

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: RAFEH-RAFIE ARDESTANI, Petitioner, V.

IMMIGRATION AND NATURALIZATION SERVICE

CASE NO: 90-1141

PLACE: Washington, D.C.

DATE: October 8, 1991

PAGES: 1 - 37

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY  
SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 RAFEH-RAFIE ARDESTANI, :

4 Petitioner :

5 v. : No. 90-1141

6 IMMIGRATION AND NATURALIZATION :

7 SERVICE :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, October 8, 1991

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States at  
13 11:50 a.m.

14 APPEARANCES:

15 DAVID N. SOLOWAY, ESQ., Atlanta, Georgia; on behalf of the  
16 Petitioner.

17 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,  
18 Department of Justice, Washington, D.C.; on behalf  
19 of the Respondent.

20

21

22

23

24

25

1 CONTENTS

2	ORAL ARGUMENT OF	PAGE
3	DAVID N. SOLOWAY, ESQ.	
4	On behalf of the Petitioner	3
5	LAWRENCE G. WALLACE, ESQ.	
6	On behalf of the Respondent	24
7	REBUTTAL ARGUMENT OF	
8	DAVID N. SOLOWAY, ESQ.	
9	On behalf of the Petitioner	35

1 P R O C E E D I N G S

2 (11:50 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 90-1141, Rafeh-Rafie Ardestani v. Immigration  
5 and Naturalization Service.

6 Mr. Soloway, you may proceed.

7 ORAL ARGUMENT OF DAVID N. SOLOWAY

8 ON BEHALF OF THE PETITIONER

9 MR. SOLOWAY: Mr. Chief Justice, and may it  
10 please the Court:

11 This case addresses the applicability of the  
12 Equal Access to Justice Act, or the EAJA, to deportation  
13 hearings before an immigration judge. More particularly,  
14 this case deals with 5 U.S.C. Section 504, that prong of  
15 the EAJA that applies to administrative proceedings. And  
16 those proceedings, in order to be eligible for EAJA fees,  
17 the Government must be represented by counsel.

18 In this case, the Government, the Immigration  
19 Service, was represented by their trial counsel. In  
20 addition, it is required that the statute say that this  
21 proceeding be determined. It must be determined on the  
22 record. That is the case here. And in addition, the  
23 position of the Government must be not even substantially  
24 justified. Here the Immigration Service produced no  
25 evidence at all in support of its position.



1           The EAJA was enacted to further specific  
2     purposes. One was to aid victims, to help avoid the  
3     situation where someone might have to surrender their  
4     rights and succumb to unjustified Government action just  
5     because of the expense of hiring an attorney. Mrs.  
6     Ardestani's petition for asylum was wrongfully denied and  
7     she was unjustifiably placed in deportation proceedings,  
8     proceedings so complex and with consequences so harsh,  
9     that it was necessary for her to engage an attorney.

10           Another specific purpose of the EAJA statute is  
11     to deter unjustified Government action. And that's done  
12     by holding the agency itself accountable. The Service did  
13     not dispute the Secretary of State's determination that  
14     Mrs. Ardestani had a well-founded fear of persecution were  
15     she to be returned to Iran under the Khomeini regime.  
16     Instead, the Service unwarrantedly asserted that Mrs.  
17     Ardestani had firmly resettled in a third country. They  
18     asserted that even though she had been in a third country  
19     for only 3 days, staying in --

20           QUESTION: We're really not -- those are really  
21     quite peripheral facts, aren't they, Mr. Soloway? What  
22     we're talking about here is whether a deportation  
23     proceeding is an adjudication under Section 554 for  
24     purposes of the EAJA?

25           MR. SOLOWAY: That's correct, Mr. Chief Justice.

1 The EAJA provides broadly for protection for people who  
2 have been subjected to severe agency misconduct. And of  
3 all the possible Government agencies, and of all the  
4 possible agency proceedings, deportation proceedings are  
5 the ones that most specifically meet the EAJA context.  
6 They're the ones where the most harsh consequences meted  
7 out by any agency are meted out -- consequences that may  
8 be tantamount to banishment or exile, or in the words of  
9 Justice Brandeis, "the loss of life and property and all  
10 that makes life worth living." This is particularly so in  
11 the context of asylum where, as here, it had been  
12 determined that the refugee would be subjected to  
13 persecution.

14 Moreover, persons in deportation proceedings are  
15 the very people for whom the remedial measures of the EAJA  
16 most perfectly are met.

17 QUESTION: Mr. Soloway, I mean, that's  
18 all -- yes, I mean, it's very sympathetic, but the fact is  
19 even in criminal trials, when someone is wrongly  
20 prosecuted, and it turns out there was no basis for the  
21 prosecution, EAJA does not reimburse the wrongfully  
22 prosecuted criminal defendant. Although he may have spent  
23 hundreds of thousands of dollars on his defense, he's not  
24 reimbursed, is he?

25 MR. SOLOWAY: That's correct, Your Honor.

1 QUESTION: So, we're here to read this statute.  
2 Is this one of those instances that's reimbursed or one  
3 that isn't? There are some very touching situations that  
4 are not reimbursed. This may be one of them. Can we talk  
5 about the statute?

