"WHAT'S IN A NAME?"[1]
WHILE FBI SLOWLY ADMINISTERS NAME CHECKS FOR USCIS, SOME COURTS ENTERTAIN MANDAMUS AND APA SUITS BY FRUSTRATED LAWFUL IMMIGRANTS

INTRODUCTION

How many combinations of the name Jose Garcia Rodriguez can appear in government records? At least a dozen, as one government memorandum reported in 2006:

- Jose Garcia Rodriguez
- Jose Rodriguez Garcia
- Jose Garcia
- Jose Rodriguez
- Garcia Jose Rodriguez
- Garcia Rodriguez Jose
- Garcia Jose
- Garcia Rodriguez
- Rodriguez Jose Garcia
- Rodriguez Garcia Jose
- Rodriguez Jose
- Rodriguez Garcia[2]

By adding variations in spelling (i.e. "Rodriguez" might be written "Rodrigues"), missing or incorrect dates of birth, and missing or incorrect places of birth,[3] a name check of criminal and national-security records for "Jose Garcia Rodriguez" will potentially produce a multitude of results to resolve. Such voluminous results will require an enormous expenditure of effort, particularly if some checks are performed manually.[4] Congress mandated these checks "as part of the effort to ensure that immigration benefits are provided only to those individuals who are eligible" and not to those who pose "potential threats to our national security."[5]

Notwithstanding the 2006 memorandum cited above, a 2008 government memorandum opined that given the existence of other types of security checks, national security would not be jeopardized if—after having waited for name-check completion for more than 180 days, and regardless

1. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 1.
2. Memorandum from Michael L. Aytes, Assoc. Dir., Domestic Operations, U.S. Citizenship & Immigration Servs., to Reg'l Dirs., U.S. Citizenship & Immigration Servs. 3 (Dec. 21, 2006), *available at* http://www.ailf.org/lac/chdocs/lac_mandamus_aytesmemo.pdf.
3. *Id.*
4. *Id.*
5. *Id.* at 1.

of their incompletion—immigration officials would adjudicate immigrant benefits for certain types of applications.[6] This radical policy change "responds to a 2005 [Department of Homeland Security] Inspector General recommendation" to align background checks with immigration enforcement efforts.[7] It is safe to assume that this recommendation was prompted, at least in part, by judicial opinions from some federal district courts regarding the power of judicial review as applied to immigration lawsuits.[8]

This Note discusses whether, under Section 242(a)(2)(B) of the Immigration and Nationality Act (INA)[9] or under the Administrative Procedure Act (APA),[10] federal courts have mandamus power to entertain lawsuits involving adjustment of status (AOS) when the United States Citizenship and Immigration Services (USCIS) fails to process AOS applications within a reasonable time because of delays in mandatory name checks administered by the Federal Bureau of Investigation (FBI). These delays cause undue hardships for applicants—aliens lawfully present in the United States.[11]

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6. Memorandum from Michael Aytes, Assoc. Dir., Domestic Operations, U.S. Citizenship & Immigration Servs., to Field Leadership, U.S. Citizenship & Immigration Servs. (Feb. 4, 2008), http://www.uscis.gov/files/pressrelease/DOC017.PDF [hereinafter Aytes, February 2008 Memorandum]; *see* U.S. Citizenship & Immigration Servs., Questions and Answers: Background Check Policy Update (Feb. 28, 2008), http://www.uscis.gov/files/article/NameCheckQA_28Feb08.pdf [hereinafter USCIS, Q&A] (noting that immigration benefits will not be adjudicated until two other security checks, "a definitive FBI fingerprint check and Interagency Border Inspection Services (IBIS) check are completed and resolved favorably"); *see also* Marisa Taylor, *Homeland Security Easing Immigrant Background Checks*, MCCLATCHY NEWSPAPERS (D.C.), Feb. 10, 2008, *available at* http://www.mcclatchydc.com/100/story/27280.html (noting that the new process poses no threats to national security). "[The government] officials said the new process does not pose any new security risks because . . . applicants have been allowed to remain in the country while they wait to be screened. 'We will do nothing that cuts corners or compromises national security[.]'" *Id.* (quoting Chris Bentley, Spokesman, U.S. Citizenship & Immigration Servs.).

7. USCIS, Q&A, *supra* note 6.

8. *Compare* Tang v. Chertoff, No. 07-203-JBC, 2007 U.S. Dist. LEXIS 64022, at *15–16 (D. Ky. Aug. 29, 2007) (finding mandamus jurisdiction), Aboushaban v. Mueller, No. C 06-1280 BZ, 2006 U.S. Dist. LEXIS 81076, at *6 (N.D. Cal. Oct. 24, 2006) (finding mandamus and APA jurisdiction), Haidari v. Frazier, No. 06-3215 (DWF/AJB), 2006 U.S. Dist. LEXIS 89177, at *9–10 (D. Minn. Dec. 8, 2006) (finding mandamus and APA jurisdiction), *and* Yue Yu v. Brown, 36 F. Supp. 2d 922, 927–28 (D. N.M. 1999) (finding mandamus and APA jurisdiction), *with* Feng Li v. Gonzalez, No. 06-5911(SRC), 2007 U.S. Dist. LEXIS 32608, at *23 (D. N.J. May 3, 2007) (finding that there was no mandamus or APA jurisdiction) *and* Rogatch v. Chertoff, No. CA 06-541ML, 2007 U.S. Dist. LEXIS 28450, at *6 (D. R.I. Apr. 17, 2007) (finding that there was no mandamus or APA jurisdiction). See *infra* Part II for detailed analysis of these cases.

9. Immigration and Nationality Act § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (2006).

10. 5 U.S.C. §§ 551–559, 701–706 (2006) (originally enacted as Act of June 11, 1946 (Administrative Procedure Act), ch. 324, 60 Stat. 237).

11. As Representative Clarke stated, "[t]hese delays and backlogs push many honest immigrants into a status of legal limbo where they may be required to stop working and traveling. Some may not even know whether they can remain in the country legally." Press Release, Congresswoman

Federal courts should have the power of review either under mandamus jurisdiction or under the APA. Part I provides background on the uneven allocation of power among the branches of the federal government with respect to immigration suits. Part I.A discusses the sources of Congress's plenary power over immigration. Part I.B describes the delegated power of two executive agencies, USCIS and FBI, over immigration. Part I.C discusses the limited review power of federal courts over immigration matters. Parts II.A and II.B explore a split of authority regarding AOS suits that plaintiffs have brought under the mandamus and APA statutes. Part II.C describes arguments used by both petitioners and the federal government in AOS mandamus actions. Finally, Part III argues that the federal courts' mandamus power should remain intact with respect to AOS suits despite the recently announced 180-day name-check window.[12] Part III.A posits an analogy between the power of review over AOS mandamus actions and naturalization actions, which federal courts have much better-settled authority to adjudicate. Part III.B proposes restructuring of the procedures of the immigration agencies.

I. UNEVEN ALLOCATION OF POWER AMONG THE BRANCHES OF THE FEDERAL GOVERNMENT IN THE IMMIGRATION CONTEXT

The United States is a nation of immigrants,[13] and since the formation of this nation, the federal government has allocated power over immigration among the legislative, executive, and judicial branches. However, the federal government has not allocated this authority evenly.

Yvette D. Clarke (D-N.Y.), Congresswoman Clarke Introduces Immigration Backlog Reduction Bill (Oct. 17, 2007), http://clarke.house.gov/releases.shtml (follow hyperlink adjacent to text reading "(October 17, 2007)") (last visited Apr. 20, 2009). Although the legislative initiative gained thirty-four cosponsors, H.R. 3828 did not advance past the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, and never became law. GovTrack.us, H.R. 3828: Citizenship and Immigration Backlog Reduction Act, http://www.govtrack.us/congress/bill.xpd?bill=h110-3828 (last visited Apr. 20, 2009).

12. As discussed in this Note's conclusion, judicial review will continue to provide a remedy in the event that USCIS does not implement the promised 180-day rule in a timely manner.

13. *See* OFFICE OF CITIZENSHIP, U.S. CITIZENSHIP & IMMIGRATION SERVS., HELPING IMMIGRANTS BECOME NEW AMERICANS: COMMUNITIES DISCUSS THE ISSUES app. B, at 13 (2004) [hereinafter USCIS, HELPING IMMIGRANTS] (reporting that according to the 2000 U.S. Census, the total population of the United States was nearly 282 million people, where 31 million of them, or eleven percent, were foreign born). In 2000, approximately half of all immigrants came from Latin America (52%), and the other half came from the following regions: Asia (26%), Europe (16%), Africa (3%), and North America (3%). *Id.*

A. Plenary Power of Congress

Historically, Congress has had almost unlimited power over immigration. The Immigration Clause of the United States Constitution gives Congress the power "[t]o establish an [sic] uniform Rule of Naturalization."[14] Although this express grant of power over naturalization—the process by which aliens become citizens of the United States—does not address the full measure of immigration matters, several other clauses of the Constitution imply a broad immigration power for the federal government: the Commerce Clause,[15] the Migration and Immigration Clause,[16] and the War Powers Clause.[17]

Congress's immigration power grew when the United States Supreme Court first expressly acknowledged Congress's unlimited authority to exclude Chinese laborers who were noncitizens, citing the inherent sovereign power in the *Chinese Exclusion Case*.[18] Four years later, in 1893, the Court reiterated Congress's broad power to dictate the terms of admission for alien workers in *Fong Yue Ting v. United States*.[19] Relying on the *Chinese Exclusion Case*, the Court held that "[t]he right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[20]

Since the first judicial rulings on Chinese laborers more than a century ago, Congress has retained its virtually unrestricted immigration power. In fact, some commentators have noted a modern trend in the legislative branch to assume additional power over immigration, often at the expense of the judiciary's already limited authority over immigration matters.[21]

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14. U.S. CONST. art. I, § 8, cl. 4.

15. U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations").

16. U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress . . . .").

17. U.S. CONST. art. I, § 8, cl. 11 (granting Congress the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water").

18. The Chinese Exclusion Case, 130 U.S. 581, 603–04 (1889). The Court stated:

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. . . . If it could not exclude aliens it would be to that extent subject to the control of another power.

Id.

19. Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (citing The Chinese Exclusion Case, 130 U.S. at 603–04).

20. *Id.* at 707.

21. *See, e.g.*, Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial*

B. Delegated Power of the Executive Agencies

Two executive agencies are often named in mandamus suits involving AOS: USCIS, a component of the Department of Homeland Security (DHS), and FBI, a component of the Department of Justice.[22]

1. USCIS

USCIS, whose duties were formerly performed by the Immigration and Naturalization Service,[23] is a federal agency composed of about 15,000 federal "employees and contractors"[24] responsible for the administration of immigration and naturalization adjudication functions.[25] These functions include, among other things, adjudication of immigrant visa petitions, naturalization petitions, and asylum and refugee applications.[26]

USCIS adjudicates the applications of immigrants who seek entry, permanent residency, or citizenship from the United States.[27] Simply stated,

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Review of Immigration Proceedings, 29 CONN. L. REV. 1411, 1412 (1997).

