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## Notes

### Aliens' Alienation from Justice: The Equal Access to Justice Act Should Apply to Deportation Proceedings

In the fiscal year 1987, 48,404 aliens faced the ordeal of deportation proceedings.<sup>1</sup> Often these aliens could not defend their interests adequately because they could not speak English.<sup>2</sup> An attorney versed in the extremely complicated law of immigration<sup>3</sup> was indispensable to protect the aliens' interests in staying in the country with family and friends. Because they could not afford an attorney to represent them, however, the aliens often faced the deportation proceedings alone.<sup>4</sup> Further, they were not entitled to court appointed counsel under the Im-

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1. Elliot, *Relief From Deportation: Part I*, IMMIGR. BRIEFINGS 1, 4 (Aug. 1988). The Immigration and Naturalization Service (INS) deported 109,016 aliens in the fiscal years 1981-1986. *Id.* at 4. Deportation is especially hard on the alien. The alien could be separated from family, sent to a strange country, or could have no country to go to and thus be detained indefinitely. See Note, *An Opportunity to be Heard: The Right to Counsel in a Deportation Hearing*, 63 WASH. L. REV. 1019, 1022 (1988); see also *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("deportation is a drastic measure and at times the equivalent of banishment or exile"); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation can deprive a person "of all that makes life worth living").

2. Stern, *Applying the Equal Access to Justice Act to Asylum Hearings*, 97 YALE L.J. 1459, 1470 n.73 (1988).

3. See, e.g., *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) (comparing the INA to "King Minos's labyrinth in ancient Crete" and stating the Act is "certain to accelerate the aging process of judges"); see also Wasserman, *Practical Aspects of Representing an Alien at a Deportation Hearing*, 14 SAN DIEGO L. REV. 111, 112 (1976) (calling the INA "the longest, the most ambiguous, the most complicated, and the most illogical statute on the books").

4. Stern, *supra* note 2, at 1470. Legal aid is not likely to be forthcoming either. Although some legal aid programs do exist, they are blatantly understaffed. *Id.* at 1470; see also Note, *INS Transfer Policy: Interference with Detained Aliens' Due Process Right to Retain Counsel*, 100 HARV. L. REV. 2001, 2005-06 (1987) (stating the representation of aliens is done mostly by pro bono, and most pro bono attorneys cannot afford to travel to hearings). In addition, some alien detention centers are far removed from large cities. For example, when a new detention facility was located in Oakdale, Louisiana, in 1986 there were only five attorneys in the city. None had ever had an immigration case. Stern, *supra* note 2, at 1470 n.77.

migration and Nationality Act (INA).<sup>5</sup>

The Equal Access to Justice Act (EAJA) could help aliens in this predicament. The EAJA potentially lessens the impact of the aliens' gross disadvantages by providing for attorney fees in certain agency adjudications.<sup>6</sup> The federal courts of appeals, however, are split on whether the EAJA applies to deportation proceedings. The Ninth Circuit has held that the EAJA does apply to deportation proceedings<sup>7</sup> while the Third Circuit has held that the EAJA does not apply.<sup>8</sup>

The circuit courts agree that application of the EAJA to deportation proceedings depends on whether the deportation hearing is an "adversary adjudication" within the meaning of the Act.<sup>9</sup> An adversary adjudication, as defined in section 504,

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5. Immigration and Nationality Act of 1952, § 292, 8 U.S.C. § 1362 (1988); Note, *supra* note 1, at 1027. The alien has no constitutional right to appointed counsel. *Aguilera-Enriquez v. INS*, 516 F.2d 565, 569 (6th Cir. 1975) (absence of counsel did not deprive alien's hearing of the fundamental fairness required by due process), *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).

6. 5 U.S.C. § 504 (1988). Section 504(a) provides that:

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.

*Id.* § 504(a)(1).

Individuals without tremendous resources are allowed to collect attorney fees. An individual whose net worth is over \$2,000,000 at the time the adjudication was initiated may not collect attorney fees. *Id.* § 504(b)(1)(B)(i). There is a similar provision for businesses and municipal governments. Any owner of an unincorporated business, a partnership, or unit of local government (with a few exceptions) may not collect attorney fees if the net worth of the organization exceeds \$7,000,000 or has more than 500 employees. *Id.* § 504(b)(1)(B)(ii).

7. *Escobar Ruiz v. INS*, 838 F.2d 1020, 1030 (9th Cir. 1988) (en banc).

8. *Clarke v. INS*, 904 F.2d 172, 178 (3d Cir. 1990). The Eleventh Circuit has also considered whether the EAJA applies to deportation proceedings. *Ardestani v. INS*, 904 F.2d 1505, 1514 (11th Cir. 1990) (holding the EAJA does not apply to deportation proceedings), *cert. granted*, 111 S. Ct. 1101 (1991). Even though the Supreme Court has granted certiorari in *Ardestani*, the opinion will not be considered in detail because the Eleventh Circuit's analysis does not add any substantial arguments that did not consider the *Clarke* court and is weaker analytically. For a brief analysis of the *Ardestani* opinion, see *infra* note 129.

9. Adversary adjudication is defined in § 504(b)(1)(C) as "an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license." 5 U.S.C. § 504(b)(1)(C)(i) (1988).

is "an adjudication under section 554 [of the Administrative Procedure Act (APA)]."<sup>10</sup> Hence, the dispositive issue is whether deportation proceedings are adversary adjudications "under section 554" of the APA.<sup>11</sup>

This Note argues that the EAJA does apply to deportation proceedings. Part I examines alien rights, the INA, and the EAJA's purposes and scope. Part II discusses cases that have considered whether the EAJA applies to deportation proceedings. Part III draws on the purposes behind the EAJA as well as its legislative history to conclude that the EAJA applies to deportation proceedings. Finally, this Note recommends using a functional test to determine if the EAJA is applicable to other agency proceedings.

## I. ALIEN RIGHTS, THE IMMIGRATION AND NATIONALITY ACT, AND THE EQUAL ACCESS TO JUSTICE ACT

### A. ALIEN RIGHTS AND THE IMMIGRATION AND NATIONALITY ACT

The rights accorded to aliens<sup>12</sup> flow from one premise:

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10. *Id.* The phrase "under section 554" is ambiguous. See *infra* Part III. B. 1. One plausible interpretation is that "under" means that the agency proceeding must be governed by § 554 of the APA before the EAJA applies. The other possible interpretation is that the agency proceeding must be the functional equivalent of APA proceedings or "in accordance with" the type of proceeding required by the APA. See, e.g., *Escobar Ruiz*, 838 F.2d at 1023.

11. If "under section 554" is interpreted to mean that the proceeding must be governed by the APA, the EAJA does not apply to deportation hearings. *Ardestani*, 904 F.2d at 1511-12; *Clarke*, 904 F.2d at 178. The INA provides that the regulations promulgated under the Act provide the exclusive procedure for deportation hearings. 8 U.S.C. § 1252(b) (1988). The Supreme Court has held that the APA's hearing procedures are superseded by the INA procedures in deportation hearings. *Marcello v. Bonds*, 349 U.S. 302, 310 (1955).

If "under section 554" is interpreted to mean that the adjudication must only be the functional equivalent of an APA adjudication or an adjudication defined by APA standards, however, the EAJA does apply to deportation proceedings. *Escobar Ruiz*, 838 F.2d at 1030. The hearing procedures in deportation cases are similar in all important respects to the adjudication procedures mandated by the APA. *Id.* at 1025.

The INS has consistently contended that the EAJA does not apply to deportation proceedings. Rudnick, *EAJA Fees in Immigration Cases*, IMMIGR. BRIEFINGS 1, 19 (Oct. 1989). The Bureau of Immigration Appeals has agreed with this viewpoint, although it held the EAJA does apply to cases arising in the Ninth Circuit because of that circuit's ruling the EAJA does apply to deportation cases. *In re Anselmo*, Int. Dec. 3105 (B.I.A. 1989) (deportation proceedings), *digested in* 66 INTERPRETER RELEASES 598-601 (May 26, 1989).

12. Constitutional law concerning the rights of aliens differentiates be-

every sovereign nation possesses the inherent power to regulate the admission of foreigners into its territory.<sup>13</sup> Consequently, Congress enjoys plenary power to set standards for the admission, exclusion, and deportation of aliens.<sup>14</sup>

Although Congress has plenary power over aliens, the Supreme Court has held that aliens nonetheless have procedural due process rights when contesting their admission, exclusion, and deportation.<sup>15</sup> Because due process imposes no substantive limits on Congress,<sup>16</sup> aliens can contest only

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tween the rights of legal and illegal aliens. Legal aliens are properly documented immigrant aliens and non-immigrant aliens. Lopez & Lopez, *The Rights of Aliens in Deportation and Exclusion*, 20 IDAHO L. REV. 731, 731 (1984). Immigrant aliens (also known as permanent aliens) have the privilege to work and live permanently in the United States. *Id.* Non-immigrant aliens (e.g., tourists, students, etc.) are allowed in the United States only temporarily. *Id.* "Illegal" aliens are termed "deportable" in United States law. *Id.*

13. *Galvan v. Press*, 347 U.S. 522, 530-31 (1954); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). Although courts do not accord aliens the full array of constitutional rights given citizens, aliens do possess some important rights under the Constitution. For example, aliens' rights to receive, own, and transfer property are protected by the equal protection clause. Lopez & Lopez, *supra* note 12, at 733. Aliens also have the same access to the judiciary as citizens. *Id.* at 734. In addition, all aliens accused of crimes are protected under the fifth and sixth amendments. *Id.* at 734-35.

Although the Constitution does not explicitly give the right to regulate the admission of foreigners, the Supreme Court has implied the power as a right every sovereign nation enjoys. *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889); Note, *supra* note 1, at 1025.

14. *Galvan*, 347 U.S. at 531 ("[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1952) ("The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose."). Congress has established twenty grounds for deportation. 8 U.S.C. § 1251 (1988). Many of these are similar to the grounds for exclusion. Compare Immigration and Nationality Act of 1952, § 212, 8 U.S.C. § 1182 (1988) (grounds for exclusion) with Immigration and Nationality Act of 1952, § 241, 8 U.S.C. § 1252 (1988) (grounds for deportation).

15. *Galvan*, 347 U.S. at 530-31. Because the regulation of aliens is peculiarly concerned with the political conduct of government, courts only have the power to make sure that the alien is treated fairly under whatever law Congress has passed. *Id.* at 530-31 (when enforcing government policies, the executive branch must obey the procedural safeguards of due process, but Congress has plenary power to decide the conditions aliens must satisfy to remain in the United States).

16. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("Whatever the procedure authorized by Congress is, it is due process so far as the alien denied entry is concerned. . . . [I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government." (citations omitted)). Aliens have no right to enter the United States. Helton, *Reconciling the Power to Bar or Ex-*

whether the government followed its own procedures.<sup>17</sup>

The APA governs most administrative hearings.<sup>18</sup> In 1955, however, the Supreme Court held in *Marcello v. Bonds*<sup>19</sup> that the INA,<sup>20</sup> and not the APA, governs deportation proceedings.<sup>21</sup> INA procedures<sup>22</sup> guarantee the alien the right to reasonable notice, to counsel, to examine witnesses, and to present evi-

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*pel Aliens on Political Grounds with Fairness and the Freedoms of Speech and Association: An Analysis of Recent Legislative Proposals*, 11 FORDHAM INT'L L.J. 467, 476 (1988). However, minimal due process is usually given to an alien trying to enter the country. Lopez & Lopez, *supra* note 12, at 749. The excluded alien gets a fair hearing, statutes must be complied with, and rulings must be based on evidence having adequate support on the record. *Id.*

17. Lopez & Lopez, *supra* note 12, at 746. Alien rights end with procedural due process. Congress can withhold admission or deport an alien on any substantive ground. *Id.* at 752.

18. Until 1955, it was unclear whether the APA applied to deportation proceedings. *Marcello v. Bonds*, 349 U.S. 302, 303-05 (1955).

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

20. 8 U.S.C. §§ 1101-1503 (1988). Congress passed the INA to create a comprehensive and revised immigration and naturalization law. H.R. REP. NO. 1365, 82nd Cong., 2d Sess. 5, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653 [hereinafter H.R. REP. NO. 1365].

