

## **RATLIFF V. ASTRUE: THE COLLISION OF THE EQUAL ACCESS TO JUSTICE ACT AND THE DEBT COLLECTION IMPROVEMENT ACT**

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### I. INTRODUCTION

In 1980, Congress passed the Equal Access to Justice Act (EAJA), a partial waiver of sovereign immunity permitting “prevailing parties” in cases against the federal government to recover attorney’s fees and costs.<sup>1</sup> The original EAJA contained a sunset provision and expired in 1984 but was promptly reenacted and has since remained in place.<sup>2</sup> Historically, attorney’s fee payments under the EAJA were directed to the attorney of the prevailing party or to the attorney and her client jointly.<sup>3</sup> This system allowed for the attorney to collect her fees promptly without going through her client as an intermediary.

In a series of recent cases, most frequently involving successful appeals of administrative denials of Social Security disability benefits, the government has argued that the literal language of the EAJA does not allow for direct payment to attorneys but instead directs fees exclusively to the clients themselves.<sup>4</sup> At first glance, this distinction might appear minor and technical as well as perhaps inefficient or inconvenient, but not devastating in its repercussions. This new system, however, poses two significant problems that effectively undermine the fee-shifting goals of the EAJA. First, it forces the client to serve as an extra channel through whom the funds must travel before

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<sup>1</sup> Act of Oct. 21, 1980, Pub. L. No. 96-481, § 204(a), 94 Stat. 2321, 2327–29.

<sup>2</sup> Equal Access to Justice Act, 5 U.S.C. § 504 (2006), 28 U.S.C. § 2412 (2006).

<sup>3</sup> See *Stephens v. Astrue*, 565 F.3d 131, 135 (4th Cir. 2009); Respondent’s Brief in Opposition to Petition for Writ of Certiorari at 4, *Astrue v. Ratliff*, No. 08-1322 (U.S. June 25, 2009).

<sup>4</sup> See, e.g., *Ratliff v. Astrue*, 540 F.3d 800 (8th Cir. 2008), *cert. granted*, 130 S. Ct. 48 (2009); *Manning v. Astrue*, 510 F.3d 1246 (10th Cir. 2007), *cert. denied*, 129 S. Ct. 486 (2008).

reaching their ultimate destination. Given that fees permissible under the EAJA are quite meager<sup>5</sup> and that clients who avail themselves of the fees often face financial hardship, the possibility of nonpayment or partial payment is substantial. Second, and more importantly, direct payment to the client qualifies the payments for automatic offset pursuant to the Debt Collection Improvement Act of 1996.<sup>6</sup> Therefore, a client can win his suit and receive an award of attorney's fees but lack the opportunity to furnish those fees to his attorney because of the automatic offset of the fees against the client's other outstanding debts to the government.<sup>7</sup> These offsets have spawned recent litigation to determine the proper payable party because fee payments are not subject to offsets when they are in the name of the attorney rather than the debtor-client. If continued, the offsets could have the long-term effect of creating a disincentive for attorneys to enter practice areas that are reliant on government-paid attorney's fees, especially for clients with other outstanding debts.<sup>8</sup> As a result, direct payment of attorney's fees to indebted clients essentially defeats the purpose of the EAJA by removing the attorney's assurance that she will receive those fees if she prevails in her case.

Circuits are split on whether fees should be paid to the client or his counsel. Most courts side with the government's interpretation of the statute and order payment of the funds to the "prevailing party" rather than counsel.<sup>9</sup> But a sizable minority of courts have instead sided with the claimants<sup>10</sup> and ordered payment of the fees directly to their attorneys.<sup>11</sup> When courts pay EAJA fees directly to the attorneys,

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<sup>5</sup> The statutory cap on EAJA fee payments is \$125 per hour, with adjustments for cost of living expenses. § 2412(d)(2)(A)(ii).

<sup>6</sup> 31 U.S.C. § 3716 (2006); see *infra* notes 149–52 and accompanying text.

<sup>7</sup> To be offset under the Debt Collection Improvement Act, the debt must be to a government agency. § 3716(a). The offsets are not available to assist in recovery for private creditors.

<sup>8</sup> See *Stephens v. Astrue*, 565 F.3d 131, 139 n.4 (4th Cir. 2009) ("At oral argument, counsel for Stephens, who represented all thirty-four of the claimants in this case, stated that he already had declined representation for several Social Security claimants who would have been subject to an administrative offset.").

<sup>9</sup> See, e.g., *Bryant v. Comm'r of Soc. Sec.*, 578 F.3d 443, 449 (6th Cir. 2009); *Stephens*, 565 F.3d at 140; *Reeves v. Astrue*, 526 F.3d 732, 735 (11th Cir. 2008); *Manning v. Astrue*, 510 F.3d 1246, 1249–50 (10th Cir. 2007), *cert. denied*, 129 S. Ct. 486 (2008).

<sup>10</sup> For reasons discussed *infra* note 63, litigation on this matter most frequently features the client seeking direct payment to his attorney while the government seeks to pay directly to the client. The client's best interests are typically served by keeping the fees in his attorney's name so as to avoid potential government offsets.

<sup>11</sup> See, e.g., *Ratliff v. Astrue*, 540 F.3d 800, 802 (8th Cir. 2008), *cert. granted*, 130 S. Ct. 48 (2009); see also *King v. Comm'r of Soc. Sec.*, 230 F. App'x 476, 481 (6th Cir.

they generally do so for policy reasons and for the sake of consistency, as most courts, until recently, always paid attorneys directly.<sup>12</sup>

If the disputes on this question were confined to Social Security disability appeals, where most of the litigation in this area has so far taken place, the impact of these decisions would be limited to that rather narrow and esoteric field. But the EAJA can be implicated in nearly all civil suits against the federal government.<sup>13</sup> The broader effect of interpreting the EAJA to direct funds to the client may be to dissuade attorneys from entering any practice area with a substantial number of cases in which a federal government agency, department, or official will be a party. Beyond the EAJA, applying a literal reading of the “prevailing party” language presents a broader problem. This language, awarding the fees to “prevailing parties,” is not isolated to the EAJA; rather, it is boilerplate fee-shifting language for federal statutes that permit recovery of attorney’s fees in countless areas, including civil rights statutes, environmental laws, and consumer protection actions.<sup>14</sup> If courts in EAJA cases continue to direct payments to clients rather than counsel, a genuine and substantial risk exists that the resulting precedent could apply to civil-rights statutes and any other statute containing the same “prevailing party” fee-shifting language. Under current Supreme Court precedent, the term “prevailing party” applies identically across federal statutes.<sup>15</sup> Therefore, a holding with regard to the proper payable party in a case involving the EAJA will be applicable to all other similar fee-shifting statutes employing that language. In that event, the effect of permitting offsets from attorney’s fee statutes would be to dissuade attorneys from entering numerous practice areas that are reliant on such statutes.

Part II of this Comment will discuss the legislative history of the EAJA and compare Supreme Court rulings on the “prevailing party” language. Part III of this Comment will summarize the competing views of the circuit courts that have disagreed on the question of who

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2007) (unpublished decision), *overruled by* *Bryant v. Comm’r of Soc. Sec.*, 578 F.3d 443, 446–47 (6th Cir. 2009).

<sup>12</sup> See, e.g., *Ratliff*, 540 F.3d at 802; *King*, 230 F. App’x at 481.

<sup>13</sup> See 28 U.S.C. § 2412(b) (2006) (“[A] court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought *by or against the United States or any agency or any official of the United States acting in his or her official capacity* in any court having jurisdiction of such action.”) (emphasis added).

<sup>14</sup> See *infra* note 41 and accompanying text.

<sup>15</sup> E.g., *Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603 n.4 (2001); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Hanrahan v. Hampton*, 446 U.S. 754, 758 n.4 (1980).

is the proper recipient of attorney's fees awarded pursuant to the EAJA. Part IV of this Comment explains why the client is currently the proper payable party in the absence of an assignment of fees to his attorney, discusses the potential impact that these EAJA-related rulings could have on civil-rights statutes, and evaluates potential judicial and legislative options for improvement of the law in this area. Ultimately, this Comment will argue that the EAJA directs payments to the client, not his attorney, but that this process can be circumvented through the use of assignments. Nevertheless, to fix this problem fully, Congress will need to initiate legislative reforms.

## II. LEGISLATIVE HISTORY AND "PREVAILING PARTY" INTERPRETATION

Congress enacted the original EAJA in 1980 as a component of a bill providing assistance for small business.<sup>16</sup> The originally enacted legislation contained a sunset provision that caused the law to expire in 1984.<sup>17</sup> The EAJA was renewed on a permanent basis in 1985, and the new version contained a retroactivity provision to fill the gap from the time of the original EAJA's expiration.<sup>18</sup> The new version contained some minor technical amendments, but the core of the law remained intact.<sup>19</sup> Congress included additional amendments as part of a 1996 reform package;<sup>20</sup> it proposed more amendments recently, but none has passed or even gained traction.<sup>21</sup>

### A. *Legislative History*

Most of the EAJA's official legislative history comes from the House Judiciary Committee Report that accompanied passage of the

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<sup>16</sup> Act of Oct. 21, 1980, Pub. L. No. 96-481, 94 Stat. 2321.

<sup>17</sup> Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217, 222 (1994).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> For information about the 1996 amendments, which are mostly outside the scope of this Comment, see Judith E. Kramer, *Equal Access to Justice Act Amendments of 1996: A New Avenue for Recovering Fees from the Government*, 51 ADMIN. L. REV. 363 (1999). The changes allow parties to recover fees in situations where the government prevails but its original demand is "substantially in excess of the final award" and also increase the inflation-adjusted hourly rate cap from \$75 to \$125. *Id.* at 376-77.

<sup>21</sup> H.R. 1735, 111th Cong. (2009); H.R. 5833, 110th Cong. (2008); Albert B. Crenshaw, *GAO Finds Little Help to Understand Rules; Agencies Flout the Law, Report Says*, WASH. POST, Jan. 28, 2002, at E8.

1980 legislation.<sup>22</sup> The report reveals that the legislation was designed to benefit “certain individuals, partnerships, corporations and labor and other organizations” by ensuring that they are not “deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights.”<sup>23</sup> Through a requirement that funds be paid directly from agency coffers, the EAJA’s design serves a two-fold purpose: to make it easier for individuals and small businesses to seek remedies against the federal government and to deter government agencies from abusing their power.<sup>24</sup>

The legislation accomplished its goal through a limited statutory exception to the “American Rule” on attorney’s fee payments and through a waiver of sovereign immunity. The longstanding practice in American jurisprudence is for each party to a civil lawsuit to bear the burden of its own costs.<sup>25</sup> Under the English Rule, by contrast, the losing party is responsible for paying the fees of the winning party.<sup>26</sup> The policy incentives behind either rule will inevitably clash when adversaries have disproportionate wealth and resources. For example, under the American Rule, a poor client will be left responsible for his own fees despite prevailing against a major corporation, whereas under the English Rule, a prevailing corporation can impose

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<sup>22</sup> See H.R. REP. NO. 96-1418 (1980), as reprinted in 1980 U.S.C.C.A.N. 4984. Although the EAJA was originally proposed in the Senate, the Senate Small Business Committee’s Report simply adopted the House Report and did not issue any independent findings of significance. S. REP. NO. 96-974 *passim* (1980), as reprinted in 1980 U.S.C.C.A.N. 4953. Similarly, the Conference Report on the EAJA essentially summarizes the statutory text, providing little in the way of interpretation or explanation. H.R. REP. NO. 96-1434, at 20–28 (1980) (Conf. Rep.), as reprinted in 1980 U.S.C.C.A.N. 5003, 5010–17.

<sup>23</sup> H.R. REP. NO. 96-1418, at 5, as reprinted in 1980 U.S.C.C.A.N. 4984, 4984.

<sup>24</sup> See *id.* at 9–10; see also *Sullivan v. Hudson*, 490 U.S. 877, 890 (1989) (interpreting the EAJA “in light of its purpose to diminish the deterrent effect of seeking review of, or defending against, government action”) (internal citations omitted).

<sup>25</sup> See *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247–54, 269 (1975) (explaining the history of and reaffirming the American Rule by precluding fee-shifting without an existing authorization under statute or common law); *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796) (overturning the inclusion of attorney’s fees, recognizing the prevailing practice among the states, and establishing the American Rule).

<sup>26</sup> John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1601–13 (1993) (discussing the current United Kingdom law as part of a broader comparative discussion of fee-shifting rules in different jurisdictions).

its substantial fee costs upon a near-insolvent losing plaintiff.<sup>27</sup> In this sense, the advantages and disadvantages of each rule can vary based on the outcome of the case. In different circumstances, each rule can appear just or unjust based on whether the wealthier party prevails.<sup>28</sup> The American Rule is not ironclad, and it has some exceptions in both common law and statutory law, but it is the general rule for lawsuits in the United States.<sup>29</sup>

In its entirety, the EAJA contains three separate fee-shifting provisions.<sup>30</sup> The first provision is a limited waiver of sovereign immunity that opens the federal government to the same common-law exceptions to the American Rule as a private party would face.<sup>31</sup> The second provision extends the waiver to instances where the court finds the government's position to be unreasonable.<sup>32</sup> The third provision creates a process for recovering costs when a party prevails in an administrative adjudication.<sup>33</sup>

The legislation operates in a straightforward and direct manner but contains a significant amount of language that has been disputed and can be subject to multiple interpretations. The statute awards both "a judgment for costs" and "reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity."<sup>34</sup> Within thirty days of a final judgment, the party seeking an award of fees must submit an application to the court, including "an itemized statement from any attorney or expert witness representing or appearing on behalf of the party."<sup>35</sup> If the court then determines that the party prevailed in the suit, the party will be entitled to compensation for costs, including at-

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<sup>27</sup> For real-life examples of such dilemmas, see Tim Cornwell, "Double or Quits:" *Quayle Likes the "English Rule" but Brits Have Their Doubts*, LEGAL TIMES, Feb. 10, 1992, at 1, available at 1992 WLNR 5213065. Insurance will often cover the costs of the losing party in English Rule jurisdictions. Dan Slater, *The Debate over Who Pays Fees When Litigants Mount Attacks*, WALL ST. J., Dec. 23, 2008, at A8.