6 MR. SOLOWAY: Yes, Your Honor.

7 QUESTION: Good. What does it say?

8 MR. SOLOWAY: This statute says that adversary  
9 adjudications, that is the adjudications for which EAJA  
10 applies, are those that are under Section 554. "Under  
11 Section 554" is a term that has been the focus of the  
12 various circuit courts, and it's a term upon which the  
13 majority and the dissentient court below focused. It's an  
14 ordinary, common preposition. It's a word with perhaps as  
15 many as 25 meanings as a preposition.

16 In order for this Court to properly glean the  
17 correct meaning of the definition "under Section 554,"  
18 it's necessary for this Court to look at the entire  
19 statutory scheme. This Court has held that interpretation  
20 of a statute is not an inert exercise in grammatical or  
21 literary composition. Instead, we have to look at what  
22 was the EAJA statute about. And, Justice Scalia, I think  
23 it's important to understand the way that deportation  
24 hearings are precisely those that fit that statutory  
25 scheme.

1           "Under Section 554," those words are merely a  
2 cross reference to the definitional provisions in Section  
3 554. It merely means that Congress was cross-referencing  
4 and importing into the statute the definition in Section  
5 554. That definition requires -- that definition provides  
6 that a statute must require that the hearing be determined  
7 on the record. In addition, there are six express  
8 exemptions, none of which arguably are involved in this  
9 case.

10           Confronted by a foreign language, confronted by  
11 the most harsh consequences meted out, confronted by a  
12 strange culture where the necessity of having a lawyer be  
13 involved are at its apex, deportation proceedings are most  
14 precisely in concert with the EAJA provisions.

15           QUESTION: I don't know. Maybe they more  
16 resemble, in fact, some of our opinions have said that  
17 they, and we've accorded some protections that are  
18 otherwise accordable in criminal proceedings. I mean,  
19 we've analogized them on occasion -- being deported to  
20 criminal proceedings. And if they're analogized to that  
21 rather than other 554 proceedings, then there'd be no  
22 compensation. I don't --

23           MR. SOLOWAY: Your Honor, of course, if they  
24 were tantamount to criminal proceedings, were this Court  
25 to so hold, the Sixth Amendment right to counsel may be



1     invoked.  The -- that's not something that's being urged  
2     in this case.  As a matter of fact, here particularly,  
3     we're talking about someone who has engaged counsel at  
4     their own expense and merely a fee shifting in those  
5     adversary adjudications where the Government has been  
6     abusive.

7                 QUESTION:  Of course the Sixth Amendment right  
8     to counsel is not a right to have counsel paid for.

9                 MR. SOLOWAY:  Well, I'm talking about appointed  
10    counsel, yes, Your Honor.

11                Your Honor, if I understood your earlier  
12    question correctly, you were suggesting that were these to  
13    be viewed as criminal proceedings, deportation  
14    proceedings, because they mete out consequences that may  
15    be as harsh or harsher than many criminal sanctions.  What  
16    seems to follow is that perhaps a person, an indigent  
17    person, is entitled to appointed counsel under the Sixth  
18    Amendment, although the Ardestani case doesn't  
19    specifically require this Court to address that.

20                However, in looking at the statutory scheme and  
21    in understanding what this statute means, it's helpful to  
22    note that in the legislative history there was a change in  
23    the Senate bill from "subject to," the language urged by  
24    the Service, to "under Section 554," and the joint  
25    explanatory statement of the conference committee, which

1 may be particularly probative because it represents the  
2 views of both the House and Congress, stated that  
3 adversary adjudications were those, and I quote, are  
4 defined under the Administrative Procedures Act, where the  
5 agency takes a position through representation by counsel.

6 But it's probably a lot more instructive for  
7 this court to note that there were no discussions about  
8 whether or not different agencies, different categories of  
9 agencies were to be within the scope of EAJA. Instead,  
10 EAJA was a broad remedial statute, and the discussions  
11 were about categories of proceedings, those that  
12 were -- pardon me -- trial like, versus those that are  
13 rule making or price fix -- rate fixing.

14 In addition to that, in order to get -- to  
15 understand the meaning of the common preposition under, in  
16 this particular instance, the EAJA, on its face,  
17 recognizes the Administrative Conference of the United  
18 States as an authority on the EAJA implementation. The  
19 EAJA -- pardon me -- the ACUS chairman is required to be  
20 consulted with in order for --

21 QUESTION: We will resume there at 1:00, Mr.  
22 Soloway.

23 MR. SOLOWAY: Thank you, Your Honor.

24 (Whereupon, at 12:00 p.m., oral argument in the  
25 above-entitled matter was recessed, to reconvene at

1 1:00 p.m.this same day.)

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 AFTERNOON SESSION

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll resume argument  
4 now in No. 90-1141, Ardestani against INS.

