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Checking the DHS: Constitutional and Subconstitutional Approaches to Resolving Whether Noncitizens in Removal Proceedings Can Obtain Effective Judicial Review of Naturalization Decisions

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Checking the DHS: Constitutional and Subconstitutional Approaches to Resolving Whether Noncitizens in Removal Proceedings Can Obtain Effective Judicial Review of Naturalization Decisions

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Aliens (Persons) -- United States -- Legal status, laws, etc., United States. Dept. of Homeland Security, United States. Immigration & Nationality Act, Deportation -- United States, Constitutional law -- United States, Judicial review -- United States, Emigration & immigration -- Government policy -- United States, Naturalization -- United States

COMMENTS

CHECKING THE DHS: CONSTITUTIONAL AND SUBCONSTITUTIONAL APPROACHES TO RESOLVING WHETHER NONCITIZENS IN REMOVAL PROCEEDINGS CAN OBTAIN EFFECTIVE JUDICIAL REVIEW OF NATURALIZATION DECISIONS

MICHAEL CASTLE MILLER*

Forgotten in the current legislative debates regarding immigration policy is a deep divide among seven federal circuits over whether immigrants who face deportation, after applying for and being denied citizenship, can obtain judicial review of the citizenship denial. Under a plain reading of the Immigration and Nationality Act, the answer seems to be yes—courts must exercise de novo review notwithstanding the pendency of removal proceedings. One provision prevents the U.S. Department of Homeland Security (DHS) from considering applications filed by people facing deportation, but nothing limits federal courts' powers when the DHS has already made a decision on the

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application or has delayed making a decision for a reason unrelated to the pending removal proceedings.

Nevertheless, perhaps because of the tremendous deference that the DHS enjoys under the plenary power doctrine, five U.S. circuit courts of appeal have construed these statutes to deny judicial review. In practice, the statute has been turned upside down in these circuits: the DHS regularly considers naturalization applications even while removal proceedings are pending and federal courts cannot review the DHS naturalization decisions. Furthermore, according to an oft-referenced Bureau of Immigration Appeals case, once the DHS initiates removal proceedings, immigration judges cannot lift the process to allow consideration of the naturalization applications without the DHS's approval.

Consequently, the DHS effectively has discretion to circumvent judicial review of its naturalization decisions in these circuits whenever it can find a justification for initiating removal proceedings against the applicant. Therefore, despite their severity, removal proceedings have now become a litigation tactic for permanently silencing review of naturalization decisions. This Comment demonstrates that the DHS's power can be challenged both on constitutional grounds under the procedural due process exception to the plenary power doctrine and on subconstitutional grounds under the plain text of the statutes and regulations.

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INTRODUCTION

Since the late nineteenth century, the Supreme Court has interpreted the Constitution to give Congress and federal executive agencies "plenary power"—that is, broad and generally unreviewable authority—over immigration decisions.¹ This plenary power doctrine was perhaps expressed most forcefully in *Nishimura Ekiu v. United States*,² when the Court, in deciding whether a noncitizen's due process rights were violated, stated that "the decisions of executive or

1. See Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626 (1992).

2. 142 U.S. 651 (1892).

administrative officers, acting within powers expressly conferred by Congress, *are* due process of law."³ Under the doctrine, courts have tended to grant considerable deference to the government's immigration decisions, often leaving its discretion unchecked.⁴ Congressional and executive agency power under this doctrine appears, at first glance, to be a relic frozen in time, standing in sharp contrast to the more liberal development of due process and equal protection rights in most other areas of the law over the last century.⁵

Over time, courts have softened this contrast by weakening the plenary power doctrine using both constitutional and "subconstitutional"⁶ interpretations.⁷ Under both approaches, courts bring immigration law more in line with constitutional norms in other areas of law and raise questions about the continued strength of the doctrine.⁸

At a constitutional level, courts have developed a procedural due process exception to the plenary power doctrine that keeps the government's substantive decisions in check.⁹ Whereas the plenary power doctrine leaves substantive decisions largely unreviewable,¹⁰ this exception allows courts to review the procedural methods employed to carry out those substantive decisions.¹¹ Courts therefore

3. *Id.* at 660 (emphasis added); *see also* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

4. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990).

5. *See* Motomura, *supra* note 1, at 1626–27 (contrasting the development of constitutional protections largely on par with citizens in areas outside of immigration with a "stunted growth" in the immigration context).

6. This Comment uses the term "subconstitutional" to refer to statutes and regulations and the rights and obligations they create. Motomura, *supra* note 4, at 548.

