Seizing The Power:

Making The Government Pay For The Citizen's Defense

A NEW DAY HAS DAWNED.

The law now requires that, in order to forfeit property, the owner first must have been convicted of a crime upon which the forfeiture is based. Notice must be sent to the owner or other interested parties within 60 days after the seizure. The government now has the burden of proof to show, by clear and convincing evidence, that the property is forfeitable. There is no longer a bond requirement to file a claim, and the claim of interest can now be filed within 60 days from the date of notice of the seizure, instead of the previous 10 days.

Any property which has been paid or pledged to pay for attorney's fees cannot be subjected to forfeiture proceedings. There is now a strict proportionality standard imposed before any property can be forfeited. Significantly, the "relation-back doctrine" has been abolished, and homes and businesses can no longer be forfeited merely because a few telephone calls were made from them, unless the property was actually used to facilitate the unlawful transaction.

To eliminate the historical and obvious conflicts of interest which exist when law enforcement agencies get direct attribution of forfeited funds and seized property, the state treasuries now will receive the bounty, rather than the individual agencies. Additionally, states can no longer transfer property to the federal government for the purpose of avoiding state or local laws which would otherwise limit the ability to forfeit the property.

JAMES W. BURDICK *is counsel to the firm of Hertz, Schram & Saretsky, PC, Bloomfield Hills, Michigan. A former Wayne County (Michigan) Prosecuting Attorney and Special Assistant Attorney General (Michigan), he specializes in criminal defense, forfeiture and administrative law related to criminals such as licensing, DEA registration, HHS disqualification, etc.*

DOLLAR

By James W. Burdick

Sounds too good to be true? Well, of course this all would be true if the Conyers Forfeiture Bill (H.R. 3347) were to pass both houses of Congress. Cheryl Epps' article on the Conyers Bill in The Champion, January 1994, detailed all this good news. Unfortunately, the "news" ain't quite news yet. The reality is, we still live in Reagan's America, and we have to live with the state of the law as it is today . . . a law heavily weighted in favor of the government.

There are, however, a couple of small areas of opportunity available to help the citizens and to make the government pay for the citizen's defense: the Equal Access to Justice Act,[1] and the "Little Tucker Act."[2]

The EAJA

In theory, the Equal Access to Justice Act provides for reimbursement of defendants' costs of litigating the forfeiture case, including attorney's fees at the maximum rate of $75 per hour.[3] EAJA fees and costs may be awarded whenever the prosecution of a civil action by the United States is not "substantially justified," or whenever the action (or inaction) of government agencies has not been "substantially justified." To have been "substantially justified," the government's position must have been justified "in substance or in the main."[4] In order to successfully obtain an award of EAJA fees and costs, the district court must first determine whether the government's position was justified, both in law and in fact, to a degree that could satisfy a reasonable person.[5]

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.[6]

> Except as otherwise specifically provided by statute, a court *shall* award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for a judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.[7]

Note that section 2412(b) *allows* the court to award reasonable fees and expenses of attorneys in (almost) any civil case, even if the government was substantially justified. However, section 242(d)(1)(A) *requires* the court to award those fees whenever it determines that the position of the United States was not substantially justified.

How And When To Ask

It never hurts to put the government on notice of your intent to seek "EAJA sanctions." Why wait? Part of the impact of up-front notice is a clear signal that you intend to vigorously defend the lawsuit, and perhaps as important, to make the government pay for your efforts and its own recalcitrance.