21. *Marcello*, 349 U.S. at 310. More specifically, the Court held that when the procedures of the two statutes diverge, the INA provisions take precedence over the APA. *Id.* The Court noted that Congress used the APA as a model when constructing the INA hearing procedures, but because Congress detailed the hearing procedures in the INA it was clear Congress was taking the general provisions of the APA and creating a specialized procedure for the specific needs of the deportation process. *Id.* at 308. It also noted that the statute provides that the INA procedure was deemed the exclusive procedure in the statute. *Id.* at 309. Thus, the Court concluded that the INA supersedes the hearing provisions of the APA. *Id.* at 310.

The major difference between the INA and the APA that the Court found to be of special importance, the functions of the hearing officer, has now been eliminated. At the time of the *Marcello* opinion, the INA allowed the same person to be both the hearing officer and the prosecutor while the APA forbade hearing officers to have a prosecutorial role. *Escobar Ruiz v. INS*, 838 F.2d 1020, 1025 (9th Cir. 1988) (en banc). Amendments in the immigration regulations, however, have extinguished any meaningful differences between the roles of the hearing officers subject to the INA or APA. *Escobar Ruiz v. INS*, 813 F.2d 283, 292 (9th Cir. 1987).

22. 8 U.S.C. § 1252(b) provides that:

A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall, make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present . . . No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions

dence.<sup>23</sup> Aliens do not, however, have a right to appointed counsel.<sup>24</sup> Section 292 of the INA states that aliens shall have the right to counsel, but "at no expense to the Government."<sup>25</sup>

Deportation hearings typically begin with a hearing before an immigration judge.<sup>26</sup> Aliens may appeal the judge's decision to the Board of Immigration Appeals.<sup>27</sup> When administrative appeals are exhausted, the United States Courts of Appeals have jurisdiction to review the immigration judge's decision.<sup>28</sup>

## B. EQUAL ACCESS TO JUSTICE ACT

### 1. Attorney Fees Before the EAJA

Before Congress passed the EAJA, federal courts applied the American Rule to reject prevailing parties' claims for attor-

or in which he shall have participated . . . in prosecuting functions . . . [R]egulations shall include requirements that —

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section.

8 U.S.C. § 1252(b) (1988).

The INS is responsible for apprehending and prosecuting deportable aliens. Lopez & Lopez, *supra* note 12, at 750-51. This enforcement mentality makes it very difficult to safeguard alien rights. *Id.*

23. 8 U.S.C. § 1252(b) (1988).

24. 8 U.S.C. § 1362 (1988) ("In any exclusion or deportation proceedings . . . 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." (emphasis added)).

25. *Id.*

26. 8 C.F.R. §§ 3.14, 242.1(a) (1990). Immigration judges are independent from the INS enforcement apparatus. The Attorney General separated the Immigration Court and the INS by creating a new office, the Executive Office for Immigration Review. *See Escobar Ruiz v. INS*, 813 F.2d 283, 292 (9th Cir. 1987); Stern, *supra* note 2, at 1467.

27. 8 C.F.R. § 3.36 (1990).

28. 8 U.S.C. § 1105a (1988). Although deportation proceedings are civil, the standard of proof is higher than in normal civil proceedings. *Woodby v. INS*, 385 U.S. 276, 285 (1966). The government has to prove deportability by "clear, unequivocal, and convincing" evidence. *Id.* Because the *ex post facto* clause does not apply to aliens, deportability can be based on conduct prior to the passage of a deportation law. *Marcello v. Bonds*, 349 U.S. 302, 314 (1955); *Galvan v. Press*, 347 U.S. 522, 530 (1954).

ney fees.<sup>29</sup> Under the American Rule, all parties are responsible for paying their own attorney fees and other expenses incurred during litigation.<sup>30</sup> Courts justified the American Rule by concluding that the fear of having to pay the opposing party's attorney fees would deter worthy plaintiffs from bringing suit.<sup>31</sup> Courts carved out a few exceptions to the American Rule, however, allowing fee shifting<sup>32</sup> in two common law situations.<sup>33</sup> Congress also enacted several statutory exceptions,<sup>34</sup> believing that awarding fees could further important policy goals.<sup>35</sup>

In addition to these exceptions, some federal appellate courts created a "private attorney general" rule in the early

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29. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

30. H.R. REP. NO. 1418, 96th Cong., 2d Sess. 8, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4986 [hereinafter H.R. REP. NO. 1418].

31. *Id.* at 9, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4988.

32. Fee shifting allows the winner in the litigation to collect her attorney fees from the loser.

33. There are two main common law exceptions to the American Rule. The first permits awards to a prevailing party who secured a common fund for many claimants. This is known as the common benefit exception. *Alyeska Pipeline*, 421 U.S. at 257. The second permits fee awards when the losing party acted with manifest bad faith during the litigation. *Id.* at 258-59; Stern, *supra* note 2, at 1461.

34. For examples of statutory exceptions, see Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1988) (allowing attorney fees to prevailing party if party wins under Public Accommodations portion of Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-6); Civil Rights Act of 1968, 42 U.S.C. § 3612(c) (1988); Organized Crime Control Act, 18 U.S.C. § 2520 (1988) (allowing attorney fee recovery if person's wire communication is intercepted or used in violation of ch. 119 Organized Crime Control Act, ch. 119, 18 U.S.C. §§ 2510-2520 (1988)); Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(E) (1988) (allowing fee against United States when "complainant has substantially prevailed" in FOIA action); Voting Rights Act of 1975, 42 U.S.C. § 1973l(e) (1988) (allowing reasonable attorney fee as part of costs to "enforce voting guarantees of the fourteenth and fifteenth amendment"); Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1988) (allowing attorney fee when complainant enforces 42 U.S.C. §§ 1981-1983, 1985-1986).

35. H.R. REP. NO. 1418, *supra* note 30, at 8, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4987. For example, see the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988). The purpose of the Act was twofold. First, Congress realized civil rights laws depend heavily on private enforcement. Congress wanted citizens to have a meaningful opportunity to vindicate the congressional policies embodied by the civil rights laws. S. REP. NO. 1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5909. Second, Congress wanted citizens to recover what it cost them to vindicate their civil rights in court. *Id.* at 2, 1976 U.S. CODE CONG. & ADMIN. NEWS at 5910; see also *Alyeska Pipeline*, 421 U.S. at 263 ("Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation").



1970s.<sup>36</sup> Under this rule, plaintiffs who prevailed in cases that advanced significant public purposes<sup>37</sup> could receive attorney fees from private parties because they were acting as a "private attorney general."<sup>38</sup> Courts reasoned that these plaintiffs were acting not only for themselves, but for the public as a whole.<sup>39</sup> Consequently, courts advanced a policy of furthering the public interest by encouraging relatively poor plaintiffs to protect their rights and bring suits that cost might otherwise preclude.<sup>40</sup>

In 1975, however, the Supreme Court overruled the private attorney general exception in *Alyeska Pipeline Service Co. v. Wilderness Society*.<sup>41</sup> The Court held that courts can award attorney fees against the government only when statutes specifically authorize such fees.<sup>42</sup> The Court reasoned that, although the private attorney general rule might be good public policy, only Congress could decide when such fee shifting was desirable.<sup>43</sup>

Congress responded to the Court's elimination of the private attorney general rule by passing statutes that expressly authorized attorney fees.<sup>44</sup> In 1980, Congress passed the EAJA,

36. *Alyeska Pipeline*, 421 U.S. at 270.

37. See, e.g., *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1032-33 (D.C. Cir. 1974) (litigation vindicated important statutory rights of citizens and ensured the governmental system functioned properly), *rev'd sub nom. Alyeska Pipeline*, 421 U.S. 240 (1975).

38. Rudnick, *supra* note 11, at 2.

39. *Id.*

40. See, e.g., *Wilderness Soc'y*, 495 F.2d at 1036. The court argued:

Acting as private attorneys general, not only ha[s] [Wilderness Society] ensured the proper functioning of our system of government, but they have advanced and protected in a very concrete manner substantial public interests. An award of fees would not have unjustly discouraged . . . Alyeska from defending its case in court. And denying fees might well have deterred [Wilderness Society] from undertaking the heavy burden of this litigation.

*Id.*; see also *Hoitt v. Vitek*, 495 F.2d 219, 220 (1st Cir. 1974) (private attorney general rationale used to award fees in prison inmates civil rights action because "public . . . benefits when the constitutionality of the treatment of prisoners is assured").

41. 421 U.S. 240, 269 (1975). The Court eliminated the "private attorney general" rule with respect to private litigants and held that the exception could not be used in suits against the federal government. *Id.* at 267-68.

42. *Id.*

43. *Id.* at 271.

44. For example, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 445 (codified as amended at 42 U.S.C. § 1988 (1988)); see also Rudnick, *supra* note 11, at 3 (stating Congress reacted to the *Alyeska Pipeline* decision with a "flurry of legislative activity").

an expansive exception to the American Rule.<sup>45</sup>

## 2. Attorney Fees Under the EAJA

### a. *The EAJA's Statutory Provisions*

The EAJA awards attorney fees to a prevailing party<sup>46</sup> in court proceedings,<sup>47</sup> including judicial review of administrative actions, and in agency adjudications,<sup>48</sup> unless the government's position<sup>49</sup> was substantially justified<sup>50</sup> or the surrounding cir-

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45. 5 U.S.C. § 504 (1988); 28 U.S.C. § 2412 (1988). Congress first passed the EAJA as an addition to the Small Business Export Expansion Act, Pub. L. No. 96-481 §§ 203-204, 94 Stat. 2321, 2325-29 (1980). The bill contained a sunset provision providing for an automatic repeal on October 1, 1984, unless Congress voted for an extension. *Id.* §§ 203(c), 204(c), 94 Stat. at 2329. Congress made the EAJA permanent in 1985 by passing the reenactment statute. Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80 § 6(a)-(b), 99 Stat. 183, 186 (repealing §§ 203(c) and 204(c) of original EAJA and making the EAJA permanent). The reenactment amendments applied retroactively to any case started by October 1, 1984, and finished before the law was reenacted. *Id.* § 7(b), 99 Stat. at 186.

46. Congress intended that the term "prevailing party" would "be consistent with the law that has developed under existing statutes." H.R. REP. NO. 1418, *supra* note 30, at 11, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4990. Thus, a party can be deemed prevailing if "he obtains a favorable settlement of his case . . . or even if he does not ultimately prevail on all issues." *Id.* at 11, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4990; see *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (prevailing party is one who succeeds on any significant issue in the litigation and achieves some of the benefits sought by the party).

47. 24 U.S.C. § 2412(d)(1)(A) provides that:

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

24 U.S.C. § 2412(d)(1)(A) (1988).

48. 5 U.S.C. § 504 provides that:

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.

5 U.S.C. § 504(a)(1) (1988).

49. The definition of the government's position was liberalized in the 1985 amendments. Before there was a question whether "position of the agency" meant only its litigation posture, or included the actions of the agency that led up to the litigation. H.R. REP. NO. 120, 99th Cong., 1st Sess., pt. 1, at 9, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 132, 137 [hereinafter H.R. REP. NO. 120]. Several courts had held that only the government's litigation

cumstances would make an award unjust.<sup>51</sup> The standard for whether government action is substantially justified is essentially one of reasonableness.<sup>52</sup> The government must show that its case had a reasonable basis in both law and fact.<sup>53</sup> In passing the EAJA, Congress reasoned that private litigants were not only defending their vested interests, but also refining and formulating public policy.<sup>54</sup> Thus, fairness dictated that such litigants receive attorney fees when the government position was not substantially justified.<sup>55</sup>

b. *Purposes of the EAJA*

The EAJA has three main purposes. First, the Act aids victims of unjustified government action<sup>56</sup> who otherwise could

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posture needed to be reasonable, but Congress wanted both the government's underlying action and its litigation posture to be substantially justified before a fee award was precluded. The 1985 amendments make it clear that the position of the government includes both its actions that led up to the litigation, and its litigation position. Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80 § 1(c)(3), 99 Stat. 183, 184 (codified at 5 U.S.C. § 504(b)(1)(E) (1988)); *id.* § 2(c)(2), 99 Stat. 183, 185 (codified at 24 U.S.C. § 2412(d)(2)(D) (1988)).

