the lodestar method depends on how you, what you mean
9 by the lodestar method. There is a lodestar method using
10 the fee shifting context that is a noncontingent fee.
11 There is also a lodestar method that may allow enhancement
12 for contingency and that would be a fee-shifting context.

13 QUESTION: The district court here relied on
14 the bar fees in the Portland area, didn't it, for lawyers
15 that have been practicing a certain amount of time?

16 MR. SCHNAUFER: Yes, Mr. Chief Justice. The
17 hourly rates used were established as noncontingent hourly
18 rates however since the attorney services were contingent
19 on success, an attorney fee awarded at that rate would not
20 be fully compensatory. That when an attorney fee is
21 contingent on success, the attorney fee, a reasonable
22 attorney fee should reflect the contingent nature.

23 QUESTION: Well, every fee is in a sense
24 contingent on success. I mean, if you lose the lawsuit,
25 you don't charge the same amount as if you win the

1 lawsuit, whether or not the fee agreement is contingent?

2 MR. SCHNAUFER: Yes. Mr. Chief Justice. In
3 this case, the government maintained that \$125 for one
4 attorney was the appropriate reasonable noncontingent
5 hourly rate, however, the government also concedes that
6 the class-based risk of loss in these cases is two out of
7 three. We have set forth agency's own statistics showing
8 that 1/3 of Social Security plaintiffs end up receiving
9 past due benefits and so on average, an attorney will
10 receive 1/3 of that noncontingent hourly rate if that
11 noncontingent hourly rate is all the compensation that the
12 attorney can obtain.

13 QUESTION: Mr. Schnaufer, here's my problem
14 with, with your basic argument, which is look at the
15 parties who negotiated a fee in another context, that
16 negotiated fees with what the court begins with. This is
17 not other contexts. All three of the contracts involved
18 in this case provided for a fee of 25 percent of the back
19 benefits, right?

20 MR. SCHNAUFER: Yes, Justice Scalia.

21 QUESTION: And there is testimony in this case
22 that that is the universal practice, the universal
23 practice of all the lawyers that represent these kind of,
24 these kinds of clients.

25 MR. SCHNAUFER: Yes, Justice Scalia.

1 QUESTION: And that, that 25 percent of back
2 benefits is the maximum allowed by law?

3 MR. SCHNAUFER: Yes, Justice Scalia.

4 QUESTION: Now, what, what reason is there to
5 believe that this is a, you know, an honest evaluation by
6 the two parties of what the, of what the lawyers' services
7 are worth? The lawyers are simply going for the absolute
8 maximum that the laws allow. I don't know why we should
9 "approach this" or why Congress would have approached it
10 as cases in which well, you know, after all, the parties
11 struck a deal at the beginning at arm's length and that
12 should be the starting point. This is not that kind of a
13 situation. It is a closed market in which these, these
14 plaintiffs take what the bar gives them. That's about
15 it.

16 MR. SCHNAUFER: Justice Scalia, I believe that
17 if the statute specified a 5 percent maximum fee or 10
18 percent maximum fee, the attorneys would also generally
19 charge, almost universally charge that same five or 10
20 percent. It's important to take a look at the 25 percent
21 cap on past due benefits in relative context. This is 25
22 percent of past due benefits. It's not 25 percent of the
23 whole value of the case. In normal civil litigation an
24 attorney recovers not 25 percent of a small part of the
25 judgment but the lifetime benefit.

1 QUESTION: Sometimes it would be a larger part
2 of the benefit. It depends entirely on how long the case
3 goes on. It's entirely fluky, and in all of the cases,
4 the lawyers come in and say 25 percent. That's the max I
5 can get, and that's what I'm going to ask for.

6 MR. SCHNAUFER: I think that, Justice Scalia, I
7 think in this case it's useful to look at an example and
8 see what that 25 percent cap actually does. The
9 government in this case maintained that the noncontingent
10 hourly rate was \$125 per attorney. Also the government
11 does not dispute that the risk of loss is one in three and
12 so a fully compensatory hourly rate would multiply that
13 hourly rate times a three multiplier for \$375 an hour.
14 However, in these cases, the actual, the 25 percent cap
15 came in, would have been met at \$280, \$190 and roughly
16 \$270.

17 QUESTION: But your multiplication assumes a
18 fictitious market. If I'm an attorney and I'm practicing
19 in this area and I know I'm going to win only one out of
20 every three cases, I'm going to tell the judge my hourly
21 rate in order to make a decent level in this part of the
22 law and this special is X dollars an hour, \$150 an hour.
23 I have to get that. And I take it the trial judge would
24 say yes, that's right, \$150 an hour is the prevailing
25 rate. That's what you get.

