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Ardestani v. United States Department of Justice: Applying the Equal Access to Justice Act to Deportation Proceedings - Exalting Technicalities over Justice

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CASENOTES

Ardestani v. United States Department of Justice: Applying the Equal Access to Justice Act to Deportation Proceedings—Exalting Technicalities Over Justice?

I. Introduction

In 1980, Congress enacted the Equal Access to Justice Act (EAJA) to aid small businesses and individuals faced with the legal cost of challenging unjustified government actions. It provides, inter alia, that attorney's fees shall be awarded to a small business or individual who sues and prevails against the United States.[1] The EAJA applies to agency proceedings that fall within the scope of an adversary adjudication.[2] In *Ardestani v. U.S. Department of Justice, I.N.S.*[3], the United States Court of Appeals for the Eleventh Circuit considered the question of applicability of the EAJA to deportation proceedings.[4] The Eleventh Circuit held that the EAJA is not applicable to deportation proceedings because such proceedings do not fall within the definition of an adversary adjudication.[5]

This Note examines the reasoning of *Ardestani* and its implica-

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[1] 28 U.S.C. § 2412(d)(1)(A) (1988).

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

Id. The Administrative Procedure Act, 5 U.S.C. § 504(a)(1) (1988) states in part:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

Id.

[2] 28 U.S.C. § 2412(d)(3) (1988). The language of the EAJA states that it applies to adversary adjudication *under* section 504 of the Administrative Procedure Act (APA). *Id.*

[3] 904 F.2d 1505 (11th Cir. 1990).

[4] *Id.* at 1508.

[5] *Id.* at 1515.

tions for deportation and other agency proceedings. It sketches the history of the EAJA from its inception in 1980 and highlights the ambiguities in the Act that have caused conflicting interpretations among the appellate courts. The Note concludes that the majority opinion is flawed from an indulgence in technicalities, a misreading of critical provisions of the Immigration and Nationality Act (INA) and the Administrative Procedure Act (APA), and a misplaced reliance on certain case law. As a practical matter, the *Ardestani* decision will decrease an indigent alien's accessibility to counsel in deportation proceedings.

II. Overview of the *Ardestani* Facts and Decision

In 1982, Ardestani, an Iranian woman, entered the United States as a visitor.[6] Fearing persecution upon her return to Iran, Ardestani applied for asylum in the United States. Acting in its advisory capacity, the United States Department of State notified the Immigration and Naturalization Service (INS) that Ardestani's fear of persecution was well-founded.[7] Despite the State Department's finding, the INS denied Ardestani's asylum application and ordered her to show cause why she should not be deported.[8] At the deportation hearing, the immigration judge (IJ) found that Ardestani had established a well-founded fear of persecution and granted her asylum for one year.[9]

Ardestani applied for attorney's fees and expenses incurred by her in this action. The IJ awarded attorney's fees pursuant to the EAJA since Ardestani was the prevailing party and INS's opposition to her asylum application was not substantially justified.[10] On appeal, the Board of Immigration Appeals (BIA) vacated the award of attorney fees and expenses made by the IJ on the ground that these adversary proceedings fell under the INA and not under the EAJA.[11] Thereafter, Ardestani filed a petition before the Eleventh Circuit Court of Appeals to review the BIA decision. The court ruled that BIA had correctly found that the IJ had no statutory authority to award attorney's fees to Ardestani since the proceeding was not

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[6] *Id.* at 1507.

[7] The State Department makes the determination whether the fear of persecution is well-founded and submits its recommendation to the INS. Being the repository of information on foreign governments, the State Department's recommendation is given due deference and generally adopted by the INS.

[8] *Ardestani*, 904 F.2d at 1507.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 1508. The Board took into account the regulations promulgated by the United States Attorney General to implement the EAJA. *See* 28 C.F.R. § 24 (1982). Since deportation proceedings are not specifically covered by these regulations, they were deemed to be outside the sphere of these regulations. *See id.* § 24.103.

under the EAJA and affirmed the decision of the BIA.[12]

An adversary adjudication is "an adjudication *under* section 554 [of the Administrative Procedure Act] in which the position of the United States is represented by counsel."[13] The court in *Ardestani* maintained that a deportation proceeding is an adversary adjudication under the INA but not under the APA.[14] Since the EAJA waives sovereign immunity in allowing attorney's fees against the United States,[15] the *Ardestani* court felt constrained to construe the Act in a strict fashion. Construing the statute strictly, the court held that deportation proceedings do not fall within the ambit of the EAJA. The court's conclusion was further buttressed by commentary from the model rules[16] for agency implementation of the EAJA issued by the Administrative Conference of the United States (ACUS). Expressing concern that a "liberal interpretation of the draft rules may provide for broader applicability than Congress intended"[17], the ACUS restricted "awards to cases required to be conducted under the procedures of section 554."[18]

The *Ardestani* court's decision not to treat a deportation proceeding as an adversary adjudication under the APA was also based on the United States Supreme Court decision in *Marcello v. Bonds*.[19] In *Marcello*, the Supreme Court held that "the hearing requirements of the APA do not govern deportation proceedings, which are controlled under section 242 of the Act, 8 U.S.C. section 1252."[20] The *Marcello* Court attributed the similarities of the hearing provisions under the APA and under the INA to the fact that the APA was used as a model for the INA.[21] Despite these similarities, the *Marcello* Court maintained that section 242 of the INA was a deliberate attempt by Congress to create a separate procedure tailored to deportation proceedings and therefore APA hearing provisions should not apply to deportation proceedings.[22] Relying on this determination, the court in *Ardestani* reasoned that since deportation proceedings are not governed by the provisions of the APA, such proceedings are not within the scope of the EAJA.[23]

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[12] *Ardestani*, 904 F.2d at 1515.

[13] 5 U.S.C. § 504(b)(1)(C) (1988) (emphasis added).

[14] *Ardestani*, 904 F.2d at 1511-12.

[15] *Id.* at 1509.

[16] 46 Fed. Reg. 32,900 (1981). Model rules are intended to provide guidance to agencies in developing their own regulations and to promote uniformity of procedures. *Id.*

[17] *Id.* at 32,901.

[18] *Id.*

[19] 349 U.S. 302 (1955).

