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Waiting to Be an American: The Courts' Proper Role and Function in Alleviating Naturalization Applicants' Woes in 8 U.S.C. § 1447(b) Actions

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WAITING TO BE AN AMERICAN: THE COURTS' PROPER ROLE AND FUNCTION IN ALLEVIATING NATURALIZATION APPLICANTS' WOES IN 8 U.S.C. § 1447(B) ACTIONS

I. INTRODUCTION

At the age of 17, Zuhair Mah'd, a Jordanian national, came to the United States to attend college.[1] After finishing college, Mah'd remained in the U.S., putting his knowledge to work by making computers for the blind.[2] In 2004, in his 30s, Mah'd applied to become a U.S. citizen.[3] However, approximately two years later, Mah'd's naturalization application had neither been granted nor denied by the U.S. government, presumably due to the FBI's backlog in conducting name checks.[4] Thus, after waiting for more than two years for a determination on his naturalization application, Mah'd took the FBI and the U.S. Citizenship and Immigration Services (USCIS) to court to receive a determination on his application.[5] Due to the delay, the court ordered USCIS to issue a decision on Mah'd's application after the completion of the FBI background checks, and Mah'd hoped to pick up his citizenship papers shortly after the decision.[6]

However, Mah'd is not the only individual who has waited years for a determination on his naturalization application. Thousands of individuals have waited for years to receive decisions on both naturalization applications and permanent-resident applications due to a backlog in the FBI name-check process.[7] As of May 6, 2008, there were 269,943 FBI name checks pending.[8] Over 17,000 name checks had been pending for over a year, while close to 5,000 name checks had been pending for nearly three years.[9] Since the horrific

1. *Day to Day: Background-Check Backlogs Delay Citizenship Bid* (NPR radio broadcast May 2, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=9958267 [hereinafter NPR].

2. *Id.*

3. *Id.*

4. *Id.*

5. *See id. See also* Mahd v. Chertoff, No. 06-CV-01023-WDM-PAC, 2007 WL 891867, at *3 (D. Colo. Mar. 22, 2007).

6. NPR, *supra* note 1. *See also Mahd*, 2007 WL 891867, at *3.

7. U.S. CITIZENSHIP & IMMIGRATION SERV., OMBUDSMAN ANN. REP. 2008, at 6, http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2008.pdf [hereinafter 2008 OMBUDSMAN REPORT].

8. *Id.*

9. *Id.*

events of September 11, 2001, name checks have slowed down the clearance process on naturalization applications.[10] As a result of long delays, individuals waiting for determinations on their naturalization applications are in limbo: they are barred from voting, cannot get certain jobs, have difficulties adopting children, and can be separated from their families.[11] Thus now many individuals, like Mah'd, are going to court to compel a determination on their naturalization applications by using 8 U.S.C. § 1447(b) to their advantage, which states:

> If there is a failure to make a determination [on the naturalization application by USCIS] . . . before the end of the 120-day period after the date on which the examination is conducted . . . 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.[12]

However, courts have conflicted over the meaning of this statute. Many times, once an applicant files an action in a district court pursuant to § 1447(b), USCIS will deny the application while the action is pending in court. In situations such as these, some courts have held that the district courts have exclusive jurisdiction over the matter,[13] while other courts have held that the district courts and USCIS have concurrent jurisdiction over the matter and consider the matter moot.[14] If in fact the court retains jurisdiction over a § 1447(b) action, the court must decide to either remand the case to USCIS with appropriate instructions or determine whether the naturalization application should be granted.[15] For different reasons, courts have split on this issue as well.[16]

This comment will first examine the history behind naturalization procedures in the U.S. Second, this comment will analyze the conflicting

10. NPR, *supra* note 1.

11. *After Years of Delay, Lawsuits Jumpstart Path to US Citizenship*, INT'L HERALD TRIB., Dec. 25, 2007, at 1.

12. 8 U.S.C. § 1447(b) (2006).

13. *See, e.g.*, Etape v. Chertoff, 497 F.3d 379, 381 (4th Cir. 2007) (holding that the district courts have exclusive jurisdiction over 8 U.S.C. § 1447(b) petitions); U.S. v. Hovsepian, 359 F.3d 1144, 1159 (9th Cir. 2004) (en banc) (finding that the district courts have exclusive jurisdiction over pending naturalization applications after 120 days of the applicant's examination).

14. *See, e.g.*, Bustamante v. Chertoff, 533 F. Supp. 2d 373, 376 (S.D.N.Y. 2008) (concluding that the district courts and immigration agencies have concurrent jurisdiction over 8 U.S.C. § 1447(b) petitions).

15. 8 U.S.C. § 1447(b).

16. *See, e.g.*, Taalebinezhaad v. Chertoff, 581 F. Supp. 2d 243, 246 (D. Mass. 2008) (denying USCIS's motion for remand); Manzoor v. Chertoff, 472 F. Supp. 2d 801, 810 (E.D. Va. 2007) (remanding the naturalization application to USCIS with instructions on how to proceed on the application).

opinions among the courts as to whether 8 U.S.C. § 1447(b) provides the district courts with exclusive jurisdiction over pending naturalization applications or whether the district courts and USCIS share jurisdiction over § 1447(b) actions. Additionally, where courts have retained jurisdiction, this comment will address different court decisions to either remand the matter back to USCIS or adjudicate the application. Finally, this comment will conclude with the author's analysis that courts should retain exclusive jurisdiction and determine the applications on their merits.

II. THE NATURALIZATION PROCESS

A. The Naturalization Process Prior to the Homeland Security Act

The U.S. federal government has not always controlled naturalization proceedings and immigration regulations.[17] When the American Revolution ended in 1783, just years after the colonies declared their independence, the federal government left naturalization matters to the states.[18] It was not until 1790 when Congress took naturalization matters into its own hands.[19] Under the 1790 Act, free, adult, white individuals who had resided in the U.S. for at least two years were eligible for U.S. citizenship.[20] In order to obtain citizenship, a petitioner had to file a naturalization application with a state or federal court in the state where the petitioner resided.[21] Despite small legislative alterations to naturalization requirements throughout the following century, the basic framework under the 1790 Act applied: petitioners were to bring their naturalization applications to a court in their state of residence.[22]

Agencies first made their mark on immigration matters in the Immigration Act of 1891.[23] Under the supervision of the Treasury Department, the Bureau of Immigration was established to regulate immigration laws.[24] However, the

17. WALTER A. EWING, IMMIGRATION POLICY CTR., OPPORTUNITY AND EXCLUSION: A BRIEF HISTORY OF U.S. IMMIGRATION POLICY 2 (2008), http://www.immigrationpolicy.org/sites/default/files/docs/OpportunityExclusion11-25-08.pdf.

18. *Id. See also* U.S. CITIZENSHIP & IMMIGRATION SERV., IMMIGRATION LEGAL HISTORY: LEGISLATION FROM 1790–1900, at 1, *available at* http://www.uscis.gov/files/nativedocuments/Legislation%20from%201790%20-%201900.pdf [hereinafter LEGISLATION FROM 1790–1900].

19. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 104, *repealed by* Act of Jan. 29, 1795, ch. 20, § 4, 1 Stat. 414, 415.

20. § 1, 1 Stat. at 103. *See also* EWING, *supra* note 17, at 2; EILLEEN BOLGER, ROCKY MOUNTAIN REG'L NAT'L ARCHIVES & REC. ADMIN., BACKGROUND HISTORY OF THE UNITED STATES NATURALIZATION PROCESS (2003), http://www.colorado.gov/dpa/doit/archives/natinfo.htm.

21. § 1, 1 Stat. at 103. *See also* BOLGER, *supra* note 20.

22. Nancy Morawetz, *Citizenship and the Courts*, 2007 U. CHI. LEGAL F. 447, 451 (2007).

23. LEGISLATION FROM 1790–1900, *supra* note 18, at 4. *See also* Immigration Act of Mar. 3, 1891, ch. 551, § 7, 26 Stat. 1084, 1085.

24. LEGISLATION FROM 1790–1900, *supra note* 18, at 4. *See also* § 7, 26 Stat. at 1085.

Bureau did not stay in the Treasury Department's hands for long. In 1903, the Bureau was transferred to the Department of Commerce and Labor, where a commissioner was granted control over enforcing immigration laws.[25] Naturalization matters were later transferred to the Department of Commerce and Labor in the Naturalization Act of 1906, and the Bureau of Immigration became the Bureau of Immigration and Naturalization.[26] Not only did the 1906 Naturalization Act combine both immigration and naturalization matters into one agency, but the Act also added more requirements to become a naturalized citizen, such as the ability to understand English.[27]

In 1933, the Bureau's name was changed to the Immigration and Naturalization Services (INS) by executive order.[28] Although the INS was an agency under the Department of Labor and Commerce, [29] the Department of Justice played a predominant role in enforcing immigration laws.[30] Thus, in 1940, for security purposes, the Department of Justice took over the INS.[31] However, despite the INS taking over immigration and naturalization matters, the INS was not equipped to award citizenship.[32] This power was still left to the courts.[33]

An important advancement in U.S. immigration and naturalization policy occurred in the 20th century. Prior to 1952, not all races were entitled to become U.S. citizens.[34] However, in 1952, Congress took a big leap in reforming its naturalization laws by allowing all races to apply for

25. U.S. CITIZENSHIP & IMMIGRATION SERV., IMMIGRATION LEGAL HISTORY: LEGISLATION FROM 1901–1940, at 1, http://www.uscis.gov/files/nativedocuments/Legislation%20from%201901-1940.pdf [hereinafter LEGISLATION FROM 1901–1940]. *See also* Act of Feb. 14, 1903, ch. 552, § 4, 32 Stat. 825, 826–27.

26. LEGISLATION FROM 1901–1940, *supra* note 25, at 1. *See also* Naturalization Act of June 29, 1906, ch. 3592, § 1, 34 Stat. 596.