5 Mr. Soloway.

6 MR. SOLOWAY: Mr. Chief Justice, and may it  
7 please the Court:

8 More important than the rejection of the Senate  
9 language "subject to" that's been urged by the Government,  
10 and perhaps more important that the joint explanatory  
11 statement of the Conference Committee, that embraced the  
12 very use of the term that we urge here, the EAJA  
13 recognized the ACUS as an authority on the subject of the  
14 EAJA, and there the chairman stated that questions of  
15 EAJA's coverage should turn on substance.

16 The fact that a party has endured the burden and  
17 expense of a formal hearing, rather than technicalities.  
18 This is particularly important because that's precisely  
19 what we're faced with here -- a suggestion that a hyper-  
20 technical interpretation of the word "under" to defeat the  
21 reach of the EAJA statute to those particularly in need of  
22 the statute is to be compared to the functional and more  
23 appropriate interpretation as "as defined in" -- in other  
24 words, just mere importation, a cross-reference of those  
25 terms.



1           And for that reason, the burden should be on the  
2   Government to show that the Congress intended not to have  
3   merely a cross-reference to import those definitional  
4   words, but the Government really should have the burden to  
5   show that Congress intended to cover and protect people  
6   from all sorts of agency adjudications, but not those  
7   particularly in need of it in deportation proceedings.

8           There's no dispute that the EAJA statute applies  
9   to certain Social Security cases, those in which the  
10  Government, as represented by counsel --

11           QUESTION: Have we held that?

12           MR. SOLOWAY: Your Honor, the practice -- let me  
13   answer your question directly. I don't believe that  
14   question has ever been presented. It's been so clear on  
15   its face that it's never been challenged.

16           In those instances where Social Security  
17   proceedings have counsel representing the Government, the  
18   EAJA applies. There have been fees award -- awarded and  
19   there's not been a challenge. And the Government in this  
20   case hasn't urged a different interpretation.

21           As a matter of fact, in the legislative history  
22   of the 1985 reenactment, there's a specific example used  
23   of application of the EAJA statute. In that explicit  
24   example, the Congress -- the legislative history states in  
25   those instances -- for example, Social Security

1 proceedings -- where the Government is represented by  
2 counsel, then in those events -- in those events the EAJA  
3 will apply.

4 QUESTION: But that's in legislative history  
5 materials. There's nothing in the statutory language  
6 itself that answers the question whether Social Security  
7 hearings are covered. Is that correct?

8 MR. SOLOWAY: Except for the interpretation and  
9 the same reasoning that's urged in this case, Your Honor.

10 QUESTION: In other words, if they are under the  
11 APA or whatever it is, then you argue that by a parity of  
12 reasoning, the deportation proceeding is also under?

13 MR. SOLOWAY: Mr. Justice Stevens, that's  
14 largely correct, but there's even more to the argument  
15 than that. In 1971, this case, in the Richardson v.  
16 Perales case, declined to decide the distinction whether  
17 or not Social Security proceedings are technically  
18 governed by the Administrative Procedure Act, or instead  
19 by the more specialized version of the APA, namely the  
20 Social Security Act.

21 That arcane legal distinction has never been  
22 resolved. That debate has never been terminated. Yet  
23 Congress clearly wasn't interested in whether or not  
24 Social Security proceedings were technically governed by  
25 that statute. Instead, they simply wished to categorize

1 by types of proceedings, rather than by agencies or by  
2 governing statutes.

3 QUESTION: Well, isn't there a case in this  
4 Court that says that INS proceedings are not under the  
5 APA? What is that -- Morello?

6 QUESTION: Marcello.

7 QUESTION: Or Marcello?

8 MR. SOLOWAY: Well, Justice White, the Marcello  
9 case was not an EAJA case, but there this Court was called  
10 to look upon a divergence, a unique divergence that  
11 existed 36 years ago between the Immigration Nationality  
12 Act and the APA. Only in the immigration act could one  
13 person have both adjudicatory and prosecutorial functions.  
14 And this Court ruled that in those hearing provisions,  
15 that differed from the APA's hearing provisions, that the  
16 INA proceed -- INA provisions would prevail.

17 QUESTION: Well, does a proceeding under the APA  
18 have any -- what does it mean to say under the APA?

19 MR. SOLOWAY: Your Honor, the statute here says  
20 under Section 554.

21 QUESTION: Yes.

22 MR. SOLOWAY: Do I understand you correctly to  
23 be meaning under Section 554 as opposed to under --

24 QUESTION: Yes.

25 MR. SOLOWAY: Under Section 554, the definition

1 of an adversary adjudication is defined under Section 554.

2 QUESTION: And so what does "under" mean in  
3 your --

4 MR. SOLOWAY: It merely means, Your Honor, a  
5 cross reference, as defined in that section, in accordance  
6 with that section. It merely is a phrase used to  
7 transport, if you would, the definitional section with its  
8 exceptions into the EAJA statute.

9 QUESTION: But these hearings are not conducted  
10 in accordance with that section.

11 MR. SOLOWAY: They are, Your Honor. There --  
12 all of the statutes are identical. There's the  
13 requirement that determinations be made on the record.  
14 There's the entitlement to a personal appearance and  
15 reasonable notice. All of the Section 554 elements, all  
16 of them, without exception, are in place in deportation  
17 hearings.