> Why no judicial branch? The evisceration of judicial power is due to important recent legislation [the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)] that purports to eliminate, or at least radically curtail, judicial review of immigration proceedings.

Id.; *see also infra* Part I.C (discussing the limited review power of the federal courts).

22. For example, in 2007, a typical list of defendants included the Attorney General of the United States, Alberto Gonzalez; the Secretary of Homeland Security, Michael Chertoff; the Director of the USCIS, Emilio T. Gonzalez; the Director of the USCIS Vermont Service Center, Paul Novak; and the Director of the FBI, Robert S. Mueller. Li v. Gonzalez, No. 06-5911(SRC), 2007 U.S. Dist. LEXIS 32608, at *2 (D. N.J. May 3, 2007). "Suing more than one official or entity is often necessary . . . when the petitioner–plaintiff is unsure whom to sue. If a court determines that it lacks either personal or subject-matter jurisdiction over a respondent–defendant, the court will dismiss the action against that respondent–defendant." Trina A. Realmuto, Am. Immigration Law Found., Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation 2 (2003), http://www.ailf.org/lac/pa/lac_pa_040706.pdf. Illustrating this necessity, courts usually dismiss all but one of the named defendants in suits arising from unprocessed naturalization applications. *E.g.*, Astafieva v. Gonzales, No. C 06-04820 JW, 2007 U.S. Dist. LEXIS 28993 at *4 (N.D. Cal. Apr. 2, 2007) ("[T]he only relevant Defendant is Michael Chertoff, in his capacity as Secretary of the Department of Homeland Security."); *see infra* notes 190–99 and accompanying text (describing the *Astafieva* litigation).

23. Press Release, U.S. Citizenship & Immigration Servs., USCIS Announces Permanent Management Appointments 1 (Sept. 24, 2003), http://www.ilw.com/immigdaily/News/2003,0925-mgmt.pdf.

24. U.S. Citizenship & Immigration Servs., USCIS Transformation Program Concept of Operations 8 (2007), http://www.uscis.gov/files/nativedocuments/TransformationConOps_Mar07.pdf [hereinafter USCIS Transformation Program].

25. *See id.* ("More than 7.5 million applications are received per year, comprised of over 50 types of immigration benefits.").

26. U.S. Citizenship & Immigration Servs., About USCIS, http://www.uscis.gov/ (follow "About USCIS" hyperlink) (last visited Apr. 21, 2009).

27. BLACK'S LAW DICTIONARY 765 (8th ed. 2004) (defining an immigrant as "[a] person who arrives in a country to settle there permanently").

USCIS decides "whether and in what manner a foreign national may enter the United States, request temporary status, apply for a green card [to stay here permanently], and ultimately seek U.S. citizenship."[28] Consequently, a multistep immigration process begins when the agency approves a permanent residency petition, the I-485,[29] which can be family sponsored or employment based.[30] The completed process—known as adjustment of status for petitioners already residing in the United States—transforms an alien into a lawful permanent resident (LPR) and a holder of a green card.[31]

The process of status adjustment, or any other procedure for obtaining immigrant and nonimmigrant benefits,[32] comprises three stages: application, adjudication, and issuance.[33] First, a petitioner applies for the benefit by filing an appropriate application and, if required, a filing fee, usually at a USCIS Service Center.[34] Next, the agency "adjudicat[es] . . . each benefit application."[35] Finally, USCIS "issu[es] a decision, grant[s] immigration status, den[ies] benefits, or refer[s] customers to other government entities (e.g., immigration court, etc.)."[36]

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28. Prakash Khatri, U.S. Citizenship & Immigration Servs. Ombudsman, 2007 Annual Report to Congress 7 (2007), http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf [hereinafter USCIS, 2007 Ombudsman Report]. The USCIS 2007 Ombudsman Report was issued by Prakash Khatri, whose tenure ended in March 2008. Press Release, U.S. Dep't of Homeland Sec., Statement by Homeland Security Secretary Michael Chertoff on the Appointment of the CIS Ombudsman (Mar. 4, 2008), http://www.dhs.gov/xnews/releases/pr_1204720623164.shtm (announcing Michael Timothy Dougherty as the new USCIS ombudsman). For more information on the USCIS ombudsman's position, see *infra* note 61.

29. 8 C.F.R. § 299.1 (2008) (describing the I-485 as an "Application to Register Permanent Residence or Adjust Status").

30. IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 635 (10th ed. 2006). Other potential immigrants are: "Diversity immigrants," "Refugees and asylees," and "Persons not subject to limitations." *Id.*

31. *Id.* In 2006, nearly two-thirds, or 64.7%, of all LPRs adjusted their status while in the United States, and only approximately one-third, or 35.3%, filed their I-485 petitions from abroad. RUTH E. WASEM, CONG. RESEARCH SERV., U.S. IMMIGRATION POLICY ON PERMANENT ADMISSIONS 2 (Feb. 29, 2008) (on file with author). Although the petitions filed from abroad are handled somewhat differently—first reviewed by USCIS, and then adjudicated by the Department of State's Bureau of Consular Affairs—both types of petitioners must meet identical statutory requirements involving national security, health, and adequacy of financial resources. *Id*.

32. In contrast to immigrant benefits, which permit potentially permanent residence in the United States, nonimmigrant benefits permit "an alien who is making a *temporary* visit" to the United States to engage in a specific activity, such as working or studying, for a period of time consistent with the nonimmigrant visa. ROBERT C. DIVINE, IMMIGRATION PRACTICE 6-1 (2006–2007 ed. 2006) (emphasis added); *see also* U.S. Citizenship & Immigration Servs., USCIS—Services & Benefits, http://www.uscis.gov/ (follow "Services & Benefits" hyperlink) (last visited Apr. 21, 2009) (summarizing immigration benefits).

33. USCIS Transformation Program, *supra* note 24, at 12.

34. *Id.* at 17.

35. *Id.* at 12.

36. *Id*.

Before adjudicating I-485 applications, USCIS requires "full biometrics (i.e., fingerprints, photograph and signature)," as well as background checks of applicants.[37] The agency verifies completion of files either "at the time of filing or just before an adjudication."[38] During adjudication, USCIS also ensures that "all background checks are completed."[39] One of these background checks is a "name check" performed by FBI.[40]

2. FBI

FBI[41] has administered name checks since the Eisenhower administration.[42] In April 1953, President Eisenhower signed Executive Order 10450, requiring National Agency Checks for federal employment.[43] Section 9 of the Order mandated a "security-investigations index" which would "contain the name of each person investigated."[44] Over time, the scope of name checks has grown beyond "pre-employment vetting."[45] More than seventy federal and state agencies now have the power to request name checks[46] FBI administers the National Name Check Program (NNCP) for USCIS.[47]

The NNCP provides electronic and manual searches of FBI's Central Record System (CRS) Universal Index (UNI).[48] First, "'batch' submissions" are searched against the UNI Index electronically.[49]

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37. *Id.* at 16. Applications for "naturalization, asylum and adoption of orphans" also require full biometrics. *Id*.

38. *Id.* at 18.

39. *Id.*

40. *Id.*

41. FBI was established in 1908 and now has more than 30,000 employees. Fed. Bureau of Investigation, About Us—Quick Facts, http://www.fbi.gov/quickfacts.htm (last visited Apr. 20, 2009).

42. Fed. Bureau of Investigation, National Name Check Program, http://www.fbi.gov/hq/nationalnamecheck.htm (last visited Apr. 13, 2009) [hereinafter FBI NNCP].

43. Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 27, 1953), *available at* http://www.archives.gov/federal-register/codification/executive-order/10450.html.

44. *Id.*

45. FBI NNCP, *supra* note 42. Other uses of name checks include "security clearance, attendance at a White House function, . . . admission to the bar, or [an entry] visa." *Id.*

46. *Id.*

47. *Id.* The other two federal agencies that submit requests to the NNCP are the Office of Personnel Management, which screens potential federal employees, and the Department of State, which requests name checks of applicants for certain types of entry visas. *Id.* "[C]ongressional committees, the Federal judiciary, friendly foreign police and intelligence agencies, and state and local criminal justice agencies" submit NNCP requests. Declaration of Michael A. Cannon at 2, Trujillo v. Gonzalez, No. 05-23055 (S.D. Fla. Jan. 30, 2006), *available at* http://immigrationportal.com/attachment.php?attachmentid=16342 [hereinafter Cannon January Declaration].

48. FBI NNCP, *supra* note 42.

49. *Id.* The UNI Index contains more than 90.8 million files. The search provides a "main"

Approximately 68% of the batch returns a result of "No Record" within about two days.[50] Second, FBI administers an additional manual review "[b]ecause a name and birth date are [sometimes] not sufficient to positively correlate a file with an individual."[51] The manual check reports another 22% of the names as having "No Record," for a total of 90% of all the "No Record" batch submissions.[52] The remaining 10% of the requests are considered as "possibly being the subject of an FBI record."[53] For these requests, the NNCP "retrieve[s] and review[s]" the FBI record—either electronically or manually, depending on whether the record was uploaded digitally or originated as a paper file.[54] After retrieving the records, FBI examiners review the files—which constitute less than 1% of each batch—"for possible derogatory information."[55] As one commentator noted, manual reviews "can cause long delays, even when similarities" of the requested name check and FBI's existing investigative file "later turn out to be coincidental."[56]

Both the slow pace of FBI-administered manual reviews and the increase in volume in the post-9/11 period of USCIS-requested name checks contribute to the current backlog of unprocessed immigration applications. According to one of the top NNCP officials, "[p]rior to September 11, 2001, FBI processed approximately 2.5 million name check requests per year."[57] In 2003, the number of USCIS requests more than doubled to 6.3 million.[58] Although the number of name checks decreased by almost half to 3.3 million by 2005,[59] in recent years the number of applications has increased again, and "USCIS is [still] waiting for the backlog to be processed while submitting new names weekly."[60]

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entry where a requested name corresponds with FBI's CRS directly, or a "reference" entry that "generally only mentions or references an individual . . . located in another 'main' file." The NNCP checks "a multitude of combinations, switching the order of the first, last, and middle names, as well as . . . searches the names phonetically [to retrieve] similar spelling variations [for names transliterated from other languages]." Cannon January Declaration, *supra* note 47, at 3–5.