[20] Ardestani v. United States Dep't of Justice, 904 F.2d 1505, 1511 (11th Cir. 1990)(citing Marcello v. Bonds, 349 U.S. 302 (1955)).

[21] *Marcello*, 349 U.S. at 308-09.

[22] *Id.*

[23] This reasoning of the *Ardestani* court seems to be flawed. The inapplicability of the

Additional support for its holding that deportation proceedings are not covered by the EAJA was found by the *Ardestani* court in the regulations[24] implementing the EAJA. The regulations list the proceedings covered by the EAJA. Deportation proceedings are not found in the most recent promulgation of the list.[25] The information published with the interim rule reveals that deportation hearings were intentionally excluded pursuant to *Marcello*.[26] Congress was aware of this regulatory exclusion when it amended the EAJA in 1985. The *Ardestani* court argued that Congress's decision to allow this regulatory exclusion to stand, at a time when it had the opportunity to abolish the exclusion, confirms its intention to exclude deportation proceedings from the EAJA.[27] Additionally, the absence of criticism by the ACUS of the Attorney General's interpretation regarding the inapplicability of the EAJA to deportation proceedings lent further support to the *Ardestani* court's determination that the regulation was a reasonable construction of the EAJA.[28]

The decision of the *Ardestani* court also turned on its interpretation of section 292 of the INA as an existing fee-shifting statute. Section 292 of the INA states that "[i]n any exclusion or deportation proceeding, . . . the person concerned shall have the privilege of being represented (*at no expense to the Government*) by such counsel, authorized to practice in such proceedings, as he shall choose."[29] The fee-shifting provision of the EAJA is mandatory in that it must be followed "[e]xcept as otherwise specifically provided by statute."[30] Nevertheless, the EAJA fee-shifting provision "is not intended to replace or supersede any existing fee-shifting statute [and] . . . is intended to apply only to cases . . . where fee awards against the government are not already authorized."[31] The *Ardestani* court read section 292 of the INA as an existing fee-shifting provision and thereby concluded that it could not be superseded by the fee-shifting provision of the EAJA.[32] Additionally, the court found that the "general language of EAJA [was] insufficient to overcome the absolute words of the [INA]."[33] In the absence of any clear intention otherwise, "a specific statute will not be controlled or nullified by the

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APA hearing provisions to deportation proceedings does not necessarily take these proceedings outside the scope of the EAJA.

[24] *See* 28 C.F.R. § 24 (1982).

[25] *Id.* § 24.103 (1989).

[26] *See* 46 Fed. Reg. 48,921, 48,922 (1981).

[27] *Ardestani*, 904 F.2d at 1512.

[28] *Id.*

[29] 8 U.S.C. § 1362 (1988) (emphasis added).

[30] 28 U.S.C. § 2412(d)(1)(A) (1988).

[31] H.R. REP. No. 1418, 96th Cong., 2d Sess. 18 (1980), *reprinted in* 1980 U.S. CODE CONG. AND ADMIN. NEWS 4997.

[32] *Ardestani*, 904 F.2d at 1513.

[33] *Id.* at 1514.

general one."[34] Not finding any clear congressional intent in the EAJA to amend the INA fee-shifting provision, the *Ardestani* court concluded that the EAJA fee-shifting provision does not apply to deportation proceedings.

The dissent in *Ardestani* found deportation proceedings to fall squarely within the definition of an "adversary proceeding" under section 554 since these proceedings were adjudications "required by statute to be determined on the record after opportunity for an agency hearing."[35] Furthermore, the dissent found fault with the majority's application of the rule in *Marcello* to remove deportation proceedings from the ambit of the EAJA. The dissent reasoned that even if the INA hearing provisions supersede the hearing provisions of the APA, such supersession does not erase the fact that deportation proceedings are of the type defined under section 554.[36] Finally, the dissent did not find "the recovery of attorney's fees pursuant to EAJA [to be] in conflict with nor precluded by section 292 of the Immigration and Nationality Act"[37] because section 292 is designed to prevent the appointment of counsel for indigent aliens in deportation proceedings and is not a fee-shifting statute.[38]

III. Background on Applicability of EAJA to Deportation Proceedings

In 1980, Congress enacted the EAJA to enable individuals and small businesses to recover attorney fees when they prevail in civil actions against the United States.[39] The EAJA has three principal purposes: first, to enable small parties to defend against unjustified government actions, second, to deter unjustifiable government action and third, to improve the quality of administration of federal law through increased exposure to litigation.[40] Although the EAJA encourages individuals to defend their rights against unreasonable government action, the Act does narrow the scope of the government's liability by limiting its application to adversary adjudications.[41] The

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[34] *Id.* at 1513 (quoting Morton v. Mancari, 417 U.S. 535, 550-51 (1974)).

[35] *Id.* at 1516 (Pittman, J., dissenting) (quoting 5 U.S.C. § 559(a) (1988)).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *See supra* note 1.

[40] *See* Note, *Applying the Equal Access to Justice Act to Asylum Hearings*, 97 YALE L.J. 1459, 1469 (1988).

[41] *See* H.R. REP. No. 1418, 96th Cong., 2d Sess. 14 (1980), *reprinted in* 1980 U.S. CODE CONG. AND ADMIN. NEWS 4993 (limiting the government's liability under EAJA by awarding fees only in adversary adjudication). The legislative intent can be deciphered from the following excerpt:

> [T]he decision to award fees only in adversary adjudication reflects a desire to narrow the scope of the bill in order to make its costs acceptable. It also reflects a desire to limit the award of fees to situations where participants have a concrete interest at stake but nevertheless may be deterred from as-

EAJA applies to adversary adjudications "under section 554 [of the APA] in which the position of United States is represented by counsel."[42] Section 554(a) of the APA states that "[t]his section applies . . . in every case of adjudication required by statute to be determined on the record after an opportunity for an agency hearing."[43] Deportation proceedings are required by the INA to be determined on the record after the alien has been given the opportunity for a hearing[44] and thus meet the APA's applicability criteria under section 554(a). Additionally, the government is represented by counsel at deportation proceedings. Despite the apparent satisfaction of the two statutory requirements, courts have not always allowed deportation proceedings to be treated as adversary adjudications.[45]