50. The Supreme Court has held that "substantially justified" means only that the government's position has to have a reasonable basis in both law and fact. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). This result contradicts the EAJA's legislative history. A House report states that when Congress passed the Act in 1980, it rejected the standard of "reasonably justified" in favor of "substantially justified;" thus, "the test must be more than mere reasonableness." H.R. REP. NO. 120, *supra* note 49, at 9, 1985 U.S. CODE CONG. & ADMIN. NEWS at 138. The government has the burden of proving that its action was substantially justified. H.R. REP. NO. 1418, *supra* note 30, at 10, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4989.

51. For an example of special circumstances making an award unjust, see *Oguachuba v. INS*, 706 F.2d 93, 99 (2d Cir. 1983) (alien's "notorious and repeated violations" of federal law made EAJA award unjust). Few awards have been overturned on this ground. *Stern*, *supra* note 2, at 1463.

52. *Pierce*, 487 U.S. at 565.

53. *Id.*

54. H.R. REP. NO. 1418, *supra* note 30, at 10, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4988-89.

55. *Id.* at 10, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4989 ("Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable government action and also bear the costs of vindicating their rights.").

56. See H.R. REP. NO. 1418, *supra* note 30, at 6, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4984 ("The purpose of the bill is to reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States, unless the Government action was substantially justified."). Congress found that government bureaucracies were coercing compliance with the law by using their greater resources to outlast their poorer adversaries. *Id.* at 10, 1980 U.S. CODE

not defend their rights because of the cost of litigation.<sup>57</sup> Second, Congress sought to deter unjustified government action<sup>58</sup> by requiring the agency that took the action to pay the fee award.<sup>59</sup> Third, Congress hoped to expose government action to more adversarial testing<sup>60</sup> in order to promote fair laws and

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CONG. & ADMIN. NEWS at 4988; see also *United States v. 1,378.65 Acres of Land*, 794 F.2d 1313, 1315-16 (8th Cir. 1986) (Congress passed EAJA "to encourage relatively impecunious private parties to challenge abusive or unreasonable government behavior by relieving such parties of the fear of incurring large litigation expenses" (citing *Spencer v. NLRB*, 712 F.2d 539, 549 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984))).

57. H.R. REP. NO. 1418, *supra* note 30, at 10, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4988. The extensive expansion of government relations during the 1970s exacerbated this problem. *Id.* Congress was concerned that, just as the influence of the bureaucracy was having more effect on individuals, the ability of individuals to contest agency action was decreasing. Thus, the deterrent effect of being unable to collect fees from the government was a debilitating problem due to the pervasive presence of the bureaucracy. *Id.* Although the original rationale for the American Rule was to not deter litigation for fear of having to pay the other side's attorney fees, Congress found that the American Rule was actually deterring litigation against the government because individuals could not fight a foe with such enormous wealth. *Id.* at 9, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4988. People without great personal wealth were forced to endure agency-caused injustice rather than contest it because the cost of litigation exceeded the benefit that litigation could offer. *Id.*

58. *Id.* at 20, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4999; see also *id.* at 12, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4991 ("fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority"); H.R. REP. NO. 120, *supra* note 49, at 9-10, 1985 U.S. CODE CONG. & ADMIN. NEWS at 137-38 (stating that the courts should consider the agency's underlying action when deciding if it acted with "substantial justification" or else the incentive for careful agency action would be removed).

59. 5 U.S.C. § 504(d) (1988); 28 U.S.C. § 2412(4) (1988). Congress hoped that losing fee awards would make the agency rethink its actions because it was losing money from its budget. H.R. REP. NO. 1418, *supra* note 30, at 16, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4995 (stating that fee awards should be paid by the budget of the agency whose actions were contested in order to make each agency accountable for its actions); *Equal Access to Justice Act of 1979*, S. 265: *Hearings before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 1-2 (1979) (statement of Sen. DeConcini) (arguing that EAJA "represents a vital weapon in our struggle to tame Government regulations" and that the best way to make agencies more responsible would be by taking attorney fees out of the agency's budget); see also Robertson & Fowler, *Recovering Attorneys' Fees From the Government Under the Equal Access to Justice Act*, 56 TUL. L. REV. 903, 914 (1982) ("Congress imposed the risk of a fee award as an incentive for agencies to police their own enforcement and other litigation activities more rigorously, so that only sound, well-prepared cases would be initiated or litigated.").

60. H.R. REP. NO. 1418, *supra* note 30, at 10, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4988-89. Congress feared that legal precedent was being set in situations where individuals did not have a true opportunity to challenge agency action. *Id.* at 10, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4988. Con-

policies.<sup>61</sup>

c. *Scope of the EAJA*

The EAJA does not apply to situations governed by other fee shifting statutes.<sup>62</sup> It does apply to proceedings governed by the APA. It is unclear whether the EAJA applies to proceedings that are functionally equivalent to those governed by the APA.<sup>63</sup>

When Congress passed the EAJA it required the Administrative Conference of the United States (ACUS) to develop model rules to guide agencies in the EAJA's implementation.<sup>64</sup> The ACUS suggested a broad reading of the EAJA,<sup>65</sup> arguing that given its purposes, the EAJA should apply when a party has gone through a formal hearing regardless of whether the APA governs the proceeding.<sup>66</sup>

Despite the ACUS's suggested rules, courts were unsure whether the EAJA covered certain agency adjudications, such as social security hearings.<sup>67</sup> In response, Congress included a provision in the legislative history of the 1985 EAJA reenact-

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gress wanted to allow people to contest government action in court so the decision would be based on the merits of the case, not on the cost of litigating. *Id.* at 10, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4988-89. If the government were able to coerce compliance because of its greater resources, precedent would be established without seriously considering positions contrary to those of the government. *Id.* at 10, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4988. Congress believed this would undermine the integrity of the judicial process. *Id.*

61. Congress believed an adjudication could demonstrate that policy was misguided, or that it could lead to the development of more precise rules. *Id.* at 10, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4989.

62. 28 U.S.C. § 2412(d)(1)(A) (1988).

63. *See, e.g., infra* Part II (different views of the *Escobar Ruiz* and *Clarke* courts on the scope of the EAJA).

64. 5 U.S.C. § 504(c)(1) (1988). This section states that each agency should establish uniform procedures for the consideration of fee awards under the EAJA after consulting with the ACUS. *Id.*

65. The commentary to the model rules notes: "Exactly what proceedings are encompassed by [the language of the EAJA] has long been a difficult legal question, and we proposed a broad interpretation of the reference to adjudications 'under section 554' largely to avoid protracted debate about whether particular proceedings fall within its ambit." Equal Access to Justice Act: Agency Implementation, 46 Fed. Reg. 32,900, 32,901 (1981).

66. *Id.* The ACUS stated: "[C]onsidering the purposes of the [EAJA], questions of its coverage should turn on substance — the fact that a party has endured the burden and expense of a formal hearing — rather than technicalities." *Id.*

67. H.R. REP. NO. 120, *supra* note 49, at 10, 1985 U.S. CODE CONG. & ADMIN. NEWS at 138-39.

ment that extended the EAJA to social security hearings.<sup>68</sup> In addition, Congress amended the EAJA to include contract appeals made under the Contract Disputes Act<sup>69</sup> within its scope.<sup>70</sup>

Even with these clarifying amendments, the EAJA's scope remains unclear. The circuit courts agree that application of the EAJA depends on whether the particular hearing is an "adversary adjudication" within the meaning of the Act.<sup>71</sup> An adversary adjudication, as defined in section 504, is an "adjudication under section 554 [of the APA]."<sup>72</sup>

The Eighth Circuit has used language suggesting that "an adjudication under section 554" means an adjudication *defined by* the terms of section 554.<sup>73</sup> Other circuits, however, have adopted a narrower view of the EAJA's scope. For example, the Sixth Circuit has held that the EAJA does not cover benefit determinations under the Federal Employees Compensation Act<sup>74</sup> (FECA) because the APA does not govern FECA hearings.<sup>75</sup> The District of Columbia Circuit has also adopted a narrow view of the EAJA, holding that a company that successfully challenged a Department of Energy (DOE) price regulation was not entitled to EAJA fees because the APA did not govern the hearing.<sup>76</sup>

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68. *Id.*

69. 41 U.S.C. §§ 601-613 (1988).

70. 5 U.S.C. § 504(b)(1)(C) (1988). With this section, Congress overruled an earlier court's decision holding that contract appeals are not covered by the EAJA. *See Fidelity Constr. Co. v. United States*, 700 F.2d 1379, 1387 (Fed. Cir. 1983). The *Fidelity* court had held that contract appeals were not covered by the EAJA because the APA does not govern those proceedings. *Id.* at 1386.

71. "Adversary adjudication" is defined in § 504(b)(1)(C)(i) as "an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license." 5 U.S.C. § 504(b)(1)(C)(i) (1988).

72. *Id.*

73. *See Cornella v. Schweiker*, 728 F.2d 978, 988 (8th Cir. 1984) (quoting the terms of § 554 of the APA to define what "adversary adjudication" meant in the EAJA).

74. 5 U.S.C. §§ 8101-8193 (1988).

75. *Owens v. Brock*, 860 F.2d 1363 (6th Cir. 1988). Relying on the principle of statutory construction that waivers of sovereign immunity should be construed strictly, the court held that because FECA claims are not governed by the APA, they are not "adversary adjudications" and thus the EAJA does not apply in FECA proceedings. *Id.* at 1366.

76. *St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446, 451 (D.C. Cir. 1989). The proceedings are governed by the Department of Energy Organization Act, 42 U.S.C. §§ 7101-7375 (1988) (DOE Organization Act). The court reasoned that the DOE Organization Act does not require that hearings be "on

The Supreme Court has not specifically decided whether the phrase "under section 554" means "governed by" or "defined by." In *Sullivan v. Hudson*,<sup>77</sup> however, the Court recently endorsed a broad reading of the EAJA.<sup>78</sup> In extending the EAJA to cases involving administrative adjudications on remand from district court,<sup>79</sup> the Court reasoned that such adjudications are so intimately tied to judicial proceedings that they may be considered part of the "civil action" for purposes of a fee award.<sup>80</sup> In reaching its decision, the Court interpreted the statute in light of its purpose of removing obstacles to litigation against the government.<sup>81</sup> The Court thus rejected the narrow interpretation proffered by the government that a "civil action" can occur only in a court of law.<sup>82</sup>

In the deportation context, the government has argued consistently that the EAJA does not apply to deportation proceedings.<sup>83</sup> Aliens, however, have begun to argue that the

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the record" as required by the APA. *St. Louis Fuel*, 890 F.2d at 448. In addition, the court concluded that Congress wrote a bright-line rule into the EAJA. *Id.* at 451. EAJA fees are possible in those adjudications that are governed by the APA, but not in adjudications that are not subject to that statute. *Id.*

77. 490 U.S. 877 (1989).

78. In *Sullivan*, the Court read the statute in light of its purpose. *Id.* at 890. The issue was whether a social security claimant is entitled to fees under the EAJA for representation provided during administrative proceedings on remand from the district court. *Id.* at 879. The Court had to decide whether the term "civil action" included proceedings outside a court of law. *Id.* at 882-83. The Social Security administrator argued that "civil action" only meant proceedings that occurred in a court of law. *Id.* at 891. The Court rejected that narrow view, holding that administrative proceedings can be so intimately tied with judicial proceedings that they can be considered part of the "civil action" for purposes of a fee award. *Id.* at 890. A "civil action" can include administrative proceedings necessary to the completion of a civil action. *Id.* at 892.

79. *Id.*

80. *Id.* at 889-90.

81. *Id.*

82. *Id.* at 891-92.