50. Cannon January Declaration, *supra* note 47, at 5.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id*. at 6.

56. Patricia Medige, *Immigration Issues in a Security-Minded America*, COLO. LAW., March 2004, at 11, 12.

57. Cannon January Declaration, *supra* note 47, at 6.

58. FBI NNCP, *supra* note 42.

59. *Id.*

60. Medige, *supra* note 56, at 12. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS STRATEGIC PLAN: SECURING AMERICA'S PROMISE 4 (June 16, 2005), *available at* http://www.uscis.gov/files/nativedocuments/USCISSTRATEGICPLAN.pdf (reporting that, as of 2005, USCIS receives more than 5 million applications annually); Spencer S. Hsu, *Immigrant Paperwork*

The backlog has only worsened in recent years.[61] Indeed, the USCIS ombudsman[62] noted in his 2007 congressional report, which contained quantitative analysis of the past three years, that "FBI name checks may be the single biggest obstacle to the timely and efficient delivery of immigration benefits."[63] The USCIS ombudsman reported that, as of May 2007, USCIS had over 300,000 FBI name-check cases pending, a figure he characterized as "staggering."[64] Out of the current backlog, almost two-thirds of the cases have been pending for more than three months, and a third have been pending for more than a year.[65] The number of cases pending for more than two-and-a-half years has increased roughly 44% as compared to 2006, a "disturbing" trend.[66]

These long delays deprive law-abiding I-485 applicants and their dependants of many immigrant and nonimmigrant benefits including:

- Loss of employment and employment opportunities
- Possible termination of employment
- Difficulties obtaining drivers' licenses
- Inability to qualify for certain federal grants and funds
- Limitations on the ability to purchase property
- Difficulties obtaining credit and student loans
- Disqualification from in-state tuition[67]

Not only do legitimate applicants not receive their benefits in a timely manner, but they incur additional costs associated with waiting and complying with the law.[68] As one commentator described the situation,

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Backs Up at DHS, WASH. POST, Nov. 22, 2007, at A01 (reporting that, in 2007, "USCIS received 7.7 million applications for all types of immigration benefits").

61. *See* USCIS, 2007 Ombudsman Report, *supra* note 28, at 14 n.2 ("The separate USCIS FBI Pending Name Check Aging Report of May 4, 2007 indicates the pending number of FBI name checks for both green card and naturalization cases has increased to 329,160.").

62. *See id.* at ii (describing the independent nature of the USCIS ombudsman, who "reports directly to the DHS Deputy Secretary with an annual report to Congress without prior review and comment by DHS or the executive branch, as directed by the Homeland Security Act of 2002").

63. *Id*. at ii, 37.

64. *Id.* at 37.

65. *Id.*

66. *Id.*

67. *Id.* at 39.

68. *See, e.g.*, Rogatch v. Chertoff, No. CA 06-541ML, 2007 U.S. Dist. LEXIS 28450, at *1–3 (D.R.I. Apr. 17, 2007) (describing the allegations of an I-485 employment-based applicant and mandamus plaintiff, for "financial losses associated with filing for extensions of work and travel authorizations" that he sustained during more than two-and-a-half years of waiting and checking on the status of his application); *see also* Haidari v. Frazier, No. 06-3215(DWF/AJB), 2006 U.S. Dist. LEXIS 89177, at *3 & n.2 (D. Minn. Dec. 8, 2006) (noting that the plaintiff was required to submit multiple sets of fingerprints during the waiting period because I-485 applicants' fingerprint reports expire after fifteen months).

"many applicants for residency [or adjustment of status] . . . have found themselves in the unusual position of having passed the requirements for obtaining their status, but of not being able to receive officially that status for many months,"[69] or even years.[70] Accordingly, frustrated applicants either wait with "no idea of the reason for the delays,"[71] or they file lawsuits against executive agencies in order to obtain justice from the courts.

C. Limited Review Power of the Federal Courts

Federal courts are courts of limited jurisdiction.[72] That is, federal courts, as opposed to most state courts, do not have general jurisdiction;[73] rather, the United States Constitution and Congress limit the reach of their jurisdiction.[74] As one leading legal scholar stated, "the initial words of Article III [of the Constitution]—'the judicial Power of the United States shall be vested'—created a federal judicial system."[75]

The Constitution granted Congress the power to create "such inferior Courts as the Congress may from time to time ordain and establish."[76] Using this power, Congress, in the Judiciary Act of 1789,[77] established "lower federal courts, and they have existed ever since."[78] In recent years, I-485 applicants have filed suits against USCIS and other executive agencies in federal district courts, which have original jurisdiction over federal-question cases, i.e., "all civil actions arising under the Constitution, laws, or treaties of the United States."[79] These litigants invoke two federal statutes: 28 U.S.C. § 1361 (the mandamus[80] statute) and the APA.[81]

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69. Medige, *supra* note 56, at 12.

70. *See infra* Part II.A (describing applicants who have been waiting for the adjudication of their immigrant benefits for a period between three to ten years).

71. Medige, *supra* note 56, at 12.

72. CHARLES A. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 15 (2d ed. 1970).

73. *Id.* "Most state courts are courts of general jurisdiction, and the presumption is that they have jurisdiction over a particular controversy unless a showing is made to the contrary." *Id*.

74. *See id.* at 1 ("Any study of the federal courts . . . necessarily must begin with two eighteenth century landmarks—Article III of the Constitution and the Judiciary Act of 1789.").

75. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPALS AND POLICIES 35 (3d ed. 2006) (quoting U.S. CONST. art. III, § 1, cl. 1).

76. U.S. CONST. art. III, § 1, cl. 1.

77. Act of Sept. 24, 1789 (Judiciary Act of 1789), ch. 20, 1 Stat. 73 (1789).

78. CHEMERINSKY, *supra* note 75, at 36. Today, the federal court system consists of 89 federal district courts presided over by nearly 300 district judges. WRIGHT, *supra* note 72, at 7 (citing 28 U.S.C.A. § 133). The appellate level includes eleven federal courts—"one for the District of Columbia, and ten for numbered circuits." *Id*. at 8 (citing 28 U.S.C.A. § 41). Usually, a panel of a minimum of three judges hears federal appeals. *Id*. (citing 28 U.S.C.A. § 46(c)). The United States Supreme Court completes the federal judicial hierarchy. *Id.* at 9.

79. 28 U.S.C. § 1331 (2000).

80. *See* BLACK'S LAW DICTIONARY 980 (8th ed. 2004) (translating *mandamus*, from Latin, as

1. Mandamus Jurisdiction

The writ of mandamus is a time-honored judicial remedy. Since the Judiciary Act of 1789, Congress has granted the federal judiciary, particularly the Supreme Court, the power "to issue . . . writs of *mandamus* . . . to any courts appointed, or persons holding office, under the authority of the United States."[82] Thus, from the late eighteenth century, the courts have used the mandamus power to provide a remedy to petitioners who suffer harm as a result of malfeasance or nonfeasance by government officials. The Supreme Court first analyzed the mandamus power in *Marbury v. Madison*.[83]

It is well settled that the elegantly written opinion by Justice Marshall is "the single most important decision in American constitutional law."[84] Apart from establishing "the authority for the judiciary to review the constitutionality of executive and legislative acts,"[85] the opinion reiterated the notion of a remedy against the executive branch of the federal government in mandamus actions "when there is a specific duty to a particular person, but not when it is a . . . matter left to executive discretion."[86] In Chief Justice Marshall's words:

> [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.[87]

"we command").

81. *See* Administrative Procedure Act § 10(e), Pub. L. No. 79-404, 60 Stat. 243, 243–44 (codified as amended at 5 U.S.C. § 706 (2006)) (granting judicial review of administrative actions).

82. Judiciary Act of 1789 § 13.

83. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 138 (1803).

84. CHEMERINSKY, *supra* note 75, at 39. *See generally* Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in* Marbury v. Madison, 1986 WIS. L. REV. 301, 301 n.2 (1986). "The case . . . is studied in virtually every constitutional law and federal courts course, as well as many administrative law classes. It is reprinted in most casebooks . . . and is discussed in numerous books and articles." *Id.* (citations omitted).

85. CHEMERINSKY, *supra* note 75, at 39.

86. *Id*. at 42.

87. *Marbury*, 5 U.S. at 166.

More than two centuries later, the modern mandamus statute, 28 U.S.C. § 1361, tracks the language of the Judiciary Act of 1789 and Justice Marshall's opinion by commanding that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."[88] Consequently, in mandamus suits involving AOS, plaintiffs ask the federal courts to order USCIS to process their I-485 applications in a timely manner, even though FBI-administered name checks may be incomplete.[89]

Although mandamus review has, like habeas corpus, long been a judicial remedy,[90] in the immigration context the federal courts' mandamus power of review is limited or residual. Indeed, in response to the question of how many branches the federal government has, one legal scholar answered that "where immigration enforcement is concerned, the more accurate answer might appear to be two branches—Legislative and Executive."[91] Regarding the follow-up question of the judiciary's nominal role, the scholar responded that "[t]he evisceration of judicial power is due to important recent legislation that purports to eliminate, or at least radically curtail, judicial review of immigration proceedings."[92]

The Antiterrorism and Effective Death Penalty Act (AEDPA)[93] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[94] are two major enactments that, in 1996, narrowed the scope of judicial review in immigration cases. In AEDPA, Congress eliminated judicial review for "those found deportable for having committed certain criminal offenses."[95] In IIRIRA, Congress "went far beyond AEDPA" by eliminating "distinctions between exclusion and deportation proceedings," replacing them with "a single removal proceeding," and continuing "AEDPA's ban on judicial review of removal orders against so-called

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88. 28 U.S.C. § 1361 (2006).

89. *See infra* Part II (analyzing both favorable and adverse decisions of the federal courts).

90. *See* Gerald L. Newman, *Jurisdiction and The Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1965 (2000) (emphasizing that "Congress did . . . continuously vest[] [the federal courts] with jurisdiction in habeas corpus over federal detention, from the First Judiciary Act of 1789 to the current statute, 28 U.S.C. § 2241").

91. Benson, *supra* note 21, at 1412.

92. *Id.* "Two forms of congressional plenary power—power over the jurisdiction of the Federal courts and power over immigration—shaped [modern immigration] legislation." *Id.*

93. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

94. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.).

95. David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2487 (1998).

'criminal aliens.'"[96] These latter provisions were codified at INA section 242.[97] The defendants in the current I-485 name-check suits rely on section 242 because it "attempts to remove judicial review of most claims for discretionary relief."[98] Section 242 reads, in pertinent part:

> Notwithstanding any other provision of law . . . , including section 2241 of title 28, United States Code [(power to grant writ of habeas corpus)], . . . and sections 1361 [(power to compel a U.S. officer to perform his duty)] and 1651 [(power to issue "all writs necessary")] of such title . . . no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under [certain enumerated sections of INA including INA § 245 (8 U.S.C. § 1255)] [adjustment of status], or
>
> (ii) any other decision or action . . . which is specified . . . to be in the discretion of the Attorney General or the Secretary of Homeland Security [except cases for asylum].[99]

In short, the defendants invoke INA section 242(a)(2)(B)(i)–(ii) by characterizing the Secretary of Homeland Security's adjudication of AOS (I-485) applications as discretionary.[100] Thus, the defendants maintain, federal courts lack mandamus jurisdiction over name-check suits.