<sup>28</sup> Note that the EAJA works only to the advantage of the individual or small business: the government may be forced to pay the plaintiff's costs, but the plaintiff is never under any obligation to pay the costs of the government. 28 U.S.C. § 2412(b) (2006).

<sup>29</sup> See Vargo, *supra* note 26, at 1578–90.

<sup>30</sup> See Sisk, *supra* note 17, at 223–25.

<sup>31</sup> *Id.* at 223.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 224.

<sup>34</sup> 28 U.S.C. § 2412(a)(1), (b) (2006).

<sup>35</sup> § 2412(d)(1)(B).

torney's fees.<sup>36</sup> There are, however, three significant limitations on the right of a prevailing party to receive fees. First, awarded fees cannot exceed \$125 per hour, subject to cost of living adjustments.<sup>37</sup> Second, when a client is an individual with a net worth over \$2 million or a business or business owner with a net worth over \$7 million, the client is not eligible for fee payments.<sup>38</sup> Third, if "the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust," then the court will not grant an award.<sup>39</sup>

The statute directs the fees and costs to the "prevailing party," a term mirrored in many other federal statutes.<sup>40</sup> When Congress enacted the EAJA, it was cognizant of the existence of statutes using identical language in other contexts, including civil-rights and environmental statutes.<sup>41</sup> Despite the seemingly clear meaning of this language, the term "prevailing party" has been the subject of significant litigation.<sup>42</sup> Congress did not use the EAJA committee report as a venue to provide additional guidance on interpreting the term, but instead stated only that "[i]t is the committee's intention that the interpretation of the term ['prevailing party'] be consistent with the law that has developed under existing statutes."<sup>43</sup>

#### B. *Judicial Interpretation of "Prevailing Party" Language*

Congress made clear its intention that existing precedent on the term "prevailing party" should control interpretation of the EAJA.<sup>44</sup> When Congress passed the EAJA, the direct recipient of the funds was

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<sup>36</sup> § 2412(d)(1)(A).

<sup>37</sup> § 2412(d)(2)(A)(ii).

<sup>38</sup> § 2412(d)(2)(B).

<sup>39</sup> § 2412(d)(1)(A).

<sup>40</sup> § 2412(b), (d)(1)(A).

<sup>41</sup> H.R. REP. NO. 96-1418, at 8 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4984, 4987. Specifically, the committee report pointed to Titles II and VII of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, Title III of the Organized Crime Control Act, the Freedom of Information Act, the Voting Rights Act of 1975, the Consumer Product Safety Act, and the Civil Rights Attorneys Fees Award Act of 1976. *Id.* But the list from the committee report is not exhaustive. Other examples of the same "prevailing party" language can be found in statutes such as the Clean Water Act, 33 U.S.C. § 1365(d) (2006), the Clean Air Act, 42 U.S.C. § 7604(d) (2006), and the Privacy Act, 5 U.S.C. § 552a(g)(2)(B), (3)(B), (4) (2006).

<sup>42</sup> *See infra* Part II.B.

<sup>43</sup> H.R. REP. NO. 96-1418, at 11, *as reprinted in* 1980 U.S.C.C.A.N. at 4990.

<sup>44</sup> *Id.*

an uncontroversial matter.<sup>45</sup> The drafters probably never contemplated the possibility of such a dispute. The legislative history contains an in-depth discussion of what precisely, under existing precedent, makes a party qualify as “prevailing” in light of the possibilities of reversed appellate victories, partial victories, and partial reversals.<sup>46</sup> By the time Congress drafted the EAJA, significant litigation had already taken place over the term’s definition, but none of it focused on the determination of the payable party.<sup>47</sup> Since the passage of the EAJA, a great deal of litigation has ensued over the “prevailing party” language and the interplay between an attorney and her client on the issue of fee payments. Nevertheless, the Supreme Court has yet to directly address the question of who is the proper payee,<sup>48</sup> but it has provided some guidance for how to interpret the phrase.<sup>49</sup> Most importantly, the Supreme Court has repeatedly stated that all statutes that include the phrase “prevailing party” with regard to attorney’s fees should receive identical interpretive treatment.<sup>50</sup>

When the Court has discussed issues of fees for prevailing parties, it has frequently referred to the fees as belonging not just to the “prevailing party” but also to the “claimant” and “plaintiff.”<sup>51</sup> Although these dicta are not dispositive, they demonstrate that the Court, like Congress, views the payable party as the client, claimant, or plaintiff, and not the attorney representing him. In other in-

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<sup>45</sup> Contemporaneous cases interpreting language of the EAJA and other “prevailing party” fee-shifting statutes do not directly discuss the dilemma of determining a proper recipient, and dicta in those cases suggest that courts were not even contemplating the question. See *infra* notes 51–65 and accompanying text.

<sup>46</sup> H.R. REP. NO. 96-1418, at 11–12, as reprinted in 1980 U.S.C.C.A.N. at 4990–91.

<sup>47</sup> Sisk, *supra* note 17, at 227 (“Precisely because of the significant policy and financial issues lurking behind every EAJA dispute, this statute has been the situs of closely fought litigation battles. . . . [V]irtually every paragraph and phrase in the statute has been the subject of litigation and nearly every word has been parsed by the courts in reported decisions.”).

<sup>48</sup> See *infra* notes 50–63 and accompanying text.

<sup>49</sup> *Id.*

<sup>50</sup> *E.g.*, *Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603 n.4 (2001); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Hanrahan v. Hampton*, 446 U.S. 754, 758 n.4 (1980). The legislative history also reflects this understanding. See *supra* note 43 and accompanying text.

<sup>51</sup> *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002) (“Under EAJA, a party prevailing against the United States in court, including a successful Social Security benefits claimant, may be awarded fees . . . .”); *Hensley*, 461 U.S. at 433 (“A plaintiff must be a ‘prevailing party’ to recover an attorney’s fee under § 1988.”); see also *id.* at 441 (Brennan, J., dissenting) (“I also agree that plaintiffs may receive attorney’s fees for cases in which ‘they succeeded on any significant issue in litigation which achieves some of the benefits sought in bringing suit.’”).



stances, when the Court specifically addressed whether a party has actually prevailed, it has also used the individual client as the stand-in who must achieve actual success to “prevail” in the suit. For example, the Court held in *Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources* that a plaintiff is not entitled to fees when his lawsuit is rendered moot because the defendant stopped engaging in the offensive behavior as a result of the suit.<sup>52</sup> In so holding, the Court made clear that its determination was based on the perspective of the client and not the attorney, stating that under its prior cases, “a ‘prevailing party’ is one who has been awarded some relief.”<sup>53</sup> Relief is awarded for the benefit of the client, not his attorney. Additionally, the Court, viewing the term “prevailing party” as a legal term of art, cited *Black’s Law Dictionary* to define a prevailing party as a “party in whose favor judgment is rendered, regardless of the amount of damages awarded.”<sup>54</sup> Also instructive in this particular instance is Justice Scalia’s concurrence, where he wrote, “[W]hen ‘prevailing party’ is used by courts or legislatures in the context of a lawsuit, it is a term of art. It has traditionally—and to my knowledge, prior to the enactment of the first statutes at issue here, *invariably*—meant the party that wins the suit . . . .”<sup>55</sup> The Court’s treatment of the term “prevailing party” in *Buckhannon* largely reinforces the idea that the term refers strictly to the individual seeking relief and not his counsel. But because the nature of the dispute in *Buckhannon* is so easily distinguished from the current situation, the Court’s dicta there are hardly definitive here.

The Court has touched on the question of the payable party more closely in cases involving disputes between the attorney and the client. In *Venegas v. Mitchell*,<sup>56</sup> an attorney sought to attain fees pursuant both to 42 U.S.C. § 1988 and a contingency agreement with his client. In reaching its decision, the Court held that “section 1988 makes the prevailing *party* eligible for a discretionary award of attorney’s fees” because “it is the party, rather than the lawyer, who is so

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<sup>52</sup> 532 U.S. 598, 600 (2001).

<sup>53</sup> *Id.* at 603.

<sup>54</sup> *Id.* (citing BLACK’S LAW DICTIONARY 1145 (7th ed. 1999)); *see also id.* at 628–29 (Ginsburg, J., dissenting) (criticizing the majority for using the *Black’s Law Dictionary* definition and arguing that “[i]n prior cases, [the Court has] not treated *Black’s Law Dictionary* as preclusively definitive”). The definition of “prevailing party” remains identical in the latest edition. BLACK’S LAW DICTIONARY 1232 (9th ed. 2009).

<sup>55</sup> *Buckhannon*, 532 U.S. at 615 (Scalia, J., concurring).

<sup>56</sup> 495 U.S. 82 (1990).

eligible.”<sup>57</sup> But dispositive as the language might seem as it relates to the payable party, the case primarily focused on the question of contingent fees exceeding statutory awards.<sup>58</sup> To the extent that the holding discussed the eligible party, it applied only to disputes over contingent fees and predefined contractual arrangements between a plaintiff and his attorney.<sup>59</sup> The language indicating that the party should receive the fees in that circumstance does not automatically lead to the conclusion that the party should receive the fees directly in the current circumstance, when both the attorney and the client want payment directed to the attorney alone.

The Court provided its most insightful precedent on the question of the proper payable party in *Evans v. Jeff D.*, where it held that a plaintiff has the authority to waive § 1988 attorney’s fees as part of a settlement agreement.<sup>60</sup> In that case, the Court made the client the master of the attorney’s fees and held that “Congress bestowed upon the ‘prevailing party’ (generally plaintiffs) a statutory eligibility for a discretionary award of attorney’s fees in specified civil rights actions. It did not prevent the party from waiving this eligibility anymore than it legislated against assignment of this right to an attorney.”<sup>61</sup> This holding makes clear that the right to fees belongs to the client and that the attorney is powerless to prevent the client from bargaining away attorney’s fee payments during the course of settlement negotiations.<sup>62</sup> The decision sidesteps the question of who could be an eligible recipient of the fees. In fact, it explicitly states that the client retains the right to assign attorney’s fees to his counsel.<sup>63</sup>

The existing precedent makes clear that the client is the ultimate decision maker regarding fees between client and attorney.

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<sup>57</sup> *Id.* at 87–88.

<sup>58</sup> *Id.*

<sup>59</sup> *See id.* at 89.

<sup>60</sup> 475 U.S. 717, 720 (1986).

<sup>61</sup> *Id.* at 730–31.

<sup>62</sup> *See* Martha Sherrill Davis, *Attorney Fee Awards in Voting Rights Litigation*, 34 S.D. L. REV. 303, 332–36 (1989); David Paul Enzminger, Note, *Waive Goodbye to Law in the Public Interest—The Use of Coercive Fee Waivers in Civil Rights Actions*, *Evans v. Jeff. D.*, 475 U.S. 717 (1986), 19 ARIZ. ST. L.J. 749, 757–59 (1987).

<sup>63</sup> Under the current practice of the Social Security Administration, as seen in *Manning v. Astrue*, 510 F.3d 1246 (10th Cir. 2007), *cert. denied*, 129 S. Ct. 486 (2008), discussed *infra* Part III.A, the government will write a check to the client, care of the attorney. The client can direct the funds as he chooses, and he may be under a contractual obligation to assign them to his attorney. But the client’s ability to assign the right does not speak to the willingness of the government or the court to enter the attorney as the direct recipient without using the client as an intermediary.

The recent line of cases, however, raises the question as to whether the statutory language precludes the client from requesting that the funds be payable directly to his attorney. Noteworthy in the Supreme Court cases is the absence of consideration given to the identification of the proper recipient. With the concern focusing on whether the client or the attorney is better suited to make decisions, the Court repeatedly determined that the client was the appropriate decision maker. But the Court never addressed the question of what might happen if the plaintiff and the defendant disagreed. In the past, parties have litigated the amount of the fees owed or whether fees were owed at all, but because the burden of writing a check to an attorney rather than the client was so marginal, attorneys never litigated the determination of the proper recipient.<sup>64</sup> Instead, courts did not begin looking into the current question until losing parties started to dispute the appropriateness of direct payment to attorneys.

### III. THE EAJA PAYABLE-PARTY CIRCUIT SPLIT

From the EAJA's enactment in 1980 through 2005, only in limited instances did parties litigate disputes over whether the proper payable party should be the client or his counsel.<sup>65</sup> Many, if not most, of the recent cases presenting this question have been in the context of successful appeals from administrative denials of Social Security disability benefits, most likely because they are common and feature plaintiffs with disabilities who are more likely to face financial hardship resulting in debts to the government.<sup>66</sup>

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<sup>64</sup> See *infra* Part III.