18 QUESTION: What about the requirement that was  
19 at issue in Marcello?

20 MR. SOLOWAY: That's no longer a distinction.  
21 That distinction has evaporated. No longer do deportation  
22 adjudicative officers have prosecutorial functions. It no  
23 longer exists. Were Marcello to be --

24 QUESTION: But the requirement, the issue is  
25 whether the requirement exists. You're just saying that



1 voluntarily the Government may be complying with it, but  
2 the fact is that the requirement that Marcello addressed  
3 does not exist. And if the requirement does not exist,  
4 then these things are not really under 554.

5 MR. SOLOWAY: Justice Scalia, I respectfully  
6 disagree with you. If the analysis is going to look at  
7 what takes place, what are the rights of people in  
8 deportation proceedings, and are they different, can they  
9 rely upon, are they in some functional and meaningful way  
10 different than those hearings conducted under the  
11 technical governance of the APA, the answer has to be no.  
12 And the fact that the Marcello distinction has long since  
13 evaporated is an important fact.

14 QUESTION: How did the distinction -- what -- as  
15 I remember, and I am very vague on it, but this  
16 distinction only lasted for a couple of years, 1950 or  
17 '52, when they allowed the INS Hearing Officer to have  
18 investigative functions. What is it that terminated the  
19 INS Hearing Officer's ability to have this dual function?  
20 Is it statute or a practice?

21 MR. SOLOWAY: It was not a statute, Your Honor.  
22 It was a regulation.

23 QUESTION: I see.

24 MR. SOLOWAY: And there's been no need for a  
25 statute since that's been the long-standing practice

1 for -- in deportation proceedings.

2 QUESTION: Well, speaking of regulations,  
3 Congress has never taken issue with the Department of  
4 Justice regulation on this matter, has it?

5 MR. SOLOWAY: Your Honor, if you're specifically  
6 referring to the 1985 reenactment, which has been raised  
7 by the Service in this case, it's important to note that  
8 in 1984, before that reenactment, there were two circuit  
9 court of opinion decisions that looked at the terms "under  
10 Section 554" and interpreted those to be -- to mean simply  
11 as defined in that section -- namely, requiring that a  
12 hearing be determined on the record and that Government be  
13 represented by counsel. And while neither of those were  
14 deportation --

15 QUESTION: Yeah, but who is the officer -- is  
16 the fee statute administered by the Department of Justice?

17 MR. SOLOWAY: Yes, Your Honor -- well, in the  
18 setting of deportation proceedings --

19 QUESTION: You don't say that the Attorney  
20 General doesn't have authority to issue regulations under  
21 the fee statute?

22 MR. SOLOWAY: The fee statute itself states that  
23 the agencies may promulgate their rules after consultation  
24 with the ACUS chairman. And in fact, the ACUS chairman  
25 has taken a position that's completely at odds with the

1 interpretation reached by the Attorney General.

2 QUESTION: Well, that may -- that may be so, but  
3 do you say that any regulation of the Attorney General  
4 under this statute is invalid?

5 MR. SOLOWAY: No.

6 QUESTION: Just any?

7 MR. SOLOWAY: No.

8 QUESTION: Well, so he does have a regulatory  
9 authority?

10 MR. SOLOWAY: Your Honor --

11 QUESTION: But you say he's quite mistaken in  
12 this case, but Congress has never taken issue with the  
13 regulation.

14 MR. SOLOWAY: Your Honor, while that's true,  
15 that the Congress has not focused upon the Attorney  
16 General's regulation --

17 QUESTION: And if you think they focused on the  
18 two cases you mentioned, I would think they focused on the  
19 issue and at the same time didn't disturb the Attorney  
20 General's regulation.

21 MR. SOLOWAY: I suggest that it's just as  
22 plausible that Congress didn't look at either the Seventh  
23 Circuit or the Eighth Circuit's interpretation, or this  
24 regulation. It had -- the issue of EAJA fees being within  
25 the scope of deportation hearings had simply never been

1 adjudicated, had never come up through the courts. The  
2 Escobar Ruiz case in the Ninth Circuit came after the 1985  
3 reenactment.

4 QUESTION: Do I understand your position  
5 correctly that -- it seems to me what you're saying is  
6 that if an agency is conducting its proceedings -- happens  
7 to be -- in accordance with the requirements of Section  
8 554, even though it's not obligated to, and even though it  
9 doesn't say I am trying to conduct it pursuant to 554. If  
10 it just happens to be doing that, EAJA applies.

11 MR. SOLOWAY: No, Your Honor. The reason for  
12 that is that Section 554 requires, it states that the  
13 Statute must mandate that a hearing be required on the  
14 record and the mere fact that an agency might in its  
15 discretion allow hearings to be determined on the record,  
16 would not place it within the ambit of the EAJA.

17 QUESTION: No, but carrying Justice Scalia's  
18 question a bit further, if there were some statute, not  
19 part of APA, just some -- one statute at large in some  
20 isolated part of the U.S. Code that said proceedings X  
21 shall be conducted in accordance with the procedural  
22 requirements of the APA. Then you would say there was an  
23 entitlement to fees. Because then you would say that  
24 proceeding is an adjudicatory proceeding as defined in  
25 Section 554 of the Title V.