1 MR. SCHNAUFER: Justice Kennedy, I believe the
2 hourly --

3 QUESTION: You, you, you made the assumption of
4 a, of a fictitious market.

5 MR. SCHNAUFER: Justice Kennedy, I believe that
6 the government concedes that there is a preloss in a
7 typical Title II case and also the government's position
8 was that the appropriate noncontingent win, lose or draw
9 hourly rate was \$125 for one of these attorneys.
10 Therefore, under the government scheme, paying \$125 an
11 hour to an attorney for services will only mean that the
12 only grosses only \$44, roughly, roughly a third of that
13 amount. And so the way the government is counting, the
14 establishing of the hourly rate at \$125, admitting to the
15 class based risk of loss as one of not contesting that,
16 can you see that the attorney's recovery is actually much
17 lower than that noncontingent hourly rate, given the --

18 QUESTION: Well, it will be --

19 QUESTION: Let me ask you a question I have
20 been trying to get in for a while here. What would you,
21 what would your reaction be to a rule that says the
22 district judges shall require the applicant for a fee to
23 one, file any contract he has, two, file a statement of
24 his hours, three, file his normal rate that he normally
25 charges and based on the district judge's knowledge of the

1 proceedings, he shall set a reasonable fee?

2 MR. SCHNAUFER: Justice Stevens, I believe that
3 that would accomplish the goal readily, a local district
4 court could adopt such a rule which would be consistent in
5 406(b). I think that the court should also at the same
6 time consider whether or not there is any offsetting award
7 under the Equal Access Justice Act. Also, whether or not
8 there is any fee, fee liability under 406(a).

9 QUESTION: Well, the district court here
10 expressed, perhaps it was a magistrate judge, expressed
11 some skepticism as to the number of hours, I think, put in
12 on one of these cases.

13 MR. SCHNAUFER: Mr. Chief Justice, I believe
14 that the district court judge disputed whether there was
15 any special expertise involved. The government did not
16 contest that all the hours in these cases were reasonably
17 spent, the 25 hours, the 39 and the 52 hours.

18 QUESTION: Well, the fact the government didn't
19 contest it doesn't mean that perhaps we shouldn't pay some
20 attention to the view of the district judge.

21 MR. SCHNAUFER: The district court judge did
22 award the number of hours requested. The district court
23 judge did not reduce the hours at all in terms of the
24 hours. I'd like to take the rest --

25 QUESTION: Why should we consider the separate

1 fee under the equal access to justice act? A reasonable
2 fee is a reasonable fee. Why does it matter that some
3 money may be forthcoming from a different source to pay
4 for it?

5 MR. SCHNAUFER: The statute concerns how much
6 the client will actually end up paying his or her
7 attorneys that the Equal Access Justice Act --

8 QUESTION: And it says that they should pay a
9 reasonable amount.

10 MR. SCHNAUFER: All right. Yes. A reasonable
11 amount. And for example, the out-of-pocket attorneys fees
12 in this case with the EAJA offset was 29,675 for all three
13 claimants who received \$114,000 in back benefits. And so
14 in that context I believe that the attorney fees, the
15 judge should consider the equal access to justice act
16 because how much the claimant pays is very important.

17 QUESTION: How does it work under the
18 fee-shifting --

19 QUESTION: The equal access to justice fee is
20 for the benefit of the lawyer, rather than the client.

21 MR. SCHNAUFER: The EAJA itself, the offset
22 provision states that the attorney should keep the larger
23 of the 406(b) and the EAJA fee so the statute itself
24 contemplates that the attorney is entitled to the larger
25 fee.

1 QUESTION: In the context of a fee-shifting
2 statute where EAJA applies, the lawyer gets the fees from
3 the Defendant under EAJA. Can the lawyer have an
4 agreement with the client that the client is going to pay
5 an override above, above what the lawyer gets from the
6 Defendant?

7 MR. SCHNAUFER: Yes. We rely quite heavily,
8 Justice Ginsburg, on this Court's decision on Venegas vs.
9 Mitchell, recognizing that an attorney fee paid by a
10 client to his or her own attorney can be in addition to
11 the amount of a fee-shifting statute. A fee-shifting
12 statute such as the EAJA will not provide a fully against
13 tore fee in almost all cases. This is particularly true
14 since the EAJA's hourly rate has an artificial cap. It is
15 not the prevailing market rate based upon the attorney's
16 services in the legal community. If I may, I take the --

17 QUESTION: Very well, Mr. Schnaufer. Mr.
18 Salmons, we will hear from you.

19 ORAL ARGUMENT OF DAVID B. SALMONS

20 ON BEHALF OF THE RESPONDENT

21 MR. SALMONS: Mr. Chief Justice, may it please
22 the Court: For three reasons the Court should use the
23 lodestar method to determine and award a reasonable
24 attorney's fee under the Social Security Act. First, the
25 lodestar method best reflects the plain language and

1 purposes of Section 406(b). Second, it is consistent with
2 the strong presumption in favor of the lodestar approach
3 announced in this Court, attorneys' fees cases and third
4 it best furthers the statute's directive that the fees
5 awarded in each case must be reasonable.

6 QUESTION: Does the lodestar method take into
7 account the contingent nature of the recovery?

8 MR. SALMONS: Your Honor, the lodestar method
9 permits district courts to take a number of factors into
10 account in determining the reasonable hourly rate and the
11 reasonable fee under this Court's decision in Dague,
12 however, courts are not permitted to increase what would
13 otherwise be a reasonable fee based on the mere fact that
14 it was contingent.

15 QUESTION: Would it be a reasonable fee if it
16 included in the hourly rate reference to the fact that
17 there is only a 1/3 success rate? As a judge, I want to
18 practice in this area. I know the area very well. I win
19 only a third of the time, therefore my hourly rate takes
20 into account the fact that I'm going to win only a third
21 of the time and my hourly rate is \$200 an hour. Can the
22 district judge accept that?