<sup>65</sup> Before the Social Security Administration began requesting that EAJA fees be paid only to the client, the question was litigated almost exclusively in the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit. See, e.g., *FDL Techs., Inc. v. Nathan*, 967 F.2d 1578, 1581 (Fed. Cir. 1992) (holding that “the prevailing party, and not counsel, is entitled to attorney fees” when a military contractor prevailed in a contract dispute against the Army); *Phillips v. Gen. Serv. Admin.*, 924 F.2d 1577, 1582 (Fed. Cir. 1991) (holding that fee awards should be made “to the ‘prevailing party,’ not the attorney”); see also *Marre v. United States*, 117 F.3d 297, 304 (5th Cir. 1997) (holding that “prevailing party” language in fee-shifting provisions of federal tax statutes directs payment to the attorneys because “the prevailing party is only nominally the person who receives the award; the real party in interest vis-à-vis attorneys’ fees awarded under the statute are the attorneys themselves”) (citing *Plant v. Blazer Fin. Serv.*, 598 F.2d 1357 (5th Cir. 1979)). No other court of appeals addressed the question directly until *King v. Commissioner of Social Security*, 230 F. App’x 476 (6th Cir. 2007).

<sup>66</sup> In 2006, the Social Security Administration received 2,140,112 applications for disability benefits with an award rate of just 33.7 percent. OFFICE OF RES., EVALUATION, AND STATISTICS, SOC. SEC. ADMIN., ANNUAL STATISTICAL REPORT ON THE

Some older EAJA cases raised the payable-party question but did only indirectly. In those cases, the question involved the standing of an attorney to independently request fees pursuant to a fee-shifting statute with “prevailing party” language. An often-cited case in this area is *Oguachuba v. INS*, where the U.S. Court of Appeals for the Second Circuit held that an attorney did not have standing to petition for fees and that when fees are available, the motion must be on the client’s behalf.<sup>67</sup> But the resurgence of the payable-party question reopened *Oguachuba* to scrutiny. The U.S. Court of Appeals for the Eighth Circuit recently held that an attorney could bring a motion for fees on her own behalf, principally because the court concluded that she was the payable party and entitled to the fees.<sup>68</sup> But while the standing question relates to the current question on the margins, it is the subject of a separate circuit split that is outside the scope of this Comment.<sup>69</sup>

On the question of the proper payable party under the EAJA, circuit courts are split. The U.S. Courts of Appeals for the Fourth, Sixth, Tenth, Eleventh, and Federal Circuits all take the position that the fees are payable only to the client.<sup>70</sup> The U.S. Courts of Appeals for the Fifth and Eighth Circuits take the opposite position that the

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SOCIAL SECURITY DISABILITY INSURANCE PROGRAM 136 (2008), available at [http://www.ssa.gov/policy/docs/statcomps/di\\_asr/2007/di\\_asr07.pdf](http://www.ssa.gov/policy/docs/statcomps/di_asr/2007/di_asr07.pdf). For a description of the typical problems that face a Social Security disability claimant, see Morton Denlow, *Substantial Evidence Review in Social Security Cases as an Issue of Fact*, 28 J. NAT’L ADMIN. L. JUDICIARY 29, 29–39 (2008).

<sup>67</sup> 706 F.2d 93, 97 (1982) (“The claim that a denial of attorneys’ fees penalizes the lawyer but not the client exhibits a fundamental confusion about the nature of that relationship both in our legal system and under the EAJA. Whether an award of attorneys’ fees under the Act ultimately redounds to the benefit of counsel depends upon the private contractual arrangements between the attorney and the client.”).

<sup>68</sup> *Ratliff v. Astrue*, 540 F.3d 800, 802 (8th Cir. 2008), cert. granted, 130 S. Ct. 48 (2009).

<sup>69</sup> See *Lowrance v. Hacker*, 966 F.2d 1153, 1156 (7th Cir. 1992) (recognizing a split between the U.S. Court of Appeals for the Seventh Circuit and the U.S. Courts of Appeals for the First and Second Circuits in an action for fees under the identical “prevailing party” language of 42 U.S.C. § 1988 and stating the Seventh Circuit rule that an exception on standing for an attorney to request fees on his own behalf exists “where the lawyer is acting in his capacity as the client’s representative” because “whether the motion for fees is in the name of the party or his attorney truly is a ‘technicality’ that places ‘form over substance’”).

<sup>70</sup> See *Bryant v. Comm’r of Soc. Sec.*, 578 F.3d 443 (6th Cir. 2009); *Stephens v. Astrue*, 565 F.3d 131 (4th Cir. 2009); *Reeves v. Astrue*, 526 F.3d 732 (11th Cir. 2008), cert. granted, 130 S. Ct. 48 (2009); *Manning v. Astrue*, 510 F.3d 1246 (10th Cir. 2007), cert. denied, 129 S. Ct. 486 (2008); *FDL Techs., Inc. v. Nathan*, 967 F.2d 1578 (Fed. Cir. 1992).

fees are payable directly to the attorney.<sup>71</sup> Although these are the only circuit courts yet to decide the issue, district courts in all twelve circuits have confronted it.<sup>72</sup>

A. *Payment to the Client under Manning v. Astrue*

The leading case supporting the proposition that only the client can be a recipient of “prevailing party” attorney’s fees is *Manning v. Astrue*.<sup>73</sup> There, the Tenth Circuit confronted two issues: “(1) whether attorney’s fees under the EAJA are payable to Ms. Manning or to her attorney and (2) if the attorney’s fees are payable to Ms. Manning, whether the fees may be offset under the Debt Collection Improvement Act for an outstanding student loan debt . . . .”<sup>74</sup> The factual background of *Manning* is common for these types of cases. An administrative proceeding resulted in the denial of supplemental Social Security income benefits for Manning.<sup>75</sup> She appealed this denial to the U.S. District Court for the Eastern District of Oklahoma and prevailed.<sup>76</sup> She moved for the payment of attorney’s fees under the EAJA, to which the Commissioner of Social Security did not object.<sup>77</sup>

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<sup>71</sup> See *Ratliff v. Astrue*, 540 F.3d 800, 801 (8th Cir. 2008), *cert. granted*, 130 S. Ct. 48 (2009). The Fifth Circuit has not yet answered the question with regard to the EAJA, but it has held that the “prevailing party” language under another statute permits payment directly to an attorney. *Marre v. United States*, 117 F.3d 297, 304 (5th Cir. 1997). When taken with Supreme Court precedent holding that fee-shifting “prevailing party” language interpretations are interchangeable between statutes, it should follow that the Fifth Circuit allows for EAJA payments to be paid directly to an attorney. See, e.g., *Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603 n.4 (2001); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983). The government agrees with this position and “has treated *Marre* as precluding (within the Fifth Circuit) use of the offset mechanism to offset debts owed by the prevailing party against EAJA awards.” Petition for Writ of Certiorari at 15, *Ratliff v. Astrue*, No. 08-1322 (U.S. June 25, 2009); see also *Bean v. Barnhart*, 473 F. Supp. 2d 739, 743 (E.D. Tex. 2007) (in which the Social Security Administration appears to acquiesce to the attorney as a direct recipient).

<sup>72</sup> See, e.g., *Barber v. Astrue*, No. CIV-S-00-1286 WBS DAD, 2008 U.S. Dist. LEXIS 65199 (E.D. Cal. July 8, 2008); *Woods v. Comm’r of Soc. Sec.*, No. CV-07-76-B-W, 2008 U.S. Dist. LEXIS 27999 (D. Me. Apr. 3, 2008); *Chonko v. Comm’r of Soc. Sec.*, 624 F. Supp. 2d 357 (D.N.J. 2008); *Hogan v. Astrue*, 539 F. Supp. 2d 680 (W.D.N.Y. 2008). Note that the only circuit where a district court has not yet addressed the issue directly is the Fifth Circuit, which, for reasons discussed *supra* note 71, has likely concluded the question based on related precedent.

<sup>73</sup> 510 F.3d 1246 (10th Cir. 2007), *cert. denied*, 129 S. Ct. 486 (2008).

<sup>74</sup> *Id.* at 1248.

<sup>75</sup> *Id.* at 1247.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

But when Manning received the attorney's fees, she was given \$1966.12 less than the award amount because of an administrative offset from the Department of Education for past-due student loans.<sup>78</sup> This offset was nearly one-third of the total \$5958.30 attorney's fee award.<sup>79</sup> Manning's counsel filed motions for the court to set aside the offset or to direct the fees specifically to Manning's counsel rather than to Manning herself so that the debtless counsel could receive the full amount of the awarded fees.<sup>80</sup> The district court denied both motions.<sup>81</sup>

In deciding the proper recipient of the funds, the Tenth Circuit engaged in a multi-step process of evaluating the plain meaning of the statutory language, the way that courts have interpreted identical "prevailing party" language in other federal statutes, the EAJA's legislative history, the broader statutory framework relating to Social Security disability payments, and the standing arguments of *Oguachuba*.<sup>82</sup> On the question of the literal statutory language, *Manning* summarily concluded that the "statutory language clearly provides that the prevailing party, who incurred the attorney's fees, and not that party's attorney, is eligible for the attorney's fees."<sup>83</sup> The court also examined how other courts have interpreted the "prevailing party" language in other statutes, but its examination was fairly cursory and did not add much to the analysis of the statutory language.<sup>84</sup>

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<sup>78</sup> *Id.* at 1247–48.

<sup>79</sup> *Manning*, 510 F.3d at 1247.

<sup>80</sup> *Id.* at 1248.

<sup>81</sup> *Id.*

<sup>82</sup> *See id.* at 1249–55.

<sup>83</sup> *Id.* at 1249–50.

<sup>84</sup> Supreme Court precedent on this matter does not directly address the question of the payable party but often implies that the payable party is the client. *See supra* Part II.B. The *Manning* court cited many of these precedents as support for the idea that the court should direct payment to the client rather than to counsel. *Manning*, 510 F.3d at 1250–51. But it appears that the Tenth Circuit may have exaggerated the weight of the precedent's effect on the case. For example, the court cited *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002), as support for its assertion that "[u]nder EAJA, a party prevailing against the United States in court, including a successful Social Security benefits claimant, may be awarded fees payable by the United States if the Government's position in the litigation was not 'substantially justified.'" *Manning*, 510 F.3d at 1249–50. But an examination of the context surrounding the quoted portion indicates that the Court was paraphrasing rather than interpreting the statutory language. *See Gisbrecht*, 535 U.S. at 796. Although the existing precedent does favor an approach that would award fees to the client, the *Manning* court might have exaggerated the merits of direct application of this precedent.

The court also evaluated the legislative history and determined that it supported an outcome in favor of directing the fees to the client.<sup>85</sup> Specifically, the court examined the House Committee Report, which stated that the EAJA “rests on the premise that certain individuals . . . may be deterred from seeking review of . . . unreasonable governmental action because of the expense involved in securing a vindication of their rights,” and concluded that “[t]his statement of purpose directly addresses the question whether the EAJA fees are for the claimant or for the claimant’s attorney and clearly states that the fees are for the claimant.”<sup>86</sup>

Perhaps the most compelling portion of the court’s analysis is its treatment of Manning’s argument that “uncodified portions of the EAJA anticipate that her attorney will receive the EAJA fee award.”<sup>87</sup> In her argument, Manning pointed to a separate attorney’s fee provision contained within the Social Security appeals law itself.<sup>88</sup> When a claimant prevails in a Social Security disability appeal, “the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total past-due benefits to which the claimant is entitled by reason of such judgment . . . .”<sup>89</sup> Manning argued that this language unambiguously directs the fees to the attorney.<sup>90</sup> She further suggested that an uncodified Savings Provision of the EAJA specifically states that fees awarded pursuant to the Social Security Act “shall not prevent an award of fees and other expenses” under the EAJA but that if a claimant’s attorney “receives fees for the same work” under both sections, she must “refund[] to the claimant the amount of the smaller fee.”<sup>91</sup> Manning argued that because the statute could potentially have required the attorney to be responsible for refunding the EAJA

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<sup>85</sup> *Manning*, 510 F.3d at 1251–52.

<sup>86</sup> *Id.* at 1251 (quoting H.R. REP. NO. 96-1418, at 5–6 (1980), as reprinted in 1980 U.S.C.C.A.N. 4984, 4984).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1251–52.

<sup>89</sup> 42 U.S.C. § 406(b)(1)(A) (2006). Prevailing parties often disfavor this fee provision because it only allows the court to “certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits.” *Id.* Fees pursuant to the EAJA, on the other hand, represent genuine fee shifting, where the attorney receives extra payment from the government based on the work performed rather than simple apportionment of some benefits won in the suit.

<sup>90</sup> *Manning*, 510 F.3d at 1251–52.