27. LEGISLATION FROM 1901–1940, *supra* note 25, at 1. *See also* § 8, 34 Stat. at 599.

28. U.S. CUSTOMS & BORDER PROT., *U.S. Immigration and Naturalization Service–Populating a Nation: A History of Immigration and Naturalization*, Sept. 10, 2008, http://www.cbp.gov/xp/cgov/about/history/legacy/ins_history.xml [hereinafter CBP].

29. § 4, 32 Stat. at 826.

30. BOLGER, *supra* note 20.

31. LEGISLATION FROM 1901–1940, *supra* note 25, at 6. *See also* Act of June 4, 1940, ch. 231, § 3, 54 Stat. 230, 231; BOLGER, *supra* note 20; CBP, *supra* note 28 (noting that the Immigration and Naturalization Bureau become the Immigration and Naturalization Service in 1933).

32. *See* Morawetz, *supra* note 22, at 452.

33. *Id.*

34. *See, e.g.*, Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20, § 4, 1 Stat. 414, 415 (Act only allowing white adults to become citizens); Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256 (Act allowing immigrants of African descent to naturalize); Act of July 2, 1946, ch. 534, § 1, 60 Stat. 416 (Act authorizing naturalization of individuals from India and the Philippine Islands).

naturalization in the Immigration and Nationality Act of 1952 (INA).[35] Not only did the INA make major changes to U.S. naturalization policy, but it also integrated all other immigration statutes into the INA and codified existing immigration and naturalization provisions.[36] Today the INA is still the primary source of immigration law.[37]

Although the courts retained exclusive jurisdiction over naturalization adjudications, federal agencies continued to play a key function in the naturalization process. In the 1980s, naturalization applicants were required to submit an application to a naturalization court.[38] After submitting the application, an INS employee administered an examination,[39] and would submit a recommendation to the court to grant or deny citizenship to the applicant.[40] Generally, courts would follow the recommendations of the INS employee in either granting or denying citizenship.[41]

In the 1980s, there were a number of concerns regarding naturalization delays caused by backlogs in the courts' dockets.[42] Prior to the enactment of the Immigration Act of 1990, this concern was reflected in a House Report, which stated, "Fully qualified applicants must wait two years in some places to be sworn in as a U.S. citizen. This, of course, affects employment opportunities, travel plans, and . . . most importantly, deprives these individuals of their right to vote."[43] Another concern in the House Report included indetermination on the part of naturalization examiners, which helped support the fact that applicants should still be able to utilize the court system.[44] As seen in the House Report, "Congress sought to achieve two major goals: to 'streamline' the process of acquiring citizenship so as to solve the problem of unnecessary delays, and to preserve full recourse to the courts."[45]

The courts' basic power to grant naturalization applications, for the most part, ended with an amendment to the INA in 1990, known as the Immigration

35. Immigration and Nationality Act of June 27, 1952 (INA), Pub. L. No. 82-414, ch. 2, § 311, 66 Stat. 239 (1952) (codified as amended at 8 U.S.C. § 1422 (2006)).

36. U.S. CITIZENSHIP & IMMIGRATION SERV., IMMIGRATION AND NATIONALITY ACT, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextchannel=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD.

37. *Id.*

38. Morawetz, *supra* note 22, at 452. *See also* 8 U.S.C. § 1445(a) (1988).

39. Morawetz, *supra* note 22, at 452. *See also* 8 U.S.C. § 1446(b) (1988).

40. Morawetz, *supra* note 22, at 452–53. *See also* 8 U.S.C. § 1446(c).

41. Morawetz, *supra* note 22, at 453. *See also* H.R. REP. NO. 101-187, at 10 (1989).

42. Morawetz, *supra* note 22, at 453–54.

43. *Id. See also* H.R. REP. NO. 101-187, at 8 (1989).

44. Morawetz, *supra* note 22, at 454. *See also* H.R. REP. NO. 101-187, at 12, 14.

45. Morawetz, *supra* note 22, at 454. *See also* H.R. REP. NO. 101-187, at 8, 14.

Act of 1990.[46] The Immigration Act of 1990 gave the Attorney General exclusive jurisdiction over naturalization adjudications,[47] which, for the first time, granted an agency the power to grant or deny naturalization applications.[48] Instead of the courts giving their final stamp of approval on naturalization applications, the INS was given the authority to grant citizenship through the Attorney General.[49] Thus, the Immigration Act of 1990 ended the courts' 200-year reign over adjudicating naturalization applications.

B. Current Naturalization Procedures

After the deadly attacks of 9/11, the U.S. once again saw a change in immigration and naturalization policies. The Homeland Security Act abolished the INS in 2002,[50] and the newly created Department of Homeland Security took over the INS tasks.[51] INS's former functions were separated into three branches: United States Citizenship and Immigration Services (USCIS), Information and Customs Enforcement (ICE), and Customs and Border Protection (CBP).[52] Among other functions, USCIS took charge of naturalization applications and adjudications.[53]

Now, an individual wishing to obtain U.S. citizenship must file a naturalization application with USCIS.[54] Generally, in order to become a naturalized citizen, the applicant must know the English language, be familiar with U.S. history and government,[55] and be at least 18 years of age.[56] Furthermore, an applicant must have resided in the U.S. for at least 5 years as a permanent resident before he or she may become a naturalized citizen.[57]

After a naturalization application has been submitted, USCIS conducts an investigation to determine if the applicant is fit for U.S. citizenship.[58] At a

46. Morawetz, *supra* note 22, at 454; U.S. CITIZENSHIP & IMMIGRATION SERV., IMMIGRATION LEGAL HISTORY: LEGISLATION FROM 1981–1996, at 3–4, http://www.uscis.gov/files/nativedocuments/Legislation%20from%201981-1996.pdf [hereinafter LEGISLATION FROM 1981–1996].

47. LEGISLATION FROM 1981–1996, *supra* note 46, at 3–4. *See also* 8 U.S.C. § 1446(d).

48. Morawetz, *supra* note 22, at 454.

49. *Id. See also* 8 U.S.C. § 1421(a) (2006); 8 U.S.C. § 1446(a).

50. 6 U.S.C. § 291(a) (Supp. 2002).

51. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified as amended at 6 U.S.C. § 101). *See also* Lauren E. Sasser, *Waiting in Immigration Limbo: The Federal Court Split Over Suits to Compel Action on Stalled Adjustment of Status Applications*, 76 FORDHAM L. REV. 2511, 2514 (2008).

52. Sasser, *supra* note 51, at 2514.

53. *Id.*

54. *See* 8 U.S.C. § 1445(a) (2006).

55. 8 U.S.C. § 1423(a) (2006).

56. 8 U.S.C. § 1445(b).

57. 8 U.S.C. § 1427(a) (2006).

58. 8 C.F.R. § 335.1 (2009). *See also* 8 U.S.C. § 1446(a) (2006).

minimum, the investigation must include "a review of all pertinent records, police department checks, and a neighborhood investigation . . . ."[59] Additionally, a criminal background check must be performed under the supervision of the FBI, and only after there has been a definitive response from the FBI on the criminal background check will an applicant be able to appear before USCIS for his or her initial examination.[60] The initial examination consists of a question-and-answer series administered under oath by a USCIS officer.[61] So long as the applicant meets all statutory requirements, USCIS must grant the applicant's naturalization application.[62]

Although from the outset USCIS has the power to determine who may become a naturalized citizen, the court system still has some power in naturalization proceedings. Congress has given courts the power to review USCIS's denial of a naturalization application.[63] If USCIS denies an application for naturalization, the applicant has the option to request a hearing before an immigration officer to appeal USCIS's decision.[64] It is only after the applicant has received a decision on his or her appeal that the applicant may go to court to request a review on his or her citizenship denial.[65]

Furthermore, the courts have the power to determine naturalization applications when there is a delay at the agency level.[66] Under 8 U.S.C. § 1447(b), a naturalization applicant may petition a district court for a hearing on his or her naturalization application if USCIS delays on making a decision on the application.[67] The applicant may only bring a § 1447(b) action after 120 days of his or her naturalization examination.[68] The "examination" has generally been held to mean the applicant's initial interview with USCIS.[69] Thus, once the applicant's initial interview with USCIS takes place, the "120-day clock" begins to tick for the applicant to bring a § 1447(b) suit.[70]

According to USCIS's own regulation, a full criminal background check must be completed before the initial examination.[71] The full criminal background check includes investigative results of criminal and administrative

59. 8 C.F.R. § 335.1.

60. 8 C.F.R. § 335.2(b) (2009). In the past, USCIS conducted initial interviews before proceeding with the FBI background checks; now, USCIS completes the FBI background checks before administering initial interviews. *See* 2008 OMBUDSMAN REPORT, *supra* note 7 at 5–7.

61. 8 C.F.R. § 335.2(c).

62. 8 C.F.R. § 335.3(a) (2009).

63. *See* 8 U.S.C. § 1421(c) (2006).

64. 8 U.S.C. § 1447(a) (2006).

65. 8 U.S.C. § 1421(c).

66. *See* 8 U.S.C. § 1447(b).

