

Report for Recommendation 92-5

**Monitoring the Federal Government's Conduct
Through Fee Shifting Under the Equal Access
to Justice Act: An Inconclusive Experiment**

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Executive Summary

Congress first waived the federal government's immunity from attorney fee awards under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504, 28 U.S.C. §2412(d), in 1980 and reenacted the Act in 1985. Although the evidence before Congress was largely anecdotal, Congress primarily sought to aid small businesses, which it perceived were too often subject to arbitrary and oppressive governmental regulation. To that end, the EAJA authorizes private parties of modest size that prevail in nontort civil litigation against the United States in both courts and agencies to recover their fees and expenses. No recovery will be allowed, however, if the government demonstrates that its position was substantially justified, which has been construed to require the government to show that its position had a reasonable basis in both law and fact. Akin to a negligence standard, the substantial justification standard ensures that the government need pay fees only when its conduct can seemingly be considered "wrongful." In addition, the Act precludes fee awards to large parties and, under 28 U.S.C. §2412(d), sets a maximum hourly rate of \$75 per hour. The rate can be raised if the court "determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."

The success of the Act can be assessed by analyzing its effectiveness in accomplishing three possible congressional goals: first, to equalize the litigating strength of the government and private parties; second, to deter government wrongdoing; and third, to compensate parties injured by government wrongdoing.

First, the Act has had some success in providing an incentive to small parties to contest government overreaching through litigation. Although I have not been able to assess that incentive empirically, there are sound theoretical reasons to conclude that the Act has successfully led to more litigation against the government in two circumstances: when parties have small, strong monetary claims against the government, and when parties have nonmonetary claims against the government, as in many public interest law suits. Private parties, however, have ample incentive to contest government conduct in the vast majority of contexts without the carrot of fee shifting. For instance, most, if not all, contract claims would be brought against the United States irrespective of the prospect of fee shifting. Moreover, the substantial justification standard dampens the incentive effect of fee shifting by making the prospect of recovery less certain.

Second, the Act as a whole has had only marginal impact on deterrence of government wrongdoing. Because fee awards must be paid out of the

offending agency's budget, Congress hoped that EAJA litigation would spur agencies to act more prudently when determining the rights of small parties in particular. Even if there is a significant amount of arbitrary behavior by government agencies--a proposition which I doubt--shifting fees is unlikely to bring about better governance for several reasons. As an initial matter, government policymakers are unlikely to consider the prospect of an attorney fee award in fashioning policy. Although they may realize that the policy will be attacked at some point in litigation, they will not know if a party eligible for fees will be the one making the challenge; nor are they likely to think that their policy could ever be considered not substantially justified. In addition, the fee award, whose average in nonsocial security court cases is only \$40,000, is unlikely to be great enough to induce added care. When the EPA issues regulations, the threat of an attorney fee award is unlikely to change its behavior. Furthermore, even if agency policymakers considered the prospect of fees, the government does not generally quantify litigation costs--attorneys at DOJ may represent their client agencies at no charge, and agency attorneys generally do not record the time they spend on a particular case.

Although the EAJA is unlikely to deter government misconduct, it may have more impact in cases in which government officials apply policy to particular factual contexts, whether in land condemnation or benefits cases. In cases not involving general government policy, there may be a greater chance for arbitrary behavior because of the lack of political checks constraining the governmental conduct. Conversely, officials applying preexisting policy in fact-specific contexts are more likely to consider the prospect of fees either because the potential fee award represents a greater percentage of the total amount in controversy or because such officials in general are more likely to internalize general litigation costs than are their colleagues who fashion policy. For instance, because of limited resources, an agency may consider the prospect of an attorney fee award before devoting some of those scarce resources to initiating a new enforcement action.

Largely because of the EAJA's limited impact on deterrence, concerns for overdeterrence in the absence of the substantial justification standard are overblown. Not only are government officials unlikely to internalize fully the potential cost of an attorney fee award, but they may pursue certain objectives despite the potential for an adverse award. For instance, it may be so politically important to pursue false claims against former directors of insolvent S & L's that governmental officials will do so despite the risk of an award. Furthermore, the fear of overdeterrence is not acute given the safe harbor afforded many agency actions by deferential standards of review. In other words, the substantial justification standard will provide little protection beyond that provided by the substantial evidence in the record or arbitrary and capricious standard. Government officials are already protected to a certain

extent from an adverse decision because of those deferential standards of review. Thus, the case for the substantial justification standard as a means of protecting against overdeterrence is weak.

The third possible goal underlying the Act is to compensate private parties injured by government wrongdoing. To begin with, there is a debate over whether payment of attorney's fees is necessary for full compensation. Under the American Rule of attorney's fees, each party must bear its own fees as a cost of living under our judicial system. Even if payment of fees is required for full compensation, however, the EAJA does not accomplish the goal consistently. Neither the government nor a large private party can collect fees when it prevails.

Despite the inconsistencies, some might argue that the substantial justification standard is critical to confine compensation to instances in which the government is at "fault," much as recovery in tort is generally limited to negligence. But notions of corrective justice might argue in favor of compensation even when the government's position is substantially justified. To some, wrongdoing is not synonymous with fault, and the government may be in some sense at fault every time its policy is determined to be arbitrary or its findings not supported by substantial evidence in the record. In addition, some might believe that compensation is justified from a corrective justice perspective whenever the government deprives a private party of an entitlement, even if the government was not negligent. In short, many would argue that the substantial justification standard blunts whatever corrective or distributive justice notions the Act attempts to further.

Thus, the Act has achieved only mixed success at best, providing some incentive for private parties injured by government action to contest that conduct more vigorously, and compensating some parties more fully for the injuries they have received at government hands. Moreover, the substantial justification standard arguably impedes all three goals underlying the Act--equalizing the litigating strength of the parties, deterring government wrongdoing, and pursuing corrective justice.

Costs

In face of the uncertain benefits wrought by the Act, the costs of administering the Act are excessive. One-way fee shifting under the EAJA increases the burden on the taxpayer in a number of ways. First, the potential for fee shifting likely makes settlement of the underlying action more difficult to accomplish, and second, the EAJA adds a new layer of costs by introducing an additional round of litigation generating more fees for government and private attorneys, and more adjudicative expense in courts and agencies. Ambiguous provisions in the Act, such as the provision allowing for enhancements when "a special factor, such as the limited availability of

qualified attorneys for the proceedings involved, justifies a higher fee," or the substantial justification standard, impair the prospects for settlement and add to the costs of litigating the fee dispute. Repeal of the substantial justification standard, even if it would not induce settlement, would likely streamline the fee litigation. Although the government has defeated some large fee requests on the ground that its position had been substantially justified, litigation over that standard in other cases has cost the government almost as much money as it has saved.

To gauge more completely the costs of the EAJA in general and the substantial justification standard in particular, I studied all cases decided under the EAJA for a 1-year period of time. There were over 2,000 EAJA cases decided, which comprises 3% of the entire caseload of civil cases involving the government. Over 90% of all applications resolved arose out of individual benefits determinations, in which \$5 million were awarded during the target year. The mean award in those cases was less than \$3,500, and the government demonstrated that its position was substantially justified in slightly over 10% of all EAJA petitions filed. There were 27 other court cases, in which \$1 million were awarded, and the government demonstrated that its position was substantially justified in roughly 20% of those cases. Finally, there were approximately 80 agency cases resolved during the target year, with less than \$1 million in awards, and the government demonstrated substantial justification in roughly 30% of those cases. Thus, at least in all the cases litigated, the government saved only a modest amount--less than 20% of the EAJA fees claimed--because of the substantial justification standard, and litigation over that standard cost taxpayers almost as much money in government attorney time, private attorney time, and court time. Although the substantial justification standard deters some private parties from filing for fees, the government saves very little--putting that self-selection issue to the side--by arguing substantial justification in every case and thereby making the prospects of a quick settlement much less likely.

Suggested Revisions

Given the competing pull of the underlying policy goals--equalizing the parties' litigating strengths, minimizing governmental errors, furthering corrective justice, and preserving the public fisc--the choice of whether to rescind the Act, convert to automatic fee shifting, or do nothing may appear close. But, irrespective of one's views of the Act in general, automatic fee shifting is warranted in the individual benefits context, and the Act should be streamlined to minimize the potential for collateral litigation and maximize the prospects for settlement of at least the fee petition.

1. Congress should eliminate the substantial justification standard for fee applications arising out of individual benefit claims. First, automatic fee

shifting would ensure that even small beneficiaries, who may not be able to attract counsel through contingency fee arrangements, can obtain counsel. Otherwise, an individual with a meritorious \$8,000 claim for back benefits might not be represented.

Second, automatic fee shifting would ensure greater utilization of EAJA by prevailing private parties seeking benefits. In the target year, only 30-40% of all prevailing claimants applied for EAJA fees, primarily, in my view, because private counsel stand to gain little and lose considerably by filing for fees. Private counsel through contingency fee arrangements generally can obtain up to 25% of back benefit awards, and that amount is usually greater than an EAJA award. If the EAJA award is collected, that amount must be returned to the beneficiary, and all work done on the petition is likely pro bono. Similarly, if the EAJA award is defeated, work on the petition probably cannot be billed to the impecunious client. Many counsel react by not filing for fees and thus saving themselves time and the SSA money. It is noteworthy that the percentage of cases in which the government is substantially justified is the same nationally as it is in two jurisdictions in which judges have required all prevailing parties to file for fees under EAJA or write a memorandum explaining why they are not pursuing the EAJA remedy.

Third, automatic fee shifting would spare the taxpayer significant expense because it would expedite settlement of the fee dispute and thereby ease the judicial workload, without fear of overdetering SSA decisionmakers because they are protected by a deferential standard of review.

Finally, a change to automatic fee shifting in the social security disability context plausibly comports with corrective and distributive justice notions--the substantial evidence standard itself reflects a fault standard, and the prevailing beneficiaries can ill afford to pay up to 25% of their back benefits in attorney's fees.

2. Irrespective of whether the substantial justification standard is retained, the EAJA should be revised to foster settlement and reduce issues for litigation.

Offer of judgment provision. Congress should enact an offer of judgment provision, modeled loosely on Federal Rule of Civil Procedure 68, to provide that, if a private party rejects the government's offer of judgment in the EAJA dispute, it cannot thereafter claim fees for subsequent proceedings related to the EAJA claim if it does not receive more than the offer after judgment. This change would enable government counsel after losing a case to limit the government's exposure to fees by seeking quick settlement of the fee dispute.

Eliminating ambiguous provisions. Congress should eliminate as many ambiguities in the Act as possible. For instance, it should strike the provision allowing enhancement of fees when "a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a

higher fee." The enhancement provision breeds uncertainty, costs money to litigate, and makes settlement more difficult to obtain. In addition, Congress should amend 28 U.S.C. §2412(d) (2) to specify how courts should calculate the cost-of-living increase authorized in the Act. Congress should select the index upon which to base cost-of-living adjustments, and it should specify whether the cost-of-living increase should be calculated as of the date the work is performed, the EAJA application is filed, or the EAJA petition is granted. Litigation over these issues drains public funds without serving any compensating purpose. Finally, Congress should repeal the Act's 30-day filing deadline, 28 U.S.C. §2412(d)(1)(B), or at least change the Act's definition of "final judgment" in 28 U.S.C. §2412(d)(2)(G), to eliminate the inordinate amount of litigation over the timeliness of EAJA petitions. Currently, some district court remands to agencies are considered final judgments, thus triggering the 30-day filing limit in the EAJA, even though claimants do not yet know whether they have "prevailed" in the underlying action. Moreover, district courts do not always specify whether they intend to retain jurisdiction over remanded cases. Litigation over the timeliness of fee petitions saps resources of the litigants and judges without protecting any legitimate interest of the government--private parties have ample financial incentive to file for fees expeditiously without the spur of a jurisdictional filing deadline.

Introduction

Congress first waived the government's immunity from attorney fee awards under the Equal Access to Justice Act ("EAJA") in 1980¹ and reenacted the Act in 1985.² By authorizing courts to award attorney's fees to private parties of modest means who prevail in litigation against the United States, Congress sought two interconnected goals: to provide an incentive for private parties to contest government overreaching, and to deter subsequent government wrongdoing.³ The United States has paid almost 2,000 EAJA awards in a typical year,⁴ and its exposure extends to the thousands more cases each year⁵

¹Pub. L. No. 96-481, 94 Stat. 2321, 2325-30 (codified at 28 U.S.C. §2412 and 5 U.S.C. §504).

²Pub. L. No. 99-80, 99 Stat. 183. As originally enacted, the Act included a 3-year sunset provision. President Reagan vetoed a legislative proposal to make the Act permanent in 1984 because of his opposition to two provisions, one which would have required the government to show that both its underlying position and position in the litigation were "substantially justified" to preclude fee shifting, and another that would have required the payment of interest by the United States on fee awards not paid within 60 days. Memorandum Returning Without Approval a Bill To Reauthorize the Equal Access to Justice Act, 2 Pub. Papers 1811 (Nov. 8, 1984). Legislation to extend the Act was subsequently reintroduced in Congress, and with several minor additions, this version was signed by the President on August 5, 1985.

The Act has since been amended twice, as part of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874, 1948, and of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, 3746.

³For the legislative history of the Act, see H.R. Rep. No. 1434, 96th Cong., 2d Sess. (1980); H.R. Rep. No. 120, 99th Cong., 1st Sess. (1985); H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980); S. Rep. No. 253, 96th Cong., 1st Sess. (1979). The EAJA thus marks a departure from the so-termed American Rule of attorney's fees under which each party to a litigation bears its own fees. See generally *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

⁴The Administrative Office reported 412 cases decided in 1990 involving the EAJA. Annual Report of the Director of the Administrative Office of United States Courts (1990). See 28 U.S.C. §2412(d)(5) ("The Director of the Administrative Office of the United States Courts shall include in the annual report . . . the amount of fees and other expenses awarded during the preceding fiscal year"). But, as I discuss *infra* at text accompanying notes 114-15, the number approaches 2,000 if one counts all of the cases not reported to that office. There have been approximately 100 fee applications a year in agency cases as reported by the Administrative Conference of the United States. Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act (Oct. 1, 1989-Sept. 30, 1990). The EAJA directs the Administrative Conference of the United States to provide to Congress information about individual awards and proceedings within each agency. 5 U.S.C. §504(e).

⁵Although the government's exposure is difficult to calibrate with precision, one Senate Report estimated that the government loses about 20,000 civil cases a year. S. Rep. No. 586,

in which private parties prevail against the government in litigation in both courts and agencies.⁶ Taxpayers thus underwrite millions of dollars in EAJA fees each year which, one hopes, has the impact—at least at the margin—of deterring government wrongdoing without overdetering vigorous government enforcement efforts.

To prevent overdeterrence, the Act provides that private parties who prevail against the United States in any nontort civil action⁷ may collect attorney's fees against the federal government only if the government cannot demonstrate that its position was "substantially justified," which has been construed to require the government to demonstrate that its position had a reasonable basis in both law and fact.⁸ The Act also precludes awards to large parties,⁹ and includes a unique cap on fees which sets a maximum hourly rate, currently \$75 an hour plus cost-of-living increases,¹⁰ unless the court determines that "a special factor, such as the limited availability of qualified

98th Cong., 2d Sess. 32 (1984) (estimating for 1983 and 1984). Fees are not available in some of those cases, and many of the prevailing parties obviously do not meet the eligibility standards in the Act. Nonetheless, the conviction remains that many private parties, for any number of reasons, are not utilizing the EAJA. See generally Mezey & Olson, *Collecting Attorney Fees From the Federal Government: The Equal Access to Justice Act* (discussing theories on underutilization) (manuscript on file with author).

⁶The Act covers certain agency as well as court proceedings. In 28 U.S.C. §2412(d)(3), the Act provides that fees may be awarded "to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5." Section 504 in turn provides that an adversary adjudication is one under Section 554 in which the United States' position is represented, but does not include a rate fixing or licensing proceeding. Although proceedings before agency boards of contract appeals are not adjudications under 5 U.S.C. §554, fees are available under the Act.

⁷The Act provides that any application must be filed "within thirty days of final judgment in the action." 28 U.S.C. §2412(d)(1)(B).

⁸*Pierce v. Underwood*, 487 U.S. 552 (1988). Fees are also precluded if the court finds that "special circumstances" would make an award unjust. 28 U.S.C. §2412(d). Findings of special circumstances have been rare, confined primarily to instances of misconduct by private parties or to instances in which eligible parties serve in essence as stalking horses for noneligible parties. See, e.g., *Guste v. Lee*, 853 F.2d 1219 (5th Cir. 1988).

⁹28 U.S.C. §2412(d)(2)(B) ("party" means (i) an individual whose net worth did not exceed \$2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government or organization whose net worth did not exceed \$7,000,000 at the time the civil action was filed . . .").

¹⁰Although agencies through rulemaking may also permit cost-of-living increases for EAJA fees in agency litigation, 5 U.S.C. §504(c)(1), none have done so.

attorneys for the proceedings involved, justifies a higher fee."¹¹ Fees can also be awarded to private parties, irrespective of the substantial justification of the government's position, "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."¹²

The Act, however, is unlikely to accomplish the lofty goals set by Congress. In Part I, I address on a theoretical level the incentive scheme in the Act. First, in the majority of cases, the EAJA does not induce private parties to challenge governmental action because sufficient incentives to litigate already exist, and because the EAJA in most contexts provides only a weak incentive to sue. Although the Act does provide some incentive for private parties to bring small, strong monetary claims and strong claims for nonmonetary relief, the goal of equalizing the strength of the parties--by itself--does not persuasively justify continued operation of the Act. Raising the fee cap and repealing the substantial justification standard would go part way towards establishing more of a balance between the private party and government.

Second, the prospect of paying an attorney fee award has only limited impact on the government's primary conduct, even though the award is paid out of the offending agency's budget. Few agency officials consider litigation costs when crafting policy. Moreover, the government need not pay fees if it demonstrates that its position was substantially justified, and government officials will seldom consider that their own judgment might be considered *ex post* to be unreasonable. Eliminating the substantial justification standard might deter the government from continued conduct injuring private parties more effectively, at least in contexts in which the government official is likely to consider litigation costs before acting. Even with automatic fee shifting, it is doubtful that government officials will be chilled from acting or litigating vigorously for fear of exposure to an attorney fee award in light of other incentives to act. The fear of overdeterrence, moreover, is not acute given that most government actors subject to the EAJA are shielded by a safe harbor created by deferential standards of review.

Instead of serving as a means of monitoring governmental misconduct, the EAJA today functions primarily as a compensation measure to recompense small private parties for the often expensive and trying chore of litigating

¹¹*Id.* Enhancements, for instance, have been awarded to counsel who specialize in environmental issues. *National Wildlife Fed'n v. FERC*, 870 F.2d 542 (9th Cir. 1989). See generally *infra* text accompanying notes 180-84.

¹²28 U.S.C. §2412(b). That waiver is tied to policies of specific statutes and therefore is outside the scope of this Article, which focuses on the desirability of general fee shifting against the government.

against the government. Because the government is only liable for fees when it is at "fault," *i.e.*, when it cannot demonstrate that its position was substantially justified, some would argue that the Act comports with notions of corrective justice.¹³ The case for corrective justice, though plausible, is far from compelling. Congress, for instance, has never sanctioned one-way fee shifting (at least across-the-board) against large corporations in the private sector even when they are at "fault." And some might well believe that wrongdoing or fault at times is implicit in the government's failure to prevail in the underlying lawsuit, irrespective of the substantial justification of the government's position. Finally, viewing the Act as a corrective justice mechanism cannot explain why prevailing parties of sufficient means are ineligible for fees even when the government's position lacks substantial justification, and why the government cannot recover fees when a private party is at fault. Congress, in other words, has not evinced a consistent concern for corrective justice, and any aim of corrective justice in the Act is apparently tempered by distributional concerns, because the government and wealthy parties cannot recover fees.

The substantial justification standard arguably impedes attainment of all three possible goals underlying the Act--it blunts private parties' willingness to litigate vigorously against the United States, undermines the deterrent effect of a fee award, and prevents some private parties who have suffered injuries at government hands from receiving full compensation for their injuries. Although the substantial justification standard might nonetheless be defended as a means to protect the federal fisc, I argue in Part II that the standard saves the federal government an unexpectedly modest sum of money. The government successfully defeats some fee applications on the ground that its position was substantially justified, yet the standard increases expenses in other cases because it makes settlement less likely and results in more complex fee litigation.¹⁴

¹³Many commentators believe that, from a perspective of corrective justice, compensation should be awarded only in the presence of causation and fault. For the debate, compare Weinrib, *Causation and Wrongdoing*, 63 CHL.-KENT L. REV. 407 (1987) (hereinafter *Causation and Wrongdoing*) with Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981), and Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L. J. 349 (1992) (hereinafter *Tort Law and the Demands of Corrective Justice*).

¹⁴Litigants are unlikely to predict with great accuracy whether courts will find the government position to be substantially justified. Courts have not construed the standard in an intuitive manner. For instance, courts have concluded that administrative action found to be arbitrary and capricious could nonetheless be considered reasonable, see *Pierce v. Underwood*, 487 U.S. 552 (1988) (concluding that a finding that an action was arbitrary and capricious cannot be equated with finding of no substantial justification). Courts have also held that the government is not substantially justified even when the underlying action had originally been upheld in court.

In Part II I also argue that the expense of administering the EAJA as a whole is significant. Taxpayers must not only at times pay the fees of private attorneys, but also the salaries of government attorneys and support staff, as well as those of judges and agency hearing officers. Based in part on a study of all EAJA applications resolved during the 12-month period from June 30, 1989 to June 30, 1990, I conclude that the overall costs of the EAJA, as currently constituted, are indefensibly high.

Finally, in Part III, I suggest possible improvements to the current statutory scheme. The normative allure of the suggestions depends on the goals sought to be accomplished in the Act.

First, if deterring government wrongdoing is the preeminent goal, then the EAJA should be repealed, to prevent needless waste of taxpayer dollars. The Act's failure to deter government misconduct effectively undermines the premise underlying its enactment, and government funds could be more productively allocated elsewhere. Second, and somewhat paradoxically, the Act could be transformed into an automatic fee shifting mechanism. Although far from compelling, there is some reason to believe that officials applying preexisting rules may internalize the cost of attorney's fees due to the close nexus between such decisionmaking and litigation. Moreover, there is arguably greater need to deter government officials making such fact-specific judgments due to the absence of internal political checks safeguarding enforcement choices. Converting to automatic fee shifting would augment the Act's incentive to private parties to bring suit on meritorious claims, and possibly deter government errors in some contexts. And eliminating the substantial justification standard, to many, would further a goal of just compensation. In addition, the empirical study suggests that the government is unlikely to lose significant amounts of money by switching to an automatic fee-shifting mechanism, unless such a change induces far more new applications for fees than I expect. Third, in the absence of more definitive data illuminating operation of the Act, some may well favor retaining the Act's current structure despite its costs and apparent lack of effectiveness. The status quo at least achieves a rough compromise between those advocating more aggressive measures to check government overreaching and those safeguarding the integrity of government programs and the public fisc.

Although the question of whether to repeal the Act, give it more teeth, or leave it untouched is perhaps close in most contexts, change to automatic fee shifting is compelling in individual benefits litigation, which comprises the vast majority of all EAJA disputes. Automatic fee shifting would provide incentive for parties to bring small, strong claims that might not otherwise

See, e.g., *Russell v. Sullivan*, 930 F.2d 1443 (9th Cir. 1991); *Smith v. O'Halloran*, 930 F.2d 1496 (10th Cir. 1991).

attract counsel. Fee shifting would also lessen the temptation that private attorneys now have to bypass the EAJA and collect their fees from the back benefit awards to the detriment of their clients. At the same time, the deferential standard of review afforded individual benefits determinations minimizes the potential to chill conscientious governmental action.

Finally, irrespective of whether the substantial justification standard is retained, the Act should be revised to foster settlement and minimize the costs of EAJA litigation. For instance, to encourage settlement, Congress should authorize an offer of judgment device, modeled loosely on current Fed. R. Civ. P. 68, which would afford the government leverage to force settlement on the fee issues arising out of a losing case. To eliminate recurrent issues in litigation, the enhancement provision should be excised, the cost-of-living provisions made more specific, and the statute of limitations made easier to administer. Narrowing the scope of litigable issues under the Act should in turn promote settlement.

I. The Theoretical Case for the EAJA

To encourage suits and deter government wrongdoing, the EAJA adopts a one-way fee shifting mechanism enabling private prevailing parties--defendants or plaintiffs--to recover fees against the United States. Unlike other attorney fee statutes which shift fees to encourage suit in particular substantive areas,¹⁵ the EAJA is unique in authorizing fee shifting across a wide gamut of cases, including all civil actions against the United States not sounding in tort. Congress designed the EAJA as a way to equalize the litigating strength between the government and private litigants of modest means.¹⁶ Thus, both private plaintiffs and defendants are eligible for fees, but only if they satisfy the size restrictions in the Act.¹⁷ From the perspective of those stated legislative goals, evaluation of the EAJA depends upon 1) the need to equalize the strength of the government and private parties to encourage those private parties to contest vigorously government overreaching; 2) the efficacy of fee shifting in accomplishing that goal; 3) the need for deterrence; and 4) the efficacy of fee shifting in deterring government errors in such civil contexts.

