

Applying the Equal Access to Justice Act to Asylum Hearings

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The Refugee Act of 1980¹ attempted to establish a uniform and nonideological procedure for considering applications by refugees for political asylum in the United States.² Charges persist, however, that foreign policy and ideology still dominate the government's adjudication and litigation of asylum claims, thereby thwarting the goals of the Act.³ Even when a refugee presents a strong asylum claim, the Immigration and Naturalization Service (INS) generally contests the application by appealing an Immigration Judge's (IJ) decision.⁴ Although IJ denials of strong asylum claims have been reversed or remanded by the federal courts,⁵ few asylum seekers have the resources to appeal.⁶

This Note argues that unjustified government opposition to meritorious asylum claims should be countered through the application of a federal

1. Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.). The Act was the first comprehensive U.S. statute to regulate refugee admissions and resettlement.

2. As part of the Act, Congress incorporated the definition of refugee used in the 1967 U.N. Protocol Relating to the Status of Refugees: any person demonstrating a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, [who] is outside the country of his nationality and is unable or, owing to such fear, is unwilling to . . . return to it." Convention Relating to the Status of Refugees, July 28, 1951, art. I, 19 U.S.T. 6223, T.I.A.S. No. 6577, 189 U.N.T.S. 150 (entered into force for the United States on Nov. 1, 1968). Congress thus sought to abolish the previous U.S. system of explicit ideological and national preferences in executive grants of asylum. The Refugee Act of 1980 eliminated the explicitly ideologically-based provision in the Immigration and Nationality Act of 1952 which granted "conditional entry" visas to aliens who fled persecution on account of race, religion, or political opinion "(I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East," Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913 (amending Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 203(a)(7), 66 Stat. 163, 178-79 (1952)), and replaced it with the new asylum statute, 8 U.S.C. § 1158(a) (1982).

For a comprehensive history of these ideological preference statutes and of the legislative history of the 1980 Refugee Act, see Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

3. See, e.g., U.S. COMMITTEE FOR REFUGEES, DESPITE A GENEROUS SPIRIT: DENYING ASYLUM IN THE UNITED STATES 7-10 (1986); AMERICAN IMMIGRATION LAWYERS ASSOC., COMMENTS ON PROPOSED ASYLUM AND WITHHOLDING OF DEPORTATION REGULATIONS (1987) (copy on file with the author); Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 SAN DIEGO L. REV. 999 (1985); Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 22 U. MICH. J.L. REF. 243 (1984) [hereinafter Helton, *Unfulfilled Promise*]; Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450, 459 (1985).

4. See *infra* text accompanying note 77; see also *infra* notes 52-55 and accompanying text.

5. See *infra* note 46.

6. See *infra* notes 75-77 and accompanying text.

attorneys' fees award statute, the Equal Access to Justice Act (EAJA),⁷ to deportation proceedings in which the government opposes asylum claims. The EAJA awards attorneys' fees to a party who prevails against the United States in any civil action or in any "adversary adjudications" by federal agencies,⁸ in which the "position" of the agency is not "substantially justified."⁹ Application of the EAJA to asylum hearings will attract more representation for asylum seekers, deter the INS through the threat of fee awards, and expose more INS litigation to judicial review, which should further reform and refine INS asylum policy.

This Note argues that the purposes and legislative history of the EAJA justify its application to asylum hearings. In *Escobar Ruiz v. INS* [*Escobar Ruiz I*],¹⁰ the first and only court to address the issue held that the EAJA applied to deportation hearings, the forum in which asylum claims are adjudicated. But the INS still opposes the EAJA's application to deportation hearings,¹¹ and the status of the law in other circuits is untested.

Section I examines the history, purposes, and terms of the EAJA, especially as it applies to agency proceedings. Section II focuses on asylum procedure and policies, and argues that application of the EAJA to asylum hearings would serve the purposes of the Act by aiding asylum seekers contesting unjustified INS opposition to their claims. Finally, Section III proposes two changes to strengthen the EAJA's effectiveness in agency proceedings: Congressional amendment of a key statutory term, and clarification by the Justice Department of the process by which fee awards are reviewed.

7. Pub. L. No. 96-481, tit. II, 94 Stat. 2321 (1981) (codified as amended at 5 U.S.C. § 504, 28 U.S.C. § 2412).

8. 28 U.S.C. § 2412(d) (Supp. IV 1986), pertains to fee awards made by federal courts in civil cases (except tort cases) including proceedings for judicial review of agency action. 5 U.S.C. § 504 (Supp. IV 1986) contains very similar language but applies to awards made by agency adjudicators in adversary adjudications.

9. The relevant portion of 5 U.S.C. § 504(a)(1) states:

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.

10. 787 F.2d 1294 (9th Cir. 1986) [hereinafter *Escobar Ruiz I*], *reh'g denied*, 813 F.2d 283 (1987) [hereinafter *Escobar Ruiz II*], *aff'd en banc*, 838 F.2d 1020 (1988) [hereinafter *Escobar Ruiz III*]. See *infra* Section IIB for a full description of the case.

11. The INS did not seek certiorari but indicated that it will seek to reverse the holding of *Escobar Ruiz III* by litigating a "more appropriate" future case in the Supreme Court. *No Supreme Court Review in Escobar Ruiz*, 65 INTERPRETER RELEASES 540 (May 23, 1988). Further, the INS has stated that it will not comply with the holding of *Escobar Ruiz III* even within the Ninth Circuit, "in order to bring the matter before the Supreme Court at the earliest possible moment." *INS Refuses to Be Bound by Escobar-Ruiz*, 65 INTERPRETER RELEASES 899, 900 (Sept. 2, 1988).

I. THE EAJA: TERMS AND BASIC PURPOSE

A. *History of Fee Award Provisions*

The EAJA, originally enacted as an experiment,¹² significantly changed existing law by permitting attorneys' fees awards against the government in civil actions and in adversary agency adjudications. Under the common law "American Rule," parties in litigation traditionally pay for their own attorneys' fees and costs, except where attorneys' fees are specifically authorized by statute.¹³ The American Rule became subject to increasing attack in the 1960's and 1970's, and courts began to experiment with new exceptions to the doctrine.¹⁴ The most significant of these new judicial exceptions, the "private attorney general" theory,¹⁵ was abolished in *Alyeska Pipeline Service Co. v. Wilderness Society*.¹⁶ In response to *Alyeska*, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976,¹⁷ which permitted prevailing parties in actions brought under certain civil rights statutes to collect attorneys' fees. Four years later, Congress enacted a far more comprehensive attorneys' fees bill, the EAJA, to enable small parties,¹⁸ who might otherwise be unable to afford to assert

12. The EAJA was passed with a sunset clause under which its key provisions expired automatically in 1984. Pub. L. No. 96-481, §§ 203(c), 204(c), 94 Stat. 2325, 2327, 2329 (1982). In 1985, Congress passed new legislation which permanently reenacted and amended the EAJA in important respects. Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80, 99 Stat. 183 (1985) (codified at 5 U.S.C. § 504, 28 U.S.C. 2412 (Supp. IV 1986)).

The EAJA has been supported by an unusual coalition of small business organizations, whose members are often victims of unjustified government actions, and civil rights groups. H.R. REP. NO. 1418, 96th Cong., 2d Sess. 7 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4986 [hereinafter H.R. REP. NO. 1418]. Groups who have testified in support of the EAJA include the ACLU, Congress Watch, the Council for Public Interest Law, the National Federation of Independent Businesses and the Small Business Loan Council. *Id.*; see also H.R. REP. NO. 120, 99th Cong., 1st Sess. 7, reprinted in 1985 U.S. CODE CONG. & ADMIN. NEWS 132, 135 [hereinafter H.R. REP. NO. 120].

13. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). The American Rule was first articulated by the Supreme Court in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796). There are two traditional narrow common law exceptions to the rule: when the losing party has acted in "bad faith" he may be obliged to pay attorney fees (bad faith exception), or when a successful party preserves or creates a benefit for a group, the court may permit her to recover fees from the beneficiaries (common benefit exception). See *Spencer v. NLRB*, 712 F.2d 539, 543 (D.C. Cir. 1983).

Congress has enacted many specific statutory exceptions to the American Rule. For a sample list, see H.R. REP. NO. 1418, *supra* note 12, at 4987.

14. See *Spencer*, 712 F.2d at 544.

15. This theory allowed private plaintiffs to collect attorneys' fees against private parties, even in the absence of specific statutory authority, when their suits vindicated certain public rights. *Id.* at 544 n.15. Courts that followed this doctrine reasoned that when litigants helped enforce certain broad rights and interests promoted by, for example, civil rights and environmental legislation, they should not have to pay the costs of the litigation. Winold, *Institutionalizing an Experiment: The Extension of the Equal Access to Justice Act — Questions Resolved, Questions Remaining*, 14 FLA. ST. U.L. REV. 925, 927 (1987).

16. 421 U.S. 240, 263 (1975) ("[C]ongressional utilization of the private-attorney-general concept can in no way be construed as a grant of authority to the Judiciary to jettison the [American] rule.").

17. Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified at 42 U.S.C. § 1988).

18. Eligibility for an EAJA award is limited to individuals with a net worth of less than \$2 million, businesses with a net worth of less than \$7 million and nonprofit organizations of any size. 5 U.S.C. § 504(b)(1)(B) (Supp. IV 1986).

their legal rights, to defend against or seek review of unreasonable government action.¹⁹

B. *Purposes of the EAJA*

The EAJA has three principal purposes. First, the EAJA seeks to aid victims of unjustified government action who might be deterred by the cost of litigation from legally contesting such action.²⁰ Congress intended the EAJA to prevent the government from coercing compliance with its position merely because the affected individuals lacked the funds to litigate against the government.²¹ Congress wanted to ensure that individuals, small businesses, and other organizations would decide on the merits rather than on their fear of high attorneys' fees whether or not to defend against or seek review of unjustified government action.²²

A second goal of the EAJA is to deter such unjustified government action by the threat of sizeable awards of attorneys' fees which would come from agency budgets.²³ By requiring that the government prove that its position is substantially justified or face liability for a fee award,²⁴ Congress also intended to "caution agencies to carefully evaluate their case and not to pursue those which are weak or tenuous."²⁵

A third objective is to expose, by statutory revival of the private attorney general theory,²⁶ more governmental action to "adversarial testing . . . to refine the administration of federal law—to foster greater precision, efficiency and fairness in the interpretation of statutes and in the formulation and enforcement of governmental regulations."²⁷ Congress felt that the EAJA would promote more agency adjudications, which would often bring to light and correct inaccurate or erroneous agency policy or action.²⁸

19. H.R. REP. NO. 1418, *supra* note 12, at 4988. The EAJA is a general statutory exception to the American Rule. Only common law and specific statutory exceptions to the American Rule existed prior to the enactment of the EAJA. *Id.* at 4986-87.

20. The American Rule was based on a desire not to deter litigation by penalizing a losing party for having brought or defended a lawsuit. But, the House Report concluded: "[I]n litigation with the Government, the American rule is in fact having the opposite effect. For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process." *Id.* at 4988.

21. *Id.* "[T]he Government with its greater resources and expertise can in effect coerce compliance with its position. . . [and thus] precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views." *Id.*

22. *See*, H.R. REP. NO. 120, *supra* note 12, at 132-33.

23. *See* H.R. REP. NO. 1418, *supra* note 12, at 4991; *see also* *Spencer v. NLRB*, 712 F.2d 539, 550 n.40 (D.C. Cir. 1983).

24. *See infra* notes 29-34 and accompanying text.

25. H.R. REP. NO. 1418, *supra* note 12, at 4993.

26. *See supra* note 15. The EAJA and the private attorney general theory are based 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." H.R. REP. NO. 1418, *supra* note 12, at 4988.

27. *Spencer*, 712 F.2d at 550 n.41.

28. H.R. REP. NO. 1418, *supra* note 12, at 4989.

C. Key Terms of the EAJA

To win an EAJA award an applicant must show that she is an eligible "prevailing party."²⁹ Courts have generally held that to be a "prevailing party" one need only succeed on any significant issue which achieves some of the benefit sought by the parties.³⁰ The government must then show that its "position"³¹ in the adjudication was "substantially justified,"³² or that "special circumstances" would make an award unjust,³³ or it will be liable for an EAJA fee award.³⁴

29. 5 U.S.C. § 504(a)(1) (Supp. IV 1986); 28 U.S.C. § 2412(d) (1986 Supp. IV).

30. See *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Environmental Defense Fund v. EPA*, 716 F.2d 915 (D.C. Cir. 1983).

31. A key amendment to the EAJA in 1985 resolved the split in the circuits over the meaning of the term "position" of the agency. Pub. L. No. 99-80, §§ 1(a)(1), 1(b)(1)(E), 2(b), 99 Stat. 183, (codified at 5 U.S.C. §§ 504 (a)(1), (b)(1)(E), 28 U.S.C. §§ 2412(d)(2)(D)). Following the enactment of the EAJA in 1981, some circuits followed the more restrictive "litigation theory": In determining whether the "position" of the government was substantially justified, the reviewing court or agency adjudicator would look *only* at the government's *litigation* position, and *not* at the underlying agency position—the facts which formed the basis of the litigation or adjudication. *Spencer v. NLRB*, 712 F.2d 539 (D.C. Cir. 1983).

For example, if the government is a defendant it may present a technical defense, such as lack of jurisdiction, which is unrelated to the merits of the underlying action. Although the government may lose, by presenting only that defense—assuming that lack of jurisdiction is a substantially justified, or reasonable, legal argument—the government could escape liability for EAJA fees under the litigation theory, regardless of how unreasonable its original action was.

Congress in 1985 ratified the broader "underlying action" approach, in which the court or Administrative Law Judge (ALJ) reviewing a fee application would look at both the government's legal arguments *and* the prelitigation facts of the case on the record to make the substantial justification determination. See H.R. REP. NO. 120, *supra* note 12, at 140-42; *Haitian Refugee Center v. Meese*, 791 F.2d 1489, 1496-97 (11th Cir. 1986).

32. 5 U.S.C. § 504(a)(1) (Supp. IV 1986); 28 U.S.C. § 2412(d) (Supp. IV 1986). The Supreme Court recently addressed the split in the circuits concerning the interpretation of the "substantially justified" standard. In *Pierce v. Underwood*, 108 S. Ct. 2541 (1988), the Court held that the standard should be essentially one of reasonableness. This ruling may limit the effectiveness of the EAJA and reduce government liability for awards, given that since the 1985 reenactment of the EAJA, many courts had been imposing a higher, "more than mere reasonableness" standard on the government. See *infra* notes 95-99 and accompanying text.

33. Only in rare cases has the government escaped liability for an EAJA award under this provision. For instance, only two of 95 EAJA application denials in the federal courts in 1987 were made because special circumstances made an award unjust. 1987 DIRECTOR ADMIN. OFFICE U.S. CTS. ANN. REP. 101 [hereinafter 1987 CTS. REP.].

34. A recent case illustrates how the EAJA works in agency adjudications. In *Phil Smidt & Son v. NLRB*, 810 F.2d 638 (7th Cir. 1987), a former employee of a small company had sought backpay after proving that she had been wrongfully discharged. An NLRB official investigating the case wrote to the company twice, first directing payment of \$920 to the employee, but then later demanding payment of more than \$5,000, based on an affidavit by the employee which falsely claimed that her tax returns were erroneous and that she had suffered a loss of income after her discharge. The company refused to pay such a large amount and a hearing was set solely to determine the amount of backpay. *Id.* at 639-40.