67. *See id.*

68. *See id.*

69. Manzoor v. Chertoff, 472 F. Supp. 2d 801, 806 (E.D. Va. 2007).

70. *See id.*

71. 8 C.F.R. § 335.2(b) (2006).

records, as well as fingerprint checks.[72] In the past, name checks were not included in the criminal background check.[73] Therefore, an individual's initial examination could take place before the completion of the name check but only after the criminal background check. However, in 2006, USCIS changed its policy and now requires that the name check be complete before the initial examination.[74] Thus, now, the 120-day clock does not start ticking until both the name check and the initial interview are complete. Despite this change in policy, there are still individuals who have completed their initial interviews but are still waiting for clearance on their name checks, for these individuals applied for naturalization prior to the policy change.[75] Furthermore, the new policy is relevant because it can deter § 1447(b) suits, and the applicants will more than likely have long wait times before hearing a response from USCIS.[76] By allowing the courts to maintain some power in the naturalization process, and at the same time, giving an agency the power to adjudicate naturalization petitions, there has been "considerable confusion in sorting through the proper role for the courts in naturalization cases."[77]

III. DETERMINING WHETHER 8 U.S.C. § 1447(B) VESTS THE COURTS WITH EXCLUSIVE JURISDICTION OR CONCURRENT JURISDICTION WITH USCIS

After an applicant has waited more than 120 days from his or her naturalization examination and has heard no response from USCIS, many applicants bring suit against the government in a U.S. district court by utilizing § 1447(b).[78] However, the courts have conflicted in determining what authority they actually have under this statute.[79] Some courts have held that the district courts have exclusive jurisdiction over the pending application.[80] Under this interpretation, regardless whether USCIS makes a determination on an application during a pending § 1447(b) action, the courts will reject

72. *Id.*

73. *See* Memorandum from Michael Aytes, Acting Assoc. Dir. of Domestic Operations, USCIS, Background Checks and Naturalization Interview Scheduling (Apr. 25, 2006), http://www.ailf.org/lac/uscismemo060425.pdf [hereinafter Memo on Background Checks].

74. *Id.*

75. *See, e.g.*, Janko v. Chertoff, No. 3:08-CV-145, 2009 WL 102961, at *1 (N.D. Ind. Jan. 15, 2009) (naturalization applicant brought § 1447(b) action after the name-check policy change, but at the time he applied for naturalization, his initial interview was completed before the results of the name check); Semreen v. USCIS, No. 8:07-cv-1941-T-33TGW, 2008 WL 5381908, at *1 (M.D. Fla. Dec. 23, 2008) (same).

76. NPR, *supra* note 1.

77. Morawetz, *supra* note 22, at 456.

78. *See* 8 U.S.C. § 1447(b) (2006).

79. *See, e.g.*, Etape v. Chertoff, 497 F.3d 379, 381 (4th Cir. 2007); U.S. v. Hovsepian, 359 F.3d 1144, 1164 (9th Cir. 2004) (en banc); Bustamante v. Chertoff, 533 F. Supp. 2d 373, 381 (S.D.N.Y. 2008).

80. *See, e.g.*, *Hovsepian*, 359 F.3d at 1164; *Etape*, 497 F.3d at 381.

USCIS's determination and either remand the case back to USCIS with instructions on how to proceed with the application or decide whether the applicant should be awarded citizenship.[81] However, other courts have held that § 1447(b) provides the courts and USCIS with concurrent jurisdiction over the matter.[82] Therefore, under this scenario, if USCIS makes a determination on an application during a § 1447(b) action, the court will consider the case moot and dismiss the action.[83] Thus, there is a lack of consistency among the courts in terms of what role they actually play in § 1447(b) actions.

A. Exclusive Jurisdiction

Only a few appellate courts have decided whether § 1447(b) vests the district courts with exclusive jurisdiction prior to 2009.[84] The Ninth Circuit in *U.S. v. Hovsepian* determined in 2004 that § 1447(b) does in fact give the district courts exclusive jurisdiction over pending naturalization applications.[85] In 2007, the Fourth Circuit in *Etape v. Chertoff*, relying heavily on *Hovsepian*, came to the same conclusion.[86]

1. U.S. v. Hovsepian

Hovsepian was the first federal appellate court to determine whether § 1447(b) vests the district courts with exclusive jurisdiction over pending naturalization applications.[87] In determining that § 1447(b) grants the courts with exclusive jurisdiction, the Ninth Circuit looked at the law's text, the statutory context, and congressional policy objectives.[88]

In viewing the statutory text of § 1447(b), the Ninth Circuit noted several reasons why it grants the courts exclusive jurisdiction.[89] First, the Ninth Circuit found that a concurrent jurisdiction interpretation of § 1447(b) would be inconsistent with the entire language of the statute.[90] Because § 1447(b) states that the district courts "may either determine the matter or remand the matter, with appropriate instructions, to [USCIS] to determine the matter,"[91] and because the statute expressly gives the courts, and only the courts, the option to either remand the case to USCIS or determine the application for

81. *See* 8 U.S.C. § 1447(b).

82. *See, e.g.*, *Bustamante*, 533 F. Supp. 2d at 381.

83. *See id.*

84. *See Bustamante v. Napolitano*, 582 F.3d 403, 410 (2d Cir. 2009); *Etape*, 497 F.3d at 381–82, 388; *Hovsepian*, 359 F.2d at 1152, 1159, 1164.

85. *Hovsepian*, 359 F.2d at 1164.

86. *Etape*, 497 F.3d at 388.

87. *See Hovsepian*, 359 F.3d at 1159, 1164.

88. *Id.* at 1159–64.

89. *Id.* 1160–61.

90. *Id.* at 1160.

91. 8 U.S.C. § 1447(b) (2006).

itself,[92] the Ninth Circuit determined that Congress intended for the courts to have exclusive jurisdiction. Moreover the Ninth Circuit found that the courts could not necessarily determine the matter if USCIS could also determine the outcome of the application, which would be the case under a concurrent jurisdiction scheme.[93]

Furthermore, the Ninth Circuit looked at the "remand" language in § 1447(b).[94] According to the Ninth Circuit, if in fact USCIS had concurrent jurisdiction during a § 1447(b) action, there would be no reason for Congress to place the word "remand" in the statute because USCIS would have the power to decide the application all along.[95] Moreover, the Ninth Circuit noted that when a typical case is remanded to a district court, it is remanded because the district court lost jurisdiction over the matter.[96] In essence, remand provides for a hierarchy, where a higher body of law can send a case back to a lower body of law.[97] However, under a concurrent-jurisdiction interpretation, the court could not "remand the case," in the typical sense, if in fact USCIS retained the same jurisdiction as the court throughout the § 1447(b) action.[98] Moreover, if USCIS had the power to make a determination on the application all along, then the word "remand" in the statute would be meaningless.[99] The Ninth Circuit stated that it could not interpret the statute in such as manner that would render a portion of it meaningless.[100]

The Ninth Circuit found further support for its statutory interpretation of § 1447(b) in *Brock v. Pierce County*.[101] In *Brock*, the Supreme Court "held that an agency does not lose jurisdiction unless the statute at issue requires that the agency act within a particular time period *and* the statute specifies a consequence for failure to comply with the time limit."[102] According to *Hovsepian*, § 1447(b) requires that USCIS act within a particular time frame of 120 days from the applicant's initial interview and specifies a consequence for USCIS's failure to act within the 120 days by handing over jurisdiction to the courts.[103] Hence, applying *Brock*, the Ninth Circuit concluded that USCIS loses jurisdiction after 120 days.

92. *Hovsepian*, 359 F.3d at 1160.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *See id.*
98. *See Hovsepian*, 359 F.3d at 1160.
99. *See id.*
100. *Id.*
101. *Id.* at 1161.
102. *Id. See also* Brock v. Pierce County, 476 U.S. 253, 259 (1986).
103. *Hovsepian*, 359 F.3d at 1161.

The Ninth Circuit also looked to the statutory context of § 1447(b) to determine that the district courts have exclusive jurisdiction over pending naturalization applications.[104] When interpreting the meaning of the statute, the Ninth Circuit noted that it must "consider Congress' words in the context of the overall statutory scheme."[105] Thus, the court looked to another statute in the same sub-chapter as § 1447(b).[106] That statute, 8 U.S.C. § 1421(c), provides that a district court can review a naturalization application *de novo* if USCIS denied the application, and the applicant has exhausted all appeals at the agency level.[107] Because district courts are allowed to determine naturalization applications in § 1447(b) actions just like courts in § 1421(c) hearings, the Ninth Circuit found, based on a consistent statutory-context interpretation, that the courts retain the final word in § 1447(b) suits just as the courts retain the final word in § 1421(c) hearings.[108] Thus, by having the final word, the courts retain exclusive jurisdiction in § 1447(b) suits.[109]

Hovsepian went on to explain congressional policy objectives when Congress enacted the Immigration Act of 1990.[110] Congress's four main objectives, according to the Ninth Circuit, were "to reduce the waiting time for naturalization applicants," to "streamline the process of applying for naturalization and . . . to reduce the burdens on courts and [USCIS]," to maintain "consistency and fairness of naturalization decisions," and "to give naturalization applicants the power to choose which forum [to] adjudicate their applications."[111]

If Congress's purpose in enacting the Immigration Act of 1990 was to reduce the waiting time for applicants applying for naturalization, Congress's purpose would be undermined if the courts maintained that the statute allowed for concurrent jurisdiction, according to *Hovsepian*.[112] Congress's purpose would be undermined because USCIS would have no incentive to make a determination on an application within the 120-day time frame if it could simply make a determination during a pending § 1447(b) action in the district court.[113] Therefore, nothing would really change for USCIS once a § 1447(b) action started because the agency would have the same power that it had prior to the start of the § 1447(b) action.[114] Thus, if the courts determined that 8

104. *Id.*
105. *Id.* n.14 (citing A-Z Int'l v. Phillips, 323 F.3d 1141, 1147 (9th Cir. 2003)).
106. *Id.* at 1161–62.
107. 8 U.S.C. § 1421(c) (2006).
108. *Hovsepian*, 359 F.3d at 1162.
109. *Id.*
110. *Id.* at 1163.
111. *Id.* at 1163–64.
112. *Id.* at 1163.
113. *Id.*
114. *Hovsepian*, 359 F.3d at 1163.