83. Rudnick, *supra* note 11, at 19. The Bureau of Immigration Appeals has agreed with this viewpoint, although it held the EAJA does apply to cases arising in the Ninth Circuit because of that circuit's ruling that the EAJA does apply to deportation cases. *In re Anselmo*, Int. Dec. 3105 (B.I.A. 1989) (deportation proceedings), *digested in* 66 INTERPRETER RELEASES 598, 598-601 (1989). The Attorney General's regulations specifying which administrative proceedings conducted by the Department of Justice are covered by the EAJA do not include deportation hearings as one of the proceedings covered by the Act. Department of Justice Implementation of the Equal Access to Justice Act in Department of Justice Administrative Proceedings, 28 C.F.R. § 24.103 (1990). The ACUS did not criticize the Attorney General's regulation. *See* Implementation of the Equal Access to Justice Act in Department of Justice Administra-

EAJA should apply to deportation proceedings.<sup>84</sup> The Ninth and Third Circuits have polarized the analysis of whether "under section 554" means the EAJA only covers proceedings "governed by" the APA or includes proceedings "defined by" APA standards.<sup>85</sup>

## II. APPLYING THE EAJA TO DEPORTATION PROCEEDINGS

### A. *ESCOBAR RUIZ v. INS*

The Ninth Circuit, the first federal court of appeals to consider whether the EAJA applies to deportation proceedings, held in *Escobar Ruiz v. INS*<sup>86</sup> that the EAJA did apply to such proceedings.<sup>87</sup> The dispute before the court centered on the meaning of the phrase "an adjudication under section 554" of the APA. The government argued that "under" meant "conducted under" or "governed by" section 554.<sup>88</sup> Because the INA governs deportation proceedings, the government argued that the EAJA did not apply to deportation proceedings.<sup>89</sup> The appellant, Escobar Ruiz, countered that "under" meant "as defined by" or "under the meaning of" section 554 of the APA.<sup>90</sup> He argued that deportation proceedings were functionally equivalent to APA hearings, and thus were of the type "defined

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tive Proceedings, 47 Fed. Reg. 15,774-76 (1982) (codified at 28 C.F.R. §§ 24.101-24.309).

84. See *infra* Part II.

85. See *id.*

86. 838 F.2d 1020 (9th Cir. 1988) (en banc). The case arose when Escobar Ruiz allegedly entered the United States without inspection. *Id.* at 1022. The immigration judge ruled he was deportable, and the Bureau of Immigration Appeals affirmed. *Id.* After Escobar Ruiz appealed to the Ninth Circuit, the INS reopened his deportation proceedings. *Id.* Escobar Ruiz then applied for attorney fees under the EAJA. *Id.* In the first of three decisions, the court held that § 292 of the INA does not preclude application of the EAJA. *Escobar Ruiz v. INS*, 787 F.2d 1294, 1297 (9th Cir. 1986). The court held that the EAJA applies to all civil actions not covered by existing fee shifting statutes. *Id.* at 1297.

In the second proceeding, the government argued that deportation was not an "adversary adjudication" within the meaning of the EAJA. *Escobar Ruiz v. INS*, 813 F.2d 283, 285 (9th Cir. 1987). The court held that deportation proceedings did meet the EAJA's definition of adversary adjudication. *Id.* at 293. After these two proceedings, the Ninth Circuit heard the case en banc. *Escobar Ruiz*, 838 F.2d 1020.

87. *Escobar Ruiz*, 838 F.2d at 1030.

88. *Id.* at 1023.

89. *Id.*

90. *Id.*



by" the APA.<sup>91</sup>

Because the Ninth Circuit found both interpretations of the phrase plausible, it examined the legislative history and purposes of the EAJA to determine the correct interpretation.<sup>92</sup> When deciding which interpretation was correct the court considered three factors: the legislative history surrounding the EAJA, the purposes of the EAJA, and the EAJA's applicability to social security proceedings.<sup>93</sup>

The court found that the conference committee that passed the original EAJA used a "defined under" standard.<sup>94</sup> In addition, the ACUS<sup>95</sup> also used a "defined by" standard.<sup>96</sup> Because both the original conference committee and the ACUS supported a "defined by" interpretation, the court reasoned that this interpretation best effectuated congressional intent.<sup>97</sup>

As a policy matter, the court argued that the broader "defined by" standard was more consistent with the EAJA's goals and objectives.<sup>98</sup> Congress passed the EAJA to counter deterrents to litigation against the government.<sup>99</sup> Moreover, because deportation proceedings are as burdensome as adjudications

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91. *Id.*

92. *Id.* The court found its use of legislative history "particularly appropriate" because the case was one of first impression. *Id.*

93. *Id.* at 1023-27.

94. *Id.* at 1023. The conference committee in its statement said the statute: "defines adversary adjudication as an agency adjudication *defined under* the Administrative Procedures [sic] Act where the agency takes a position through representation by counsel or otherwise." H.R. CONF. REP. NO. 1434, 96th Cong., 2d Sess. 23 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5003, 5012 (emphasis added) [hereinafter H.R. CONF. REP. NO. 1434]. The APA defines adjudication as an adjudication: "required by statute to be determined on the record after opportunity for an agency hearing . . ." 5 U.S.C. § 554(a) (1988).

95. The EAJA requires agencies to promulgate their own rules after consultation with the ACUS. 5 U.S.C. § 504(c)(1) (1988).

96. *Escobar Ruiz*, 838 F.2d at 1024. The commentary to the model rules notes: "Exactly what proceedings are encompassed by [the language of the EAJA] has long been a difficult legal question, and we proposed a broad interpretation of the reference to adjudications 'under section 554' largely to avoid protracted debate about whether particular proceedings fall within its ambit." Equal Access to Justice Act: Agency Implementation, 46 Fed. Reg. 32,900, 32,901 (1981). The court also noted the fact that the ACUS believed that "'considering the purposes of the [EAJA], questions of its coverage should turn on substance — the fact that a party has endured the burden and expense of a formal hearing — rather than technicalities.'" *Escobar Ruiz*, 838 F.2d at 1024 (quoting 46 Fed. Reg. 32,900, 32,901 (1981)).

97. *Escobar Ruiz*, 838 F.2d at 1024.

98. *Id.* at 1025. The court found the government's "hypertechnical, highly restrictive" interpretation would not serve those purposes nearly as well. *Id.*

99. *Id.* at 1026. The statute's primary purpose is to "increase the accessi-

governed by the APA, the court found no practical basis to exclude deportation hearings from the EAJA.<sup>100</sup> Indeed, the court found that the nature of deportation proceedings supported applying the EAJA to ensure that the INS prosecuted aliens only when the basis of the prosecution was at least colorable.<sup>101</sup>

Finally, the Ninth Circuit compared social security adjudications and deportation proceedings.<sup>102</sup> The court noted that when Congress reenacted the EAJA, it included social security administrative hearings among those proceedings that the EAJA covers.<sup>103</sup> Thus, Congress's inclusion of social security proceedings indicated that the EAJA already covered more than just cases governed directly by the APA.<sup>104</sup> Congress was concerned primarily with whether the hearings were "of the type defined under section 554."<sup>105</sup> The court concluded that because deportation proceedings, like social security hearings, were of the type defined by section 554 of the APA, but not governed by it, the EAJA applied to deportation proceedings.<sup>106</sup>

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bility to justice — in administrative proceedings and civil actions." H.R. REP. NO. 120, *supra* note 49, at 8, 1985 U.S. CODE CONG. & ADMIN. NEWS at 136.

100. *Escobar Ruiz*, 838 F.2d at 1026. The court wrote:

Adjudications determined on the record after an agency hearing where the government is represented tend to be expensive and time-consuming proceedings, and are especially likely to discourage legitimate claimants from vindicating their rights. In particular, deportation proceedings are difficult for aliens to fully comprehend, let alone conduct, and individuals subject to such proceedings frequently require the assistance of counsel. Certainly such individuals have "concrete interests" at stake, yet the expense involved may often deter them from asserting their rights against unreasonable governmental action.

*Id.*

The court also reasoned that not applying the EAJA would be inconsistent with congressional intent. *Id.*

101. *Id.* In addition to the fact that the "deterrent effect" of cost was no less harmful in deportation hearings than APA adjudications, the court reasoned that public policy would suffer if aliens couldn't challenge arbitrary government action in deportation hearings. *Id.*

102. *Id.* at 1026-27.

103. *Id.* The court noted that there had been a question of whether social security adjudications were governed by the APA because the Supreme Court had "refused to decide" whether social security disability claims are governed by the APA. *Id.* at 1026 (citing *Richardson v. Perales*, 402 U.S. 389, 409 (1971)). Congress stated explicitly that social security hearings in which the Secretary is represented by counsel are covered by the EAJA. H.R. REP. NO. 120, *supra* note 49, at 10, 1985 U.S. CODE CONG. & ADMIN. NEWS at 138-39.

104. *Escobar Ruiz*, 838 F.2d at 1027.

105. *Id.*

106. *Id.* The court noted that the government could offer no other types of

After analyzing the EAJA's legislative history and purposes, the Ninth Circuit considered and rejected the government's two main arguments. The government had argued that, because the Supreme Court in *Marcello v. Bonds*<sup>107</sup> held that the INA governs deportation proceedings, the EAJA should not apply to deportation proceedings.<sup>108</sup> The court discounted this argument, concluding that *Marcello* only held that the INA superseded the APA's hearing procedures when the two Acts diverged.<sup>109</sup> The court also rejected the government's argument that section 292<sup>110</sup> of the INA should be construed as a provision precluding fee shifting. The government argued that because the EAJA did not apply to other fee shifting statutes,<sup>111</sup> the EAJA should not apply to INA proceedings. The court held that section 292 of the INA did not preclude fee shifting,<sup>112</sup> noting that the section 292 did not forbid attorney fees to aliens in all situations; rather the section stated only that indigent aliens were not entitled to appointed counsel as a matter of

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hearings besides deportation and social security that met the definition of § 554 yet were not governed by the APA. Because the government includes social security proceedings under EAJA's coverage, see Department of Health and Human Services, Implementation of the Equal Access to Justice Act in Agency Proceedings, 52 Fed. Reg. 23,311, 23,312 (1987) (codified at 45 C.F.R. §§ 13.1-13.30), the court could find no reason for treating deportation proceedings differently. *Escobar Ruiz*, 838 F.2d at 1027.

107. 349 U.S. 302 (1955).

108. *Escobar Ruiz*, 838 F.2d at 1025.

109. *Id.* In any event, the court ruled that the crucial distinction between the INA and APA — the role of the hearing officer — had since vanished. New regulations under the INA now made the hearing officer's role indistinguishable under the two statutes. Because the hearing provisions of the two statutes are presently "fundamentally identical," the court ruled that there was "no question" that deportation hearings were similar to hearings conducted under the APA. *Id.*

It is puzzling why the court bothered distinguishing *Marcello* at all. Once the court decided to use a functional standard, it does not matter whether the INA supersedes or replaces the APA. All that is important is whether the deportation procedures are the functional equivalent of the APA procedures. See *infra* Part III.

110. See *supra* notes 24-25 and accompanying text for a description of this section of the INA.

111. 28 U.S.C. § 2412(d)(1)(A) begins: "Except as otherwise specifically provided by statute, a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . . ." 28 U.S.C. § 2412(d)(1)(A) (1988) (emphasis added). This portion of the statute means that the EAJA applies to all civil actions except statutes that already have fee shifting provisions. H.R. REP. NO. 1418, *supra* note 30, at 18, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4997.

112. *Escobar Ruiz*, 838 F.2d at 1028.

right.<sup>113</sup> Hence, the court held that the EAJA applied to deportation proceedings.<sup>114</sup>

#### B. *CLARKE V. INS*

In *Clarke v. INS*,<sup>115</sup> the Third Circuit reached a contrary result than the *Escobar Ruiz* court, finding that the EAJA does not apply to deportation proceedings.<sup>116</sup> The *Clarke* court rejected the appellant's application for attorney fees, stating that the EAJA's legislative history, coupled with canons of statutory construction, compelled the result.<sup>117</sup> The court first noted that the EAJA would not cover deportation proceedings if section 504 of the Act required the APA to govern agency proceedings because the INA governs deportation proceedings.<sup>118</sup>

The court then interpreted the correct meaning of section 504's language. It relied first on canons of statutory interpretation, noting that statutes waiving sovereign immunity from fee claims must be construed strictly in favor of the sovereign.<sup>119</sup> Hence, in choosing between the technical "governed by" interpretation versus the functional "defined by" interpretation, the court felt compelled to limit application of the EAJA to those adjudications governed by section 554.<sup>120</sup>

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113. *Id.* The court reasoned that the INA committee report discussed § 292 in the context of the rights aliens have in deportation proceedings. *Id.* Thus, § 292 was not a proscription against fee shifting, but a proscription against appointed government counsel. *Id.*

114. *Id.* at 1030. After holding that the EAJA does apply to deportation proceedings, however, the court ruled that *Escobar Ruiz* was not entitled to fees under the Act because he was not a prevailing party. *Id.* at 1029. Three judges dissented from the court's opinion, arguing that because the court ruled *Escobar Ruiz* was not a prevailing party, the court should not have ruled on whether the EAJA applied to deportation proceedings. *Id.* at 1030-31 (Blaine Anderson, Beezer, and Brunetti, JJ., dissenting).