When you first file your claim or your answer to a civil in rem forfeiture complaint, it is entirely appropriate to include a demand for EAJA fees and costs "because the government was not substantially justified in [seizing this property] or [prosecuting this action] or [etc.]."[8]

Whether you choose to advise the government and the court of this fact immediately or at some later point in time, you must file your application no later than *30 days after* final judgment in the action. The formal request must include: your fees and other expenses; an averment showing (if it has been determined) that you are the prevailing party; the basis of your client's eligibility to receive an award under the EAJA; and the specific amount sought, including an itemized statement of attorney and expert witness fees, as well as the rates at which the various fees and other expenses were computed. To be effective (and comport with the statute), the petition must also incorporate the following:

- An allegation that the position of the United States was not substantially justified;[9]
- An averment declaring what the highest rate of compensation for expert witnesses paid by the United States has been (since the act maintains that as the cap [§ 2412(d)(1)(C)(2)(A)]);
- An allegation that your client seeking the EAJA fees and cost reimbursement is either (i) an individual whose net worth did not exceed $2 million at the time the civil action was filed, or (ii) an owner of an unincorporated business, partnership, corporation, association or organization, the net worth of which did not exceed $7 million at the time the civil action was filed, and which did not have more than 500 employees at that time [§ 2412(d)(1)(C)(2)(B)];
- A statement detailing the reasons why an increase in excess of the $75 per hour presumptive attorney fee cap should be considered, e.g., the limited availability of qualified attorneys for the proceedings involved, cost of living increases, etc.;
- A statement explaining your own expertise in great and graphic detail, so that the court will feel comfortable in increasing the fees;
- An affidavit from an actuary describing the cost of living increase since the act was first amended in 1980 (*See*, 'Exceeding the $75 Cap,' *infra.*);
- Your affidavit setting forth in graphic detail your curriculum vitae, your experience in the forfeiture field, your background (say, as a federal or state prosecutor), the number of forfeiture cases in which you have appeared, the seminars in which you have participated as an attendee or lecturer, etc. Utilize and emphasize sufficient facts to enable the judge to evaluate the issue of "limited availability" and your specific "qualifications for the proceedings;"
- Perhaps some mention of the impact of *Caplin & Drysdale* on the already limited availability of specially skilled criminal defense attorneys willing to accept these kinds of cases due to the obvious risks involved.[10]

In sum, draft a clear, concise and detailed package. Be prepared to prove at a hearing that the government *was not* substantially justified (e.g., by showing various "traditional" aspects of the government's activities, e.g., that the government seizes everything in sight before it asks any questions; that it maintains custody of all seized items until forced to return it; that it is always, and was in this case, unreasonable, arbitrary and exceedingly slothful in admitting which items of property, if any, should be returned voluntarily, like the refrigerator, to an innocent owner).

Plan and execute the EAJA claim like a mini-lawsuit. Make sure you have all your ducks in a row, as you always do in your criminal cases. Remain cognizant of the fact that, while this is a "civil" case and you are a criminal defense attorney, you can, and

will, organize it and implement it just as you would any good criminal defense.

Defining Substantial Justification

The EAJA authorizes an award of reasonable attorney's fees against the government, except where the court finds that the position of the government was "substantially justified." A magistrate's finding of probable cause to issue a *seizure* warrant does not create substantial justification for the prosecution of a forfeiture action. To argue otherwise is pure sophistry.[11] The notion that probable cause to seize property equates with substantial justification to pursue a forfeiture action has been uniformly rejected by the courts which have considered the issue.[12]

The bases for rejecting such an otherwise seemingly plausible (government-esque) argument are founded in the very structure of civil forfeiture actions. There are three distinct procedural aspects of a civil in rem forfeiture prosecution: (1) the warrant for the seizure; (2) the complaint for forfeiture; and (3) the forfeiture proceeding itself.[13] Each of these procedural stages is separate and has a different purpose. As the court recognized in *Patricia Drive*:

> In seeking a warrant for seizure, the government's purpose is to win the right [only] *to hold and thereby safeguard* suspect property prior to the initiation of formal forfeiture proceedings. Having thus secured the property at issue, the actual forfeiture proceeding is then commenced by the filing of a Section 881 complaint. . . .The proceeding itself, of course, finally determines the forfeiture issue.[14]