¹⁵Congress has generally authorized one-way fee shifting as an inducement to enforce specific statutory policies. See, e.g., 42 U.S.C. §1988 (Civil Rights Act); 42 U.S.C. §19731(e) (Voting Rights Act); Title VII of the Civil Rights Act, 42 U.S.C. §2000(e)-5k; Title II of the Civil Rights Act, 42 U.S.C. §2000(a)-3(b) (employment discrimination); 5 U.S.C. §552(a)(4)(E) (Freedom of Information Act).

¹⁶For the legislative history, see *supra* note 3.

¹⁷Wealthy private individuals and large firms are therefore not eligible for fee shifting because there is unlikely to be an imbalance in resources. See note 9 *supra*.

Deterrence may arise either from the government's increased exposure to external review (by judges or agency hearing officers) or from its need to internalize the cost of paying fee awards.

Government conduct, however, is not monolithic, and the need for deterrence and the efficacy of fee shifting should be assessed with an eye to the important differences among government actions injuring private parties. A principal distinction lies in the difference between governmental policymaking of general impact and case-specific governmental determinations, whether in benefits cases, contract actions, or enforcement proceedings. "Policy" suggests a rule or practice of general applicability, preceded by deliberation, which is intended to set a model or guide for future conduct. In contrast, case-specific governmental action involves implementation of previously set policy or application of set policy to particular facts, with no necessary precedential effect.¹⁸ To determine eligibility for grants and benefits, for example, government officials must determine whether private parties satisfy preexisting eligibility criteria, and to determine whether to mete out a fine, officials must decide whether a private party's conduct warrants the sanction.¹⁹ Although the distinction may break down at the margins, much can be gained from separating governmental conduct into those two broad categories.²⁰ While the Act may provide a modest incentive to private parties to challenge government overreaching in both contexts, only in the case-specific categories such as enforcement will fee shifting even possibly compel the government to internalize the costs of its wrongdoing.

A. Equalizing the Strength of the Parties

The government can potentially utilize more resources in litigating than can private parties. Its sheer wealth may give it an unfair advantage in litigation, much like the advantage General Motors or Exxon can obtain over its smaller

¹⁸Compare *Londoner v. Denver*, 210 U.S. 373 (1908) (hearing required to contest assessment of tax for individuals especially benefiting from improved roads); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (hearing not required to challenge legislative determination to increase valuation of taxable property across the board). For discussion of the tenuous line between policymaking and case-specific application of law to fact, see *infra* text accompanying notes 131-38.

¹⁹For a discussion of the fact-specific decisions made by the IRS, see Zelenak, *Should Courts Require the IRS to be Consistent*, 38 TAX L. REV. 411, 412-15 (1985).

²⁰The difference between policy and case-specific actions tracks the distinction between rulemaking and adjudication in the Administrative Procedure Act. See 5 U.S.C. §551(4) ("Rule" means the whole or a part of any agency statement of general or particular applicability and future effect ..."; (7) ("adjudication" means agency process for the formulation of an order.)).

adversaries. Private parties may not be able to afford protracted litigation against the government, as plaintiffs or defendants, because of their comparative lack of resources.

For instance, a pilot might not contest a small fine issued by the Federal Aviation Administration (FAA) in the absence of the Act unless collateral consequences (e.g., suspended license) make it indispensable to file suit irrespective of the cost. The FAA might prevail solely due to its size. Not only might that result be unfair, but it could have external effects as well, because many pilots may gain from a determination that the agency erred in issuing the fine in the circumstances. In other words, the public benefit in challenging a governmental action may not be reflected in the stake of one particular litigant. Especially if the evidence that small parties tend to be risk averse holds,²¹ some meritorious claims will not be brought against the government, and some issues not fully aired merely because of the expected litigation costs.²²

To what extent the government actually benefits from its size advantage is not clear. Many government attorneys are overworked and devote considerably less time to individual cases than do private counsel. On any given case, there may be one government attorney against several associates and a partner in a law firm. Even when private parties cannot afford law firms, the staffing may be equivalent. Nonetheless, some private parties plainly cannot afford to litigate in the same style as the government, and they may not pursue litigation against the government vigorously because of their lack of resources.

Assuming this lack of parity, the question remains whether the fee shifting in the EAJA restores the imbalance in resources between the private party of modest means and the government. An award of attorney's fees may provide a private party considerable incentive to challenge governmental regulation that it finds opprobrious or to defend against a governmental suit that it believes to be without merit. The impact of the EAJA is likely to be modest, however, given that so many private parties have ample incentive and means to challenge or defend against wrongful government conduct whether or not the prospect of fee shifting exists.

²¹Rowe, *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 142 (1984, issue no. 1) (hereinafter *Predicting the Effects*).

²²This relationship can be expressed algebraically: where p is the plaintiff's expectation of prevailing; a , plaintiff's legal fees, and x , plaintiff's estimate of judgment, then suit will be brought only when $px > a$. With one-way fee shifting, however, plaintiff would bring suit where $px > (1-p)a$, since there is a substantial likelihood that the government will have to pick up the tab for the attorney's fees. Under the EAJA, $(1-p)a$ must be redefined as $(1-r)a$, where r is plaintiff's expectation of prevailing in the fee litigation.

Most private parties who litigate against the United States, even those falling within the eligibility provisions in the Act, would in all likelihood contest government action just as vigorously whether or not their attorney's fees would be reimbursed. If the recovery could be significant, or if compliance with a governmental regulation would put the private party to great expense, then fee shifting would not be needed to ensure that suit is brought or defended to check governmental action, unless the party is without assets.²³ Companies would likely have incentive to challenge substantial fines levied under OSHA whether or not their attorney's fees could be reimbursed. Similarly, most contract claims before agency boards of contract appeals would be brought irrespective of the Act. Even if the private party cannot afford counsel at prevailing rates, it may well be able to attract counsel to pursue a monetary claim through a contingency fee arrangement. For instance, private parties seeking social security disability benefits may contract with counsel for up to 25% of the back benefits sought,²⁴ and thus most individuals with substantial claims can find competent counsel to represent them.

For nonmonetary controversies as well, there still may be adequate incentive for private parties to contest the governmental action. A private company may need to exonerate itself from a charge of violating a health regulation to maintain its good name and status in the business community. Or, the principle at stake--such as allowing a union to campaign on company property--may be of such obvious import to a company that the lack of money would not be an obstacle to challenging the governmental action.

Nonetheless, there are at least two primary categories in which the EAJA should theoretically encourage suits that would not otherwise be brought. First, the prospect of attorney's fees should encourage small, strong monetary claims.²⁵ Because of the costs of litigation, private parties may not sue if only a modest amount of money is at stake even when they have a substantial chance of winning. The smaller the claim, the greater the percentage of ultimate recovery firms or individuals need to expend on attorney's fees. A contingency fee arrangement may not suffice to ensure adequate counsel in

²³Even if an affected business has few assets to devote to litigation, suits may also be brought by trade associations which sue on behalf of their members to contest governmental action. See, e.g., *Love v. EPA*, 924 F.2d 1492 (9th Cir. 1991); see also Note, *The Award of Attorney's Fees Under the Equal Access To Justice Act*, 11 HOFSTRA L. REV. 307, 317 (1982).

²⁴42 U.S.C. §406(b). If counsel are entitled to fees under both the Social Security Act and the EAJA, then they must refund the amount of the smaller fee to the claimant. Act of Aug. 5, Pub. L. No. 99-80, 99 Stat. 183, 186.

²⁵Predicting the Effects, *supra* note 21, at 142. Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 747 (1988) (hereinafter *Explaining Constitutional Tort Litigation*).

such contexts, and will not suffice when the government is the moving party due to the absence of a financial carrot.²⁶

Consider the situation of a claimant with a \$10,000 claim against the United States. That claim might not be brought—even if the private plaintiff estimated an 80% chance of success—if the attorney's fees could be expected to reach \$8,000. On the other hand, with one-way fee shifting under the EAJA, claims will be brought even if the fees exceed \$8,000²⁷ as long as there is a significant chance that the fees will be shifted to the government under the Act. A risk averse party might not bring suit if it believed it had a negligible chance to collect attorney's fees, but it likely would if it stood a 50% chance of recovering its own fees.

The Act similarly should afford private parties an incentive to bring suit, and defend against government claims, which are not readily monetizable. In particular, public interest groups benefit from the EAJA,²⁸ because there rarely

²⁶Fee shifting should encourage vigorous challenges to government policy not only by private parties who are plaintiffs but also those who are defendants. Just like plaintiffs challenging government policy, targets of government enforcement must decide how many resources to devote to defending against governmental enforcement efforts. Such private parties might need less encouragement since they have already been singled out as targets for enforcement. The prospect of recovering attorney's fees should nonetheless instill individuals and businesses with even greater resolve to contest what they believe to be government overreaching, particularly because they cannot benefit from contingency fees.

²⁷There may be some distortion because fees under the EAJA are capped at \$75 per hour plus cost-of-living increases.

²⁸Although the evidence before Congress was largely anecdotal, Congress primarily wished to aid small businesses who lacked the means to challenge what was perceived to be arbitrary governmental conduct, whether they were plaintiffs or defendants. The EAJA was in fact appended to an act to aid small businesses in general. See, e.g., H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980) ("In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue. This kind of truncated justice undermines the integrity of the decisionmaking process"). See also 125 Cong. Rec. 21435-36 (July 31, 1979) (statements of Senators Culver, Dole); Award of Attorneys' Fees Against the Federal Government, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary, 96th Cong., 2d Sess. 102-103 (May 20 and June 24, 1980) (statement of James D. McKeivitt, Nat'l Fed'n of Independent Business). Indeed, some public interest groups like the ACLU originally opposed the Act on the ground that it might impede governmental regulatory efforts.

The congressional paradigm of a small business fighting opprobrious governmental regulation does not represent a typical EAJA claim, because of the prevalence of social security disability claims. Other claims are brought by individuals contesting license suspensions, fines, etc., and still others are brought by public interest groups such as the Sierra Club. Ironically, deregulation in the 1980s may have undermined the need for the EAJA, at least from the perspective of many small businesses who initially supported the measure. At the same time, public interest groups began to support the Act as evidence of its utilization by public interest groups grew. Still, there

is sufficient incentive for any one plaintiff to expend its own resources on behalf of the public when little material recovery is possible.²⁹ The availability of fees thus makes litigation more likely, at least in the absence of a well-stocked war chest. Challenges to environmental threats, for instance, might not be brought but for the possibility of fee shifting.³⁰

Yet for the EAJA to induce private parties to challenge governmental action, the private parties must be assured *ex ante* that they are likely to be able to collect fees. Private parties must not only assess the strength of their claims against the United States, but also gauge whether courts on review will find that the government's position had been substantially justified. Risk averse parties may rightly conjecture that, except in cases in which the probability of prevailing is quite high, they have little chance of recovering fees. Thus, the Act--at best--provides only a limited incentive for private parties to challenge perceived government wrongdoing. Nonetheless, the availability of fees in some cases--even if unexpected--allows public interest lawyers to bring nonfee generating claims as well. In other words, the EAJA to a limited extent subsidizes public interest attorneys, enabling them to conduct more litigation.³¹

Not surprisingly, fee shifting under the EAJA will not likely result in nuisance litigation. The \$75 per hour maximum, even when expanded to account for the increased cost of living, is hardly sufficient to over-encourage suit. Moreover, the need to surmount the substantial justification standard also stands as a disincentive to frivolous litigation. Finally, in contrast to insurance companies or other repeat players in the private sector, the government will not likely settle weak cases for their nuisance value. The government has less incentive to settle than do such private parties because of political considerations against giving windfalls to undeserving claimants, and because the government does not consider litigation costs as fully. No attorney can hope to get rich through the EAJA.

is no question but that the EAJA currently benefits those small businesses who wish to contest continuing governmental regulation.

²⁹Congress can of course provide more direct incentive for individuals to bring suit to redress injuries suffered by the public at large by authorizing such individuals to seek fines on behalf of the public and share with the government any recovery. See, e.g., 31 U.S.C. §3730 (providing for *qui tam* actions under False Claims Act).

³⁰Nonetheless, fee shifting will induce few such cases to be brought. The prospect of fees is too uncertain to provide incentive to sue unless other incentives--funding through grants, *pro bono* policies at firms, or attorney preference--exist to enable the litigation to proceed.

³¹Whether the EAJA is efficient as a subsidy poses a difficult question beyond the scope of this report. As opposed to direct subsidies to legal aid offices, fee shifting directs subsidies only to those public interest groups who have achieved the greatest success in litigation.

In short, on a theoretical level, the EAJA furnishes some incentive for private parties to contest governmental action involving a modest sum of money or nonmonetizable issues, particularly when the chance of success on the claims is substantial. Small businesses and public interest groups are marginally more likely to contest governmental regulation if the prospect of fee-shifting exists.³² Moreover, that incentive should not lead to the filing of frivolous lawsuits against the government. In that sense, the EAJA successfully redresses the imbalance of resources between the government and its smaller adversaries, but only on a very modest scale. Even then, the percentage of successful EAJA applications in which the original suit would not have been filed but for the Act is probably quite small.³³

To equalize the litigating strength of private parties and the government further, fees recoverable under the EAJA could be increased to market rates,³⁴ and the substantial justification standard could be rescinded. Those changes would provide at least somewhat greater incentive to private parties to contest governmental action in more circumstances and with greater vigor. The

³²Groups qualifying for tax exempt status under 26 U.S.C. §501(c)(3) cannot, however, choose to pursue litigation merely because of the potential for a monetary award.

³³Professors Schwab and Eisenberg have attempted to gauge whether passage of the Civil Rights Attorneys Fee Award Act of 1976, 42 U.S.C. §1988, served as a significant incentive for parties to bring more civil rights actions. They conclude, based on a representative study of filing rates, that attorney's fees "play a lesser role in civil rights litigation than one might expect." *Explaining Constitutional Tort Litigation*, *supra* note 25, at 755-759.

It is quite difficult to determine whether the EAJA, as an empirical matter, has encouraged more suits to be filed. The data collected by the Administrative Office are not specific enough to allow any reasonable inferences. From 1977 to 1978, for instance, the number of civil cases filed against the federal government increased 16%, and then another 19% the following year. After passage of the EAJA, the rate of increase in civil cases involving the government did not materially differ. Similarly, the number of government contracts cases that were filed by private parties actually decreased after passage of the Act—more cases were filed in 1977 than were in 1987 even though the number of civil cases filed against the government doubled. See the 1977 and 1987 Annual Reports of the Director of the Administrative Office of the United States Courts. In contrast, the number of social security determinations in court escalated exponentially after passage of the Act, but that increase is likely directly attributable to the government's aggressive policy of forcing beneficiaries off the social security rolls. There are just too many factors, in particular the change in administration, to derive any comfort one way or another from the figures. See the 1979-1990 Annual Reports of the Director of the Administrative Office of the United States Courts.

³⁴That is currently the practice under the Civil Rights Act, 42 U.S.C. §1988, and the possibility of enhancements, though slim, exists. See generally *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (narrow majority of court would allow enhancements for inability to obtain counsel in particular markets).

number of additional suits filed and any increase in litigation resolve, however, would be difficult to predict and impossible to measure.

B. Prospect for Deterrence

Congress presumably did not wish to encourage vigorous litigation against the United States for its own sake, but to check government misconduct. If the government must pay attorney's fees for litigation when the government's underlying position³⁵ is not substantially justified, then it might use more care in the future, whether in deciding to litigate or in pursuing the underlying actions affecting the interests of private parties. Indeed, because any attorney fee award predicated on a lack of substantial justification must be paid out of the agency's own appropriated funds,³⁶ Congress hoped that the EAJA would provide the agency considerable incentive to avoid any situations in which its conduct might be assessed *ex post* to be unreasonable.³⁷ Deterrence might stem either from the EAJA's incentive to private parties to litigate against the United States and thereby expose its actions to judicial review, or from the government's need to pay attorney's fees if its actions are found to be unreasonable. Alternatively, a series of EAJA awards might signal Congress or the President that a particular agency required greater supervision.

But prior to determining whether fee shifting under the EAJA would encourage greater care, a critical preliminary question is to what extent such deterrence is needed. The case for deterring government wrongdoing through

³⁵28 U.S.C. §2412(d)(2)(D). Before the 1985 amendments, many courts deemed "position" to refer to the government's position in court. See, e.g., *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481 (10th Cir. 1984); *Spencer v. NLRB*, 712 F.2d 539 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984). Construed in that manner, the Act deterred litigation misconduct (and misjudgment), but only indirectly the misconduct of policymakers. The congressional reenactment made it clear that the government's position is to include both the "position taken by the United States in the civil action" and "the action or failure to act by the agency upon which the civil action is based."

³⁶28 U.S.C. §2412(d)(4). In contrast, the government compensates parties who are eligible for fees pursuant to §2412(b) through the judgment fund. See Robertson & Fowler, *Recovering Attorney's Fees From the Government Under the Equal Access to Justice Act*, 56 TUL. L. REV. 903, 913-14 (1982) (hereinafter *Recovering Attorney's Fees*). In most cases the losing agency need not absorb litigation costs, since the Department of Justice serves as its litigator and costs are not apportioned to client agencies. Charging agencies for the cost of Department of Justice litigation might indeed promote more sensitivity to the costs of disputes with private parties, but it might also chill the agencies' willingness to contact and rely on the Department of Justice, at a cost of unified governmental policy.

³⁷See generally *Recovering Attorney's Fees*, *supra* note 36, at 945-47. Most of the other academic literature focusing on the EAJA is highly descriptive.

fee shifting in all nontort civil actions is far from compelling, for there is an arsenal of political checks which constrain governmental wrongdoing, at least in comparison to that in the private sector. In other words, the efficacy of fee shifting in deterring government wrongdoing can only be assessed in conjunction with other restraints upon the government. And, in any event, the prospect of fee shifting under the EAJA should only marginally contribute to deterring government misconduct.

1. Need for Deterrence

The EAJA is in part grounded on the congressional perception that government actors are inadequately deterred from misconduct by the political process. I doubt that anyone would challenge the Act's premise that government wrongdoing exists. Government wrongdoing, however, is likely to be less extensive than misconduct by firms (or individuals) in the private sector. Private firms are presumably motivated almost exclusively by profit, while the government in contrast (one hopes) acts in a broader public interest. Though the two at times converge, few question that the public interest at other times may be served by regulating firms in the private sector because of their potential for self-interested behavior. Yet Congress has not usually adopted one-way fee shifting against corporations.³⁸

More importantly, the government's efforts in the public interest are checked by more than market forces and shareholder oversight.³⁹ An intricate web of political checks--including judicial review--safeguards the content of government policymaking and application of that policy to particular circumstances. Government agencies generally act only after considerable internal debate, and after interested private parties have a chance to influence the process. For instance, environmental policy regulating toxic waste dumps is usually set through notice-and-comment rulemaking, which gives agency staff and affected parties the opportunity to mold the eventual policy selected.⁴⁰ Even in the absence of notice-and-comment rulemaking, agency policy is formulated only after considerable debate and frequently after affording interested private parties an informal opportunity to contribute to the debate. In addition, congressional committees may well learn of key policy initiatives before they are implemented, and that knowledge enables Congress--or its

³⁸For exceptions, see the Sherman Act, 15 U.S.C. §15, Truth-in-Lending Act, 15 U.S.C. §1640, and see generally H. Cohen, *Awards of Attorneys' Fees by Federal Courts to Federal Agencies*, CRS Report for Congress (Nov. 29, 1989) (listing statutes).

³⁹In light of their own financial interest, shareholders (or employees of companies) are unlikely to deter some kinds of corporate misfeasance.

⁴⁰See, e.g., 42 U.S.C. §7410.

agents--to gain some influence over the ultimate policy chosen. To the extent that Congress after the fact deems that an agency has selected unwise policy, it has the tools to force the agency either directly or indirectly to change such policy, and Congress remains at least somewhat accountable for its decisions--including whether to change agency policy--to the electorate.⁴¹ In light of the political checks, therefore, government wrongdoing should pose *less* of a problem than wrongdoing in the private sector.

Similarly, government officials implementing previously set policy are subject to political checks, though the checks are not likely to be as effective as those confronting agency policymakers. Such government officials must determine how to apply broad policy set by Congress or other agency officials. In contrast to officials making policy choices, officials implementing policy in fact-specific contexts generally act without the benefit of participation from the public. Moreover, fact-specific application of policy--whether in enforcement or benefits contexts--rarely grabs Congress' eye, unless an agency targets an influential constituent. Some enforcement decisions, however, are prefaced by considerable debate or at least examination within the agency,⁴² and generally only relatively senior agency officials have the authority to approve significant affirmative litigation.⁴³ Agencies have also placed controls on officials making benefit determinations to ensure as much consistency as possible.⁴⁴ Even

⁴¹That accountability, however, is admittedly attenuated, which is one reason why commentators have roundly condemned broad delegations of congressional authority to agencies. See, e.g., J. Ely, *Democracy and Distrust* 130-34 (1980); T. Lowi, *The End of Liberalism: The Second Republic of the United States* 92-126 (2d ed. 1979); Aronson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 21-37 (1982).

⁴²There are checks within the agency in the benefits context as well. See *Mathews v. Eldridge*, 424 U.S. 319 (1976) (describing the process by which determinations to terminate disability benefits are reached); see also 20 CFR §§404.900-404.906 (1991) (detailing steps in termination decision).

⁴³The Assistant Attorney General for the Civil Division, for instance, must approve each case filed under the False Claims Act which seeks over \$500,000. 28 CFR Pt. O, Subpt. Y §4(c)(5) (1991). The General Counsel of the SEC must review all enforcement cases prior to suit. 17 CFR §200.21 (1991).

⁴⁴The Social Security Administration ("SSA") in the 1980s attempted to exercise greater control over decisionmaking by administrative law judges by demanding greater productivity from each judge and attempting to achieve more consistent results. The SSA instituted a peer review program whereby SSA's Appeals Council reviewed certain ALJ determinations on its own motion. SSA's efforts engendered considerable controversy. See generally Pierce, *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron & Mistretta*, 57 U. CHI. L. REV. 481 (1990).

before judicial review, therefore, the political process to some extent molds executive implementation decisions as well as policymaking itself.⁴⁵

The political checks constraining government officials' discretion at times deter government wrongdoing, and were designed for that very end.⁴⁶ This is not to suggest that we should automatically trust what agencies do, and judicial review is an essential complementary check upon government conduct. The political checks, however, minimize the need for oversight through private actions, at least in comparison to oversight of private decisionmaking,⁴⁷ since some other mechanism is in place to force accountability. And, in particular, the need to force the government to internalize the cost of its adversaries' attorney's fees is questionable when both internal political checks and the external check of judicial review act in concert to monitor governmental conduct. Yet, while Congress has not seen fit to deviate from the American rule that each side bear its own attorney's fees in most situations in the private sector, it has authorized fee shifting against the government.

2. Effect on Deterrence

Irrespective of the need to check governmental misconduct, there is little reason to believe that the path chosen by Congress in the EAJA will be at all successful. First, little deterrence can be expected to arise from the EAJA's arguable inducement to private parties to contest governmental action. Even in the absence of the EAJA, government decisionmakers recognize that the prospect of suit and external review exists. Indeed, given our litigious culture, it would be surprising if a government policymaker did not anticipate that somewhere down the line that policy could be challenged in a lawsuit. Moreover, there is a distinct possibility that targets of enforcement action or disappointed benefits claimants will seek review of the relevant government determinations either within the agency or in courts. To be sure, some policy might not be challenged in the absence of fee shifting, and some enforcement decisions might not be as vigorously contested; but because government decisionmakers will not know which policies or enforcement decisions will go unchallenged, they must consider the possibility of a lawsuit in every case.

⁴⁵Cf. *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (discussing political decisions underlying agency enforcement decision).

⁴⁶Krent, *Reconceptualizing Sovereign Immunity* (on file with author).

⁴⁷My point is not that the political checks provide optimal deterrence, only that such checks do not operate in the private sector. Private decisionmaking, though, is checked to a certain extent by the prospect of government regulation. Corporate managers recognize that any controversial misstep that results in public indignation may induce government regulators to act. But the force of that check is uncertain, and the government is likely to intervene only in particularly egregious contexts.

The extra inducement of litigation provided in the EAJA, therefore, is unlikely to serve as a substantial *ex ante* check upon government decisionmakers.