The interpretation of the phrase "an adjudication under section 554" has been problematic because of its apparent ambiguity.[46] The phrase lends itself to two entirely different interpretations. It may be interpreted either as "an adjudication *defined under* section 554 or as an adjudication *governed by* section 554."[47] Since the legislative history of the EAJA sheds little light on the interpretation to be preferred, courts have often referred to the commentary accompanying the model rules[48] of the ACUS to interpret the EAJA. Unfortunately, the commentary offers conflicting guidance on the interpretation of the EAJA. On the one hand, the ACUS commentary recommends a broad interpretation by stating that "questions of [EAJA's] coverage should turn on substance . . . rather than technicalities."[49] On the other hand, it puts a damper on the extent of the EAJA's coverage by stating that "a liberal interpretation may provide for broader applicability than Congress intended."[50]

In contrast to the ambivalance of the commentary accompanying ACUS's model rules, the legislative history of the EAJA supports a "defined under" interpretation of the phrase "an adjudication under section 554."[51] The opinions of the Seventh and Eighth Circuits

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serting or defending that interest because of the time and expense involved in pursuing administrative remedies.

Id.

[42] 5 U.S.C. § 504(b)(1)(C) (1988).

[43] *Id.* § 554(a) (1988).

[44] *See* 8 U.S.C. § 1252(b) (1988).

[45] *E.g.*, Ardestani v. United States Dep't of Justice, 904 F.2d 1505, 1516 (11th Cir. 1990) (Pittman, J., dissenting).

[46] *See* Note, *Immigration Law—Equal Access to Justice Act—Deportation Proceedings Qualify Under the Act*, Escobar Ruiz v. INS, 838 F.2d 1020 (9th Cir. 1988), 13 SUFFOLK TRANSNAT'L L. REV. 497, 499 n.18 (1989).

[47] *See id.*

[48] Model rules were issued by the ACUS for the guidance of federal agencies in implementing the EAJA. These model rules were intended to provide guidance for agencies in developing their own regulations. *See* 46 Fed. Reg. 32,900 (1981).

[49] *Id.* at 32,901.

[50] *Id.*

[51] *See* H.R. REP. No. 1418, 96th Cong., 2d Sess. 23 (1980), *reprinted in* 1980 U.S. CODE

also support a "defined under" interpretation of the phrase.[52] These opinions, however, must be read with some circumspection since they did not involve coverage of deportation proceedings under the EAJA.

Escobar Ruiz v. INS[53] was the first case to consider coverage of deportation proceedings under the EAJA.[54] The *Escobar Ruiz* court found that the legislative history and the purpose of the EAJA clearly supported the "defined under" interpretation.[55] The Ninth Circuit reasoned that deportation proceedings qualify as adversary adjudications covered by the EAJA because they meet two requirements: first, the United States is represented by counsel in a deportation proceeding; and second, deportation proceedings are adjudications decided on the record after an opportunity for a hearing.[56]

The Ninth Circuit's reasoning in *Escobar Ruiz* was criticized by the Sixth Circuit, in *Owens v. Brock*,[57] for its "abandonment of the principle that waiver of immunity is to be construed narrowly."[58] Although critical of the *Escobar Ruiz* holding, the *Owens* decision may not have significantly diminished the vitality of *Escobar Ruiz* for three reasons. First, the *Escobar Ruiz* case occurred in a deportation context and therefore can be distinguished from *Owens* which involved a Federal Employees Compensation Act (FECA) proceeding.[59] The complicated nature of INS proceedings coupled with the poor language skills of potential deportees makes the argument for access to the EAJA very compelling in deportation proceedings.[60] Second, the INS procedures are not excepted from section 554, but FECA proceedings are specifically excluded from coverage under section

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CONG. AND ADMIN. NEWS 5012 (the Committee declared that EAJA "defines adversary adjudication as an agency adjudication *defined under* the Administrative Procedures Act") (emphasis added). It must also be noted that Congress changed the words "an adjudication subject to section 554" to "an adjudication under section 554" thereby intimating its intention that in order for a procedure to be adversary it need not directly be subject to section 554. *Id.* at 4989-91.

[52] *See* Smedberg Mach. and Tool, Inc. v. Donovan, 730 F.2d 1089, 1092 (7th Cir. 1984) (EAJA defines adversary adjudication as an "adjudication under section 554 of this title in which the position of the United States is represented by Counsel or otherwise"); Cornella v. Schweiker, 728 F.2d 978, 988 (8th Cir. 1984) (social security proceedings are adversary proceedings as defined by terms of section 554). *See also* Bonanza Trucking Corp. v. U.S., 664 F. Supp. 1453, 1461 (Ct. Int'l Trade 1987) (customs hearings were an adjudication *within the meaning* of section 554) (emphasis added).

[53] 838 F.2d 1020 (9th Cir. 1988).

[54] *See id.* at 1021.

[55] *Id.* at 1023-25.

[56] Escobar Ruiz v. INS, 813 F.2d 283, 293 (9th Cir. 1987), *aff'd on rehearing*, 838 F.2d 1020 (9th Cir. 1988).

[57] 860 F.2d 1363 (6th Cir. 1988). In *Owens*, the court decided that a proceeding for the determination of employee benefits under the Federal Employees Compensation Act (FECA) did not constitute an adversary adjudication. *Id.* at 1367.

[58] *Id.* at 1366.

[59] *See id.* at 1364.

[60] *See id.* at 1366.

554.[61] Third, the *Owens* decision could have withstood judicial review solely on the ground that "plaintiff's entitlement to workmen's compensation was not required by statute to be determined on the record."[62]

Recently, the District of Columbia Circuit also rejected the Ninth Circuit's interpretation of the phrase "an adjudication under section 554."[63] The issue in *St. Louis Fuel and Supply Co. v. F.E.R.C.* was whether Department of Energy (DOE) proceedings for contesting remedial orders fell within the classification of "adversary adjudication" covered by the EAJA.[64] The *St. Louis Fuel and Supply* court felt bound to honor the canon that "waivers of the sovereign's immunity must be strictly construed"[65] and therefore ruled that the DOE proceeding was not covered by the EAJA. Moreover, *St. Louis Fuel and Supply* is readily distinguishable from *Escobar Ruiz*. First, the *St. Louis Fuel and Supply* case occurred in a remedial DOE proceeding and not in a deportation context. Second, whereas the DOE proceeding in *St. Louis Fuel and Supply* was not required by the DOE Act to be on the record,[66] all deportation proceedings are required by the INA to be on the record.[67]