The First Circuit also stressed the distinction between the magistrate's probable cause determination for seizure purposes and the pleading requirements of the forfeiture complaint: "[T]he probable cause determination of the magistrate and that in the complaint addressed two different questions: the first, whether the government has probable cause to hold the property until it can file a complaint against it, includes considerations of the need to protect the government's interest and comes at an earlier stage in the proceedings. The second, *whether the facts in the government's possession support an inference that the property is subject to forfeiture, must be more narrowly tailored to precisely identify . . . the property the government can keep.*"[15]

This and other rulings reveal the clear distinction between a magistrate's determination of probable cause for a seizure warrant, based solely on the government's ex parte representations and the adversarial forfeiture proceeding itself. The forfeiture proceeding is (at least presumably) possessed of inherent due process safeguards because of the very nature of the adversarial process, which any ex parte proceeding simply does not provide by definition.[16]

To countenance the government's typical claim that the magistrate's determination equates with substantial justification, would nearly always mean the government was substantially justified just because of its adroitness in convincing any magistrate (in a purely ex parte venue) that a seizure warrant should be issued to protect the government's potential interest in the property.

Obviously a civil action is the functional opposite of an ex parte proceeding such as one involving a request for seizure warrant.[17] Merely because a magistrate agrees with the government for purposes of seizure, does not in any way establish that the government's position in the forfeiture proceeding was substantially justified. As the Supreme Court held in *Pierce*, "Obviously, *the fact that one other court agreed or disagreed with the government does not establish whether its position was substantially justified.* Conceivably, the government could take a position that is not substantially justified, yet win. . . ."[18]

Judges have been known under the most peculiar of circumstances to find substantial justification when an EAJA petition looms on the horizon. Even where judges have found no probable cause exists to justify forfeiture (i.e., at the commencement of the forfeiture trial as opposed to the seizure stage), they have still been known to reason that probable cause previously "existed" at the time a magistrate issued the seizure warrant, thus equating probable cause to substantial justification, utilizing this circular disingenuous logic. Why? No matter how evil the government motives appear, many judges still hate to require the government to cough up money for any vigorous defense attorney.

Judges must be educated, and therefore we must continue to seek these fees in order to educate the judges. Some, even like the proverbial blind squirrel in winter, will, on occasion, find a few acorns.

Fees For Getting Fees For Defending The Case Or 'Malice Through The Looking Glass'

It is important to remember that there is very little we can do to actually make the government realize it's been wrong, other than to make it pay a few meager dollars that statutes such as EAJA offer. Unfortunately, there are also a few difficulties with the EAJA. For example, a great number of EAJA claims cannot economically be prosecuted beyond the district court level. Unfortunately, in the most egregious cases, where EAJA fees are most often appropriate, the claimant rarely has either the resources to prosecute an appeal or the benefit of an attorney who has the luxury of being able to work for free.

Of the many peculiar aspects attendant to a claim for EAJA fees, the *Jean v. Nelson*[19] court was confronted with this conundrum, a potentially endless series of lawsuits to recover EAJA fees for the expense and costs of prosecuting an EAJA claim in the original case.

You must focus on reimbursement for fees and costs first, for successfully defending the case which the government was not substantially justified in bringing; then getting additional fees for the time spent securing that original award; then getting still more fees for seeking reimbursement for your efforts securing the original award. And so it can go ad nauseam.

The circuits which have addressed the question of "fees for fees" in the EAJA context are divided. Two have held that a successful EAJA fee applicant should not recover attorney fees incurred in litigating the original EAJA fee issues, unless the government's position in the fee litigation itself was not substantially justified.[20]

On the other hand, the D.C. Circuit recognized the absurdity with this approach:

> If we require every victorious EAJA plaintiff to make a separate claim for fees for bringing the first EAJA suit, and permit the government to claim that its first EAJA *defense* was substantially justified on the merits, we face the distinct possibility of an infinite regression of EAJA litigation. A successful EAJA plaintiff will bring another suit claiming fees for bringing the EAJA suit, and the government will defend on the ground that its EAJA defense was substantially justified. If the plaintiff wins this suit, yet a third suit will be required to recover fees for the second suit recovering fees. And if the government contests this suit and loses, yet a fourth suit will have been spawned, and so on [and so on, and so on]. In our opinion the per se fee-shifting rule is the least objectionable exit from this Kafka-esque judicial nightmare; in most cases, a loss on the generous "substantially justified" EAJA

threshold strongly indicates that the government is [already] clinging to an unreasonable position.[21]

The D.C. Circuit did not squarely hold, however, that successful EAJA fee applicants are *automatically* entitled to "fees for fees." In a subsequent case, it held that the government may raise certain technical defenses, such as an untimely filing by the fee applicant, and defend against an application for "fees for fees" on the ground that the technical defense is substantially justified.[22]

The Third Circuit has adopted yet a third approach. There the court held that, where the ". . . sole basis for the opposition [to the EAJA fees] is the alleged substantial justification of the government's position and the underlying proceedings," the fee applicant "will almost always, if not always, be entitled to fees for litigating over an EAJA fee petition if she is entitled to fees for the underlying litigation." Yet where the government's opposition to EAJA fees is based on other contentions, "an application for fee petition expenses can present issues not resolved by the proceedings on the original fee petition."[23]

Only the Second Circuit has held that the government's position in the fee litigation is irrelevant to a determination of whether a successful EAJA fee applicant can claim fees for fees, saying that "we regard it as more consistent with the congressional purpose to treat plaintiff's fee application as part of the government's cost of taking positions that are not substantially justified."[24]

The Eleventh Circuit held in *Jean v. Nelson, supra*, that it would clearly contravene Congress' purpose in passing the EAJA to require successful EAJA fee applicants bear the costs of obtaining the EAJA fee award in the first place: "Attorneys fees incurred in defending an EAJA award on appeal, or appealing a denial of EAJA fees, are recoverable as part of the final fee award."[25] Thus, "the United States may not oppose a 'fees for fees' request solely on the ground that its position in the fee litigation was substantially justified."[26]

As a practical matter, however, the circuit can be the final stop, since you will have made your "fees-on-fees" argument on direct appeal. For example, if a district judge ordered $5000 in fees at $75 per hour, counsel should advise the circuit court of the time spent on appeal at the $75 rate as well.

Is this "raising a new matter" on appeal? Maybe, but you will likely get the court to respond in some manner at least, one way or the other.

To someone who has been a civil servant virtually his or her entire life, whether as government attorneys, state prosecutors or state court judges, the notion of an attorney's value being characterized as $75 per hour (or even more than $75) is anathema.[27]

So, even when you are able to prove attorney's fees are clearly manifest, you still may get only one-half to one-quarter of what your actual fees are. Most courts are loath to increase the $75 hourly rate, despite Congress' intent to make increases available.

The Overriding Benefits

So is that bad? Would it be merely a Pyrrhic victory to win a few dollars when your bill has been thousands? Absolutely not, simply because you have reminded the government attorneys that they *are not* infallible and they *are not* indestructible. You remind them, by even the most meager of EAJA awards, that there may well be reckoning one day. Each time you remind them of their own fallibility, no matter how small the award, you also remind them that you are a person whom they must respect. You remind them, if nothing else, that they must consider the possibility of another "loss" in yet another case in which you or your many, many "co-conspirators" in the criminal defense community are involved.

By pursuing these cases at every single opportunity, you also remind the government that they will be made to pay for disingenuousness, something which may some day haunt them in terms of real dollars. Moreover, every single time the judges see these cases, and every single time you remind them in a professional and cogent manner of the government's outrageous conduct, the easier it will be the next time around in a civil or criminal case.