Second, the prospect of paying attorney's fees should act as a weak deterrent at best. Government policymakers rarely consider the possibility of attorney's fees when formulating government positions. It is ludicrous to think that officials at NHTSA or the EPA consider the potential financial impact from an adverse attorney fee award in setting seat-belt policy or effluent standards, any more than Congress would consider litigation costs in enacting broad social policy. As a general matter policymakers do, or at least should, consider the cost-benefit justification of the policy they pursue.⁴⁸ Yet, given the separation in most agencies between policymakers and litigators, consideration of possible attorney fee awards is not likely to be of significant concern to policymakers. For instance, in setting car safety standards, NHTSA must recognize the possibility of a legal challenge, but it also recognizes that the Department of Justice will handle the litigation at no charge to the client agency.⁴⁹ This is not to suggest that agency policymakers are not aware that litigation costs the government money, only that full internalization is unlikely given that the current costs of litigation are not even quantified, let alone deemed attributable to the actions of certain agency policymakers.⁵⁰

Moreover, the prospect of a substantial attorney fee award is quite remote. Few government policymakers consider it likely that their policy will be set aside upon judicial review, let alone that it could be considered *ex post* to be unreasonable. Nor would policymakers necessarily be aware of whether successful challengers to government policy would qualify under the eligibility standards in the Act. In any event, an attorney fee award is likely to be trivial, or at least quite modest, in comparison to the financial and social goals to be advanced by government-wide policy.

Finally, an attorney fee award is not likely to be an effective deterrent to government misconduct in view of the large gap in time between formulation of government policy and award of attorney's fees. Litigation challenging governmental action may span years, particularly if the court remands the case back to the agency for further consideration. Even in the absence of remands, litigation over several years is not out of the ordinary. In addition, the

⁴⁸Executive agencies, pursuant to Executive Orders 12291 and 12498, must present proposed rules to the Office of Management and Budget for review in part to ensure that agencies have undertaken cost-benefit analyses in proposing the rules. See generally Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989).

⁴⁹See note 36 *supra*.

⁵⁰Requiring government attorneys to record their time and then collating the data to estimate litigation costs in selected cases might represent a significant step in forcing government attorneys to be more aware of the costs arising from their conduct of government litigation.

attorney fee litigation may span several more years.⁵¹ From start to finish, therefore, the challenge to governmental policy will likely last at least a couple of years, during which political administrations or at least agency personnel might change. The lessons of an attorney fee award are likely dissipated, if not lost, with the passage of time, and they can easily be rationalized (if one would care to) as the result of an ineffective or incompetent precursor in office.

Nonetheless, federal agencies that implement policy directives by assessing the facts of each particular case are somewhat more likely to be deterred by the prospect of an attorney fee award. Such agency personnel must determine how to apply broad rules in fact-specific situations. Because those making implementation decisions more frequently consider litigation costs, there is a greater likelihood that consideration of potential attorney's fee liability, at least at the margins, will encourage agency personnel to proceed with greater caution. The prospect of litigation costs might make the FAA pause before levying a small fine against a pilot under a novel theory of culpability.⁵² And in general, there is less money at stake in such contexts so that the costs of enforcement are likely to be considered more fully.⁵³

Consider, for instance, the Department of Justice's Section on Civil Frauds. In determining whether to sue under the False Claims Act,⁵⁴ officials must not only consider the likelihood of success and potential recovery, but also the costs of litigation, in terms of government employee time and potential exposure to attorney's fee awards. It may be that the suit is so politically important (as for instance some suits against defense contractors or against former savings and loan directors) that cost is irrelevant, or it may be that suit is necessary as a test case notwithstanding the expense. In addition, even a costly suit may be cost effective in the long run because it may deter future false claims against the government. Nonetheless, such enforcement groups have limited funds, and the prospect of an attorney's fee award may have some added deterrent force.

⁵¹Much attorney's fee litigation, of course, lasts longer than the underlying litigation itself. See *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980).

⁵²Small business groups have charged that government agencies, to project the image of an aggressive watchdog, at times padded their enforcement record by filing actions against small companies hoping that such companies do not have the resources to defend themselves adequately. See note 28 *supra*.

⁵³Moreover, although some enforcement actions (such as NLRB unfair labor practice charges) span as much time as challenges to agency policy, on the whole, there is likely less of a time gap between the case-specific implementation of policy and the judicial resolution of any subsequent challenge.

⁵⁴31 U.S.C. §3730.

Consider as well agency officials making case-by-case determinations of benefits eligibility. The prospect of an adverse attorney's fee award in addition to litigation costs might prompt the officials to take more care in resolving contested issues under the Act. From a cost-benefit perspective, it might be financially prudent to grant benefits to claimants who have a strong claim to eligibility because, irrespective of the ultimate result, the cost of any necessary litigation might eclipse the amount saved in denying benefits. Still, the substantial justification standard largely removes concern for attorney's fees because officials who deny benefits in close cases are unlikely to consider that their actions could later be determined unreasonable.⁵⁵

Finally, the EAJA might help deter agency wrongdoing by alerting Congress or the President to a wayward agency. A series of EAJA awards might signal something amiss. Yet a signaling function can only operate if there is sufficient information available to the watchdog. Only the Department of Health and Human Services has a significant enough EAJA caseload (approximately 2,000 cases a year) from which any conclusions can be drawn. In the target year, for example, the Department of the Interior was the second most active agency in court cases, losing five out of the seven fee disputes resolved.⁵⁶ The Armed Services Board of Contract Appeals, which granted 13 applications in the last fiscal year,⁵⁷ had the most active caseload arising out of agency adjudications. Such data, particularly because of the unique fact patterns among the cases, provide little grist for any oversight committee or agency. Thus, even if congressional or executive overseers would consider EAJA awards as a barometer of agency performance--an assumption which anecdotally is not borne out--there are inadequate statistics upon which any judgment can be made.

A caveat, however, is in order. Even if the EAJA does not significantly deter careless government policy or implementation decisions, it may help deter litigation misconduct. In cases in which the private parties have prevailed or are likely to prevail at the trial court (or agency) level, there are perhaps insufficient checks upon government litigators to prevent delay. Judgment, for instance, need not be paid until "final," and finality under the

⁵⁵See text accompanying notes 62-63 *infra*. In addition, the EAJA awards may comprise such a small percentage of the total benefits awarded that any deterrence from the award is unlikely. See note 145 *infra*.

⁵⁶Annual Report of the Director of the Administrative Office of the United States Courts (1990).

⁵⁷Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act (October 1, 1989--September 30, 1990).

judgment fund statutes means when all possible remedies are exhausted.⁵⁸ Thus, the more the litigation is protracted, the less the compensation for the private parties, and fees need not be paid until subsequent judgment under the EAJA. Particularly for attorneys who rely upon government litigation for their livelihoods, the delays of possibly years before receiving compensation can be quite devastating. An award of attorney's fees therefore plausibly ensures that government litigators do not needlessly protract litigation, for if they do, the penalty may be a greater award of attorney's fees.

Predicating the EAJA on the need to police government litigation tactics is not fully satisfying, however. An award of fees for the underlying litigation seems overbroad if all that is at stake is dilatory tactics. Although I doubt that such misconduct is widespread, sanctions may be appropriate--and have been awarded--for such litigation misconduct,⁵⁹ but litigation sanctions independent of the EAJA should be sufficient.⁶⁰

As an overall means to deter government misconduct, therefore, the EAJA is quite problematic. In comparison to the private sector, most government policymakers are likely to be less concerned with cost-benefit analysis and thus less likely to internalize the extra costs represented by the attorney's fee award. Those costs in any event are probably trivial in comparison to the economic or political value of the governmental policy. Furthermore, the political checks already facing most government decisionmakers diminish the need for the added deterrence of EAJA awards, particularly given the possibility of judicial review.⁶¹ Still, one cannot totally discount the potential for deterrence, and the

⁵⁸See 31 U.S.C. §1304(a); 28 U.S.C. §2414. But cf. *Trout v. Garrett*, 891 F.2d 332 (D.C. Cir. 1989) (despite judgment fund limitations, interim attorney's fees permissible in certain situations); *Rosenfeld v. United States*, 859 F.2d 717 (9th Cir. 1988) (same).

⁵⁹Some courts have held that sovereign immunity does not block sanctions under Rules 11 & 37 of the Rules of Civil Procedure. See, e.g., *Mattingly v. United States*, 939 F.2d 816 (9th Cir. 1991); *United States v. Gavilan Joint Community College District*, 849 F.2d 1246 (9th Cir. 1988).

⁶⁰Indeed, the EAJA formerly accomplished that goal more narrowly when the "position of the United States" was interpreted to refer to its position (and thus its conduct) in the litigation itself. See, e.g., *Spencer v. NLRB*, 712 F.2d 539 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984). Fees could be awarded, not if the underlying action was arbitrary, but if the government's litigation tactics were suspect. See also note 35 supra.

⁶¹The preceding discussion suggests that fee shifting under the EAJA has not overdeterred government policymaking. Government officials have been chilled neither from formulating policy nor from pursuing aggressive enforcement measures for fear of incurring attorney's fee liability. Thus, as currently constituted, the EAJA does not have a deleterious impact upon government policy. Indeed, awards under the EAJA have been substantially lower than the Justice Department originally projected. The Department, as well as the Congressional Budget Office, estimated that the Act would cost taxpayers over \$100 million a year. H.R. Rep. 1418, 96th Cong., 2d Sess. 20 (1980). In contrast, the Administrative Office and Administrative

prospect of attorney's fees may have a modest deterrent impact upon those government decisionmakers who must decide how to implement government policy in fact-specific contexts, because they are more likely to assess the potential litigation costs arising from an enforcement action or denial of a government benefit. And such decisionmakers, in contrast to government officials formulating general policy, face comparably fewer internal checks prior to reaching their fact-specific decisions.

Although the prospect of effective deterrence through fee shifting is slim, rescinding the substantial justification standard would marginally increase deterrence of future errors by subjecting the government to attorney's fee awards in all cases in which a private eligible party prevails. In the absence of the substantial justification standard, fee awards would become more certain, and the government's exposure to fees greater. Similarly, elevating the fee cap could augment deterrence slightly by forcing the government more fully to internalize the costs of its wrongdoing, but the same structural impediments to more effective monitoring remain.

3. Potential for Overdeterrence

Given that fee shifting under the EAJA will not likely deter government actors at all, any fear of overdeterrence is seemingly misplaced. The substantial justification standard plainly protects against overdeterrence by creating a significant cushion for government conduct—only when the government's position lacks substantial justification need the government fear an EAJA award. Indeed, Congress included the substantial justification standard to assuage administration fears of chilling effective governance.

Even without the substantial justification standard, however, the EAJA would not likely result in overdetering government activity. Eliminating the standard would raise the stakes for government policymakers and litigators. Automatic fee shifting is akin to a tax upon losing, and in close cases, government attorneys may decide not to bring a case, or to launch a new jurisdictional argument, for fear of incurring greater fees. As discussed previously, the prospect of fees will not likely deter policymakers, but officials making fact-specific determinations may be affected at the margins. Elimination of the substantial justification standard likely would make such officials more concerned with the prospect of attorney's fees.

The line between effective deterrence and overdeterrence is of course hard to draw, and it is not amenable to any definitive empirical analysis. As with

Conference together have reported payouts of only several million dollars a year. See text accompanying notes 105-17 *infra*. Even if that figure underrepresents the amounts that have been paid, such amounts do not even come close to that originally projected.

questions of deterrence and incentive to sue, the potential for overdeterrence depends upon the nature of the litigation. To the extent the underlying liability standard incorporates a measure of wrongdoing, there is less likely to be overdeterrence. For instance, agency officials awarding benefits may not take into account the political affiliation of the claimants. A successful challenge to a denial of a claim hinges upon proof of impermissible motivation by the agency. Because agency officials should never consider the political affiliation of a claimant, the prospect of fee liability will not likely hinder their actions in determining eligibility on the basis of recognized criteria. In other words, there is at times little reason to encourage agency actions at the margins of the law.⁶² Department of Justice officials contesting false claims against the government, however, are not protected by any fault standard--the claim depends only upon whether the evidence satisfies the statutory standards, and a reasonable construction of the statute or of the facts of the case does not ensure success.⁶³

Moreover, there is less risk of overdetering government agencies when their actions are protected by a deferential standard of review. Standards such as "substantial evidence in the record" or "arbitrary and capricious" create a safe harbor for agency officials implementing policy at the outskirts of their authority. Officials who recognize that their decisions will be sustained by substantial evidence in the record will not readily be overdeterred by the prospect of fees because of the margin of safety created by the deferential standard.

The potential for overdeterrence thus varies in each context in which the EAJA applies. The risk of overdeterrence is greatest when the government's underlying liability is predicated on conduct that is not clearly "wrongful" and that is not protected by any deferential standard of review. Enforcement actions provide an example--courts must decide not whether the government acted wrongfully in bringing suit, but whether all provisions in the Act were satisfied. Nonetheless, government officials may have sufficient nonmonetary incentives in bringing enforcement actions or contract claims to negate the potential for overdeterrence. Such government officials would realize that, even if there is a risk of paying fees when trying to set new precedent,

⁶²Cf. Rich, "Denial of Benefits to Blacks May Signal Bias, GAO Says," Wash. Post A17 at col. 1 (May 12, 1992) (GAO study unearthed disparities in agency determinations of eligibility for social security benefits).

⁶³See, e.g., *Crandon v. United States*, 494 U.S. 152 (1990) (rejecting government suit to recover for false claims despite plausible reading of statute); see also *United States v. Boeing Co.*, 747 F. Supp. 319 (E.D. Va. 1990) (awarding private party's EAJA claim in same case), rev'd, No. 90-3510 (4th Cir. March 3, 1992).

overturn old, or set an example for other private parties, those goals should be well worth the modest price.

Converting to an automatic fee shifting system might nonetheless chill government attorneys' efforts in the underlying litigation. Attorneys would recognize that novel jurisdictional or statutory arguments come with a price, namely that unsuccessful arguments raise the amount of attorney's fees paid to prevailing private parties. Yet, if the amount or principle at stake in the litigation is significant enough, and the arguments are plausible, government attorneys should have ample incentive to litigate as vigorously as possible. Government attorneys could also protect themselves by launching such new arguments in cases in which they stand little chance of paying EAJA fees, either when the private party does not satisfy the eligibility criteria in the Act, or when the government stands an excellent chance of winning on other grounds. The burden of defending against such arguments would not therefore rest on the shoulders of prevailing private parties of modest means.

Irrespective of the impact on the underlying litigation, converting to automatic fee shifting plainly will not overdeter government attorneys from raising creative arguments in the fee litigation itself. The purpose of streamlining the EAJA would be to remove much of the need for "creative" arguments, because in the vast majority of cases only the reasonableness of hours expended would be at stake. In any event, a switch to automatic fee shifting would not overdeter government litigators more than they are already, due to the prevailing parties' current entitlement to fees for successful fee litigation, irrespective of the reasonableness of the government's arguments opposing the fee award.⁶⁴

In short, while the prospect of overdeterrence exists, the prospect is neither certain nor that daunting. Overdeterrence is unlikely if a deferential standard of review protects the government decisionmaker, or if there is little positive benefit to be derived from governmental conduct at the margins of the law. Moreover, there should be little fear of deterring novel governmental arguments in the underlying litigation as long as the litigation is important enough. Finally, there should be no impact whatsoever on the conduct of the

⁶⁴See text accompanying notes 97-98 *infra*.

fee litigation itself. Thus, although the substantial justification standard has some effect in protecting against overdeterrence, its role is modest at best.⁶⁵

C. Compensation Role

Although the EAJA may have only limited success in encouraging suits and deterring government wrongdoing, it plausibly serves to compensate more fully some parties who are injured by the government. There is certainly normative appeal in providing that those injured by government wrongdoing receive compensation. Many have noted that compensation for injuries, whether inflicted by governmental or private agents, is hardly complete when a substantial chunk of that award may go towards attorney's fees.⁶⁶ But compensation under the EAJA is quite limited, applying only to those 1) satisfying the eligibility standards in the Act; 2) who have prevailed in litigation against the United States; and 3) against whom the government

⁶⁵If the EAJA were applied more broadly to include all agency proceedings, a different type of overdeterrence might ensue. Many agency proceedings are informal, reflecting more of a magisterial than an adversarial approach. In disability determinations before ALJs, for instance, there is no attorney representing the position of the Secretary. To apply the EAJA to such proceedings could change the nature of the proceedings dramatically, because the government would logically treat the proceedings more like trials to limit its exposure to attorney's fees. For instance, the government might prevent the claimant from introducing new evidence at a hearing to restrict his or her chance to prevail. Thus, the current line between adversarial and nonadversarial adjudications in the EAJA makes sense, to preserve the integrity of informal agency processes. Recognition of the necessity of a line, however, does not shed light on the current controversy over where to place the line.

The Supreme Court recently concluded that only agency proceedings technically governed by 5 U.S.C. §554 fell within the scope of the Act, even if the agency by statute was required to utilize the same procedures as under Section 554. *Ardestani v. INS*, 112 S. Ct. 515 (1991) (relying in part on canon of strictly construing waivers of sovereign immunity to conclude that immigration proceedings not covered because they are not "under" §554). If Congress is convinced of the Act's success, then it should consider, on a category-by-category basis, whether to extend the Act to proceedings required by statute which are substantially similar to those under Section 554.

Similarly, Congress may wish to revisit the issue of which proceedings in Article I courts should be covered under the Act. Although Congress explicitly included litigation in the Claims Court in reenacting the Act in 1985, 28 U.S.C. §2412(d)(2)(F), it has left the status of other Article I courts unresolved. For instance, the Court of Veterans Appeals, which was established after the latest reenactment, held that it lacked authority to award attorney's fees under the Act. *Jones v. Derwinski*, No. 90-58 (March 13, 1992).

⁶⁶See, e.g., Leubsdorf, *Recovering Attorney Fees as Damages*, 38 *RUTGERS L. REV.* 438, 442-44 (1986); II Rowe, *Enterprise Responsibility for Personal Injury* (ALI Reporter's Study) (hereinafter *Enterprise Responsibility*).

cannot demonstrate that its position was substantially justified. While the Act thus plainly eschews any general compensation goal,⁶⁷ the restrictions can in part be explained by notions of corrective and distributive justice.

1. Corrective Justice and the Requirement of Fault

There is currently no consensus as to whether notions of corrective justice require a losing party in litigation to pay the attorney's fees of its adversary. On the one hand, if a prevailing party can recover her doctor bills, it is not clear why she cannot recover her attorney's fees, since both generally represent out-of-pocket expenses. On the other hand, attorney's fees perhaps can be distinguished on the ground that all of us in society have agreed to bear the risk and hence costs of litigation--unlike medical bills--irrespective of whether we prevail. In the long run, we may be successful litigating as often as we lose. The persistence of the American Rule of attorney's fees, under which each side must bear its own litigation costs, plausibly reflects such an understanding.⁶⁸

Assuming that payment of attorney's fees is ever consistent with principles of corrective justice, fee shifting might be appropriate in two contexts. First, fee shifting plausibly could be required whenever a party's position in litigation is wrongful. Most courts interpreted the EAJA in that fashion prior to the 1985 reenactment.⁶⁹ Second, fee shifting might alternatively be required whenever the losing party's underlying conduct is "wrongful,"⁷⁰ or otherwise gives rise to a duty to compensate under principles of corrective justice.

To some, the EAJA may be normatively attractive in requiring the government to pay attorney's fees as damages whenever the government is at

⁶⁷Indeed, because many tort victims (as well as others) cannot recover at all against the United States because of the lingering doctrine of sovereign immunity, see, e.g., 28 U.S.C. §2680(a) (listing exceptions to waiver of liability under the Federal Tort Claims Act), the case for more fully compensating parties through the EAJA, who have already obtained some relief, is far from compelling.

⁶⁸The EAJA poses an anomaly because those injured by the government stand in the same shoes as would any prevailing party under the American Rule on attorney's fees, whether plaintiff or defendant. Although Congress at times has permitted fee shifting in other contexts, such as under the Truth in Lending Act, 15 U.S.C. §140(a), most prevailing parties--irrespective of the size of their adversaries--cannot collect fees even after prevailing.

⁶⁹See note 35 *supra*.

⁷⁰The same difficulty in justifying recovery based solely on compensation exists in the general negligence standard in torts. See generally P. Huber, *Liability: The Legal Revolution and its Consequences* (1988); R. Posner, *Economic Analysis of the Law* 187-90 (3d ed. 1988); Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 951-52 (1981).

fault in forcing a private party to litigate to vindicate its interests. From the perspective of corrective justice,⁷¹ that element of fault arguably supplies the necessary condition to support an award of fees. The substantial justification standard, in other words, limits payment of attorney's fees to those contexts in which the government's position either in the underlying action or in the litigation itself lacks a reasonable basis in law and fact.

To others, however, wrongdoing may not be synonymous with lack of substantial justification. First, the government's failure to prevail in litigation might itself reflect fault. Private parties can prevail against the government at times only by surmounting the hurdle of deferential review under the APA--the arbitrary and capricious or the substantial evidence test--which incorporates a standard of wrongdoing.⁷² Corrective justice principles might therefore require compensation whenever a government policy is invalidated as arbitrary, or an agency adjudication overturned because of the lack of support in the record.

Second, some might believe that corrective justice requires compensation not only when the government is at fault, but when the loss itself is wrongful. Compensation may be owed, for instance, when the government erroneously withholds benefits (and enjoys the use of the money), or deprives private parties of other entitlements, irrespective of its good faith.⁷³ Because corrective justice notions rely so heavily on individual intuition, it is difficult to say with any confidence whether the compensation scheme in the EAJA--or in fact, any fee shifting mechanism--is consistent with corrective justice principles. The decision to limit fees to instances where the government fails to demonstrate substantial justification is perhaps plausible, but by no means compelled, from a perspective of corrective justice.

Moreover, whatever one's view of the justice of requiring the government to pay attorney's fees when its position was not "wrongful," the Act as a whole does not reflect a consistent application of corrective justice principles. First, the "fault" standard is not reciprocal, the government cannot obtain fees when it prevails in litigation when the private party was at fault. Second, wealthy private litigants cannot obtain fees even when the government's position is not substantially justified. Large parties, just like smaller ones,

⁷¹See, e.g., Causation and Wrongdoing, *supra* note 13; Jeffries, *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82 (1989).

⁷²At other times, private parties can prevail only if a reviewing court determines that the agency's construction of a statute is unreasonable. *Chevron, USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Doctrines of deference, in other words, may ensure that agency action is overturned only when the agency has been at fault.

⁷³Cf. Tort Law and Demands of Corrective Justice, *supra* note 13. Compensation might not be required, however, for enforcement actions filed by government agencies which fail because reasonable enforcement initiatives do not disturb any entitlement of the target.

arguably deserve compensation if they are injured by government misconduct.⁷⁴

2. Distributive Justice

To the extent the EAJA reflects a principle of corrective justice, that principle is apparently tempered by distributive concerns. Private parties need not pay fees when their actions have been without substantial justification. Moreover, the Act also excuses the government from paying fees when the private parties are wealthy, despite the wrongfulness of the government's conduct. The Act therefore plausibly furthers distributive goals in shifting fees only when the party injured has relatively few resources.

Finally, whether or not a compensatory goal represents sound policy, the Act, as I will discuss, implements that goal in an ineffective manner because so much of the expense involved in administering the EAJA goes not to injured parties but instead must be used to pay government attorneys, government decisionmakers, and private attorneys. Thus, the case for maintaining the EAJA as a corrective justice mechanism, molded by distributive concerns, is questionable.⁷⁵

In short, the EAJA as currently constituted serves an amalgam of functions, none very effectively. The Act equalizes the strength of the parties, but only a little, does not likely deter government wrongdoing, and serves to compensate partially some victims of government misconduct. Repeal of the substantial justification standard would augment the effectiveness of the Act on at least the first two fronts, and it might help on the third depending upon one's view of corrective justice.

II. Costs of EAJA Litigation

Although the EAJA's record in encouraging more vigorous litigation against the United States, deterring government overreaching, and satisfying the demands of corrective justice may be uncertain, its costs are quite tangible.

⁷⁴Moreover, the \$75 per hour fee cap undercuts a compensation goal, because it undercompensates attorneys representing private parties in government litigation in most markets in the country.

⁷⁵Nonetheless, the EAJA currently may serve a salutary function in creating the appearance of fairness. Some may believe that injuries at the hands of government officials are somehow "worse" than those received at the hands of private parties, presumably because of the breach of public trust involved. In any event, it is quite difficult to gauge whether enactment of the EAJA has contributed to a greater sense of well being among small regulated businesses or private individuals, and if so how to measure that contribution against the costs to the taxpayer.