In attempting to fathom the meaning of the phrase "an adjudication under section 554," the EAJA's treatment of social security administrative hearings serves as a useful analog. In *Richardson v. Perales*,[68] the Supreme Court refused to decide whether the APA had application to social security disability claims because "the social security administrative procedures [did] not vary from that prescribed by the APA."[69] After determining that social security proceedings meet the *defined under*[70] standard, the *Richardson* Court saw no need to decide whether the proceedings also met the *governed by*[71] standard. The Legislature must have been aware of the *Richardson* deci-

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61 *See id.* at 1365. A provision of FECA specifically excludes workers' compensation proceedings from coverage under section 554. *Id. See also* Fidelity Constr. Co. v. United States, 700 F.2d 1379 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983) (proceeding exempted under section 554 does not constitute an adversary adjudication).

62 *Owens*, 860 F.2d at 1370 (6th Cir. 1988) (Nelson, J., concurring). In fact, Judge Nelson reinstated the *Escobar* holding by stating that at a future date the *Owens* court was not foreclosed from reaching the same result as that reached by the Ninth Circuit in *Escobar*. *Id. See also* Allen v. Faragasso, 585 F. Supp. 1114 (1984) (FECA benefit demonstrations are not adversary adjudications because they are not required by statute to be determined on the record after opportunity for an agency hearing).

63 St. Louis Fuel and Supply Co. v. F.E.R.C., 890 F.2d 446 (D.C. Cir. 1989).

64 *See id.* at 447.

65 *Id.* at 449-50.

66 *See id.* at 448.

67 *See* 8 U.S.C. § 1252(b) (1988).

68 402 U.S. 389 (1970).

69 *Id.* at 409.

70 The "defined under" standard is satisfied when the proceeding is of the type defined under section 554.

71 The "governed by" standard is satisfied when section 554 directly applies to the proceedings.

sion when it reenacted the EAJA in 1985; yet Congress included social security hearings in its amendment of the EAJA.[72] The inference to be drawn is that Congress did not consider the uncertainty of the direct applicability of APA to social security hearings relevant to whether the EAJA applied to such hearings. Congress was satisfied that the EAJA applied to such hearings by virtue of the fact that these hearings were of the type defined under section 554.[73] Arguably, by the same reasoning, the EAJA should apply to deportation proceedings since a deportation hearing is also of the type defined under section 554.

Courts have also turned to the regulations,[74] developed by the Attorney General[75] to implement the EAJA, to determine whether or not deportation proceedings are within the scope of the EAJA. The regulations list the proceedings covered by the EAJA. Deportation proceedings have not been added to the most recent promulgation of this list.[76] The exclusion of deportation proceedings is not an oversight since the comments published with the interim rule reveal that deportation proceedings were intentionally excluded pursuant to *Marcello*.[77] It follows that Congress must have been aware of this administrative interpretation when it amended the EAJA in 1985. The presumption is that Congress was influenced by the Attorney General's interpretation and therefore, deportation proceedings are not covered by the EAJA.[78]

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[72] *See* H. R. REP. No. 120, 99th Cong., 1st Sess. 10 (1985), *reprinted in* 1985 U.S. CODE CONG. AND ADMIN. NEWS 138.

[73] *See* Escobar Ruiz v. INS, 813 F.2d 283, 291 (9th Cir. 1987), *aff'd on rehearing*, 838 F.2d 1020 (9th Cir. 1988).

[74] 28 C.F.R. § 24.103 (1990). Note that the regulation applies only to those proceedings that are included in the regulatory list.

Section 554(a) of the INA specifically excludes six kinds of actions from its provisions, but deportation proceedings are not among them. 5 U.S.C. § 554(a) (1988). Thus, it is the regulatory scheme and not the statutory scheme that puts deportation proceedings outside the scope of the EAJA.

[75] Section 1103(a) of the INA authorizes the Attorney General to develop regulations for the INS. *See* 8 U.S.C. § 1103(a) (1988).

[76] 28 C.F.R. § 24.103 (1990).

[77] *See* 46 Fed. Reg. 48,921, 48,922 (1981). Specifically, the supplementary information states:

> Hearings conducted by the Immigration and Naturalization Service (INS) pursuant to 8 U.S.C. 1226 (exclusion) and 8 U.S.C. 1252 (deportation) are exempt from the requirements of the Administrative Procedures Act, Marcello v. Bonds, 349 U.S. 757 (1955). Therefore, the Act does not apply.

Id. This interpretation of *Marcello* by the Attorney General is erroneous. *Marcello* did not exempt deportation hearings from the requirements of the APA. *Marcello* merely held that when the hearing provisions of the INA and of the APA are in disharmony, the more specialized provisions of the INA will take precedence over the APA provisions. *See infra* notes 101-03 and accompanying text.

[78] *See* Cannon v. University of Chicago, 441 U.S. 677, 698-99 (1979) ("[I]t is not only appropriate but realistic to presume that Congress was thoroughly familiar with these unusually important precedents . . . and that it expected its enactment to be interpreted in conformity with them"); Lorillard v. Pons, 434 U.S. 575, 581 (1978) ("Congress is pre-

The EAJA waives the sovereign's immunity because it allows attorney's fees to be recovered from the United States. The United States Supreme Court has held that "[i]n analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign."[79] In determining the applicability of the EAJA to deportation proceedings, some courts have given a strict construction to the phrase "an adjudication under section 554" concluding that the EAJA does not apply to deportation proceedings.[80] This view, however, runs contrary to that expressed in the House Report for the 1985 reauthorization of the EAJA, wherein Congress chastised the judiciary for its restrictive interpretation of the EAJA and instructed the courts to take the "expansive view" and apply the "broader meaning."[81] In contrast to the rule that waivers must be strictly construed, the Court in *Franchise Tax Boards of California v. USPS*[82] ruled that "waivers by Congress of governmental immunity in case of . . . federal instrumentalities must be *liberally* construed."[83] The Court in *Franchise Tax* found its rule to be in harmony with the increasing tendency of Congress to waive the immunity of federal agencies.[84] In two recent cases decided by the District Court for the District of Columbia, *McKenzie v. Kennickell* and *Brown v. Marsh*, the court allowed an interim award of attorney fees based on a liberal construction of the Civil Rights Act.[85]

In *Marcello*, the Supreme Court held that deportation proceedings are governed by section 242 of the INA and not by the hearing requirements of the APA.[86] The importance of *Marcello* to the current debate is placed in proper perspective by reviewing the history

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sumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.").