U.S.C. § 1447(b) mandated concurrent jurisdiction, "Congress' intent to require [USCIS] to make a determination within 120 days of an applicant's examination" would be frustrated.[115]

The Ninth Circuit also addressed Congress's intention to streamline the naturalization process in enacting the Immigration Act of 1990.[116] By allowing both USCIS and the courts to maintain concurrent jurisdiction, the end result would "lead to a waste of time and resources because district courts and [USCIS] would often engage in unnecessary duplication of factual investigations and legal analyses."[117] Furthermore, allowing USCIS to maintain jurisdiction would waste resources if USCIS made a determination on a naturalization application during a pending § 1447(b) action.[118] According to the court, if USCIS denied the application during a pending action under a concurrent-jurisdiction scheme, the courts would have to dismiss the case, and the applicant would have to exhaust all administrative hearings before bringing his case back to the court.[119] Unless the applicant moved to a different district, more than likely the same court would end up reviewing the same naturalization application that was brought during the § 1447(b) action.[120] Undoubtedly, this process would be duplicative and clog up the court system's resources.[121] Therefore, if courts were to hold that § 1447(b) allows for concurrent jurisdiction, the courts and USCIS would be overly burdened, which would frustrate Congress's intention of streamlining the naturalization process.[122]

The Ninth Circuit also concluded that if § 1447(b) vests both USCIS and the courts with jurisdiction, there would be a race to determine the result of a naturalization application, which would frustrate the drafters' concerns of consistency and fairness in naturalization determinations.[123] When there is a disagreement between USCIS and a district court as to whether a naturalization application should be granted, the first to decide on the application would ultimately prevail if both the courts and USCIS had jurisdiction.[124] According to the Ninth Circuit, there would be a rush to the finish line to make a decision on the applications by both the courts and USCIS, which would lead to mistakes in reviewing the application.[125] In the eyes of the applicant, when

115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Hovsepian*, 359 F.3d at 1163–64.
121. *See id.*
122. *Id.* at 1164.
123. *Id.*
124. *Id.*
125. *Id.*

there is a rush to determine the merits of a naturalization application, the legitimacy of the process is diminished.[126] This would not stay true to the congressional objective of fairness in the process.[127] Moreover, as noted by the Ninth Circuit, a finding that § 1447(b) gives courts exclusive jurisdiction advances the consistency of the process because courts would have the last word on both delayed applications in § 1447(b) actions, as well as on application denials per § 1421(c).[128] Therefore, by concluding that § 1447(b) provides courts with exclusive jurisdiction over pending applications, the process of reviewing delayed applications would be consistent with the process of reviewing denied applications, which, according to the Ninth Circuit, would ultimately be fairer to the applicant.[129]

In looking at the fourth and final congressional objective, that Congress intended for applicants to choose the forum to adjudicate their naturalization applications, the court found further support for its holding that § 1447(b) provides courts with exclusive jurisdiction over pending naturalization applications.[130] In the words of Congressman Morrison, "*it is the applicant, not the government*, who decides the place and setting and the timeframe in which the application will be processed."[131] Thus, by finding that § 1447(b) provides for concurrent jurisdiction, the applicant would be stripped of a judicial determination if USCIS elected to make a decision on the naturalization application during the pending action.[132] Therefore, the Ninth Circuit found further support for its finding that 8 U.S.C. § 1447(b) provides the courts with exclusive jurisdiction over pending naturalization applications.

2. Etape v. Chertoff

Three years after the *Hovsepian* decision, the Fourth Circuit, in *Etape*, determined whether or not 8 U.S.C. § 1447(b) vests the district courts with exclusive jurisdiction over pending naturalization applicants.[133] The Fourth Circuit relied heavily upon the Ninth Circuit's decision to determine that § 1447(b) does in fact vest the district courts with exclusive jurisdiction.[134] However, the Fourth Circuit also came up with some further points to bolster the exclusive jurisdiction holding.

126. *Hovsepian*, 359 F.3d at 1164.

127. *Id.*

128. *Id.*

129. *See id.*

130. *Id.*

131. *Id.* (citing 135 CONG. REC. 16,995 (1989) (statement of Rep. Morrison) (emphasis added)).

132. *See Hovsepian*, 359 F.3d at 1164.

133. Etape v. Chertoff, 497 F.3d 379, 381 (4th Cir. 2007).

134. *See id.* at 383–84.

The Fourth Circuit stated that by allowing USCIS to maintain concurrent jurisdiction under § 1447(b), the court would be stripped of its power to determine the matter or remand the issue back to USCIS if USCIS made a decision on a naturalization application during a pending § 1447(b) action.[135] Essentially, by allowing USCIS to make a determination on an application during a pending action, the courts would be divested of their jurisdictional power.[136] According to the Fourth Circuit, Congress's intent was not to divest the courts' jurisdictional power by allowing USCIS to essentially take over a pending matter.[137]

The Fourth Circuit also expanded upon some of the congressional policy conclusions made by the Ninth Circuit in *Hovsepian*. The Fourth Circuit noted that most of USCIS's investigatory functions take place before the applicant's initial examination and that the 120-day clock does not start ticking until well after USCIS has already made some of its findings.[138] For example, FBI fingerprint checks are generally completed in a few days and, in some cases, even minutes.[139] Therefore, according to the Fourth Circuit, USCIS's expertise, which Congress intended to employ in the statute, would not be undermined by giving the district courts exclusive jurisdiction, as a majority of USCIS's investigations, including some background checks, take place well before a petitioner can even bring a § 1447(b) action.[140] Putting worries to rest that courts do not have the resources to conduct investigations and that allowing courts to conduct investigations will "strain[] judicial resources,"[141] the court concluded that Congress had faith in allowing the courts to conduct *de novo* reviews of naturalization applications, and judicial resources would not be strained if the court chose the option of sending the case back to USCIS.[142] Thus, the Fourth Circuit strengthened the conclusion that 8 U.S.C. § 1447(b) provides courts with exclusive jurisdiction as opposed to jurisdiction shared by the courts and USCIS.

B. Concurrent Jurisdiction

Although many courts have held that 8 U.S.C. § 1447(b) provides courts with exclusive jurisdiction over pending applications,[143] some courts have

135. *Id.*
136. *Id.* at 383.
137. *Id.*
138. *Id. at 386.*
139. 2008 OMBUDSMAN REPORT, *supra* note 7, at 6.
140. *Etape*, 497 F.3d at 386.
141. *See id.* at 394 (Hamilton, J., dissenting).
142. *Id.* at 387.
143. *See id.* at 383; United States v. Hovsepian, 359 F.2d 1144, 1159 (9th Cir. 2004) (en banc); Zaranska v. U.S. Dep't of Homeland Sec., 400 F.Supp.2d 500, 505 (E.D.N.Y. 2005).

concluded otherwise.[144] Although overruled in 2009,[145] *Bustamante v. Chertoff* provides an example of the reasoning behind those courts in other circuits that find that § 1447(b) provides both the courts and USCIS with jurisdiction over applications.[146] In *Bustamante*, the plaintiff filed a complaint pursuant to § 1447(b) after receiving no response from USCIS after 120 days from taking his naturalization examination.[147] While the action was pending in the district court, USCIS denied the plaintiff's application.[148] Although the district court acknowledged that the majority of courts have found that § 1447(b) vests the courts with exclusive jurisdiction over naturalization applications,[149] the district court went against the grain and determined that § 1447(b) does not divest USCIS of its jurisdiction over the matter.[150]

In *Bustamante*, the court looked at the statute's plain language[151] and legislative history,[152] and found that the Supreme Court also supported concurrent jurisdiction.[153] The district court determined that the plain language of § 1447(b) does not divest the agency of jurisdiction in an action involving a pending naturalization application.[154] By looking at other statutes passed by Congress,[155] the district court inferred that the absence of the word "exclusive" in § 1447(b) allows the agency to retain jurisdiction over pending naturalization applications.[156] The court was not persuaded by the plaintiff's argument that the words "determine" and "remand" in the statute grant the courts exclusive jurisdiction over pending naturalization applications.[157] As stated under § 1447(b), when a plaintiff brings an action in a district court for a delinquent decision on the part of USCIS, the court can determine whether to

144. *See* Bustamante v. Chertoff, 533 F.Supp.2d 373, 376 (S.D.N.Y. 2008) (holding that 8 U.S.C. § 1447(b) provides for concurrent jurisdiction among the courts and USCIS); Perry v. Gonzales, 472 F.Supp.2d 623, 630 (D.N.J. 2007); Al-Saleh v. Gonzales, No. 2:06-CV-00604 TC, 2007 WL 990145, at *2 (D. Utah Mar. 29, 2007).

145. *See* Bustamante v. Napolitano, 582 F.3d 403, 410 (2d Cir. 2009).

146. *Bustamante*, 533 F.Supp.2d at 381.

147. *Id.* at 374.

148. *Id.*

149. *Id.* at 376.

150. *Id*.

151. *Id.*

152. *Bustamante*, 533 F. Supp. 2d at 378.

153. *Id.* at 380.

154. *Id.* at 376.

155. *Id.* (reviewing statutes, such as 5 U.S.C. § 8477 (2006), 6 U.S.C. § 442 (2006), 7 U.S.C. § 2279 (2000), 7 U.S.C. § 2279 (2000 & Supp. II 2002), 11 U.S.C. § 524 (2000 & Supp. V 2005), where the words "exclusive jurisdiction" were specifically stated when district courts were granted exclusive jurisdiction over actions).

156. *Bustamante*, 533 F. Supp. 2d at 377.