115. 904 F.2d 172 (3d Cir. 1990).

116. *Id.* at 178. The case arose in 1988 when the INS began deportation proceedings against Clarke. After the immigration judge dismissed the charges, Clarke applied for attorney fees under the EAJA. *Id.* at 173.

117. *Id.* at 178.

118. *Id.* at 174.

119. *Id.* at 175 (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983)). Assuming that the statute should be construed strictly in favor of the United States, the court found the *Escobar Ruiz* interpretation of "an adjudication under section 554" "strained and untenable." *Id.*

120. *Id.* The court noted that the "defined under" interpretation used by the *Escobar Ruiz* court had been criticized in other cases. *Id.* at 175-76 (citing *St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446, 448 (D.C. Cir. 1989) (holding that proceedings challenging a price regulation remedial order was not an adversary adjudication within the meaning of the EAJA); *Owens v. Brock*, 860 F.2d 1363, 1365 (6th Cir. 1988) (holding that workers' compensation hearings

The *Clarke* court also found support for its position in the EAJA's legislative history. The Third Circuit noted that Congress did not amend the statute in 1985 to include deportation proceedings, even though the United States Attorney General in 1984 promulgated regulations stating that the EAJA did not apply to deportation proceedings.<sup>121</sup> Further, even though Congress may not have implicitly ratified the Attorney General's interpretation of the EAJA, the court could not conclude that Congress intended to overturn that regulation without Congress's affirmative action.<sup>122</sup>

The court made three other arguments to support its position. First, it ruled that section 292 of the INA precluded fee shifting.<sup>123</sup> The court did not explain this ruling, noting only that legislative intent was ambiguous, and that the canon of limited waivers of statutory immunity demanded resolving the ambiguity in the government's favor.<sup>124</sup> Second, because Congress had acted affirmatively to include proceedings that courts previously thought the EAJA did not cover,<sup>125</sup> the *Clarke* court was reluctant to imply legislative intent to include deportation

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conducted under the Federal Employee's Compensation Act are not adversary adjudications under the EAJA). For a more detailed discussion of *St. Louis Fuel* and *Owens*, see *supra* notes 74-76 and accompanying text.

121. *Clarke*, 904 F.2d at 177. The attorney general regulations excluding deportation proceedings can be found in Implementation of the Equal Access to Justice Act in Department of Justice Administrative Proceedings, 28 C.F.R. § 24.103 (1990).

122. *Clarke*, 904 F.2d at 177. In other words, the court suggested that Congress had acted to remedy other mistaken interpretations of the EAJA but had not acted to clear up the Attorney General's regulation excluding deportation proceedings from EAJA coverage. Therefore, the court should not imply legislative intent when Congress had acted affirmatively in previous cases. *Id.* at 178.

123. *Id.* at 177. The court accepted as "plausible" Clarke's argument that § 292 only precluded appointed counsel for indigent aliens and was not a bar against fee-shifting. *Id.* It also concluded, however, that Congress did not "intend to disturb its longstanding proscription against government funding of counsel for aliens in deportation proceedings" when it passed the EAJA. *Id.* Because the court could find no evidence of definitive legislative intent, the court refused to resolve the ambiguity in Clarke's favor, especially given the "limited nature of statutory exceptions to sovereign immunity." *Id.*

124. *Id.*

125. In 1985, Congress legislatively overruled *Fidelity Constr. Co. v. United States*, 700 F.2d 1379 (Fed. Cir. 1983), by amending 5 U.S.C. § 504(b)(1)(C) (the definition section of "adversary adjudication") to include some administrative hearings under § 6 of the Contract Disputes Act of 1978, 41 U.S.C. § 605 (1988). Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80 § 1(c)(2), 99 Stat. 183, 184 (codified at 5 U.S.C. § 504(b)(1)(C)(iii) (1988)). In 1986 Congress amended the same section to include hearings under the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801-3812 (1988). Omni-

proceedings.<sup>126</sup> Third, the court held that a bright line rule should determine the coverage of the EAJA;<sup>127</sup> absent such a rule, courts would have to determine on a case-by-case basis whether the EAJA applied to a particular administrative proceeding.<sup>128</sup>

In holding that the EAJA did not apply to deportation proceedings,<sup>129</sup> the *Clarke* court rejected the *Escobar Ruiz* court's analysis. It concluded that the 1980 conference committee report's use of the words "defined under" was not important, because there was no indication that the conference committee

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bus Budget Reconciliation Act of 1986, Pub. L. No. 99-509 § 6103(c), 100 Stat. 1874, 1948 (codified at 5 U.S.C. § 504(b)(1)(C)(iii) (1988)).

126. *Clarke*, 904 F.2d at 178.

127. *Id.*

128. *Id.* (arguing a functional interpretation would force courts to decide, on a case-by-case basis, "whether a particular proceeding is close enough to a section 554 hearing to be an adjudication 'as defined by' that section or 'of the type referred to' in it" (quoting *St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446, 451 (D.C. Cir 1989))).

129. Using basically the same reasoning as the Third Circuit, the Eleventh Circuit in *Ardestani v. INS* also held that the EAJA did not apply to deportation proceedings. 904 F.2d 1505, 1515 (11th Cir. 1990).

In denying *Ardestani's* claim for attorney fees under the EAJA, the Eleventh Circuit began with the presumption that the intent of the legislature can be found in the plain meaning of the statute. *Id.* at 1508. In addition, the court relied on the canon of construction that courts should construe waivers of sovereign immunity strictly in favor of the sovereign. *Id.* at 1509. Because the stricter version of the statute would use the "governed by" interpretation of "under section 554" the court used that interpretation. *Id.* at 1514.

The court then reasoned that because Congress knew that the Attorney General regulations did not include deportation proceedings in the hearings covered by the EAJA when it reenacted the EAJA and had clarified the EAJA's coverage in response to legislative and judicial interpretations, the court should rule that the EAJA does not cover deportation proceedings. *Id.* at 1512. In addition, the court ruled the Attorney General's interpretation should be given deference. *Id.* at 1512-13 (quoting *Chevron, USA, Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 843 (1984)). The Attorney General's interpretation that deportation proceedings are not covered by the EAJA was deemed a permissible construction of the statute. *Id.* at 1513.

Finally, the *Ardestani* court ruled that § 292 of the INA precluded fees. *Id.* The court interpreted the parenthetical phrase "at no expense to the government" as a complete bar to fees against the government. *Id.* After assuming that § 292 barred fee-shifting, the court argued that the EAJA could not cover deportation proceedings because a specific statute (i.e., the INA) cannot be nullified or controlled by a general statute (i.e., the EAJA). *Id.* The court concluded that the "governed by" standard should apply to the EAJA. Consequently, the holding of the Supreme Court in *Marcello* that deportation is governed by the INA constrained the court to hold that the EAJA did not apply to deportation proceedings.

understood the implications of that phrase.<sup>130</sup> It also disagreed with the *Escobar Ruiz* court's analogy of deportation proceedings to social security proceedings. The Supreme Court stated that social security proceedings did not vary from the APA's requirements.<sup>131</sup> Moreover, the legislative history suggested that Congress believed the APA governed social security hearings.<sup>132</sup> Therefore, the *Escobar Ruiz* court's analogy to deportation proceedings was faulty.<sup>133</sup>

### III. DEPORTATION PROCEEDINGS ARE WITHIN THE SCOPE OF THE EAJA

The *Escobar Ruiz* court correctly held that the EAJA applies to deportation proceedings. The EAJA's language, "an adjudication under section 554," is ambiguous — "under" can be subjected to two different interpretations.<sup>134</sup> The legislative history of the EAJA demonstrates that Congress intended that the EAJA apply to a proceeding that is the functional equivalent to an APA hearing.<sup>135</sup> Finally, applying the EAJA to deportation proceedings fulfills the EAJA's purpose of enabling individuals to litigate against the government without the expense of litigation as a deterrent.<sup>136</sup> Hence, courts should interpret the phrase, "an adjudication under section 554," to mean an adjudication "as defined by" section 554 of the APA.

#### A. SECTION 292 OF THE INA DOES NOT PRECLUDE THE EAJA'S APPLICATION TO DEPORTATION PROCEEDINGS

Because the EAJA does not apply to other fee shifting statutes,<sup>137</sup> a threshold issue is whether section 292 of the INA is a provision that prohibits fee shifting. Section 292 states that aliens can be represented by counsel at "no expense to the government."<sup>138</sup> The *Clarke* court argued that this language precludes fee shifting.<sup>139</sup> This interpretation is erroneous. Neither

130. *Clarke*, 904 F.2d at 176 (citing *Owens v. Brock*, 860 F.2d 1363, 1366 (6th Cir. 1988)).

131. *Id.* at 177 (citing *Richardson v. Perales*, 402 U.S. 389, 409 (1971)).

132. *Id.*

133. *Id.* at 176-77.

134. *See infra* Part III. B. 1. Because the statute is ambiguous, looking to the legislative history and statutory purpose is justifiable. *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

135. *See infra* Part III. B. 2.

136. *See infra* Part III. B. 3.

137. *See supra* note 62 and accompanying text.

138. 8 U.S.C. § 1362 (1988).

139. *Clarke v. INS*, 904 F.2d 172, 177 (3d Cir. 1990).

the INA nor the committee reports indicate that section 292 is a fee shifting provision.<sup>140</sup> Rather, the language of this section merely states that, although aliens have a right to counsel, they do not have a right to government appointed counsel; it says nothing about fee shifting. Application of the EAJA to deportation proceedings does not contravene the policy underlying the INA because the EAJA does not give indigents the right to government paid counsel, but merely awards fees to any alien who prevails in an adversary proceeding against the INS.<sup>141</sup> Because section 292 is not a fee shifting provision, the INA does not preclude the EAJA's application to deportation proceedings.

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140. 8 U.S.C. §§ 1101-1503 (1988). The committee report discusses § 292 when it describes the rights aliens have in deportation hearings. H.R. REP. NO. 1365, *supra* note 20, at 57, 1952 U.S. CODE CONG. & ADMIN. NEWS at 1712. If Congress meant to prohibit fee shifting, Congress surely could have found a better place in the statute to do so than in the context of delineating alien rights.

141. *Escobar Ruiz v. INS*, 838 F.2d 1020, 1028 (9th Cir. 1988) (en banc). The INS itself has rejected a broad reading of the parenthetical language "at no expense to the government" as a general bar against government funded legal assistance for aliens. INS regulations state that the immigration judge shall advise the alien about her right to be represented by an attorney, at no expense to the government, and of the availability of "free legal services programs." 8 C.F.R. § 236.2(a) (1990) (provision for exclusion hearings); *accord* 8 C.F.R. § 242.16(a) (1990) (provision for deportation proceedings) (emphasis added). The INS, at the time it issued the above regulations, stated that it found "no conflict between the limitation in section 292 of the Act and the availability of free legal services rendered by those organizations which are recipients of funds provided by certain *Federal agencies or the Legal Services Corporation*." Notification to Aliens of the Availability of Free Legal Services Programs, 44 Fed. Reg. 4652 (1979) (amendment codified at 8 C.F.R. § 242.2) (emphasis added). Likewise, the possibility of EAJA fee awards paid by government agencies does not conflict with the parenthetical language of § 292 because the phrase "at no expense to the government" is not a general bar against government payment of attorney fees.