23 MR. SALMONS: No, Your Honor. I think under
24 Dague that would not be permissible. This court in
25 Dague --

1 QUESTION: Then that's a false market the
2 district judge is using in order to award the fee. I
3 don't understand that. And, of course, I see the
4 consistency of your position because if you said yes well
5 then I would say well doesn't the contingency fee do the
6 same thing. So I'm -- but -- I'm concerned about how the
7 district judge can award in effect just \$40 an hour.

8 MR. SALMONS: Your Honor, I think there are at
9 least the three responses to that. First, this Court in
10 Dague rejected the notion that contingency enhancements
11 were necessary in order to determine a reasonable fee in
12 the context of fee-shifting statutes.

13 QUESTION: What in that case, what statute were
14 we interpreting?

15 MR. SALMONS: That involved Section 1988, Your
16 Honor.

17 QUESTION: Yes. Not this one.

18 MR. SALMONS: That's correct.

19 QUESTION: Not cases like this where there is a
20 low success rate, and where the language of the statute
21 says a reasonable fee.

22 MR. SALMONS: Your Honor --

23 QUESTION: I mean, why isn't the court, why
24 can't the court determine it as it wishes, so long as it
25 finds at the end of the day it's reasonable? An hourly

1 rate that it enhances somewhat or the risk factor, or even
2 a contingent fee could be reasonable, as long as it
3 doesn't exceed 25 percent. Doesn't this statutory
4 language leave that open?

5 MR. SALMONS: Your Honor, I think the statutory
6 language is open to this Court and to courts generally to
7 construe a standard that best furthers the purposes of the
8 act. This Court has long held --

9 QUESTION: Do you think the statute requires
10 that one particular method be selected or does it leave it
11 up to the judge?

12 MR. SALMONS: Your Honor, it certainly leaves
13 it up to courts. That's true in fee-shifting statutes as
14 well as with this statute.

15 QUESTION: Well I'm not, I'm not sure that
16 fee-shifting statutes are necessarily an appropriate
17 analogy here because perhaps there is no reason for
18 requiring a Defendant to pay a lot of money because of an
19 arrangement between the plaintiff and his attorney was
20 contingent, and the attorney doesn't win many cases. But
21 I think if you are talking about an agreement between the
22 plaintiff and the client in the actual case, there may be
23 more of a case for it.

24 MR. SALMONS: Your Honor, I think actually to
25 the contrary in the contempt of fee-shifting statutes this

1 Court has long recognized that the purpose of those
2 statutes is merely to encourage lawyers to undertake that
3 litigation, and nevertheless, this Court has said that a
4 contingent enhancement is not necessary to provide that
5 extra inducement that a lodestar calculation is adequate
6 and appropriate in striking the balance that Congress
7 intended when Congress only intends to encourage
8 litigation. In this context, by contrast, Section 406(b)
9 is not merely a statute designed to encourage litigation,
10 but is designed to protect Social Security claimants and
11 their awards of back --

12 QUESTION: I can't understand your position
13 that a reasonable fee must be determined without regards
14 to the realities of the special practice. I just don't
15 understand that.

16 MR. SALMONS: Your Honor, that, that is simply
17 not our position. It is not our position the courts must
18 be blind to the realities of this practice.

19 QUESTION: Is one of the realities that you can
20 win only a third of the time?

21 MR. SALMONS: Well, those numbers obviously
22 vary. Lawyers in this kind of environment are prevailing
23 all of the time.

24 QUESTION: Let's assume that that is a given in
25 the particular community and in the particular practice.

1 MR. SALMONS: Yes, Your Honor. I think that
2 one thing that's important to keep in mind is that
3 Congress struck the balance in this statute between
4 protecting claims and encouraging lawyers.

5 QUESTION: In the case that I put, can the
6 judge or cannot the judge take into account the fact that
7 the attorney is going to win only a third of the time?
8 This is his only practice. This is all he does. He is a
9 specialist.

10 MR. SALMONS: Your Honor, if what you mean by
11 take into account --

12 QUESTION: That the hourly rate --

13 MR. SALMONS: That the court can increase the
14 hourly rate in order to provide a subsidy from prevailing
15 Social Security claimants to losing Social Security
16 claimants, I think that would be inappropriate under this
17 statute and under this Court's decisions in Dague, which
18 although it is a different context, I think the difference
19 is quite strongly in favor of applying the same rule here.

20 QUESTION: It's not a subsidy. What's a
21 subsidy? I mean the obvious, everybody has the same
22 point. If you say they can only learn \$40 an hour, the
23 Social Security people won't be represented or they will
24 pad their hours. Now, I can't believe Congress wanted
25 that. So, so there doesn't seem to be an answer to that,

1 and Congress used the word may, so may means may. I mean,
2 that's the simple argument.

3 MR. SALMONS: That is correct, Your Honor.

4 QUESTION: And it sounds to me so far there is
5 no answer.

6 MR. SALMONS: The point I was making is that it
7 certainly is available to this Court to set a standard for
8 courts to apply.