Before the start of the hearing the company offered to pay the original determination of \$920. But the NLRB General Counsel rejected this settlement offer and at the hearing the ALJ found that the company owed only \$631, even less than the original NLRB demand. *Id.* at 640-41.

Having prevailed in the NLRB adjudication, the company sought attorneys' fees by filing an EAJA application with the ALJ. The ALJ dismissed the application, and a panel of the NLRB affirmed, on the grounds that the NLRB General Counsel's position in the case was substantially justified because its legal arguments at the hearing were reasonable. *Id.* at 641.

The Seventh Circuit, however, reversed the NLRB panel's denial of fees because it was based on the wrong legal standard and was unsupported by substantial evidence. *Id.* at 643. The court found

EAJA awards for attorneys' fees in agency adjudications have been rare. In the first three years after the passage of the EAJA, the number of applications and awards and the total dollar amount of all EAJA awards fell far below expectations.³⁵ The lack of applications and the low number of awards were particularly striking in administrative agency adjudications, where Congress had believed that many awards would be made.³⁶ Even when the number and amount of court awards increased,³⁷ the number of administrative awards remained extremely low leading many to proclaim the EAJA a failure in agency proceedings.³⁸ An alternative explanation is that during the Reagan years there has been less agency activity and fewer enforcement initiatives which would spur EAJA applications.³⁹ In either case the consistently small number of agency applications and the low percentage of applications which result in awards, compared with the significantly higher numbers for comparable court cases, suggest that flaws in the statute itself limited the EAJA's impact in agency adjudications in its first three years.

For example, the provisions in the original Act governing standards for judicial review of fee decisions were arguably too restrictive. Judicial review of administrative fee adjudications was discretionary with the federal courts and was under an abuse of discretion standard.⁴⁰ Congress had feared that a large volume of routine appeals of agency fee denials would flood the federal courts.⁴¹ But during the three years that this narrow

that the NLRB Regional Director's position was not substantially justified because it lacked a reasonable basis in fact, regardless of the legal arguments. The court found that the Regional Director made a factual error in increasing the backpay demand, despite the presence of clear evidence which the Regional Director's office had at the time that should have indicated the error and obviated the need for a hearing.

35. The Congressional Budget Office (CBO) estimated that EAJA awards during fiscal years 1982-84 would be \$310 million, based on an estimated 11,200 court awards and 8,100 administrative agency awards. H.R. REP. NO. 1418, *supra* note 12, at 4999-5002. The actual amount of all EAJA awards during those three years was less than \$4 million and the total number of awards was less than 200. H.R. REP. NO. 120, *supra* note 12 at 137.

36. The CBO estimated that awards would be made in some 2,700 administrative cases per year, with an average award of \$7,200 for a total cost to the government of \$19.4 million in fiscal year 1982, and \$62 million total for fiscal years 1982-84. H.R. REP. NO. 1418, *supra* note 12, at 4999-5002. But during fiscal years 1982-1984 only 21 awards were made by administrative agencies, while 223 applications were denied and 160 were still pending. The total amount of the awards was less than \$158,000 for those three years. 1985 CHAIRMAN ADMIN. CONF. U.S. ANN. REP. ON AGENCY ACTIVITIES UNDER THE EQUAL ACCESS TO JUSTICE ACT app. IV [hereinafter 1985 ACUS REP.].

37. Between 1982 and 1985 the number of applications granted in U.S. courts increased from 10 to 420. The percentage of applications granted also increased, from less than 50% in 1982 to more than 70% in 1985. The total amount awarded grew from \$264,339 to \$1,912,768 in that same period. 1987 CTS. REP., *supra* note 33, at 97.

38. See Stewart, *The Equal Access to Justice Act: a Failure in Agency Proceedings?*, Nat'l L.J., May 21, 1984, at 20, col. 1; *Law to Fund Suits Against Agencies Called Ineffective*, L.A. Daily J., June 2, 1983, at 1, col. 6.

39. Telephone interview with Mary Candace Fowler, Staff Attorney, Administrative Conference of the United States (Apr. 20, 1988).

40. Parties seeking review of an ALJ's denial of their fee request had to file for leave to appeal. Pub. L. No. 96-481, § 203(c)(2), 96 Stat. 2325, 2326 (1980) (codified at 5 U.S.C. § 504(c)(2)).

41. H.R. REP. NO. 1418, *supra* note 12, at 4995. Congress also made denial of a petition for

judicial review provision of the original EAJA was in effect, few administrative fee denials were reviewed, and fewer still were reversed.⁴² Thus, when Congress extended and amended the EAJA in 1985, it was no longer concerned with a flood of cases. Congress expanded the opportunity for judicial review by providing for an automatic right to appeal administrative fee decisions, and by changing the standard of review from abuse of discretion to substantial evidence on the record of the agency.⁴³ This liberalized standard of judicial review made possible awards in cases such as *Phil Smidt & Son v. NLRB*.⁴⁴ Expanded judicial review is especially important given the low number of agency awards, and the obvious reluctance of agency administrators to grant large awards out of their own budgets, even in the rare cases where they do make awards.⁴⁵ In the asylum context, judicial review is especially important because so many significant legal victories have been won in the federal courts on appeal from agency adjudications.⁴⁶

II. APPLICATION OF THE EAJA TO ASYLUM PROCEEDINGS

This Section describes current asylum application and adjudication procedure and then reviews the legal debate over whether the EAJA applies to those adjudications. It argues that the EAJA should apply to asylum adjudications by demonstrating that the EAJA's three objectives will be furthered by its use in that context.

A. *Asylum Procedure*

Asylum is one of two principal forms of statutory relief available to an alien in the United States who claims that she will be persecuted if deported to her country of origin.⁴⁷ Asylum is a temporary but highly de-

leave to appeal unreviewable. *Id.*

42. From 1982-1984 the courts granted only four of seven petitions leave to appeal an agency's fee determination, and reversed the agency in only one of those cases. 1982 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 183; 1983 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 82; 1984 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 93.

43. Pub. L. No. 99-80, § (1)(d), 99 Stat. 183, 184 (codified at 5 U.S.C. § 504(c)(2)). Congress believed that the new language was more consistent with the normal scope of judicial review of administrative actions. H.R. REP. NO. 120, *supra* note 12, at 145.

44. 810 F.2d 638 (7th Cir. 1987); see *supra* note 34.

45. See *supra* note 100.

46. The Board of Immigration Appeals (BIA), the administrative appellate court for asylum hearings, has been reversed often. See, e.g., *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987) (reversing BIA and holding "well-founded fear" standard for asylum not equivalent to higher standard of "clear probability" of persecution for withholding of deportation); *Desir v. Ilchert* 840 F.2d 723 (9th Cir. 1988) (BIA erred in concluding that beatings, arrests and assaults on Haitian did not constitute political persecution); *Arteaga v. INS*, 836 F.2d 1227, 1229 (9th Cir. 1988) ("The BIA has frequently resorted to catchall statements in its asylum decisions . . . [regardless of whether correct legal standard was actually applied]."); *Shahandeh-Pey v. INS*, 831 F.2d 1384 (7th Cir. 1987) (BIA's discretionary denial of asylum was abuse of discretion where Board failed to weigh or even mention well-founded fear of asylum seeker).