The one-way fee shifting under the EAJA increases the burden on the taxpayer in a number of ways, all of which are exacerbated due to the substantial justification standard. First, in comparison to the American Rule under which parties bear their own litigation costs, the potential for fee shifting likely makes settlement of the underlying action more difficult to accomplish, and thereby increases expenses the taxpayer must foot for the initial litigation with the government. As discussed below, repeal of the substantial justification standard would likely facilitate settlement of both the underlying case and the fee dispute. Second, the EAJA adds a new layer of costs by introducing an additional round of litigation which generates more fees for government and private attorneys, and more adjudicative expense in courts and agencies. Repeal of the substantial justification standard, even if it would not induce settlement, should streamline the fee litigation. Although the government has defeated some large fee requests on the ground that its position had been substantially justified,⁷⁶ litigation over that standard in other cases has probably cost the government almost as much money as it has saved.

A. Impact on Settlement

Theoretically, the EAJA should make the underlying dispute with the government more difficult to resolve. The likely disagreements over whether liability for fees exists and over the amount of attorney's fees that would be recoverable augment the odds that the parties cannot come to an amicable agreement of the underlying suit.

In the absence of the EAJA, private parties litigating against the government will likely settle if their expected recovery is less than the government's expected loss or if their expected loss is greater than the government's expected gain. Viewed another way, the parties will likely settle if plaintiff's estimate of the expected judgment exceeds defendant's estimate by less than the sum of their anticipated legal costs.⁷⁷ Obviously, there are pragmatic reasons why settlement may not occur even under these circumstances--whether because of precedential value, strategic bargaining,

⁷⁶During the target year, for instance, the government demonstrated that its position had been substantially justified to defeat an EAJA request for \$233,804, Annual Report of the Director of the Administrative Office of the United States Courts 1990, and the year before it defeated a request for over \$.5 million. Annual Report of the Director of the Administrative Office of the United States Courts 1989.

⁷⁷See Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUDIES 57, 63 n.33 (1982) (hereinafter, *Suit, Settlement, and Trial*).

lack of information, etc.--but many cases will settle, particularly if they involve financial issues with little systemic impact. Assuming risk neutrality (and insignificant settlement costs), the governmental and private parties will determine whether to settle by discounting the possible outcomes of their litigation by their probability of success.⁷⁸ For instance, if plaintiff has a \$10,000 claim against the government and an 80% chance of prevailing, and anticipates expending \$4,000 in legal fees, its expected gain is \$4,000. Assume that the government litigator believes that it has a 40% chance of losing, and estimates its costs in terms of resources expended at trial to be \$2,000. The government therefore likely will lose \$6,000 from the litigation, and the difference between plaintiff's expected gains of \$4,000 and the government's expected loss of \$6,000 creates a "positive" bargaining range of \$2,000 in which both parties have the incentive to settle.⁷⁹ The incentives to settle when the government is plaintiff should be identical.

If the Equal Access to Justice Act applies, however, the potential for settlement diminishes. In the same hypothetical, the private plaintiff now believes it has not only an expected judgment of \$4,000, but perhaps a 60% chance (given the substantial justification standard) of recovering its \$4,000 in expenses, for a total expectation of \$6,400. The government in turn might consider that it has a 20% chance of paying fees, and thus its expected loss now approaches \$6,800.⁸⁰ The bargaining gap has thus narrowed, although settlement is still possible. If the government believes, however, that it has no chance of paying the private attorney's fees because its position was substantially justified, then the parties will not conceivably settle the litigation.⁸¹

To be sure, if the parties have the same estimate of the likelihood of paying attorney's fees, then the bargaining span should not change, even if the total amount of money at stake has increased. Yet in many if not most cases, the government's estimate of its liability for fees will be less than that of plaintiff--the government generally has a higher expectation of success on the merits of

⁷⁸*Id.* at 57.

⁷⁹This relationship can be expressed algebraically to suggest that the private plaintiff will settle if $px - a \leq qy + b$, where p = plaintiff's expectation of prevailing; q = defendant's expectation that plaintiff will prevail; a = plaintiff's expected legal fees; b = defendant's expected legal fees; x = plaintiff's estimate of judgment; and y = defendant's estimate of adverse judgment. For similar analysis, see *Suit, Settlement, and Trial*, *supra* note 77.

⁸⁰The figure might be somewhat higher because of the possibility that the government in addition would ultimately be required to pay fees for the fee litigation.

⁸¹Similarly, if government litigators do not internalize the cost of government litigation in deciding whether to settle, then no settlement under these facts is likely.

both the underlying action and the fee issue itself.⁸² When the government's estimate of fee exposure (largely because of the substantial justification standard) is less than that of plaintiff, there is consequently diminished range within which to reach a settlement under a fee shifting scheme.⁸³ This result makes a good deal of intuitive sense because when parties have more to disagree over, the prospect of agreement dims. Of course, other factors are involved in the decision whether to settle, but in the generality of cases, the prospect of fee shifting under the EAJA should make settlement more difficult to obtain.

If anything, the EAJA probably creates a perverse incentive to litigate. Anecdotal evidence suggests that some government attorneys view an award of attorney's fees as stigmatizing because of the prerequisite determination under Section 2412(d) that the government's actions were not substantially justified. Few attorneys believe that the policy or enforcement choice they are defending was unreasonable, and thus few are willing to concede that a prevailing party is entitled to fees under the current standard. Settlement is thus less likely because of the understandable reluctance to label the government's conduct, and by extension one's own, as unreasonable.

Moreover, government litigators may be loath to settle for fear of supporting future litigation against themselves. There is little love lost between some government litigators and their opponents, particularly repeat players such as public interest attorneys, and perhaps an understandable reluctance to reward one's opponent.⁸⁴ The substantial justification standard thus opens the door for government litigators to base their determination of whether to settle cases on factors extrinsic to cost-benefit analysis such as the identity of the claimant's counsel. Should the government be required to pay a series of hefty awards, its willingness to play favorites might wane--but the appearance of impropriety might persist because the decision to settle a case is based on subjective factors.

Many instances of government litigation do not involve money per se, with litigation over eligibility for benefits and over contract performance

⁸²Should the government overestimate the amount of private attorney's fees required for litigation, then the prospect for settlement is accordingly enhanced.

⁸³Predicting the Effect, *supra* note 21, at 157; cf. Explaining Constitutional Tort Litigation, *supra* note 25, at 755 (hypothesizing that the government is generally less risk averse than its opponents).

⁸⁴Government attorneys may also wish to avoid paying fees under the EAJA given that the EAJA rates--even with the cap--seem significantly in excess of what most government attorneys earn.

constituting the primary exceptions.⁸⁵ Settlement of nonfinancial issues is typically far more difficult to obtain. And even those suits involving money may readily implicate principles extending far beyond the case at hand. That the EAJA in theory makes settlement of all claims marginally more difficult, therefore, probably has less tangible impact than might otherwise be expected. Nonetheless, passage of the EAJA, particularly in light of the likely disagreement over applicability of the substantial justification standard, has made settlement of the underlying suits between private litigants and the government--at least as a theoretical matter--slightly more difficult to achieve.⁸⁶

B. Litigation Costs

In addition to making settlement less likely, the EAJA--in no small part due to the substantial justification standard--has significant impact in increasing overall litigation costs. Fee disputes are notorious for their complexity. The Supreme Court has decried the tendency for fee litigation to dwarf the underlying dispute between private litigants and the government,⁸⁷ resulting in--as Justice Brennan noted--socially unproductive litigation, "which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion . . . in its wake."⁸⁸ The EAJA thus adds substantial costs to government litigation--even aside from the possible impact on settlement of the underlying dispute--by increasing government attorney time, private attorney time that must be compensated by the government,⁸⁹ and the time of adjudicators in both the judiciary and agencies that also must ultimately be paid for by the taxpayer.

⁸⁵Tort claims involve money, but the Equal Access to Justice Act excludes fee shifting in tort cases. The Federal Tort Claims Act permits private counsel to recover fees out of the award itself. See 28 U.S.C. §2678.

⁸⁶Elimination of the substantial justification standard in some contexts might hinder settlement. Government attorneys, for instance, might be reluctant to settle cases or might decline to appeal adverse judgments if they recognized that a fee award would automatically follow. But just as likely, the prospect of fees might prompt government attorneys in other cases to settle or decline appeal because of the very fear of expanding the government's fee liability. Indeed, as discussed at text accompanying notes 77-83 *supra*, settlement overall should be facilitated in the absence of the substantial justification standard because one key variable has been removed from settlement negotiations.

⁸⁷*Hensley v. Eckerhart*, 461 U.S. 424, 437 (1982).

⁸⁸*Id.* at 455 (Brennan, J., dissenting).

⁸⁹In addition, private attorney time that is not compensated by the government can well be considered socially unproductive.

Consider a relatively run-of-the mill EAJA case arising out of a civil penalty action brought by the Department of Agriculture⁹⁰ under the Plant Quarantine Act.⁹¹ The private party successfully challenged the penalty, arguing that the pertinent regulations governing inspection of luggage and personal effects could not conceivably cover his conduct. He subsequently filed a fee application under the EAJA for approximately \$6,500. Agency attorneys contested the application, arguing both that the hours were excessive and that the agency had been substantially justified in bringing the civil penalty action. At the end of hearings, the hearing officer determined that the agency had not been substantially justified, but reduced the award of fees by roughly 25%, for an award of slightly under \$5,000. So far, so good. The question from the agency's perspective should be whether the \$1,500 saved was cost effective given the need for the government to pay fees on fees, the need for the government to compensate its own attorneys and staff in contesting the EAJA application, and the need for the government to absorb the costs incurred by the agency hearing officer and support staff. The government unquestionably prevails in some EAJA litigation, and that litigation presumably deters inflated claims in future EAJA cases. Yet it is undeniable that defending against EAJA requests requires significant resources that could perhaps be best utilized elsewhere. No accurate gauge of the overall amount can be made because government attorneys rarely record their hours expended in litigation.

In the particular Department of Agriculture case, however, agency officials recorded the amount of time expended on the case. Combining hours recorded by government attorneys in fighting the EAJA application (50 hours + 18 hours' support staff) and the hours recorded by the hearing officer (40 hours + 16 hours for support staff) and then by the agency head on review (20 hours + 8 hours for support staff) suggests that the government as a whole expended more in fighting the fee application than was originally sought in the case. Indeed, in this instance, there was no report of whether the agency in addition paid the private attorney's fees on fees, which would have increased the government's expenditures even more. Thus, taxpayers expended roughly \$9,000⁹² in saving \$1,500 in EAJA fees, when the most that could have been saved was \$6,500. Perhaps there were nonfinancial considerations in litigating the EAJA case, but it appears almost irrelevant that the government

⁹⁰In re Wiley Prentice, P.Q. No. 61 (Oct. 27, 1988).

⁹¹7 U.S.C. §151, et seq.

⁹²As a rough measure, I used a \$75 per hour figure for the salaries and fringe benefits of government litigators and hearing officers, and \$20 per hour figure for support staff, even though those figures are likely somewhat high.

successfully reduced the fees paid, because it was doomed to lose financially from the outset.

The Department of Agriculture case could be viewed as atypical,⁹³ and it could be explained as nothing more than short-sighted litigation strategy. But it suggests a more important point, namely that there are significant hidden costs in EAJA litigation, costs in terms of government attorney time⁹⁴ and that of adjudicators in agencies as well as on the bench.

⁹³There are of course other instances. The United States Army Corps of Engineers' unsuccessful effort to combat fees in *Golden Gate Audubon Society v. United States Army Corps of Engineers*, 732 F. Supp. 1014 (N.D. Cal. 1989), provides another illustration. The prevailing plaintiffs originally requested \$43,420 in fees after the court determined that the government had not been substantially justified. Government attorneys nonetheless challenged the fee request on a number of grounds: the reasonableness of hours expended in the summary judgment motion, the reasonableness of hours expended prior to filing the complaint, nonproductive and duplicative work, etc. As the district court remarked,

Ironically, that portion of plaintiffs' current claim *not* challenged by federal defendants amounts to \$34,012, nearly 80% of the original claim. Thus, in retrospect, it appears that by intensively litigating the fee petition, federal defendants caused plaintiffs to incur approximately \$31,000 in additional expenses (to say nothing of the significant portions of defendants' and the court's time that were also consumed) in order to potentially save approximately \$9,408.

Id. at 1022 n.12 (emphasis in original). Government attorneys estimated that they expended sixty hours litigating the fee issues, though that figure appears extremely low given the briefs and hearings involved. See also A. Koh, *Lawyer Awarded \$10,000 Fee After Government Refused \$600*, N.Y.L.J., Nov. 12, 1987, at 1. col.4.

Although the study suggests that government litigators at times make short-sighted litigation decisions in combatting EAJA applications, other efforts have been justified from a cost-benefit perspective. See text accompanying note 119 *infra*.

⁹⁴Consider as well the efforts of the government attorneys in the Civil Division of the Justice Department in contesting EAJA applications. The Civil Division, a litigating force of some 500 attorneys, is responsible for all tort, contract, and agency litigation involving the government, with the exception primarily of antitrust, tax, and some specialized agency cases. Most EAJA litigation is conducted outside the Department of Justice by agency staff in conjunction with Assistant United States Attorneys. For instance, 15 cases decided in the target year were handled by DOJ attorneys out of the more than 400 reported to the Administrative Office of United States Courts, and only 10 were supervised or litigated by the Civil Division. Because line attorneys in the DOJ are now required to record time spent on various cases (even though their reporting duties are in no way policed and in some instances honored in the breach), some approximation of the government attorney resources expended in EAJA litigation is possible. During the target year over 4,500 hours were recorded on EAJA matters in the Civil Division (not limited to the cases resolved during that year), exclusive of most time expended by supervisors within the Division's various branches. Those hours, which according to DOJ officials considerably underestimate hours actually expended, represent more than the full workload of two attorneys. Nor do those hours include the efforts of attorneys from the DOJ's client agencies, which assist DOJ attorneys in handling EAJA (as well as other) cases arising out of their agencies.

The substantial justification standard in effect requires parties to relitigate their underlying dispute. Eligible parties must demonstrate to the judge or hearing officer that the government was not only wrong in the underlying litigation, but that it was inexcusably wrong. To make that showing, private parties must analyze all the legal questions and factual disputes anew in an effort to persuade the decisionmaker of the government's lack of substantial justification. At times, fresh research by both sides is required to determine whether, in light of prior precedents, the government was justified in asserting the position that it did. At other times, research can reveal whether the government should have known not to rely on a discredited witness or statistical study. Thus, not only is there an element of repetition in arguing that the government was not only wrong but unjustifiably so, but the very arguments can be taxing to litigants and courts alike.

In assessing the cost of the EAJA, therefore, it is insufficient to factor in only the costs of payments to private attorneys. In the absence of the EAJA, fewer government attorneys would be required, or government attorneys could be shifted to work on issues of possibly greater social importance. Moreover, the burden on the federal judiciary would be lightened somewhat, and the workload of agency hearing officers would correspondingly diminish. From the taxpayer's perspective, the uncertain benefits of the EAJA in general must be assessed against the backdrop of increased litigation costs on several fronts, and the utility of the substantial justification standard, which saves the government money in some cases, must be balanced against the increased costs of litigation attributable to that standard.

C. Empirical Data

To gauge the current costs of the EAJA, I conducted a study of the costs associated with disposition of all EAJA applications resolved from June 30, 1989 to June 30, 1990. I selected that time period because it was the most recent available following the Supreme Court's decision in *Pierce v. Underwood*,⁹⁵ which held that the substantial justification standard was essentially one of reasonableness, and that appellate courts should defer to the trial courts' findings on that issue.⁹⁶ Within that period, the Court issued its

⁹⁵487 U.S. 552 (1988).

⁹⁶Although I did not study the number of appellate decisions preceding and following *Underwood*, evidence compiled by the Administrative Office confirms that there have been somewhat fewer appeals in recent years. In 1988, for instance, the Administrative Office reported that 67 EAJA decisions were issued by appellate courts, and 54 decisions the next year. Annual Report of the Director of the Administrative Office of the United States Courts 1988-

decision in *Commissioner, INS v. Jean*,⁹⁷ holding that the EAJA requires the government to pay the private party's fees for litigating fee issues whenever the government cannot bear its burden of demonstrating substantial justification for the underlying litigation. The decision in *Jean* should have paved the way for a modest increase in the amount of attorney's fees awarded, and accordingly, I would expect the fees on fees paid by the government to increase, barring an increased rate of settlement, in future years.⁹⁸

By statute, the Administrative Office of United States Courts ("AO") collects all EAJA decisions resolved by Article III tribunals. The reporting scheme, however, is predicated on the willingness of court clerks to transmit the pertinent information (on provided forms) to the Administrative Office. The AO reported 412 decisions for that time period, and over 90% of the reported cases involved social security claims. Some caution is in order, however. No decisions, for instance, were received from California district courts, the Southern District of New York, and Texas. In fact, the Administrative Office report itself reveals that applications from four districts--New Jersey, Northern Iowa, Western New York, and Western Louisiana--accounted for 40% of all dispositions. The number of decisions, and amount of money reported, therefore, underestimate the correct figures.

To supplement the cases reported, I checked all decisions reported during that time period in attorney fee reporters and on the computer networks. A number of decisions were found in that manner, including several in jurisdictions that did not report any cases to the Administrative Office. But those services do not report all EAJA applications arising out of social security claims. To get that number, I requested and ultimately received data from the Social Security Administration (SSA) reporting all EAJA applications resolved during the target year that arose out of individual benefit cases. SSA's figures, which include settled cases, dwarf the numbers reported to the Administrative Office.

Another pool of cases consisted of agency EAJA determinations, which by law are to be reported to the Administrative Conference of the United States. I collected data on cases resolved during the relevant time period, recognizing

1989. In contrast, information supplied to the Administrative Office reveals that only 16 appellate decisions were issued during the target year. Annual Report of the Director of the Administrative Office of the United States Courts 1990.

⁹⁷496 U.S. 154 (1990).

⁹⁸I was surprised to learn in the study that some parties who successfully obtained fees under the EAJA did not file for fees on fees, either because of oversight or because the amount at stake was not worth the "hassle" of filing for the fees.

that a number of agency determinations were probably not reported.⁹⁹ The two Administrative Conference reports encompassing the target year (the Administrative Conference reports cases decided from October 1 through September 30 of the next year) establish at least a fair approximation of the number of decisions, and amount of money paid, during the target year.

The primary object of the study was to determine the financial significance of litigation over the substantial justification standard in cases resolved during the target year, and secondarily, to approximate the litigation costs involved in EAJA disputes. I hoped to calculate the percentage of cases in which the fee application was denied due to a finding that the government's position was substantially justified, the potential EAJA fees saved by the government in such cases, the amount of fees on fees paid (fees paid to prevailing parties for work on the fee case), and finally, a rough approximation of the amount of government attorney time defending against EAJA applications.¹⁰⁰ I contacted attorneys involved in every agency case, and in every other case not involving social security litigation. Moreover, I took a statistical sampling, based on a random number table,¹⁰¹ of all individual benefits cases reported to the Administrative Office.¹⁰² Over one-half of the private attorneys responded, generating usable (if approximate) data for those cases. See Table 1. (Tables are in the Appendix.) The data were sketchiest with respect to the amount of fees awarded for the fee litigation itself. Many private attorneys either had not kept accurate records, or were unwilling to sort through their records to ascertain a separate amount. Moreover, it was not possible to piece together how many of those hours were devoted to litigating the substantial justification

⁹⁹In each category, there may be a problem of unreported settled cases. Anecdotal evidence suggests that the proportion of settled unreported cases was quite low. And all the settled cases were reported by the SSA because of its centralized payment office.

¹⁰⁰Calculating judicial cost is extremely difficult. See J. Kakalik & A. Robyn, *Costs of the Civil Justice System, Court Expenditures for Processing Tort Cases* (1982).

¹⁰¹Use of a random number table should lead to a representative sampling, even though some jurisdictions did not report EAJA cases to the Administrative Office. Social security cases in my review did not vary significantly from region to region, except for the procedures by which they were resolved.

¹⁰²To some extent, that focus was dictated by the fact that it took so long to obtain the data from the Social Security Administration, and that the SSA data did not include names of either the private or government attorney involved. In any event, the size of both groups of social security claims was similar, as was the percentage of cases in which fees were awarded (85%). The failure to report to the Administrative Office appears largely due to the unwillingness of court clerks to cooperate with that office, and that factor should not skew the representativeness of the cases that were in fact reported. It is also possible that some court clerks did not report data on settled cases even though those settlements must generally be approved by the courts before SSA will pay the award.

issue, although counsel attributed the bulk of the research to litigation over that issue.¹⁰³

In comparison, the government response overall was quite limited. Too few government attorneys keep track of their time to make study of government time meaningful. Nonetheless, some government attorneys record their time on particular cases, either because of an agency requirement, as at the Department of Justice, or because of personal interest. With the data received, government attorney time could be assessed in at least a fraction of the cases. A model was generated from the information available in nonsocial security court cases, social security individual benefits cases, and agency cases (see Tables 2-5 in Appendix), even though the statistical representativeness of the sample is unclear.¹⁰⁴ As with information obtained from private attorneys, it was impossible to attribute what percentage of government attorney time was devoted to demonstrating the substantial justification of the government's position. At least in all cases not involving individual benefits claims, however, the issue of substantial justification was litigated in every case and, judging from anecdotes, generally received the most focus from the government (as well as private) litigators.

1. Court Cases Not Involving Individual Benefits

For the target year, the Administrative Office reported 412 EAJA applications resolved, of which 27, or 7%, did not arise out of social security individual benefits litigation. Of those 27 cases, fees were granted in 21 cases,¹⁰⁵ and the government's defense of substantial justification was dispositive in four of the five denials¹⁰⁶ for which I received data.¹⁰⁷ The

¹⁰³Disputes over the reasonableness of hours in contrast generally require less research.

¹⁰⁴There was obviously self-selection, but how that may have skewed the data is unknown.

¹⁰⁵Those fee awards were not necessarily paid, however, because the EAJA decisions are subject to further review.

¹⁰⁶The Administrative Office reported the sixth denial as an application against the Department of Energy seeking \$267,476 in fees.

¹⁰⁷Roughly 20% of the cases, in other words, were denied because the government's position was substantially justified. That figure was similar in the preceding year, but significantly larger in the year before.

Fees can be denied for other reasons besides the substantial justification of the government's position. The Administrative Office reported that of the 41 applications denied that year (including social security cases), only 26 were denied because of the government's substantial justification. Annual Report of the Director of the Administrative Office of the United States Courts 1990. Others were denied because of the lack of timely filing, because the applicant was not a prevailing party, etc. During the preceding year, only one-half of all denials rested on a

median award in this group of 21 cases was approximately \$40,000,¹⁰⁸ and the mean award was slightly more, at \$48,000. The difference between the median award and mean award was probably less this year than in most, because there was only one award in excess of \$200,000.¹⁰⁹

Within this group of 27 cases, I received relatively complete data only on four cases (Table 2). The government lost in all four cases, and the amount awarded was \$108,931. In litigating the cases, the private parties collected \$20,717 in fees on fees, and government attorneys recorded an estimated 288 hours of work, which would amount to roughly the same amount of money if calculated at \$75 an hour.¹¹⁰ The government attorney time was significantly understated, given that the efforts of client agencies were not included in the hours recorded. Obviously, litigating the substantial justification issue in these four cases was to no avail, and cost the taxpayer considerable money, without even considering the judicial resources expended. In this group of cases, litigation expense on the fee application approximated 40% of the amount of fees originally claimed by the private prevailing party, not counting the unrecorded time of attorneys from the client agency.¹¹¹ Although the government did save considerable money in litigating the substantial justification issue in several large cases for which I did not receive government attorney time, the amount saved represents only a modest percentage of the amount awarded overall. Approximately 15% of the \$1.7 million sought in

finding of substantial justification. Annual Report of the Director of the Administrative Office of the United States Courts 1989.

¹⁰⁸The figures reported to the Administrative Office and Administrative Conference include expenses such as photocopying costs, expert witness fees, etc. Those expenses were so minimal in relation to the amount of fees paid that I have ignored them for the purposes of this study. For instance, the AO reported that, in the target year, \$40,229 was awarded in expenses in comparison to the \$2,179,350 granted overall.

¹⁰⁹Greater awards would skew calculation of the mean. In comparison, the Justice Department recently settled two EAJA applications for more than \$1 million each. Both cases arose out of successful challenges to INS policy with respect to refugees. *Orantes-Hernandez v. Thornburgh*, No. 82-1107 (C.D. Cal. July 2, 1991) (\$2.5 million) (refugees from El Salvador); *Jean v. McNary*, No. 81-1260 (S.D. Fla. Feb. 25, 1991) (\$1.7 million) (refugees from Haiti).

¹¹⁰Government attorneys make less than \$75 an hour, but the \$75 estimate includes overhead and benefits. Similarly, the billing rate of attorneys in private firms is greatly in excess of the compensation paid to those same individuals.