7. *See* Motomura, *supra* note 1, at 1627–30 (describing how the Supreme Court's use of procedural rights as a surrogate for substantive rights weakens the plenary power doctrine); Motomura, *supra* note 4, at 548–50 (asserting that because of the weakness of constitutional protections in the immigration context, courts have looked to other sources of law and thereby "undermine[d] the plenary power doctrine").

8. Motomura, *supra* note 1, at 1626–27; *see also* Motomura, *supra* note 4, at 549–50 (speculating that the introduction of constitutional principles from mainstream public law has led to the demise of the plenary power doctrine).

9. Motomura, *supra* note 1, at 1627–32; *see also infra* Part I.A.1 (explaining the procedural due process exception).

10. Substantive immigration decisions can only be struck down if the government cannot set forth any rational basis for making them—a very easy standard for the government to meet. *See, e.g.*, *Resendiz-Alcaraz v. U.S. Att'y Gen.*, 383 F.3d 1262, 1271–72 (11th Cir. 2004) (observing that only a rational basis is necessary for federal statutes that distinguish among groups of noncitizens to withstand an equal protection challenge).

11. Motomura, *supra* note 1, at 1627–30; *see infra* notes 57–60 and accompanying text (explaining the distinction between "procedural" and "substantive" decisions).

have a potential back-door approach to addressing substantive concerns over an immigration agency's power—namely, by finding “procedural surrogates,” or procedural problems with the way that power is exercised.¹² This approach allows courts to fill some of the “vacuum” left by the denial of substantive due process rights for immigrants.¹³

At a subconstitutional level, courts have construed immigration statutes and regulations in ways that make them more consistent with constitutional norms from outside the immigration context than with the plenary power doctrine.¹⁴ When norms from outside the immigration context subtly influence statutory interpretation in this way, immigration scholar Hiroshi Motomura calls them “phantom constitutional norms.”¹⁵ This approach allows courts to avoid deciding constitutional questions—such as whether an agency power violates procedural due process or is consistent with the plenary power doctrine—and to instead frame decisions through statutory interpretation.¹⁶

This Comment employs both of these approaches to one issue over which the plenary power doctrine still has a strong hold: judicial review of the U.S. Department of Homeland Security's (the DHS or “the Department”) decisions in naturalization applications after the DHS initiates removal proceedings.¹⁷ Congress has provided

12. Motomura, *supra* note 1, at 1627–31. Motomura notes the significant problems that using “procedural surrogates” cause for the development of the law, yet he regards them as necessary as long as the plenary power doctrine is in force. *Id.*

13. *Id.* at 1631–32.

14. Motomura, *supra* note 4, at 548–49, 564–66, 573–74; *see infra* Part I.A.2.

15. Motomura, *supra* note 4, at 549.

16. *Id.* at 562–63. As with “procedural surrogates,” “phantom norms” necessarily distort the orderly development of the law. *Id.* at 549.

17. Removal proceedings are administrative adjudications conducted in the Executive Office of Immigration Review (EOIR) of the U.S. Department of Justice (DOJ) to determine whether the DHS can lawfully remove a noncitizen from the country. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C., § 304, 110 Stat. 3009-546, 3009-587 to -597 (codified as amended at 8 U.S.C. §§ 1224, 1229a–1229c (2012)); *see also id.* § 371, 100 Stat. at 3009-645. In 1996, Congress began using the term “removal” to encompass both “deportation” (forcing a person out of the country) and “exclusion” (preventing a person outside the country from coming in). *See id.* §§ 301–304, 110 Stat. at 3009-575 to -597; CHARLES A. WIEGAND, III, FUNDAMENTALS OF IMMIGRATION LAW 1 (2011), available at http://www.justice.gov/eoir/vll/benchbook/resources/Fundamentals_of_Immigration_Law.pdf (discussing that before 1996, noncitizens already present in the United States had the right to a deportation hearing and were afforded greater procedural safeguards, while noncitizens outside the United States were placed in exclusion proceedings).

Because this Comment primarily concerns deportation, it uses that word in place of the more modern term, “removal.” However, it generally uses “removal proceedings” rather than the older term “deportation proceedings” except when discussing proceedings occurring before 1996.

naturalization applicants with recourse to the federal district courts if the DHS denies or delays a determination on their applications.¹⁸ Influenced by the plenary power doctrine, however, many circuit courts have held that noncitizens lose this right when the DHS places the noncitizen in removal proceedings.¹⁹ Because the criteria that make noncitizens eligible (or ineligible) for naturalization are different from the criteria that make them deportable, many noncitizens in removal proceedings would otherwise be eligible to naturalize—that is, they meet the requirements for naturalization but also meet the requirements for deportability.²⁰ Additionally, contrary to what many circuit courts have held, this Comment demonstrates that pending removal proceedings should not serve as an absolute bar to naturalization. Courts should still be able to order the DHS to naturalize noncitizens who are in removal proceedings.²¹

The following hypothetical scenario illustrates the current situation in many circuits²²: Antonin Lombardi was an Italian citizen who immigrated with his parents to New York City in 1984 when he was fourteen-years-old. In 1987, he became a lawful permanent resident, but two years later he was sentenced to seven years' imprisonment for felony burglary. He was released after three years and began to reform his life by completing his education, marrying a U.S. citizen, opening a small business with her, and raising two children.