[79] Library of Congress v. Shaw, 478 U.S. 310, 318 (1986); Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-86 (1983).

[80] *See* Owens v. Brock, 860 F.2d 1363, 1366 (6th Cir. 1988). *Accord* St. Louis Fuel and Supply Co. v. F.E.R.C., 890 F.2d 446, 449-50 (D.C. Cir. 1989); Haitian Refugee Center v. Meese, 791 F.2d 1489, 1494 (11th Cir.), *vacated in part on other grounds*, 804 F.2d 1573 (11th Cir. 1986). *But cf.* Jones v. Lujan, 883 F.2d 1031 (D.C. Cir. 1988) (government cannot assert doctrine of sovereign immunity to avoid award of attorney fees to prevailing attorney who proceeded pro se under the EAJA).

[81] *See* H.R. REP. No. 120, 99th Cong., 1st Sess. 9 (1985), *reprinted in* 1985 U.S. CODE CONG. AND ADMIN. NEWS 137.

[82] 467 U.S. 512 (1983).

[83] *Id.* at 517 (quoting FHA v. Burr, 309 U.S. 242, 245 (1940)) (emphasis added). In fact, the Court admonished the federal agency not to accomplish the waiver of sovereign immunity by a ritualistic formula, but instead to ascertain the scope of a waiver by reference to underlying congressional policy. *Id.* at 521 (citing Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 301, 389 (1939)).

[84] *Id.* at 517 (quoting FHA v. Burr, 309 U.S. 242, 245 (1940)).

[85] *See* McKenzie v. Kennickell, 669 F. Supp. 529 (D.D.C. 1987) (awarding interim attorney fees against federal government is not barred by doctrine of sovereign immunity); Brown v. Marsh, 707 F. Supp. 21 (D.D.C. 1989) (awarding interim attorney fees against Army for discrimination in its promotion practices did not violate sovereign immunity of federal government).

[86] *See* Marcello v. Bonds, 349 U.S. 302, 308 (1955).

of the immigration laws. Prior to the amendment of the immigration laws in 1951, the Supreme Court, in *Wong Yang Sung v. McGrath*[87] held that the APA did apply to deportation hearings.[88] The *Wong Yang Sung* decision triggered an immediate congressional response and the House of Representatives passed a rider to an appropriations bill which specifically exempted the INA from the adjudicatory provisions of the APA.[89] This rider was repealed in the subsequently enacted Immigration and Nationality Act of 1952 leaving the APA applicable to immigration cases unless "other provisions of the 1952 Immigration Act made the [APA] inapplicable."[90] The INA of 1952 contained special statutory hearing provisions for matters of deportation patterned upon analogous provisions of the APA. The 1952 Immigration Act, although delineating this new methodology for determining deportability,[91] did not contain, as was required by section 559 of the APA,[92] a specific exception from that Act. What the 1952 Immigration Act did provide was that "[t]he procedure [in the INA] shall be the sole and exclusive procedure for determining deportability of an alien under this section."[93] The issue that arose was whether the hearing provisions of the INA, when read in conjunction with the "sole and exclusive procedure" language, were sufficient to excuse deportation proceedings from the requirements of the APA's corresponding provisions. The *Marcello* Court addressed this issue and held that the hearing provisions, when coupled with language of exclusivity, were sufficient to create such an exemption.[94]

The *Marcello* decision has not been legislatively or judicially overruled. On the judicial front, the *Marcello* rule is now applied to exempt not only the hearing procedures of the IJ, but also that of the Board of Immigration Appeals (BIA) from subjection to the APA.[95]

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87 339 U.S. 33, *modified on other grounds*, 339 U.S. 908 (1950).

88 339 U.S. at 50. The Court stated that "the limitation to hearings 'required by statute' [in the APA] exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom or special dispensation; not those held by compulsion." *Id.* Consequently, the *Wong Yang Sung* Court held that the APA applied to deportation hearings even though such hearings were constitutionally, as opposed to statutorily, mandated. *Id.*

89 8 U.S.C. § 155(a) (1946).

90 *Marcello*, 349 U.S. at 316 (Black, J., dissenting).

91 *See* 8 U.S.C. § 1252(b) (1988).

92 5 U.S.C. § 559 (1988). This section provides that a "[s]ubsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly." *Id.*

93 8 U.S.C. § 1252(b) (1988).

94 *Marcello*, 349 U.S. at 308-10.

95 *See* Ho Chong Tsao v. INS, 538 F.2d 667, 669 (5th Cir. 1976) (per curiam), *cert. denied*, 430 U.S. 906 (1977) (holding that the APA has no relevance to the Board's review of an IJ's refusal to revoke the alien's deportation order). *See also* Cisternas-Estay v. INS, 531 F.2d 155, 158-59 (3d Cir.), *cert. denied*, 429 U.S. 853 (1976); Giambanco v. INS, 531 F.2d 141, 144 (3d Cir. 1976) (holding that the APA applies not only to deportation proceedings held before the IJ but also to hearings held before the Board of Immigration Appeals).

On the legislative front, Congress had the opportunity, when it reenacted the EAJA in 1985, to overrule the decision of the Attorney General not to include deportation proceedings in the list of proceedings covered by the EAJA.[96] Congress' silence at this crucial juncture has given succor to the *Marcello* decision. Although standing on sound judicial and legislative footing, the *Marcello* decision is susceptible to two attacks. First, the intent of Congress while enacting the 1952 Immigration Act was to reinstate the *Wong Yang Sung* decision and to make it the law of the land.[97] Although this clearly expressed intent was recognized by the dissent, it escaped the majority in *Marcello*.[98] This oversight remains a blemish on *Marcello's* legal standing. Second, the original proposal that evolved into the 1952 Immigration Act contained the provision that *"[n]otwithstanding any other law, including . . [*the Administrative Procedure Act*]*, the proceedings so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien who is in the United States."[99] The phrase, "[n]otwithstanding any other law, including the . . . [Administrative Procedure Act]" was omitted from the final bill. Thus, the bill that finally passed did not expressly supersede the requirements of the APA.[100]

Despite these susceptibilities, the *Marcello* decision continues to flourish unabated. While contending with the applicablilty of *Marcello* to immigration proceedings, it must be borne in mind that "*Marcello* did not hold that deportation proceedings are excluded or exempted from section 554 [of the APA]."[101] Indeed, immigration proceedings are governed by the APA.[102] *Marcello* held only that

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96 *See supra* notes 74-78 and accompanying text.