2. APA Jurisdiction

AOS plaintiffs use another legal avenue to seek redress for executive agencies' inaction: the APA.[101] As one legal scholar stated, "[p]assage of

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96. *Id.*

97. "The Immigration and Nationality Act, or INA, was created in 1952 . . . [after] [t]he McCarran-Walter bill . . . collected and codified many existing provisions . . . [into] the basic body of immigration law." U.S. Citizenship & Immigration Servs., USCIS – Immigration and Nationality Act, http://www.uscis.gov/ (follow "Laws & Regulations" hyperlink; then follow "Immigration and Nationality Act" hyperlink) (last visited Apr. 22, 2009). "Although it stands alone as a body of law, the Act is also contained in the United States Code[,] a collection of all the laws of the United States . . . arranged in fifty subject titles . . . . Title 8 of the U.S. Code . . . [is entitled] 'Aliens and Nationality'." *Id.*

98. Benson, *supra* note 21, at 1452.

99. Immigration and Nationality Act of 1952 § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (2006). For more detail on the provisions of section 242(a)(2)(B)(i), see Newman, *supra* note 90, at 1987 n.148 (listing other sections, such as "8 U.S.C. §§ 1182(h) (waiver of inadmissibility for crime), 1182(i) (waiver of inadmissibility for misrepresentation), 1229b (cancellation of removal . . .), [and] 1229c (voluntary departure)").

100. *See infra* Part II.B.2 (analyzing the USCIS's discretionary power over AOS applications).

101. 5 U.S.C. §§ 551–559, 701–706 (2006) (originally enacted as Act of June 11, 1946

the Declaratory Judgment Act in 1934 and the [APA] in 1946 expanded judicial review of immigration proceedings” since “[b]oth statutes, in combination with general federal question jurisdiction, made it possible for noncitizens to challenge the actions of the government.”[102]

Under 5 U.S.C. § 706, the APA’s scope-of-review provision, “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”[103] In the current I-485 name-check suits, some federal courts have done just that and found in favor of the plaintiffs by “compel[ling] agency action . . . unreasonably delayed” on the ground that agency inaction was “arbitrary [and] capricious.”[104]

II. FEDERAL DISTRICT COURTS SPLIT OVER MANDAMUS AND APA JURISDICTION

The federal circuits have recently split in their willingness to exercise mandamus and APA jurisdiction.

(Administrative Procedure Act), ch. 324, 60 Stat. 237).

102. Benson, *supra* note 21, at 1429 (footnotes omitted). There are contrasting approaches to the APA’s scope of judicial review. *Compare* Shaughnessy v. Pedreiro, 349 U.S. 48 (1955) (reiterating viability of APA review) *with* Heikkila v. Barber, 345 U.S. 229 (1953) (precluding APA review). *See* Benson, *supra* note 21, at 1429–31 (discussing transition in jurisprudence between *Heikkila* and *Shaughnessy*). For a history of judicial review of administrative actions in the immigration context, see Newman, *supra* note 90, at 1967–68.

> From 1882 until 1952, no express authorization for judicial control of administrative decisions existed in the immigration statutes.
>
> The structure of judicial oversight changed in 1952, because the enactment of the Immigration and Nationality Act (INA) made the judicial review procedures of the Administrative Procedure Act of 1946 . . . applicable to cases arising under the INA.

Id. (footnotes omitted).

103. 5 U.S.C. § 706 (2006).

104. *Id.* § 706(2)(A)–(F). Section 706 states that the court shall deem an agency’s action “unlawful” when the action is:

- an abuse of discretion;
- or otherwise not in accordance with law; [or is]
- contrary to constitutional right, power, privilege, or immunity;
- in excess of statutory jurisdiction, authority or limitations; or
- short of statutory right;
- without observation of procedure required by law;
- unsupported by substantial evidence . . . ; or
- unwarranted by the facts [in a *de novo* court proceeding].

WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 323 (4th ed. 2000) (alterations other than ellipsis in original).

A. Favorable Decisions: Plaintiffs' Arguments Win

It should be noted at the outset that courts distinguish between the jurisdictional "power to adjudicate the case" in the first instance and the nonjurisdictional "power to grant relief" or to establish "sufficiency of a valid cause of action" once a valid action has been brought.[105] As an American Immigration Law Foundation (AILF)[106] advisory explained, "[t]he failure to state a valid cause of action calls for a judgment on the merits and not for dismissal for want of jurisdiction."[107] Consequently, in order "to avoid tackling the merits under the ruse of assessing jurisdiction,"[108] the courts deem the allegations of the claim as true, assert jurisdictional power to hear the claim, and proceed with determining whether they have the power to grant the requested relief.

Accordingly, one court's opinion that favored I-485 plaintiffs begins with an assertion that "the district court has jurisdiction under § 1361" unless the claim is "patently frivolous."[109] Upon meeting this jurisdictional threshold,[110] the opinion addresses the next issue, the judicial power to grant

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105. AILF Legal Action Ctr., Practice Advisory, Mandamus Jurisdiction Over Delayed Applications: Responding to the Government's Motion to Dismiss 3 (Sept. 24, 2007), http://www.ailf.org/lac/pa/mandamus-jurisdiction9-24-07 PA.pdf (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1988)) [hereinafter AILF, Mandamus Jurisdiction]. According to the *Steel Co.* Court, "[i]t is firmly established . . . that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co.*, 523 U.S. at 89; *see also* Ahmed v. Dep't of Homeland Sec., 328 F.3d 383, 386–87 (7th Cir. 2003) (discussing the Court's authority to grant relief). The *Ahmed* Court stated:

> [I]t is necessary to distinguish between the court's power to adjudicate the petition and the court's authority to grant relief. Only the former necessarily implicates the subject-matter jurisdiction of the court; the latter will depend on whether the statute on which the plaintiff is relying imposes a clear duty on the officer or employee of the United States.

Id. at 386.

106. Am. Immigration Law Found., AILF Background, http://www.ailf.org/main_about.asp (last visited Apr. 20, 2009) (noting that AILF "was established in 1987 as a tax-exempt, not-for-profit educational, charitable organization" to work closely with practitioners and the general public on immigration law and policy).

107. AILF, Mandamus Jurisdiction, *supra* note 105, at 3 (citing Bell v. Hood, 327 U.S. 678, 682 (1946)).

108. *Ahmed*, 328 F.3d at 386 (quoting Carpet, Linoleum, & Resilient Tile Layers, Local Union No. 419 v. Brown, 656 F.2d 564, 567 (10th Cir. 1981)).

109. *Id.* (reiterating the *Bell v. Hood* test that the Supreme Court set forth in 1946); *see* Bell v. Hood, 327 U.S. at 682–83 ("[A] suit may sometimes be dismissed for want of jurisdiction where the alleged claim . . . clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous.").

110. Additionally, "[p]laintiffs in a mandamus action may allege subject matter jurisdiction under . . . the federal question statute, 28 U.S.C. § 1331." Am. Immigration Law Found., Practice Advisory, Mandamus Actions: Avoiding Dismissal & Proving the Case 2 (Aug. 15, 2005), http://www.ailf.org/lac/pa/lac_pa_081505.pdf [hereinafter AILF, Mandamus Actions]. The APA,

mandamus or APA relief. For mandamus relief, the court must establish whether the prerequisites have been met: (1) whether the plaintiff has "a clear right to the relief" requested; (2) whether the defendant has "a duty to perform the act in question"; and (3) whether there is "no other adequate remedy available."[111] In order to find for the plaintiff, the court must answer all three questions in the affirmative. With respect to APA relief, the court must conclude that the defendants "unreasonably delayed the processing" of the application under 5 U.S.C. § 555(b) on the ground that the action was "unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(1).[112]

1. Plaintiff Has a Right to Have His Claim Adjudicated

The plaintiff's right to relief springs from the defendant's duty to act. Thus, courts consider the statute setting forth USCIS's mandatory duty to adjudicate immigration petitions and whether the plaintiff's interests fall "within [a] 'zone of interests' to be protected . . . by the statute . . . in question."[113] In *Yue Yu v. Brown*, Yue Yu, a Chinese citizen and an unmarried minor, was found eligible for long-term foster care and permanent guardianship in July 1996.[114] The INA provides for "'special immigrant juvenile status' ('SIJ status')" for minors who are dependent on a juvenile court:[115] "a minor with SIJ status may apply for adjustment of status to [become an LPR]."[116] The plaintiff filed her applications for SIJ and LPR status in August 1996.[117] These applications remained unprocessed until January 1999, the time of the *Yue Yu* mandamus action.[118] The *Yue Yu* court had "no hesitation in concluding that the named Plaintiff . . . [fell] within the zone of interest of the INA provisions for SIJ and LPR status"[119] and found a clear right to mandamus relief.[120]

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however, "does not provide an independent basis for subject matter jurisdiction." *Id.* (citing Califano v. Sanders, 430 U.S. 99, 105 (1977)). Instead, the APA provides a basis for relief. *Id.* Similarly, a mandamus plaintiff may invoke 28 U.S.C. § 2201 as a "procedural" statute but not as a "jurisdictional" one. Haidari v. Frazier, No. 06-3215 (DWF/AJB), 2006 U.S. Dist. LEXIS 89177, at *8 n.3 (D. Minn. Dec. 8, 2006).

111. *Ahmed*, 328 F.3d at 387.

112. Ying Huang v. Gonzales, 2007 U.S. Dist. LEXIS 32276, at *13–14 (W.D. Wash. May 2, 2007).

113. *See* AILF, Mandamus Actions, *supra* note 110, at 3 & n.3 (quoting Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970), wherein the Supreme Court articulated, for the first time, the "zone of interests" test for the APA).

114. Yue Yu v. Brown, 36 F. Supp. 2d 922, 925 (D.N.M. 1999).

115. *Id.* at 925 (citing 8 U.S.C. § 1101(a)(27)(J)).

116. *Id.* (citing 8 U.S.C. § 1255).

117. *Id.*

118. *Id.* at 933 (noting that the delay was partially due to the plaintiff's failure to submit the complete applications until January 1998).

119. *Id.* at 930.

Similarly, in *Haidari v. Frazier*, the court found the plaintiffs had a right to relief under the APA.[121] The three plaintiffs, all of Palestinian descent, were separately granted asylum between April 1999 and December 2000.[122] All three individually filed their I-485 applications for AOS between January 2000 and February 2002.[123] Over the course of several years, USCIS ordered, and FBI conducted, the plaintiffs' name checks and fingerprint reports; the latter were repeated upon expiration.[124] While performing these security checks, FBI discovered that each plaintiff had a prior arrest, although records indicated that the charges against two of them were dismissed.[125] By August 2006, when all three filed a complaint for a writ of mandamus, the I-485 applications had been pending for four to six years.[126]

The *Haidari* court based the plaintiffs' right to timely relief on its interpretation of two provisions, 8 C.F.R. § 209.2, which requires agency officials to notify applicants of decisions, and 5 U.S.C. § 555(b), which mandates that agencies act "within a reasonable time."[127] Finding for the

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120. *Id.* at 932–33; *see* Iddir v. INS, 301 F.3d 492, 500 (7th Cir. 2002) (holding that the winners of the Diversity Visa (DV) Lottery Program established the right to have their applications timely adjudicated "[b]ased upon the directive language . . . in the statute and the applicable regulations," but denying mandamus relief because the DV statute had stripped the INS of both its duty to provide that adjudication and its ability to provide relief).