Assuming for the sake of argument that § 292 of the INA and the EAJA might conflict, courts should if possible interpret the statutes so that they can co-exist. See *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("when two statutes are capable of co-existence, it is the duty of the courts, absent a *clearly expressed* congressional intent to the contrary, to regard each as effective" (emphasis added)); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (courts should interpret statutes to give effect to both if congressional purposes can still be met). Section 292's purpose is to bar government-appointed counsel. *Escobar Ruiz*, 838 F.2d at 1028. The EAJA's purpose is to encourage litigation against unjustified government action. See *supra* Part I. B. 2. b. Because the statutes can co-exist without destroying either statute's purpose, § 292 should not be construed to bar EAJA fees in deportation cases.



## B. THE EAJA'S SCOPE INCLUDES DEPORTATION PROCEEDINGS

## 1. The Statutory Language of the EAJA is Ambiguous

In section 504 of the EAJA, the phrase "an adjudication under" the APA is ambiguous.<sup>142</sup> Without legislative context, "under" might connote "pursuant to" or "subject to."<sup>143</sup> The term is not, however, self-defining.<sup>144</sup> For example, "under" can also mean "in accordance with" or "as defined by."<sup>145</sup> Thus, given its ambiguity, courts should interpret "under" in light of the EAJA's legislative history and purposes.<sup>146</sup> When interpreted in this context, "under" means "in accordance with" or "as defined by."<sup>147</sup>

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142. Among other definitions, "under" has been defined to mean both "subject to" (the *Clarke* court's definition) and "in accordance with" (the *Escobar Ruiz* court's definition). 18 THE OXFORD ENGLISH DICTIONARY 950 (2d ed. 1989) [hereinafter OXFORD ENGLISH DICTIONARY]; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2487 (1986) [hereinafter WEBSTER'S DICTIONARY]. The ACUS also thought the phrase "under section 554" was ambiguous. 46 Fed. Reg. 32,901 (1981) ("Exactly what proceedings are encompassed by [the phrase 'under section 544'] has long been a difficult legal question, and we proposed a broad interpretation of the reference to adjudications 'under section 554' largely to avoid protracted debate about whether particular proceedings fall within its ambit.").

143. OXFORD ENGLISH DICTIONARY, *supra* note 142, at 949; WEBSTER'S DICTIONARY, *supra* note 142, at 2487.

144. For example, The Oxford English Dictionary offers 25 different definitions for the preposition "under." See OXFORD ENGLISH DICTIONARY, *supra* note 142, at 947-51.

145. *Id.* at 950; WEBSTER'S DICTIONARY, *supra* note 142, at 2487.

146. *Blum v. Stenson*, 465 U.S. 886, 896 (1984) ("[w]here . . . resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear"); *Commissioner v. Engle*, 464 U.S. 206, 217 (1984) (when the statutory language has several possible interpretations, the court's duty is "to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested" (quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957))); *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 118 (1983) (court should interpret statutory language in light of congressional purposes); *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949) (statutory words and definitions should not be read "in a mechanical fashion [which would] destroy one of the major purposes [of the statute]"). Even if the statutory language were unambiguous, the purpose of the statute should be considered to see if the statutory language frustrates congressional intent. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983).

147. See *infra* Part III. B. 2.-3. This functional use of the word "under" includes deportation proceeding within the scope of the EAJA.

## 2. The EAJA's Legislative History Supports a Functional Approach

### a. Conference Report

The original conference report used the phrase "defined under" to explain the scope of Section 504;<sup>148</sup> thus, the *Escobar Ruiz* court ruled that Congress intended "under section 554" to mean "as defined by" section 554.<sup>149</sup> As the *Clarke* court argued, however, Congress could have failed to recognize the implications of a "defined under" interpretation.<sup>150</sup>

The same conference report, however, better supports the *Escobar Ruiz* court's position that the EAJA applies to deportation cases. The conference report, in the same section that included the "defined under" language, indicates that an administrative hearing becomes an adversary adjudication when the government takes a position in the adjudication.<sup>151</sup>

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148. H.R. REP. NO. 1434, *supra* note 94, at 23, 1980 U.S. CODE CONG. & ADMIN. NEWS at 5012.

149. *Escobar Ruiz v. INS*, 838 F.2d 1020, 1024 (9th Cir. 1988) (en banc). The court's use of the ACUS model rules also provides some support for the court's position. The agency's interpretation is entitled to deference because the EAJA itself requires agencies to consult with the ACUS before promulgating rules for implementing the EAJA. See 5 U.S.C. § 504(c)(1) (1988). However, the ACUS' interpretation is of questionable value, because it is premised on the argument that a broad definition would avoid litigation over whether the EAJA applies. See 46 Fed. Reg. 32,900, 32,901 (1981). The ACUS interpretation has not reduced litigation over the scope of the EAJA. There is little reason to give weight to the interpretation because the desired result has not been fulfilled. Other legislative history also supports interpreting "under" to mean "as defined by." An earlier version of the EAJA had used the words "subject to section 554," see S. 265, 96th Cong., 2d Sess. (1980) (bill as originally passed by Senate), but that language was later changed to "under section 554." See Small Business Export Expansion Act of 1980, Pub. L. No. 96-481, § 203(a)(1), 94 Stat. 2321, 2325 (codified as amended at 5 U.S.C. § 504(b)(1)(C)(i) (1988). "Subject to" means "governed by;" but "under" is susceptible to more varied interpretations. See *supra* Part III. B. 1. This substitution also suggests that Congress rejected the narrow interpretation of "under section 554" that the INS suggested and embraced the larger, less hypertechnical interpretation.

150. At least one court has argued that the conference report's use of "defined under" provides no more than "ephemeral" support for the *Escobar Ruiz* court's position. *Owens v. Brock*, 860 F.2d 1363, 1366 (6th Cir. 1988). The *Owens* court reasoned that: "There is no evidence in the legislative history to indicate that the conference committee understood the term 'defined under' to include within EAJA coverage those proceedings that are not governed by section 554 but instead are merely conducted in a similar manner." *Id.*

151. H.R. CONF. REP. NO. 1434, *supra* note 94, at 23, 1980 U.S. CODE CONG. & ADMIN. NEWS at 5012. The conference report states:

The Senate bill defines adversary adjudication as one where the agency takes a position through representation through counsel or otherwise . . . . The conference substitute defines adversary adjudica-

When the government argues against the interests of a particular individual, as it does in an agency adjudication, only that individual will bear the consequences of the agency's decision.<sup>152</sup> Thus, an agency adjudication is different from rulemaking proceedings in which the agency promulgates regulations that apply to the public at large. In agency adjudications, the individual's battle to vindicate her rights will likely be long and costly.<sup>153</sup> Congress intended to give an individual a meaningful chance to defend her interests against the government when it has decided to take unjustified action against her.<sup>154</sup> Congress intended that the individual get this chance when the government takes a position in the proceeding, not when the APA governs the hearing. Therefore, the EAJA should apply to deportation proceedings.

b. *The 1985 Amendments*

1. Congress Expressly Included Some Adjudications Not Governed by the APA

In two 1985 amendments, Congress indicated that its concern was not with whether the APA governed a particular hearing, but with whether the hearing was adversarial, whether counsel represented the government, and whether a party suffered the burden and expense of an agency hearing. When Congress reenacted the EAJA, it rejected a case that used the "governed by" interpretation of the EAJA.<sup>155</sup> In that

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tion as an agency adjudication defined under the [APA] where the agency takes a position through counsel or otherwise. It is intended that this definition precludes an award in a situation where an agency . . . does not take a position in the adjudication. If, however, the agency does take a position at some point in the adjudication, the adjudication would then become adversarial.

*Id.* (emphasis added). The government does take a position in deportation proceedings. It argues that the alien should be deported.

152. This is what Congress was referring to when it said that it wanted to limit fee awards to those situations where "concrete interest[s]" are at stake. See H.R. REP. NO. 1418, *supra* note 30, at 14, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4993.

153. *Id.* at 5-6, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4984 (stating that the premise behind the EAJA is that vindicating one's rights in suits against the government is expensive and many people lack the financial resources to fight substantially unjust government action).

154. See *supra* Part I. B. 2. b.

155. See *Fidelity Constr. Co. v. United States*, 700 F.2d 1379 (Fed. Cir. 1983) (holding that contract appeals governed by the Contract Disputes Act (CDA) are not covered by the EAJA, because CDA proceedings are not subject to § 554 of the APA). When Congress reenacted the EAJA it legislatively overruled this decision. See *Equal Access to Justice Act, Extension and Amend-*

case, the court had held that the EAJA did not cover contract appeals.<sup>156</sup> Congress expressly included such appeals within the scope of the EAJA<sup>157</sup> even though the Contract Disputes Act, not the APA, governs contract appeals. Congress also included social security proceedings within the scope of the EAJA.<sup>158</sup> This inclusion strongly supports applying the EAJA to deportation proceedings as well. Although the APA might not govern social security proceedings,<sup>159</sup> Congress nevertheless stated in the 1985 legislative history that the EAJA applies to social security proceedings as long as counsel represents the interests of the United States<sup>160</sup> and the government advocated

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ment, Pub. L. No. 99-80, § 1(c)(2), 99 Stat. 183, 184 (codified at 5 U.S.C. § 504(b)(1)(C)(ii) (1988) ("adversary adjudication means . . . any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978"); H.R. REP. NO. 120, *supra* note 49, at 15, 1985 U.S. CODE CONG. & ADMIN. NEWS at 144. The reason Congress amended the statute was to preserve people's option to appeal their contract dispute either to the Claims Court or the agency board. *Id.* Without this amendment, Congress feared people would only appeal to the Claims Court because EAJA fees were available there but not at the agency level. *Id.* Although Congress expressed this rationale for passing the amendment, the amendment also shows that Congress was not terribly concerned about whether an agency hearing was governed by the APA. Instead, it was concerned with whether people underwent the burden and expense of an adversarial hearing.

156. See *supra* notes 69-70 and accompanying text.

157. See 5 U.S.C. § 504(b)(1)(C)(ii) (1988) (stating any appeal made pursuant to the Contract Disputes Act is covered by the EAJA).

When Congress reenacted the EAJA in 1985, it consistently expressed disapproval of the restrictive interpretations given to the EAJA by agencies and courts. See, e.g., H.R. REP. NO. 120, *supra* note 49, at 9-10, 1985 U.S. CODE CONG. AND ADMIN. NEWS at 137-38.

158. H.R. REP. NO. 120, *supra* note 49, at 10, 1985 U.S. CODE CONG. & ADMIN. NEWS at 138-39 (stating Social Security Administration hearings are covered by the EAJA when the agency's interests are represented by counsel).

159. See generally *Richardson v. Perales*, 402 U.S. 389, 408-09 (1971) (refusing to decide if the APA or Social Security Act (SSA) applies in cases where plaintiff claimed the SSA hearing procedures violated due process); *Keegan v. Heckler*, 744 F.2d 972, 975 (3d Cir. 1984) (assuming without deciding that the APA evidentiary rules apply to SSA hearings); *Ginsburg v. Richardson*, 436 F.2d 1146, 1148 n.1 (3d Cir.) (stating the court did not need to determine if the APA supersedes the SSA with respect to judicial review of final agency decisions, because the standards of review are identical), *cert. denied*, 402 U.S. 976 (1971).

160. See H.R. REP. NO. 120, *supra* note 49, at 10, 1985 U.S. CODE CONG. & ADMIN. NEWS at 138 ("As enacted in 1980, the Act covers 'adversary adjudications' — i.e., an adjudication under section 554 of title 5, United States Code 'in which the position of the United States is represented by counsel or otherwise.'" (emphasis in original)); *id.* at 10, 1985 U.S. CODE CONG. & ADMIN. NEWS at 138-39 (stating Social Security Administration hearings are covered by the EAJA when the agency's interests are represented by counsel). The 1980 legislative history also shows that Congress was not concerned with whether

its position in the hearing.<sup>161</sup> Thus, Congress wanted the EAJA to apply regardless of whether the APA governed an adjudication.