9 QUESTION: If it's available, why wouldn't we
10 do it?

11 MR. SALMONS: That's what I was trying to
12 address, Your Honor.

13 QUESTION: All right.

14 MR. SALMONS: I think the reason why this Court
15 should not adopt a rule that would require the shifting of
16 benefits in effect from successful Social Security --

17 QUESTION: That's what I asked. What do you
18 mean shifting of benefits? It's not a -- a subsidy is
19 where you take some money and you pay for somebody to do
20 something. I don't see why you call this a subsidy.
21 That's a conclusion. What they are doing here is they are
22 charging what it costs them to provide service to Smith,
23 and it is what it costs because in the absence of this,
24 Smith won't get the service. Nor will Jones and Brown,
25 they are apt to lose. But particularly Smith won't.

1 MR. SALMONS: But Your Honor, that's not
2 necessarily true. I mean, individual cases, the riskiness
3 of individual cases is going to vary widely.

4 QUESTION: Smith is paying, Smith is paying for
5 the work done for the two guys who lost.

6 MR. SALMONS: That's correct. That's exactly
7 right. And that's the way this Court --

8 QUESTION: One way to word that.

9 MR. SALMONS: That's the way this Court
10 addressed it.

11 QUESTION: Okay. Well, why shouldn't we look
12 at it that way?

13 MR. SALMONS: That same analysis --

14 QUESTION: But why should we look at it that
15 way since Smith is also paying for what it costs to serve
16 Smith?

17 MR. SALMONS: Your Honor, I think that the
18 reason this Court should view contingency enhancements in
19 this context as inappropriate is because of the purpose of
20 the statute primarily designed to protect the benefits of
21 successful Social Security claims.

22 QUESTION: Well but the statute itself speaks,
23 sets a kept, a contingent fee of no more than 25 percent.
24 I mean the statute itself refers to that as a cap.

25 MR. SALMONS: The statute has -- that's

1 correct, Your Honor. And the statute has two provisions.
2 One is that it sets an upper bound of a reasonable fee
3 which is 25 percent but more precisely --

4 QUESTION: That does not suggest that there can
5 never be a contingency factor, does it?

6 MR. SALMONS: It does not necessarily suggest
7 that, no. What we are talking -- what I think the
8 question as Justice Breyer posed was more an a policy
9 level, why should this Court adopt a rule that would allow
10 those kinds of enhancements and I think one of the reasons
11 why that's inappropriate in this context is because the
12 purpose here is not just to encourage lawyers to take
13 these cases, which was the case in the fee-shifting
14 statutes where this Court said enhancements aren't
15 necessary. The purpose here is to protect claimants and
16 it would be particularly inappropriate --

17 QUESTION: Well, is the purpose to give fair
18 compensation to members of the bar?

19 MR. SALMONS: That is, that is a purpose, but I
20 would submit, Your Honor, that in regards to the language
21 we are focusing on of the reasonable fee, that is not the
22 primary purpose. There is a separate provision in 406(b)
23 where Congress addressed the question of the problem of
24 encouraging lawyers to take these lawsuits.

25 QUESTION: Suppose you had a good friend and he

1 said I'm going to go into Social Security work. I, I know
2 the area very well. It's going to be my specialty. I'm
3 going to win a third of the time. I'm going to in effect
4 get \$40 an hour. Would you advice him to go into that
5 part of the practice?

6 MR. SALMONS: Your Honor, that would probably
7 depend on what some of his alternatives were. I don't
8 mean that in any sort of derogatory way, but it is not the
9 case that lawyers cannot make a sufficient wage under the
10 lodestar method. It's important to remember that there
11 are at least six circuits who have been applying the
12 lodestar method.

13 QUESTION: May I ask you in a way what you mean
14 by the lodestar method. I know we have talked about it in
15 a lot of cases, but would it be a satisfactory compliance
16 with the lodestar method in your view of the case if every
17 judge said to every lawyer, file your time sheet with me,
18 I want to know your hours, I want to know your regular
19 charge, and I want to see the contract you have got, and I
20 know a lot about the case, I'll fix the fee. Would that
21 satisfy your view?

22 MR. SALMONS: Your Honor, that would certainly
23 be a one way to interpret a statute that I think on the
24 text of the statute there is nothing that would prohibit
25 it. I think there are strong reasons why this Court may

1 want to provide some guidance.

2 QUESTION: Well, the guidance is --

3 MR. SALMONS: For federal rules.

4 QUESTION: You should take into account the
5 hours, the general charge that he makes and the success in
6 the case and whatever contract he has made and then you
7 would know the case, you decide the reasonable fee. And
8 we don't want to have a 10-month argument under lodestar
9 method about what the, you know, one of the things we want
10 to avoid is protracted litigation in these cases, so we
11 want to simplify it. I think you would agree that's
12 desirable?

13 MR. SALMONS: I do agree that's desirable, but
14 I think the lodestar method is the best way to could that.

15 QUESTION: And I'm just wondering if what I
16 propose to be a sufficient compliance with the lodestar
17 method to satisfy the government?

18 MR. SALMONS: Your Honor, I think it would
19 largely be in compliance with lodestar method, although
20 not under this Court's decision in Dague which has
21 prohibited the consideration of contingency enhancements.

22 QUESTION: Did that, did that prohibition of
23 contingency enhancements apply in the context such as this
24 where it was only legally possible to charge when you win?

25 MR. SALMONS: No, Your Honor, that was not the

1 context of 1988.