97 98 CONG. REC. 4416 (1952). Congress made very clear its intention to reinstate *Wong Yang Sung*:

> Instead of destroying the Administrative Procedures Act, we undo what the Congress did in a deficiency appropriation bill several years ago when it legislated to overturn a decision of the Supreme Court, which ruled that the Administrative Procedures Act is applicable in deportation proceedings. So, here, instead of our destroying the Administrative Procedures Act, we actually see that it is reinstated in every instance.

Id. at 4302.

98 *See* Note, *Inapplicability of the Administrative Procedure Act to Adjudications Before the Board of Immigration Appeals*, 8 SETON HALL L. REV., 250, 272 n.119 (1977). The writer states:

> The most disturbing aspect of the [*Marcello*] opinion . . . was the short shrift given to the . . . holding in *Wong Yang Sung* . . . . Immediately upon repeal of the Appropriations Rider, one of the APA's sponsors had indicated that the decision should have been reinstated to its full force and effect . . . . Yet, the majority in *Marcello* chose to ignore its constitutional, as opposed to purely statutory, imperative. (Citations omitted).

Id.

99 *See Marcello*, 349 U.S. at 317 (Black, J., dissenting)(emphasis in original).

100 *See id.*

101 Escobar Ruiz v. INS, 838 F.2d 1020, 1025 (9th Cir. 1988).

102 *See* Shaughnessy v. Pedreiro, 349 U.S. 48 (1955) (an alien whose deportation has been ordered under the INA of 1952 may have his order reviewed under the APA); Wong

when the requirements of the INA and of the APA diverge, the more specialized hearing provisions of the INA govern. Amendments to immigration regulations have virtually eliminated the differences between the hearing provision of the APA and the INA.[103] The elimination of these differences has de facto placed deportation proceedings within the sphere of the APA.

The *Ardestani* decision which emanated from the Eleventh Circuit held that the EAJA did not apply to deportation proceedings.[104] Two prior cases decided by the Eleventh Circuit, *Jean v. Nelson* and *Haitian Refugee Center v. Meese*, allowed attorney's fees to be recovered under the EAJA in immigration proceedings.[105] Yet, both *Nelson* and *Haitian Refugee Center* are distinguishable because they did not "involve the specific facts of a deportation proceeding."[106] The EAJA contains two similar provisions for the recovery of attorney's fees and costs.[107] Section 504(a)(1) of the EAJA requires an agency that conducts an adversary adjudication to award attorney's fees to the prevailing party.[108] Section 2412(d)(1)(A) of the EAJA, on the other hand, requires a court to award fees to the prevailing party in any civil action including proceedings for judicial review of agency action.[109] *Nelson* and *Haitian Refugee Center* did not involve agency actions nor did they involve judicial review of agency actions. Instead, they were class action suits brought by private parties against INS challenging the agency's programs and policies.[110] Therefore, pursuant to section 2412(d)(1)(A) of the EAJA, attorney's fees were awarded to the class action plaintiffs in *Nelson* and in *Haitian Refugee Center* because the plaintiffs were the prevailing parties in their civil suits against the INS.[111] Since these actions were not proceedings under the INA, the "adversary adjudication" determination was irrelevant.

The legislative history of the EAJA states that its fee-shifting provision[112] "is not intended to replace or supersede any existing

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Wing Hang v. INS, 360 F.2d 715, 717 (2d Cir. 1966) (discretionary denials of suspension of deportation are reviewable under the APA).

103 *See Marcello*, 349 U.S. at 309-10.

104 Ardestani v. United States Dep't of Justice, 904 F.2d 1505, 1515 (11th Cir. 1990).

105 *See* Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988) (Haitian refugees brought action challenging policies of the INS of holding mass exclusion hearings and of detaining Haitian refugees during pendency of applications for asylum without any parole); Haitian Refugee Center v. Meese, 791 F.2d 1489 (11th Cir. 1986) (Haitian class successfully challenged legality of INS program to accelerate processing of applications made by Haitians for asylum).

106 *Ardestani*, 904 F.2d at 1514.

107 *See supra* note 1.

108 *See* 5 U.S.C. § 504(a)(1) (1988).

109 *See* 28 U.S.C. § 2412(d)(1)(A) (1988).

110 *See supra* note 105.

111 *See* 28 U.S.C. § 2412(d)(1)(A) (1988).

112 *Id.*

fee-shifting statute."[113] Section 292 of the INA allows an alien to be represented at a deportation proceeding by counsel of his choosing provided the representation comes at "no expense to the government."[114] Courts are polarized in their analysis of whether the provision of section 292 is a fee-shifting provision.[115] A similar issue was faced by the Ninth Circuit in *Wolverton v. Heckler*.[116] The court, in *Wolverton*, held that section 206(b) of the Social Security Act[117] did not provide for attorney fee-shifting since it specified only a limitation on the amount that a successful claimant of disability benefits must pay toward lawyer's fees.[118] In a similar vein, section 292 of the INA does not provide for fee-shifting; it merely limits the availability of government paid counsel for indigent aliens.[119]

The parenthetical phrase in section 292 of the INA expresses "Congress's intent to grant aliens the right to be represented by counsel [in deportation proceedings], but not to grant indigent aliens the right to have counsel appointed at government expense."[120] Such an intent is apparent in the decision of courts construing section 292.[121] Courts have so far "refused to go beyond the statutory right of access to counsel, and they have held that indigent aliens are not constitutionally entitled to appointed counsel."[122] However, in *Aguilera-Enriquez v. I.N.S.*[123] and in *Magallanes-Damian v. I.N.S.*,[124] the Sixth and Ninth Circuits have obliquely suggested that such an entitlement exists based on the constitutional guarantee of due process.[125] A future court may find the parenthetical language of

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[113] H.R. REP. No. 1418, 96th Cong., 2d Sess. 18 (1980), *reprinted in* 1980 U.S. CODE CONG. AND ADMIN. NEWS 4997.