157. *Id.*

remand the case to USCIS or it can adjudicate the application.[158] However, according to the court, the word "remand" in the statute does not mean that the courts are given exclusive jurisdiction in a pending application proceeding.[159] Instead, the court determined that the word "remand" only gives a court the option to remand the application back to USCIS or to adjudicate the application if USCIS had not acted on a pending naturalization application during a § 1447(b) action.[160]

The court in *Bustamante* refuted both the Ninth and Fourth Circuits' conclusions that the courts would lose their power if § 1447(b) bestowed USCIS with jurisdiction.[161] *Bustamante* came to the opposite conclusion, finding that it was not the courts but rather USCIS that would lose its power under a concurrent-jurisdiction scheme.[162] According to *Bustamante*, if both USCIS and the courts had jurisdiction over pending naturalization applications, obviously either the court or USCIS would come to a determination on the application first.[163] If a court made a decision to grant or deny an application before USCIS, USCIS would have to take the court's decision on the application without objection.[164] However, if USCIS came to a determination first and denied a pending naturalization application, the courts would still be able to have a final say on appeal.[165] In such a situation, the courts would still have jurisdiction over the matter to determine if the application was improperly denied and would have the power to reverse the findings of USCIS.[166]

Furthermore, the court concluded that when an application is denied or granted by USCIS during a § 1447(b) action, USCIS *itself* does not divest the court of its jurisdictional power under a concurrent jurisdiction interpretation.[167] Rather, the court stated that the Constitution divests the court of its power.[168] When USCIS grants or denies an application during a pending action, the controversy becomes moot, according to the court.[169] In such a

158. *Id.* at 378; 8 U.S.C. § 1447(b) (2006).

159. *Bustamante*, 533 F. Supp. 2d at 378.

160. *Id.*

161. *Id.* at 377.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Bustamante*, 533 F. Supp. 2d at 377. *See also* 8 U.S.C. § 1421(c) (2006).

166. *Bustamante*, 533 F. Supp. 2d at 377. *See also* 8 U.S.C. § 1447(a) (2006) ("If, after an examination under section 1446 of this title, an application for naturalization is denied, the applicant may request a hearing before an immigration officer.").

167. *Bustamante*, 533 F. Supp. 2d at 377.

168. *Id.*

169. *See id.*

situation, the court stated that the *Constitution* would forbid the action from going any further—not USCIS.[170]

The court in *Bustamante* also considered Congress's intent and found further support that § 1447(b) does not vest the courts with exclusive jurisdiction.[171] The court believed that the Ninth and Fourth Circuits were wrong in deciding that exclusive jurisdiction best served Congress's intent of speeding up the naturalization process, concluding that, instead, the Ninth and Fourth Circuits' interpretation would actually slow down the naturalization process.[172] According to the court, "the filing of a § 1447(b) action prods [US]CIS into making a decision."[173] When an applicant is either granted or denied his citizenship during a pending action, the court noted that USCIS usually acts within 60 days of the action being filed, before a Rule 16 conference can be held.[174] If concurrent jurisdiction was not the intent of Congress in enacting § 1447(b), speedy resolutions would be hard to come by because in many instances, district courts remand the case back to the agency instead of determining the application on the merits.[175] In such a situation, if the applicant is denied citizenship, the applicant must exhaust administrative appeals before bringing his action back into the court for further review.[176]

The court again looked to *Hovsepian* and refuted some of the conclusions made by the Ninth Circuit.[177] First, the court did not find that applicants would have to wait longer if USCIS had jurisdiction over the application.[178] Under a concurrent-jurisdiction interpretation, according to *Hovsepian*, the applicant would have to exhaust all administrative appeals before bringing his or her

170. *See id.* (citing to Etape v. Chertoff, 497 F.3d 379, 394 (4th Cir. 2007) (Hamilton, J., dissenting)). *See also* U.S. CONST. art. III, § 2:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

171. *Bustamante*, 533 F. Supp. 2d at 377.

172. *Id. See also* United States v. Hovsepian, 359 F.3d 1144, 1163 (9th Cir. 2004) (en banc); Etape v. Chertoff, 497 F.3d 379, 386 (4th Cir. 2007).

173. *Bustamante*, 533 F. Supp. 2d at 379.

174. *Id.*

175. *Id.*

176. *Id. See also* 8 U.S.C. § 1447(a) (2006) ("If, after an examination [of the naturalization applicant], an application for naturalization is denied, the applicant may request a hearing before an immigration officer."); 8 U.S.C. § 1421(c) (2006) ("A person whose application for naturalization . . . is denied, after a hearing before an immigration officer under section 1447(a) of this Title, may seek review of such denial before the United States district court . . . .").

177. *Bustamante*, 533 F. Supp. 2d at 379.

178. *Id.*

case back into the district court if USCIS denied the application during the § 1447(b) action.[179] The court found two problems with *Hovsepian*'s conclusion: the Ninth Circuit assumed that USCIS denies most applications in pending lawsuits and that district courts actually decide the applications on the merits.[180] The court stated that it had never been proven that USCIS primarily denies applications.[181] Therefore, if the courts had concurrent jurisdiction and USCIS grants an application during a pending action, the naturalization process would actually be sped up.[182] Furthermore, the court stated that since a district court cannot be forced to make a decision on the merits of a pending naturalization application, it is unlikely that the courts will actually determine the merits of the application due to busy dockets.[183] Thus, with the high probability that courts will remand the application back to USCIS, an incentive is given to USCIS to quickly determine the naturalization application in the pending transaction.[184] Therefore, the court in *Bustamante* determined that § 1447(b) did not divest USCIS of its jurisdiction because it would undermine the legislative intent in enacting the statute.[185]

Finally, *Bustamante* relied heavily on the Supreme Court decision in *Brock*,[186] just as the court in *Hovsepian* relied on *Brock* to support its conclusion that § 1447(b) provides exclusive jurisdiction over pending applications.[187] The court in *Bustamante* concluded that nothing in § 1447(b)'s statutory text requires USCIS to make a determination within 120 days on a naturalization application, unlike the case in *Brock* where the statutory language required the agency to make a determination within 120 days.[188] Furthermore, looking at the Court's ruling in *Brock*, the court drew the conclusion that § 1447(b) does not "specify a consequence" requiring a divestment of USCIS's jurisdiction.[189] According to the court, all § 1447(b) does is give the applicant an option to bring an action to court in the event that the applicant has not received a timely decision on his or her naturalization application, which does not mean that USCIS is automatically divested of its jurisdictional power.[190] Thus, the court found that its reasoning fell inline with

179. *Id*. *See also* United States v. Hovsepian, 359 F.3d 1144, 1163–64 (9th Cir. 2004) (en banc).

180. *Bustamante*, 533 F. Supp. 2d at 379.

181. *Id.*

182. *See id.*

183. *Id.* at 379–80.

184. *Id.* at 380.

185. *Id.*

186. *Bustamante*, 533 F. Supp. 2d at 380.

187. Etape v. Chertoff, 497 F.3d 379, 384 (4th Cir. 2007).

188. *Bustamante*, 533 F. Supp. 2d at 380.

189. *Id.* at 381.

190. *Id.*

the decision in *Brock* because there was no clear, unequivocal language in § 1447(b) showing Congress's intent to strip USCIS of its jurisdictional power.[191] Therefore, the court in *Bustamante* concluded that 8 U.S.C. § 1447(b) provides for concurrent jurisdiction between USCIS and the courts.[192]

IV. REMAND OR DECIDE?

In the event that a court retains jurisdiction over a § 1447(b) action, it must decide whether to remand the case to USCIS or to grant or deny the applicant citizenship itself.[193] However, just like the courts conflict on whether § 1447(b) provides the courts with exclusive or concurrent jurisdiction, the courts have come to different conclusions on whether to remand the case to USCIS or to grant or deny the naturalization application.[194]

A. Remand

A majority of courts have decided to remand the application to USCIS with instructions rather than adjudicate the matter.[195] Primarily, courts have come to this conclusion when dealing with situations where the FBI background checks have not been fully completed.[196] In such situations, USCIS has no authority to determine an application until the FBI has completed the background check.[197]

In *Manzoor v. Chertoff*, the court remanded the case with instructions to USCIS rather than determine the petitioner's qualifications for naturalization.[198] In that case, not all of the plaintiff's background checks had been completed at the time the plaintiff initiated the action.[199] The court decided to remand the case after looking at a number of factors.[200] Looking

191. *Id.*

192. *Id.* at 376.

193. *See* 8 U.S.C. § 1447(b) (2006).

194. *See* Manzoor v. Chertoff, 473 F. Supp. 2d 801, 810 (E.D. Va. 2007) (remanding the pending naturalization application back to USCIS); Taalebinezhaad v. Chertoff, 581 F. Supp. 2d 243, 246 (D. Mass. 2008) (denying USCIS's motion to remand a pending naturalization application in a § 1447(b) suit).

195. *Manzoor*, 472 F. Supp. 2d at 810.

196. *See, e.g.*, *id*.; El-Daour v. Chertoff, 417 F. Supp. 2d 679, 684 (W.D. Pa. 2005); Shalabi v. Gonzales, No. 4:06CV866 RWS, 2006 WL 3032413, at *6 (E.D. Mo. Oct. 23, 2006).

197. *Manzoor*, 472 F. Supp. 2d at 809; 8 U.S.C. § 1446(a) (2006) ("Before a person may be naturalized, an employee of [USCIS] . . . shall conduct a personal examination of the person applying for naturalization . . . ."). *See also* 8 C.F.R. § 335.2(b) (2008) ("*Completion of background checks before examination.* [USCIS] will notify applicants for naturalization to appear . . . for initial examination on the naturalization application only after [USCIS] has received a definitive response from the Federal Bureau of Investigation . . . .") (emphasis added).

198. *Manzoor*, 472 F. Supp. 2d at 808.

199. *Id.* at 803.