121. Haidari v. Frazier, No. 06-3215 (DWF/AJB), 2006 U.S. Dist. LEXIS 89177, at *10–12 (D. Minn. Dec. 8, 2006).

122. *Id.* at *2.

123. *Id.*

124. *Id.* at *3–6. "For Form I-485 applicants, FBI fingerprint reports are valid for 15 months." *Id.* at *3 n.2.

125. *Id*. at *3–5.

126. *Id.* (indicating that upon learning about the mandamus claim, USCIS requested that FBI expedite the name checks for two of the plaintiffs). Before oral argument in December 2006, when the check for one plaintiff had been completed—but his application was still not adjudicated—the checks for the remaining two plaintiffs were still pending. *Id.* at *6.

127. *Id.* at *10–12. There are "six factors for assessing the reasonableness of agency delay":

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

Yue Yu v. Brown, 36 F. Supp. 2d 922, 934 (D.N.M. 1999) (quoting Telecomms. Research & Action Ctr. (TRAC) v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984)). The *TRAC* court was the first to survey judicial opinions on the reasonableness of executive delay in light of the six-factor framework. *TRAC*, 750 F.2d at 79–80.

plaintiffs, the court concluded that "[b]ecause this claim is not patently without merit in light of the record before this Court, [the] Court does have subject matter jurisdiction" to order "expeditious[]" adjudication of the applications.[128]

2. USCIS Has a Nondiscretionary Duty to Adjudicate Applications

USCIS, although it retains the discretion to decide "whether to *grant* or *deny* an adjustment application,"[129] owes petitioners a "nondiscretionary duty" of adjudication; moreover, the agency's inaction is subject to mandamus relief.[130] The court reconciled the agency's mandatory duty of adjudication of the applications and its discretion of approval or denial of adjustment of status in the following manner:

> [FBI and USCIS] are correct in that the decision of whether to *grant* or *deny* an adjustment application is discretionary. But Plaintiffs are not requesting that this Court review a denial, nor are they seeking to compel Defendants to grant their applications. Instead, Plaintiffs are only asking this Court to compel Defendants to make *any* decision.[131]

In *Aboushaban v. Mueller*, decided in 2006, the United States granted plaintiff Mohammed Aboushaban political asylum in January 1997.[132] He filed his I-485 AOS application to become an LPR in June 1998.[133] USCIS conducted an I-485 interview in May 2000.[134] FBI completed the mandatory name check in April 2006, and reported back to USCIS.[135] As of February 2006, when Aboushaban filed his petition for mandamus relief, his "application ha[d] been pending for nearly a decade."[136] Relying on the *Yue Yu* decision, the *Aboushaban* court similarly read "the statutory text [of 8 C.F.R. § 209.2] as creating a non-discretionary [sic] duty to adjudicate the

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128. *Haidari*, 2006 U.S. Dist. LEXIS 89177, at *12 n.5, *18.

129. *Id.* at *13.

130. AILF, Mandamus Actions, *supra* note 110, at 4.

131. *Haidari*, 2006 U.S. Dist. LEXIS 89177, at *13. The court went on to conclude that "[b]ecause Plaintiffs have neither been denied nor granted relief, [INA § 242(a)(2)(B)(i)–(ii)] does not bar jurisdiction [as defendants argue]." *Id.*

132. Aboushaban v. Mueller, No. C 06-1280 BZ, 2006 U.S. Dist. LEXIS 81076, at *1 (N.D. Cal. Oct. 24, 2006).

133. *Id.* at *1–2.

134. *Id.* at *2.

135. *Id.*; *see also id*. at n.1 (noting that "[n]either party makes clear when the USCIS forwarded the plaintiff's change of status application to the FBI").

136. *Id.* at *3, *5.

plaintiff's application."[137] Next, the court stressed that "[t]he last demonstrable action taken by the government . . . was the 2000 interview" and that USCIS "moved on plaintiff's application" only after Aboushaban had appropriately initiated the mandamus action six years later.[138]

3. Plaintiff Lacks Alternative Adequate Remedy

Finally, certain courts have found that AOS petitioners, after having exhausted all available administrative remedies, were entitled to mandamus relief when no alternative adequate remedies remained.[139] In *Tang v. Chertoff*, the plaintiffs, a Chinese family of three, filed their employment- and family-based AOS applications in 2004.[140] Both spouses were researchers at the University of Kentucky, and the wife needed proof of her permanent residency by a certain date in order to secure a grant of nearly $300,000 for diabetes research from the National Institute of Health.[141] In July 2007, the plaintiffs filed a suit for mandamus relief after having "taken all steps possible to facilitate processing of their I-485 Applications including attending CIS mandated biometrics appointments on multiple occasions and updating any changes in residence and employment."[142] They also made "at least one formal request to CIS for expedited processing of their applications."[143] As a result, the court found that the plaintiffs had no alternative remedy remaining.[144] In particular, the court "lack[ed] confidence that the defendants [would] take any action at all in the

137. *Id.* at *4 (citing Yue Yu v. Brown, 36 F. Supp. 2d 922, 931–32 (D.N.M. 1999)).

138. *Id.* at *5–6. Rejecting the plaintiff's claim against FBI, the *Aboushaban* court held that "the claim as to the FBI [was] moot" because FBI had, "however belatedly, finished its role in the processing of plaintiff's application." *Id.* at *6–7, *9.

139. AILF, Mandamus Actions, *supra* note 110, at 5.

140. Tang v. Chertoff, No. 07-203-JBC, 2007 U.S. Dist. LEXIS 64022, at *2 (D. Ky. Aug. 29, 2007).

141. *Id.* at *2–4. The National Institute of Health averred that even "proof of reasonable progress toward her permanent resident status" would have sufficed. *Id.* at *4.

142. *Id.* at *2–4.

143. *Id.* at *3–4; *see* Cannon January Declaration, *supra* note 47, at 7 (explaining that while FBI administers name checks on a first-come, first-served basis, USCIS can direct certain requests to be "expedited"); *see also* Notice, U.S. Citizenship & Immigration Servs., FBI Name Check Expedite Criteria (Jan. 2005), http://www.ailf.org/lac/chdocs/lac_mandamus_USCISnamecheck.pdf (listing, along with a pending writ-of-mandamus suit, other expedited name-check criteria, including "[m]ilitary deployment," "[a]ge-out benefits (not covered under the provisions of the Child Status Protection Act)," a "grant of lawful permanent residence" by an immigration judge, and other "[c]ompelling reasons . . . [such as a] critical medical condition"). *But see* Press Release, U.S. Citizenship & Immigration Servs., USCIS Update: USCIS Clarifies Criteria to Expedite FBI Name Check (Feb. 20, 2007), http://www.uscis.gov/files/pressrelease/ExpediteNameChk022007.pdf (removing a pending mandamus suit from the expedited name-check criteria but adding "[l]oss of social security benefits or other subsistence").

144. *Tang*, 2007 U.S. Dist. LEXIS 64022, at *15–16.

foreseeable future on the plaintiffs' applications without a court order" to facilitate the plaintiffs' research, which the court found to be "in the nation's interest."[145]

The *Haidari* court similarly found that the alternative proposed by the defendants, "waiting until . . . applications are adjudicated," is not an adequate remedy for the plaintiffs.[146] "Defendants miss the point. The question is whether the Plaintiffs have adequate, alternative means to address this very issue: the fact that they are *still waiting*."[147] In short, under the reasoning of *Tang* and *Haidari*, the courts will adjudicate plaintiffs' petitions for writs of mandamus as long as there is no other alternative adequate remedy available and a judicial order will provide appropriate relief.[148]

B. Adverse Decisions: Defendants' Arguments Win

USCIS frequently makes the following three arguments in response to suits by mandamus plaintiffs: (1) plaintiff has no right to immediate relief under the circumstances;[149] (2) defendant has discretion over plaintiff's eligibility for relief;[150] and (3) plaintiff has an alternative remedy available.[151] The following cases illustrate successful uses of these arguments.

1. Plaintiff Has No Right to Immediate Adjudication

USCIS has argued that AOS petitioners do not have a right to have their applications adjudicated until security checks are completed.[152] In

145. *Id.* at *17 nn.8–9.

146. Haidari v. Frazier, No. 06-3215, 2006 U.S. Dist. LEXIS 89177, at *14–15 (D. Minn. Dec. 8, 2006).

147. *Id.* at *15 (emphasis added).

148. *Compare* Aboushaban v. Mueller, No. C 06-1280 BZ, 2006 U.S. Dist. LEXIS 81076, at *6 (N.D. Cal. Oct. 24, 2006) (directing USCIS to adjudicate the plaintiffs' applications), *and* Yue Yu v. Brown, 36 F. Supp. 2d 922, 935 (D.N.M. 1999) (finding that a delay of more than one year in processing a completed application was not reasonable as a matter of law), *with* Iddir v. Immigration & Naturalization Serv., 301 F.3d 492, 500 (7th Cir. 2002) ("Nevertheless, the [mandamus] relief the appellants currently seek is illusory, because even if the INS adjudicated the applications today, visas could not be issued.") *and* Ahmed v. Dep't of Homeland Sec., 328 F.3d 383, 388 (7th Cir. 2003) ("Here, as in *Iddir*, [the] statutory authorization [to grant the U.S. entry visa to a Diversity Visa Lottery Program winner] had expired, and that precludes mandamus relief.").

149. *See, e.g.*, Feng Li v. Gonzalez, No. 06-5911 (SRC), 2007 U.S. Dist. LEXIS 32608, at *6 (D.N.J. May 3, 2007) (presenting Homeland Security's argument that it had no "duty to process [Plaintiff's] application within a reasonable time").

150. *See id.* at *22 (holding that defendants "have discretion to withhold adjudication").

151. *See* Rogatch v. Chertoff, No. CA 06-541ML, 2007 U.S. Dist. LEXIS 28450, at *6 (D.R.I. Apr. 17, 2007) (stating that the plaintiff must wait until his application has been answered).

152. *E.g.*, *Feng Li*, 2007 U.S. Dist. LEXIS 32608, at *2 (explaining that the plaintiffs'

Feng Li v. Gonzalez, spouses Feng Li and Lei Xiao were residing in the United States pursuant to an approved Immigrant Petition for Alien Work with a National Interest Waiver.[153] In July 2004, they filed their I-485 applications, on which USCIS took no action for almost two and one-half years, until December 2006, the time of the couple's mandamus action.[154] The court found that "[p]laintiffs' application has not been adjudicated because the USCIS and [FBI] have not completed security checks adopted by the Attorney General in the aftermath of 9-11."[155] Acknowledging that the delay was due to "a severe security check backlog," the court excused the lack of adjudication on the ground that "regulations . . . allow immigration officers to direct investigations into I-485 [applications] and to withhold adjudication until those investigations are complete."[156]

In *Rogatch v. Chertoff*, a case whose reasoning was similar to, though not as thorough as, that of *Feng Li*, the court rejected the plaintiff's prayer for relief to compel USCIS "to adjudicate [his employment-based] application with or without name check clearance from FBI."[157] Vasili Rogatch, a *pro se* plaintiff, had resided legally in the United States since March 2002.[158] In 2004, he filed his AOS application based on employment.[159] More than four-and-a-half years later, USCIS had not processed the application. Rogatch filed a mandamus complaint in December 2006, challenging "only the Defendants' timeliness in adjudication of [the] application . . . not the granting or denial of [it]."[160] Although "the Court may [have been] sympathetic to [plaintiffs'] frustration with the length of time" involved, it found a lack of mandamus jurisdiction "to grant him any relief" whether or not the name check was complete.[161]

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application had not been adjudicated yet because USCIS and FBI had not completed security checks due to "a severe security check backlog" following 9/11); *Rogatch*, 2007 U.S. Dist. LEXIS 28450, at *2 (summarizing that USCIS explained that the processing of plaintiff's application was delayed as a result of a pending FBI background check).