Even if your fee petition fails, judges will ultimately be impacted by the sheer volume of the applications and horror stories. Eventually, even the most rigid judge may start to feel the heat of the light, even if he or she refuses to see it. This of course presumes that the applications are made in good faith. A single truly frivolous petition which clogs one judge's docket in a single district can reverse much of the positive momentum others in that district have collectively engendered with genuine petitions. So, just be extra careful not to make unfounded claims.

Exceeding The $75 'Cap'

Under the EAJA, the fees must be based on "prevailing market rates for the kind and quality of the services furnished [not to exceed] $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."[28]

Both of these issues were thoroughly explored in *Pierce v. Underwood, supra,* a case you must learn well in this field. There, Justice Scalia defined (for good or for bad) the predicate upon which EAJA fees in excess of $75[29] may be claimed:

> 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.[30]

How about forfeiture lawyers for forfeiture proceedings? Clearly, forfeiture is a field of expertise in which an enormous number of attorneys can claim expertise. While the sub-specialty does not rise to the level of, say, patent law (there are no masters programs in forfeiture), a compelling argument can be made based on an attorney's extensive experience in the field, coupled with numerous seminars[31] attended, and the complications that arise from a specific fact situation to merit excess fees. That may well lead to a fact-based determination of "limited availability" and "qualified for the proceedings" in a specialized sense. So include an extensive resume and give the judge detailed and sound bases to want to exceed the cap.

Justice Scalia did manage to eviscerate some arguments which could otherwise have been helpful in proving special qualifications including: the novelty or difficulty of issues, the undesirability of the case, the work and ability of counsel, the results obtained, and the contingent nature of the fee, declaring them "not qualifying," since they are applicable to a "broad spectrum of litigation and are little more than routine reasons why market rates are what they are."

Justice Scalia went on to opine that, in determining whether an EAJA "special factor" exists:

> [T]he special factor formulation suggests that Congress thought that $75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the national or local market might be. If that is to be so, the exception for "limited availability of qualified attorneys for the proceedings involved" must refer to attorneys "qualified for the proceedings" in some specialized sense, rather than just in their general legal competence. We think it refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in ques-

tion — as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty, such as patent law, or knowledge of a foreign law or language.[32] Where such qualifications are necessary and can be obtained only at rates in excess of the $75 cap, reimbursement above that limit is allowed.[33]

Cases following *Pierce* have held that compensation in excess of $75 per hour is warranted where the attorney possessed a high degree of specialized knowledge needed in the particular case. In *Nadler v. INS*,[34] the attorney was a recognized expert in immigration and naturalization law, and was held entitled to an enhanced award in an immigration case. Similarly, in *Pirius v. Bowen*,[35] an attorney specializing in Social Security law was held to be entitled to an increased EAJA award rate where the case involved a complex Social Security matter.

Conversely, courts have held that an increase in the EAJA cap is not justified where an attorney is not a specialist in an area of law, but nonetheless prosecutes a case against the government successfully, or when a specialist deals with a routine legal matter.[36]

The obvious argument to be made is that the special qualifications of a claimant's counsel do rise to the level of "specialized skills which are necessary to the litigation," based on the complex and newly-evolving issues presented in forfeiture cases, which require knowledge beyond the "basic principles of law familiar to all attorneys." Explain how a specialized practice involves specialized skills; for example, in order to defend a civil in rem forfeiture case, an attorney is required to have both an in depth knowledge of civil as well as criminal procedure, substantive criminal law, and a working knowledge of the Supplemental Rules for Certain Admiralty and Maritime Claims. Expertise in the supplemental rules is traditionally found only among attorneys specializing in admiralty law or those criminal defense attorneys engaging in federal civil in rem forfeiture cases. Thus, the *Ramon-Sepulveda* analysis would help, not hinder.

These kinds of cases are highly complex, and you should remind the courts of this fact. As attorneys, we have mastered a body of ever-evolving convoluted statutory and common law in order to competently represent our clients in these cases. Such specialized skills, coupled with the complexity of forfeiture cases in general, must be outlined to the court in graphic detail in order to warrant an upward departure from the presumptive EAJA cap.