2 QUESTION: Might not that make a difference?

3 It's one thing to say well, if you don't, if you don't
4 charge anything for your losing cases, that's your
5 problem. You ought to charge. And we are not going to
6 allow you to conduct that practice and make, make this
7 plaintiff pay for the, for the two who you lost. But when
8 you are in a different context where the only time you can
9 get fees by law is where you win, would we have to pay,
10 would we have to adopt the same rule?

11 MR. SALMONS: Your Honor, I think this Court
12 should adopt the same rule and it's because the reasons
13 this Court adopted the rule that it did in the context of
14 fee-shifting statutes was not because there was still some
15 possibility that lawyers could negotiate fees even that
16 won on a contingent basis.

17 QUESTION: What's the government's position,
18 supposing one of the Social Security lawyers has a very
19 wealthy client who feels he is entitled to Social Security
20 as a course he is just like everybody else. He hasn't
21 been paid it, and says to the lawyer, I'll pay you \$300 an
22 hour if, for all the work you put on this case because I
23 am determined to get that Social Security. Do you think
24 406(b) prohibits that?

25 MR. SALMONS: Um --

1 QUESTION: He doesn't want to get it out of the
2 judgment at all. He says I'll bill you for it afterwards.

3 MR. SALMONS: Your Honor, the commissioner does
4 interpret 406(b) to require only contingent fees, that it
5 prohibits a lawyer from charging fees when there is no
6 award of back benefits.

7 QUESTION: A maximum wouldn't make any sense
8 otherwise. I mean, the maximum is 25 percent of the back
9 pay award. If there is no back pay award, you can charge
10 as much as you like. I mean, that's strange.

11 MR. SALMONS: We think that in light of, of the
12 terms of 406(b), its purpose is in the structure with,
13 with the provision that would make it in fact a crime to
14 charge more. But the best way to read that is to require
15 that only fees that have been authorized by a court can be
16 charged.

17 QUESTION: Has the commission ever issued an
18 opinion to that effect?

19 MR. SALMONS: No, Your Honor. There is no
20 regulation that simply addresses that. To be honest with
21 you, it is not an issue that has really come up because
22 lawyers as the record here again reflects, have a
23 universal practice of entering into fee agreements that
24 say 25 percent contingency at the statutory maximum and
25 their contingent fees so it's just not an issue that comes

1 up.

2 QUESTION: So the statute says all fees are
3 contingent and the government says there can be no
4 contingent fees? That's where we are in this case?

5 MR. SALMONS: No, Your Honor. The statute says
6 the relevant language of the statute says the courts will
7 determine a reasonable fee, and we --

8 QUESTION: But all fees are contingent on
9 success. In other words, there is some confusion, I
10 think, of what the term contingent fee means. Nobody gets
11 a fee if they lose. At least the secretaries interpreted
12 the statute as long as I know to say that the only time
13 that the lawyer is going to recover is if the plaintiff
14 guess benefits, is that right?

15 MR. SALMONS: That is correct.

16 QUESTION: Okay. And then the question is
17 what's, what this provision requires. One just reaction
18 that I had to this picture is well, in tort litigation,
19 the standard is a third of the recovery. And why isn't
20 here, why isn't a quarter of the recovery eminently
21 reasonable considering as was pointed out that the
22 recovery comes only out of the past benefits. No --
23 nothing out of the future benefits the person is going to
24 get. So what is it about the 25 percent of past benefits?
25 It doesn't just make a whole lot of sense instead of

1 engaging in what we know from this very case, we'll take
2 as much time as the calculation, as the dispute over the
3 benefits themselves. The litigation here over the fees
4 took as long as the litigation over the claimant's right
5 to benefits.

6 MR. SALMONS: Your Honor, let me if I may
7 address your last point first. That is to say that the
8 commissioner's experience with the lodestar method in the
9 numerous circuits that apply it is not that it is
10 difficult to apply, but keep in mind, Your Honors, that in
11 most of these cases, the lawyers are also seeking EAJA
12 fees and so the very same court that's going to consider
13 the 406(b) fee claim has already undertaken a lodestar
14 analysis to determine a reasonable number of hours and
15 then the rate is determined by EAJA, but the
16 commissioner's experience is that the lodestar method is
17 not difficult to apply and in the vast majority of cases,
18 certainly in most circuits, the commissioner doesn't
19 object to most of the fee claims because they are
20 reasonable. The courts have determined standards for what
21 reasonable rates are in the relevant prevailing markets.

22 QUESTION: You mentioned EAJA. One of the
23 problems that I have with that analogy is it works out
24 here that you get EAJA is just about this it. These three
25 lawyers got what, what EAJA permitted. And then

1 fee-shifting statutes generally you get from the Defendant
2 what EAJA allows you, but then you can have, you can
3 recover more from your own client. Here it works out that
4 EAJA is it and it seems to me something unfair about that.

5 MR. SALMONS: Your Honor, I think the only
6 thing unfair in that sense is that Congress here has
7 determined that the market for legal services in the
8 Social Security context was failing to carry out the
9 purposes of the Social Security Act, and that lawyers had
10 unequal bargaining power and were charging inordinately
11 large contingency fees --

12 QUESTION: But those were the days you were
13 talking about 50 percent contingent fees so Congress cut
14 it back to 25, so why -- what --

15 MR. SALMONS: That's correct.

16 QUESTION: What -- you just said well, 25 not
17 in every case, maybe only work two hours, it would be
18 unreasonable, but instead of having the judge and the
19 lawyers go through this whole thing, I mean, EAJA is
20 available only if the government's position was not
21 substantially justified, right? It's not automatic.