1 MR. SOLOWAY: I think there could be no dispute  
2 that if the statute on its face used the more restrictive  
3 language than is even necessary, then, yes, it would be  
4 within the ambit of EAJA.

5 QUESTION: And it wouldn't matter whether it was  
6 some third statute or if the INS statute itself required  
7 an adjudication to fit the definition of 554. You would  
8 still say it's an adjudication as defined in 554, and  
9 therefore, under 554, as you read the word "under."

10 MR. SOLOWAY: That's correct. Yes.

11 QUESTION: May I? In response to my question, I  
12 gather then, what you would say is if the statute requires  
13 a hearing to be on the record, any statute requires that  
14 there be an on-the-record hearing, and if the agency  
15 chooses, although it is not obliged, to conduct that  
16 on-the-record hearing pursuant to 554, then EAJA applies.

17 MR. SOLOWAY: No, Your Honor. I don't  
18 believe -- if I understand you correctly --

19 QUESTION: Well, then I don't know how you  
20 reconcile Marcello, because that is exactly the situation  
21 we have here. We have a requirement of an on-the-record  
22 hearing. We have the Supreme Court holding that the  
23 agency is not obliged to comply with all the requirements  
24 of 554. But nonetheless, you tell us, it is complying  
25 with all the requirements of 554, and therefore, it's

1 under 554. Isn't that what you're telling us?

2 MR. SOLOWAY: Justice Scalia, no, that's not  
3 what I'm urging upon this Court. What -- I'd like to try  
4 to make this more clear, if I may. The EAJA statute says  
5 that the hearing -- must be required by statute to be  
6 determined on the record. That is the one that has to be  
7 specified in the statute because that's what EAJA says.

8 However, the other aspects about whether the  
9 adjudicative officer can be the same person as the  
10 prosecutorial officer is simply not something that -- upon  
11 which EAJA pivots.

12 QUESTION: The reason being that the Hearing  
13 Officer's capacity is not defined in 554. Isn't that  
14 right?

15 MR. SOLOWAY: That's correct, Your Honor.  
16 That's exactly right.

17 QUESTION: Which is entirely different from  
18 Marcello.

19 MR. SOLOWAY: Yes, Your Honor.

20 In addition to the parallel between Social  
21 Security Act proceedings which are -- where it has not  
22 been determined to be under the APA --

23 QUESTION: You're saying the Marcello  
24 requirement is not in 554 itself?

25 MR. SOLOWAY: That -- that's correct.

1           QUESTION: What about (d) that says the employee  
2 presides at the reception of evidence, shall make the  
3 recommended decision, blah, blah, blah, blah, except to  
4 the extent required for the disposition of ex parte  
5 matters. Such an employee may not -- that is the employee  
6 who presides at the reception of evidence -- may not be  
7 responsible to or subject to the supervision or direction  
8 of an employee or agent engaged in the performance of  
9 investigative or prosecuting functions for an agency.

10           MR. SOLOWAY: Yes, sir.

11           QUESTION: Isn't that the type of thing that was  
12 involved in Marcello?

13           MR. SOLOWAY: It is related to Marcello in that  
14 way.

15           QUESTION: It is indeed. It is exactly what was  
16 involved in Marcello. And it is exactly within 554, isn't  
17 it.

18           MR. SOLOWAY: But, Your Honor, it's not within  
19 the definitional part of Section 554. In other words, 554  
20 also deals with the type of notice, the method of notice,  
21 things like that. Instead, the importance of 554 and the  
22 reference to 554 is merely to import the definition.

23           QUESTION: But the statute doesn't say under the  
24 definitional part of Section 554. It says under Section  
25 554.

1 MR. SOLOWAY: Well, yes, it does, Your Honor,  
2 that's correct. On the other hand, the statute -- the  
3 EAJA statute is using Section 554 only for a definition.  
4 There's no reason either from the context of the statute  
5 or the legislative history, or any other plausible reason  
6 to view those additional requirements. But even if you  
7 did, they're all met here. All of them are met. Marcello  
8 doesn't stand in the way here because the difference that  
9 had existed 36 years ago no longer exists, and didn't  
10 exist in Mrs. Ardestani's case.

11 The entire panoply, the full -- all of Section  
12 554, if you will, has been met in the deportation  
13 proceedings.

14 QUESTION: Not by the force of statute.

15 MR. SOLOWAY: The one that's been pointed out by  
16 Justice Scalia is by regulation. That's correct.

17 QUESTION: The regulation might change and go  
18 back to the Marcello situation.

19 MR. SOLOWAY: Even if that were the case,  
20 Justice White, you'd still have the requirements of  
21 Section 554, the definition that's in 554, the requirement  
22 of a hearing on the record. That would still be met.

23 In addition, the interpretation that's urged, a  
24 meaningful, functional definition that includes those most  
25 in need of the EAJA, the ones that -- for which the EAJA



1 goals are most precisely in concert, that interpretation  
2 provides a bright line, an easy application for the courts  
3 rather than require the courts to look to Richardson v.  
4 Perales analyses or Marcello analyses, as has been  
5 discussed this afternoon.