Mr. Lombardi applied to become a U.S. citizen in 2004, but the DHS denied his application, citing his 1989 conviction of a "crime[] involving moral turpitude."²³ Though Mr. Lombardi met all of the requirements of naturalization, the DHS nevertheless had discretion to deny his application based on the applicant's past crimes.²⁴ After seeking an administrative hearing of the denial²⁵ and again being

18. 8 U.S.C. § 1421(c) (denies); *id.* § 1447(b) (delays).

19. *See infra* Part I.C.1.

20. *See infra* note 85 (discussing the requirements of naturalization and the grounds for deportation).

21. *See infra* Part III.A. (explaining how 8 U.S.C. § 1429 does not preclude orders to naturalize).

22. This scenario is most similar to the facts of *Perriello v. Napolitano*, 579 F.3d 135 (2d Cir. 2009), though much of it is common to many cases.

23. *See* 8 C.F.R. § 316.10(a)–(b) (2013) (listing "lack of good moral character" as a reason for denying a naturalization application).

24. *See* 8 U.S.C. § 1427(e) (2012) (codifying the expanded administrative discretion to consider prior acts); *Nagahi v. INS*, 219 F.3d 1166, 1168 (10th Cir. 2000) (asserting the relevance of the "good moral character" criterion to an applicant with an expunged record); 8 C.F.R. 316.10(a)(2) (allowing consideration of an individual's prior acts if relevant and if there is no indication of reform).

25. *See* 8 U.S.C. § 1447(a) ("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."); *see also* *Baez-Fernandez v. INS*, 385 F. Supp. 2d 292,

denied, Mr. Lombardi petitioned a federal district court to review the denial of his application under 8 U.S.C. § 1421(c).²⁶

Upon learning of the petition, the DHS sought a strategy for avoiding review. It found one in 8 U.S.C. § 1429. Section 1429 prohibits the DHS from considering a naturalization application if removal proceedings are pending against the applicant.²⁷ Thus, if the DHS could place Mr. Lombardi in removal proceedings, it could argue in court that it was prevented by statute from even considering his application, let alone approving it. Luckily for the DHS, it had considerable flexibility over the decision to initiate removal proceedings and could place Mr. Lombardi in removal proceedings based on his 1989 conviction alone.²⁸ After initiating the proceedings, the DHS then moved the district court to dismiss Mr. Lombardi's petition for review of his naturalization application and argued that because the DHS could not consider his application, the court could not review the DHS's denial of the application.²⁹ The district court granted the motion, following the precedent of the circuit court above it.³⁰

Mr. Lombardi then filed a motion to have the Immigration Judge ("IJ")³¹ in his removal case terminate the proceedings under 8 C.F.R. § 1239.2(f) so that the district court could review his naturalization application denial.³² However, the Board of Immigration Appeals (BIA) has previously held that IJs cannot terminate removal proceedings without an affirmative communication from the DHS stating that the person is *prima facie* eligible for naturalization.³³ Consequently, the IJ could not grant Mr. Lombardi's motion to terminate.

294 (S.D.N.Y. 2005) (rejecting petitioner's claim under § 1421(c) because he had not first requested a hearing).

26. See 8 U.S.C. § 1421(c) (allowing naturalization applicants who have been denied by the DHS to seek *de novo* review before a district court, which can conduct a hearing upon the applicant's request).

27. *Id.* § 1429.

28. The DHS seems to frequently respond to petitions for judicial review by initiating removal proceedings against the petitioner. See *infra* note 255 for examples. See generally 8 U.S.C. § 1227 (detailing the grounds for deportability to be used in removal proceedings).

29. See *infra* Part I.C.1.

30. Five circuits have reasoned similarly. See *infra* Part I.C.1.

31. IJs preside over removal proceedings pursuant to 8 U.S.C. § 1229a(a)(1). Their decisions are appealable to the Board of Immigration Appeals (BIA) under 8 C.F.R. § 1003.1(b) (2013).

32. See 8 C.F.R. § 1239.2(f) (authorizing an IJ to terminate removal proceedings if (1) there are "exceptionally appealing or humanitarian factors" involved, and (2) the applicant has established he would be "*prima facie* eligib[le] for naturalization" but for the pending removal proceedings).

