

ASTRUE v RATLIFF, No. 08-1322, ORAL ARGUMENT TRANSCRIPT

(Argued: February 22, 2010)

http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1322.pdf

(Pages: 41, line 9 to 43, line 8 & 51, line 22 to 53, line 25)

CHIEF JUSTICE ROBERTS: Counsel, do you -- do you dispute your friend's statement that 42 percent of the time in Social Security cases **the government's position is UNJUSTIFIED, and 70 percent of the time in Veterans cases?** (**see below, p. 42)

MR. YANG: Well, I think that reflects the stakes often, Your Honor. Oftentimes the government does not contest, for instance, a \$2,000 EAJA award and because it's the government, it has to -

CHIEF JUSTICE ROBERTS: So whenever it really makes a difference?
-

MR. YANG: No -

CHIEF JUSTICE ROBERTS: -- **70 percent of the time the government's position is substantially unjustified?**

MR. YANG: In cases -- **in the VA context**, the number is not quite that large, **but there's a SUBSTANTIAL number of cases at the court of appeals --**

CHIEF JUSTICE ROBERTS: What number would you accept?

MR. YANG: It was, I believe, in the order of either 50 or maybe slightly more than 50 percent. It might be 60. **But the number is substantial that you get a reversal**, and in almost all of those cases, EAJA --

CHIEF JUSTICE ROBERTS: **WELL, THAT'S REALLY STARTLING, ISN'T IT? IN LITIGATING WITH VETERANS, THE GOVERNMENT MORE OFTEN THAN NOT TAKES A POSITION THAT IS SUBSTANTIALLY UNJUSTIFIED?**

MR. YANG: **It is an unfortunate number, Your Honor. And it is -- it's accurate.**

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JUSTICE GINSBURG: In what percent of the Social Security cases where the claimant prevails is there an EAJA fee?

MR. LEACH: Forty-six percent. No, that's not right. It's about 42 percent. And I get that from combining two numbers. There are 5,481 EAJA awards per year. That's red brief page 4. And there are about 13,000 Social Security civil cases per year. That's green brief page 22. Fifty-four -- 13,000 divided by 5,481 is 42 percent.

And this bring me to the point the government was making in **suggesting** that an attorney at the beginning of a case could never know whether or not there -- there is going to be an EAJA fee, because, you know, you can't know at the beginning, **they argue, what position the government will take, whether or not the government's position is substantially justified or not.**

Well -- and the government cites Pierce/Underwood from 1988 from this Court, in which this Court said exactly that -- Pierce v. Underwood.

Pierce v. Underwood is outside the Social Security context, outside the Veterans context, **so Pierce v. Underwood is in this less than 10 percent category of cases under EAJA which are not Social Security or Veterans.**

In a Social Security case or a Veterans case, the attorney has the record before proceeding into court, before deciding whether to proceed into court. And the attorney can look at that record, read it, **and have a pretty good idea of whether or not the government position might be substantially justified or not.**

I don't ask you to take my word for any of this. Let me tell you what the data shows.

The data, Justice Ginsburg -- this is where the 42 percent of Federal Social Security cases result in an EAJA award. **If it's 42 percent, that's quite a high number of cases in which the government's position is found substantially -- not substantially justified as well as legally erroneous.**

IN VETERANS CASES, IT'S EVEN WORSE. The Court of Veterans Appeal Web site -- this the number of [p.42-end] cases -- all together -- number of dispositions per year and the number of EAJA awards. And for 2008 and 2009, if you add up the numbers, **out of all the Veterans disability cases filed, 70 percent, 7-0, result in an EAJA award.** So there's **quite a large number of cases** in which -- in -- in a Veterans context or Social Security context where **the government's position is found not to be (justified)** -