47. 8 U.S.C. § 1158(a) (1982). The other principal statutory remedy is a "withholding of depor-

sired form of relief because it permits an alien to apply for permanent residence status after one year and to receive important benefits such as work authorization.⁴⁸

To gain asylum an applicant must first establish eligibility for relief by demonstrating a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁴⁹ Then, the IJ must exercise the discretion delegated by the Attorney General, to grant or deny asylum.⁵⁰ Asylum adjudication thus involves two separate determinations which are subject to different standards of judicial review. Federal courts review asylum eligibility determinations under a substantial evidence standard and the discretionary determination is reviewed under abuse of discretion.⁵¹

The asylum seeker may follow two different procedural routes to gain asylum but can probably only recover EAJA fees by following the second of these. First, if no deportation proceedings have been instituted against her, she may affirmatively apply for asylum by requesting an interview with the office of the local district director of the INS.⁵² In most cases, the EAJA would probably not apply to the district director's decision on an affirmative application for asylum because there is no adversary adjudication and the government is not represented by counsel.⁵³

tation," under 8 U.S.C. § 1253(h). In contrast to asylum, the Attorney General is *required* to withhold deportation if an IJ determines that an alien's freedom would be threatened upon return to her native country on the basis of her "race, religion, nationality, membership in a particular social group, or political opinion." *Id.*; see *INS v. Stevic*, 467 U.S. 407 (1984) (alien must show "clear probability of persecution" to be eligible for withholding). Thus withholding of deportation is mandatory if the alien meets the statutory requirements for eligibility. Asylum, by contrast, is discretionary. See *Cardoza-Fonseca*, 107 S. Ct. at 1211 n.6.

48. 8 U.S.C. § 1158(b) provides that the Attorney General may revoke a grant of asylum if changed conditions in the asylee's country of nationality make him ineligible.

There is no limit on the number of persons who may receive grants of asylum each year, but only 5,000 asylees may become permanent residents in a given year. 8 U.S.C. § 1159(b) (1982). Work authorization is now mandatory for any asylum *applicant* who can show she has filed a "nonfrivolous" application. 8 C.F.R. §§ 274(a.12(c))(1988). For a discussion of the INS's interpretation of "nonfrivolous," see 64 INTERPRETER RELEASES 873 (July 27, 1987).

49. 8 U.S.C. § 1101(a)(42)(A) (1982).

50. 8 C.F.R. § 242.8(a) (1988). Congress made asylum discretionary primarily to prevent refugees who could resettle in a third country from receiving asylum. See generally D. MARTIN, MAJOR ISSUES IN IMMIGRATION LAW 81 & n.43 (1987). For a full exploration of the increasingly important and evolving standards of discretion, see Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 VA. J. INT'L L. 1 (1987).

51. *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1211 n.6 (1987).

52. 8 C.F.R. § 208 (1988). After the interview, the INS sends the application to the State Department for an advisory opinion (district directors and IJs are required to request these advisory opinions under existing INS regulations, 8 C.F.R. §§ 208.7, 208.10(b) (1988)), and then issues a grant or denial. If the INS rejects the claim, the applicant may not appeal directly, but may renew the claim before an IJ, who would review the matter *de novo*, if the INS institutes deportation hearings. 8 C.F.R. § 208.9 (1988). The INS has proposed new asylum regulations which would eliminate the role of district directors, replacing them with specially trained asylum officers. 53 Fed. Reg. 11,300 (1988) (to be codified at 8 C.F.R. §§ 3, 208, 236, 242 & 253) (proposed Apr. 6, 1988).

53. See *infra* notes 65-67. When Congress in 1985 expanded the scope of the "position" of the agency which must be substantially justified to include underlying agency action, see *supra* note 31, it concluded that the government would not be liable for "mere preliminary or procedural decisions which would not be subject to judicial review." H.R. REP. NO. 120, *supra* note 12, at 141. Thus, a

The EAJA would, however, apply to appellate review of an asylum claim raised in a second way: during a deportation hearing before an IJ.⁵⁴ The decision of the IJ is appealable to the Board of Immigration Appeals (BIA), whose decision may be appealed directly to the federal courts of appeals, and from there to the Supreme Court.⁵⁵

The government may be exposed to liability for an EAJA award in asylum hearings for either appealing a grant of asylum by an IJ,⁵⁶ or for contesting an asylum seeker's appeal of an IJ denial.⁵⁷ Liability might arise where the court of appeals determines that the IJ or the BIA applied the wrong legal standards or failed to articulate the reasons for a denial of asylum, and the government's argument on appeal lacks substantial justification.⁵⁸

This is an unusual posture for EAJA agency adjudications. In other

district director's decision would probably not be subject to EAJA coverage because it would be considered a "preliminary decision" not subject to judicial review.

54. Procedurally, two distinct entities within the Justice Department participate in asylum adjudication: 1) The INS, which litigates against asylum seekers and is thus liable for fee awards; and 2) the Executive Office of Immigration Review (EOIR), an independent unit of IJs who conduct deportation hearings (the forum in which asylum claims are adjudicated) and the five member BIA, which reviews IJ decisions de novo. The EOIR was established by regulation in 1983 to provide for IJ independence from the INS. Previously, IJs were a part of the INS and depended on the local INS district director for budgetary and administrative support. See T. ALENIKOFF & D. MARTIN, IMMIGRATION PROCESS AND POLICY 87-91 (1985).

In most cases EAJA fees would be available only on appeals of an IJ's decision. See *infra* notes 56-58.

55. 8 U.S.C. § 1105(a) (1982). The federal circuit court of appeals reviews asylum eligibility decisions under a "substantial evidence" standard. *Id.* § 1105 (a)(4).

56. See, e.g., *In Re Issam Arabo*, (1988) (unpublished IJ decision on file with author). In that case the IJ awarded EAJA fees after the INS first appealed the IJ's decision granting Arabo discretionary adjustment of status relief, but then dropped the appeal. The IJ awarded fees only for the work performed by Arabo's attorney contesting the meritless appeal. *Id.* at 3.

57. See *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 520 (1st Cir. 1987) (success at preliminary stages may be some evidence of substantial justification, but not dispositive). A common scenario under which fees might be awarded is if the court of appeals finds the asylum seeker eligible for asylum because the record demonstrates a well-founded fear, but remands for a discretionary determination by the BIA. Success on the eligibility issue would most likely constitute success on a significant issue and the appellant could be eligible for EAJA fees for work performed by his attorney on that issue before the BIA, even though the BIA may have ultimately denied asylum on discretionary grounds.

58. The INS could be liable for EAJA fees in a deportation hearing where no appeal is taken if the asylum seeker contests the grounds for deportation. Suppose the asylum seeker affirmatively applies for asylum and after an interview the district director denies her application. She cannot appeal the decision but thereafter the INS attempts to deport her and she requests a deportation hearing before an IJ. If she contests the grounds for the deportation order and wins, she could apply for EAJA fees for defending against the deportation order in the hearing. Her claim would be that the government's position in prompting the deportation hearing was not substantially justified.

But in many asylum cases, because the asylum seeker concedes the grounds for deportation (thus conceding that the INS's position on deportation is substantially justified), she can probably only win EAJA fees on appeal. By raising her asylum claim as an affirmative request for relief from deportation, the asylum seeker bears the burden of proof establishing that she has a well-founded fear of persecution. Even if she establishes eligibility and is granted asylum by the IJ, the INS can probably not be held not substantially justified for merely opposing the asylum claim in the initial hearing before the IJ, because the applicant is not contesting any action on the government's part that resulted in the deportation hearing. The underlying issue is deportation, which the applicant concedes. In this situation EAJA fees would only be available on appeal of the IJ's decision.

administrative settings where the EAJA applies, such as NLRB adjudications, the EAJA award may be made against the government merely for causing the adversary adjudication to be held; the EAJA fee applicant contests the government's action that prompted the adjudication in the first instance. But the fact that EAJA fees will in many asylum cases only be available for work performed on appeals to the BIA or the federal courts of appeals will not limit the Act's effectiveness because so many asylum cases are won only on appeal.⁵⁹

B. Escobar Ruiz and the Legal Debate

The INS and the Justice Department have long contended that the EAJA does not apply at all to deportation hearings,⁶⁰ but the issue was not tested in court until recently. In *Escobar Ruiz I*,⁶¹ and *Escobar Ruiz II*,⁶² the INS objected to the application of the EAJA to deportation proceedings on two major grounds. First, the INS claimed that the Immigration and Naturalization Act specifically precludes the application of any fee-shifting statute to immigration hearings because the Act gives the alien a right to counsel in such hearings, but not at the government's expense.⁶³ The court in *Escobar Ruiz I* squarely rejected this argument.⁶⁴

The INS then petitioned for rehearing, arguing that the EAJA only

59. See *supra* note 46.

60. The regulations implementing the EAJA in Justice Department administrative proceedings, 47 Fed. Reg. 15,776 (1982) (codified at 28 C.F.R. § 24.103 (1988)), omit deportation hearings from the list of covered proceedings.