<sup>91</sup> Act of Aug. 5, 1985, Pub. L. 99-80, § 3, 99 Stat. 183, 186 (amending Act of Oct. 21, 1980, Pub. L. No. 96-481, § 206, 94 Stat. 2321, 2330).

fees, Congress therefore envisioned the attorney as the proper recipient.<sup>92</sup> The court did not find this argument persuasive and held that the provision served only to help avoid double compensation, and that it “does not state that the attorney is entitled to receive the full amount of the EAJA fees awarded.”<sup>93</sup>

Furthermore, the court suggested that the Social Security past-due benefits provision was evidence that Congress intended the client, and not the attorney, to be the direct recipient under the EAJA.<sup>94</sup> The past-due benefits provision directs a “fee for payment to such attorney” and thus unambiguously designates the attorney as the beneficiary of the fee payment.<sup>95</sup> The court viewed this language as indicative of “Congress know[ing] what language to use to award attorney’s fees to an attorney and what language to use when it chooses to award the fees to the prevailing party.”<sup>96</sup> Under the *Manning* court’s view, even if the “prevailing party” language of the EAJA is derived from a boilerplate formula for fee-shifting in federal statutes, Congress has demonstrated a capability of deviating from that formula to make the distinction between party and counsel.<sup>97</sup> In the case of the EAJA and other “prevailing party” statutes, Congress chose the term “party” rather than “attorney” to denote the recipient.

In its analysis, the court also looked to *Oguachuba v. INS*,<sup>98</sup> where the Second Circuit considered a motion that an attorney made for EAJA fees on his own behalf, rather than on behalf of his client.<sup>99</sup> The Second Circuit, without reaching a decision on the issue of the properly payable party, dismissed the claim upon a finding that counsel lacked standing to pursue fees himself.<sup>100</sup> The *Manning* court interpreted this decision as a validation of treating the client as the proper recipient, reasoning that if the attorney had a direct claim to the fees, he would have had standing to bring the motion.<sup>101</sup> The

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<sup>92</sup> *Manning*, 510 F.3d at 1251.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1252.

<sup>95</sup> 42 U.S.C. § 406(b)(1)(A) (2006).

<sup>96</sup> *Manning*, 510 F.3d at 1252.

<sup>97</sup> *Id.*

<sup>98</sup> 706 F.2d 93 (2d Cir. 1983).

<sup>99</sup> *Id.* at 97–98.

<sup>100</sup> *Id.* at 98.

<sup>101</sup> *Manning*, 510 F.3d at 1252. Although the Second Circuit has not yet ruled on the appropriate payable party, some district courts in the Second Circuit have treated *Oguachuba* as settling the question in favor of direct client payments. See, e.g., Marti-



court also placed particular reliance on *Panola Land Buying Ass'n v. Clark*,<sup>102</sup> where the Eleventh Circuit held that a prevailing party's former attorney could not claim EAJA fees when the client was willing to enter a settlement agreement that included a fee-waiver provision.<sup>103</sup>

In closing, the court acknowledged that for most of the EAJA's history, the dominant practice was to pay the attorneys directly; even the government, the court noted, seemed to change its position on the proper recipient during the course of litigation.<sup>104</sup> But the court held that in light of "the statutory language, legislative history, and case law," it was required to direct payment to the client, even though the practice "seems counter intuitive."<sup>105</sup> The court proceeded to address briefly the issue of the Debt Collection Improvement Act and held that all judgments against the government are subject to automatic debt deductions unless a specific exception in the Act applies.<sup>106</sup> Because the EAJA is not listed as such an exception, an offset of Manning's attorney's fee award to pay her student-loan debts was permissible.<sup>107</sup>

*B. Payment to the Attorney Under Ratliff v. Astrue*

At this time, only one circuit favors direct payment to the attorney. In *Ratliff v. Astrue*, the Eighth Circuit held that EAJA attorney's fees should go directly to the attorney and that government offsets of the fees against the client's government debts are therefore impermissible.<sup>108</sup> In *Ratliff*, attorney Catherine Ratliff successfully represented two clients who won attorney's fees under the EAJA that were subject to partial offsets as a result of the clients' debts to the government.<sup>109</sup> Ratliff filed a suit on her own behalf against the Social Security Administration and claimed that because she was the proper recipient of the attorney's fees under the EAJA, the award reduction

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no v. Astrue, No. 07-CV-0941, 2009 U.S. Dist. LEXIS 1446, at \*7-8 (N.D.N.Y. Jan 9, 2009).

<sup>102</sup> 844 F.2d 1506 (11th Cir. 1988).

<sup>103</sup> *Manning*, 510 F.3d at 1251.

<sup>104</sup> *Id.* at 1255.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1255-56.

<sup>107</sup> *Id.*

<sup>108</sup> 540 F.3d 800, 801 (8th Cir. 2008), *cert. granted*, 130 S. Ct. 48 (2009) .

<sup>109</sup> *Id.*

represented an illegal seizure under the Fourth Amendment.<sup>110</sup> The district court dismissed her case, holding that she did not have standing to sue the government because the client is the appropriate recipient of attorney's fees under the EAJA; therefore, the court reasoned, Ratliff had no legal entitlement to the fees that the government offset and did not suffer an injury-in-fact.<sup>111</sup>

The Eighth Circuit reversed in a brief opinion containing a surprising amount of equivocation on the issue.<sup>112</sup> The court held that the attorney's fees are awarded to the attorney and not the client, but it made this decision because of peculiar in-circuit precedent.<sup>113</sup> Specifically, the court cited to two cases in which it held that third-party judgment creditors cannot recover EAJA attorney's fees and that an Internal Revenue Code fee-shifting statute provided for government payment to the attorney rather than for an offset of taxes owed.<sup>114</sup> The court reasoned that because both of these precedents favor payment of the attorney over payment of the client's debts, "EAJA fee awards become the property of the prevailing party's attorney when assessed and may not be used to offset the claimant's debt."<sup>115</sup> The court acknowledged that it might have reached a different conclusion if the case were one of first impression, but it indicated that it was constrained by Eighth Circuit precedent.<sup>116</sup>

In a concurring opinion, Judge Gruender made a compelling argument that although in-circuit precedent required payment to the

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<sup>110</sup> *Ratliff v. Astrue*, No. 06-5070-RHB, 2007 WL 6894710, at \*1 (D.S.D. May 10, 2007), *rev'd*, 540 F.3d 800, *cert. granted*, 130 S. Ct. 48. The *Ratliff* case is unique in this respect. In most other cases, the issue arises when the attorney makes the initial motion for attorney's fees under the EAJA. Here, however, the attorney sued on her own behalf after her clients' awards were offset. *Id.* Therefore, the precise question in *Ratliff* focused on the properly payable party in the context of whether the attorney had sufficient injury to file a direct claim against the government; most other cases typically revolve around which party should be paid if the court chooses to award fees. See Respondent's Brief in Opposition to Petition for Writ of Certiorari, *supra* note 3, at 15–18 (acknowledging the unique procedural posture of *Ratliff* as compared to other EAJA payable-party cases); Reply Brief for the Petitioner in Support of Petition for Writ of Certiorari at 7, *Ratliff v. Astrue*, No. 08-1322 (U.S. June 25, 2009) (same). Although the procedural posture of the case is different, the legal issues are essentially identical.

<sup>111</sup> *Ratliff*, 2007 WL 6894710, at \*1.

<sup>112</sup> See *Ratliff*, 540 F.3d at 801–02.

<sup>113</sup> *Id.* at 802.

<sup>114</sup> *Id.* (citing *Curtis v. City of Des Moines*, 995 F.2d 125, 129 (8th Cir. 1993); *United States v. McPeck*, 910 F.2d 509, 514 (8th Cir. 1990)).

<sup>115</sup> *Id.* at 802.

<sup>116</sup> *Id.*

attorney, the holding is nevertheless “inconsistent with language in two Supreme Court opinions, the EAJA’s plain language, and the holdings of most other circuit courts.”<sup>117</sup> Judge Gruender argued that both *Evans v. Jeff D.*, with its allowance of prevailing party discretion in handling attorney’s fees, and *Venegas v. Mitchell*, with its statement that an attorney’s fee award under § 1988 belongs to the client rather than the attorney, indicate that an outcome for direct payment to the client should ensue.<sup>118</sup> Judge Gruender further argued that, especially considering Congress’s explicit direction of attorney’s fees to attorneys in other statutes, the plain language of the EAJA favors payment to the party rather than to counsel.<sup>119</sup> Although he concurred in the opinion because of binding Eighth Circuit precedent, Judge Gruender’s concurring opinion strongly suggests that he would have favored payment to the client if the case appeared as a matter of first impression.<sup>120</sup>

Prior to *Ratliff*, the most significant opinion in support of paying the attorney directly was *King v. Commissioner of Social Security*.<sup>121</sup> *King* was one of the first cases to address this issue, and although it is an unpublished decision, it figures prominently in subsequent district court opinions rendering the same outcome.<sup>122</sup> In *King*, the plaintiff filed an application for supplemental Social Security income, which the Commissioner denied administratively.<sup>123</sup> The U.S. District Court for the Northern District of Ohio reversed and deemed that the Commissioner’s decision was not supported by substantial evidence.<sup>124</sup>

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<sup>117</sup> *Id.* at 803 (Gruender, J., concurring).

<sup>118</sup> *Ratliff*, 540 F.3d at 803 (citing *Venegas v. Mitchell*, 495 U.S. 82, 88 (1990); *Evans v. Jeff D.*, 475 U.S. 717, 730 (1986)).

<sup>119</sup> *Id.* at 803–04 (Gruender, J., concurring).

<sup>120</sup> *See id.* at 805. On September 30, 2009, the Supreme Court granted a petition for a writ of certiorari. 130 S. Ct. 48 (2009).

<sup>121</sup> 230 F. App’x 476 (6th Cir. 2007).

<sup>122</sup> *See, e.g., Ratliff*, 540 F.3d at 805 (Gruender, J., concurring); *Williams v. Comm’r of Soc. Sec.*, 549 F. Supp. 2d 613, 621 (D.N.J. 2008); *Pegg v. Astrue*, No. 7:07-221-KKC, 2008 WL 2038871, at \*4 (E.D. Ky. May 12, 2008); *see also Hogan v. Astrue*, 539 F. Supp. 2d 680, 683 (W.D.N.Y. 2008) (acknowledging *King* as the leading circuit decision to pay the attorney but declining to follow it).

<sup>123</sup> *King*, 230 F. App’x at 477.

<sup>124</sup> *Id.* Unlike *Manning*, the decision in *King* featured numerous ancillary issues for the Court to consider, including whether the notice of appeal was filed in a timely manner and whether King’s attorney filed for fees on her own behalf or on behalf of King. *Id.* at 478–80. The court could have rejected the claim due to a lack of standing if the attorney was seeking fees on her own behalf, but the court determined that the attorney was acting for King when she made the motion even though an “inartfully styled” brief made it a close call. *Id.* at 482.

The court approached the question by first examining the Federal Circuit's decision in *Phillips v. General Service Administration*,<sup>125</sup> where the question of whether EAJA fees are payable to a client or an attorney first arose.<sup>126</sup> The *Phillips* court issued a somewhat murky opinion, holding that an "attorney could not directly claim or be entitled to the award" but that "there must also be an express or implied agreement that the fee award will be paid over to the legal representative."<sup>127</sup> To a certain extent, the *Phillips* decision was a compromise; the court held that the fee was payable to the client but that the client must promptly surrender the fee to the attorney.<sup>128</sup> In addition to the Federal Circuit case, the Sixth Circuit examined the prevailing circuit practice and the long-term stance of the Commissioner.<sup>129</sup> In many cases, Sixth Circuit courts included language directing attorney's fees to the prevailing party's counsel without any consideration of whether she was the proper recipient and without objection from the Commissioner.<sup>130</sup> The court weighed the longstanding disposition of the Commissioner, previous Sixth Circuit treatment of the issue, and the *Phillips* dicta, and it concluded that EAJA fees are payable to the attorney at the request of the party.<sup>131</sup>

#### IV. THE APPROPRIATE DEFINITION, THE FULL SCOPE OF POTENTIAL IMPLICATIONS, AND THE NEED FOR CONGRESSIONAL ACTION

The disagreement between the courts is not based on competing policy interests or different interpretations of the statutory language. Instead, courts consistently look at the same group of factors and

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<sup>125</sup> 924 F.2d 1577 (Fed. Cir. 1991).

<sup>126</sup> *King*, 230 F. App'x at 481.

<sup>127</sup> *Phillips*, 924 F.2d at 1582–83.

<sup>128</sup> The *Phillips* case represents an anomaly in that it straddled the two possible outcomes by directing the funds to the client while going out of its way to emphasize that the fees are not the client's to keep. Proponents of paying the attorney directly and proponents of paying only the client have both pointed to *Phillips* for support. See *Manning v. Astrue*, 510 F.3d 1246, 1250 (10th Cir. 2007); *King*, 230 F. App'x at 481. But despite the mixed message of *Phillips*, the Federal Circuit clarified its position in *FDL Technologies, Inc. v. Nathan*, 967 F.2d 1578, 1581 (Fed. Cir. 1992), where it unambiguously held that the client is the proper recipient of EAJA fees. In a dissenting opinion, Judge Newman wrote that she "can not support the improvident action . . . which assured in the circumstances that the attorney fee award, although paid by the government, would never reach the attorney." *Id.* at 1582 (Newman, J., dissenting).

<sup>129</sup> *King*, 230 F. App'x at 481–82.

<sup>130</sup> See, e.g., *Martin v. Comm'r of Soc. Sec.*, 82 F. App'x 453, 456 (6th Cir. 2003).

