UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF CONCERNED VETERANS, et al., Appellees/Cross-Appellants, v. SECRETARY OF DEFENSE, et al., Appellants/Cross-Appellees.	Nos. 81-1364 81-1424
MARK GREEN, et al., Appellees, v. DEPARTMENT OF COMMERCE, Appellant.	No. 81-1791

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE JOINT PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The panel decision in these two cases was issued on April 23, 1982, in a single opinion along with Parker v. Lewis, No. 81-1965. On May 21, 1982, the National Association of Concerned Veterans, et al., and Mark Green, et al., filed a joint petition for rehearing and suggestion for rehearing en banc, arguing that the panel opinion constituted a complete restructuring of the process by which fee applicants must prove their market rates and the reasonableness of the hours for which they seek compensation. Petitioners contended that a departure from prior practice as radical as that mandated by the panel should not be imposed without the concurrence of the full Court.

On July 15, 1982, the panel, sua sponte, issued an order amending its earlier opinion in several respects. These amendments, however, fall far short of ameliorating the concerns raised in the joint petition, and in fact will only intensify the confusion spawned by the panel's initial opinion. One example will illustrate the continuing problem.

The most important amendment, as it affects these cases, is set forth on page three of the panel's order. It provides that "[o]nce the fee applicant has provided support for the requested rate, the burden falls on the Government to go forward with evidence that the rate is erroneous. And when the Government attempts to rebut the case for a requested rate, it must do so by equally specific countervailing evidence." While the amendment is surely more helpful to fee applicants than was the panel's original language, the panel's remand order, which is unaffected by the amendments, is directly at odds with the relevant facts.

Thus, in both of these cases, the plaintiffs presented substantial evidence of the reasonableness of the requested rates. In Green, for example, plaintiffs submitted two stipulations entered in Freedom of Information Act ("FOIA") cases in 1977 in which the government agreed to compensate counsel at hourly rates equivalent to those sought in Green. One of the attorneys covered by the stipulations also served as counsel in Green, and the other attorneys described in the stipulations were comparable in background and experience to the attorneys in Green.

In addition, plaintiffs cited numerous FOIA and Privacy Act cases in which other attorneys had been awarded comparable fees. Similarly, in National Association of Concerned Veterans ("NACV"), plaintiffs submitted three stipulations entered in Privacy Act and FOIA cases in which the government agreed to compensate counsel at a variety of rates. One of the stipulations involved the same two attorneys who represented NACV. The other stipulations involved counsel of similar experience to the attorneys in NACV.

Although the fee applicants in Green and NACV "provided support for the requested rate," the government came forward with no evidence whatsoever "to rebut the case for a requested rate." Under these circumstances, according to the panel's amended order, the district court properly rejected the government's generalized objections to the requests. Nonetheless, the panel left its prior order of remand intact.

Petitioners submit that the panel's amended order cannot be reconciled with the result the panel reached. In both of these cases, the government simply sat back and offered only the most conclusory objections to plaintiffs' fee requests. Because this inconsistency will only add to the uncertainty about what sort of evidentiary showing is required of fee applicants, review by the Court sitting en banc is still necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Memorandum has been served by hand on John O. Birch, Esquire, Assistant U.S. Attorney, United States Courthouse, this 22 day of July, 1982.

David C. Vladeck