153. *Feng Li*, 2007 U.S. Dist. LEXIS 32608, at *1.

154. *Id.* at *2.

155. *Id.*

156. *Id.* at *2, *22. The court cited, among other authority, 8 C.F.R. § 103.2(b)(7), which notes that an immigration officer "'*may* direct any necessary investigation' into an application" and 8 C.F.R. § 103.2(b)(18), which notes that the officer may "withhold adjudication while applications are investigated" in increments of six months "if he or she '*determines it is necessary* to continue to withhold adjudication pending completion of the investigation.'" *Feng Li*, 2007 U.S. Dist. LEXIS 32608, at *16–17 (emphasis added in *Feng Li*) (citing 8 C.F.R. § 103.2(b)(7), (18) (2008)).

157. *Rogatch*, 2007 U.S. Dist. LEXIS 28450, at *2, *6.

158. *Id.* at *1.

159. *Id.* at *1–2.

160. *Id.* at *2–3.

161. *Id.* at *6.

2. USCIS Has Discretion over Plaintiff's Application

USCIS has broad discretion, prescribed by statute, over a plaintiff's eligibility for AOS.[162] With respect to the typical mandamus argument that agencies have a "nondiscretionary duty,"[163] the *Feng Li* court agreed with the defendants that "no such duty exists."[164] The court found an absence of mandamus jurisdiction in light of 28 U.S.C. § 1361 because "the entire adjustment process, including the pace at which the application is reviewed, is left to the [official's] discretion" pursuant to INA section 242(a)(2)(B)(ii).[165] As an illustration of the discretionary authority prescribed by statute "to adjust the status of an alien to permanent residence status," the opinion cited 8 U.S.C. § 1255(a) which, in pertinent part, reads:

> The status of an alien who was inspected and admitted or paroled into the United States . . . *may* be adjusted by the Attorney General, *in his discretion* and under such regulations *as he may prescribe*, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.[166]

The *Feng Li* court dismissed the plaintiffs' reading of 8 C.F.R. § 209.2(f) as imposing "a non-discretionary duty to notify an applicant and record an admission for lawful permanent residence after a decision has been made."[167] In particular, the court construed 8 C.F.R. §§ 209.2(f) and 103.2(b)(18) as provisions for withholding adjudication:

> The plain text of the regulation does not place any limitation on the discretion of immigration officers before a decision has been rendered. There is no basis for reading § 209.2(f) to

162. AILF, Mandamus Jurisdiction, *supra* note 105, at 5 (noting that "the adjustment statute gives USCIS discretion about the actual decision" to grant or deny an adjustment application).

163. *See supra* Part II.A.2 (discussing cases in which courts have held that USCIS has a nondiscretionary duty to adjudicate applications).

164. Feng Li v. Gonzalez, No. 06-5911 (SRC), 2007 U.S. Dist. LEXIS 32608, at *6, *22–23 (D. N.J. May 3, 2007).

165. *Id.* at *6–7.

166. *Id.* (emphasis added in *Feng Li*) (quoting 8 U.S.C. §1255(a) (2006)). "[W]hile the text [of the provision] refers to the Attorney General as the official who may grant an adjustment of status, [such] authority . . . has been transferred to the Secretary of Homeland Security and the USCIS" pursuant to 6 U.S.C. §§ 271(b)(5), 557. *Id.* at *8 n.1.

167. *Id*. at *19 (footnote omitted).

> encroach on the discretion to withhold adjudication explicitly granted in § 103.2(b)(18) because § 209.2(f) refers to Defendants' duties *after* a decision has been reached, while § 103.2(b)(18) grants discretion to withhold adjudication while an application is pending.[168]

The *Feng Li* opinion deemed APA relief as unavailable for two reasons.[169] First, the court found "no statutory or regulatory provision compelling adjudication within a certain time period."[170] Second, as described above, the "decision by immigration officials to withhold adjudication is within their [broad] discretion."[171]

3. Plaintiff Has an Alternative Remedy Available

In *Rogatch v. Chertoff* the court found that a plaintiff was not eligible for mandamus relief because the remedy of waiting for adjudication of his application was available.[172] After asserting a lack of jurisdiction to grant any relief, the *Rogatch* court stated that although "the Court may be sympathetic to [plaintiffs'] frustration with the length of time his application has been pending without action . . . he can do no more than be patient while he awaits an answer to his application."[173] Although seemingly acknowledging the fruitlessness of waiting as a remedial measure, the court saw it as the only option and dismissed the plaintiff's complaint.[174]

III. JUDICIAL AND EXECUTIVE BRANCHES OF THE FEDERAL GOVERNMENT SHOULD EXERCISE THEIR IMMIGRATION POWERS TO THE FULLEST

In order to keep the separation-of-powers equilibrium balanced, all three branches of the federal government—judicial, executive, and legislative—must participate fully in solving the current backlog of

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168. *Id.*

169. *Id*. at *23–24.

170. *Id.* at *24 (internal quotations omitted) (quoting Jing Li v. Chertoff, 482 F. Supp. 2d 1172, 1178 (S.D. Cal. 2007)).

171. *Id*. (citing 8 U.S.C. § 1255(a); C.F.R. § 103.2(b)(18)). Since the court found no jurisdiction under mandamus or the APA, it held that "it [was] unnecessary to decide whether 8 U.S.C. § 1252(a)(2)(B)(ii) also denies judicial review of the agency's discretion to withhold adjudication." *Id.* at *25 n.9.

172. Rogatch v. Chertoff, No. CA 06-541ML, 2007 U.S. Dist. LEXIS 28450, at *6 (D.R.I. Apr. 17, 2007).

173. *Id.*

174. *Id.*

unprocessed I-485 applications. This backlog potentially deprives eligible applicants of immigrant and nonimmigrant benefits.[175]

A. Federal Courts Should Have Review Power over Adjustment-of-Status Claims Similar to Their Power over Naturalization Claims

The federal courts' power of review over naturalization claims should be extended to AOS claims. Both naturalization and AOS claims are interconnected procedures on the pathway to acquiring legal status.[176]

1. The Process of Naturalization

Naturalization—the process of becoming a United States citizen[177] (USC) by application, rather than by birth[178]—follows adjustment to LPR status.[179] Specifically, a foreign-born candidate seeking naturalization must satisfy the following criteria provided by Congress[180]:

1. Must be an LPR;
2. Must be 18 years old;
3. Must normally be a resident continuously for 5 years subsequent to LPR status, or if married to a USC the residency requirement is three years if: (i) the USC spouse is a USC for three years; and (ii) the parties have been married for at least three years. The requirement that the spouse live with his or her USC for the 3-year period is waived if a spouse or child obtained LPR status because of battering or extreme cruelty;
4. Must have resided for at least three months within the state in

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175. *See* USCIS, 2007 Ombudsman Report, *supra* note 28, at 39 (listing the hardships that a qualified I-485 applicant is likely to avoid if his adjustment-of-status application is adjudicated and approved).

176. *See id.* at 7 (noting that problems related to various immigration procedures are often "interconnected").

177. BLACK'S LAW DICTIONARY 261 (8th ed. 2004) (defining a citizen as a "person who, by either birth or naturalization, is a member of a political community owing allegiance to the community and being entitled to enjoy all its civil rights and protections").

178. *See* KURZBAN, *supra* note 30, at 1075–80 (documenting different birth-based ways of becoming a U.S. citizen: (1) by birth in the U.S. or certain incorporated territories; (2) by acquisition at birth; and (3) by derivation through the naturalization or U.S. birth of one parent allowing a foreign-born minor who is adopted by a USC to acquire an immediate citizenship "upon . . . admittance to the U.S. as [an] LPR" pursuant to the Child Citizenship Act of 2000, Pub. L. No. 106-395, § 101, 114 Stat. 1631).

179. *See supra* Part I.B.1 (detailing the status-adjustment process).

180. Recall that Congress's plenary power over naturalization is expressly granted by the U.S. Constitution. U.S. CONST. art. I, § 8, cl. 4. *See also supra* Part I.A (describing the evolution of Congress's power in the immigration context).

which the petition was filed;

5. Must be physically present in the U.S. for at least one-half of the required continued residence;
6. Must have resided continuously within the U.S. from the date the application filed up to the time of admission to citizenship;
7. Must not be absent from the U.S. for a continuous period of more than one year during the periods for which continuous residence is required (with some exceptions due to military service and employment);
8. Must be a person of good moral character for the requisite [time of continued residence (based, for instance, on the past and/or present criminal admission or conviction, or nonsupport of dependants);
9. Must be attached to the principles of the Constitution and well disposed to the good order and happiness of the U.S. (i.e., an applicant must take an oath of allegiance to the U.S.);
10. Must be willing to bear arms on behalf of the United States when required by the law, or perform noncombat service in the Armed Forces of the United States;
11. Must not otherwise be barred under the listed circumstances; and
12. Must pass the civics and English language test.[181]

Examining these criteria, one might wonder why the eligibility threshold is set so high. The answer lies in the United States Constitution, which affords protection of individual rights without differentiating between citizens by birth or naturalization.[182]

> The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.[183]

> All persons born or naturalized in the United States, and subject

181. KURZBAN, *supra* note 30, at 1080–88 (citations omitted). This list of criteria partially quotes and partially paraphrases the source material.

182. ROBERT MCWHIRTER, THE CITIZENSHIP FLOWCHART 1 (2007) (noting, however, that the Constitution, in Article II, Section 1, requires that the President and Vice President be "natural-born citizens"); *see also* MADELEINE KUNIN, LIVING A POLITICAL LIFE 160, 333–36 (1994). Madeleine Kunin, the first woman elected governor of Vermont, recalls her immigration from Switzerland to the United States as a child with her mother and older brother. *Id.* Having fled Nazi-occupied Europe, the family escaped the fate of six million Jewish victims of the Holocaust. *Id.* "Dual citizenship was my heritage. I had always known about the United States, just as my mother had from listening to the stories told by her parents. It seemed inevitable that we would come here." *Id.* at 326. "The difference between you and other Americans is that you became citizens with your clothes on." *Id*. at 335–36 (recalling what she said to newly sworn citizens, a comparison used by the judge who administered the oath of citizenship to Mrs. Kunin's mother in 1949).