<sup>131</sup> *King*, 230 F. App'x at 482.

weigh their relative importance. These factors can be summarized as including the statutory language, the legislative history, the policy incentives, and prior prevailing court practice.

A. *Different Factors Point to Different Outcomes*

When courts choose to follow the statutory language, as *Manning* explicitly did, the resulting interpretation invariably favors paying the client rather than the attorney.<sup>132</sup> The EAJA states, “[A] court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought by or against the United States.”<sup>133</sup> The use of the term “prevailing party” appears to refer exclusively to the plaintiff; the statute directs courts to award the fees to the party and not the party’s representative. The language does not discuss the attorney as an individual; instead, it points to the fees of the attorney and directs the funds to the party in the suit.<sup>134</sup>

Aside from the operative language, two other inferences drawn from the statute further support the idea of the client being the only permissible recipient. First, the EAJA uses the “prevailing party” language when referring to costs incurred from sources other than an attorney, such as an expert witness.<sup>135</sup> Because an attorney and her client are in a representative and fiduciary relationship, a statute could potentially refer concurrently to both when discussing the “party.” But when the same statute refers to the “prevailing party” as the recipient of costs for expert witnesses, the term can only refer to the plaintiff because the expert witness and the plaintiff have no such

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<sup>132</sup> See, e.g., *Bryant v. Comm’r of Soc. Sec.*, 578 F.3d 443, 448 (6th Cir. 2009) (“[W]e are persuaded by the plain language of the EAJA and conclude that the prevailing party . . . is the proper recipient of attorney fees under the EAJA.”); *Stephens ex. rel. R.E. v. Astrue*, 565 F.3d 131, 140 (4th Cir. 2009) (“[W]hile we may be sympathetic to the concerns raised by Stephens, sympathy does not permit us to ignore the plain language of the statute.”); *Reeves v. Astrue*, 526 F.3d 732, 735 (11th Cir. 2008) (“[T]he statute’s explicit reference to the ‘prevailing party’ unambiguously directs the award of attorney’s fees to the party who incurred those fees and not to the party’s attorney.”), *cert. granted*, 130 S. Ct. 48 (2009); *Manning v. Astrue*, 510 F.3d 1246, 1249–50 (10th Cir. 2007), *cert. denied*, 129 S. Ct. 486 (2008) (“[T]his statutory language clearly provides that the prevailing party, who incurred the attorney’s fees, and not that party’s attorney, is eligible for an award of attorney’s fees.”); see also *Ratliff v. Astrue*, 540 F.3d 800, 803 (8th Cir. 2008) (Gruender, J., concurring) (“[O]ur conclusion that EAJA attorney’s fees are awarded to a prevailing party’s attorney also contradicts the plain language of the EAJA.”).

<sup>133</sup> 28 U.S.C. § 2412(b) (2006) (emphasis added).

<sup>134</sup> See *id.*

<sup>135</sup> § 2412(a)(1).

fiduciary or representative relationship.<sup>136</sup> Second, with most of these cases arising under the umbrella of Social Security disability appeals, the actual statute providing for those appeals is instructive. The Social Security Act directs the court to “certify the amount of such fee for payment *to such attorney* out of, and not in addition to, the amount of such past-due benefits.”<sup>137</sup> This demonstrates that, notwithstanding the frequent use of the boilerplate “prevailing party” language, Congress has shown the ability to draft statutes explicitly directing fees straight to the attorney.<sup>138</sup> Given that Congress has demonstrated the capability of making this distinction, little basis exists for viewing the term “prevailing party” as reaching the attorney.

Some plaintiffs have argued that the Savings Provision of the EAJA—which indicates that when an attorney receives fees under both the EAJA and the Social Security Act, she must refund the smaller amount—supports the idea that Congress envisioned the attorney as the recipient of both.<sup>139</sup> While a court may be tempted to read past the Savings Provision and simply take the operative “prevailing party” language at face value, such a reading is problematic because the operative language and the Savings Provision are irreconcilable. The operative language directs the funds to the “prevailing party” while the Savings Provision indicates that “where the claimant’s attorney receives fees for the same work under [the Social Security Act] and [the EAJA], the claimant’s attorney refunds to the

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<sup>136</sup> In some other statutes with the same “prevailing party” language, the attorney’s fees provision is not separated from the miscellaneous-costs provision as it is in the EAJA. For example, the fee-shifting provision of the Voting Rights Act permits “the court, in its discretion, [to] allow the prevailing party . . . a reasonable attorney’s fee, reasonable expert fees, and other reasonable litigation expenses as costs.” 42 U.S.C. § 19731(e) (2006). In this context, the statute cannot be read to imply that the attorney is the “prevailing party” because the attorney’s fees are not segregated from other fees as they are in the EAJA, but they are instead lumped in combination with miscellaneous costs. For the term “party” to encompass the attorney in this situation, it would need to have two meanings at once. *Cf.* *District of Columbia v. Heller*, 128 S. Ct. 2783, 2794 (2008) (“It would be rather like saying ‘He filled and kicked the bucket’ to mean ‘He filled the bucket and died.’”). While this could mean that Congress had a separate intent for the two statutes, such intent is not relevant considering the Supreme Court’s statements that all “prevailing party” language in federal statutes should be treated the same. *See* sources cited *supra* note 50.

<sup>137</sup> 42 U.S.C. § 406(b)(1)(A) (2006) (emphasis added).

<sup>138</sup> *See id.*

<sup>139</sup> Act of Aug. 5, 1985, Pub. L. 99-80, § 3, 99 Stat. 183, 186 (amending Act of Oct. 21, 1980, Pub. L. No. 96-481, § 206, 94 Stat. 2321, 2330); *see* *Manning v. Astrue*, 510 F.3d 1246, 1253–54 (10th Cir. 2007), *cert. denied*, 129 S. Ct. 486 (2008).

claimant the amount of the smaller fee.”<sup>140</sup> No explanation for this discrepancy is particularly satisfying. One possibility is that Congress simply erred in drafting the statute. Another is that because the Social Security Act payments are capped at twenty-five percent of past-due benefits, Congress drafted the language envisioning that the Social Security payments would always be smaller.<sup>141</sup> But if this were the case, Congress would have probably ordered the refund of the Social Security Act fees rather than the smaller of the two. The third possibility is that Congress added the Savings Provision while operating under the assumption that the fees would continue to be paid to the attorney directly and that the Savings Provision merely represented the first codification of this practice.<sup>142</sup> Such an explanation is possible but peculiar considering that the Savings Provision is silent on the direction of the initial fee payments and instead relates only to the subsequent refund. The House Report on the Savings Provision indicates that Congress may have simply assumed that the EAJA already paid funds directly to the attorney.<sup>143</sup> But in the context of a fee-shifting provision, courts may not need to interpret the term “party” so narrowly.<sup>144</sup>

In this particular context, the argument can be made that the proper emphasis within the EAJA’s language instead rests with the term “prevailing.” The purpose of the statute is to ensure that the losing party pays the costs of the prevailing party. By contrast, in the aforementioned § 406 language explicitly shifting some past-due benefits to the attorney, the statute envisions a situation where a client and attorney have already prevailed and begin assessing fee payments.<sup>145</sup> By that point, the only possible dispute is between client

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<sup>140</sup> 28 U.S.C. § 2412(b) (2006); § 3, 99 Stat. at 186.

<sup>141</sup> See *supra* note 89.

<sup>142</sup> For a compelling argument in support of the theory that Congress functionally used the Savings Provision amendment to codify the payment of fees to the attorney, see *Stephens v. Astrue*, 539 F. Supp. 2d 802, 806–10 (D. Md. 2008), *rev’d*, 565 F.3d 131 (4th Cir. 2009).

<sup>143</sup> H.R. REP. NO. 99-120, at 7 (1985), as reprinted in 1985 U.S.C.C.A.N. 132, 135–36 (“The bill clarifies that an EAJA award in Social Security cases is not precluded by the fee provision in the Social Security Act[] . . . . The bill also prohibits attorneys from collecting both EAJA fees and Sec. 406(b) fees in the same case.”).

<sup>144</sup> See Anna L. Chambers, Comment, *Equal Access to Justice Act Cuts Off Equal Access for Social Security Claimants: Reeves v. Barnhart*, 12 JONES L. REV. 93, 106–07 (2007) (arguing that “the use of the phrase ‘prevailing party’ cannot be used as conclusive evidence that Congress intending [sic] the EAJA check to be payable to the claimant”).

<sup>145</sup> 42 U.S.C. § 406(b)(1)(A) (2006).

and counsel. Bearing in mind a purpose of genuine fee shifting between adverse parties, the term “party” could potentially distinguish the two sides of the case rather than the prevailing client and his attorney. Taking the EAJA’s “prevailing” emphasis in conjunction with the congressional goal of effectuating attorneys’ payments, the term “party” can reasonably include, without a significant logical leap, both the attorney and her client together and thus permit a court to exercise its discretion to direct fees to counsel rather than client. Curiously, no court appears to have embraced or explored this interpretation of the statute’s language, as those favoring payment to the attorney have instead relied upon other considerations.<sup>146</sup> Nevertheless, the statute’s straightforward language might not actually be as straightforward as it first appears.

Aside from the statutory language, many courts will also look to the EAJA’s legislative history to gain an understanding of precisely who is intended to be the fee recipient. The legislative history, however, is completely silent on the question. When legislative reports discuss the “prevailing party,” they deal exclusively with determining the requirements for a party to prevail.<sup>147</sup> The silence in the legislative history demonstrates a broader problem with the “prevailing party” language in fee-shifting statutes: no one seems to have anticipated disputes arising as a result of a client desiring direct payment to his attorney while the adverse party demands direct payment to the client.<sup>148</sup> After all, as an abstract matter, whether the direct recipient is the party or the counsel should make no difference, and from a drafter’s standpoint, the situation where the client is litigating to *avoid* personal acceptance of the government’s fee payments is difficult to imagine.

The reason for this conflict is the Debt Collection Improvement Act, which takes advantage of the client’s use of the fee-shifting provi-

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<sup>146</sup> Some courts adopt an approach of paying the attorney by emphasizing congressional intent as a superceding factor over the plain meaning of the language, but none has attempted to interpret the plain meaning of the statute as permitting direct attorney payment without an assignment. *See infra* note 159 and accompanying text.

<sup>147</sup> *See supra* Part II.A.

<sup>148</sup> The risk of unintended and unforeseen consequences has been generally recognized in the past and represents one of the most significant problems with the use of legislative history as an interpretive tool. *See, e.g.,* Richard A. Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 811 (1983) (“Most canons of statutory construction go wrong not because they misconceive the nature of judicial interpretation or of the legislative or political process but because they impute omniscience to Congress. Omniscience is always an unrealistic assumption, and particularly so when one is dealing with the legislative process.”).



sion by reshifting the fees back to the government to satisfy the client's debts.<sup>149</sup> In the relevant portions, the Act provides that after satisfying certain procedural thresholds, the Department of the Treasury is entitled to offset any government payment issued to the debtor so long as the payment source is not exempted.<sup>150</sup> Social Security past-due benefits are not wholly exempt from offset, but they are subject to special rules that exempt the first \$9000 of benefits received each year.<sup>151</sup> Therefore, when an indebted claimant succeeds in a suit to obtain past-due benefits, the government will often find itself unable to deduct funds from the relief and instead must resort to recovery through the fee award.<sup>152</sup>

The legislative history makes clear that the purpose of the EAJA is to facilitate private litigation against the federal government and the weight of its resources by providing compensation to prevailing parties.<sup>153</sup> But payment to client or counsel accomplishes this policy goal because payment to either will result in the alleviation of the client's debts. The legislative history therefore provides no real basis for determining the appropriately payable party. As a result, both sides of the dispute frequently claim the legislative history in support of their positions.<sup>154</sup>

As a result of the legislative history's malleability, many courts that favor directing payment to the attorney instead focus on the pol-

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<sup>149</sup> See 31 U.S.C. § 3716 (2006); see also *Hines v. Astrue*, No. 3:05-CV-02416-KOB, 2007 U.S. Dist. LEXIS 96985, at \*8–9 (N.D. Ala. Dec. 11, 2007) (“Under the proposed practice, the government can refuse to pay Social Security benefits without substantial justification yet suffer no true penalty because the EAJA fees that it is required to pay out one day as a penalty can be seized the next.”).

<sup>150</sup> § 3716. The source of the debt is mostly immaterial, so long as a state or the federal government is the creditor. FIN. MGMT. SERV., U.S. DEP'T OF THE TREASURY, 2001 FEDERAL DEBT COLLECTION & SOCIAL SECURITY PAYMENT GUIDE 1 (2001) (on file with author) (listing student loans, Farm Service Agency and Rural Development Agency loans, and Food Stamp overpayment as “the most common delinquent federal non-tax debts owed”).

<sup>151</sup> § 3716(c)(3)(C).

<sup>152</sup> See *supra* note 89.

<sup>153</sup> See *supra* notes 23–30 and accompanying text.