22 MR. SALMONS: That's correct. That's correct.
23 It's a standard that course seem to find on a regular
24 basis in these cases, but that is the standard.

25 QUESTION: Does the government -- I don't know

1 how it works, but when someone is seeking benefits from
2 the government, government has prevailed all through the
3 agency, loses in court, does the government just sort of
4 concede that the government's position was not
5 substantially justified?

6 MR. SALMONS: Not necessarily, Your Honor. I
7 think the government lawyers in each case would look at
8 the prevailing circuit law or, of the jurisdiction, would
9 look at the facts of the case and make the determination.
10 In most of these cases, EAJA fees seem to be awarded and
11 the resolution of those fees doesn't take a lot of time.

12 QUESTION: Well, shouldn't there about, you say
13 you look at the law of the particular circuit. I would
14 think that a concept like was the government's position
15 substantially justified shouldn't be whatever it means in,
16 in 12 different appellate courts.

17 MR. SALMONS: My point, Your Honor, is just one
18 of the things I think that's keeping, is important to keep
19 in mind in these cases is that they, by their nature, tend
20 to be very routine and so both in terms of awarding EAJA
21 fees and in terms of awarding 406(b) fees, it is not very
22 difficult for courts to develop practices in these cases
23 that, that result in a very expedited process, and that in
24 fact, that is, that is the way the lodestar method is
25 applied and I, and it seems to me, Your Honors, that the

1 alternative that's being proposed would largely frustrate
2 the purpose that Justice Stevens was identifying of the
3 need for some sort of expedited procedures here. They
4 point to four additional factors that aren't lodestar
5 factors that they think courts should take into account.

6 Some of the contingency circuits who have
7 adopted some modified contingency rule have added
8 additional factors, including requiring courts to ask
9 whether the claimants had been notified that there were
10 other options other than the 25 percent contingent fee
11 which under the facts of this case we were told the
12 lawyers would never do.

13 QUESTION: Does the government have any
14 statistics as to how often an award of attorneys fees by a
15 district judge is appealed to the Court of Appeals?

16 MR. SALMONS: Your Honor, that is, in the
17 context of 406(b) cases?

18 QUESTION: Yes.

19 MR. SALMONS: There are no -- the agency does
20 not specifically keep statistics on that, although I did
21 discuss that with the relevant agency personnel and was
22 informed that in fact the agency very rarely seeks an
23 appeal unless the case involves some broader legal
24 principle that the agency determines is important to
25 litigation.

1 QUESTION: How about the attorney?

2 MR. SALMONS: I do not have any figures on
3 that, Your Honor.

4 QUESTION: Mr. Salmons, another question of
5 statistics. We have had the statistic that only one out
6 of three cases is successful. And I take it you have not
7 challenged that. That's one of the arguments that there
8 is something that is really outrageous practice going on
9 and there is a need to enhance for that contingency. What
10 I want to ask is are there any, is there any evidence,
11 statistical or otherwise, to explain why the rate is only
12 one win out of three cases?

13 One reason might be that, or one description
14 might be that virtually all lawyers who take these cases
15 in fact have the experience of losing two for every one.
16 But another explanation might be that lawyers who can tell
17 the difference between a good case and a bad case win at a
18 very high rate, and that a lot of young lawyers who don't
19 have access to many clients are willing to take long shots
20 and that when you average those two together, you bet the
21 one win out of three cases.

22 Do we know, do we know which possible
23 description is correct or whether there is some third
24 description that explains the one in three?

25 MR. SALMONS: Your Honor, I'm not aware of any

1 statistical or other information that's directly on point,
2 although I could think it is important to keep in mind
3 that the standards of review among other things have a lot
4 to do with the outcome of these cases, and that, and that
5 the general statistics that the courts provide through,
6 for example, the federal judiciary home page that tracks
7 different types of cases in different circuits, for
8 example, shows that there has been dramatic increases in
9 the number of Title II disability lawsuits that are filed
10 initially in district courts between the period of 1990 to
11 2000. In fact, that they have tripled.

12 QUESTION: Does that have anything to do with
13 what the rate is because these are all cases that lost at
14 the administrative level, right?

15 MR. SALMONS: That's correct.

16 QUESTION: Is there any, any showing that maybe
17 in the prior period, there were more cases winning at the
18 administrative level, therefore fewer getting into the
19 court?

20 MR. SALMONS: Not that I have seen. In fact,
21 Your Honor, the numbers that I have seen suggest that the
22 percentage of cases that win before the agency has been
23 relatively consistent.

24 QUESTION: I don't understand the point were
25 you driving at. So what, so they tripled in 10 years, you

1 know, and the ice cap melted.