Although Congress did not specifically consider immigration proceedings during the debate over the passage of the EAJA, the Act was intended to have general application to agency adversary adjudications involving eligible parties. See H.R. REP. NO. 1418, *supra* note 12, at 4988. This is especially clear when the EAJA is contrasted to other fee-shifting statutes which are issue-specific. See The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559, 90 Stat. 2641, (amending 42 U.S.C. § 1988).

61. 787 F.2d 1294 (9th Cir. 1986). Plaintiff, a Salvadoran trade unionist, sought asylum but was ordered deported at a hearing in which he appeared pro se. Plaintiff subsequently found pro bono counsel and moved to reopen and file for asylum. Before the circuit court ruled on his appeal, the INS voluntarily reopened the proceedings. Plaintiff then filed for EAJA fees for his attorney's work before the Ninth Circuit and the BIA. *Id.* at 1296. Though the court held that the EAJA did apply to work done in IJ and BIA immigration proceedings, it did not address the central issue of whether such proceedings are deemed "adversary adjudications" under the EAJA. See *infra* notes 64-66.

62. 813 F.2d 283 (9th Cir. 1987).

63. The INS argued that the EAJA's key section contains an exception which precludes its application to immigration proceedings. The EAJA applies "except as otherwise specifically provided by statute." 28 U.S.C. § 2412(d)(1)(A) (emphasis added). The INS argued that a provision in the Immigration and Naturalization Act (INA) "specifically otherwise provided" (thus precluding application of the EAJA) that "[i]n any [BIA or IJ proceedings] the person concerned shall have the privilege of being represented (at no expense to the Government)" barred the application of the EAJA. *Escobar Ruiz I*, 787 F.2d at 1296-97 (quoting 8 U.S.C. § 1362 (1982)(emphasis added)).

64. 787 F.2d at 1296-97. The court held that Congress, in enacting the EAJA, intended the phrase "except as otherwise specifically provided by statute" to prevent the EAJA from superseding other existing specific fee-shifting statutes. But the INA is not such a statute, since it contains no provision for awarding fees. *Id.* Therefore, the court concluded, "[d]eportation proceedings before the IJ and the BIA . . . are precisely the type of proceedings to which Congress intended [the EAJA] to apply." *Id.*

applies to administrative proceedings that are "adversary adjudications,"⁶⁵ and that immigration proceedings are not included within that term.⁶⁶ The court, in *Escobar Ruiz II*, dismissed this argument as well, reasoning that the legislative history of the EAJA shows that Congress meant to cover this type of proceeding.⁶⁷

C. *Deterring Routine INS Opposition to Asylum Claims*

In addition to the arguments advanced by the Ninth Circuit, this Note argues for application of the EAJA to asylum proceedings to further the three purposes of the Act: enabling small parties to defend against unjustified government actions, deterring such government action, and improving the quality of government policy through increased exposure to litigation.

Critics have pointed to several aspects of INS asylum procedure and policy that contravene the asylum provisions of the 1980 Refugee Act: ideological biases in asylum determinations,⁶⁸ the powerful weight accorded general foreign policy considerations through reliance on State Department advisory opinions on asylum claims,⁶⁹ and denial of notice of both the right to apply for asylum and the right to counsel in asylum hearings.⁷⁰

Application of the EAJA in asylum adjudications by IJs and the BIA will serve the three purposes of the EAJA by: (1) aiding asylum applicants who are often deterred from pressing their claims on appeal, (2) deterring the INS from litigating clearly meritorious claims or pursuing unjustified policies, and (3) promoting more adversarial testing of the gov-

65. Fee awards were limited to adversary adjudications partly to narrow the scope of the Act and thus reduce its estimated costs. H.R. REP. NO. 1418, *supra* note 12, at 4993.

66. The EAJA defines "adversary adjudication" as "an adjudication under section 554 of this title [the Administrative Procedure Act] in which the position of the United States is represented by counsel. . . ." 5 U.S.C. § 504(b)(1)(C) (Supp. IV 1986). Thus administrative proceedings are covered by the EAJA if: (1) they are considered adversary adjudications under the APA; and (2) the government is represented in those proceedings by counsel. The government has conceded that it is represented by counsel in deportation hearings. *Escobar Ruiz III*, 838 F.2d 1020, 1023 n.2 (9th Cir. 1988).

It argues, however, that the phrase "adjudication under section 554 [of the APA]," meant only those proceedings that were *governed directly* by the APA. Since immigration proceedings are not governed by the APA, the INS claimed that they are thus not covered by the EAJA. In support the INS cited *Marcello v. Bonds*, 349 U.S. 302 (1955) (hearing provisions of the APA do not apply to deportation hearings). *Escobar Ruiz II*, 813 F.2d 283, 287 (1987).

67. The court rejected the argument in favor of *Escobar Ruiz's* position that "an adjudication under section 554" meant an adjudication *as defined under* that section. 813 F.2d at 291. The court reasoned that both interpretations were plausible, but found stronger support for *Escobar Ruiz's* broader interpretation in the legislative history of the EAJA and in the Statement accompanying the Model Rules for the Implementation of the EAJA. *Id.* at 289.

The court then held that deportation hearings were adversary adjudications as defined under 5 U.S.C. § 554 (1982). 813 F.2d at 283, *aff'd Escobar Ruiz III*, 838 F.2d 1020, 1030 (9th Cir. 1988). This section defines adjudications as those "required by statute to be determined on the record after opportunity for an agency hearing . . ." 5 U.S.C. § 554 (a). Deportation proceedings are required to be on the record after a hearing. *Id.*

68. *See infra* notes 81-82.

69. *Id.*

70. *See Orantes-Hernandez v. INS*, 685 F. Supp. 1488, 1506-08 (C.D. Cal. 1988).

ernment's actions towards asylum seekers and thus fostering greater precision and fairness in the INS's interpretation of the 1980 Refugee Act.

First, availability of the EAJA may attract more representation for asylum seekers,⁷¹ whose numbers have increased significantly since the termination of the Immigration Reform and Control Act of 1986 (IRCA) amnesty program.⁷² Given the asylum seeker's cultural disadvantages,⁷³ legal representation is especially critical to her success.⁷⁴ Although refugees seeking asylum have a statutory right to be represented by counsel, they have no right to appointed counsel.⁷⁵ Since asylum seekers are often too poor to retain private counsel and are generally ineligible for representation by legal services offices using Legal Services Corporation funding,⁷⁶ many are without representation.⁷⁷

71. Attorneys may be attracted by the possibility of receiving fees in meritorious cases and underfunded legal service organizations may be able to stretch their limited budgets with fee awards. *Cf. Evans v. Jeff D.*, 475 U.S. 717, 741 (1986) (Civil Rights Attorney's Fees Awards Act improves civil rights victims' ability to employ counsel).