183. U.S. CONST. art. IV, § 2, cl. 1.

> to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.[184]

Thus, the Constitution grants a naturalized citizen the right to vote, to hold public office, and to be a member of the United States House of Representatives or Senate.[185] In addition, a naturalized citizen qualifies for a United States passport.[186]

An eligible LPR becomes a citizen when USCIS adjudicates and approves his Application for Naturalization (Form N-400) and the applicant has taken the oath of allegiance.[187] Like an I-485 applicant, an N-400 applicant must have his fingerprints taken[188] and undergo an FBI criminal

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184. U.S. CONST. amend. XIV, § 1.

185. MCWHIRTER, *supra* note 182, at 1 (citing U.S. CONST. amend. XV; art. I, §§ 2, 3). The right to vote is an essential part of American democracy and becomes even more critical during presidential elections. A newly naturalized citizen "would be proud and emotionally satisfied if he gets to vote, . . . and especially if the person he will vote for will become the president." Nina Bernstein, *'04 Voting Opportunity Remains For Newest Naturalized Citizens*, N.Y. TIMES, Oct. 15, 2004, at B3, *available at* 2004 WLNR 5564942 (quoting Vladimir Epshteyn, President, Russian-American Voters Educational League, who explained the significance of a New York State law that extended the voter registration deadline for naturalized citizens by allowing those "sworn in as citizens after [the election-registration] deadline . . . to register in person at [the County] Board of Elections headquarters . . . until 10 days before [the] election"). In the 2008 presidential election, immigrants voiced their choice strongly; for example, "Hispanic voters backed [Barack] Obama 2-to-1." Laura Isensee, *Fixing Flawed System is One Priority Among Many Obama Renews Campaign Pledge, but Economy, Mexico's Drug Violence Likely to Come First*, DALLAS MORNING NEWS, Mar. 23, 2009, at 1A. Madeleine Albright, the first woman to hold the public office of Secretary of State and a self-described "refugee," immigrated from Communist Czechoslovakia as a child with her parents and two siblings on diplomatic passports. MADELEINE ALBRIGHT, MADAM SECRETARY 18–20 (2003). The whole family obtained American citizenship via political asylum after Mrs. Albright's father, working at the United Nations, wrote a letter on February 12, 1949, begging Secretary of State Dean Acheson for "the [family's] right to stay in the United States." *Id.* at 18–19. Four months later the family was granted political asylum. *Id.* at 20.

186. KURZBAN, *supra* note 30, at 1091 (citing 22 C.F.R. § 51.44). This Note's author described her own experience of getting her first U.S. passport after being naturalized as follows:

> An envelope passed over to me by my husband Jim did not look a bit more significant than your usual mail. Yet, here it was—my American passport. It had golden lettering on a royal navy cover with crisp pages. On the first page it read in three languages [English, French, and Spanish] "The Secretary of State of the United States of America hereby requests all whom it may concern to permit the citizen/national of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection." I felt protected by just reading that—protected and honored.

Natalia May, *Proud To Be An American*, IWC NEWSLETTER (Int'l Women's Club of the Upper Valley, Hanover, N.H.), Nov. 2001, at 4 (on file with author).

187. *See* 8 C.F.R. § 316.4(a) (2008) (providing that an "applicant shall apply for naturalization by filing . . . Form N-400"); 8 C.F.R. § 103.2(b)(8) (2008) (explaining USCIS approval of applications for naturalization); 8 C.F.R. § 337.9 (2008) (stating that a person is naturalized on the date that they take the oath of allegiance).

188. KURZBAN, *supra* note 30, at 1089 (noting, however, that N-400 applicants do not submit their fingerprints along with their applications, like I-485 applicants do; rather, N-400 applicants are

investigation, including a name check.[189] Like I-485 applications, hundreds of thousands of N-400 applications have gone unprocessed for months.[190] Yet an N-400 applicant has something on his side that an I-485 does not have: statutorily supported judicial review.

2. Judicial Review over Naturalization Claims

Congress has granted federal district courts broad discretion with respect to suits by N-400 applicants. In particular, INA section 336(b) specifically provides the courts with the power of review when applications have not been adjudicated for more than 120 days after a naturalization "examination":

> If there is a failure to make a determination under section 1446 of this title [INA section 335, 8 U.S.C. § 1446] before the end of the 120-day period after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter. Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to [USCIS] to determine the matter.[191]

Although the statutory language is rather straightforward, courts have interpreted it differently. In *Astafieva v. Gonzalez*, plaintiff Irina Vladimirovna Astafieva, an LPR, filed her N-400 Application for

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called in separately for fingerprinting).

189. Astafieva v. Gonzales, No. C 06-04820 JW, 2007 U.S. Dist. LEXIS 28993, at *5–6 (N.D. Cal. Apr. 2, 2007) (reporting that "[i]n 1997, Congress began to require a criminal background investigation of all applicants for naturalization" pursuant to Act of Nov. 26, 1997, Pub. L. No. 105-119, 111 Stat. 2440, 2448, and upon which USCIS adopted 8 C.F.R. § 335.2(b), a pre-adjudication regulation mandating "a definitive response from the FBI" for all N-400 applicants).

190. As Michael Aytes, Associate Director of USCIS, explained: "The immigration agency's workload has nearly doubled . . . with 1.4 million naturalization applications arriving from October 2006 to September 2007, compared with 731,000 applications the year before. Between July and September of this year alone, USCIS received 560,000 applications . . . ." Hsu, *supra* note 60. The officials described the three factors that prompted this "off the charts" N-400 boost: the impending filing fee increase effective July 30, 2007; "legal immigrants' anxiety at an increasingly harsh tenor of the political debate over illegal immigration"; and "heightened interest in the 2008 presidential election." *Id.* As result, the applications' processing time has grown from seven months to about eighteen months. *Id.* In March 2008, USCIS announced a shorter "average processing time of 14–16 months" calling it "a marked improvement from the 16–18 months projection" of January 2008. Statement, Emilio T. González, Director, U.S. Citizenship & Immigration Servs. (Mar. 14, 2008), http://www.docstoc.com/docs/1068699/statement-by-USCIS-Director-Emilio-T-Gonzalez-on-Processing-of-Naturalization-Applications.

191. Immigration and Nationality Act § 336(b), 8 U.S.C. § 1447(b) (2006).

Naturalization in September 2003.[192] One month later, USCIS submitted a name-check request for her to FBI.[193] In May 2004, the plaintiff attended a naturalization interview where she passed her tests on English and American Civics.[194] In November 2006, the court granted the plaintiff a hearing regarding her action seeking a declaratory judgment "that she [was] entitled to be naturalized."[195] The court asserted jurisdiction over the matter under 8 U.S.C. § 1447(b) based on the fact that the plaintiff's application had been pending for thirty-five months after the naturalization interview.[196] Based on the facts that FBI had had the plaintiff's name check pending for thirty-nine months with no indication of completion and had no derogatory information "that should prevent Plaintiff from becoming a naturalized citizen," the court found no reason for further delay and granted the plaintiff's naturalization application.[197] The court ordered "Michael Chertoff, in his capacity as Secretary of the Department of Homeland Security, or his designated officer, to administer the Oath of Citizenship to Irina Vladimirovna" and to issue her a Certificate of Naturalization.[198]

Likewise, in *Walji v. Gonzales*, with facts analogous to those in *Astafieva*, the Fifth Circuit Court of Appeals ruled in favor of the plaintiff, a Ugandan native and Canadian citizen, leading to the granting of his United States citizenship.[199] The significance of the *Walji* opinion lies in the fact that "[i]n a rare turnabout, the Fifth Circuit granted a petition for rehearing and reversed itself."[200] In a prior decision in June 2007, the Fifth Circuit found for the government, concluding that when an FBI security investigation is not complete, a USCIS "examination" under 8 U.S.C. § 1447(b) has not occurred, and thus the 120-day period is not triggered.[201]

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192. *Astafieva*, 2007 U.S. Dist. LEXIS 28993, at *2–3.

193. *Id.* at *3.

194. *Id.*

195. *Id.* at *1–2.

196. *Id.* at *7–8.

197. *Id.* at *8. The court based its decision on the information the plaintiff received from FBI after she had requested record of her name check under the Freedom of Information Act. *Id.* The court held "an *in camera* hearing under seal" upon the government's request so as not to reveal certain information on public record. *Id.*

198. *Id.* at *8–9. Although the plaintiff named six defendants, including the U.S. Attorney General and the Directors of USCIS and FBI, the court found the Secretary of DHS to be the "only relevant" party and dismissed the others. *Id.* at *4. As a result, Michael Chertoff, as Secretary of DHS, or his designee, was to administer a public oath of allegiance, which is the final step in the naturalization process. KURZBAN, *supra* note 30, at 1085, 1091. Usually, an approved N-400 applicant has a choice to have the oath administered by USCIS, a U.S. district court, or any state court. *Id.* at 1089.

199. Walji v. Gonzales, 500 F.3d 432, 439 (5th Cir. 2007).

200. *Fifth Circuit Reverses Position in Natz Delay Case* Walji, LITIG. CLEARINGHOUSE NEWSL. (Am. Immigration Law Found. Legal Action Ctr., D.C.), Sept. 17, 2007, at 1, http://www.ailf.org/lac/litclearinghouse/litclr_newsletter_091707.pdf.

201. *Id.*.

Yet, in September 2007, the same panel of three circuit judges granted the petition for rehearing, deemed the statute applicable, and reversed its own June judgment "because the clear intent of Congress was to accelerate naturalization applications, and the statutory . . . language gives a definite time frame for decision once an examination has occurred."[202]

This easily invoked judicial review is of little comfort, however, to most N-400 petitioners because the agency has difficulty carrying out courts' orders in a timely manner; USCIS is overwhelmed by a "surge" in application filings.[203] As USCIS Director Emilio González reported, "[d]uring Fiscal Year 2007, the agency received approximately 1.4 million naturalization applications" which surpassed the number of naturalization applications filed in fiscal years 2005 and 2006 combined.[204] For now, N-400 applicants have not escaped the I-485 applicants' fate of long delays; the average application processing time is up to eighteen months.[205] This processing time is unlikely to decrease, and, for that matter, USCIS will be unable to timely execute judicial orders from favorable mandamus or APA actions until the agencies improve their internal procedures.

B. Executive Agencies Should Restructure Their Procedures

Both USCIS and FBI should reorganize their procedures in order to address the growing demands of the immigration system. USCIS, finding it "satisfying that so many people want to become a part of the American fabric," has begun to address the necessity of restructuring its procedures to meet the application increase[206] and, ultimately, to reduce the current backlog of unprocessed forms. Four major areas of concern are adequate staffing, effective training programs, new adjudication approaches, and improved information technology.[207] Some steps that the agency has already taken with respect to staff and its training include "expanding work hours, adding shifts," and "hiring 1,500 new employees," of which almost half are adjudicators.[208] In terms of new approaches, USCIS has opened

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202. *Walji*, 500 F.3d at 439.