<sup>154</sup> Compare *Stephens v. Astrue*, 539 F. Supp. 2d 802, 809 (D. Md. 2008) (“[A] construction of the EAJA that effects windfall payments to individual Social Security claimants and reduces the availability of counsel for future claimants not only thwarts Congress's intent, but also is an irrational and unfair result.”), *rev'd*, 565 F.3d 131 (4th Cir. 2009), with *Manning v. Astrue*, 510 F.3d 1246, 1251 (10th Cir. 2008) (“[T]he legislative history for the EAJA also makes it clear that certain prevailing parties, and not their attorneys, may recover attorney's fees . . .”), *cert. denied*, 129 S. Ct. 486 (2008).

icy incentives underlying the EAJA.<sup>155</sup> No compelling policy argument genuinely supports paying the client rather than the attorney. Such a payment scheme runs contrary to even the client's interest. When the client has other outstanding debts, the client still benefits from immediately paying the attorney's invoice with fees that the court designates for that purpose. When no debt exists, the attorney still has a contractual entitlement to the fees and no benefit is gained when the client must act as an intermediary between the court and counsel. Any argument in favor of paying preexisting loans before paying new debts that the plaintiff incurs as a result of the litigation ignores the fact that the fees awarded are *attorney's* fees that the court granted to the plaintiff in the specific amount owed to counsel and for the specific purpose of paying counsel. No court would support an outcome whereby a client uses court-ordered attorney's fees to pay credit card debts, mortgages, or utility bills while the attorney still awaits payment. Yet ironically, the Debt Collection Improvement Act commands this outcome. Even though fees are labeled as attorney's fees, they are effectively used to pay the client's other debts. Even many courts deciding in favor of paying the client rather than the attorney acknowledge that the decision is a result of the statutory language and that the more sensible policy decision would be to direct payment to the attorney.<sup>156</sup>

Courts holding for direct payment to the attorney have almost universally relied on policy arguments.<sup>157</sup> These courts often combine the policy arguments with references to the longstanding practice of paying the attorney directly or use the Savings Provision to construe the statute as permitting direct payment to the attorney; however, the policy arguments always remain central.<sup>158</sup> In some instances, courts candidly admit that they will order payment to the attorney directly, notwithstanding the contradictory statutory language, because of the

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<sup>155</sup> See *infra* notes 157–59 and accompanying text.

<sup>156</sup> See, e.g., *Manning*, 510 F.3d at 1255 (describing as “counter intuitive” the decision “that an award of attorney’s fees does not go to the attorney”); *Reeves v. Astrue*, 526 F.3d 732, 738 (11th Cir. 2008) (“All this, Reeves contends, is bad public policy. He may well be right, but policy decisions are properly left to Congress, not the courts.”).

<sup>157</sup> See, e.g., *Vargas v. Comm’r of Soc. Sec.*, No. 07-3586 (KSH), 2008 WL 699581, at \*3–5 (D.N.J. Mar. 12, 2008).

<sup>158</sup> See, e.g., *King v. Comm’r of Soc. Sec.*, 230 F. App’x 476, 481 (6th Cir. 2007); *Stephens v. Astrue*, 539 F. Supp. 2d 802, 814 (D. Md. 2008), *rev’d*, 565 F.3d 131 (4th Cir. 2009).

policy issues' overwhelming weight. For example, one court, in granting fees to the attorney directly, stated,

The decisions siding with the Commissioner have primarily relied on the principle of statutory construction which holds that courts should apply the plain meaning of a statute when the statutory language is clear and unambiguous. However, these courts, for the most part, have ignored a less often cited, but equally important, principle of statutory construction which holds that when the literal application of statutory language would either produce an outcome demonstrably at odds with the statute's purpose or would result in an absurd outcome, courts are entitled to look beyond the plain meaning of the statutory language.

The literal application of [the EAJA] in this case undeniably leads to bizarre and absurd results.<sup>159</sup>

This statement on statutory interpretation is correct and deserves some consideration,<sup>160</sup> but it is not applicable here. While it is true that courts will "rewrite" statutes when the application of the strict statutory language blatantly contradicts the purpose of the statute, the ordinary circumstances for such a finding usually involve a particularly bizarre outcome when the facts are applied to the law literally.<sup>161</sup> Although the argument for paying only the client is largely impractical, it is still in harmony with the goals of the EAJA when considering those goals in conjunction with the goals of the Debt Collection Improvement Act.<sup>162</sup> Specifically, the outcome of paying the client is not so one sided when considering that Congress has

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<sup>159</sup> *Williams v. Comm'r of Soc. Sec.*, 549 F. Supp. 2d 613, 616 (D.N.J. 2008) (internal citations omitted); *see also Quade v. Barnhart*, 570 F. Supp. 2d 1164, 1171-72 (D. Ariz. 2008) (explaining that payment only to the client would render an "absurd result" and should not be permitted).

<sup>160</sup> *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 850-53 (1992) (defending judicial use of legislative history to help avoid absurd results and to rectify drafting errors); Louis Fisher, *Statutory Construction: Keeping a Respectful Eye on Congress*, 53 SMU L. REV. 49, 49-52, 65-67 (2000) (discussing different court approaches to statutory construction).

<sup>161</sup> *See generally, e.g., Demarest v. Manspeaker*, 498 U.S. 184 (1991) (permitting convicted prisoners to recover witness fees even though the statute technically precludes it because they are appearing pursuant to subpoenas); *Green v. Bock Laundry Mach. Co.*, 590 U.S. 504 (1989) (procedural protections with regard to admissibility of prior felony convictions for defendants in the Federal Rules of Evidence permitted to apply to civil plaintiffs).

<sup>162</sup> *See Chonko v. Comm'r of Soc. Sec.*, 624 F. Supp. 2d 357, 366 (D.N.J. 2008) ("The Court acknowledges that allowing the government to use statutory offsets to reduce its EAJA payments may frustrate EAJA's purpose. But it is equally true that such practices serve the purposes of those statutory offsets: to allow the federal government to collect debts owed to it.").

permitted offsets as a revenue-raising technique.<sup>163</sup> Congress may have balanced the competing factors and simply felt that the policy goals of the Debt Collection Improvement Act outweighed the policy goals of the EAJA. Few would likely support this balance, as it defeats the EAJA entirely in some situations and serves only the purpose of raising relatively meager amounts of revenue<sup>164</sup> through the fee-shifting statutes. But it would be incorrect to argue that the offsets further no policy goal whatsoever, even in this situation, given that they do serve a legitimate revenue-raising purpose.

In addition to the statutory language, legislative history, and policy considerations, courts often consider Supreme Court precedent with regard to the payment of attorney's fees. Courts on both sides of the dispute have cited existing precedent to support their holdings. While proponents of paying the attorney point to the longstanding practice of paying the attorneys and the actions of the Commissioner in earlier cases, proponents of paying only the client point to court rulings on the identical "prevailing party" language of civil rights statutes.<sup>165</sup> But the approach of looking to prior court practice on payment of fees is flawed because it avoids the fact that for a great deal of time, parties did not litigate the proper recipient issue, which was instead a matter of consent between the parties.<sup>166</sup> In some past instances, parties litigated the question in the civil-rights context,<sup>167</sup> but in most cases, the parties consent to who is the appropriate fund re-

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<sup>163</sup> See 28 U.S.C. § 2412(d)(2)(A)(ii) (2006); 31 U.S.C. § 3716 (2006).

<sup>164</sup> In the fiscal year 2007, all administrative-offset collections accounted for a total of \$179 million. U.S. DEP'T OF THE TREASURY, FISCAL YEAR 2007 REPORT TO THE CONGRESS: U.S. GOVERNMENT RECEIVABLES AND DEBT COLLECTION ACTIVITIES OF FEDERAL AGENCIES 12 (2008), available at <http://www.fms.treas.gov/news/reports/debt07.pdf>.

<sup>165</sup> See *Reeves v. Astrue*, 526 F.3d 732, 735–36 (11th Cir. 2008); *supra* notes 84, 138 and accompanying text.

<sup>166</sup> *Richardson v. Penfold*, 900 F.2d 116, 117 (7th Cir. 1990) ("Technically the award of attorney's fees under section 1988 is to the party, not to his lawyer, but it is common to make the award directly to the lawyer where, as in this case, the lawyer's contractual entitlement is uncontested."). With the issue remaining uncontested for so long, the Commissioner essentially acquiesced for decades to the idea of paying an attorney directly under the EAJA and only recently began to take a vociferous position in favor of the literal language. See *Vargas v. Comm'r of Soc. Sec., No. 07-3586 (KSH)*, 2008 WL 699581, at \*8 n.4 (D.N.J. Mar. 12, 2008) (holding for payment directly to attorney and pointing out that "[t]wo of the 'claimant as prevailing party' cases . . . are decades old and unpersuasive enough that up until now, the government did not follow them").

<sup>167</sup> See *Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3d Cir. 1977) ("Of course, since the object of fee awards is not to provide a windfall to individual plaintiffs, fee awards must accrue to counsel.").

recipient and litigate whether payment of those funds is proper in the first place. Also, the absence of a direct question likely lured some courts into a degree of complacency with regard to terminology. In one early case, when a district court granted payment to the plaintiff's attorney, it wrote that a "clerical mistake" was responsible for the court's original decision to direct fees to the plaintiff rather than counsel.<sup>168</sup>

The most relevant and substantive precedents in this area involve interpretation of the phrase "prevailing party" in federal fee-shifting statutes.<sup>169</sup> Although the Supreme Court has never directly addressed the issue of which party is properly payable under any "prevailing party" statute, it has addressed some issues on the margins that might favor an approach of treating the client as the proper recipient under the EAJA.<sup>170</sup> In earlier "prevailing party" statutes, however, the opposition was often another private party or a state or local government who sought no offsets from the attorney's fee award. Recovering from the federal government is unique because the Debt Collection Improvement Act presents a new policy problem that does not exist in the other cases. Nevertheless, the possibility of offsets should not change the meaning of "prevailing party" in the EAJA.<sup>171</sup> The reason that offsets have taken place in EAJA cases but not in cases involving other fee-shifting statutes is not because the EAJA's language is unique, but because the EAJA invariably produces payments from the federal government rather than private parties.<sup>172</sup> The different treatment for attorney's fees from the federal government is not a result of internal interpretation of the EAJA; rather, it

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<sup>168</sup> Dixon-Townsell v. Barnhart, 445 F. Supp. 2d 1283, 1284 (N.D. Okla. 2006), *overruled by* Manning v. Astrue, 510 F.3d 1246, 1252 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 486 (2008).

<sup>169</sup> See *supra* Part II.B.

<sup>170</sup> See *id.*

<sup>171</sup> Note that the major Supreme Court precedents all involve issues of whether a party can be considered to have prevailed, and if he has, what his rights are when handling the fees. The term "prevailing party" could potentially have a different meaning between statutes with regard to payment rights even though it has the same meaning with regard to "the standards for awarding fees." Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983) (quoting S. REP. NO. 94-1011, at 4 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5912). But such a possibility seems contrary to the traditional practice of treating identical language in separate statutes alike. *But see* Sisk, *supra* note 17, at 348 (explaining that the EAJA is unique among "prevailing party" fee-shifting statutes because it requires that the prevailing party must have "incurred" the fees).

<sup>172</sup> The EAJA only applies when the United States is the losing party. 28 U.S.C. § 2412(d) (2006).

represents a byproduct of a collision with the Debt Collection Improvement Act.<sup>173</sup>

As noted in Part II.B, the Supreme Court cases on this question avoid the issue of the payable party. Most of those precedents involve a conflict between the client and the attorney rather than a conflict between the client with his attorney against the adverse party.<sup>174</sup> As a result, they are so easily distinguishable from the current situation that they provide little help. Although the Supreme Court has generally referred to the client as the recipient of the fees and has sometimes explicitly designated the “plaintiff” or the “claimant” as the fee target, the Court only did so as dicta and never in an instance when it was central to the determination of who should be the recipient of fees when both the client and his counsel want them paid directly to counsel.<sup>175</sup> These dicta provide guidance on how the Court has viewed the term in the past but not in a way that significantly aids in solving the payable-party issue in this situation.

With the law as it stands today, the majority of courts addressing this question—including the Courts of Appeals for the Fourth, Sixth, Tenth, Eleventh, and Federal Circuits—have put forth the best reading of the statute. The plain meaning of the term “prevailing party” suggests that the EAJA directs payment to the actual client seeking relief in the case. Further, if not for the Debt Collection Improvement Act, payments directly to clients would fulfill the goals of the EAJA just as effectively as would payments to counsel. Supreme Court interpretations of the term “prevailing party,” while not definitive, all lend themselves more appropriately to an approach that would pay the party rather than his counsel.

#### B. *Why the EAJA’s Policies Should Prevail*

Under current law, unassigned fees paid pursuant to the EAJA should be properly payable to the client and not his attorney.<sup>176</sup> Nev-

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<sup>173</sup> *Stephens ex rel. R.E. v. Astrue*, 565 F.3d 131, 140 (4th Cir. 2009) (“We also note that Stephens’s real problem lies with the Debt Collection Improvement Act, not the EAJA. Prior to the implementation of that statute, our answer to the question posed in this case would have had no real practical impact.”).

<sup>174</sup> *See, e.g., Venegas v. Mitchell*, 495 U.S. 82, 84–85 (1990) (involving a dispute between client and his former counsel over payment of § 1988 fees in light of a contingency arrangement); *Evans v. Jeff D.*, 475 U.S. 717, 722–23 (1986) (involving a question of whether a client can waive § 1988 attorney’s fees as part of a settlement agreement).

<sup>175</sup> *See supra* note 51 and accompanying text.