¹¹¹In the four cases, the total amount claimed was \$117,376. The parties evidently included in that amount sums ultimately requested (and subsequently granted) for work on the fee applications. Thus, the percentage of litigation expense in the sample actually exceeds 40% of the amount originally claimed. That percentage, though high, is not startling given that preliminary research suggests that the legal fees of both sides taken together in small cases may often exceed recovery by a plaintiff. Trubeck, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 72, 121 (1983).

those 27 cases was saved by virtue of the substantial justification defense,¹¹² though some of those fees might have been disallowed for other reasons. Given the government's relatively low success rate, eliminating the substantial justification standard would not have increased the government's exposure appreciably in this group of cases. As mentioned previously, the substantial justification standard might nonetheless serve as a critical filter in preventing other cases from being filed.

Furthermore, the amount of fees requested in these four cases was \$117,376, of which \$108,931 was awarded. Even with respect to the reasonableness of the fees requested, therefore, the government arguably did not act in a cost-effective way--putting to the side the possible deterrent effect of vigorously contesting the amount of fees. The government presumably expended more in litigation than the \$9,000 saved. The Administrative Office figures bear this relationship out, though not as dramatically. In the 21 cases in which \$1 million was awarded, only \$1,187,624 was claimed. Thus, the modest reduction in attorney's fees was to a large extent offset by the need to pay government attorneys' salaries and the need to pay fees on fees. Government efforts were plainly cost effective in contesting only the several large fee applications presented--litigating the vast majority of remaining cases, at least in retrospect, appears wasteful.

2. Individual Benefits Cases

There are two sets of data with respect to individual benefits cases administered by the Social Security Administration. First, the Administrative Office reported applications for EAJA fees in 385 social security cases, of which 350 were granted, or 91% of the total. For those 350 cases, the amount claimed was \$1,300,005, and the amount awarded was \$1,171,075. The amount saved in the 35 cases was \$160,947, some of which can be attributed to the court's determination that the government's position was substantially justified. The percentage of applications denied by virtue of the substantial justification defense was less than 10%.¹¹³ The mean award was \$3,346, which was probably close to the median given that there are few, if any, huge awards in individual benefits cases.

The more complete data submitted by the Social Security Agency were quite similar. There were 2,007 applications for fees resolved, with 1,700

¹¹²If, in the one case for which I did not receive data, the court denied fees on the ground that the government was substantially justified, then the percentage saved by virtue of litigating the substantial justification issue would double.

¹¹³HHS also successfully defended against fee applications because of their lack of timeliness, because the private party had not prevailed, etc.

granted, or 85% of the total.¹¹⁴ Of the applications granted, the mean request was \$3,584, and the mean award was \$3,244. Of the applications denied, the average request was \$2,867. The total amount potentially saved by litigating the substantial justification issue was obviously quite modest, putting to the side again the question of deterring additional claims.

I received relatively complete data on 14 HHS EAJA applications arising out of individual benefit claims (Table 3). The private party prevailed in 13 cases, which departs only slightly from the overall average in such cases.¹¹⁵ In those 13 cases, courts awarded (through approval of settlements or after litigation) \$59,335, for a mean award of \$4,564, slightly above the figure for all HHS cases. Of that \$59,335 total, \$4,595 was expended on fees on fees, and HHS regional attorneys recorded 90 hours of attorney time, which would amount to \$6,750 if calculated at \$75 per hour. Those amounts taken together constitute approximately 20% of the amount of fees claimed, a lesser percentage than in nonsocial security cases. In all of the cases, however, the regional HHS attorney works in tandem with an Assistant United States Attorney. The hours for the AUSA's were not recorded, but even if the AUSA's devoted less time to EAJA applications than did the regional attorneys, the number of hours expended by government attorneys should be substantially higher than the numbers I obtained. In addition, it is impossible to reconstruct how much time was devoted to the substantial justification issue, but in the only case in which the government prevailed, the HHS attorney expended an estimated 15 hours in defeating a \$7,650 claim, which was an abnormally large EAJA claim. Thus, in this sample of individual benefits cases, the utility of litigating the substantial justification issue is open to serious doubt, and in fact, the government evidently conceded the issue in some cases by agreeing to settlement. Extrapolating to the entire pool of HHS cases, the government saves very little from litigating the substantial justification issue, and the administrative burden is considerable. The greater rate of settlement in HHS cases is thus quite understandable. Fees on fees as well as the need to compensate government attorneys nearly cancel out the amount of money saved due to the periodic finding that the government's position was substantially justified.

In addition, although the data were sketchy, government attorneys successfully bargained or litigated the applications down from the \$67,327 originally requested, to the \$59,335 awarded. Overall, then, in the 14 cases

¹¹⁴According to the Administrative Office, the 85% figure has stayed relatively constant for the last several years. Annual Report of the Director of the Administrative Office of the United States Courts 1988-1990.

¹¹⁵The HHS cases were from two regions, but there is no reason to suspect that HHS cases in those two regions differ significantly from cases in the rest of the country.

government attorneys saved slightly more by litigating than they would had they paid the full fee requests, not considering 1) any deterrent effect on subsequent applications; 2) hours generated by AUSA's, and 3) hours expended in judicial resources. From the perspective of the taxpayer, the wisdom of such government litigation is questionable at best, unless the deterrent effect on future fee applications is significant.

3. Agency Cases

The Administrative Conference issued two reports to cover the time period targeted in the study. In its first report, it reported that 108 fee applications from agency adjudications were resolved, with 56 grants, and 52 denials. The amount awarded was \$577,077,¹¹⁶ the mean award being \$10,305. In 33 of the 52 applications denied, the agency determined that the government had been substantially justified in the underlying litigation.

In the next year, only 70 applications were decided, 34 applications granted, and 36 denied. The total amount awarded, however, \$961,672,¹¹⁷ was almost double the preceding year. The difference largely stemmed from the presence of one \$475,724 award. Because of that award, the mean award jumped to \$28,284, while the median stayed constant, at \$10,868. Nineteen applications were denied because the agency determined that the government had been substantially justified in the underlying litigation.¹¹⁸

Within this group of cases, I received relatively complete data on eight cases, which constitutes roughly 10% of the cases in the target year. See Tables 4-5. The government defeated the application in two cases, in one because its position was substantially justified, and in the other on jurisdictional grounds. The total amount awarded from the eight applications was \$651,678, which included the single largest award in that year, the \$475,724 award in resolving consolidated claims before the Armed Services Board of Contract Appeals. The amount saved in the one case in which the government was determined to be substantially justified was \$9,133, assuming that the full amount claimed was properly payable. In pursuing the six

¹¹⁶That figure apparently does not include awards for 22 cases in which the amount was not reported or in which the agency, after determining that the private party was entitled to fees, directed the parties to engage in settlement negotiations. Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act (October 1, 1988--September 30, 1989).

¹¹⁷That figure apparently does not include awards for 11 cases in which the amount was not reported or in which the agency, after determining that the private party was entitled to fees, directed the parties to engage in settlement negotiations. *Id.*

¹¹⁸Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act (October 1, 1989--September 30, 1990).

successful applications, private attorneys estimated that they incurred \$51,358 in fees that were compensable as fees on fees (and factored into the overall award). For their part, government attorneys estimated that they expended 318.25 hours in fighting those applications, which at \$75 an hour (for the sake of comparison) amounts to \$23,869 of taxpayer money. Litigation fees thus constituted only 6% of the total amount claimed, and twice that percentage for the amount awarded.

It is impossible to determine how much of the private and government attorney resources was devoted to the substantial justification issue in this group of cases. Plainly, however, litigating over the substantial justification issue was not justifiable on a cost-benefit basis, and briefing the substantial justification issue generally takes up considerable time because of the research involved. At most only \$9,000 was saved in comparison to the ultimate awards totalling \$651,000. This figure is misleading, however, given that the government prevailed on the substantial justification issue in 29% of the cases during the 2-year period, which is almost 50% more than its success rate in nonsocial security court cases during the target year.¹¹⁹

Government attorney efforts in this group of cases were rewarded in reducing the amounts originally claimed. According to the data submitted by the litigants, the amount originally sought in this group of eight cases was \$1,308,713. The government thus saved the taxpayers half of the amount claimed at a cost of approximately only \$51,000 in fees on fees and perhaps half that amount again in government attorney time. Putting to the side the question of adjudicatory resources, litigating over the size of the claim, at least in this group of cases, was clearly cost effective. That effectiveness, however, was largely due to the agency's success in reducing the large contract award from \$968,490 to \$475,724. Excluding consideration of that case, private claimants in the past year originally claimed \$609,570 in the fee cases in which \$485,947 was ultimately awarded (Table 5), a percentage saving that is still somewhat higher than in the court cases.

In short, the data collected confirm that the government successfully invokes the substantial justification defense in a modest proportion of all cases, in less than 15% of the social security cases, in 20% of nonsocial security court cases, and in 30% of agency cases. The data collected, however, were too sketchy to demonstrate anything else empirically. The failure of government attorneys to record the time they spend on various cases itself suggests the difficulty of forcing the government at present to internalize the

¹¹⁹At least one commentator has speculated that the greater incidence of denials due to substantial justification in agency cases reflects the agency adjudicator's lack of independence. Stewart, *The Equal Access to Justice Act: A Failure in Agency Proceedings?* NAT'L L. J. 20 (May 21, 1984).

cost of litigation. Nonetheless, the evidence collected in the sample of cases corroborates the thesis that, had the substantial justification standard been rescinded, the overall government expense in administering the EAJA would not have been significantly greater, putting to the side the question of how many new applications might be filed. The money saved through litigation was modestly in excess of the amount of fees on fees paid and compensation due government counsel, disregarding judicial costs.

III. Potential Revisions

The data generated by the empirical study, in conjunction with analysis of the incentive structure in the Act, suggest that two quite different approaches are possible to address the most prominent deficiencies in the Act--the inordinate transaction costs and the less than successful effort to deter government wrongdoing. The most dramatic option would be repeal.¹²⁰ Taxpayer dollars could be more effectively allocated elsewhere if monitoring governmental wrongdoing is the predominant goal of the Act.¹²¹ Alternatively, if the Act is to be retained, an automatic one-way fee shifting mechanism might marginally increase deterrence of government errors and encourage more suits to be brought without much extra expense. Transaction costs would be minimized and settlement plausibly facilitated under such a scheme, and government officials--particularly those in charge of enforcing regulatory requirements and making eligibility determinations for benefits--might be forced to think a little longer before acting. Converting to automatic fee shifting might also make sense as a compensation strategy, even though it is debatable whether eliminating the substantial justification standard would comport with corrective justice principles. Given the competing pull of the underlying policy goals--equalizing the parties' bargaining positions, minimizing government errors, and furthering corrective justice--the choice of whether to rescind the Act, convert to automatic fee shifting, or do nothing may appear close. But, irrespective of one's views of changing the Act in general, automatic fee shifting is warranted in the social security disability context.

¹²⁰Whether one would favor such an option in the absence of assurances that the money saved--arguably \$7 to 8 million a year (\$5 to 6 million a year in payouts and several million in transaction costs)--would be channeled to parties injured by the government raises a separate question.

¹²¹Some have suggested that additional training of government employees or additional congressional inquiries following on the heels of government wrongdoing might help deter subsequent wrongdoing. See P. Schuck, *Suing the Government* (1983).

A. Rescinding the Act

Despite its all too evident costs, the EAJA has not wrought any benefits that can be empirically verified. For reasons canvassed earlier, the prospect of attorney's fees only rarely enables more vigorous representation of private parties in litigation against the United States. Most private parties satisfying the eligibility requirements in the Act have the financial resources or incentive to contest governmental action irrespective of the cost of the litigation. Those parties who can barely afford counsel are not likely to hire counsel merely because of the EAJA since they need to be confident not only of ultimate success, but also of the government's inability to demonstrate that its position was substantially justified. The EAJA might afford such claimants or other parties the luxury of obtaining better counsel, or it might afford them greater financial security, but only seldom does it enable litigation to proceed where it would not in the absence of the Act.

At the same time, there is little reason to believe that fee shifting under the Act has successfully deterred government wrongdoing. The substantial justification standard itself makes the prospect of added deterrence unlikely, because government officials independent of the Act have considerable incentives to formulate only reasonable government policy and pursue only reasonable enforcement initiatives, both because of internal political checks and the omnipresent likelihood of external oversight through judicial review. Moreover, the size of any attorney fee award is likely to be too small to be of concern to either policymakers or enforcement officials.

Yet, despite the Act's likely lack of effect, millions of dollars each year change hands, a significant percentage of which is attributable to the transaction costs or litigation expense arising out of disputes over EAJA applications.¹²² To be sure, some attorney fee awards make challenges to future government conduct more likely, and compensation under the Act is normatively appealing to many because of the government's possible "fault" in forcing the private party to litigate. Much of the overall cost in administering the EAJA, however, is attributable to payment of government attorneys and government decisionmakers, which in no way serves the underlying purposes of the Act. Whether from a perspective of deterrence or corrective justice, that money can more effectively be spent in other ways.¹²³

¹²²The study suggested that 20-40% of the EAJA's cost in court cases is attributable to such transaction costs, exclusive of the resources consumed in judicial decisionmaking.

¹²³I do not want to discount the possibility that the Act should be retained as it is, because of its marginal role in equalizing the parties' litigating strength, and its concomitant value as a compensation measure, tempered by distributive concerns. Except for social security cases, as I discuss at text accompanying notes 145-67 *infra*, such a result seems plausible, even though the

B. Automatic Fee Shifting

Converting to an automatic fee shifting mechanism would plausibly provide more incentive for private parties to contest government overreaching in at least some settings, and possibly augment deterrence of governmental errors. Although the change would lead to greater government exposure to fee awards, the larger number of awards would be balanced to some extent by savings in litigation costs. And while the move from a fault standard as a basis for compensation might be unpalatable to some, automatic fee shifting arguably would have beneficial distributive effects in ensuring that private parties of modest means are fully compensated for injuries due to governmental errors.¹²⁴

1. Scope of any Change

For reasons discussed previously, the case for added deterrence is more plausible in fact-specific contexts such as benefit determinations or enforcement than for challenges to general policy.¹²⁵ Government officials implementing preexisting guidelines are more likely than their counterparts to internalize the potential cost from attorney's fees. They are more concerned with case-specific facts, and the costs associated with enforcing broad policies in particular contexts. Moreover, case-specific decisions, as opposed to policy decisions, generally involve less money, so that the prospect of attorney fee awards is likely to be more significant in comparison. It would be tempting, therefore, to limit the EAJA to the situation-specific contexts.

Act appears quite inefficient. If the substantial justification standard is retained, transaction costs should be minimized in the ways I suggest at text accompanying notes 168-96 *infra*.

¹²⁴Automatic fee shifting against large parties might also make sense, but only if such fee shifting is reciprocal, as recommended under the President's Executive Order 12778 on Civil Justice Reform §1(h) (Oct. 23, 1991).

¹²⁵As discussed previously, the internal checks safeguarding government action operate more effectively at the policy level. Government policy decisions are generally preceded by more internal discussion, more input from affected private parties--whether through notice-and-comment rulemaking or informal lobbying--than are case-specific decisions. The generality of policy decisions ensures greater visibility and usually greater debate. In addition, Congress itself (or more accurately, interested members of Congress) is more likely to be aware of government policy as opposed to case-specific determinations, because more people are affected and greater resources are at stake. *Ex ante*, Congress can therefore more readily exercise a check on the content of policymaking than on case-specific decisions due to relative visibility of government policy, and the likelihood of congressional oversight *ex post* is also greater for policymaking than case-specific decisions, if for no other reason than because of the appearance of impropriety if Congress meddled in particular enforcement or benefit proceedings.

Consider the facts underlying the Supreme Court's fee decision in *Pierce v. Underwood*.¹²⁶ There, individuals successfully sued the Department of Housing and Urban Development for its decision not to implement an "operating subsidy" program which was ostensibly authorized by Congress. The pertinent housing statute provided for three subsidy programs. While the statute provided that the Secretary was "authorized to make" the operating subsidy payments in question, it stated that the Secretary *shall* make the other payments. In 1974, Secretary Hills determined that, in light of the insufficient funds provided by Congress, she would allocate the funds to the two subsidy programs she believed Congress had stressed. That decision had enormous practical significance to apartment owners, as well as dwellers, across the nation, and the decision was apparently reached at the highest level of the agency.¹²⁷ Even though the decision was not preceded by notice-and-comment rulemaking, interested parties had ample opportunity to lobby the Secretary before she made the decision. And because the decision had immediate ramifications, it was subject to oversight by interested committee members in Congress. Thus, while the decision may well have been incorrect, it had been substantially shaped by political forces, and the existence of such political checks minimized the likelihood of an arbitrary decision.¹²⁸

In contrast, consider the dispute underlying the court of appeals' award of fees in *Wilkett v. ICC*.¹²⁹ There, a trucking company successfully challenged the ICC's denial of its application for an expanded license. ICC officials refused the request because they had uncovered evidence that the owner had been convicted of various nontransportation related criminal offenses, despite the fact that the owner had complied with ICC regulations fully in the past, and despite the fact that the ICC had previously considered only the company's track record of compliance in determining fitness for future service. The ICC's fact-specific determination in the case set no policy for the future,¹³⁰

¹²⁶ 487 U.S. 552 (1988).

¹²⁷ See *Ross v. Community Services, Inc.*, 395 F. Supp. 278, 285-86 (D. Md. 1975).

¹²⁸ See also *Trahan v. Reagan*, 824 F.2d 96 (D.C. Cir. 1987) (awarding fees for successful challenge to IRS issuance of forms, despite the fact that issuance was preceded by substantial debate amongst interested agencies); *Smith v. O'Halloran*, 930 F.2d 1496 (10th Cir. 1991) (awarding fees for successful challenge to Secretary's decision to promulgate "facility-oriented" enforcement system rather than patient-oriented system to ensure that hospitals operated consistent with Medicaid requirement). Cf. *Griffon v. United States Dep't of Health & Human Services*, 832 F.2d 51 (5th Cir. 1987) (denying fees to successful challenge to regulation, adopted after notice-and-comment rulemaking, which gave retroactive effect to procedural statute).

¹²⁹ 844 F.2d 867 (D.C. Cir. 1988).

¹³⁰ Indeed, it evidently could not be reconciled with prior ICC decisions. *Wilkett v. ICC*, 710 F.2d 861 (D.C. Cir. 1983).

probably would not have attracted Congress' attention, and did not likely invite widespread participation within the agency. Irrespective of whether the action was justified, it was not checked as fully by the political process as was the decision underlying *Underwood*.

The distinction between government policy and implementation decisions, however, often breaks down in practice.¹³¹ Government policy has long been made not only through rulemaking and other less formal modes, but also through case-by-case enforcement actions or benefit determinations.¹³² Eligibility standards for benefits or licenses, for instance, may become clearer as elaborated in each successive agency determination as in *Wilkett*.¹³³ Availability of EAJA awards in case-specific implementation actions might nonetheless serve a salutary purpose. Commentators have long urged agencies to formulate policy through rulemaking rather than adjudication.¹³⁴ At least in theory, policy emerging through rulemaking (or even less formal means, as in *Underwood*) benefits from wider participation from interested members of the public as well as within the agency itself. The ramifications of proposed

¹³¹Many agency policy determinations, for instance, are unpublished as in *Underwood*, and thus have not been tested by the formal requirements of notice-and-comment rulemaking. The more informal the policy, the closer to case-specific judgment it becomes. Even then, however, greater political checks likely constrain the agency in comparison to case-specific decisions. The generality of the policy ensures against ad hoc deliberations, and the greater impact of a general policy suggests that significant *ex post* checks exist to correct wrongdoing.

¹³²Conversely, some policy determinations affect only a relatively few individuals. Consider, for instance, legislative enactments exempting individuals from rules of broad application, see, e.g., §309 of the Energy and Water Developments Appropriation Act, Pub. L. No. 100-202, 101 Stat. 1329 (1987) (prohibiting Department of Energy from enforcing judgment it had obtained against oil magnate), or targeting one particular enterprise, see Pub. L. No. 100-202, 101 Stat. 1329 (1987) (forcing Rupert Murdoch to divest ownership of either television station or newspaper) (see *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988), striking down the law).

¹³³The Supreme Court has routinely upheld an agency's choice to formulate policy either through case-specific determinations or through general policymaking. In *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), for example, the Court sanctioned the SEC's policy justification for denying a petition for reorganization. The SEC reasoned that, in certain circumstances, management could not trade its own securities during reorganization proceedings, and it intended that reasoning to apply prospectively. Similarly, in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), the Court held that the NLRB could change its prior policy of treating buyers as managerial employees through case-by-case enforcement actions. Authorizing EAJA awards only in fact-specific cases, therefore, runs the risk of affecting government policy formulation as well as implementation of that policy.

¹³⁴See, e.g., Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1986); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

policy may be more easily assessed, and the decisionmakers are not as likely biased by any disposition in favor or against a private party as they may be in litigation. The EAJA thus could spur agencies--at the margins--towards fashioning policy outside of litigation. Agencies could make policy through implementation actions,¹³⁵ but at the risk of opening themselves to EAJA awards.

The distinction between challenges to government policy and fact-specific determinations could be pursued in several different ways. The EAJA, for instance, could be limited to challenges arising out of agency adjudications, since almost all agency adjudications involve enforcement or fact-specific determinations. But such a change would also exempt case-specific decisions heard in federal court, and it might retain fee shifting for some challenges to government policy within its sweep, since government policy is at times challenged through adjudication in the agencies.

Alternatively, the EAJA could be limited to all cases in which the government is the moving party, suing private individuals or companies in court and bringing enforcement actions before the agency. The government generally sues private entities in its enforcement role, and defends against challenges to government policy efforts. Indeed, many federal agencies are divided into enforcement and defense divisions.¹³⁶ Nonetheless, there is not a neat fit between defensive litigation and defense of policy. For instance, the government generally defends against challenges to its benefit determinations, which are case-specific, and the government may either sue or be sued on contract claims. Moreover, just as in private litigation, the configuration between plaintiff and defendant is sometimes happenstance, whether because of a particular procedural requirement forcing targets of enforcement to sue to block enforcement efforts, or because of the declaratory relief sought.

Finally, the distinction between general policy and case-specific determinations could be effectuated by exempting challenges to overall government policy from the Act.¹³⁷ The EAJA could apply only to cases in which private parties have successfully challenged governmental application of

¹³⁵Private parties may challenge previously set policy either by directly challenging that policy or by challenging it instead in the midst of an adjudication over application of that policy to particular facts.

¹³⁶See, e.g., United States Government Manual 711 (1991 ed.) (division of responsibilities in SEC); 28 CFR §0.65 (division within Environmental & Natural Resources Division of Department of Justice).

¹³⁷For instance, courts have needed to determine whether a bargaining proposal is inconsistent with a government-wide rule or regulation under the Civil Service Reform Act, 5 U.S.C. §7117. See, e.g., U.S. Merit Systems Protection Board v. FLRA, 913 F.2d 976 (D.C. Cir. 1990); Dep't of Navy, Military Sealift Command v. FLRA, 836 F.2d 1049 (3d Cir. 1988).

rules to a given factual situation. For instance, the EAJA could exempt successful challenges to "previously-set rules, policies, or practices of general application." The exemption could apply regardless of whether the challenge arose in the context of an adjudication, enforcement action, or rulemaking.

Although the distinction between policymaking and implementation of policy has theoretical validity, the difficulty of distinguishing between the two may suggest to many that it is not worth crafting such an exception. Moreover, the study reveals that there are comparatively few occasions in which fees have been awarded under the EAJA for challenges to government-wide policy as in *Underwood*. Any attempt to confine the EAJA to certain categories of cases--unrelated to the underlying causes of action--is probably unrealistic.¹³⁸

In short, if the goal of the Act is to equalize the strength of the parties and monitor the government's conduct more effectively, then there are at least plausible reasons to adopt an automatic fee shifting approach. Particularly in contexts in which agency officials apply previously set rules on a case-by-case basis, greater monitoring might prove beneficial. Although it is unlikely that awarding fees for successful challenges to rules of general import would improve monitoring of governmental conduct, exempting such policy challenges appears impractical. Thus, those desiring some additional mechanism by which to deter governmental errors as well as to encourage suit may favor an across-the-board switch to automatic fee shifting.

2. Increased Compensation

Converting to an automatic fee shifting mechanism would obviously increase compensation paid by the government to those injured by its acts. The change need not be justified in terms of compensation, because of the possible instrumental reasons favoring elimination of the substantial justification standard. But, in light of the shaky instrumentalist arguments previously discussed, a compensation argument might prove dispositive in determining whether to amend the Act. From a compensation perspective, automatic fee shifting might be defended either because the injury suffered by the private party is "wrongful" even when the government is substantially

¹³⁸There might be several other ways to restrict the scope of any revamped EAJA. Congress, for instance, might choose particular agencies or agency proceedings that, because of questionable actions in the past, warrant coverage. Or, Congress could consider the bureaucratic incentive scheme in various agencies to determine the likelihood that fee awards might chill agency initiative. Agency actions not protected by deferential standards of review, for example, might be exempted from the Act's coverage. The difficulty of making such assessments and the obvious attractiveness of across-the-board rules suggest that the scope of the Act remain the same, even if the Act is otherwise amended.

justified, or out of a desire to redistribute wealth from the government to private parties of modest size whom the government in some way has injured.