Justice Scalia's opinion in *Pierce* creates guideposts which both simplify and to a degree organize the application process, however preposterous and unfair they may be. *Pierce* did not attack the "adjustment for inflation" argument either.[37] Since the $75 per hour rate was established in 1980, one would think any "adjustment for inflation" would automatically boost the rate substantially. Any objective district judge should be hard-pressed to deny this, given that, in that same 13 years, the United States Congress has voted itself (and, incidentally, federal judges) what amounts to nearly a 150 percent "cost of living" raise. Given the widely acknowledged inflationary rate that was experienced over the last 13 years, that $75 per hour rate is exceedingly low. Even the most cynical judge would be less than comfortable disputing that the *starting* point in 1994 should be somewhere in the neighborhood of $150 per hour. To supplement your creativity and imagination, find an experienced actuary to come up with precise numbers. Include those findings in your petition as well.

Unlike "special factors," cost-of-living adjustments are not narrowly construed. *See Animal Lovers Volunteer Association*,[38] where the Ninth Circuit held that, absent unusual circumstances that would make an adjustment for inflation *inappropriate*, such an adjustment should be made. "To withhold an inflation adjustment without justification would undermine the very purpose of the EAJA and perpetuates financial disincentive to challenge wrongful government action.",[39,40] Similarly, the court in *Ramon-Sepulveda*,[41] held that a provision for an increase due to the rise in the cost of living is a reflection of Congress' intent that the EAJA cap rate fluctuate with the real market value.[42] Because Congress intended to incorporate the cost of living into the EAJA cap, it was appropriately considered by the district court.

United States of America v. $12,248 U.S. Currency,[43] offers a useful discussion of what is or is not substantially justified. There, the majority agreed that, while probable cause existed for the initial seizure of the claimant's money, probable cause did "not automatically equate with substantial justification for the government's action in conducting a poor investigation of [the claimant's] claim and for its unreasonable delay in pursuing and processing litigation of a forfeiture claim." The Ninth Circuit concluded that the government violated the claimant's Fifth Amendment due process rights by "depriving him of his property for an unreasonable period of time," the government having failed to explain why it waited 15 months before instituting forfeiture proceedings. There are other jewels in this opinion as well. I recommend that you read it and use it in your cases.

What is particularly gratifying, is that the Ninth Circuit also held that, even though the claimant eventually won the case, and got his cash back, he nonetheless "suffered prejudice" *merely by being deprived of his funds for an unreasonable period of time.*

This case is yet another good example of the increasing sensitivity on the part of some federal judges. Cases like this give hope that the pendulum may once again be swinging back in the western part of the country. Maybe it is a harbinger of good things to come. *Maybe.*

Bonus: Non-Litigation Expenses And The Little Tucker Act

The Tucker Act, Title 28 USC § 1346(a) provides for explicit waiver of governmental immunity. Where non-litigation costs or "liquidated or unliquidated damages" (i.e., other than claims in tort) exist against the government, whether it be by "civil action" or "claim," the Tucker Act is the mechanism by which you can seek reimbursement for those losses.

For example, lost interest on funds held unjustifiably by the government, damage (or loss of value) to a vehicle incurred while the government "unjustifiably retains possession of that vehicle after a seizure," and any other out-of-pocket costs may best be pursued through claims under the Tucker Act.[44] The Tucker Act becomes important in the forfeiture context because, under EAJA, the only "costs" which can be claimed are costs of the *litigation* itself, not the outside costs the client incurs, like storage, towing or damage to an asset or its relative value. Under the Tucker Act, *any other kind* of "costs" incurred as a result of the government's unjustifiable conduct can be claimed.