6 I'd like to reserve my time if there are no  
7 questions.

8 QUESTION: Very well, Mr. Soloway.

9 Mr. Wallace, we'll hear now from you.

10 ORAL ARGUMENT OF LAWRENCE G. WALLACE

11 ON BEHALF OF THE RESPONDENT

12 MR. WALLACE: Thank you, Mr. Chief Justice, and  
13 may it please the Court:

14 This is not a case in which the question  
15 presented is left unresolved by the statutory text that  
16 Congress enacted. The very purpose of a definition  
17 section in a statute is to delimit the scope of the  
18 operative terms that the definition section undertakes to  
19 define. Here the operative term on which petitioner must  
20 rely in Section 504(a) is "adversary adjudication by the  
21 agency." And subsection (b) of the same section, 504,  
22 defines that term as an adjudication under Section 554 of  
23 the Administrative Procedure Act.

24 QUESTION: Mr. Wallace, can I ask you right  
25 there, if one were to agree, and I understand you don't

1 agree with this, but the word "under" should be given the  
2 meaning "as defined in, then would you win or lose?

3 MR. WALLACE: I think that's a close question,  
4 the -- but I -- only because procedures adopted by  
5 regulation now have brought the administrative deportation  
6 proceedings closer, and very close, to what is described  
7 in Section 554. But there has been no pertinent statutory  
8 change since Marcello against Bonds was decided in 1955.  
9 So as far as statutory requirements are concerned, the  
10 same discrepancies occur in the statutory obligations  
11 between what the Immigration and Nationality Act provide  
12 and what Section 554 provides.

13 And our position is that EAJA should not be  
14 interpreted, and there is not indication that EAJA was  
15 intended to deter agencies from voluntarily adopting  
16 procedures that more closely conform to Section 554 of the  
17 Administrative Procedure Act by imposing a cost on that  
18 kind of agency procedural reform by making EAJA fees kick  
19 in.

20 And indeed, the very authority that petitioner  
21 cites, the Administrative Conference of the United States,  
22 came to that same conclusion after receiving comments on  
23 their proposed model rule. And in issuing the final model  
24 rule at the page of the Federal Register we cite in our  
25 brief, volume 46, page 32901, they say quite specifically

1 after discussing this problem of the possibility of  
2 deterrence of voluntary adoption of the improved  
3 procedures, we have decided, therefore, to drop the  
4 provision of the draft rules suggesting that awards will  
5 be available and agencies voluntarily use the procedures  
6 described in Section 554.

7 QUESTION: That seems like a good answer. What  
8 do you do about the Social Security cases?

9 MR. WALLACE: The -- in the 1985 reenactment of  
10 EAJA, there was a reference in the legislative history, in  
11 the reports to a procedure under the Social Security Act,  
12 which was a pilot program that has now been entirely  
13 discontinued as of 1987. We describe that in some detail  
14 in a footnote in our brief in Sullivan against Hudson in  
15 this Court. That's No. 88-616.

16 Footnote 25 in that brief explains that after a  
17 district court decision called Solling against Bowen,  
18 criticizing the adoption of this pilot program as  
19 unauthorized by statute and saying that the statute  
20 requires proceedings in which the Secretary is not  
21 represented, and therefore, wholly outside of the EAJA  
22 context. The Secretary, as we explained at 52 Federal  
23 Register 17286, discontinued in 1987 that pilot program  
24 all together.

25 Now, apparently the committee thought that

1 adjudications under that pilot program were governed by  
2 554. That is not definitively resolved what the rationale  
3 was for the committee saying that it thought that such  
4 Social Security hearings would be covered, but that has  
5 become a moot point in light of the discontinued use of  
6 that program.

7 QUESTION: I'm not really troubled with the  
8 legislative history part of it. I'm asking for your  
9 opinion on whether -- and other Social Security  
10 proceedings are not at all covered.

11 MR. WALLACE: They are not at all covered.

12 QUESTION: In the case we had last term,  
13 Melconian, was a court action, I take it, which is  
14 different.

15 MR. WALLACE: That is correct. The question in  
16 this case is only the question of the scope of the  
17 authorization of the award of fees for administrative  
18 adversary adjudications, defined as adjudications under  
19 Section 554.

20 So we have explained in detail in footnote 12 of  
21 our brief that throughout Section 504, the indisputable,  
22 repeated usage of the word "under" in conjunction with  
23 another section of the United States code, or another  
24 provision of law, the indisputable usage is that it means  
25 governed by that provision or subject to that provision.



1 QUESTION: Well, if it means that, the Social  
2 Security Act, there should be no fees under the Social  
3 Security.

4 MR. WALLACE: Well, that was a question left  
5 open in this Court's decision.

6 QUESTION: But I mean if your argument is  
7 consistent, that's the result it would lead to, wouldn't  
8 it?

9 MR. WALLACE: Well, we don't know whether this  
10 now discontinued procedure was subject to Section 554 or  
11 not. This Court's decision in Richardson against Perales  
12 left that question open, and it had never been  
13 definitively determined. And there will not be an  
14 occasion now to determine it, because the program is  
15 discontinued. So we don't know whether that was correct.