It is difficult to discuss views of corrective justice cogently, but it bears emphasizing that, to many, a finding that the government was substantially justified is not tantamount to a finding that there was no wrongdoing. The government may be "at fault" when its underlying position was found unsupported by substantial evidence or was determined to be arbitrary. And some may believe that the government is always at fault in denying benefits to those who are eligible under statutory criteria established by Congress, or in some other way depriving parties of statutory entitlements. Even if the government cannot be considered "at fault," corrective justice principles might suggest compensation if the loss is considered "wrongful."¹³⁹ Finally, if the government can be considered a wrongdoer in a large percentage of cases in which it loses, automatic fee shifting might be justified because of the considerable costs of distinguishing those few cases in which the government is justified.

In any event, irrespective of claims of corrective justice, automatic fee shifting can be defended as a matter of distributive justice. Distributive goals arguably support compensating private parties of modest size who have been injured at government hands. Automatic fee shifting to many is thus consistent with goals of corrective and distributive justice.

3. Anticipated Costs of Automatic Fee Shifting

Converting to an automatic one-way fee shifting scheme for reasons of either increased deterrence or expanded compensation would likely have only a modest impact on overall costs, while more directly benefiting the parties challenging governmental action. Unquestionably, the government would pay more awards under an automatic fee shifting scheme, yet there would be some countervailing savings in litigation expense. Like the Supreme Court's decision automatically authorizing awards of fees for the fee litigation itself,¹⁴⁰ eliminating the substantial justification standard would minimize the need for protracted fee litigation and, in all likelihood, ease settlement of the underlying litigation as well as the fee dispute itself.

In terms of expense, the study suggested that, holding to the side the possibility of increasing EAJA applications, greater payments to private parties under the revised EAJA would to a considerable extent be balanced by savings

¹³⁹For instance, corrective justice principles might require compensation in contexts analogous to "takings" cases even when no government wrongdoing exists. Tort Law and the Demands of Corrective Justice, *supra* note 13. See also text accompanying notes 71-73 *supra*.

¹⁴⁰See text accompanying notes 97-98 *supra*.

in reduced government attorney time, reduced adjudicative costs, and reduced payments for private attorneys for work on attorney fee applications. A sharp increase in the number of applications filed by prevailing parties could markedly increase the EAJA's overall costs. And some increase is to be expected because the substantial justification standard undoubtedly deters some applications from being filed. But the increase is unlikely to be dramatic, since most private parties who prevail consider that there is at least some chance that a court will find the government's position to be unreasonable, as the overall 80% success rate (including agency cases) now attests, and they recognize that any time expended on fee applications can be recouped if an ultimate attorney fee award is made.

Even if more fee applications would be filed under an automatic fee shifting scheme, the change would not likely induce an avalanche of prospecting suits. The "reward" of \$75 per hour is not attractive enough to invite abuse by most attorneys, and of course unsuccessful private parties receive no compensation at all. Even automatic fee shifting, therefore, would not ensure counsel anything close to market rates, barring an exceptional contract with their clients.¹⁴¹

Some, however, might consider automatic fee shifting inefficient in encouraging small claims that are comparatively expensive to litigate. As discussed previously, a party with a contract claim against the United States for \$10,000 might not litigate if its expected fees constitute a significant percentage of expected recovery. With automatic fee shifting, a private party might have the incentive to devote more than \$10,000 of fees to the case. In other words, compensation through the lodestar removes a market constraint on litigation.

The prospect of vigorous litigation over small claims, however, is not necessarily a reason to abandon automatic fee shifting. First, fee shifting equalizes the resources between the government and small private party, which helps ensure that neither side is likely to prevail because of the other side's funding constraints.¹⁴² Second, it is quite difficult to place a price tag on much government litigation such as injunctions to determine whether pursuing the claim is cost effective, particularly given the external effect on third parties.

¹⁴¹See also Note, *Reenacting the Equal Access to Justice Act: A Proposal for Automatic Attorney's Fee Awards*, 94 YALE L. J. 1207, 1221-28 (1985) (arguing for rescinding the substantial justification standard).

¹⁴²The incentive to litigate small claims aggressively may prove beneficial to the system as a whole. Fee shifting enables a plaintiff to extract more from a recalcitrant defendant, and such defendants will more likely settle future small claims expeditiously. See generally Rowe, *The Supreme Court on Attorney Fee Awards, 1985 & 1986 Terms: Economics, Ethics & Ex Ante Analysis*, 1 GEO. J. LEGAL ETHICS 621, 624-25 (1988).

Even if money is at issue, there may well be broader principles at stake. One contractor's successful suit against the government over a nominal sum may benefit many contractors, and if the government prevails, it may gain an advantage in many of its dealings with contractors. Thus, while a change to automatic fee shifting will induce more claims to be filed, the increase in small claims is unlikely to result in socially wasteful litigation.

Moreover, a change to automatic fee shifting should increase the government's incentive to settle the fee dispute, and minimize litigation costs. After losing a case, government attorneys would be able to gauge the government's exposure to a fee award quite accurately, and they would likely wish to conclude settlement as soon as possible to minimize governmental cost--both in paying the private attorney for work on the fee portion of the case, and in paying for government counsel.¹⁴³ In addition, converting to an automatic fee shifting mechanism would eliminate the stigma of finding no substantial justification and thus pave the way for earlier settlement efforts, at least of the fee dispute.¹⁴⁴ Thus, a change to automatic fee shifting would not necessarily cause the government's current exposure to fees to rise exponentially. Increased payment of fees would, to a considerable extent, be balanced by savings in government resources.

On balance, then, the case for converting to an automatic fee shifting mechanism is plausible, but certainly not overwhelming. More private parties injured by government wrongdoing would have the incentive to contest government overreaching, and more private parties would receive full compensation for their injuries. Whether the government as a consequence would change its conduct, however, is much more difficult to predict.

C. The Special Case of Individual Benefits Litigation

Despite the shaky arguments for fee shifting against the government in general, the case for revising the EAJA in the context of social security determinations, which comprise the vast majority of all EAJA litigation, is quite strong. Automatic fee shifting would ensure representation for even

¹⁴³There would be fewer issues over which to disagree. Substantial justification is clearly the most frequent issue in dispute in EAJA fee litigation. Of the 70 fee applications resolved in agency cases during fiscal year 1990, for instance, substantial justification was at least a significant, if not the primary issue, in 53 of the cases. See Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act (Oct. 1, 1989-Sept. 30, 1990).

¹⁴⁴In addition, the change would prevent the government from channeling--or appearing to channel--its efforts into blocking fees for less favored public interest attorneys.

small individual benefit claims for which contingency fee arrangements do not suffice. And from a distributive justice perspective, there is much to say for permitting those whose benefits were incorrectly denied to recover the full amount of back benefits without having to pay attorney's fees. Though the prospect of improving the complex social security system through fee shifting is perhaps chimerical,¹⁴⁵ there is concomitantly little reason to fear overdeterrence.

Transforming the EAJA to automatic fee shifting in the social security context is normatively appealing. First, the change to automatic fee shifting would provide an incentive for private attorneys to accept small individual benefit claims under both Title II and Title XVI of the Social Security Act.¹⁴⁶ Under contingency fee arrangements, most beneficiaries with strong claims of significant size can obtain an attorney, if they desire, to press their claims. For instance, Title II of the Social Security Act, which is an insurance program, directs the SSA to withhold from any judgment a reasonable fee, not to exceed 25% of back disability benefits awarded,¹⁴⁷ thus ensuring counsel a guaranteed payment mechanism. Moreover, the likelihood of prevailing in a disability case under Title II is quite strong, with many specialized attorneys

¹⁴⁵The system is simply too vast. In fiscal year 1989, for example, there were over 300,000 requests for hearings before ALJs, 61,000 requests for review before the Appeals Council, and almost 8,000 cases filed in district court. Given the approximately \$200 billion in total payments that year, the added cost in EAJA fees is de minimis and therefore cannot be expected to induce change. Social Security Administration 1990 Annual Report to the Congress. Moreover, because substantial efforts have already been devoted towards improving the accuracy and efficiency of the system, it may be somewhat optimistic to think that awarding EAJA fees in more cases each year will prompt HHS to consider new ways to improve the system. See generally J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil, M. Carrow, *Social Security Hearings & Appeals* (1978) ("Social Security Hearings"); see also Pierce, *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron & Misretta*, 57 U. CHI. L. REV. 481 (1990).

Nonetheless, the Appeals Council in recent years has begun to review more denials on its own motion before a civil case can be filed. See Social Security Administration 1991 Annual Report to the Congress 13 (Appeals Council has accepted more appeals to ensure "legally defensible hearing decisions"). That action might in part be explained by HHS' awareness that weeding out bad cases may save the agency EAJA fees down the road.

¹⁴⁶42 U.S.C. §401, et seq. (Title II); 42 U.S.C. §1381, et seq. (Title XVI).

¹⁴⁷§206(b), 42 U.S.C. §406(b). Courts currently construe the statutory language to permit a 25% award in almost every context, irrespective of the seemingly independent qualification that the award must be "reasonable." The Sixth Circuit, for instance, has held that awards up to twice the market rate should automatically be considered reasonable, but that any award in excess of that amount should be subject to special scrutiny. *Hayes v. HHS*, 923 F.2d 418 (6th Cir. 1990). See also *Wells v. Sullivan*, 907 F.2d 367, 368-72 (2d Cir. 1990) (approving award of 25% of judgment and discouraging HHS efforts to contest such awards).

expecting to prevail in 80% of the challenges they bring.¹⁴⁸ Although the contingency fee may be quite generous if the back benefits owed are substantial, a 25% award might be insufficient to attract counsel if the back benefits at stake are small. Converting to automatic fee shifting under the EAJA therefore will encourage counsel to represent beneficiaries with small disability claims who cannot attract counsel through contingency fee arrangements.¹⁴⁹

Perhaps more importantly, automatic fee shifting would encourage counsel to pursue supplemental assistance claims under Title XVI of the Social Security Act, which is a welfare program. Although the definition of "disability" is the same under both provisions, claims under Title XVI differ from those under Title II in two fundamental respects. First, they are typically smaller,¹⁵⁰ and second, the payment mechanism under 42 U.S.C. §406(b) is not available,¹⁵¹ thus eliminating an attractive feature of disability litigation. No one disputes that many beneficiaries with plausible claims under Title XVI cannot currently obtain counsel.

Thus, eliminating the substantial justification standard would directly advantage those beneficiaries pursuing small claims, which presumably is the category for which the EAJA is most needed. Although encouraging all small claims to be brought against the government might be inefficient--the judicial system cannot easily handle small claims effectively--encouraging individual benefit claims¹⁵² from those who can least afford to be without benefits arguably is justified.

¹⁴⁸Claimants, both those who litigate pro se and those who retain counsel, ultimately prevail in approximately 50% of court cases. See *Hayes v. HHS*, 923 F.2d 418 (6th Cir. 1990) (estimating that social security attorneys are successful in 50% of the cases they file in court); see also note 153 infra.

¹⁴⁹Prevailing parties currently may seek attorney's fees under the EAJA if the government cannot demonstrate that its position in the underlying litigation was substantially justified. The prospect of fees under the EAJA provides incentive in small cases if counsel can accurately predict the likelihood that the government lacked substantial justification in denying benefits. Eliminating the substantial justification standard would make the prospect of recovery more certain and thus, at least at the margin, encourage more suits. Unlike the award under the Social Security Act, fee awards under the EAJA must be paid by the agency out of appropriated funds. The attorney must return the lesser of the two awards to the client. 99 Stat. 186.

¹⁵⁰The maximum monthly benefit currently is \$422 per month. Social Security Bulletin Annual Statistical Supplement 4 (1991). In contrast, disability benefits are not strictly based on need, and thus can greatly exceed the SSI maximum. Almost one-half of all court cases involving benefit claims administered by the Social Security Administration involve SSI claims, at least in part. Social Security Administration 1991 Annual Report to the Congress 34.

¹⁵¹*Bowen v. Galbreath*, 485 U.S. 74 (1988).

¹⁵²Applications for fees arising out of class actions should be resolved like any other nonindividual benefit claim. Class actions typically challenge policy formulated or implemented

Second, in light of evidence of underutilization of the EAJA by prevailing individual benefits claimants, the change to automatic fee shifting might be needed to give private counsel sufficient incentive to apply for EAJA fees. In fiscal year 1989, for example, there were approximately 6,000 claimants who prevailed as a result of court cases (predominantly disability and SSI), and most presumably would be eligible for EAJA fees.¹⁵³ Yet there were only 2,000 applications for fees in the target year.¹⁵⁴ Thus, roughly only one-third of eligible prevailing parties are pursuing fees through the EAJA. To be sure, part of the reason for the limited use of the EAJA may stem from self-selection--parties recognize that the government was likely substantially justified.¹⁵⁵ But much of the explanation--and my guess is most of it--centers on the lack of incentive for counsel representing disability claimants to file for EAJA fees.

by the agency as opposed to the substantial evidence underlying a particular benefit determination. If the substantial justification standard is to be retained in other policy contexts, then it should apply in SSA class-wide litigation as well. SSA has estimated that 100 class actions currently are pending. Social Security Administration 1991 Annual Report to the Congress 13.

¹⁵³The Social Security Agency reported in fiscal year 1989 that there were 6,616 final court decisions, of which it prevailed in 72% of the cases. However, the claimants prevailed in 80% of a similar number of remands. Thus, there were likely over 6,000 claimants who ultimately prevailed. There were fewer final court decisions and remands in fiscal year 1990, according to the agency because of the Appeals Council's more aggressive position in accepting more appeals to forestall successful court actions. See Social Security Administration 1991 Annual Report to Congress 13.

¹⁵⁴The applications for fees considered in the study did not necessarily arise from all cases decided during fiscal year 1989 because of delays from remands, delays in deciding the fee applications, etc.

¹⁵⁵I simply doubt that the self-selection explanation has much bite. Private parties recognize that the Secretary has already been held to be unsupported by substantial evidence, and that they enjoy somewhat greater than an 85% statistical chance that a court will find that the government's position was not substantially justified.

Because of the ethical problems I discuss at text accompanying notes 155-60 *infra*, the District of New Jersey, among others, requires all prevailing HHS claimants who are represented by counsel to file for fees under the EAJA. In re Standing Order in Social Security Cases, Misc. 85-465 (D.N.J. Dec. 27, 1985); *Taylor v. Heckler*, 608 F. Supp. 1255 (D.N.J. 1985). See also *Dowdy v. Bowen*, 636 F. Supp. 591 (W.D. Mo. 1986); *Sumler v. Bowen*, 656 F. Supp. 1322, 1338-39 (W.D. Ark.), *aff'd*, 834 F.2d 711 (8th Cir. 1987). In the target year, Social Security Administration records reveal that 42 EAJA cases were resolved in the district, and that the private party prevailed in 37 of those cases, which replicates the same success ratio in all the HHS cases. The Middle District of Florida similarly requires all prevailing claimants to file for EAJA fees or provide an explanation for not doing so. *Knagge v. Sullivan*, 735 F. Supp. 411, 415 (M.D. Fla. 1990). In the target year, private parties succeeded in 22 of 24 EAJA cases, though the average award was smaller than elsewhere. Thus, the self-selection explanation probably has only limited validity.

Currently, the intersection of a contingency fee system with the EAJA creates perverse incentives. Even if attorneys believe that the government's position has been unjustified, they may decline to seek fees under the EAJA. To begin with, the 25% (or less) counsel receive from their clients as approved under the Social Security Act may well exceed the lodestar (calculated at \$75 per hour plus the cost of living) for which they would be eligible under the EAJA. Litigating the EAJA claims, therefore, will not result in any benefit to counsel, and counsel have little incentive to pursue such EAJA claims, particularly given the risk that they would be found ineligible for fees, and thus forfeit all work devoted to the EAJA claim. Moreover, even if the 25% award is comparable to what could be recovered under the EAJA, the private attorneys face the risk of losing the EAJA case, and the loss probably cannot be chargeable to their impecunious clients.¹⁵⁶ An EAJA application might also delay payment of attorney's fees under the Social Security Act because judges not infrequently decide the issues together.¹⁵⁷ From a cost-benefit perspective, therefore, it may not be worth the private attorneys' time to pursue the EAJA remedy, even when the government has not been substantially justified. As a result, the social security claimants suffer and, conversely, the coffers of SSA benefit. Indeed, judges in a number of jurisdictions have required benefit attorneys to file claims in each case in which the claimant prevails to ensure that such attorneys do not take the easy way out to the detriment of their clients.¹⁵⁸

¹⁵⁶While the prospect of fees on fees creates some countervailing incentive to seek fees under the EAJA, the prospect of a loss—particularly when the original award was generous—deters private attorneys from seeking EAJA fees. This same conflict of interest can arise under the EAJA whenever private counsel can recover more from the client than they can from the government. It is particularly acute in contingency fee cases because counsel are not paid by the hour and thus may receive no compensation for litigating the fee question.

¹⁵⁷Combining the attorney fee mechanisms in the EAJA and the Social Security Act presents an attractive option, but one which is fraught with difficulty unless substantial revisions are made. As an initial matter, many would oppose the interference with private contract if the EAJA completely supplanted the private contract between client and attorney. Moreover, if the EAJA compensated all prevailing parties at a level replicating a market contingency fee, then the problem of providing incentive for counsel to accept small cases would remain. At the same time, a prospect of overcompensating attorneys would exist in several contexts. First, the SSA would pay more than it currently does in those cases in which substantial back benefits are awarded, and second, payment on a percentage basis might overcompensate those attorneys—particularly legal services attorneys and those paid for by insurance plans—who do not face risk of nonpayment from accepting a social security case. A further difficulty would arise given that fees for work in administrative proceedings are currently available under the Social Security Act but not under the EAJA.

¹⁵⁸See note 155 *supra*.

Converting to an automatic fee shifting system would minimize the ethical quandary faced by social security counsel.¹⁵⁹ Even when the amount recovered under a contingency contract would exceed the EAJA award, the EAJA award would offset some of the attorney's fees that the claimant must otherwise pay to his or her attorney.¹⁶⁰

Third, the shift would spare the government as a whole significant administrative expense, because the question of substantial justification--which is the only disputed question in much EAJA social security litigation--would not arise. The issue of the appropriate number of hours and rate (if beneath the fee cap), should be readily determined because both sides will likely develop sufficient familiarity with social security cases to gauge the reasonableness of hours expended in a given case. In fact, anecdotal evidence suggests that currently in some jurisdictions there is no dispute over the reasonable number of hours expended in disability cases.¹⁶¹ Although the

¹⁵⁹Even with automatic fee shifting, some counsel might not bother to file for fees since they stand to gain nothing from the hours expended. Because counsel must return the lesser of two fee awards to the client, there is scant incentive for litigating under EAJA if the EAJA award is not likely to be greater than the one under the Social Security Act. When the EAJA award is less than the private fee arrangement, the problem is exacerbated if courts require prevailing parties' counsel to return fees on fees for the EAJA litigation as well as fees for the underlying litigation. Counsel should at a minimum be able to keep that part of the fee award attributable to the fee litigation, since such compensation does not represent "fees for the same work." 99 Stat. 186.

A requirement that all prevailing social security claimants file for EAJA fees, as in the District of New Jersey, is problematic, however, given that private counsel would be forced to initiate litigation for which they might not even receive compensation. Cf. *Venegas v. Mitchell*, 110 S. Ct. 1679 (1990) (articulating norm against interference with contract between plaintiff and counsel in §1988 suit).

¹⁶⁰The fact that only one-third of prevailing parties in individual benefit cases file for EAJA fees is particularly startling given the substantial percentage of SSI cases included. Counsel for SSI claimants should have greater incentive to file for EAJA fees given the smaller size of the claim and the fact that no payment mechanism exists. Thus, the percentage of successful Title II disability claimants who file for EAJA fees likely falls well under 33%.

Underutilization also might arise from a lack of information. Some corroboration for this explanation lies in the fact that, according to SSA, the percentage of prevailing claimants who file EAJA petitions has gradually increased in the past several years. The heightened awareness may be attributable in part to Supreme Court cases such as *Commissioner, INS v. Jean*, 496 U.S. 154 (1990), and *Sullivan v. Hudson*, 490 U.S. 877 (1989), which received considerable publicity in the social security community.

¹⁶¹In other jurisdictions, however, there is little cooperation between attorneys and Assistant United States Attorneys, and agreement cannot always be reached on the pertinent amounts. To the extent that such inability to compromise is attributable to private attorney overreaching, the offer of judgment device should aid the government. And to the extent that the disagreement is attributable to the government's intransigence, the automatic fee shift means that the private

savings in expenses would not fully compensate for the increased EAJA awards paid by the Social Security Administration, the SSA would in all likelihood currently be paying more but for the private attorneys' self-interested decision to forego the EAJA route.

Moreover, there would be substantial savings in judicial resources. More than 2,000 cases were resolved (through litigation and settlement) involving EAJA applications in the target year, and while most cases were probably resolved quickly, the aggregate takes a toll on the already overloaded judicial system. Automatic fee shifting would minimize that burden.¹⁶²

Fourth, there is little fear of overdetering social security decisionmakers.¹⁶³ In evaluating disability, HHS officials recognize that disability determinations will be overturned only if there is not substantial evidence in the record. That substantial evidence standard creates a type of safe harbor--determinations at the margins of the statutory standards should be upheld.¹⁶⁴ Officials determining eligibility for benefits should not be chilled by the prospect of fees from making close calls because they are protected by a deferential standard of review.¹⁶⁵ Indeed, because the substantial justification standard is so close to the substantial evidence standard, the EAJA approaches an automatic fee shifting statute today,¹⁶⁶ and statistics demonstrate that

attorney will ultimately be compensated for any protracted litigation over the proper amount of the award.

¹⁶²The 2,000 fee cases resolved represent 3% of all civil cases involving the government resolved each year. Annual Report of the Director of the Administrative Office of the United States Courts 172 (1989). That percentage is somewhat misleading given the relatively few resources needed to adjudicate EAJA cases in comparison to antitrust cases, malpractice cases, etc.

¹⁶³Indeed, as mentioned earlier, there is scant reason to believe that the change will lead to any significant deterrence at all. See note 145 *supra*.

¹⁶⁴This is not to ignore that courts might be applying a standard far more strict than the substantial evidence standard. Courts may be sympathetic with individual benefits claimants even if they otherwise manifest a pro-government bias. Nonetheless, the possibility of judicial misapplication exists not only in this context but in determining the merits of the underlying lawsuit between the government and private party as well as in determining the substantial justification of the government's position. It is impossible to ascertain to what extent courts are fulfilling their statutory mandate. Recommendations for structuring a fee shifting mechanism are predicated on courts' good faith, even if erroneous, application of the governing legal principles.

¹⁶⁵One study found that HHS ALJs were not even concerned with the prospect of judicial review, let alone the prospect of an EAJA award. Social Security Hearings, *supra* note 145, at 139-40 (ALJs not deterred by prospect of judicial review, given the modest (7%) percentage of cases that are appealed).

¹⁶⁶To be sure, courts have uniformly held in the wake of *Pierce v. Underwood* that a finding of substantial evidence cannot be equated with a lack of substantial justification. The failure of the Secretary adequately to explain his decision or his reliance upon conflicting testimony may be

correlation.¹⁶⁷ In the target year, 85% of EAJA applications in social security cases were granted, and some were denied for reasons other than substantial justification, such as lack of timely filing.

Finally, eliminating the substantial justification standard arguably comports with corrective justice principles. Courts only overturn the Secretary's denial of benefits when the determination lacks substantial evidence. Even though the government's position may not lack substantial justification, the government's determination plausibly can be considered wrongful if it is not supported by substantial evidence. The substantial evidence standard itself establishes a fault standard, though at a lower threshold than the substantial justification test. Awarding fees for erroneous denials, therefore--at least in the vast majority of disability cases--provides compensation when the government has been at fault. Even those who believe that the government is not necessarily at fault when claimants prevail might conclude that the cost (and difficulty) of identifying those cases is too prohibitive given that there is so little fear of overdeterrence. Moreover, even when the government is not at fault, corrective justice principles might suggest that the claimants' loss itself is wrongful, because the government has deprived beneficiaries of a statutory entitlement and enjoyed the use of the money in the interim.

Thus, because of the strong case for distributive justice, because so many social security claims involve small, strong claims, and because there is little fear of overdeterrence, prevailing parties in individual benefits litigation should be entitled to fees irrespective of the substantial justification of the government's position.