200. *Id.* at 808–09.

first to background checks, the court in *Manzoor* came to the conclusion that the courts could not analyze background checks on applicants in the same manner as USCIS, and furthermore, in many cases, USCIS must ask follow-up questions to determine the applicant's qualifications for naturalization.[201] Since the FBI conducts the background checks, and USCIS analyzes the results of the background checks, the court found USCIS was in the better position to interpret and follow up on background checks than the courts.[202]

The court also decided to remand the case to USCIS due to its finding that the 120-day time frame in § 1447(b) was to accelerate the naturalization process rather to impede it.[203] At the time the case was decided, it was USCIS's policy to complete the initial examination before completing name checks.[204] The court concluded that if it were to decide the case for itself, the courts would "discourage [US]CIS from continuing its practice of scheduling interviews prior to the completion of the FBI background checks."[205] The court hinted that if it were to grant or deny the petitioner citizenship, it would encourage USCIS to complete all background checks, including the name check, before the initial interview.[206] Thus, the 120-day time frame would not kick in until after USCIS had completed the initial interview – which would occur after the name check – and impede the acceleration process.[207] Additionally, because USCIS was simply waiting for a response from the FBI (which it needed in order to adjudicate the naturalization application), the court thought it only fair to hand the case back over to USCIS, since the agency had no authority in the first place to adjudicate the application.[208]

Manzoor also noted that "nothing in § 1447(b) mandates that USCIS make a decision within 120 days of the initial interview" because all the statute says is that an applicant has the option to go to court to compel action on the application.[209] Also, the court found that USCIS does not necessarily even have authority to grant or deny a naturalization application before or after 120 days of the initial interview due to the fact that USCIS cannot make a determination on a naturalization application until after all background checks are complete.[210] Therefore, the court determined that if USCIS's delay is due

201. *Id.* at 808.

202. *Id.*

203. *Id.*

204. *See Manzoor*, 472 F. Supp. 2d at 808. *See also* Memo on Background Check, *supra* note 74.

205. *Manzoor*, 472 F. Supp. 2d at 808.

206. *See id.* at 808–09.

207. *See id.* at 809.

208. *See id.*

209. *See id.*; 8 U.S.C. § 1447(b) (2006).

210. *Manzoor*, 472 F. Supp. 2d at 809. *See* Fingerprinting Applicants and Petitioners for Immigration Benefits; Establishing a Fee for Fingerprinting by the Service; Requiring

to the FBI's failure to complete a background check, the court should remand the case back to USCIS.[211]

Finally, in coming to its conclusion to remand the case to USCIS, the court in *Manzoor* stated that it did not want applicants to use the court system as a way of expediting their naturalization applications by filing lawsuits with the district courts, as it was not Congress's intent in enacting § 1447(b) to provide individuals with a way to expedite the naturalization process.[212] According to the district court, when applicants file such lawsuits, the lawsuit distracts USCIS and eats away at the agency's resources.[213] By remanding the case to USCIS with instructions to make a decision, the court stated that this would prevent applicants from "jump[ing] to the front of the line" to get determinations on their naturalization applications.[214] Rather, courts should determine the case for themselves only in rare instances where both the background checks and initial interview have already been completed, which shows an unnecessary delay on the part of USCIS.[215]

B. Adjudicating the Application

Only a handful of courts have decided to adjudicate a naturalization application rather than to remand the application to USCIS.[216] In *Taalebinezhaad v. Chertoff*, the court denied USCIS's motion to remand the application to USCIS and, instead, opted to hold a hearing on the merits.[217] While the court noted that a majority of courts dealing with § 1447(b) hearings generally remand, the court also noted that such decisions to remand generally occur when the FBI had failed to complete an essential background check or there were other security concerns at hand.[218] Because the government had not established that any background checks on the plaintiff were pending and the plaintiff had waited for over two years for a decision on the application, the court in *Taalebinezhaad* decided that it should not remand given the

Completion of Criminal Background Checks Before Final Adjudication of Naturalization Applications, 63 Fed. Reg. 12,979, 12981 (Mar. 17, 1998) (USCIS "must receive confirmation from the Federal Bureau of Investigation (FBI) that a full criminal background check has been completed on applicants for naturalizations before final adjudication of the application").

211. *Manzoor*, 472 F. Supp. 2d at 809.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *See, e.g.*, Taalebinezhaad v. Chertoff, 581 F. Supp. 2d 243, 245 (D. Mass. 2008); Omran v. Dep't of Homeland Sec. et al., No. 1:07-cv-187, 2008 WL 320295, at *3, *5 (S.D. Ohio Feb. 4, 2008); Shalan v. Chertoff, No. Civ.A. 05-10980-RWZ, 2006 WL 42143, at *2 (D. Mass. Jan. 6, 2006).

217. *Taalebinezhaad*, 581 F. Supp. 2d at 246.

218. *Id.* at 245.

circumstances of the case.[219] The court decided it would take matters into its own hands due to USCIS's failure to provide the plaintiff with a timely response when USCIS had all of the background check results.[220] Furthermore, the court stated that USCIS could present findings to the court to help the court come to a conclusion on the application, which countered the argument that USCIS is better equipped to make decisions on naturalization applications.[221]

However, in *Attisha v. Jenifer*, the court refused to remand the case to USCIS despite the fact that the FBI name check had not yet been completed.[222] Due to the fact that almost two and a half years had passed since a request for a name check had been made, the court stated that the delay was inappropriate.[223] While recognizing that completing mandatory background checks is an important function of USCIS, the court stated that remanding the case in no way would expedite the plaintiff's background check, given the fact that USCIS could not guarantee that a decision on the application could be rendered by a specific time.[224] By interpreting that § 1447(b) was enacted in part to ensure that USCIS does not unreasonably delay determinations on naturalization applications, the court found it proper to take over the action and to determine the merits of the application for itself.[225]

V. AUTHOR'S ANALYSIS: TAKING OVER THE ACTION AND DETERMINING THE APPLICATION ONCE AND FOR ALL

A. Exclusive Jurisdiction

For many reasons, courts should find that 8 U.S.C. § 1447(b) vests the court with exclusive jurisdiction. From § 1447(b)'s statutory text to the congressional intent of enacting § 1447(b), concurrent jurisdiction with USCIS would frustrate the goals of Congress in implementing the statute.

By looking at the cases discussed, the Ninth and Fourth Circuits arguably make better points that the courts should retain exclusive jurisdiction over pending naturalization applications, as opposed to the court in *Bustamante*, which found that § 1447(b) grants both the courts and USCIS with jurisdiction. The Fourth and Ninth Circuits' strongest points came from their statutory-text interpretations, as well as the fact that Congress intended to speed up the

219. *Id.* at 246.

220. *Id.*

221. *Id.* (citing Etape v. Chertoff, 497 F.3d 379, 387 (4th Cir. 2007)).

222. Attisha v. Jenifer, No. 07-CV-10345, 2007 WL 2637772, at *3 (E.D. Mich. Sept. 6, 2007).

223. *Id.*

224. *Id.*

225. *Id.*

naturalization process in enacting the Immigration Act of 1990. Because the text of the statute expressly states that the courts have the power to either remand the application or make a determination on the matter,[226] it makes sense that courts would retain exclusive jurisdiction over § 1447(b) matters *unless the court decided* to remand the matter to USCIS.[227] Furthermore, the Ninth Circuit made a compelling point: Why would Congress even place the word "remand" in the statutory text if in fact USCIS were to have concurrent jurisdiction with the courts throughout § 1447(b) actions?[228] In essence, under a concurrent-jurisdiction interpretation, the courts would have nothing to remand to USCIS because USCIS would have the power to "remand" the case to itself.[229] As stated by the Ninth Circuit, "When we 'remand' a case to the district court . . . we do so because the district court has lost jurisdiction once we acquire it upon the filing of a proper notice of appeal . . . The most natural reading is that Congress used the term 'remand' in the same sense."[230] Thus, under this analysis, USCIS has no jurisdiction once a § 1447(b) action is filed.[231] Moreover, by analyzing the definition of the word "remand" in such a context, courts have found that a portion of the statute would be rendered meaningless, which cannot be done, as every word in a statute must be given full effect.[232]

In terms of statutory construction, the court in *Bustamante* concluded in part that § 1447(b) gives both the courts and USCIS jurisdiction over naturalization applications because the word "exclusive" was not mentioned in the statutory text.[233] While the language of § 1447(b) does not include the words "exclusive jurisdiction" as do other statutes,[234] the absence of such language should not have factored into the court's analysis of whether § 1447(b) actions vest courts with exclusive jurisdiction.[235] Although such an analysis on its face may be compelling, the court in *Bustamante* failed to note that the words "concurrent jurisdiction" are nowhere found within the text of

226. 8 U.S.C. § 1447(b) (2006).

227. *See* U.S. v. Hovsepian, 359 F.3d 1144, 1160 (9th Cir. 2004) (en banc); Etape v. Chertoff, 497 F.3d 379, 383 (4th Cir. 2007).

228. *Hovsepian*, 359 F.3d at 1160.

229. *Id.*

230. *Id.*

231. *See id.*

232. *Etape*, 497 F.3d at 384.

233. Bustamante v. Chertoff, 533 F. Supp. 2d 373, 377 (S.D.N.Y. 2008).

234. *See, e.g.*, 5 U.S.C. § 8477(e)(7)(A) (2006) ("The district courts of the United States shall have exclusive jurisdiction of civil actions under this subsection."); 6 U.S.C. § 442(a)(2) (2006) ("Such appropriate district court of the United States shall have original and exclusive jurisdiction over all actions for any claim for loss of property, personal injury, or death arising out of, relating to, or resulting from an act of terrorism . . . ."); 7 U.S.C. § 25(c) (2006) ("The United States district courts shall have exclusive jurisdiction of actions brought under this section.").

235. *Bustamante*, 533 F. Supp. 2d at 376.

the statute either.[236] By determining that both the courts and USCIS have jurisdiction in § 1447(b) actions due to the fact that the words "exclusive jurisdiction" are not explicitly referenced to in the statute,[237] the opposite interpretation – that the courts have exclusive jurisdiction over § 1447(b) actions – could be true as well, since the statute does not explicitly state the words "concurrent jurisdiction."[238] Congress has used the words "concurrent jurisdiction" in some statutes,[239] just as it has used the words "exclusive jurisdiction" in others.[240] Moreover, the text of the statute explicitly states "[s]uch court has jurisdiction over the matter."[241] Because USCIS is not a court, it can be inferred from the text that this phrase does in fact explicitly give the courts exclusive jurisdiction, since the statute does not say that USCIS has jurisdiction.[242] Thus, *Bustamante's* textual reading of § 1447(b) is less than compelling in terms of statutory construction.