[114] 8 U.S.C. § 1362 (1988).

[115] *Compare* Escobar Ruiz v. INS, 787 F.2d 1294, 1297 (9th Cir. 1986), *aff'd on rehearing*, 838 F.2d 1020 (9th Cir. 1988)(Legislative history makes it clear that "except as otherwise specifically provided" clause was intended to refer only to other fee-shifting statutes and section 292 of the INA is clearly not such a statute) *with* Ardestani v. United States Dep't of Justice, 904 F.2d 1505, 1513 (11th Cir. 1990) (treating section 292 of the INA that bars the privilege of availability of appointed counsel as a fee-shifting provision).

[116] 726 F.2d 580 (9th Cir. 1984).

[117] 42 U.S.C. § 406(b) (1982).

[118] *See Wolverton*, 726 F.2d at 582.

[119] *See* Escobar Ruiz v. INS, 838 F.2d 1020, 1028 (9th Cir. 1988).

[120] *Id.*

[121] *See, e.g.*, Perez-Perez v. Hanberry, 781 F.2d 1477, 1482 (11th Cir. 1986) (holding that excludable aliens are not entitled to representation at government expense in habeas corpus proceedings challenging denial of parole).

[122] Note, *Right to Counsel in a Deportation Hearing*, 63 WASH. L. REV. 1019, 1027 (1988) (citing Aguilera-Enriquez v. INS, 516 F.2d 565, 569 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); Martin-Mendoza v. INS, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975); Henriques v. INS, 465 F.2d 119, 121 (2d Cir. 1972), *cert. denied*, 410 U.S. 968 (1973)).

[123] 516 F.2d 565 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

[124] 783 F.2d 931 (9th Cir. 1986).

[125] *See Aguilera-Enriquez*, 516 F.2d at 569 ("[D]ue process must be afforded in deportation proceedings [and] any right a petitioner may have to counsel is grounded in the fifth amendment guarantee of due process."); *Magallanes-Damian*, 783 F.2d at 933 ("Where an

section 292 to be unconstitutional.

IV. Significance of the *Ardestani* Decision

The *Ardestani* court's decision is inconsistent with the congressional policy underlying the EAJA.[126] By giving the statutory phrase "adjudication under section 554"[127] a "governed by"[128] interpretation, the court has narrowed the scope of the EAJA.[129] The narrowing of the EAJA's scope serves the government's own interest by limiting its liability. However, it hinders the deportees by making their access to counsel more difficult in deportation proceedings.[130] Instead of quibbling over the technicality of the meaning of "an adjudication under section 554,"[131] the court should have heeded the dissent's advice to put its focus on the phrase "adjudication required by statute to be determined on the record."[132] Broadening the scope of the EAJA is justified because there have been far fewer claims for recovery of attorney's fees under the EAJA than anticipated when the Act was first promulgated.[133]

The *Ardestani* court's restrictive interpretation of the EAJA, precluding its application to deportation proceedings, has stultified the spirit of the EAJA.[134] The two major purposes of the EAJA are 1) to deter unjustified governmental actions by expanding the government's liability for such actions and 2) to aid victims of unjustified government action.[135] The court's overly restrictive interpretation of what constitutes an adversary adjudication has stifled the first purpose of the EAJA because it allows the government impunity from liability for unjustified actions. The facts of *Ardestani* clearly illustrate this point. INS escaped liability in spite of the fact that it denied

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unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise, fundamental fairness would be violated").

126 *See* H.R. REP. No. 120, 99th Cong., 1st Sess. 8 (1985), *reprinted in* 1985 U.S. CODE CONG. AND ADMIN. NEWS 132, 136 (primary purpose of the EAJA is to increase individual's accessibility to justice).

127 5 U.S.C. § 504(b)(1)(C)(i) (1988).

128 *See supra* note 71.

129 *See* Escobar Ruiz v. INS, 813 F.2d 283, 287 (9th Cir. 1987), *aff'd on rehearing*, 838 F.2d 1020, 1028 (9th Cir. 1988). Under this restrictive "governed under" interpretation, deportation proceedings would be excluded from the ambit of the EAJA.

130 An alien's poor grasp and knowledge of English makes this lack of access to counsel of greater concern than would be the case with a similarly situated individual who was conversant with the language.

131 5 U.S.C. § 504(b)(1)(C)(i) (1988).

132 5 U.S.C. § 554(a) (1988).

133 *See* H.R. REP. No. 120, 99th Cong., 1st Sess. 10 (1985), *reprinted in* 1985 U.S. CODE CONG. AND ADMIN. NEWS 132, 137.

134 *See* Note, *The Equal Access to Justice Act in the Federal Courts*, 84 COLUM. L. REV. 1089, 1094 (1984) (unduly narrow interpretation of the EAJA frustrates Congress' purpose of encouraging individuals to challenge unjustified governmental action).

135 *See* H.R. REP. No. 1418, 96th Cong., 2d Sess. 5-6 (1980), *reprinted in* 1980 U.S. CODE CONG. AND ADMIN. NEWS 4984, 4984.

appellant's application for political asylum in egregious contempt of the State Department's determination that a well-founded fear of persecution had been established by the appellant.[136] The second major purpose of the EAJA is also equally frustrated because attorneys now have no incentive to represent an alien in a deportation proceeding since such proceedings have been ruled to be beyond the scope of the EAJA.

The *Ardestani* court's decision not only removes deportation proceedings from the ambit of the EAJA, but also leaves unclear the requirements that other administrative agencies must meet to come within the scope of the EAJA. In the past, courts had clearly specified two requirements to be met for proceedings to qualify under the EAJA.[137] By ignoring these requirements, the *Ardestani* court has now made it very difficult to predict which proceedings will qualify under the EAJA.[138]

The *Ardestani* court relied heavily on the *Marcello* decision to arrive at its conclusions.[139] It did so on the sole basis that *Marcello* had not been legislatively or judicially overruled and failed to examine the suspect foundations of *Marcello*.[140] Even given the reality that the *Ardestani* court was bound by the Supreme Court's *Marcello* decision, the *Ardestani* court should have recognized that *Marcello* held only that when the requirements of the INA and of the APA diverge, the more specialized requirements of the INA govern.[141] Amendments to the immigration regulations have made the hearing provisions of the INA and the APA virtually identical making the application of *Marcello* to the instant case inapposite.[142] The court's decision also was tainted with an illogical derivation. Assuming arguendo that *Marcello* applied to the instant case, the derivation is that the APA hearing provisions would not apply to deportation proceedings. This does not preclude the determination that deportation proceedings are of the type defined under the APA.[143] Thus, the court's application of *Marcello* to the instant case was not well-founded.