<sup>176</sup> *See supra* Part IV.A.

ertheless, the goals of the EAJA are inescapably thwarted when attorney's fees are automatically offset against preexisting government debts. The policy goals of the EAJA and the Debt Collection Improvement Act inevitably clash; one statute is a government revenue raiser while the other encourages lawsuits against the government.<sup>177</sup> When comparing these two policies, however, the goals of the EAJA are far more important for society. As the House Conference Report on the EAJA said,

[T]he government with its greater resources and expertise can in effect coerce compliance with its position. . . .

. . . [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.<sup>178</sup>

Fees under the EAJA are available for prevailing parties in virtually any civil case against the federal government.<sup>179</sup> These include not only the aforementioned Social Security disability appeals but also numerous other actions, including erroneous forfeitures, stays of deportation orders, and appeals of some veterans' disability benefits.<sup>180</sup> In passing the EAJA, Congress intended to make the courts widely available to aggrieved parties and to ease the process of pur-

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<sup>177</sup> See H.R. REP. NO. 96-1418, at 11 (1980), as reprinted in 1980 U.S.C.C.A.N. 4984, 4990. The Debt Collection Improvement Act contains scant legislative history, but its goals are transparent. See 31 U.S.C. § 3716 (2006); H.R. REP. NO. 104-537 (1996) (Conf. Rep.); Paras N. Shah, Comment, *Lockhart v. United States: Decapitating the New Deal & Ignoring the Plain Language of the Social Security and Debt Collection Improvement Acts*, 58 ADMIN. L. REV. 455, 460-63 (2006) (explaining the history and operation of the Debt Collection Act as amended by the Debt Collection Improvement Act).

<sup>178</sup> H.R. REP. NO. 96-1418, at 10 (1980), as reprinted in 1980 U.S.C.C.A.N. 4984, 4988.

<sup>179</sup> See 28 U.S.C. § 2412(a)(1), (b) (2006) (stating that EAJA fees and costs are available "to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action") (emphasis added).

<sup>180</sup> The examples of cases allowing for recovery of fees pursuant to EAJA are too extensive to list exhaustively. See, e.g., *Scarborough v. Principi*, 541 U.S. 401, 405 (2004) (successful appeal of denial of veteran's disability benefits); *Carbonell v. INS*, 429 F.3d 894, 895-97 (9th Cir. 2005) (successful appeal of a deportation order); *United States v. 2659 Roundhill Drive*, 283 F.3d 1146, 1148-49 (9th Cir. 2002) (successful appeal of government property forfeiture); *Humane Soc'y of the U.S. v. Bush*, 159 F. Supp. 2d 707, 709 (Ct. Int'l Trade 2001) (successful suit enjoining the Secretary of Commerce to inform the President of "reason to believe" that Italy was engaging in illegal driftnet fishing); see also *Sisk*, *supra* note 17, at 230 ("In sum, the EAJA encompasses nearly every claim or case that is civil, rather than criminal, in nature.").

suing judicial remedies.<sup>181</sup> The benefits of encouraging people to bring forth these types of cases far outweigh the benefits of the relatively meager revenue-raising accomplishments of offsetting winnings.

Nevertheless, compelling as these policy incentives might be, they cannot overcome the barriers to direct attorney payment in the absence of an assignment, most notably the operative statutory language. When Congress drafted the EAJA, it left open the possibility of the government offsetting plaintiffs' fees in "prevailing party" actions. The Debt Collection Improvement Act sets forth certain exceptions to administrative offsets. The exceptions are narrow but create the inescapable conclusion that Congress made a decision to exempt certain government payments without including fee-shifting statutes among those exemptions.<sup>182</sup> Congress may simply have failed to investigate the issue adequately before passing the legislation. After all, awards of past-due Social Security benefits are partially exempt, including attorney's fees awarded from those benefits.<sup>183</sup> It is therefore peculiar that Congress would choose to partially exempt from offsets attorney's fee payments for Social Security claimants pursuant to one statute but permit offsets under another similar statute. But the distinction is not necessarily arbitrary; the exempted fees are removed directly from the prevailing party's awarded benefits while the offset-eligible fees are extra governmental payments to a person who is already indebted to the government. Therefore, the effect of not offsetting EAJA fees would be for the government to pay the prevailing party's private debts before collecting on the party's government debts.

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<sup>181</sup> The only apparent restriction on the scope of the EAJA is that the action must be "civil." Therefore, acquitted defendants in criminal cases and successful appellants of criminal convictions are not eligible for fees under the EAJA. Further, some circuits have held that an application for a writ of habeas corpus is not a "civil action" in the way that the EAJA intends. *O'Brien v. Moore*, 395 F.3d 499, 501 (4th Cir. 2005) ("Because the EAJA does not expressly authorize an award of attorneys fees to a prevailing party *in a habeas corpus proceeding* and because the term 'civil action' does not unambiguously encompass habeas actions, we conclude that the EAJA does not contain the unequivocal expression of congressional intent necessary to amount to a waiver of sovereign immunity . . .").

<sup>182</sup> See 31 C.F.R. § 285.5(e)(2) (2008) (listing exemptions from administrative offsets).

<sup>183</sup> 31 U.S.C. § 3716(c)(3)(C) (2006).



*C. The Limited Availability of a Judicial Remedy*

In an ordinary situation, the plain language of the statute will direct to the client payment that will then be eligible for offsets. More recently, however, courts have shown an increased willingness to permit payments directly to the attorney when the client signs an assignment of fees to counsel, even in circuits with a default rule for payment to the client.<sup>184</sup> In the Eleventh Circuit in particular, district courts have directed the fees to the attorney but only when the client has presented an assignment.<sup>185</sup> There is no clear reason why this practice has become widespread in the Eleventh Circuit but not elsewhere. Courts favoring this approach cite to *Reeves v. Astrue*,<sup>186</sup> which directed payment to the client, and distinguish it because it did not involve an assignment.<sup>187</sup> Courts in other circuits are less accommodating to this compromise.<sup>188</sup> No appellate court has yet addressed this practice, but it seems to be a reasonable position that is faithful to the EAJA's underlying policies and adheres to its literal statutory language.

Under this Eleventh Circuit practice, the client's assignment serves as his affirmative representation that courts should direct the

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<sup>184</sup> See *Spradlin v. Astrue*, 626 F. Supp. 2d 1226, 1229 (M.D. Fla. 2009) (recognizing the "common practice of other courts in" the Middle District of Florida of permitting an assignment to allow direct payment to attorney); *Kersey v. Astrue*, No. 2:08cv00045, 2009 U.S. Dist. LEXIS 43355, at \*13 (W.D. Va. May 21, 2009) (permitting assignment to prevail over default rule of payment to client); *Coffman v. Astrue*, No. 8:07-CV-1416-T-TGW, 2008 U.S. Dist. LEXIS 101299, at \*5 (M.D. Fla. Dec. 5, 2008) (Commissioner of Social Security declines to oppose an award directly to counsel when client signs an assignment); *Nayab v. Astrue*, No. 07cv0733 JM(WMc), 2008 U.S. Dist. LEXIS 86927, at \*18-19 (S.D. Cal. Oct. 28, 2008) (same); *Flentroy-Tennant v. Astrue*, No. 3:07-cv-101-J-TEM, 2008 U.S. Dist. LEXIS 49304, at \*5-6 (M.D. Fla. June 26, 2008) (permitting an assignment to the attorney as a means to avoid debt offsets).

<sup>185</sup> See, e.g., *McCullough v. Astrue*, 565 F. Supp. 2d 1327, 1332 (M.D. Fla. 2008); cf. *Hynes v. Astrue*, No. 3:07cv245/LAC/EMT, 2008 U.S. Dist. LEXIS 107064, at \*4-5 n.2 (N.D. Fla. Nov. 10, 2008) (recognizing this approach as a common practice).

<sup>186</sup> 526 F.3d 732 (11th Cir. 2008).

<sup>187</sup> E.g., *Thompson v. Astrue*, No. 3:08-cv-355-J-MCR, 2009 U.S. Dist. LEXIS 7198, at \*5-6 (M.D. Fla. Jan. 26, 2009).

<sup>188</sup> See, e.g., *Rosenstiel v. Astrue*, No. 2:08-231-DCR, 2009 U.S. Dist. LEXIS 87005, at \*6 (E.D. Ky. Sept. 22, 2009) (providing that assignment to attorney does not overcome EAJA requirement of payment to client); *Greer v. Astrue*, No. CIV-08-284-D, 2009 U.S. Dist. LEXIS 46406, at \*1 (W.D. Okla. June 1, 2009) (same); *Patton v. Astrue*, No. CIV-07-329-SPS, 2009 U.S. Dist. LEXIS 6951, at \*4 (E.D. Okla. Jan. 29, 2009) (stating that fees go to client even when attorney has a lien on EAJA awards).

attorney's fees to the attorney.<sup>189</sup> Because such an assignment is already necessary for the direct payment of fees through the portion of the client's past-due benefits pursuant to § 406, it seems reasonable to adopt the same straightforward practice to direct payment of EAJA fees, even though it is not yet entirely clear whether such an assignment will always serve the purpose of avoiding offsets.<sup>190</sup> In some ways, this option is superior to the rule allowing for automatic and default attorney payment, as it ensures the client a more informed and flexible role in determining the destination of the fees. Although the result will likely be the same, as most clients would probably assign the fees to counsel,<sup>191</sup> this process has the benefit of being consistent with both the language and the goals of the EAJA. In the future, more attorneys should present this argument,<sup>192</sup> and more courts in other circuits should consider it as an option.

*D. The Broader Need for Corrective Legislation*

Judicial recognition of assignments is entirely workable, but only a relatively small number of courts practice it. As a result, Congress should act to guarantee the effectuation of the EAJA's goals. On March 26, 2009, Representative Peter DeFazio, an Oregon Democrat

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<sup>189</sup> See *Dotson v. Astrue*, No. 08-0095-CG-M, 2009 U.S. Dist. LEXIS 6254, at \*1–2 n.1 (S.D. Ala. Jan. 8, 2009) (denying direct payment to attorney because “there is no supporting documentation, such as a signed fee agreement or an assignment of the fee, attached”).

<sup>190</sup> SOC. SEC. ADMIN., SSA PUB. NO. 05-10001, REGISTRATION REQUIREMENTS FOR DIRECT PAYMENTS TO REPRESENTATIVES 1 (2007), available at <http://www.ssa.gov/pubs/10001.pdf>. Whether the assignment will prevent offsets may still be an open question, and it appears that at this time, the offsets still occur even when an assignment is present. 3 NAT'L ORG. OF SOC. SEC. CLAIMANTS' REPRESENTATIVES, SOCIAL SECURITY PRACTICE GUIDE § 27.03[10] (2009) (“[I]f the plaintiff has an unpaid federal debt, . . . the amount of the EAJA fee may be reduced by this debt amount, even if the check is made payable to the attorney.”); see also *Woller v. Astrue*, No. 08-60733-CIV-COHN, 2009 U.S. Dist. LEXIS 2684, at \*2 (S.D. Fla. Jan. 14, 2009) (declining to decide whether an assignment, which allowed for direct payment to attorney, could prevent offsets from ensuing because “the issue [was] not ripe in the specific context of this award”).

<sup>191</sup> *Contra Viega v. Astrue*, No. 8:07-CV-1001-T-EAJ, 2009 U.S. Dist. LEXIS 3494, at \*3 (M.D. Fla. Jan. 12, 2009) (claimant requests that she, and not her attorney, be the direct recipient of fees).

<sup>192</sup> This argument is likely to receive more attention in the future because the National Organization of Social Security Claimants' Representatives now recommends that all attorneys representing clients potentially subject to offsets obtain assignments of fees. Press Release, Nat'l Org. of Soc. Sec. Claimants' Representatives, Supreme Court to Determine EAJA Payee (Oct. 5, 2009) (on file with author).

known for taking some “idiosyncratic views,”<sup>193</sup> introduced legislation to address the current issue.<sup>194</sup> Representative DeFazio’s legislation would address the issue only with regard to the EAJA as it applies to Social Security claimants by adding a new section to the EAJA that would specify payment to the attorney directly and also exempt Social Security payments from Debt Collection Improvement Act offsets.<sup>195</sup>

The enactment of Representative DeFazio’s proposal would be a good starting point and would address most of the current problems because the overwhelming majority of these disputes arise through cases involving Social Security disability appeals. But his legislation fails to address the full scope of the problem because in different situations it can be either too broad or too narrow.

The proposal is too broad because it rewrites part of the EAJA to direct attorney’s fee payments directly to attorneys. This new scheme ensures that the attorney would receive all fees owed to her, but directing fees exclusively to the attorney with no client rights could pose a significant problem when the client and the attorney disagree on the desired outcome, such as in *Evans v. Jeff D.*<sup>196</sup> Changing the actual language of the fee-shifting statute would be the ideal solution when the Social Security claimant and his attorney agree that the attorney should be the recipient, but it would open the door to other problems when client and counsel disagree and could have the effect of undermining a client’s autonomy.

Representative DeFazio’s solution is too narrow because it affects only EAJA payments pursuant to Social Security cases. Therefore, the same problem could arise in other non-Social Security cases under the EAJA or in cases involving non-EAJA fee-shifting statutes.<sup>197</sup> The portion of the proposed legislation that would prevent Debt Collection Improvement Act offsets of EAJA payments arising from Social Security claims, if expanded to encompass all “prevailing party” fee-shifting statutes, would be an ideal solution to the problem. Under the current law, certain government payments are not subject to debt offsets, but these payments are narrow and do not include attorney’s

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<sup>193</sup> MICHAEL BARONE & RICHARD E. COHEN, *THE ALMANAC OF AMERICAN POLITICS* 2008, at 1368 (2008).