Has there been much success employing Tucker Act claims in these circumstances? Well, as far as I know it has rarely been invoked, and thus there is not an abundance of case law in this area. That should never stand in the way of motivated attorneys, and these claims should likewise be pursued at each legitimate opportunity. Creativity is the name of the game, particularly where the deck has been so overwhelmingly stacked against us, as it has been in recent years. Use of the Tucker Act in appropriate circumstances will undoubtedly cause enough generalized confusion, misdirection and potential embarrassment, that it is well worth the effort to file such claims. You may very well win, and those awards are not subject to any

limitation, other than the $10,000 maximum recited in the statute. Hence, the informal name for the statute of the "little" Tucker Act.

Keep fighting, and keep trying to make the government pay for the citizen's defense. ■

NOTES

1. Title 28 U.S.C. § 2412 (EAJA).
2. Title 28 U.S.C. § 1346(a).
3. So long as the applicant's personal net worth does not exceed $2,000,000; a business net worth may not exceed $7,000,000, nor can it have more than 500 employees.
4. Pierce v. Underwood, 487 U.S. 552, 556 (1988).
5. *Id.* at 565; United States v. One 1985 Chevrolet Corvette, 914 F.2d 804, 808 (6th Cir. 1990); Jankovich v. Bowen, 868 F.2d 867, 869 (6th Cir. 1989).
6. Title 28 U.S.C. § 2412(b).
7. Title 28 U.S.C. § 2412(d)(1)(A), (emphasis added).
8. This tactic should be employed on a case by case basis, and only after a thorough review of the facts in each particular case. *See, infra.* Some courts require notice. *E.g.,* Ninth Circuit Rule 39-1.6 ("A party who intends to request attorney fees on appeal shall include in its opening brief a short statement of the authority pursuant to which the request is made.").
9. Note that the lack of substantial justification may be based on the action of an agency *or the failure of an agency to act* [§ 2412(d)(1)(B)].
10. As noted by the District Court in *Charms II, supra,* the Supreme Court's decision in Caplin & Drysdale Chartered v. United States, 491 U.S. 617 (1989), decided one year after *Pierce*, will further diminish the already limited availability of specially skilled criminal attorneys accepting federal and state drug forfeiture cases. That factor alone should dictate an upward departure from the presumptive EAJA fee cap.
11. United States v. Real Property at 2323 Charms Road (Charms Road II), 728 F. Supp. 1326, 1328 (E.D. Mich. 1990). *Reversed on other grounds*, 946 F. 2d 437, (1991).
12. For example, the First Circuit held that a magistrate's determination of probable cause for a seizure warrant is insufficient to establish probable cause for a forfeiture complaint. United States v. Poll No. 3172, 852 F.2d 636, 639 (1st Cir. 1988).
13. United States v. Real Property Known as 6 Patricia Drive, 705 F. Supp. 710, 716 (D. RI 1989).
14. *Id.* at 716, [emphasis added].
15. United States v. Poll No. 3172, 852 F.2d at 639, [emphasis added].
16. Analogously, the fact that a magistrate makes a determination that there is probable cause to issue a search warrant does not mean that probable cause actually exists. Rather, the validity of the search warrant is tested via an adversarial hearing with the ultimate decision vesting with an Article III Judge either directly or after exceptions are filed to a Magistrate's Report and Recommendation.
17. The legislative history of the Equal Access to Justice Act also stresses that EAJA awards are made in the context of *adversarial* agency adjudications and court actions. *See, e.g.*, H.R. Rep. No. 1418, 96th Cong., 2d Sess. 13 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4984, 4992; H.R. Rep. No. 1434, 96th Cong., 2d Sess. 21-22, *reprinted in* 1980 U.S. Code Cong. & Admin. News 5003, 5010-11; H.R. Rep. No. 120(I), 99th Cong., 1st Sess. 7, *reprinted in* 1985 U.S. Code Cong. & Admin. News 135.