2 MR. SALMONS: I surely don't want to overstate
3 it.

4 QUESTION: I don't understand what you were
5 driving at. What was the point that you were making?

6 MR. SALMONS: The point I was attempting to make,
7 Your Honor --

8 QUESTION: Is this the result of those, of
9 those jurisdictions that have allowed contingency to be
10 considered?

11 MR. SALMONS: No. Not at all. Your Honor.
12 The point I was trying to make is that there aren't any
13 hard statistics that show how the different legal rules
14 have having an effect on litigants in this context, but
15 the general --

16 QUESTION: And likewise, I take it there are no
17 statistics on how the different compensation approaches
18 are having an effect?

19 MR. SALMONS: That's correct. And that's,
20 that's the point I was trying to make, Your Honor. That
21 all that we can tell is that one, the commissioner has not
22 been flooded with complaints in the circuits that applied
23 the lodestar, which is the dominant method and has been
24 for over 10 years.

25 QUESTION: Do you have any flooded in the other

1 jurisdictions?

2 MR. SALMONS: No. My point is that there are,
3 there are, there is no reason to think that the rules are
4 having that dramatic of an effect on the availability of
5 counsel.

6 QUESTION: Then why don't we leave it alone?
7 Let the judge do it?

8 MR. SALMONS: That is certainly an option that
9 is before this Court. The government's position is that
10 if the Court is going to address the issue of what
11 standards should be applied, that the best way for this
12 Court to do it is to specify that the lodestar method is
13 the best method, and that includes --

14 QUESTION: But that is a pretty big swing if
15 you say if the judge can go up to 25 percent if that's
16 reasonable, here what was the percent, the lodestar
17 percent, the lodestar yielded what percent of the past two
18 benefits in these cases?

19 MR. SALMONS: Your Honor, I don't have that
20 figure. I can tell you that in terms of hourly rates, for
21 example, I --

22 QUESTION: Wasn't it about half of what the
23 contingency would have been?

24 QUESTION: Even less, I think.

25 MR. SALMONS: It varied in the, in the cases.

1 QUESTION: I think it was under 10 percent.

2 MR. SALMONS: I think one way to sort of try
3 and track that is that what the claimants lawyers in these
4 cases did was because they recognized they were in a
5 lodestar circuit, they had, they kept the same number of
6 reasonable hours they would use for their EAJA fees which
7 the government did not contest and then they just divided
8 that by the 25 percent figure and came up with an hourly
9 rate. So the hourly rates they sought in these cases
10 ranged from around \$180 an hour to nearly \$300 an hour.

11 QUESTION: But those were chopped down by the
12 judge.

13 MR. SALMONS: That's correct.

14 QUESTION: Because they were not supposed to,
15 at least this Court, the Court here did it. It took out
16 following this Court's precedent any override for risk of
17 nonsuccess.

18 MR. SALMONS: That's right, Your Honor. The
19 Ninth Circuit has --

20 QUESTION: So I'm not talking about the rates
21 that the lawyers asked for, I'm talking about the rates
22 that they got. My concern is this. If you just say well
23 judge, look at the agreement. Look at the hourly rate.
24 You can get swings from one court saying as I think was
25 true here, 7.8 percent to another judge saying in that

1 very same case 25 percent. That's why I think you have to
2 have a little more control, a little more uniformity.

3 MR. SALMONS: Your Honor, let me make two
4 points very quickly. One is that when Congress enacted
5 this statute, it recognized not only that lawyers were
6 charging an inordinately large percentage in terms of
7 their contingency fees, but there was an inherent problem
8 with contingency fees because in this context they do not
9 track the value, a reasonable value of legal services.
10 They turn unnecessarily on factors such as the number of
11 dependents and the amount of delay that it takes in order
12 to get the benefits over which time the benefits continued
13 to accrue which just has no bearing whatsoever on the
14 amount, the value of the legal services provider.

15 QUESTION: Are you recommending that we say let
16 the judge do it, no matter what? Is that the government's
17 position? I thought the government was coming in with a
18 pretty stiff position that it's the lodestar method
19 period.

20 MR. SALMONS: That is the government's
21 position, Your Honor. We think that the lodestar method.
22 Let me just see if I can, and be very clear.

23 QUESTION: Your position is that we do not want
24 to subsidize bad suits?

25 MR. SALMONS: Yes. That is exactly right.

1 QUESTION: It is not in the best interests of
2 anybody, the country or anybody else, to encourage lawyers
3 to bring bad suits and then get paid for it when they win
4 a good suit, right?

5 QUESTION: I was wondering if you had spent a
6 lot of time --

7 QUESTION: This is certainly a way to get
8 lawyers in the good suits.

9 MR. SALMONS: But, Your Honor, there is no,
10 there is no evidence of that. And in fact the evidence
11 that it does exist is to the contrary. There are six
12 circuits that have been employing the lodestar method for,
13 for decades without any evidence that there is a failure
14 of lawyers who want to take these cases. The lawyers in
15 these cases submitted affidavits that said we, we practice
16 regularly in federal courts in Title II cases and we have
17 been doing it for years and years and that's in the
18 context of lodestar statutes.

19 QUESTION: Why not make it run the same way the
20 veterans' benefits do? I mean, after all, it's a similar
21 kind of set up. You claim that if it's at the agency, you
22 lose, you come to court, and there it's the agreement is
23 20 percent, so it's, but that seems to be working fine,
24 right? Where the judge gives the 20 percent.