<sup>194</sup> H.R. 1735, 111th Cong. (2009). He previously introduced the same legislation in the 110th Congress (2007–2008), but it never received a committee hearing or any action. H.R. 5833, 110th Cong. (2008).

<sup>195</sup> H.R. 1735.

<sup>196</sup> 475 U.S. 717 (1986).

<sup>197</sup> See *infra* Part IV.E.

fees.<sup>198</sup> Congress could easily expand this list to include payments resulting from awards of attorney's fees under the EAJA and other federal laws. This solution would not curtail the continued use of the client as a middleman between the court and the attorney on fee payments, but it would help limit the risk of unintended consequences of changing the EAJA language itself. Any statutory remedy should therefore only aim at stopping the offsets.

The goal of ensuring that attorneys are paid in full is an important one, especially with regard to the types of cases that draw EAJA fees. EAJA fees are capped at the fairly modest amount of \$125 per hour (with cost of living adjustments available) and contain net-worth caps for prevailing parties.<sup>199</sup> With these types of restrictions, EAJA fees become disproportionately important in practice areas involving impoverished clients.<sup>200</sup> If the administration of justice regardless of client income is accepted as a societal goal, then it is important to promote every possible incentive for attorneys to enter these fields. The low price tag on EAJA fees is problematic enough; the threat of government offsets only further deters attorneys from pursuing these practice areas.

*E. The Potential Application of "Prevailing Party" Language Beyond the EAJA*

As important as EAJA fees may be, they are far from the most important potential application of the "prevailing party" language. The dispute over the fee recipient has so far only directly arisen in the context of EAJA suits, but the language is ubiquitous in federal fee-shifting statutes.<sup>201</sup> Thus, courts could apply their EAJA interpretation to similar "prevailing party" language in other statutes. This possibility is far from merely speculative. Courts have used interpretations of civil-rights statutes with "prevailing party" fee-shifting language as the basis for decisions on EAJA payments,<sup>202</sup> and they may

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<sup>198</sup> The current exceptions to debt offsets are Black Lung Part C benefit payments, payments under tariff laws, some Veterans Affairs payments exempted from offset by statute, payments under Title IV of the Higher Education Act of 1965, federal-loan payments other than travel advances, and any payment where offset is prohibited by statute or by order of the Treasury Secretary. 31 C.F.R. § 285.5(e)(2) (2008).

<sup>199</sup> 28 U.S.C. § 2412(d)(1)(B), (2)(A)(ii) (2006).

<sup>200</sup> See *supra* note 180.

<sup>201</sup> See *supra* note 41 and accompanying text.

<sup>202</sup> See, e.g., *Ratliff v. Astrue*, 540 F.3d 800, 802 (8th Cir. 2008), *cert. granted*, 130 S. Ct. 48 (2009).

just as readily use interpretations of the same language from EAJA cases to apply to civil rights cases.

As a result, these EAJA rulings could have far-reaching consequences, potentially affecting civil-rights, environmental, consumer-protection, employment, and government-transparency laws that are central to our values as a society. If this occurs, just as the current EAJA laws serve to dissuade attorneys from accepting cases on behalf of Social Security disability claimants, attorneys may be persuaded to veer away from other public interest cases.<sup>203</sup> The government could have made this argument when these statutes first took effect, but it has never done so. But the same can be said for the first twenty-five years of the EAJA, when relatively few cases involved the issue of the appropriately payable party.<sup>204</sup> Despite the government's longstanding assent to attorney's fees going directly to the attorney in other types of cases, it is far from settled practice; a shift could occur as rapidly as did the shift in EAJA treatment.<sup>205</sup> In the past, prevailing par-

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<sup>203</sup> The fee offsets will only apply when the case is against the federal government. In most civil-rights cases, all parties will be private persons, private firms, or state or municipal governments. As a result, unlike the EAJA, these statutes provide for fee-shifting when both the plaintiff and defendant are private parties. *See, e.g.*, 42 U.S.C. § 1988(b) (2006); *id.* § 2000A-3(b). Fee offsets will not ensue unless the federal government is the losing party. This severely limits the number of cases where offsets will become an issue, but when the government itself is liable for a civil-rights violation or another activity subject to a fee-shifting statute, the suit is perhaps more important than when a private party is engaged in ordinary discrimination. *See, e.g.*, Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. COLO. L. REV. 159, 176 (1993) ("States should enact converse-1983 laws because doing so is in the highest tradition of supporting the federal Constitution and vindicating its implicit remedial scheme, which so heavily depends on each government policing *the other* to vindicate citizen rights."); Matthew J. Perry, *Justice Murphy and the Fifth Amendment Equal Protection Doctrine: A Contribution Unrecognized*, 27 HASTINGS CONST. L.Q. 243, 247-58 (2000) (describing the background of the Equal Protection Clause's application against the federal government and its significance); *see also* MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1990, at 40-45, 119-32 (1991).

<sup>204</sup> *See* Vargas v. Comm'r of Soc. Sec., No. 07-3586, 2008 WL 699581, at \*8 n.4 (D.N.J. Mar. 12, 2008) (pointing out that even though some precedent existed for the payment of clients directly, the government has only recently sought to actually enforce it).

<sup>205</sup> In many of the cases regarding the proper payable party under EAJA, courts have acknowledged that the longstanding traditional practice was to direct funds straight to the attorney. *See* Quade v. Barnhart, 570 F. Supp. 2d 1164, 1172-73 (D. Ariz. 2008); Meyler v. Comm'r of Soc. Sec., No. 04-4669, 2008 U.S. Dist. LEXIS 51684, at \*11-12 (D.N.J. July 7, 2008); *see also* Manning v. Astrue, 510 F.3d 1246, 1255 (10th Cir. 2007) (pointing out that the government changed its position on the ap-

ties have occasionally entered into disputes with their adversaries over whether the client or counsel should receive payment, but these cases rarely addressed the question directly and never involved instances where both the client and counsel wanted payment directed to counsel.<sup>206</sup> The government took a significant leap in the EAJA cases by pursuing litigation for no apparent purpose other than to offset the fees of prevailing parties.<sup>207</sup>

In suits against the government under non-EAJA “prevailing party” fee-shifting statutes, the government still retains a financial incentive to seek offsets. Unless the government decides to exercise a greater degree of self-restraint, perhaps for fear that the same changes in the context of civil rights or government transparency could garner greater attention or outrage than Social Security disability appeals, the government will likely pursue debt offsets against civil-rights recoveries in the same way that it has under the EAJA.<sup>208</sup> In fact, such an outcome is more probable now than it would have been if these arguments first appeared in civil-rights cases. Because of this EAJA issue, five circuits now have controlling precedent to the effect

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propriate payable party during the course of litigation), *cert. denied*, 129 S. Ct. 486 (2008).

<sup>206</sup> See, e.g., *Collins v. Romer*, 962 F.2d 1508, 1516 (10th Cir. 1992) (stating that fees are payable to plaintiff, not his attorney directly, even though plaintiff was dropped from some counts in multiparty suit); *Willard v. City of Los Angeles*, 803 F.2d 526, 527 (9th Cir. 1986) (providing that when plaintiff agreed to waive attorney’s fees as part of a settlement, his attorney had no standing to seek fees on his own) (citing *Evans v. Jeff D.*, 475 U.S. 717 (1986)); *Jonas v. Stack*, 758 F.2d 567, 568 (11th Cir. 1985) (determining that attorney who prosecuted fee litigation for attorney of prevailing party lacked standing because he did not personally represent the prevailing party); *Brown v. Gen. Motors Corp., Chevrolet Div.*, 722 F.2d 1009, 1011 (2d Cir. 1983) (asserting that after client discharged his attorney, attorney lacked standing to apply for own fees); *Miller v. Amusement Enters., Inc.*, 426 F.2d 534, 539 (5th Cir. 1970) (stating that the court is responsible for ensuring “that the fees allowed are to reimburse and compensate for legal services rendered” and holding that the Court will consequently not pay “to the litigants”).

<sup>207</sup> The government has admitted that its new policy of insisting on payment only to the client is a result of improved technology that makes it easier to track who has debts that are subject to offset. *Stephens v. Astrue*, 539 F. Supp. 2d 802, 809–10 (D. Md. 2008), *rev’d*, 565 F.3d 131 (4th Cir. 2009); Respondent’s Brief in Opposition to Petition for Writ of Certiorari, *supra* note 3, at 4. The change in methodology is so recent that the Social Security Administration’s own handbook still indicates that when a federal court rules in favor of a plaintiff in a Social Security case, his “attorney may request reimbursement of the expenses he or she incurred in representing” the plaintiff. SOC. SEC. ADMIN., SOCIAL SECURITY HANDBOOK § 2019.7 (2009), available at [http://www.ssa.gov/OP\\_Home/handbook/handbook.20/handbook-2019.html](http://www.ssa.gov/OP_Home/handbook/handbook.20/handbook-2019.html).

<sup>208</sup> The Secretary of the Treasury has the authority to exempt certain types of payments from offsets under certain circumstances. 31 U.S.C. § 3716(c)(3)(B) (2006); 31 C.F.R. § 285.5(e)(2)(vi) (2008).

that attorney's fees can be offset under the Debt Collection Improvement Act. The Supreme Court will soon hear and decide *Astrue v. Ratliff* and potentially set down a national standard on how to interpret this portion of the EAJA. Although the Court will resolve the circuit split on this specific question, Congress should still consider additional amendments to clarify the EAJA on these important issues.

#### V. CONCLUSION

For the first two decades of the EAJA, only occasional disputes arose over the proper payable party. Only the Federal Circuit and a smattering of district courts addressed the issue, and it often arose as a result of disputes between an attorney and her client. That changed when the Social Security Administration altered its longstanding practice and began requesting fee payment exclusively to the client. As a result of that change, the issue now arises frequently in the context of common appeals from administrative decisions to deny Social Security disability benefits. While the payments previously went to the attorneys directly, essentially by consent as a result of a prevailing party's uncontested request, courts have now been forced to take a position on the question of the proper recipient.

Under the current law, the plain language of the statute unambiguously directs the funds to the client rather than his counsel. Additionally, the broader construction of the statute and the legislative history, once divorced from the intent and history of the Debt Collection Improvement Act, at least partially support direct payment to the client. Although the attorney has a contractual right to the funds, the client incurs the cost of the fees and is entitled to be the immediate beneficiary of the fee payments. Courts have some flexibility to implement their own solutions to the problem when the client assigns his fee rights to counsel, but otherwise the language is fairly tight and inescapable. The law on this matter is, however, palpably flawed from a policy standpoint. It fulfills the Debt Collection Improvement Act's goals of supporting alternate collection techniques for the prevailing party's debts, but the practice of paying fees to the client rather than the attorney does not serve the best interests of the client, the attorney, or society over the long term. Making it more difficult for an attorney to collect her fees in full discourages attorneys from entering fields heavily reliant on government-paid attorney's fees and thus defeats the very purpose of the EAJA. Furthermore, the current law overcomes the congressional goal of allowing each person whom the government wronged to help with "refining and formulating public

policy” through the courts.<sup>209</sup> For whatever reason, Congress’s broader scheme regards the revenue-raiser actions as more important than the goals of the EAJA. Although courts may be tempted to remedy this inexplicable misplacement of priorities, the statutory language is sufficiently clear that courts ought not unnecessarily venture to fix the problem in the absence of a fee assignment.<sup>210</sup>

Although assignments enable courts to provide direct payment to attorneys to mitigate this risk, courts will not accept this approach universally. For that reason, the best solution is for Congress to remedy this flawed statutory arrangement. This can be accomplished through the simple addition of attorney’s fees to the list of exemptions from offsets in the Debt Collection Improvement Act. A complete overhaul of all “prevailing party” fee-shifting statutes, with a goal of clarifying the intent to pay attorneys directly, would solve the immediate problem but would pose a risk of unintended consequences in the event of a conflict between a client and his attorney. The current practice of paying EAJA fees to clients has the potential to create an enormous disincentive for attorneys to enter fields of law that rely on EAJA fees or to take cases involving clients indebted to the government. The current practice also presents significant risk that the common statutory language could create a spillover effect that will adversely affect the attorneys of other non-EAJA plaintiffs suing the federal government. Just as the government suddenly changed its approach to EAJA fees, nothing prevents it from doing the same with other fee-shifting statutes. The scope and implications of the change in practice under the EAJA are relatively narrow, but the flaw in the current drafting could reverberate to cause a chilling effect on a much broader array of important lawsuits. Without adoption of the assignment alternative or congressional action, the EAJA might effectively become a self-defeating statute that, in many cases, fails to accomplish its centerpiece goal of permitting individuals to pursue cases against the government.

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<sup>209</sup> H.R. REP. NO. 96-1418, at 10 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4984, 4988.

<sup>210</sup> *See* *Reeves v. Astrue*, 526 F.3d 732, 738 (11th Cir. 2008) (stating that even if the EAJA language on attorney’s fees represents “bad public policy,” decisions on policy “are properly left to Congress, not the courts”).