## 2. Congress Did Not Implicitly Ratify the Attorney General's Regulations Excluding Deportation Proceedings

In 1985, Congress did not amend the EAJA to include deportation proceedings despite allegedly knowing that the existing Attorney General regulations excluded deportation hearings.<sup>162</sup> This failure does not, however, prove that Congress intended deportation proceedings to be outside the scope of the EAJA. Congress did not explain why it did not add deportation proceedings to the EAJA, nor did it expressly state its intent to exclude deportation proceedings. Such legislative silence is not reliable as an interpretive tool.<sup>163</sup> Indeed the re-

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the APA governed social security proceedings, but only with whether the government had taken a position in the adjudication. H.R. CONF. REP. NO. 1434, *supra* note 94, at 23, 1980 U.S. CODE CONG. & ADMIN. NEWS at 5012 ("It is intended that this definition precludes an award in a situation where an agency, e.g., the *Social Security Administration*, does not take a position in the adjudication. If, however, the agency does take a position at some point in the adjudication, the adjudication would then become adversarial." (emphasis added)).

161. H.R. REP. NO. 120, *supra* note 49, at 10, 1985 U.S. CODE CONG. & ADMIN. NEWS at 138 (stating that if the Social Security Administration takes a position during the adjudication, the proceeding was an adversary adjudication within the meaning of the EAJA).

162. *Clarke v. INS*, 904 F.2d 172, 177 (3d Cir. 1990).

163. *Helvering v. Hallock*, 309 U.S. 106, 119, 121 (1940). The Court noted:

To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities . . . . Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of . . . Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.

*Id.*; see also R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 181-82 (1975)

(Even where [Congress] is fully aware of [an administrative interpretation], there are often reasons other than approval why a legislature remains silent or inactive . . . . There could hardly be less reputable legislative material than legislative silence . . . no court should feel inhibited, merely by virtue of legislative silence or inaction, in correcting what it conceives to have been a faulty [administrative] interpretation.);

W. ESKRIDGE, JR. & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 772 (1988)

(Things the legislature fails to do (inaction) far outnumber the things it actually does (action). Both state and federal courts have generally been leery of relying on such inaction as rejection of amendments to a

enactment history does not indicate that Congress was aware of the Attorney General regulations.<sup>164</sup> Moreover, Congress did not modify the pertinent language, "under section 554," when it reenacted the EAJA.<sup>165</sup> Because Congress did not change this language,<sup>166</sup> courts cannot imply a legislative intent to exclude

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bill, failure to repudiate administrative or judicial interpretations of a statute, failure to act on a companion or rival bill, or failure to amend a statute in a subsequent bill.);

H. HART & A. SACKS, *THE LEGAL PROCESS* 1395 (tent. ed. 1958) ("If a legislature were under a duty to consider every question of public policy which is mooted in a court or elsewhere and to declare itself one way or the other, inaction would obviously be significant. But is there such a duty? Would it be tolerable if there were?").

164. See generally H.R. REP. NO. 120, *supra* note 49, 1985 U.S. CODE CONG. & ADMIN. NEWS 132 (no reference to the Attorney General regulations). In *SEC v. Sloan*, 436 U.S. 103 (1978), the Supreme Court held that the SEC's use of its summary suspension power was not given congressional approval merely because Congress reenacted the Securities Exchange Act after a Senate committee stated its approval of the Securities Exchange Commission's practice. *Id.* at 119-20. The Court stated that the committee report was not sufficient in itself to indicate widespread awareness of the SEC's construction of the statute. *Id.* at 121. Thus, reenactment of a statute, even after a committee report notes the existence of an agency practice and *approves* of it, is not always enough to infer that Congress ratified an agency interpretation. In the present case, the House report did not indicate awareness of the Attorney General's regulations. Because congressional awareness of the Attorney General regulations is lower than that in the *Sloan* case, Congress cannot be presumed to have implicitly ratified the regulations.

165. The present issue is analogous to the Supreme Court's analysis in *Pierce v. Underwood*, 487 U.S. 552, 566-67 (1988). The *Pierce* court had to decide what the term "substantially justified" meant in the EAJA. The 1985 House report said that: "Because in 1980 Congress rejected a standard of 'reasonably justified' in favor of 'substantially justified,' the test must be more than mere reasonableness." H.R. REP. NO. 120, *supra* note 49, at 9, 1985 U.S. CODE CONG. & ADMIN. NEWS at 138. The Court held that this report's definition of "substantially justified" was not an authoritative interpretation of the EAJA. *Pierce*, 487 U.S. at 566-67. The report's definition was not an authoritative interpretation of what the original EAJA meant because only courts can say what an enacted statute means. *Id.* at 566. The statement was not an authoritative expression of what the ninety-ninth Congress intended,

because it is not an explanation of any language that the 1985 Committee drafted, because on its face it accepts the 1980 meaning of the terms as subsisting, and because there is no indication whatever in the text or even the legislative history of the 1985 reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation.

*Id.* at 566-67.

Likewise, the Attorney General's regulation is not the definitive interpretation of the 1980 statute because only courts can give final interpretations of statutes. In addition, the regulation is not an authoritative interpretation of the 1985 EAJA because Congress did not change the phrase "an adjudication under section 554" to show it wanted to broaden or narrow the EAJA's scope.

166. See generally H.R. REP. NO. 120, *supra* note 49, at 14, 1985 U.S. CODE

deportation proceedings.<sup>167</sup>

### 3. The Legislative Purposes are Furthered by Including Deportation Proceedings Within the Scope of the EAJA

In addition to the legislative history, the purposes of the EAJA also demand that the EAJA apply to deportation proceedings.<sup>168</sup> Applying the EAJA to deportation proceedings will further the EAJA's policies of allowing individuals to fight unjustified government action without fear of expensive attorney fees as well as that of deterring unwarranted government action.<sup>169</sup>

The legislative history is replete with evidence indicating that Congress intended to give individuals access to agencies and their quasi-judicial decisions.<sup>170</sup> When Congress used the phrase "adversary adjudication," its primary concern was with whether individuals had borne the expense of a hearing and had a concrete interest at stake in the proceeding, and with whether counsel had represented government interests.<sup>171</sup> Congress was not concerned whether the APA governed the

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CONG. & ADMIN. NEWS at 142-43 (list of amendments Congress made to the EAJA — an amendment of the phrase "under section 554" was not on the list).

167. *Cf. Pierce*, 487 U.S. at 566-67 (reasoning that a House committee's report that stated "substantial justification" means a higher standard than reasonableness did not change the meaning of the EAJA because Congress did not change the words "substantial justification" to show it wanted a different standard). Likewise, Congress did not amend the phrase "an adjudication under section 554" to show it intended to broaden or narrow the EAJA's scope. Thus, the Attorney General's regulation does not aid the interpretation of the EAJA because Congress did not amend the statute to show it wanted the meaning of "under section 554" to change from the original meaning intended in 1980.

168. *Escobar Ruiz v. INS*, 838 F.2d 1020, 1025-26 (9th Cir. 1988) (en banc).

169. *See supra* Part I. B. 2. b.

170. *See id.*

171. *See e.g.*, H.R. REP. NO. 1418, *supra* note 30, at 14, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4993 (The EAJA covers only adversary adjudications because Congress wanted to "limit the award of [attorney] fees to situations where participants have a concrete interest at stake but nevertheless may be deterred from asserting or defending that interest because of the time and expense involved in pursuing administrative remedies"); H.R. CONF. REP. NO. 1434, *supra* note 94, at 21, 1980 U.S. CODE CONG. & ADMIN. NEWS at 5010 ("An adversarial adjudication is one in which the agency position is represented by counsel or otherwise."); H.R. REP. NO. 120, *supra* note 49, at 10, 1985 U.S. CODE CONG. & ADMIN. NEWS at 133-39 ("While, generally, Social Security administrative hearings remain outside the scope of this statute, those in which the Secretary is represented are covered by the [EAJA].").

agency hearing, because individuals can have a stake in the agency outcome and go to great expense to influence the outcome even if the APA does not govern the hearing.<sup>172</sup>

Moreover, Congress passed the EAJA in response to the Supreme Court's *Alyeska Pipeline* decision.<sup>173</sup> Thus, the EAJA reflects Congress's attempt to codify the private attorney general rule.<sup>174</sup> As such, Congress demonstrated its policy of furthering the public interest and protecting individual rights by encouraging poorer individuals to protect their rights by bringing (or defending) suits that cost might otherwise preclude.<sup>175</sup> Given this policy, Congress would not want the individual's ability to contest government action to depend on the fortuity of whether the APA governed the agency proceeding. Such a result would be anomalous.

Extending the EAJA to deportation proceedings also fulfills its policy of deterring agency overzealousness.<sup>176</sup> INS attorneys are extremely aggressive, often opposing defenses to deportation regardless of the merits of the case.<sup>177</sup> The INS administrators might reevaluate their harsh policies if substantial fee awards in EAJA adjudications reduced their budget,<sup>178</sup> a result Congress intended.<sup>179</sup> In addition, individuals must challenge the decisions of immigration judges and the Board of Immigration Appeals because these decisions often are wrong.<sup>180</sup> Finally, aliens have a cultural disadvantage in the

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172. Deportation proceedings, for example, are often long and costly. *Escobar Ruiz*, 838 F.2d at 1026.

173. H.R. REP. NO. 1418, *supra* note 30, at 6, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4985.

174. See *supra* notes 36-45 and accompanying text.

175. *Id.* at 6, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4984 ("[t]he purpose of the [EAJA] is to reduce the deterrents [to litigation against the government] by entitling certain prevailing parties to recover an award of attorney fees"); *id.* at 10, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4988-89 ("[t]he [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"); see also *supra* Part I. B. 2. b. (one purpose of EAJA is to aid victims of unjustified government action who might be deterred by the cost of litigation of defending themselves).

176. Stern, *supra* note 2, at 1471.

177. *Id.* The reason for this aggressive stance is that during the Reagan administration the INS began a new recruitment policy to attract many aggressive trial attorneys, many from the Justice Department, to prosecute deportation cases. *Id.*

178. *Id.*

179. See *supra* notes 58-59 and accompanying text.

180. Stern, *supra* note 2, at 1465.



American administrative process.<sup>181</sup> The possibility of receiving EAJA fees when the government acts without substantial justification allows aliens a level playing field in defending against the government's suits.<sup>182</sup>

Finally, a broad reading of the EAJA in light of its purposes comports with Supreme Court precedent.<sup>183</sup> In *Sullivan v. Hudson*, the Court faced the issue of whether the EAJA's term "civil action" included proceedings on remand from court or precluded all proceedings except those occurring in a court of law.<sup>184</sup> Although the Court could reasonably have interpreted "civil action" to include only proceedings in court, it refused to interpret the phrase so narrowly.<sup>185</sup> The Court concluded that such an interpretation would frustrate the EAJA's purpose of diminishing the deterrent effects of litigation against the government.<sup>186</sup> Similarly, courts should construe broadly the phrase "under section 554" to achieve the EAJA's purpose.<sup>187</sup>

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181. *Id.* at 1470. For example, many people who are seeking asylum do not speak English; nor do they understand the United States legal system and their right to apply for asylum. *Id.* at 1470 n.71.

182. Attorneys may be attracted by the possibility of recovering fees and underfunded legal aid organizations will be able to take cases because they will be given fee awards. *Id.*

183. *Sullivan v. Hudson*, 490 U.S. 877 (1989). In *Sullivan*, the Supreme Court read the statute in light of its purpose. *Id.* at 890. The issue was whether a social security claimant was entitled to fees under the EAJA for representation provided during administrative proceedings on remand from the district court. *Id.* at 879. The Court had to decide what the term "civil action" meant with regard to the EAJA. *Id.* at 883-84. The social security administrator argued that "civil action" only meant proceedings that occurred in a court of law. *Id.* at 891. The Court rejected that narrow view, holding that administrative proceedings can be so intimately tied with judicial proceedings that they can be considered part of the "civil action" for purposes of a fee award. *Id.* at 892. "Civil action" can include administrative proceedings necessary to the completion of a civil action. *Id.*

184. *Id.* at 879. The Supreme Court noted that the administrative proceeding required by remand was critical to vindicate claimants' rights. *Id.* at 889. The Court correctly realized that to allow fees for work in court but not on remand would create an incentive for attorneys to abandon clients before the remand proceeding. *Id.* at 889-90.