203. *A Message from USCIS Director Emilio González*, USCIS MONTHLY (U.S. Citizenship & Immigration Servs., D.C.), Jan. 2008, at 1.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Naturalization Delays: Causes, Consequences and Solutions: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 11 (2008) (statement of Emilio T. Gonzalez, Director, U.S. Citizenship & Immigration Servs.), *available at* http://judiciary.house.gov/hearings/printers/110th/40282.pdf.

208. *Id.* at 12–13.

several informational channels to advise the public at large and to respond to applicants' inquiries.[209]

The USCIS ombudsman has suggested two novel adjudication approaches, neither of which have been adopted: a pre-application security check and a risk-based approach.[210] In a nutshell, a suggested pre-application becomes the first step of the traditional, three-step "application-adjudication-issuance" process.[211] During pre-application the agency issues a Clearance Report as "documentary proof that the applicant successfully completed" the "process initiation" and "biometric/biographic data share" substeps.[212] "Pre-application is more than a pre-screening that determines *prima facie* eligibility" because "[i]t moves the case to an adjudicating officer who reviews the file and interviews the applicant, if necessary" and issues a decision shortly after, if not on the same day of, the interview.[213]

This pre-application process could potentially preclude judicial relief in the event that assembling an initial file for the pre-application process is unreasonably delayed. In the absence of an assembled file, an applicant might be unable to assert an unreasonable delay of the overall process and seek relief under the mandamus or APA statutes. Such a suit would arguably be unripe.

The ombudsman's other proposed approach involves a risk-based assessment of an applicant including, but not limited to, a determination of "whether the individual has been in the United States for many years or a few days, is from and/or has traveled frequently to a country designated as a State Sponsor of Terrorism, or is a member of the U.S. military."[214] Simply put, a risk-based approach would eliminate unnecessary FBI name checks of those applicants who have already been screened by DHS law-enforcement entities as a prerequisite of employment.[215]

The USCIS ombudsman has also suggested an improvement in information technology, specifically "Background Check Service (BCS), a

209. *Id.* at 12. "[O]ur first priority was to accept filings and provide applicants with proper receipt notices as quickly and efficiently as possible" by reporting the status of receipting progress on the USCIS website. *Id.* Other information services include "Frequently Asked Questions" on the USCIS website and a customer-service hotline. *Id.*

210. USCIS, 2007 Ombudsman Report, *supra* note 28, at 41–45.

211. *See supra* Part I.B.1 (providing a detailed overview of the application process).

212. USCIS, 2007 Ombudsman Report, *supra* note 28, at 42 fig.11, 43. During "process initiation," an applicant registers intent electronically; pays a processing fee; and undergoes fingerprinting, photographing, financial review, and naturalization testing, if necessary. *Id.* at 42 fig.11. During "biometric/biographic data share," all the necessary "information is shared with law enforcement and other appropriate agencies/offices." *Id.*

213. *Id.* at 42 fig.11, 43.

214. *Id.* at 43.

215. *Id.* at 43–44.

new IT system that will track the status of background and security checks for pending cases."[216] Not only would BCS detail the status of pending name checks, it would also "automatically indicate when a delayed name check is complete and the case can be adjudicated."[217]

Unlike the USCIS ombudsman, who focuses on the external consequences of the agency's underperformance, the FBI ombudsman holds "an internal position" for the benefit of the agency's employees.[218] Since the FBI ombudsman has not made public proposals for reducing the name-check backlog, those suggested by USCIS might be applied to FBI's processes by analogy, especially improvement of information technology. In an age when currently "[ninety-three to ninety-seven] percent of all information is now created electronically,"[219] dispensing with paper files and the manual searches they necessitate should not be optional.[220]

CONCLUSION

The controversy stemming from name-check delays has not been fully resolved by the judiciary. Although the federal circuits are split over mandamus and APA jurisdiction, the United States Supreme Court has not granted certiorari on the issue. The judicial branch, despite having a limited power of review in the immigration context, has proven its potency as of late. For example, a U.S. Federal District Court in California promptly ordered USCIS to adjudicate a petitioner's pending I-485 application.[221] Pursuant to the Equal Access to Justice Act, the court ordered USCIS to pay approximately half of the petitioner's attorneys fees and costs, or about $25,000.[222]

After a number of federal district courts found jurisdiction over

216. *Id.* at 43. Although USCIS planned to implement BCS in April 2007, it still had not deployed the system three months later. *Id.*

217. *Id.*

218. Federal Bureau of Investigation, About Us—FBI Executives, Sarah Zeigler—Ombudsman, http://www.fbi.gov/libref/executives/zeigler.htm (last visited Apr. 18, 2009). For example, the goal of Sarah Zeigler, an FBI internal ombudsman, is "to achieve balance and harmony in the workplace." *Id.*

219. SHARON D. NELSON ET AL., THE ELECTRONIC EVIDENCE AND DISCOVERY HANDBOOK: FORMS, CHECKLISTS, AND GUIDELINES, at xv (2006).

220. *See supra* notes 45–55 and accompanying text (discussing FBI's electronic and manual file searches).

221. Shirmohamadali v. Heinauer, 535 F. Supp. 2d 1059, 1062 (E.D. Cal. 2008).

222. Shirmohamadali v. Heinauer, No. CIV S-07-1073 DAD, 2008 WL 2682701, at *4–5 (E.D. Cal. July 3, 2008); *see* Jian J. Zhou, *Court Orders USCIS to Pay Alien's Attorney Fee*, IMMIGRATION DAILY, Aug. 19, 2008, http://www.ilw.com/articles/2008,0819-zhou.shtm (describing Shirmohamadali's victory and recovery of attorney's fees as "significant").

mandamus and APA suits filed by frustrated I-485 applicants,[223] USCIS recently revised its guidance with respect to name-check procedure.[224] Under the newly announced procedure, if a name-check request has been pending more than 180 days, an AOS application will be adjudicated and a green card will be issued regardless of the fact that FBI has not finished the name check.[225]

Although the judiciary has prompted the executive branch to implement a quick and seemingly workable solution to the backlog of unprocessed applications for immigrant benefits,[226] in the long run courts lack the resources necessary to ensure equity for aliens lawfully present in this country.[227] What will happen if USCIS fails to abide by its own 180-day policy? Frustrated applicants will continue to file APA and mandamus suits, and some courts—but not all—will continue to grant relief. But, as one court observed, favorable mandamus and APA rulings will inevitably lead to line-jumping, at least in the absence of reform by the relevant agencies:

> When . . . the Court lacks power to review the ultimate agency decision and the agency's cases are backlogged, granting the writ to compel adjudication would do nothing more than shuffle to the front of the line those I-485 applicants canny enough to file a

223. *See supra* Part II.A (analyzing favorable decisions of the federal courts).

224. Aytes, February 2008 Memorandum, *supra* note 6.

225. *Id.*

226. Although the new 180-day limit applies to AOS applicants, it explicitly excludes naturalization applicants. "There is no change in the requirement that . . . FBI name check results be obtained and resolved prior to the adjudication of an Application for Naturalization (N-400)." *Id.* This unequal treatment of AOS and naturalization applicants can be explained by the reserved right of revocation of immigrant benefits in the executive branch. Under the new policy, DHS can revoke a green card if an I-485 applicant is found ineligible after an FBI name check is complete, thus creating a revocation ground that supplements the grounds specified in 8 U.S.C. §§ 1227, 1256 (2006). Aytes, February 2008 Memorandum, *supra* note 6. The process of revocation of approved naturalization petitions would be, undoubtedly, more complex since it involves stripping an individual of his or her constitutionally protected rights. *See supra* notes 182–86 and accompanying text (discussing the rights that the Constitution guarantees to naturalized citizens). Revocation of naturalization, also known as denaturalization, may occur under the following three procedures:

> (1) through a court proceeding, INA § 340(a), 8 U.S.C. § 1451(a); (2) through an administrative proceeding, INA § 340(h); or (3) as a result of a criminal conviction for knowingly procuring naturalization by fraud under 28 U.S.C. § 1425, where the sentencing judge strips the person of his or her citizenship, INA § 340(e).

KURZBAN, *supra* note 30, at 1094.

227. Federal courts have been struggling with the increasing number of lawsuits against USCIS filed because of name-check delays. Emily Bazar, *Immigrants Sue to Speed Citizenship*, USA TODAY, Feb. 22, 2008, at 3A, *available at* http://www.usatoday.com/news/nation/2008-02-21-namecheck_n.htm. The number of new cases of this ilk increased from approximately 270 in 2005 to more than 4400 in 2007. *Id.* Most cases filed in 2007 are still pending. *Id.*

> Complaint in federal district court.[228]

In other words, successful individual mandamus and APA suits would do nothing for the vast majority of applicants who do not file suit. Therefore, USCIS and FBI must further coordinate their procedures[229] to ensure that the ministerial "what's in a name" check[230] does not deprive law-abiding aliens of AOS and, potentially, the opportunity to become citizens of the United States.[231]

—*Natalia May*[*]

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228. Feng Li v. Gonzalez, No. 06-05911(SRC), 2007 U.S. Dist. LEXIS 32608, at *22 (D.N.J. May 3, 2007). *See* notes 167–71 and accompanying text (providing a detailed analysis of why the *Feng Li* court held that it lacked power of review either under the mandamus statute or under the APA).

229. In April 2008, USCIS and FBI announced "a joint plan to eliminate the backlog of name checks pending with the FBI." Press Release, U.S. Citizenship & Immigration Servs., USCIS and FBI Release Joint Plan to Eliminate Backlog of FBI Name Checks (Apr. 2, 2008), http://www.uscis.gov/files/article/NameCheck_2Apr08.pdf. "The joint plan will focus on resolving the oldest pending FBI name checks first." *Id*. Since FBI has already processed name checks that were pending for more than four years, USCIS planned to start processing applications that are more than three years old in May 2008, with an ultimate goal of processing, by February 2009, applications whose name checks have been pending for more than 180 days. *Id*. Starting in June 2009, FBI plans to process "[ninety-eight] percent of all name checks within [thirty] days," with the remaining two percent processed within ninety days. *Id*.

230. *See supra* Part I.B.2 (describing the FBI's name-check process).

231. USCIS, HELPING IMMIGRANTS, *supra* note 13, app. B, at 14 (reporting that, for example, in 2002, the LPR population was 11.4 million, of which 7.8 million individuals were eligible for naturalization).

* J.D. candidate 2009, Vermont Law School; B.A. equivalent 1993, Murmansk State Pedagogical Institute. I would like to thank Josh Adams for suggesting the topic and providing invaluable advice as to the form and substance of this Note. My deep gratitude goes to Professors Arthur Edersheim, Michael Harris, and John Greabe for their guidance and critique; Jane Woldow for her assistance in legal research; and the *Vermont Law Review* editorial staff, especially Ed Kulschinsky, Kristen Reed, Jason Gregoire, Katie Johnson, Cara Cookson, Patrick Joy, Peter Scully, Scott Souers, Hayley Williamson, and Tim Summers for their diligent editing. Lastly, this Note would not have been possible without the unconditional love and support of Jim, Sophia, Alison, Caitlin, Thelma, Olga, Irina, and the rest of my family on both sides of the Atlantic.