D. Minimizing Litigation Costs

If the EAJA is to be retained--irrespective of whether the substantial justification standard is rescinded--several changes should be made to minimize litigation costs and facilitate settlement. Settlement of EAJA claims can be facilitated in two ways. First, Congress should enact an offer of judgment provision to encourage government counsel to make an offer of judgment on the EAJA claim immediately upon losing a case. If the private party rejects the government's offer and then does not receive more than that offer after

reasonable, even if not supported by substantial evidence. See, e.g., *Hadden v. Bowen*, 851 F.2d 1266 (10th Cir. 1988); *Taylor v. Heckler*, 835 F.2d 1037 (3d Cir. 1987); *Pullen v. Bowen*, 820 F.2d 105 (4th Cir. 1987); *Cohen v. Bowen*, 837 F.2d 582 (2d Cir. 1988). Nonetheless, a safe harbor exists by virtue of the deferential standard of review, minimizing the fear of overdeterrence.

¹⁶⁷See text accompanying notes 113-14 *supra*.

judgment, it cannot recover any fees or expenses incurred after the offer. Second, the prospect of settlement should be furthered by eliminating as many ambiguous provisions in the Act as possible. The need for bright-line rules to reduce collateral litigation is clear.

1. Offer of Judgment Provision

To promote settlement, Congress should adopt an offer of judgment device to grant the government leverage to force settlement. With an offer of judgment device, defendant's formal offer of settlement exposes the other party to financial consequences should that party reject the offer and then not recover more at trial. Currently, Rule 68 of the Federal Rules of Civil Procedure provides that "[a]t any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party . . . [and] [i]f judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Rule 68 applies primarily to costs incurred by both sides such as witness fees and transcripts, but it does not usually cover attorney's fees.

In general government litigation, therefore, if a private litigant rejects a settlement offer by the government and then does not do better at trial, the government need not pay that party's post-offer costs, and the private party will be liable for any costs generated by the government after the offer. Rule 68 is likely to be effective only in complex litigation situations when the costs are quite large. Perhaps Rule 68 would foster settlement in complicated Medicare reimbursement suits or in large contract actions before the Claims Court. But Rule 68 would be of little help in most government litigation because the costs are unlikely to be large enough to give the government leverage to force early settlement.

An offer of judgment device could, however, include attorney's fees as well as costs. The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, treats attorney's fees as part of costs.¹⁶⁸ Governmental defendants in civil rights suits currently can exercise leverage over plaintiffs by making an early formal settlement offer, and thereby forcing plaintiffs to continue litigating at peril of sacrificing their post-offer costs, and more importantly,

¹⁶⁸The Federal Advisory Committee on Civil Rules proposed that Rule 68 be expanded generally to encompass attorney's fees. The proposal was rejected, in part because of the fear that strengthening Rule 68 would undermine Congress' overall intent to promote fee shifting. See Rowe & Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 *LAW & CONTEMP. PROBS.* 15 (1988, issue No. 4) (hereinafter *Empirical Research*).

their post-offer attorney's fees.¹⁶⁹ The EAJA could thus similarly be amended to permit the federal government to make an offer of judgment which, if not improved upon at trial, would cause the private party to forfeit its post-offer attorney's fees. An amended, Rule 68 could have bite in litigation with government involving considerable money such as in complicated Medicare reimbursement disputes. But those cases represent only a sliver of government litigation, for the vast majority of cases involve nonmonetary issues, denials of benefits in which the amount at stake is not in dispute, or affirmative litigation filed by the government in which the offer device likely would not be relevant. Thus, even if Rule 68 or a similar procedure permitted shifting attorney's fees as well as costs, it would not be effective in streamlining resolution of the underlying contest between the government and private party.¹⁷⁰

Nonetheless, Rule 68—or a comparable provision—might have substantial impact if applied to the collateral attorney fee dispute itself.¹⁷¹ The fee dispute concerns only money, and thus an offer of judgment device can effectively streamline the litigation. After losing a case, government attorneys could immediately assess the government's fee exposure, and make a settlement offer that would compel the private party to accept the offer at risk of jeopardizing all post-offer fees on fees and of liability for government costs.¹⁷²

¹⁶⁹Courts have, however, rejected the possibility that a civil rights plaintiff must pay the defendant's post-offer fees, as they do costs. See, e.g., *Crossman v. Marcoccio*, 806 F.2d 329 (1st Cir. 1986). They have reasoned that such fee shifting would undermine Congress' underlying decision to encourage suits. See also *Marek v. Chesny*, 473 U.S. 1 (1985) (upholding applicability of Rule 68 in Section 1988 context); *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986) (remarking upon defendant's incentive to use offer of judgment device in civil rights context).

¹⁷⁰An offer of judgment device may apply in nonmonetary contexts a well, but not very effectively. See Simon, *The New Meaning of Rule 68: Marek v. Chesny and Beyond*, 14 N.Y.U. REV. OF L. & SOC. CHANGE 475, 485-91 (1986).

¹⁷¹There are no reported cases addressing whether Rule 68 applies today to purely collateral proceedings such as an attorney's fee dispute. There is nothing in the language or structure of the provision, however, that would militate against its application. In any event, whether or not Rule 68 currently applies to attorney fee disputes, the EAJA could be amended to provide explicitly for an offer of judgment rule.

¹⁷²The most obvious impact of applying an offer of judgment rule to fee proceedings would be to benefit the government. See Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93, 118-21 (1986) (hereinafter *An Economic Analysis of Rule 68*) (noting that rule operates to redistribute wealth from plaintiffs to defendants). As a package with the change to automatic fee shifting, however, private parties would benefit overall. If the substantial justification standard is retained, however, the fee cap might be lifted somewhat in exchange for enactment of the offer of judgment device.

Although academics disagree in part,¹⁷³ operation of offer of judgment rules will likely foster settlement in many cases. Implementation of the rule minimizes any incentive that prevailing parties have to prolong the litigation. The economic literature also suggests that, irrespective of whether settlement is ultimately facilitated, the settlements which are concluded should come at an earlier point in the litigation, minimizing the total litigation costs.¹⁷⁴

Assume, for instance, that a prevailing party claims attorney's fees of \$16,000 for the litigation, and estimates that its fees in litigating the issue will amount to \$2,000. It believes it has a 60% chance of collecting the full amount, and a 100% chance of collecting the \$12,000 which the government is not contesting. In turn, assume the government estimates that it has a 60% chance of minimizing fees, believing the claim to be inflated by 25%, and assume that it estimates that its litigation costs would be \$1,500. In the absence of an offer of judgment device, the private party estimates that it probably will receive \$14,400 for its claim, plus nearly all of its \$2,000 in fees after litigation.¹⁷⁵ Thus, it may not accept a settlement offer of \$14,000, unless it is risk averse. The government for its part anticipates that, should it go to trial, it will lose \$1,500 in its fees, \$13,600 for fees for the underlying litigation, and also \$2,000 for the private attorney's fees, for a total of \$17,100. If the government officials were acting rationally, they would pay off the entire amount requested immediately, irrespective of the possibly padded claims, and save money. There would obviously be great pressure against such a course of action, for fear of encouraging false or at least dubious claims against the treasury. Refusal to settle, however, as in the Department of Agriculture case discussed earlier, would likely be financially foolhardy.

The offer of judgment device would change the calculus considerably, shifting the range in the government's favor. Assume that the government makes an early settlement offer of \$14,000. If the private party litigates, it estimates only a 60% chance of exceeding that figure, and with it a 40% chance of losing \$2000 in fees. Thus, assuming it must compensate counsel for extra work, its expected gain from trial would then diminish to \$13,600,

¹⁷³Compare *An Economic Analysis of Rule 68*, supra note 172, 15 J. LEGAL STUD. at 110-16 (concluding that there should be only a slight effect on settlement) with *Predicting the Effects*, supra note 21, 47 LAW & CONTEMP. PROBS. at 169 (suggesting a broader impact).

¹⁷⁴Early empirical research suggests that the offer of judgment rule may well bring parties to settlement earlier. *Empirical Research*, supra note 168, 51 LAW & CONTEMP. PROBS. at 13, 30; *Predicting the Effect*, supra note 21, 47 LAW & CONTEMP. PROBS. at 168.

¹⁷⁵Although the private party could recoup the \$2,000 after trial, that amount may not represent a gain because it presumably must pay counsel for the work. This calculation may be complicated by the fee arrangement the private party may have concluded with counsel.

and it should rationally accept the offer of settlement.¹⁷⁶ Some private parties might still insist on litigating, but most parties would accept the settlement offer, and avoid the risk of less recovery should the parties go to trial. The offer of judgment device may have the effect of forcing plaintiff to decide whether to settle apart from the question of defendant's possible loss from proceeding to litigation.¹⁷⁷

Despite the benefit to the government, the offer of judgment device might not facilitate settlement if the government lowers its settlement offers in light of plaintiff's increased risk. Yet some increase in settlements is to be expected for two reasons. First, because the government does not internalize its litigation costs, it will rarely if ever offer to settle a case for more than a private party can claim entitlement. The offer of judgment device shifts the settlement range downwards, thus making settlement possible in more cases. Second, because many private parties eligible for fees under the EAJA are small, they may well be risk averse, and thus more likely to accept even low-ball government offers, for fear of jeopardizing fees.¹⁷⁸ Moreover, the offer of judgment device should "smoke out" realistic settlement offers from the government at an earlier stage in the fee litigation, and thus minimize overall litigation costs.¹⁷⁹ Thus, whether or not the substantial justification standard is retained, an offer of judgment device could well reduce overall litigation costs by promoting settlement.

2. Minimizing Issues for Litigation

In addition to enacting an offer of judgment device, Congress could amend other provisions in the EAJA to minimize collateral litigation. The need for bright-line standards is clear.

Enhancements. Under the Act, private attorneys may argue that they merit greater than the \$75 per hour statutory limit if they can point to a "special

¹⁷⁶To be sure, the government's expected loss after trial still exceeds the private party's expected gain (\$15,900), but it is doubtful that the private party could extract more than its expected gain from the government, given that the government's expected loss at the moment of settlement is significantly less, because it has yet to incur costs of litigation.

If the private party's stake in settling increased to include liability for the government's post-offer attorney's fees, then there would be a further shift in the range, with the plaintiff now expecting to gain \$13,000 from the litigation, and the government expecting to lose \$15,000.

¹⁷⁷The private party will likely settle when $oj \geq p - (1-q)a$, where oj = the offer of judgment; p = the private party's expected fee recovery; q = its chance of exceeding the offer of judgment; and a = its projected attorney's fees in contesting the dispute over the fee award.

¹⁷⁸Explaining Constitutional Tort Litigation, *supra* note 25, at 755.

¹⁷⁹For a proposal to expand present Rule 68 in tort cases, see *Enterprise Responsibility*, *supra* note 66, at 283-89.

factor, such as the limited availability of qualified attorneys for the proceeding involved.¹⁸⁰ Like the substantial justification standard, the enhancement provision creates uncertainty, diminishing the likelihood of settlement and increasing overall litigation costs. Consequently, the provision allowing special enhancements should be excised.

Courts have understandably been reluctant to find that particular attorneys qualify under the enhancement provision for fear of allowing the exception to swallow the rule. Because there is arguably a shortage of qualified attorneys at the \$75 per hour rate in most major markets across the country, following the plain language of the enhancement provision might permit enhancements in almost every case. The Court in *Pierce v. Underwood*¹⁸¹ limited enhancements to situations in which counsel had some distinctive knowledge or skill, the special skill was required in the underlying litigation, and counsel with such qualifications could not be obtained at the capped rate. Although the Court indicated that patent attorneys should qualify for the enhancement,¹⁸² government attorneys have successfully combatted enhancements for their private counterparts who have expertise in appellate matters, in social security matters, and in foreign languages.¹⁸³ Nonetheless, the possibility of enhancements creates uncertainty and, even after *Underwood*, provides grist for prolonged disputes between private counsel and the government.¹⁸⁴

The "special factors" language merely invites continued litigation, forestalling settlement of the fee issues and undermining the benefits of a bright-line fee cap. Moreover, the need for enhancement is questionable, given that the EAJA only rarely serves to induce litigation, and only then in small, strong cases. In any event, no attorneys, with the exception perhaps of those litigating social security cases, can currently expect even close to market rates from the EAJA. To the extent that exceptions to the fee cap are warranted, they should be spelled out by Congress, whether for patent

¹⁸⁰ 28 U.S.C. §2412(d)(2)(A).

¹⁸¹ 487 U.S. 552 (1988).

¹⁸² *Id.* at 572.

¹⁸³ *Phillips v. GSA*, 924 F.2d 1577 (Fed. Cir. 1991) (denying enhancement for *pro bono* representation and for contingency fee arrangements); *Chynoweth v. Sullivan*, 920 F.2d 648 (10th Cir. 1990) (knowledge of social security disability law was not a special factor); *Jean v. Nelson*, 863 F.2d 759 (11th Cir. 1988) (denying enhancements for *pro bono* representation as well as for those specializing in immigration law), *aff'd* on other grounds, 110 S. Ct. 2316 (1990).

¹⁸⁴ See, e.g. *United States v. 313.34 Acres in Jefferson County*, 889 F.2d 814 (9th Cir. 1989) (suggesting possibility of enhancement in condemnation cases); *National Wildlife Fed'n v. FERC*, 870 F.2d 542 (9th Cir. 1989) (awarding enhanced fees in light of specialized training in environmental and regulatory issues); cf. *Oklahoma Aerotonics, Inc. v. United States*, 943 F.2d 1344 (D.C. Cir. 1991) (awarding enhancement for judicial delay in resolving EAJA dispute).

attorneys, those specializing in foreign languages, etc. Perhaps the fee cap should be raised, but the benefits from a bright-line rule in this context plainly outbalance the possibility that some private parties will not be able to obtain qualified counsel.

Cost of Living Increases. The Act also provides that the \$75 per hour fee cap can be raised "if a court determines that an increase in the cost of living ... justifies a higher fee."¹⁸⁵ Because the cap understates--and should understate¹⁸⁶--the prevailing market rate for attorney's fees, courts currently award a cost-of-living increase in almost all cases arising out of federal court litigation, with current rates approaching \$110 per hour.¹⁸⁷ Nonetheless, litigation has arisen with increasing regularity over which subcategory in which index to use in calculating the cost-of-living increase.¹⁸⁸ The issue could easily be clarified if Congress selected the precise method or precise index category courts should use in calculating the increase.

Moreover, courts have split as to when the cost-of-living increase is applicable--for instance, whether it should be calculated as of the date the work is performed, or as of some later date.¹⁸⁹ Although several dates are possible, choosing the date either when the application is filed or when judgment is entered creates a bright-line rule which would simplify the calculation and compensate a private party to some extent for the delay in payment, e.g., payment in 1992 for work performed in 1986.¹⁹⁰ In any event, the date should be specified to narrow the issues for litigation and enhance the prospects for settlement.

¹⁸⁵28 U.S.C. §2412(d)(2)(A).

¹⁸⁶The benefit of a bright-line cap would be lost if the cap were too high. The government would then have the incentive, in many cases, to argue that the prevailing market rate was in fact *lower* than the capped rate. To avoid that litigation, the cap should be set at the low end of the spectrum of market rates for attorneys. In other words, the statutory amount resembles more of a flat rate than a cap.

¹⁸⁷See, e.g., *Perales v. Casillas*, 950 F.2d 1066 (5th Cir. 1992).

¹⁸⁸ See, e.g., *Perales v. Casillas*, 950 F.2d 1066 (5th Cir. 1992); *Russell v. Sullivan*, 930 F.2d 1443, 1446 (9th Cir. 1991); *DeWalt v. Sullivan*, No. 91-5199 (3d Cir. April 24, 1992); *Malick v. Heckler*, No. 85-4946 (E.D. Pa. Jan. 9, 1989); *Harris v. Sullivan*, No. 87-4376 (S.D.N.Y. Sept. 4, 1991).

¹⁸⁹Compare *Perales v. Casillas*, 950 F.2d 1066, 1076 (5th Cir. 1992) (cost-of-living increase should be calculated as of date work performed); *Chiu v. United States*, 948 F.2d 711 (Fed. Cir. 1991) (same), with *Garcia v. Schweiker*, 829 F.2d 396, 402 (3d Cir. 1987) (calculation should be made as of date on which plaintiff became a prevailing party).

¹⁹⁰See *Garcia v. Schweiker*, 829 F.2d at 402 (attorneys "should not have the purchasing power of their fees eroded by such inflation"); cf. *Missouri v. Jenkins*, 491 U.S. 274, 278-84 (1989) (authorizing courts in Section 1988 litigation to use current rates to compensate for delay).

Timeliness of Fee Petition The Act at present requires prevailing parties to file an EAJA application within 30 days of "final judgment." A statute of limitations ordinarily should not give rise to excessive litigation. But the seeming simplicity of "final judgment" is unfortunately beguiling. In the context of judicial remands to agencies, it is extremely difficult to determine when final judgment occurs, and when a district court retains jurisdiction over remands to agencies. Indeed, under two recent decisions by the Supreme Court, *Melkonyan v. Sullivan*¹⁹¹ and *Sullivan v. Finkelstein*,¹⁹² private parties may be forced to file a protective EAJA petition upon judicial remand to an agency before the party can possibly know whether it has prevailed.

In *Melkonyan* the Court held that the term "judgment" in the EAJA refers to a court judgment, not the decision of an administrative agency. In individual benefits litigation, and to some extent in all agency adjudications, courts not infrequently remand challenges to agency action back to the agency for further development. For instance, in fiscal year 1990, the Social Security Administration reported that there were 4,761 final court decisions involving individual benefit claims, and an additional 4,343 court remands were processed, in which the claimant ultimately prevailed in 62% of the cases.¹⁹³ Most of those remands, under the Court's reasoning in *Finkelstein*, constitute final judgments. Thus, the 30-day filing limitation in most remanded agency cases is triggered not by a favorable agency decision upon remand, but by the district court decision ordering remand in the first instance. Compounding the problem, district courts have not clarified at the time of remand whether they retained jurisdiction (or could under *Melkonyan*) over the case. To protect their eligibility for fees, therefore, private parties whose cases are remanded to agencies must file an EAJA petition at that time even though they have yet prevailed in the litigation. Not only is such a course wasteful, but many claimants may forfeit their claims by falling into the trap inadvertently laid by the Court's decisions. The confusion engendered by *Melkonyan* and *Finkelstein* is not surprising.¹⁹⁴

¹⁹¹111 S. Ct. 2157 (1991).

¹⁹²110 S. Ct. 2658 (1990).

¹⁹³Social Security Administration, 1991 Annual Report to the Congress 34. The difficulty of ascertaining when a district court retains jurisdiction is not limited to social security contexts, even if the problem is far more acute in that setting. See *Lydon v. Howerton*, 731 F. Supp. 1545, 1551-53 (S.D. Fla. 1990) (rejecting INS' position that EAJA application filed after completion of remand proceedings was untimely).

¹⁹⁴HHS officials estimated that hundreds of courts have grappled with the timeliness question after *Melkonyan*. See, e.g., *Richard v. Sullivan*, 955 F.2d 354 (5th Cir. 1992); *Gutierrez v. Sullivan*, 953 F.2d 579 (10th Cir. 1992); *Welter v. Sullivan*, 941 F.2d 674 (8th Cir. 1991); *Damato v. Sullivan*, 945 F.2d 982 (7th Cir. 1991); *Ferguson v. Sullivan*, 771 F. Supp. 1008, 1012-13 (W.D. Mo. 1991) ("As a consequence of the Supreme Court's [decisions], a claimant

The confusion can be alleviated in several ways. First, the 30-day filing limit could be excised, replaced by a requirement that the private party indicate its intent to apply for EAJA fees in its complaint, answer, or other pleading,¹⁹⁵ as is the practice in the vast majority of other fee shifting statutes.¹⁹⁶ Private parties of course have substantial financial incentive to file as expeditiously as possible, and there is no reason to believe that such parties can achieve strategic advantage through delay. The government benefits financially from any delay unless, for some unusual reason, the delay deprives it of the evidence with which to demonstrate substantial justification. District courts could dismiss any EAJA application that disadvantaged the government as barred by laches. Changing the filing requirement could considerably simplify EAJA litigation without infringing upon the government's legitimate interests.

Alternatively, Congress could amend the definition of "final judgment" in 28 U.S.C. §2412(d)(2)(G) to include final agency determinations made after judicial remand in social security or all settings. The term "final judgment" itself could be changed to final disposition to highlight the difference. Although some ambiguity doubtless would remain, the change would eliminate at least most of the litigation spawned by *Melkonyan* and *Finkelstein*, obviating the necessity of duplicative filings. Altering the statute of limitations, therefore, as with the other changes addressed, should minimize litigation costs and, by removing subjects of contention, pave the way for settlement.

Conclusion

The Equal Access to Justice Act is the product of an uneasy compromise. Congress sought to encourage meritorious litigation against the government which would not proceed without the prospect of fee shifting, and it hoped that the possibility of fee shifting would deter government wrongdoing. At the

whose case is reversed and remanded for further proceedings likely will find that by the time s/he becomes a 'prevailing party' the time for filing has long since run").

¹⁹⁵Because of the prior notice, Congress could then consider authorizing judges and agency hearing officers to determine the fee issues at the same time that the merits of the underlying action are resolved. By the time the merits are resolved, the decisionmaker should be familiar enough with the issues in the case to assess whether the government's position was substantially justified. Although the decisionmaker might request further briefing, or might believe that the fee application could be resolved on other grounds, authorizing a simultaneous finding as to underlying liability and exposure to fees could well minimize litigation in many instances and facilitate settlement.

¹⁹⁶See, e.g., 42 U.S.C. §1988. By local rule, parties can be required to document their request for fees in a timely fashion after prevailing.

same time, it placed safeguards in the Act, most notably the substantial justification standard, to prevent overdetering vigorous government policymaking and vigilant enforcement efforts.

The effort at compromise has yielded only limited benefits. The prospect of fee shifting has marginally encouraged private parties to contest government overreaching because most private parties have adequate resources and incentives to press their challenges, and because the Act in any event promises only a modest and very uncertain fee recovery. Moreover, the Act has probably had no impact on deterrence. Policymakers are unlikely to internalize the costs of litigation, let alone attorney's fees, and such actors have sufficient incentives currently to pursue only "reasonable" policy initiatives. The question is somewhat closer for those government officials implementing previously set rules for, despite the political controls established by each agency, they are not as constrained by internal deliberation and outside lobbying in making such fact-specific judgments, and are more likely to consider the overall litigation costs in determining the appropriate application of government policy in each successive case.

From a perspective of corrective or distributive justice as well, the Act has had only partial success. Many private parties who prevail in litigation against the United States have not been recompensed fully for their attorneys' fees, whether because they exceeded the size limitation in the Act, or because the government's position was substantially justified. Consistent with the American Rule on attorney's fees, some may believe that compensation for litigation costs is not mandated by principles of corrective justice. Others may believe the government should compensate private parties even when its position is substantially justified, because the government arguably is at fault when it misapplies a statutory standard or ignores critical evidence in the record. Still others may believe that compensation is required whenever the private party's loss is "wrongful," irrespective of the government's fault. Thus, while the Act has recompensed some private parties more fully for injuries they sustained at the government's hands, it does not necessarily embody principles of corrective justice.

Much of the Act's nonsuccess can be attributed to the substantial justification standard, which attempts to steer a course between appropriate deterrence and unwarranted chilling of government initiatives. While unquestionably safeguarding against overdeterrence, the standard diminishes the Act's ability to induce private parties to challenge governmental action, because the prospect of fees, even if the underlying claim is ultimately successful, is so uncertain. The standard also blunts whatever deterrence fee shifting would otherwise have because of government officials' reluctance to consider (despite the statistics) that judges *ex post* will view governmental action to be unreasonable. And, at the same time, the standard not only

deprives some injured parties of compensation, but it encourages a second round of litigation for all private parties, which results in a significant loss to the taxpayer. The compromise of a substantial justification standard is understandable, yet theoretically flawed and practically cumbersome.

Ironically, either a total repeal or a change to automatic fee shifting could well constitute improvement. A repeal could save the government millions of dollars a year in payments to private attorneys, in government attorney salary, and in adjudicative resources. That savings could be channeled into more socially beneficial programs, if not directly passed on to taxpayers. Deterrence instead would be provided by political checks internal to the agencies, congressional oversight, and judicial review.

A change to automatic fee shifting could also improve the current system, most palpably from a distributive justice perspective. Although the change would undoubtedly cost the taxpayer more, the incremental difference would be moderated by a significant savings in litigation costs. An automatic fee shifting mechanism, coupled with an offer of judgment device, could force prompt settlement of the fee issues in most cases. Under such a system, private parties might have slightly more incentive to challenge governmental overreaching, and considerably more incentive to file for attorney's fees. Moreover, the government might be somewhat more deterred from wrongdoing because of its need to consider the prospect of attorney's fees in every case, particularly those involving fact-specific judgments. Overdeterrence, however, is unlikely due to the nonmonetary incentives confronting government officials and due as well to the protection afforded by deferential standards of review.