18. *Pierce, supra,* at 569, [emphasis added].
19. 863 F.2d 759 (11th Cir. 1988).
20. *See* Rawlings v. Heckler, 725 F.2d 1192, 1196 (9th Cir. 1984): no fees for defending EAJA award on appeal if government's appellate position is reasonable; Russell v. National Mediation Board, 775 F.2d 1284, 1285, 1291 n.8 (5th Cir. 1984): no fee for fee application where agency defense to award was partially meritorious.
21. Cinciarelli v. Reagan, 729 F.2d 801, 810 (DC Cir. 1984).
22. American Academy of Pediatrics v. Bowen, 795 F.2d 211, 214 (DC Cir. 1986).
23. Russell v. Heckler, 814 F.2d 148, 155 (3d Cir. 1987), *vacated on other grds*, 487 U.S. 1229, 108 S.Ct. 2891, 101 L.Ed.2d 925 (1988) for reconsideration of attorney's fees in light of *Pierce.*
24. Trichilo v. Secretary of Health and Human Services, 823 F.2d 702, 707 (2d Cir. 1987).
25. Hudson v. Secretary of Health and Human Services, 839 F.2d 1453, 1458 n.7 (11th Cir. 1988).
26. Jean v. Nelson, *supra* at 780.
27. On the other hand, federal courts routinely deal in three-figure attorney fee awards. *See, e.g.*, Corder v. Brown, 25 F.3d 833, 837 (9th Cir. 1994): Civil rights plaintiff hourly rates of $175 in 1985, $200 in 1986-87, $350 currently.
28. Title 28 U.S.C. § 2412(d)(2)(A)(ii).
29. Familiarity with Pierce v. Underwood is an absolute prerequisite to effectively crafting your fee argument, first, against the government's claim of substantial justification, and second, to argue for an increase in those rates.
30. 487 U.S. at 571-74.
31. Remember the so-called handwriting "expert" whose expertise is derived by no more than attendance at the few two-day "colleges", on-the-job-training and regular appearances in court . . . the ultimate boot strap qualifier. Now you can turn the argument around on the government.
32. What?
33. 487 U.S. at 572, [emphasis added].
34. 737 F. Supp. 658 (D. D.C. 1989)
35. 869 F.2d 536 (9th Cir. 1989),
36. *See, e.g.*, Animal Lovers Volunteer Association v. Carlucci, 867 F.2d 1224 (9th Cir. 1989), an environmental case which held that an increase in the statutory cap was inappropriate when requested on a "special factors" basis because the attorney did not specialize in environmental law. *See also*, Ramon-Sepulveda v. INS, 863 F.2d 1458 (9th Cir. 1988), held that an increase over the EAJA cap was inappropriate in an immigration case when the case only involved "basic principles of law familiar to all attorneys."
37. *Id.* at 552.
38. *Id.* at 1227.
39. *Id.*
40. The formula for determining the current cap on EAJA fees when adjusted for inflation is:

$$\frac{X}{\$75/hr} = \frac{CPI\text{-}Ua}{CPI\text{-}Ub}$$

where X = rate to be charged after the inflation adjustments; where CPI-Ua = Consumer Price Index for All Urban Consumers on date $75 fee was fixed by Congress; and where CPI-Ub = Consumer Price Index for All Urban Consumers on date of most recent COP-U figure available. *See Ramon-Sepulveda, supra* at 463, n.4.
41. Ramon-Sepulveda, *supra* at 1463.
42. In Chipman v. Secretary of Health and Human Services, 781 F.2d 545 (6th Cir. 1986), the court stated the obvious: Congress did not raise the $75 per hour EAJA cap when it amended the Act in 1985, giving courts all the more reason to incorporate cost of living increases (since the promulgation of the original EAJA) into any EAJA award.
43. 957 F.2d 1513 (9th Cir. 1992).
44. An enterprising attorney should also be able to make a compelling argument that business losses incurred as the result of being deprived of the cash, the car, the truck, the airplane or the boat are recoverable. *See, e.g.*, United States v. $12,248, *supra.*