Also, as touched upon in *Hovsepian*, by finding that USCIS and the courts have concurrent jurisdiction, the delay could be even longer if USCIS denies a naturalization application in the course of a proceeding.[243] Ultimately, if the petitioner wishes to appeal a denial on his or her naturalization application, the applicant must "request a hearing before an immigration officer."[244] If the petitioner's application is once again denied, only then can the petitioner go before a district court for a review of USCIS's decision.[245] More than likely, by giving USCIS jurisdiction with the courts, in this scenario, the delay in adjudicating the naturalization process would be even longer, as the applicant would have to exhaust all administrative requirements before requesting a hearing by the court. Although the court in *Bustamante* did not find this argument compelling, due to the fact that there was no evidence showing that most applications are denied and no evidence that most courts actually determine the matter for themselves, many applications will in fact be denied, which would inevitably cause the naturalization process to be dragged on even further. And, even if the court does not decide the matter for itself and instead

236. *See id.* at 376–77. *See also* 8 U.S.C. § 1447(b) (2006).

237. *See Bustamante*, 533 F. Supp. 2d at 376–77.

238. *See* 8 U.S.C. § 1447(b).

239. *See id.* The words "concurrent jurisdiction" are in many federal statutes. *See, e.g.*, 18 U.S.C. § 3241 (2006) (stating that the district courts in the Virgin Islands have concurrent jurisdiction with the district courts of the U.S. for offenses of the high seas); 38 U.S.C. § 8112 (2000) (allowing both the states and the federal governments to have concurrent jurisdiction over certain areas of veterans' benefits).

240. *See supra* text accompanying note 235.

241. 8 U.S.C. § 1447(b).

242. *See id.*

243. United States v. Hovsepian, 359 F.3d 1144, 1163 (9th Cir. 2004) (en banc).

244. 8 U.S.C. § 1447(a).

245. 8 U.S.C. § 1421(c) (2006).

decides to remand the case to USCIS, interpreting the statute to mean that the courts have exclusive jurisdiction still falls in line with Congress's intent of giving applicants judicial recourse.[246] Thus, once again, Congress's overall intent of speeding up the naturalization process would be undermined by allowing USCIS to have concurrent jurisdiction.

Furthermore, throughout the majority of the United States' history, courts have played a role in the naturalization process. Prior to the Immigration Act of 1990, an individual could only gain citizenship by court approval.[247] Although Congress enacted an agency to aid the courts in naturalization procedures,[248] from 1790[249] until 1990[250] courts had the final say on ultimately who could become a U.S. citizen. However, by taking the courts out of making initial determinations on who could or could not become a citizen,[251] Congress recognized that removing the courts from naturalization matters was not an easy thing.[252] As stated in a House Report that led to the elimination of "initial" court adjudications on naturalization applications, "[r]emoval of the 200-year-old naturalization process from the Judiciary is not a step taken lightly by the Committee. The Committee notes the important role the Courts have performed in the past of welcoming citizens to the U.S."[253] As the Committee noted, the backlog in the courts' dockets, which caused delays in the naturalization process led to the demise of the court systems' role in naturalization procedures.[254] Congress, although granting USCIS the authority

246. H.R. REP. NO. 101-187, at 14 (1989).

247. *See* Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795); Naturalization Act of June 29, 1906, ch. 3592, § 3, 34 Stat. 596.

248. *See* § 1, 34 Stat. 596 ("That the designation of the Bureau of Immigration in the Department of Commerce and Labor is hereby changed to the 'Bureau of Immigration and Naturalization,' . . . [and it] shall have charge of all matters concerning the naturalization of aliens.").

249. *See* 1 Stat. 103 ("That any alien being a free white person . . . for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record"); LEGISLATION FROM 1790–1900, *supra* note 18, at 1 (stating that the Act of March 26, 1790 was "the first federal activity in an area previously under the control of the individual states").

250. Morawetz, *supra* note 22, at 454. *See also* 8 U.S.C. § 1446(d) (2006) ("The employee [of USCIS] designated to conduct any such examination shall make a determination as to whether the application should be granted or denied, with reasons therefor.").

251. *See id. See also* 8 U.S.C. § 1421(c) (2006) (giving courts the power to review denials of naturalization applications, as opposed to giving the courts the power to make an initial determination on naturalization applications); 8 U.S.C. § 1447(b) (2006) (giving courts the power to review naturalization applications after USCIS fails to make a decision on a naturalization application, as opposed to giving the courts the power to make an initial determination on naturalization applications).

252. *See* H.R. REP. NO. 101-187, at 8 (1989).

253. *Id.*

254. *Id.*

to grant citizenship, "recognized the longstanding power the district courts had possessed over naturalization applications and so provided . . . that district courts retained their power to review an application if an applicant so chose."[255]

If in fact naturalization adjudications were stripped away from the courts due to delays in determinations on applications, Congress's plan of speeding up the naturalization process has ultimately fallen flat on its face. In 1989, a House Report stated, "[f]ully qualified applicants must wait two years in some places to be sworn in as a U.S. citizen,"[256] and it is clear that delays are equally as bad, if not worse, now than they were in 1989. This can be seen from individuals like Zuhair Mah'd, who waited over two years to obtain his citizenship.[257] Thus, if congressional members stripped the courts' power to adjudicate naturalization applications with a heavy heart in order to speed up the naturalization process,[258] it makes sense that the courts should retain exclusive jurisdiction over § 1447(b) matters. Congress stripped the courts' power to adjudicate naturalization applications when Congress decided to give USCIS the power to adjudicate naturalization applications due to adjudication delays in the courts.[259] Thus, if there is a delay at the agency level in the adjudication of naturalization applications, it can be viewed that § 1447(b) is meant to strip USCIS of its jurisdictional power. Since the courts were stripped of their power to adjudicate naturalization applications due to delays, USCIS should also be stripped of its jurisdictional power over the application due to its delay. This can only be done if the courts find that § 1447(b) vests the courts with exclusive jurisdiction. By giving USCIS concurrent jurisdiction with the courts on delayed naturalization determinations, the courts in essence are diverging from what Congress did to the courts in 1990 by taking away the courts' power to decide applications.

Furthermore, USCIS now conducts interviews *after* it obtains the results of applicants' name checks, due to the number of lawsuits brought under § 1447(b).[260] As stated earlier, FBI name checks, which are only a portion of the background check, usually account for the delay.[261] Since USCIS is only

255. Etape v. Chertoff, 497 F.3d 379, 386 (4th Cir. 2007).

256. H.R. REP. NO. 101-187, at 8.

257. NPR, *supra* note 1.

258. *See* H.R. REP. NO. 101-187, at 8.

259. *See id.* at 10.

260. Morawetz, *supra* note 22, at 457. *See also* Memo on Background Checks, *supra* note 74.

261. *See* AILF LEGAL ACTION CENTER, MANDAMUS JURISDICTION OVER DELAYED APPLICATIONS: RESPONDING TO THE GOVERNMENT'S MOTION TO DISMISS 2 (July 23, 2009), http://www.ailf.org/lac/pa/mandamus-jurisdiction9-24-07%20PA.pdf.

responsible for delays that occur after the initial examination,[262] the naturalization process will be further delayed by USCIS's new policy. This manipulation of the system by USCIS frustrates Congress's intent of speeding up the naturalization process.[263] Thus, due to USCIS's attempt to thwart § 1447(b) actions by conducting name checks before the initial interview, delays in the naturalization process can be even longer, and the courts should take over the matter exclusively to combat USCIS's new policy.

B. Adjudicating the Application

Understandably, national security is a great concern in deciding whether or not to grant an individual citizenship, especially in a post-9/11 world. This is why many courts, such as *Manzoor*,[264] have chosen to remand applications to USCIS as opposed to adjudicating the applications. Many courts believe USCIS is in a better position than the courts to analyze the background-check results from the FBI.[265] For example, in *Manzoor*, the court stated that it was "not equipped to conduct background checks of naturalization applicants."[266] However, as stated by the Fourth Circuit, USCIS "can utilize its expertise by presenting its findings to the court" in § 1447(b) proceedings.[267] Moreover, for the courts that are unwilling to accept this argument, those courts should recognize that when the courts had the sole power to adjudicate naturalization applications, the courts utilized the agency's recommendations and determinations in deciding whether to grant a naturalization application.[268]

Furthermore, in those cases where a name check or any other background check has not yet been completed, USCIS can order the FBI to expedite the name check.[269] Therefore, if USCIS orders the FBI to expedite a name check, presumably the courts can use the results of the name check to make a determination on the application. And, because USCIS does in fact have the ability to request that the FBI expedite a name check, the courts should definitely take over the matter, because it is unreasonable for USCIS to not have requested such an expedition when applicants have waited long periods of time to receive a determination on their application.[270] Once the courts receive

262. 8 U.S.C. § 1447(b) (2006) ("If there is a failure to make a determination . . . before the end of the 120-day period *after the date on which the examination is conducted* . . . the applicant may apply to the United States district court . . . for a hearing on the matter.") (emphasis added).

263. Morawetz, *supra* note 22, at 457.

264. Manzoor v. Chertoff, 472 F. Supp. 2d 801, 810 (E.D. Va. 2007).

265. *See id.* at 808.

266. *Id.*

267. Taalebinezhaad v. Chertoff, 581 F. Supp. 2d 243, 246 (D. Mass. 2008) (quoting Etape v. Chertoff, 497 F.3d 379, 387 (4th Cir. 2007)).

268. *See* Morawetz, *supra* note 22, at 453.

269. *See* Ali v. Frazier, 575 F. Supp. 2d 1084, 1095 (D. Minn. 2008).