Whether or not the substantial justification standard is rescinded for general civil litigation involving the federal government, automatic fee shifting is warranted in fee litigation arising out of individual benefits claims, which accounts for the vast majority of EAJA disputes. Counsel, under privately arranged contingency fee contracts in disability cases, currently can claim up to 25% of any back benefits awarded. If counsel can also obtain an EAJA award, they must turn over the lesser of the two awards to their clients. The change would provide more incentive to social security counsel, who have unfortunately underutilized the EAJA, to pursue EAJA fees on behalf of their clients. A revised EAJA would encourage representation for smaller disability and nondisability claims as well, particularly those for which representation through contingency arrangements is not economically feasible. Moreover, the burden on the Social Security Administration would be partially offset by savings in litigation costs. Overdeterrence is not likely, however, because of the cushion already provided by the substantial evidence standard. And, even if the hope of improved governance through fee shifting is fanciful, fee

shifting will help achieve more complete compensation for those with the greatest need.

Appendix

TABLE 1: DATA FOR SURVEY PERIOD

Type of Case	Cases (#)	Mean Hrs. of Private Counsel in Fee Dispute	Mean EAJA Request	Mean Award	% won by private party	% lost due to sub. just. finding	Max. % of EAJA Claim lost due to sub. just. finding
Court	20	64.1	\$35,798.15	\$21,691.70	70%	20%	38% ^a
Agency	28	74.1	\$96,305.08	\$41,963.31	73%	18%	2%
HHS	50	5.0	n/a	\$4,536.60	84%	16%	12%

TABLE 2: MODEL FOR COURT CASES

# of Cases Used in Model	Mean Private Hours Recorded in Fee Dispute	Mean Gov't Hours Recorded in Fee Dispute	Mean Award	Mean Fee on Fee Award	Chance of Private Side Winning
4	56.4	72.0	\$27,233.22	\$5,179.44	100%

TABLE 3: MODEL FOR HHS CASES

# of Cases Used in Model	Mean Private Hours Recorded in Fee Dispute	Mean Gov't Hours Recorded in Fee Dispute	Mean Award	Mean Fee on Fee Award	Chance of Private Side Winning
14	5.7	6.4	\$4,236.19	\$419.34	93%

^aThe 38% figure is largely attributable to one large case in which fees were denied because the government's position was substantially justified.

TABLE 4: MODEL FOR AGENCY CASES

# of Cases Used in Model	Mean Private Hours Recorded in Fee Dispute	Mean Gov't Hours Recorded in Fee Dispute	Mean Award	Mean Fee on Fee Award	Chance of Private Side Winning
8	93.1	58	\$81,459.87	\$6,419.93	75%

TABLE 5: MODEL FOR AGENCY CASES*

# of Cases Used in Model	Mean Private Hours Recorded in Fee Dispute	Mean Gov't Hours Recorded in Fee Dispute	Mean Award	Mean Fee on Fee Award	Chance of Private Side Winning
7	34.8	32.0	\$25,136.35	\$1,967.60	71%

*Table 5 reflects the same data as does Table 4, excluding the one large claim of almost one million dollars.

Supplemental Report for Recommendation 92-5

**The Equal Access to Justice Act: Should Its
Coverage Be Expanded?**

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I. Introduction

The issue addressed by this report is whether the Equal Access to Justice Act (EAJA), as it applies in the administrative context, should be amended to expand the range of cases where attorneys' fees are available. As described below, under current law, certain individuals and small organizations and businesses that prevail in adversarial administrative proceedings involving the federal government may have their fees reimbursed by the United States. The Supreme Court, in the recent case of *Ardestani v. INS*,¹ made clear that EAJA fees were potentially available only in cases where hearings were required by statute to conform to the procedural provisions of section 554 of the Administrative Procedure Act.

The question that now arises is whether such a limitation is a good one, or whether policy considerations suggest that the Act should be amended to expand the potential availability of fees to cases where administrative hearings are similarly formal, but where such formality does not derive strictly from section 554. Because the Supreme Court interpreted the statute to prohibit fee awards unless section 554 expressly governed the proceeding, any change is up to Congress.

Although there are several possible approaches, this report recommends that Congress carefully review administrative hearing programs and consider amending EAJA on a case-by-case basis as it determines that EAJA protections are appropriate in particular contexts.

II. Background

A. The Equal Access to Justice Act

The Equal Access to Justice Act is a limited fee-shifting statute. It has two parts: one applies to proceedings at the federal administrative level,² and one applies to cases in the federal courts.³ This report is concerned only with the former. That portion of the Act provides that for certain adversarial administrative adjudications involving the United States or its agencies, certain prevailing private parties may recover costs and attorneys' fees if the

¹ __ U.S. __, 112 S.Ct. 515 (1991).

² U.S.C. §504 et seq.

³28 U.S.C. §2412 et seq.

government's position in the litigation was not substantially justified. Parties that are potentially eligible for fees include individuals with net worth less than \$2 million, and businesses, organizations or local government entities worth less than \$7 million with fewer than 500 employees.

The term "adversarial adjudication" is defined in the Act as "an adjudication under section 554 [of Title 5] in which the position of the United States is represented by counsel or otherwise . . ."⁴ Section 554, as described further below, is the portion of the APA that details the requirements for a formal administrative hearing.⁵

The Act provides a ceiling of \$75 per hour reimbursement for attorney fees, unless an administrative agency by regulation increases the amount. No agency has done so.⁶

In enacting EAJA in 1980, Congress expressed its concern that "certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings."⁷ Thus, EAJA's purpose was to provide reimbursement for certain fees and costs in litigation involving the government. According to the House Report, the EAJA

rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy. An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law. An adjudication, for example, may show that the policy or factual foundation underlying an agency rule is erroneous or inaccurate, or it may provide a vehicle for developing or announcing more precise rules. The bill thus recognizes that

⁴The "represented by counsel" provision operates generally to exclude social security adjudication (at the administrative level) from coverage because the government is not represented.

⁵U.S.C. §504(b)(1)(C).

⁶Agencies are required to issue uniform regulations governing procedures for submitting fee applications, and agencies are required to consult with the Administrative Conference in developing their regulations. Shortly after the Act was passed, the Conference issued model rules, first in draft, 46 Fed. Reg. 15895 (March 10, 1981), and later in final. 46 Fed. Reg. 32900 (June 25, 1981). These model rules, as amended in 1986, are reprinted at 1 CFR Part 315, and in ACUS, Federal Administrative Law Sourcebook.

⁷Pub. L. 96-481, §202(a).

the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of Federal authority. Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights.⁸

B. Section 554 of the Administrative Procedure Act

Section 554 of the APA describes the procedures required for administrative hearings that are "required by statute to be determined on the record after opportunity for an agency hearing."⁹ That section enumerates certain procedural requirements, and incorporates by reference additional requirements provided in sections 556 and 557. Among the procedural protections provided through section 554 are

- the right to timely notice of the time, place and nature of the hearing;
- notice of the legal authority and jurisdiction under which the hearing is to be held;
- notice of the matters of fact and law asserted;
- the opportunity for submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding and the public interest permit;
- if a controversy cannot be determined by consent, a hearing and decision;
- a prohibition against ex parte contacts;
- the taking of evidence to be presided over by either the head of the agency or one of the members of the body

⁸H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988-90.

⁹5 U.S.C. §554 (a). There are certain enumerated exceptions.

comprising the agency or by an ALJ, which presiding officer(s) have certain authority, including the power to administer oaths; issue subpoenas otherwise authorized; receive and rule on evidence; regulate the course of the hearing; hold prehearing and settlement conferences; rule on procedural requests; and make or recommend decisions;

- receipt of oral or documentary evidence except where irrelevant, immaterial or unduly repetitious;
- right to present a case or defense, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts;
- the availability of a transcript;
- the right to submit proposed findings and conclusions, and exceptions and supporting reasons to recommended decisions;
- a decision that includes findings and conclusions and the reasons or basis therefor, on all material issues;
- certain requirements protecting the independence of the decisionmaker(s).

There are many statutes that invoke the section 554 procedures, generally through reference to the APA by using the language quoted above, "opportunity for a hearing on the record."¹⁰ As noted, under the provisions of EAJA, participants in such hearings are potentially eligible for fee awards if the other statutory requirements are met.

There are also a number of programs where similar hearing procedures are required not by statute, but by agency regulation.¹¹

¹⁰E.g., 42 U.S.C. §1320-7a(c)(2) (civil penalties for Medicare fraud); 49 U.S.C. §1475 (d)(1) (civil penalties of air safety violations).

¹¹E.g., 18 CFR §385.901 et seq. (FERC review of remedial orders).

C. *Ardestani v. Immigration and Naturalization Service*

In late 1991, the Supreme Court decided *Ardestani v. INS*,¹² which presented the issue of whether EAJA fees were available in cases where the procedures applicable to an adversarial administrative adjudication were virtually identical to those set forth in section 554, but where the proceeding itself (in this case a deportation proceeding), did not arise under section 554.¹³ The Court interpreted the phrase "under section 554" to refer only to those cases statutorily subject to or governed by section 554. In doing so, it rejected the petitioner's argument that "Congress's only intent in defining adversary adjudications was to limit EAJA fees to trial-type proceedings in which the Government is represented"¹⁴ The Court said that "[w]e must assume that the EAJA's unqualified reference to a specific statutory provision mandating specific procedural protections is more than a general indication of the types of proceedings that the EAJA was intended to cover."¹⁵ In coming to this result, the Court relied on the lack of legislative history to support any wider reading of the statutory language, and on the general principle that waivers of sovereign immunity should be read narrowly.

In addressing the policy issue of whether a "functional interpretation of the EAJA is necessary in order to further the legislative goals underlying the statute," the Court noted that there is "no doubt that the broad purposes of the EAJA would be served by making the statute applicable to deportation proceedings."¹⁶ While recognizing the complexity of deportation hearings, and the burden the plaintiff had to shoulder in a case where the INS position was not substantially justified, the Court held that "it is the province of Congress,

¹² ___ U.S. ___, 112 S.Ct. 515 (1991).

¹³In *Ardestani*, the INS had sought to deport petitioner. At the hearing, petitioner successfully renewed a previously denied application for asylum. The immigration judge awarded EAJA fees. They were denied on appeal to the Board of Immigration Appeals.

In an earlier case, *Marcello v. Bonds*, 349 U.S. 302 (1955), the Supreme Court had held that deportation cases were governed by the Immigration and Nationality Act, rather than by the APA. The INA provisions relating to procedures for deportation hearings were adapted from the APA, although the INA permits non-ALJ adjudicators (immigration judges), who lack the statutory independence guaranteed to ALJs, to preside and make initial decisions. The applicable regulations conform the procedures to the APA even more closely, and the Department of Justice has administratively provided for the structural independence of immigration judges by placing them in an independent Executive Office of Immigration Review. 48 Fed. Reg. 8038-40 (1983). 112 S.Ct. at 519.

¹⁴*Id.* at 520.

¹⁵*Id.*

¹⁶*Id.* at 521.

not this Court, to decide whether to bring administrative deportation proceedings within the scope of the statute."¹⁷

Two justices dissented. They took the view that the meaning of the phrase "under section 554" was ambiguous, and should be interpreted "'in light of [the EAJA's] purpose to diminish the deterrent effect of seeking review of, or defending against, governmental action.'"¹⁸ Noting that

deportation proceedings exemplify the kind of adjudications for which Congress authorized fee awards: The alien's stake in the proceeding is enormous (sometimes life or death in the asylum context); the legal rules surrounding deportation are very complex; specialized counsel are necessary but in short supply; and evidence suggests that some conduct on the part of the Government in deportation and asylum proceedings has been abusive . . . [,]¹⁹

the dissent stated its view that these concerns supported a broad reading of EAJA.

The Court's decision in *Ardestani* was based on statutory interpretation. Even the majority noted that the purposes of EAJA were consistent with a broader reading, but they believed that it is up to Congress to enact any such expansion. Thus, the ball is squarely in Congress' court.

III. Activity Under EAJA

The Equal Access to Justice Act has been on the books now for over 10 years. Under the statute, the Administrative Conference is charged with providing an annual report to Congress on the amount of fees and other expenses awarded during the preceding fiscal year.²⁰ These reports provide information about the costs of the Act, as well as the kinds of cases in which awards are given.

EAJA was first implemented in FY 1982,²¹ and the first awards were made in 1983. Eight applications were granted at the administrative level that year,

¹⁷Id.

¹⁸Id. at 522, quoting *Sullivan v. Hudson*, 490 U.S. 877, 890 (1989).

¹⁹Id. at 522.

²⁰5 U.S.C. §504(e).

²¹The Act was effective October 1981.

for a total of almost \$36,000.²² The number of applications granted has varied since then from a low of 8 to a high of 281, with an average of 56. The total amount of money paid in any one year across the federal government ranged from a low of \$36,000 to a high of under \$962,000, for a total since 1982 of \$2,731,980.

These numbers are not large, given the context of the federal budget. They are also substantially below the amounts projected by Congress at the time it passed the Act. The Congressional Budget Office estimated a cost for administrative adjudications of \$19.4 million in FY 1982, \$21.3 million in 1983, and \$22.4 million for 1984.²³

In the last several years, the largest number of fee awards has come in contract appeal cases.²⁴ In FY 1990, almost two-thirds of the fee grants (22 of 36) involved cases before boards of contract appeals. Unfair labor practice and enforcement cases were the bulk of the remainder.²⁵

The majority of fee applications denied by agencies are denied on the basis that the government's position was substantially justified.²⁶ In 1990, only one case was denied on the basis that the proceeding was not an "adversarial adjudication" as defined by EAJA.²⁷ This fact does not say anything, however, about the number of cases for fees that might be brought if the particular type of proceedings were covered.

It appears that, in recent years, the majority of the successful applicants at the administrative level have been small businesses.

IV. Should EAJA Be Expanded?

The current EAJA process provides reimbursement for attorney fees for a limited but fairly well-defined group of cases. The number of awards that has been made over the span of the program has not been extraordinarily large.²⁸

²²See Administrative Conference's Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act (October 1, 1989--September 30, 1990), dated October 4, 1991 (ACUS 1990 EAJA Report). The figures discussed here derive from Appendix II.

²³H.R. No. 1418, *supra* n. 8, at 23, 1980 U.S.C.C.A.N. at 5002.

²⁴Congress expressly amended section 504(b)(1)(C) in 1985 to include certain administrative proceedings under section 6 of the Contract Disputes Act.

²⁵ACUS 1990 EAJA Report, *supra* n. 22, at App. I.

²⁶*Id.* at App. IV.

²⁷*Id.*

²⁸454 awards were made between 1983 and 1990. ACUS 1990 EAJA Report, *supra* n. 22, at App. II.

The question is whether the scope of adjudications that are eligible for coverage under the Act should be expanded; and if so, to what extent.

A. Advantages of the Current System

As described above, EAJA currently authorizes award of attorneys' fees to certain private parties who prevail in adversarial adjudications with the federal government. The scope of eligible adjudications is limited to those where the proceeding is made subject to the provisions of section 554 of the APA by statute, and where the position of the government is represented by counsel. The status quo, now that its limits have been made clear by the Supreme Court, has the advantage that it is relatively easy to administer: there is a bright line between covered and non-covered proceedings.²⁹

A further argument in favor of retaining the status quo is that restricting EAJA coverage to those proceedings where Congress has made the judgment that section 554 applies limits any disincentive an agency might otherwise have to provide formal proceedings voluntarily in other cases or programs. Assuming that in at least some circumstances, it is advantageous to the public that formal proceedings be made available, agencies are less likely to do so if in so doing, they potentially make themselves liable for attorneys' fees.

In addition, of course, the more limited the availability of fees, the lower the cost to the government, and ultimately, to the taxpayers. In these days of limited federal funds, this might be an important factor.³⁰

B. Reasons for Change

There are, however, some good arguments in favor of amending the Act to expand its coverage. As the Supreme Court noted in *Ardestani*, deportation cases, which are not currently covered, are every bit as complicated as a section 554 proceeding, and the stakes are as high as they could be in the administrative context. Other types of proceedings, which have similarly

²⁹This is not to say that litigation over whether particular fee applications should be granted will be reduced. As the annual reports on EAJA prepared by the Administrative Conference show, the major issue in EAJA litigation at the administrative level has almost always been the question whether the government's position was substantially justified. In a few years when the government was experimenting with representation in social security disability cases, questions whether such proceedings were covered arose in a number of cases. *Underdue v. Bowen*, No. K-83-3885 (D. Md. 1987).

³⁰But see text accompanying nn. 22-23, *supra*.

formal procedures that govern them, provide the same types of barriers as those EAJA was enacted to overcome; i.e., the expense and time of litigating against the government, even where the government's action may be unreasonable. The Court in *Ardestani*, and some lower courts, even while adopting a narrow statutory interpretation of EAJA, have recognized that decisions based on policy considerations might have led to a different result.³¹

One of EAJA's purposes is to prevent individuals and small organizations from being deterred from litigating where the government's position is not substantially justified. If the assumption is that such deterrence arises from the high costs of litigation that accompany formal adjudication, such deterrence will not vary substantially depending on whether the adjudication is expressly governed by section 554, or whether similarly complex or formal procedures arise from some other source. The litigation costs to a private party are likely to be on approximately the same scale.³² It seems of questionable fairness for a private party to be penalized simply because the procedures for a formal hearing derive from some other source, be it a statute other than the APA or be it regulations.³³ There is considerable appeal to the notion that the question of coverage should turn on substance--the fact that a party has endured the burden and expense of a formal hearing--rather than on technicalities.

Moreover, as noted above, the costs of EAJA have been much lower than expected.³⁴ While the reasons for this are not known, at least one factor may be that the "threat" of potential EAJA liability serves as a deterrent against government misfeasance. If that is the case, the benefits from EAJA's existence would spread as its coverage expanded.

³¹E.g., *Hodge v. U.S. Dep't of Justice*, 929 F.2d 153, 159 (5th Cir. 1991); cf. *St. Louis Fuel & Supply Co., Inc. v. FERC*, 890 F.2d 446, 451 (D.C. Cir. 1989).

³²See, e.g., *St. Louis Fuel & Supply Co., Inc. v. FERC*, 890 F.2d 446 (D.C. Cir. 1989). In that case, the procedural framework was virtually the same as that required by section 554, but it derived partly from the Dep't of Energy Organization Act, and partly from FERC regulations. The costs to the private party would not vary as a result of the source of the procedural framework.

³³Of course, this unfairness would not rise to constitutional levels.

³⁴See text accompanying nn. 22-23, 28. EAJA awards have also been significantly below projections in court proceedings. The Congressional Budget Office cost estimates for judicial awards ranged from \$67.7 million in 1982 to \$90 million in 1984. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10, reprinted in 1980 U.S.C.C.A.N. 4984, 4988-90. For the years 1983-90, EAJA awards in judicial proceedings totalled approximately \$16.7 million. Administrative Office of the United States Courts, Annual Report (1990) at 35; Administrative Office of the United States Courts, Annual Report (1988) at 101.

V. Considerations in Amending EAJA

In considering whether EAJA's coverage should be expanded past the confines of proceedings explicitly subject to section 554, a number of questions arise. How much should it be expanded? And, how should new lines be drawn?

Several alternatives are at least theoretically available. A proceeding required by statute to have the same parameters as those in sections 554 (and 556 and 557) could be made subject to EAJA. A proceeding required by regulation (or by a combination of statute and regulation) to have those same parameters could be covered. A proceeding that has "substantially" the same procedure parameters could be covered. Congress could decide on a case-by-case basis whether certain specific types of proceedings could be covered.³⁵

A. Proceedings Statutorily Required to have the Same Procedures as Section 554

Certain types of proceedings, such as deportation cases, have statutorily-mandated proceedings that track section 554's requirements, but are not governed by that section. In these situations, the relevant statutes provide for hearings whose procedural parameters are in essence those required under section 554 (and 556 and 557). Given that Congress has determined that the adversarial hearing should have the same level of formality as those already covered by EAJA, it seems logical that the benefits of EAJA should also apply. The principal drawback of this approach is the need to determine in any particular case whether the procedures are in fact the same as those in section 554 proceedings. In some cases, this might be fairly straightforward. In others, it might be more difficult, depending on how Congress provided for the applicable hearing procedures.³⁶

³⁵Congress has done this in certain situations. In 1985, Congress amended section 504(b)(1)(C) to cover certain disputes before boards of contract appeals. It amended that section again in 1986 to cover proceedings under the Program Fraud Civil Remedies Act, 31 U.S.C. §3801. Such proceedings arguably would have been covered without the specific amendment, since most hearings under that statute are subject to section 554. 38 U.S.C. §3803(g).

³⁶See *Haire v. U.S.*, 869 F.2d 531 (9th Cir. 1989). In this case, involving certain violations of the export control regulations, sections 556 and 557 expressly applied, and section 554 did not.

B. Proceedings Where Section 554 Procedures are at Least Partly Provided for by Agency Regulation.

In some situations, Congress provides for certain procedural protections, which the agency augments in a manner that conforms to section 554 hearing procedures. For example, the statute governing appeals of certain Department of Energy remedial orders to the Federal Energy Regulatory Commission provides for minimum procedural requirements that are less than section 554 requires. However, FERC has by regulation matched the section 554 requirements.³⁷ Again, from the point of view of the private party, the burden does not vary depending on the source of the procedural requirements. This might suggest that EAJA ought to apply even where the procedures do not derive from statutory sources.

Weighing against such applicability is the fact that the agency has voluntarily offered the private party the procedural protections of a formal hearing. It might be less inclined to do so if the price for offering such benefits would be to subject itself to liability under EAJA.³⁸ The issue of whether agencies should be encouraged to provide formal proceedings is beyond the scope of this paper. However, the fact that imposing EAJA liability may serve as a significant disincentive to agencies voluntarily providing additional procedural protection argues against recommending such a standard.

C. Proceedings that by Statute Use Formal Procedures that are not Exactly the Same as Section 554

Congress has in various situations provided for administrative hearing procedures that vary from section 554. These hearings may be more or less formal. The costs to a private party may also be more or less than the costs of proceedings currently covered. In fact, given the variation in levels of fee awards in administrative EAJA awards, it is difficult to draw any clear conclusions about the costs of administrative proceedings to private parties.³⁹ Although it is at least theoretically possible to develop standards on how close to section 554 other proceedings should have to be before the benefits of EAJA

³⁷See *St. Louis Fuel and Supply Co., Inc. v. FERC*, 890 F.2d 446, 449 (D.C. Cir 1989).

³⁸Preamble to ACUS Model Rules, 46 Fed. Reg. 32900, 32901 (1981), *supra* n. 6.

³⁹In FY 1990, the amount of EAJA fees requested in proceedings varied from a low of \$1058 to a high of \$925,441, with an average of \$55,300. Awards varied from a low of \$300 to a high of \$475,700, with an average of \$41,000. More than two-thirds of awards were less than \$30,000. ACUS 1990 EAJA Report at App. III.

would apply, in practice those lines could be extremely difficult to draw. Would it be crucial, for example, that a proceeding did not require separation of functions? What about the right to be provided with a proposed or initial decision? Would it be determinative that the presiding officer were or were not an ALJ? These kinds of issues could substantially increase litigation over coverage of the Act.

D. Specific Proceedings as Congress Determines

The final, and most workable alternative is to recommend to Congress that it consider on a case-by-case basis whether EAJA ought to apply to statutorily-created administrative proceedings. Congress could thus weigh for itself whether, for example, prevailing petitioners in deportation cases should, where the government's position was not substantially justified, be entitled to EAJA fees. Congress could also decide whether it wished to provide the protection of EAJA coverage in less formal proceedings where a particularly strong interest was at stake. For example, Congress might consider it important not to deter challenges to government conduct where personal safety (as in asylum cases) or continued livelihood (security clearance revocation cases)⁴⁰ were at stake, even though it might not want to provide extremely formal processes.

A potential problem with this type of approach is that it could lead to an uneven patchwork of proceedings that were covered, depending on whether Congress (or practically speaking, different committees of Congress) remembers to consider the issue in an particular context. On the other hand, this approach would certainly lead to the clearest lines of demarcation.

V. Conclusion

Although there are several alternatives, the most practical proposal appears to be to encourage Congress to carefully review the range of administrative hearing programs currently operating outside of section 554 of the APA, and to consider the applicability of EAJA to additional categories of proceedings on a case-by-case basis.

⁴⁰Hearings involving security clearance revocations are currently heard at the Directorate for Industrial Security Clearance Review (DISCR). Hearings are fairly formal but not presided over by ALJs.