185. *Id.* The Court wrote: "we must endeavor to interpret the [EAJA] in light of the statutory provisions it was designed to effectuate." *Id.* The Court went on to quote the purpose behind the EAJA: "to diminish the deterrent effect of seeking review of, or defending against, governmental action." *Id.* at 890 (quoting purpose of Equal Access to Justice Act of 1980, Pub. L. No. 96-481, § 202(c)(1), 94 Stat. 2321, 2325 (quoted purpose not codified in United States Code)).

186. *Id.*

187. Like the term "civil action," "under" could be defined narrowly to

### C. CANONS OF STATUTORY INTERPRETATION

The *Clarke* court relied on the canon that waivers of government immunity from fee claims must be strictly construed.<sup>188</sup> This position is flawed. Neither *Clarke*, nor any of the cases it cites, provides any reason for following this canon with such rigidity.<sup>189</sup> Presumably, canons are intended to further some underlying policy.<sup>190</sup> Thus, to justify its application, the court must explain *why* the EAJA's waiver of sovereign immunity should be construed strictly in this case.

The court's failure to state such a reason probably can be explained by noting that the canon has lost much of its original rationale.<sup>191</sup> The canon, however, still adheres to the old notion that as few constraints as possible should burden the sovereign's freedom to decide how best to serve the public interest.<sup>192</sup> Use of the canon in EAJA cases does not, however, advance the canon's rationale. Superficially, the canon's policy could apply by ensuring that the government is not burdened

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lessen the government's susceptibility to liability. To do so, however, would be contrary to the EAJA's purpose. To construe "under" to mean "governed by" would create the anomalous result of attorneys who would be willing to represent claimants in APA adjudications but not in adjudications governed by other statutes. Claimants in proceedings not governed by the APA would still be deterred from contesting unjustified government action. Therefore, the phrase "under section 554" should be construed broadly to effectuate the purpose of the EAJA.

In addition to the EAJA, the Supreme Court has consistently construed other fee shifting statutes broadly. *See, e.g.*, *Pennsylvania v. Delaware Valley Citizen's Council*, 478 U.S. 546, 558 (1986) (rejecting contention that the word "action" in the fee shifting provision of the Clean Air Act should be read narrowly to include only judicial proceedings); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 62-63 (1980) (interpreting fee shifting provision of Civil Rights Act of 1964 broadly to find attorney fees available for attorney services performed in state administrative proceedings). The Court has ruled that a broad interpretation best gives effect to policies underlying these fee shifting statutes. *See, e.g., Delaware Valley*, 478 U.S. at 559-60 (broad construction of statute is crucial to vindicate a litigant's rights).

188. *Clarke v. INS*, 904 F.2d 172, 175 (3d Cir. 1990).

189. *See id.*

190. *See* 3 J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 62.01, at 111 (C. Sands 4th ed. 1972) (canon that statutes in derogation of sovereignty should be construed strictly is based on policy of preserving efficient government functioning); W. ESKRIDGE, JR. & P. FRICKEY, *supra* note 163, at 656.

191. W. ESKRIDGE, JR. & P. FRICKEY, *supra* note 163, at 657 (canon is based on old idea that a sovereign cannot be sued or regulated without its consent, but because absolute immunity of the sovereign has declined substantially in recent years, the canon has lost much of its original rationale).

192. J. SUTHERLAND, *supra* note 190, § 62.01, at 111; W. ESKRIDGE, JR. & P. FRICKEY, *supra* note 163, at 657.

with law suits. This analysis, however, ignores the EAJA's fundamental goals of purposefully encouraging suits against the government in order to make the government work more efficiently and fairly, and deterring the government from operating unjustly.<sup>193</sup> In short, Congress thought the best way to serve the public interest was not for the government to avoid litigation, but to *encourage* individuals to litigate against the government. Hence, because the rationale for the canon simply is not served when interpreting the EAJA, it should not be applied when interpreting the EAJA.

In addition, basing an argument on canons is futile because courts can almost always cite a different canon to support the contrary position.<sup>194</sup> The same holds true for the EAJA. Although the *Clarke* court relied on the canon that waivers of sovereign immunity should be construed strictly, the court ignored a more popular canon of construction that leads to the opposite result: remedial statutes should be construed broadly.<sup>195</sup> For example, a court might construct the following argument: The EAJA is a remedial statute.<sup>196</sup> Congress passed the statute because it recognized a problem — the expense of

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193. See *supra* Part I. B. 2. b.; see also *Oguachuba v. INS*, 706 F.2d 93, 98 (2d Cir. 1983) (purpose of EAJA is to deter government from bringing unjust suits or acting arbitrarily). Consequently, the purpose of the EAJA indicates that the government not only is willing to tolerate interference and constraints but even actively seeks such burdens so that it will operate fairly.

The sovereign immunity doctrine should not apply in this context for another reason. Because the canon rests on the principle that litigation should not interfere with vital government processes, J. SUTHERLAND, *supra* note 190, § 62.01, at 111, application of the canon should be relaxed when the waiver of immunity does not interfere with those processes, *id.* § 62.02, at 124. The EAJA merely requires the government to pay attorney fees to parties who prevail in litigation against it. The EAJA does not create an underlying cause of action against the United States. Therefore, liberal interpretation of the EAJA does not interfere with vital government processes. Comment, *The Waiver of Immunity in the Equal Access to Justice Act: Clarifying Opaque Language*, 61 WASH. L. REV. 217, 240 (1986). Thus, the canon is inapplicable to EAJA fee situations.

194. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950).

195. See, e.g., *Gomez v. Toledo*, 446 U.S. 635, 639 (1980) ("As remedial legislation, § 1983 is to be construed generously to further its primary purpose.") (citing *Owen v. City of Independence*, 445 U.S. 622, 636 (1980)); *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12-13 (1980) (Occupational Safety and Health Act of 1970 legislation is remedial and prophylactic in nature, thus safety legislation is to be liberally construed to effectuate the congressional purpose); J. SUTHERLAND, *supra* note 190, § 60.01, at 55.

196. See *supra* Part I. B. 2. b. (stating the problems Congress hoped to remedy by passing the EAJA).

litigation deterred people from defending against substantially unjustified government action.<sup>197</sup> The EAJA helped to remedy this problem by putting the individual and the government on a more equal footing. The EAJA allows the individual to charge the government for her attorney fees if she prevails in the litigation and the agency action was unreasonable.<sup>198</sup> Because the statute is remedial, courts should interpret it broadly to address the problem Congress sought to solve. Therefore, courts should apply the EAJA to deportation proceedings.

#### D. PROPOSED BRIGHT LINE APPROACH

Despite the other analytical flaws in the *Clarke* opinion, the Third Circuit correctly sought a bright-line rule. Its proposed rule, however, is somewhat unworkable: courts still have difficulty determining whether the APA governs an agency adjudication.<sup>199</sup> A functional analysis, on the other hand, affords a more successful bright line rule. It can offer the same ease of application as the "governed under" rule while providing results more consistent with the EAJA's purposes.

In determining whether the EAJA applies to a particular proceeding, courts should consider the phrase "under section 554" to be a shorthand way of telling the court to look at the requirements of section 554 to see whether the agency must comply with those requirements in the adjudication. The real questions for courts should be whether a statute requires the agency to have a hearing on the record<sup>200</sup> and whether counsel represented the government at the hearing.<sup>201</sup> If the answer to both is yes, the adjudication should be subject to possible fee awards under the EAJA. Thus, the EAJA applies if "the agency is required by statute to have the adjudication determined on the record after an opportunity for an agency hearing, and counsel represented the government at the hearing."<sup>202</sup>

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197. H.R. REP. NO. 1418, *supra* note 30, at 5-6, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4984.

198. *Id.*

199. *See, e.g., supra* note 103 and text accompanying note 131 (debate over whether social security hearings are governed by the APA).

200. These are the APA requirements for a hearing that the EAJA refers to in 5 U.S.C. § 504(b)(1)(C)(i) (1988).

201. This is the third requirement of 5 U.S.C. § 504(b)(1)(C)(i) (1988) for an "adversary adjudication."

202. The requirement in 5 U.S.C. § 504 (b)(1)(C)(i) that an adversary adjudication be "under section 554" leads to the 5 U.S.C. § 554 definition of adjudication. Section 554 applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5

### 1. What is a hearing?

Courts first will have to determine whether the statute requires a hearing. The statute usually will state explicitly whether a "hearing" or "proceeding" is required.<sup>203</sup> If the statute is ambiguous, courts should consider whether the proceeding at issue contemplates adversarial litigating. If so, a hearing sufficient to warrant applying the EAJA exists. For example, the INA requires that the allegedly deportable alien be allowed to present evidence, cross-examine government witnesses, and examine the evidence against her.<sup>204</sup> This language demonstrates an adversarial process. Courts should also consider whether the statute requires a neutral third party to referee the proceeding, or whether a third party will decide the conflicts between two parties. If so, the proceeding is a "hearing" within the meaning of the EAJA.

### 2. On the record

Usually the statute also will state explicitly if the hearing must be on the record. For example, the INA states that a determination of deportability be "on the record."<sup>205</sup> All a statute must require, however, is that the hearing be recorded so that a written transcript exists. In closer cases, courts can look to whether a person has the right to appeal to discover if a record is required. If so, the hearing is on the record because the appellate body needs a written history of the proceeding.

### 3. Counsel for the government

Courts can determine easily whether counsel represented the government by looking at the record of the hearing. For example, a review of the record of an alien's hearing before the immigration judge would show whether counsel represented the government.<sup>206</sup> Further, counsel need not be a licensed at-

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U.S.C. § 554(a) (1988). Thus, "under section 554" is just shorthand for saying that Congress wanted the EAJA to apply when the adjudication is on the record after an opportunity for a hearing.

203. See, e.g., Immigration and Nationality Act, 8 U.S.C. § 1252(b) (1988) ("[d]etermination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer").

204. 8 U.S.C. § 1252(b) (1988).

205. *Id.*

206. As noted in *Escobar Ruiz*, the government did not attempt to contradict the fact that the INS is not represented by counsel in deportation proceedings. *Escobar Ruiz v. INS*, 838 F.2d 1020, 1023 (9th Cir. 1988) (en banc).

torney;<sup>207</sup> rather, counsel need only be someone who advocates the government's position.

The INA requires that a determination of deportability be made on the record in a proceeding,<sup>208</sup> and that counsel represent the government during the adjudication. Thus, courts using the above rule would allow EAJA fees in deportation proceedings. The rule is easily applied, and also furthers the purposes of the EAJA. Because adjudications determined on the record after an agency hearing tend to be expensive and time consuming,<sup>209</sup> claimants may be discouraged from defending their rights. This functional rule would counter the cost deterrent by ensuring that aliens subject to the expense of a long, formal hearing have the opportunity to recoup their expenses under the EAJA if the government's position is unjustified.

### CONCLUSION

The EAJA allows poor litigants to defend themselves from substantially unjustified government action. The federal circuit courts agree that the EAJA applies to proceedings governed by the APA. The courts disagree, however, on whether the EAJA applies to proceedings governed by other statutes. Because the INA governs deportation proceedings, courts are split over whether the EAJA applies to these adjudications. Because of this controversy, allegedly deportable aliens may be unable to recover attorney fees when fighting unreasonable government action. Aliens, therefore, might not attract attorneys to their cases, thus facing confusing deportation hearings unrepresented.

This Note argues that the EAJA applies to deportation proceedings. The legislative history and purposes of the EAJA support this argument. The EAJA's legislative history shows Congress was not concerned with whether the APA governs a proceeding, and the EAJA's purposes suggest Congress wanted the EAJA to be applied broadly. The EAJA should cover all agency proceedings that are required to be on the record after an opportunity for a hearing and where counsel represents the government's position. Courts can apply the above rule easily to deportation proceedings and to other agency proceedings. Such a rule properly allows individuals who undergo lengthy

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207. 5 U.S.C. § 504 requires only that the government be represented by "counsel or otherwise." 5 U.S.C. § 504(b)(1)(C)(i) (1988).

208. 8 U.S.C. § 1252(b) (1988).

209. *Escobar Ruiz*, 838 F.2d at 1026.

proceedings to challenge unjust government action the possibility of recovering attorney fees.

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