270. *See id.* at 1095–96.

the results from the FBI check, they can utilize USCIS's expertise to determine whether or not the application should be granted.[271]

However, exactly how great a threat are these naturalization applicants to our nation's security? Before an individual can even become a naturalized U.S. citizen, the individual must have lived in the U.S. as a permanent resident for at least five years.[272] Individuals applying for permanent-resident status must undergo FBI background checks, which includes name and fingerprint checks.[273] As is the case for naturalization applications, the FBI hands the results of the background checks over to USCIS to rule on permanent-resident status adjustments.[274] Although these checks are valid for only 15 months,[275] it is clear that individuals applying for citizenship have already gone through security checks in order to be permitted to stay in the United States as permanent residents. Concerning FBI background-check delays for naturalization applications, an attorney for the ACLU stated, "We should remember, these are people who've been living here in the U.S. with green cards for at least five years. And so it doesn't make sense that a delay is going to protect us from national security threats."[276] Thus, while national security is not a matter to be taken lightly, courts should make a note that naturalization applicants (if in fact legal permanent residents) have already undergone security checks in the past; if such individuals were such a huge threat to the nation's security, more than likely they would not be in the U.S.

Also, as is the case with concurrent jurisdiction, remanding the case to USCIS has the potential to frustrate Congress's intent of speeding up the naturalization process. When in fact USCIS is waiting for background-check conclusions, many courts will remand the case to USCIS and give USCIS vague instructions. For example, in some cases, the courts have ordered USCIS to promptly make a decision on the application once the FBI background checks are complete.[277] Thus, in all actuality, the petitioner could have to wait longer to receive a decision from USCIS, as "promptly" is not always defined in terms of a time limit. Furthermore, when courts remand the case to USCIS, the applicant must then wait for USCIS to make a decision, which further delays the process; there would be no more delays if the court simply decided the issue of citizenship. Even more troubling than this is if after the remand, USCIS decides to deny the applicant citizenship, then the

271. *See Taalebinezhaad*, 581 F. Supp. 2d at 246.

272. 8 U.S.C. § 1427(a) (2006).

273. Saleem v. Keisler, 520 F. Supp. 2d 1048, 1049–50 (W.D. Wis. 2007); Sasser, *supra* note 51, at 2517.

274. *See* Sasser, *supra* note 51, at 2518.

275. Sasser, *supra* note 51, at 2519.

276. NPR, *supra* note 1 (quoting Cecillia Wang).

277. *See* Elmehelmy v. Quarantillo, No. 08-0386 (GEB), 2008 WL 5188850, at *4 (D. N.J. Dec. 10, 2008).

applicant would have to exhaust all appeals at the agency level before bringing an appeal in a district court. In essence, this long struggle could be "nipped in the bud" if the court decided to determine the application for itself. Thus, once again, we see that Congress's intent of streamlining the process and curbing delays would be frustrated.

By handing the case over to USCIS, the courts are giving USCIS more time to adjudicate naturalization applications and, at the same time, could give USCIS less incentive to make a decision on an application. In essence, if the majority of courts remand naturalization applications in § 1447(b) cases, USCIS will *still* be able to make a decision on the application as opposed to the courts.[278] Furthermore, by remanding the case to USCIS, the only thing that really changes is that the court may give USCIS a timetable to make a determination on the application. However, while this decision may seem satisfactory to some, many applicants may not be so understanding because giving USCIS more time seems to undermine the whole point of the § 1447(b) action–to receive a determination on their application due to the failure of USCIS to make a determination on the application. The courts should recognize that "a presumption of remand in delay cases undermines the statutory scheme of ready access to the courts in those cases."[279] In a way, it is almost disturbing that the courts would remand the case back to USCIS, because didn't USCIS have its chance to make a decision on the application and fail to do so? Shouldn't the courts adjudicate the application as a lesson to the agency to adjudicate the applications in a timelier manner?

Even though USCIS does not have the authority to adjudicate a naturalization application until all background checks are complete, as addressed by *Manzoor*,[280] § 1447(b) does not require that a background be complete in order for a court to adjudicate the application. As stated earlier, while many courts refrain from adjudicating the application due to incomplete background checks, this should not stop the courts from adjudicating the application since USCIS has authority to expedite the name-check process.[281] Furthermore, USCIS's own regulation states that a "decision to grant or deny the application shall be made at the time of the initial examination or within 120-days after the date of the initial examination."[282] Moreover, 8 U.S.C. § 1571(b) states that it "is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application."[283] Therefore, regarding delayed name

278. *See* Morawetz, *supra* note 22, at 458.
279. *Id.*
280. Manzoor v. Chertoff, 472 F. Supp. 2d 801, 809 (E.D. Va. 2007).
281. *See* Ali v. Frazier, 575 F. Supp. 2d 1084, 1095 (D. Minn. 2008).
282. 8 C.F.R. § 335.3(a) (2008).
283. 8 U.S.C. § 1571(b) (2006).

checks, USCIS should follow its own policy, as well as Congress's intentions, and expedite the name check to ensure that individuals receive a timely response on their naturalization application.

In-line with *Manzoor*'s worries that USCIS would change its policy of interviewing applicants before the completion of name-check results if the court decided to adjudicate the application,[284] USCIS has since changed its policy and now conducts name checks before the initial interview.[285] This is an attempt on the part of USCIS to evade § 1447(b) actions.[286] Despite the fact that the majority of courts have remanded applications to USCIS, USCIS nonetheless decided to change its policy of interviewing applicants prior to the FBI's name checks. Courts should recognize that USCIS is taking advantage of the system and frustrating Congress's intent of speeding up the naturalization process. The new policy frustrates Congress's intent because for § 1447(b) actions, the 120-day clock will not start running until after both the name check and initial interview are complete. Thus, now, applicants will more than likely have to wait even longer to receive a determination on their application and must wait longer before they can bring a § 1447(b) action in a district court. Since the name check will be completed by the time the § 1447(b) action has been initiated, the courts should take over the application and determine whether to grant or deny the application.

Finally, if a court awards a petitioner citizenship instead of remanding the application to USCIS, the applicant may be able to recover attorney's fees under the Equal Access to Justice Act (EAJA).[287] The EAJA was enacted to encourage individuals to utilize the court system when their constitutional or statutory rights are violated.[288] Because the EAJA provides that a prevailing party against an agency may recover attorney's fees,[289] this statute obviously can benefit prevailing applicants in § 1447(b) actions. However, in some cases, if an application has been remanded to USCIS with no instructions from the court to grant or deny the application, a court might not consider the applicant to be a prevailing party, even if the applicant is awarded citizenship.[290] Without § 1447(b) actions, virtually nothing would be in

284. In part of the court's decision to remand the case to USCIS, the court believed that if it did not remand the case to USCIS, it would prompt USCIS to change its policy of interviewing applicants before the background checks to interviewing the applicants after the background checks were complete. *See Manzoor*, 472 F. Supp. 2d at 808–09.

285. Morawetz, *supra* note 22, at 457 n.54; Memo on Background Checks, *supra* note 74.

286. *See* Morawetz, *supra* note 22, at 457; Memo on Background Checks, *supra* note 74.

287. *See* Othman v. Chertoff, 309 F. App'x 792, 794 (5th Cir. 2008).

288. Letter from Walter H. Eason, Jr., President/CEO of EAJA, Limitations of the Equal Access to Justice Act Are So Great as to Deny Equal Access to Justice, Inc., to U.S. Citizen (Mar. 15, 2005), http://www.equalaccess2justice.us/cgi-bin/index.cgi?page=EAJA+Information.

289. 28 U.S.C. § 2412(d)(1)(A) (2000).

290. *See Othman*, 309 F. App'x at 794.

USCIS's way to further delay naturalization adjudications, and since the EAJA encourages individuals to bring actions against agencies when individuals' rights are violated, the court could potentially deter § 1447(b) actions. This is so because individuals with low incomes may not bring § 1447(b) actions in fear that they will not receive compensation for attorney's fees if the court remands the case to USCIS. Thus, courts should take this into account when deciding whether to remand the case to USCIS or to adjudicate the application.

VI. CONCLUSION

Throughout the course of the United States' history, courts have played at least some role in the naturalization process. Once, that role was big, but slowly over time, that role has dwindled. Recognizing the important role that courts have played in the naturalization process, courts should keep in mind that their role as primary adjudicators in determining naturalization applications only ended when the courts became backlogged and were unable to adjudicate naturalization petitions in a timely manner. Thus, by finding that the courts and USCIS have concurrent jurisdiction in § 1447(b) actions, a great irony and tragedy would be present, for the exact reason an applicant brings a § 1447(b) suit is because USCIS did not adjudicate the naturalization application in a timely manner. Essentially, such a delay in the adjudication of naturalization applications is precisely why the courts were stripped of their power to determine naturalization applications almost twenty years ago. Furthermore, by looking at the statutory language, statutory context, and legislative intent of § 1447(b), it only makes sense that courts retain exclusive jurisdiction over such matters.

Additionally, in deciding to remand applications to USCIS, in many ways the courts could drag out the naturalization process even further by requiring exhaustion of administrative remedies before making an appeal before a district court. Ultimately, such a determination on the denied application could have been made if the court had simply determined the matter for itself initially in the § 1447(b) action. While security seems to be the major reason why courts have decided to remand applications to USCIS, courts still have the ability to determine applications while still protecting the nation's security by utilizing USCIS's expertise. Moreover, in situations where the background results have not been completed, the courts can have USCIS request that the name checks be expedited.

The courts should thus take back the power they once had to adjudicate naturalization applications to send a message to USCIS that delays in naturalization adjudications will not be tolerated–just as Congress did to the courts almost twenty years ago. However, not only should courts take over § 1447(b) matters to prove a point to USCIS, but the courts should adjudicate the applications for the countless number of individuals who have been waiting for

years to become U.S. citizens. Although Zuhair Mah'd's story ended happily ever after, there are still others out there who are waiting.

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