72. Pub. L. No. 99-603, 100 Stat. 3359 (1986). *See Salvadorans and Guatemalans After Amnesty: Squeezed Out of Jobs, Afraid to Go Home*, REFUGEE REP., May 20, 1988, at 4-5. One reason for this reported increase is that recently liberalized INS employment authorization regulations permit asylum applicants who file a nonfrivolous application to receive work authorization immediately. 8 C.F.R. §§ 274a.12(c)(8), 274a.13 (1988). Combined with enforcement of the employment sanctions of IRCA, many illegal aliens who previously feared applying for asylum and who did not apply or were rejected for amnesty under IRCA may now apply for asylum in order to retain or to gain employment. *See Martin, The End of De Facto Asylum: Toward a Humane and Realistic Response to Refugee Challenges*, 18 CAL. W. INT'L L. REV. 161, 163-64 (1987).

73. Many asylum seekers do not speak English, *see Nunez v. Boldin*, 537 F. Supp. 578, 586 (S.D. Tex. 1982), or are unfamiliar with our legal system and of their legal right to apply for asylum. *See Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 359 (C.D. Cal. 1982). Few can navigate complex immigration laws and asylum procedures on their own. *See Escobar Ruiz II*, 813 F.2d 283, 292 (9th Cir. 1987).

74. *See Reyes-Palacios v. INS*, 836 F.2d 1154, 1155 (9th Cir. 1988). Lawyers help document threats and persecution, which is especially important since refugees rarely have much evidence. An attorney can counsel the refugee and explain options. *See Note, Toward a Meaningful Right to Counsel for Refugees in Exclusion Proceedings*, 11 N.Y.U. REV. L. & SOC. CHANGE 297, 302 (1983).

Counsel must persuade the refugee to present her testimony in the best possible light to an IJ. This is difficult because asylum seekers often fear and distrust government officials, given their unhappy experiences with authorities in their native countries. Statement of Lynn Alvarez of El Rescate, New York University Conference on Immigration Reform (Mar. 7, 1987) (on file with author). Without counsel, asylum seekers tend to make inconsistent and damaging statements to IJs and the INS because they say what they think a particular official wishes to hear at the time. *See E. HULL, WITHOUT JUSTICE FOR ALL* 108 (1985).

75. 8 U.S.C. § 1362 (1982).

76. 45 C.F.R. §§ 1626.3, 1626.4 (1988). Except to the limited extent that legal services offices receive special, non-LSC funding, they cannot represent undocumented aliens seeking political asylum.

77. No definitive figures exist regarding the level of representation for asylum seekers. However, especially at the several detention centers operated by the INS in remote areas, there are generally only a handful of inexperienced attorneys available to represent the thousands of asylum seeking detainees. *See Note, INS Transfer Policy: Interference with Detained Aliens' Due Process Right to Retain Counsel*, 100 HARV. L. REV. 2001, 2005-06 (1987). When the newest and largest (capacity 6000) detention center opened in 1986 in Oakdale, Louisiana—two hundred miles from a major city—there were five attorneys in the town, none of whom had ever taken an immigration case. Interview with Michael Posner, Executive Director of the Lawyers Committee For Human Rights in New York City (Apr. 14, 1986).

The effect of the INS detention program is to further deny asylum seekers' access to counsel and increase the difficulties they face in understanding their options and applying for asylum. *See*

Second, the EAJA may deter routine INS opposition to asylum claims by exposing the INS to fee awards in cases in which opposition is not justified under the facts or the law. Under the Reagan Administration the INS instituted a new recruitment policy to attract younger and more aggressive trial attorneys, many of them from the Justice Department, to prosecute deportation cases. The result has been vigorous opposition to adjudicated asylum claims, often irrespective of the merits, in contrast to the traditionally passive approach to litigation taken by INS trial attorneys.⁷⁸

The deterrent effect of the EAJA may be particularly strong in the asylum context because the INS has already been subject to some of the largest EAJA awards made in civil litigation since the passage of the Act.⁷⁹ Since the same INS lawyers who worked on these court cases litigate and supervise individual asylum cases before the BIA, they may have learned from their experiences and change their practices.

Further, the EAJA may deter the INS from considering ideological bias and foreign policy concerns, which, critics contend, continue to dominate the asylum process.⁸⁰ Evidence suggests, for example, that it is much easier for aliens from Communist nations or countries hostile to the United States to obtain asylum, irrespective of the strength of their individual claims.⁸¹ A prime source of this foreign policy bias is the declining but still significant influence that the State Department has over asylum decisions through the customary issuance of advisory opinions.⁸²

Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1501-02, 1509-11 (C.D. Cal. 1988); Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir. 1985); Helton, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy—Foreword*, 21 HARV. C.R.-C.L. L. REV. 493, 499 (1986); Helton, *The Legality of Detaining Refugees in the United States*, 14 N.Y.U. REV. L. & SOC. CHANGE 353, 365 (1986).

78. Interview with Doris Meissner, Senior Fellow, Carnegie Endowment for International Peace and former Acting Commissioner of the INS (May 2, 1988).

79. See *Haitian Refugee Center, Inc. v. Smith*, 644 F. Supp. 382, 387-88, 393 (S.D. Fla. 1984) (awarding \$441,000 in EAJA fees where government consciously developed Haitian program to facilitate deportation without consideration of requests for asylum and INS "used its considerable resources to oppress plaintiff class"), *aff'd*, 791 F.2d 1489 (11th Cir. 1986); *Louis v. Nelson*, 646 F. Supp. 1300 (S.D. Fla. 1986) (EAJA award exceeding \$ 1 million for not substantially justified government policy of mass exclusion hearings and detention for all Haitian refugees effected without notice or publication).

80. See *supra* note 3.

81. A review of cases decided by INS district directors (statistics on asylum adjudications before IJs are not currently available) during the 1987 fiscal year shows that the range of the percentages of asylum grants made (versus the number decided) for applications from nations hostile to the United States was 84% (Syria and Nicaragua) to 20% (Hungary). For seven Western aligned nations the range was 26% to 0.0%, with El Salvador, Haiti, Guatemala, Honduras and the Philippines all below 5%. INS statistics reprinted in REFUGEE REP., Dec. 18, 1987, at 15.

82. IJs and the BIA often defer to the "advisory" opinions issued by the State Department's Bureau of Human Rights and Humanitarian Affairs (BHRHA), because they lack independent knowledge about political conditions in an asylum seeker's native country. See Preston, *Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations?* 45 MD. L. REV. 91, 112-114, 128-33 (1986); Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J.L. REF. 183, 193 (1984). The State Department opinion became the decisive factor in many asylum

Since the advisory opinion usually becomes a part of the record of the asylum hearing, it could be reviewed along with the rest of the government's position to determine whether the INS was substantially justified in contesting an asylum claim. If the INS relied on the advisory opinion, and the opinion stated no individualized reason for recommending against finding eligibility for asylum, the INS could be found liable for an EAJA award for contesting an applicant's case on appeal. Such an award could deter future reliance on the State Department Report.

Finally, availability of the EAJA in asylum adjudications will serve a third EAJA objective by spurring increased litigation of asylum claims and thus promoting greater BIA judicial review and modification of emerging government standards of discretion. After *INS v. Cardoza-Fonseca*,⁸³ which significantly liberalized the standards for asylum eligibility, more asylum seekers are passing the eligibility hurdle; thus, more IJs are deciding asylum cases on discretionary grounds.⁸⁴ The establishment of standards for the exercise and limitation of discretion through increased litigation will be critical to the success of future asylum seekers. While the standard of judicial review for a discretionary denial of asylum is less stringent (abuse of discretion) than the standard for eligibility determinations (substantial evidence), several appeals of discretionary asylum denials have been successful.⁸⁵

cases. See Preston, *supra*, at 128-33; Note, *Discrimination in Asylum Law: The Implications of Jean v. Nelson*, 62 IND. L.J. 127, 141-2 (1986).