16 QUESTION: But you're saying if a statute enacts  
17 the precisely identical procedures to those set forth in  
18 the Administrative Procedure Act, that then EAJA fees  
19 would not apply -- say you enact a new statute -- Nuclear  
20 Regulatory Agency, or something or another -- that that  
21 would not apply unless the statute, its only word said  
22 that these procedures -- these proceedings are governed by  
23 the APA. Their enacting parallel procedures would not  
24 be --

25 MR. WALLACE: Parallel procedures would not do

1 it, but they would not preclude the possibility that  
2 Section 554 would also apply. They might by implication  
3 be construed to exclude the separate application of  
4 Section 554, but that would be a question to be litigated.

5 QUESTION: You have precisely that problem in  
6 the National Labor Relations Act, don't you? I think the  
7 board proceedings are governed by the NLRA, which predated  
8 the APA and tracks it to some extent. And you would say  
9 that they are under -- are those proceedings under or not?

10 MR. WALLACE: I can't say that I've looked into  
11 that precise question in connection with this case. But I  
12 think the statutory criterion for the award of fees is  
13 very clear. They are available for adjudications that are  
14 governed by Section 554 of the Administrative Procedure  
15 Act.

16 QUESTION: Well, it's very clear if you read the  
17 word "under" to mean governed by. It's very fuzzy if you  
18 read the word "under" to be as defined in.

19 MR. WALLACE: Well, that -- there are barriers  
20 to reading it that way, Mr. Justice. And we think they  
21 are insuperable barriers. I mentioned one of them to you  
22 already, that throughout that section, 554, the word  
23 "under" when used in conjunction with a statutory  
24 provision -- and we collected these in note 12 of our  
25 brief, page 14. We collected all -- many examples of

1 this. Indisputably, they have to mean governed by,  
2 subject to. And the contention would be that this one,  
3 and this one alone, is different.

4 And indeed --

5 QUESTION: But if -- couldn't one counter with  
6 the argument that why would Congress single out this small  
7 category of agency proceedings for different treatment  
8 from all others when the equities would seem to be the  
9 same and the purpose of the statute would seem to apply?

10 MR. WALLACE: Well, the equities may --

11 QUESTION: And without saying a word about it?

12 MR. WALLACE: The equities may not be the same.  
13 If Congress were to give specific attention to the  
14 question of administrative deportation proceedings, and I  
15 don't want to belittle the utility of counsel in such  
16 proceedings, but Congress might well come to the  
17 conclusion that applying EAJA to these proceedings would  
18 not be the best way to address this problem. There are  
19 more than 100,000 such proceedings conducted each year by  
20 the 92 immigration judges of the INS. And the vast  
21 majority of these proceedings -- everyone I've talked with  
22 there estimates that it's upwards of 90 percent -- the  
23 question of deportability is either conceded by the alien  
24 or very quickly resolved against the alien, and the whole  
25 issue becomes a claim by the alien for political asylum or

1 for suspension of deportation.

2 QUESTION: It seems to me what you're saying is  
3 that the cases in which the Government's position would  
4 not be substantially justified are a very small number of  
5 the total universe.

6 MR. WALLACE: The Congress might conclude that  
7 because these all are a matter that involve discretion on  
8 the part of the Government, and they're all matters on  
9 which the burden of proof has shifted to the alien, that  
10 there would be very few cases in which the Government's  
11 position could fairly be said not to be substantially  
12 justified. That doesn't mean that there wouldn't be a lot  
13 of litigation about that and a lot of courts awarding  
14 fees. But Congress could conclude that this isn't really  
15 the tool.

16 And it might also be concerned that the exercise  
17 of that discretion in favor of aliens in these proceedings  
18 might be deterred if it could become a drain on the  
19 agency's budget through the award of attorney's fees.

20 QUESTION: Well, didn't they budget about 100  
21 times as much money for this statute as they've actually  
22 spent?

23 MR. WALLACE: Well, it's true that the costs  
24 have not reached the initial estimates that were made when  
25 it was --



1 QUESTION: They've failed by about 99 percent.

2 MR. WALLACE: That is correct. But there are  
3 reasons why, if Congress gave attention to this question  
4 it might conclude that there are better and more effective  
5 ways of meeting a need for the provision of counsel in  
6 this proceedings than by applying EAJA, and that EAJA  
7 might not be well suited to it. That is a matter that  
8 Congress simply has not addressed.

9 And I have not yet mentioned another barrier  
10 which we think is a very strong barrier to the alternative  
11 interpretation that petitioner espouses and that you have  
12 queried about. And that is that we are dealing here with  
13 a waiver of sovereign immunity. And those must be  
14 strictly construed in the first place. And that, in this  
15 context, really fairly precludes departure from the  
16 ordinary meaning of the word "under Section 554," to a  
17 more expansive, unusual meaning of the words "under  
18 Section 554." And they must -- in waivers of sovereign  
19 immunity must be express rather than applied, which it  
20 seems to us, fairly precludes analogy.