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136 INS relies on the expertise of the State Department to make the determination of a well-founded fear of persecution. By ignoring the State Department's expert recommendation, the INS made the basis of its action to deny asylum unreasonable.

137 *See, e.g.*, Escobar Ruiz v. INS, 813 F.2d 283, 293 (9th Cir. 1987), *aff'd on rehearing*, 838 F.2d 1020 (9th Cir. 1988) (The first requirement is that the government must be represented by counsel and the second requirement is that the proceeding must be one required by statute to be decided on the record).

138 The *Ardestani* court's refusal to recognize the criteria used by the courts in the past to make a determination of an adversary adjudication injects unpredictability in future determinations of this kind.

139 *Ardestani*, 904 F.2d at 1511.

140 *See supra* notes 97-100 and accompanying text.

141 *See supra* notes 101-03.

142 *Ardestani*, 904 F.2d at 1516 (Pittman, J., dissenting).

143 *Id.*

The *Ardestani* court's opinion also relied to a large extent on the Sixth Circuit's reasoning in *Owens*[144] that a waiver of immunity must be strictly construed in favor of the United States.[145] Ironically, the *Owens* court did not depend on this reasoning to arrive at its own decision and took pains to distinguish its case from *Escobar Ruiz*.[146] In fact, the *Owens* court placed greater reliance on the fact that the type of proceeding involved in its case was specifically exempted from section 554, unlike a deportation proceeding which is not exempted.[147] The concurring opinion of Judge Nelson disavowed the majority's criticism of *Escobar Ruiz*[148] by stating that "[o]ur criticism of *Escobar Ruiz*, which may or may not be well taken, is clearly not central to our holding in the case at bar."[149] Shorn of its dependence on *Owens*, the *Ardestani* decision stands on very suspect footing. *Ardestani's* foundations are further weakened by the current tendency of Congress to waive the immunity of federal agencies and a corresponding tendency on the part of federal courts to construe existing waivers of immunity of federal instrumentalities in a liberal manner.[150]

Nelson and *Haitian Refugee Center*, decided by the Eleventh Circuit prior to *Ardestani*, allowed attorney's fees to be recovered in immigration proceedings. The *Ardestani* court was quick to distinguish these cases on the basis that they were suits brought against INS challenging the agency's program and did not involve deportation proceedings against an individual alien.[151] Although this distinction does have merit, the diametrically opposed holdings will have a deleterious impact on deportees. The *Ardestani* decision will effectively shield the INS from liability for its unjustified actions in deportation proceedings against individual aliens. It is only when INS's actions occur with such frequency that the actions rise to the level of a program or a policy that the courts will allow the recovery of attorney's fees. The absence of protection against unjustified government action for the individual alien can scarcely be defended as good public policy.

The *Ardestani* court chose to treat section 292 of the INA as a fee-shifting provision despite the fact that provisions of a similar nature had not been treated as fee-shifting provisions by other courts.[152] The court erred in its interpretation of the phrase "at no

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144 *Id.* at 1510.

145 *See Owens*, 860 F.2d at 1366.

146 *Id.* at 1366-67.

147 *Id.*

148 838 F.2d 1020 (9th Cir. 1988) (en banc).

149 *Owens*, 860 F.2d at 1370 (Nelson, J., concurring).

150 *See supra* notes 82-85 and accompanying text.

151 *Ardestani*, 904 F.2d at 1514.

152 *See supra* notes 118-20 and accompanying text.

expense to the Government";[153] plainly, the phrase was "designed to deal with the relationship between indigency and the right to counsel"[154] and not to deal with the question of fee-shifting. The court's interpretation of section 292 decreases the indigent alien's access to counsel by removing deportation proceedings from the ambit of the EAJA. Thus, the result achieved by the court's interpretation of section 292 of the INA is to defeat the purpose of the EAJA.[155]

V. Conclusion

The *Ardestani* court's holding that deportees are not entitled to recover attorney's fees under the EAJA when the deportee prevails against the government defeats the EAJA's legislative purpose of encouraging individuals to challenge unjustified government action.[156] The court's decision also adds confusion to the process of determining what types of proceedings are covered by the EAJA.[157] The court's reliance on *Marcello* was not well-founded in view of the elimination of the differences between the APA and the INA hearing provisions.[158] In addition, the court's reliance on *Owens* was misplaced because *Owens* involved a FECA and not a deportation proceeding.[159] Moreover, by allowing attorney's fees to be recovered in class action immigration suits but refusing to do so in deportation proceedings, the court ignored the plight of single aliens.[160] Finally, by its misconceived interpretation of section 292 of the INA, the court has denied indigent aliens accessibility to counsel.[161]

KHURSHID K. MEHTA*

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153 8 U.S.C. § 1362 (1988).

154 Escobar Ruiz v. INS, 838 F.2d 1020, 1028 (9th Cir. 1988).

155 *See* H.R. REP. No. 120, 99th Cong., 1st Sess. 8 (1985), *reprinted in* 1988 U.S. CODE CONG. AND ADMIN. NEWS 136 (purpose of the EAJA is "to increase the accessibility to justice—in administrative proceedings and civil actions—of individuals, small businesses and other organizations").

156 *See* H.R. REP. No. 1418, 96th Cong., 2d Sess. 5-6 (1980), *reprinted in* 1980 U.S. CODE CONG. AND ADMIN. NEWS 4984, 4984.

157 *See supra* notes 137-38 and accompanying text.

158 *See supra* notes 139-43 and accompanying text.

159 *See supra* notes 144-50 and accompanying text.

160 *See supra* note 151 and accompanying text.

161 *See supra* notes 152-55 and accompanying text.

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