This process disadvantages the asylum seeker because she cannot directly confront the State Department sources at her hearing. Further, the advisory opinion is often based on a political compromise within the State Department in which U.S. foreign policy objectives, not factors appropriate to individual adjudication as required by the 1980 Refugee Act, control. Preston, *supra*, at 117-18. In some instances the advisory opinions contain no references to the facts of an individual case. *Rios-Berrios v. INS*, 776 F.2d 859, 861 (9th Cir. 1985) (undated advisory opinion on petitioner's asylum claim "contain[ed] no reference to facts of petitioner's case," yet concluded petitioner's fear of persecution not well-founded).

Responding to critics who have urged that the State Department's role in the adjudication process be limited to offering information on general country conditions rather than recommendations on individual cases, see Preston, *supra*, at 138-40, the INS recently indicated that the State Department will reduce the number of advisory opinions it issues. *BHRHA Cuts Down Advisory Opinions*, 64 INTERPRETER RELEASES 1215 (Nov. 2, 1987). In addition the Justice Department has instructed asylum adjudicators to pose specific questions to the BHRHA in cases in which they are unable to render a decision without advice from the State Department. 53 Fed. Reg. 2893 (1988). These regulations may reduce the incidence and influence of non-individualized advisory opinions.

83. 107 S. Ct. 1207 (1987) ("well-founded fear" standard for asylum not equivalent to harder to meet "clear probability" of persecution standard for withholding of deportation).

84. See Anker, *supra* note 50, at 4. In the past, few asylum cases were decided on discretionary grounds, most were based on eligibility. *Id.*

85. See, e.g., *Castro-O'Ryan v. INS*, 847 F.2d 1307 (9th Cir. 1988) (in exercise of discretion BIA must make findings; BIA failed to specify facts relevant to its discretionary denial and failed to indicate it had considered any factor other than drug conviction); *Shahandeh-Pey v. INS*, 831 F.2d 1384 (7th Cir. 1987) (BIA failed to weigh or even mention relevant factors in discretionary asylum denial).

Where the law of discretion in asylum cases is clear, for instance that an asylum seeker's manner of entry into the United States is only one of several factors which must be considered in exercising discretion to grant or deny an eligible asylum applicant, *Matter of Pula*, Interim Dec. No. 3033 (BIA Sept. 22, 1987), the INS may not be substantially justified in opposing an eligible applicant's appeal from an IJ's adverse denial of discretion based solely on manner of entry.

III. RECOMMENDATIONS FOR STRENGTHENING THE EAJA IN THE AGENCY CONTEXT

While application of the EAJA to asylum adjudications furthers the purposes of the EAJA by aiding asylum seekers and deterring unjustified INS litigation, the EAJA is not a perfect vehicle for achieving its own goals. This Section discusses two proposed clarifications of the EAJA that would strengthen its application in the asylum context. Both recommendations stem from and build on the 1985 amendments to the EAJA that clarified and liberalized the terms of the original Act to counter restrictive court and agency interpretations. First, Congress should clarify the "substantially justified" standard and overrule the recent restrictive Supreme Court interpretation of the phrase. Second, the Justice Department should prohibit excessive agency review of fee decisions made by IJs or the BIA.

A. Amend the "Substantially Justified" Standard

The leading reason cited for denials of EAJA fee awards is that the government has met its burden of showing that its position was substantially justified.⁸⁶ But the phrase is not defined in the text of the EAJA, and the circuits have split over its interpretation. Prior to the 1985 reenactment, a majority of circuits interpreted "substantially justified" as mere reasonableness.⁸⁷ The legislative history of the *original* EAJA supports this position.⁸⁸ But a "more than mere reasonableness" standard is supported by the legislative history of the 1985 EAJA Amendments,⁸⁹ although Congress did not actually amend the statutory language.⁹⁰ Since

86. For fiscal year 1987, 61 per cent of denials in the federal courts were made because a court found substantial justification of the government's position. 1987 CTS. REP. *supra* note 33, at 101. In agency adjudications, the comparable figure for fiscal year 1985 (the last year for which these figures are available) is 40 per cent. 1985 ACUS REP., *supra* note 36, at app. V.

87. But some circuits initially held the government to a slightly higher standard than "reasonableness." See *Cinciarelli v. Regan*, 729 F.2d 801, 804 (D.C. Cir. 1984).

88. H.R. REP. NO. 1418, *supra* note 12 at 4992 ("The test of whether or not a government action is substantially justified is essentially one of reasonableness. . . . the government must show that its case had a reasonable basis in law and fact.").

An important caveat is that the Report concluded that where a prevailing party "has had to engage in lengthy administrative proceedings before final vindication of his or her rights in the courts, the government should have to make a strong showing to demonstrate that its action was reasonable." *Id.* at 4997 (emphasis added). See *NRDC v. EPA*, 703 F.2d 700, 712 (3d Cir. 1983) (applying strong showing standard because "EPA knew all along that its position was legally untenable" and finding EPA not substantially justified). This implies a higher than "mere reasonableness" standard for those cases, for instance, in which an asylum seeker had to litigate his clearly meritorious claim case to the federal court of appeals just to establish her eligibility for asylum.

89. See H.R. REP. NO. 120, *supra* note 12, at 138. "Because in 1980 Congress rejected a standard of 'reasonably justified' in favor of 'substantially justified,' the test must be more than mere reasonableness." *Id.*

90. Congress may have believed that the clarification in the House Report, the authoritative legislative history for the 1985 amendments, would suffice to offer the courts direction on interpretation. One commentator has suggested that Congress did not change the language because it felt that the issue was complex and better left to be adjudicated on a case by case basis with guidance from legislative history. *Equal Access to Justice Act Amendments: Hearings on H.R. 5059 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*,

1985 six circuits have adhered to this "more than mere reasonableness" test;⁹¹ four others still retain the "mere reasonableness" standard;⁹² and three circuits have failed to decide the issue.⁹³ Agency adjudicators have also divided on the standard for substantial justification.⁹⁴

Most recently, in *Pierce v. Underwood*,⁹⁵ the Supreme Court held, by a 5-3 majority, that "substantially justified" means "justified to a degree that could satisfy a reasonable person," which it equated with the "mere reasonableness standard."⁹⁶ Justice Scalia, writing for the majority, rejected as unauthoritative the legislative history in the House Report of the 1985 reenactment that suggested that "more than mere reasonableness" was the correct standard.⁹⁷ Justice Brennan, joined by Justices Marshall and Blackmun, argued in dissent for the more than mere reasonableness standard, based on a full reading of the legislative history.⁹⁸

The "more than reasonableness" standard conforms with the legislative history of the 1985 Amendments and the purpose of the EAJA. In view of the restrictive holding in *Underwood*, Congress should amend the text of the EAJA to adopt this broader interpretation. The "more than mere reasonableness standard" would not require an automatic fee award in all cases in which substantial evidence does not support the government's position (the standard for judicial review of eligibility for asylum claims).⁹⁹

98th Cong., 2d Sess. 79 (1984) (Statement of David Stewart, on behalf of Small Business League Defense Comm.).

91. See, e.g., *Gavette v. Office of Personnel Management*, 808 F.2d 1456, 1467 (Fed. Cir. 1986) (en banc) ("clearly reasonable"); *Federal Election Comm'n v. Rose*, 806 F.2d 1081, 1090 (D.C. Cir. 1986) ("slightly more than reasonable"); *Lee v. Johnson*, 799 F.2d 31, 38 n.7 (3d Cir. 1986) (more than merely reasonable); *Riddle v. Secretary*, 817 F.2d 1238, 1244 (6th Cir. 1987) (same), *vacated and reh'g granted*, 823 F.2d 164 (6th Cir. 1987); *United States v. 1,378.65 Acres of Land*, 794 F.2d 1313, 1318 (8th Cir. 1986) ("clearly reasonable, well founded in law and fact, solid though not necessarily correct"); *Haitian Refugee Center v. Meese*, 791 F.2d 1489, 1497 (11th Cir. 1986) (more than mere reasonableness).