21 QUESTION: How about the Erwin decision last  
22 year?

23 MR. WALLACE: Well, the Erwin decision was one  
24 in which Congress had clearly subjected the category of  
25 cases to a waiver of sovereign immunity and the only

1 question was whether the ordinary rules of the road for  
2 waivers of sovereign immunity, the usual tolling rules of  
3 the road, would apply.

4 QUESTION: So you think the narrow reading of  
5 waivers is -- that rule is still in place?

6 MR. WALLACE: Well, this Court has repeatedly  
7 referred to it, and has referred to it approvingly in an  
8 analogous contexts because ultimately it is a rule that  
9 assures against intrusion by the courts into the  
10 legislative function of determining what claims on the  
11 public fisc should be honored and what claims should not.

12 Of course an argument can be made that this  
13 would be a worthwhile use of public funds. But there are  
14 many requests for arguably worthwhile uses of public funds  
15 and Congress has to determine how to apportion the limited  
16 resources that are available. And in at least two  
17 decisions of last term that come to mind, the United  
18 States against Dolm, and OPM against Richmond, the Court  
19 emphasized that this is the essence of the legislative  
20 function under our constitutional system.

21 And in any event, it was the well-established  
22 principal at the time Congress was drafting EAJA and that  
23 established the rules of statutory draftsmanship under  
24 which Congress put together this text, with its definition  
25 section specifying the proceedings for which fee-shifting

1 would be available.

2 So that is the proper way to read the statutory  
3 text, and it was equally well established at the time this  
4 statute was drafted by this Court's 1955 decision in  
5 Marcello against Bonds, that administrative deportation  
6 proceedings are not proceedings governed by Section 554 of  
7 the Administrative Procedure Act.

8 We have also collected in our brief, in footnote  
9 26 on pages 28 and 29, some examples of the many  
10 uncertainties that would be opened up if, instead of the  
11 terms of the waiver of sovereign immunity, the Congress  
12 used being the criterion, a more elastic criterion of  
13 procedures functionally similar to Section 554 procedures  
14 were to be adopted. This would --

15 QUESTION: I'm going to have to start reading  
16 your footnotes, if they're important enough to bring up in  
17 oral argument.

18 (Laughter.)

19 MR. WALLACE: Well, we have not yet refrained  
20 from writing footnotes, although I don't take issue with  
21 those who have.

22 So that is --

23 QUESTION: Who is that?

24 MR. WALLACE: Well, some opinions of this Court  
25 are now coming out without footnotes, and they're a

1 pleasure to read.

2 (Laughter.)

3 MR. WALLACE: In any event --

4 QUESTION: Thanks very much.

5 (Laughter.)

6 MR. WALLACE: Some of the footnotes are also a  
7 pleasure to read.

8 (Laughter.)

9 MR. WALLACE: So, in essence, our position is  
10 that the terms of EAJA's waiver of sovereign immunity  
11 govern here.

12 It happens that there's also another barrier to  
13 recovery in administrative deportation proceedings. And  
14 that is that a holding to that effect would require  
15 construing EAJA to repeal by implication Section 1362 of  
16 Title VIII. This is to us illustrative of the  
17 difficulties that are encountered by straying beyond the  
18 terms of the waiver of sovereign immunity that Congress  
19 utilized.

20 If there are no further questions, we're  
21 submitting our case.

22 QUESTION: Thank you, Mr. Wallace.

23 Mr. Soloway, you have a minute remaining.

24 REBUTTAL ARGUMENT BY DAVID N. SOLOWAY

25 ON BEHALF OF THE PETITIONER



1 MR. SOLOWAY: Thank you. I respectfully  
2 disagree with the interpretation of the ACUS exemption or  
3 discussion about voluntary compliance. I read from the  
4 Federal Register, "Congress has provided that private  
5 parties in disputes with the Federal Government are  
6 entitled to hearings as a right, and others, for whatever  
7 reasons, it has been determined that hearings may be  
8 provided at the discretion of the Government.

9 "On reflection we have concluded that it is more  
10 consistent with the purposes of the legislation not to  
11 cover proceedings of the latter type than to include them.  
12 We have decided, therefore, to drop the provision of the  
13 draft rules suggesting that awards be available when  
14 agencies voluntarily comply with the procedures described  
15 in Section 554."

16 That reference to voluntary acceptance of  
17 procedures precisely deals with the requirement of  
18 hearings being required to be on the record.

19 In addition to that, I wish to bring to this  
20 Court's attention that there's been no suggestion of why  
21 an agency adjudication --

22 CHIEF JUSTICE REHNQUIST: Mr. -- your time has  
23 expired, Mr. Soloway.

24 The case is submitted.

25 (Whereupon, at 1:37 p.m., the case in the

1 above-entitled matter was submitted.)

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

#90-1141 - RAFEH-RAFIE ARDESTANI, Petitioner V. IMMIGRATION AND  
-----  
NATURALIZATION SERVICE  
-----

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Michael Sander

(REPORTER)

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'91 OCT 16 P4:47