25 MR. SALMONS: Your Honor, that would certainly

1 be an alternative availability to Congress. The
2 difference would be the statutory language would prohibit
3 this Court from adopting a rule that would look primarily
4 to the fee contracts. Congress knows how to write that
5 kind of statute when it wants to. It did so in 406(a)(2).
6 It has not done so here. Another point I would like to
7 make, Your Honor, is that, is that these cases are, as
8 both sides seem to agree, are somewhat unique in that they
9 generally require a very low number of hours. They don't
10 require the same kinds of risk undertaken by the lawyers
11 as other contingent fee cases do.

12 QUESTION: Well, if that's so then the judge in
13 all the circuits that follow the contingent method would
14 reduce the award. I mean, in one way you are going to
15 start with the lodestar enhance. In the other way you are
16 going to start with the contingent fee reduce it. I guess
17 the simpler is the contingent fee reduce it. I think
18 frankly you don't have to go into the hours.

19 MR. SALMONS: I disagree, Your Honor, because
20 of the court's experience, the lodestar method, I think
21 that's the most efficient way for courts to determine the
22 fee.

23 QUESTION: Beyond the record, do you have any
24 statistics on how often contingent fees are reduced in the
25 contingency circuits?

1 MR. SALMONS: I do not, Your Honor. I do not.
2 One other thing that I think --

3 QUESTION: Do you have any sort of egregious
4 examples where there was a lot of delay in those circuits
5 just to build up the recovery? Has that turned out to be
6 a problem for the agency anywhere?

7 MR. SALMONS: Your Honor, the agency has not
8 experienced any particular problem under either of these
9 standards. We do think that the lodestar method as this
10 Court announced it in Dague is the best way to effectuate
11 Congress' intent under the purposes of this statute. I
12 think it's important to keep in mind that Congress has
13 already provided a mechanism to ensure adequate counsel
14 here, and that is the payment out of the back benefit
15 awards directly to the lawyer. That's different than in
16 other contingent fee contexts.

17 So that Congress was concerned with the need to
18 encourage counsel and it provided a provision to do that.
19 It struck the balance, and then it requires the courts to
20 determine the reasonable fee in each case based on a fair
21 value of the legal services provided and this Court has
22 long held that there is a strong presumption that when
23 Congress says courts determine a reasonable fee, Congress
24 means the lodestar method.

25 If the lodestar method --

1 QUESTION: That wasn't even established until
2 Hensley against -- whatever it is. The lodestar got
3 settled around in the circuits in the 1980s. Social
4 Security claims have been going on a long time. Wasn't it
5 standard before, but it was contingent?

6 MR. SALMONS: Your Honor, courts used a variety
7 of standards before as they did under other fee statutes.
8 The fact that the lodestar method wasn't fully developed
9 didn't prevent this Court from adopting it under the Civil
10 Rights Act of 1964, for example, but prior to the adoption
11 of the lodestar method, it's not the case the courts were
12 routinely deferring to the fee contracts.

13 QUESTION: Thank you, Mr. Salmons. Mr.
14 Schnauffer, you have two minutes remaining.

15 REBUTTAL ARGUMENT OF ERIC SCHNAUFER
16 ON BEHALF OF THE RESPONDENTS

17 MR. SCHNAUFER: Yes, Mr. Chief Justice. I
18 believe that the government's position is a bold new
19 position. The government has not previously advanced
20 except for in its brief that all circuits are wrong, that
21 even the lodestar jurisdictions are wrong. That no one
22 can, no enhancements for contingencies can ever be
23 permitted and so the agency cannot rely on the experience
24 in the circuit lodestar to say that this method is the
25 preferable method.

1 Claimants need attorneys. In these cases the
2 government conceded that the agency's position, underlying
3 agency position was not substantially justified without
4 attorneys whose claimants most likely would never receive
5 the benefits that they were due. Justice Stevens, you
6 asked about possibly about the EAJA of lodestar. There
7 are many reasons why the EAJA, Equal Access Justice Act is
8 not the lodestar amount. The EAJA has an artificial
9 hourly rate capped below the prevailing market rate. The
10 EAJA also often represents a settlement of the parties for
11 the risk of litigating the substantial justification
12 issue. And so we cannot rely, just because there is an
13 Equal Access Justice Act award, there is not in the case
14 already a lodestar amount.

15 Then I guess I think it allows this Court to
16 distinguish easily Dague. Dague should not be applied
17 outside of the fee-shifting context because as its
18 request, a plaintiff should be able to pay his or her own
19 attorney to take into account the risk of loss. Justice
20 O'Connor, I think was asking whether or not contingency
21 could be taken into account by a district court in
22 determining the fee. I believe that if this Court can
23 direct that the lodestar method be adopted to enhance for
24 contingency reflecting the necessary contingent nature of
25 the claim or the court can use a contingent fee method,

1 there again looking at the contingent nature of the fee,
2 regardless of which way the court goes, the court allows
3 more than one method. I brief that the contingent nature
4 of Social Security cases should be taken into account.

5 The government describes dependence. The
6 government objects that attorney fee awards would be
7 arbitrarily different based upon the number of dependents.
8 The government lost that issue in Hopkins vs. Cohen in
9 1968. This Court held in Hopkins the number -- thank you,
10 Mr. Chief Justice.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
12 Schnauffer. The case is submitted.

13 (Whereupon, at 12:00 p.m., the case in the
14 above-entitled matter was submitted.)

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