92. *Pullen v. Bowen*, 820 F.2d 105, 108 (4th Cir. 1987); *Phil Smidt & Son, Inc. v. NLRB*, 810 F.2d 638, 642 n.5 (7th Cir. 1987); *Russell v. National Mediation Bd.*, 775 F.2d 1284, 1289 (5th Cir. 1985); *United States v. Yoffe*, 775 F.2d 447, 449-50 (1st Cir. 1985).

93. See *Rosado v. Bowen*, 823 F.2d 40, 42 (2d Cir. 1987); *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 498 (9th Cir. 1987); *United States v. Charles Gyurman Land & Cattle Co.* 836 F.2d 480, 483 (10th Cir. 1987) (permitting district courts to articulate test as clearly reasonable or reasonable).

94. See e.g., *Appeal of Input Output Computer Services, Inc.*, GSBGA No. 8435(7090) at 14 (available on Westlaw 1988) (clearly reasonable); *A & J Construction Co., Inc. Application for Attorney Fees*, IBCA No. 2376-F, at 5 (available on Westlaw 1988) (same).

95. 108 S. Ct. 2541 (1988).

96. *Id.* at 2550.

97. *Id.* at 2550-01 Justice Scalia wrote that the House Committee Report on the reenactment of the EAJA endorsing the more than mere reasonableness standard inexplicably contradicted prior precedent and original legislative history which supported the mere reasonableness standard. *Id.* at 2551.

98. *Id.* at 2555-57. Justice Brennan pointed out that in originally enacting the EAJA the Senate considered but rejected the language "reasonably justified" in favor of "substantially justified" and that it did not intend to equate "substantial" with "reasonable." Justice Brennan also stressed that the 1985 legislative history should be given some weight and noted that several circuits had adopted a higher than mere reasonableness standard following that directive in the 1985 House Report. *Id.* at 2555-57.

99. For an early argument in favor of automatic fee awards see Note, *Reenacting the Equal Access to Justice Act: A Proposal for Automatic Attorney's Fees Awards*, 94 YALE L. J. 1207 (1985).

But it would ensure that the government will not escape liability for an award when an agency adjudicator or a court finds only some basis for reasonableness in the government's position.

B. *Limit Agency Review of Fee Decisions*

Another flaw in the EAJA is the ambiguous procedure governing agency review of fee decisions made by administrative adjudicators. The 1985 EAJA reenactment included an amendment indicating that the "agency" shall make the final administrative decision on a fee application.¹⁰⁰ Previously the Act provided that the final administrative decision on a fee application be made by the adjudicative officer, an IJ, for example. The legislative history of this section is sparse and confusing, but it appears that Congress wanted to ensure that administrative decisions on fees were reviewed along the same appeals path as the merits.¹⁰¹

Because in most administrative adversary adjudications the agency reviews the decision of an ALJ on appeal, it is appropriate that the agency also review the fee decision of the ALJ. Thus, in the asylum context, the BIA should review a fee application decision made by an IJ, because the BIA normally reviews the merits of an IJ's decision.¹⁰²

Under the current EAJA, although the "agency" and not the "adjudicative officer" may make the final fee application decision, it is not clear whether the agency can review a fee decision when it is not entitled to review the merits of the case. The concern is that pursuant to the 1985 amendment, the Justice Department may add an additional layer of administrative review for EAJA fee decisions which does not exist for the merits of an asylum case. For example, the Justice Department might permit or require a high official within the EOIR to review all fee awards made by IJs or the BIA. That official's decision could be the final "agency" decision, even though he has no authority to review the merits of the asylum case upon which the fee decision is based.¹⁰³ The Justice De-

100. "The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section." Pub L. No. 99-80, § 1(a)(3), 99 Stat. 183 (amending 5 U.S.C. § 504(a)(3) (1982)).

101. The House Report gives a very brief explanation for the new language, stating that "it follows the view adopted by the Administrative Conference and recognizes the fact that decisions [on the merits] in administrative proceedings are generally not final until they have been adopted by the agency." H.R. REP. NO. 120, *supra* note 12, at 142.

102. The first bill to reenact the EAJA, H.R. 5479 (1984) (vetoed by President Reagan, *see* Presidential Memorandum of Disapproval of H.R. 5479, 20 WEEKLY COMP. PRES. DOC. 1814-15 (Nov. 8, 1984)), included a section intended "to clarify the original Congressional intent to make fee award decisions of *adjudicative officers* final." H.R. REP. NO. 992, 98th Cong., 2d Sess. 9 (1984). Under this earlier bill, appellate boards in agencies, such as the BIA, would not have been permitted to review fee application decisions, because Congress feared the conflict of interest arising when an agency which must pay fee awards from its own budget reviews such awards made by an ALJ against the agency. *Id.*

103. This problem also arises in contract appeals board cases, where the agency litigates before an independent contract appeals board. Congress explicitly brought these proceedings under the EAJA's coverage in 1985. *See* H.R. REP. NO. 120, *supra* note 12, at 144. Decisions by these boards are

partment's resolution of this question in its newly revised EAJA implementing regulations will be particularly important because if the INS decided to add an additional layer of review for fee decisions, few BIA or IJ awards would likely be upheld on review by the EOIR.¹⁰⁴ This extra layer of review for fee decisions would require prevailing parties to appeal fee denials or reduced award decisions to the federal courts of appeals on a routine basis, which might deter applicants and decrease the effectiveness of the EAJA in immigration proceedings.

IV. CONCLUSION

Applying the EAJA in asylum adjudications would serve the objectives of the EAJA by providing monetary incentive to counsel to pursue appeals of meritorious asylum cases; by deterring unreasonable INS opposition in such cases and unreasonable asylum policies challenged in such adjudications; and finally, by exposing more INS asylum decisions to adversarial testing, thus encouraging greater INS compliance with the asylum provisions of the 1980 Refugee Act. The effectiveness of the EAJA in achieving these objectives will depend on how the Justice Department implements the EAJA and on how Congress reacts to the Supreme Court's decision in *Pierce v. Underwood*. Application of the EAJA is no panacea for the problems faced by asylum seekers in deportation hearings but it may significantly deter unjustified INS opposition to meritorious claims.

generally appealable directly to the federal courts of appeals.

The Administrative Conference of the United States' Model Rules for implementing the EAJA recommend that the fee appeals process in contract appeals board cases conform to the existing merits appeals process. 1 C.F.R. Alt. § 315.308 (1988); see also 1985 ACUS REP., *supra* note 36, at 7 (Model Rules concluded that new language in EAJA not intended to create a new layer of agency review where none existed before, but rather to preserve existing channels of review).

But some agencies rejected the Model Rules approach in their EAJA regulations, allowing the agency to review board EAJA decisions. For example, the National Aeronautics and Space Administration (NASA) regulations require that NASA review fee decisions made by the NASA Board of Contract Appeals. 14 C.F.R. § 1262.308 (1988).

104. The current Justice Department regulations, implemented prior to the EAJA's reenactment, are ambiguous regarding additional review of fee decisions. 28 C.F.R. § 24.307 (1988). They call for the fee decision of the adjudicative officer (here the IJ or the BIA) to be "reviewed to the extent permitted by law by the Department in accordance with the Department's procedures for the type of proceeding involved. The Department will issue the final decision on the application." *Id.* The term "Department" is defined as the "relevant Departmental component which is conducting the adversary adjudication," *id.* at § 24.102(d), which is the Executive Office of Immigration Review (EOIR) for asylum adjudications. See *supra* note 54. The EOIR's procedures for review of asylum adjudications call for direct appeals from the BIA to the federal circuit courts of appeals. Yet the last quoted sentence, mandating that the Department make the final decision on the application, could mean that an additional office or official within the EOIR or perhaps elsewhere in the Justice Department could review the BIA's fee decision.