33. *In re Acosta Hidalgo*, 24 I. & N. Dec. 103, 106 (B.I.A. 2007).

Because the DHS was the very entity that placed him in removal proceedings, it was unlikely Mr. Lombardi could convince the DHS to issue such a communication, but he tried nonetheless. The DHS's reply³⁴ stated that it actually *could not* determine his prima facie eligibility because 8 U.S.C. § 1429 prevented it from considering his application while he was in removal proceedings.³⁵ Thus, by placing Mr. Lombardi in removal proceedings, the DHS was able to evade judicial review of its denial of his naturalization application and prevent removal proceedings against him from being terminated.

Contrary to what one might expect, this scenario reflects the law in many circuits.³⁶ However, several district courts and, recently, two circuit courts have reasserted the rights of noncitizens to obtain meaningful judicial review of their naturalization applications while in removal proceedings.³⁷ These courts stand in opposition to the dominant trend of other circuit courts that have decided they cannot provide remedies when a noncitizen is in removal proceedings.³⁸

This Comment argues that both the procedural due process and unconstitutional exceptions to the plenary power doctrine provide district courts with the authority, in most cases, to grant at least three types of remedies when reviewing naturalization applications while removal proceedings are pending. These remedies include ordering the DHS to naturalize the applicant, issuing a declaratory judgment that resolves some question of fact in relation to the noncitizen's case, or declaring that the noncitizen is prima facie eligible for naturalization but for the pending removal proceedings. Part I of this Comment describes the evolution of the plenary power doctrine and its exceptions, the relevant statutes, and the current circuit split. Part II argues that granting the DHS the power to limit judicial review of naturalization applications while removal proceedings are pending violates noncitizens' procedural due process rights under the Constitution. Part III, however, observes that deciding this constitutional question is ultimately unnecessary because the relevant statutes can easily be—and are in fact best—interpreted so as to require judicial review in this situation.

34. In most cases, the DHS does not reply at all. In the rare instances in which it does, this reply is common. See cases cited *infra* note 457.

35. The Second and Third Circuits have taken this position, concluding that 8 C.F.R. § 1239.2(f) was simply inconsistent with 8 U.S.C. § 1429 but that it was not their role to reconcile them. See *infra* notes 223–234 and accompanying text.

36. See *infra* Parts I.C.1.a, C.3.

37. See *infra* Part I.C.2.

38. See *infra* Part I.C.1.a.

I. THE EVOLUTION OF JUDICIAL REVIEW IN IMMIGRATION AND NATURALIZATION PROCEEDINGS

Although the Supreme Court “ha[s] repeatedly acknowledged the strong presumption that Congress intends judicial review of administrative action”³⁹ in most other areas of law, the immigration context is often different. This Part explains how the plenary power doctrine isolated immigration law from general constitutional norms and how courts have attempted to reconcile the resulting gap through the procedural due process exception and phantom constitutional norms. It then describes the emergence of the laws directly relevant to judicial review of naturalization applications while removal proceedings are pending. Finally, this Part explains the current circuit split between courts that have denied judicial review while removal proceedings are pending and courts that have granted review.

A. *Historical Development of the Plenary Power Doctrine and Its Exceptions*

The plenary power doctrine emerged from the very first Supreme Court cases challenging Congress’s immigration decisions.⁴⁰ Though the Constitution gave Congress the authority to “establish a uniform Rule of Naturalization,”⁴¹ Congress left immigration largely unregulated at the federal level until the late nineteenth century, when anti-Chinese sentiment swept through the Western states.⁴² Following federal laws that eliminated Chinese people’s ability to immigrate, three Supreme Court cases during this period—*Chae Chan Ping v. United States (The Chinese Exclusion Case)*,⁴³ *Nishimura Ekiu v. United States*,⁴⁴ and *Fong Yue Ting v. United States*⁴⁵—established that the government’s powers over immigration were generally immune

39. *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)) (internal quotation marks omitted).

40. *Motomura*, *supra* note 1, at 1632–38.

41. U.S. CONST. art. I, § 8, cl. 4. Although the Constitution gave Congress the power to establish naturalization rules, it was silent as to whether Congress could also exclude or deport noncitizens. Two Supreme Court cases established that it could. See *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (deport); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606–07 (1889) (exclude); see also *Motomura*, *supra* note 4, at 551–54 (explaining how these cases set the conceptual framework for early immigration law).

42. *Motomura*, *supra* note 1, at 1626, 1633.

43. 130 U.S. 581 (1889).

44. 142 U.S. 651 (1892).

45. 149 U.S. 698 (1893).

from judicial scrutiny unless explicitly provided for by Congress.⁴⁶ However, limitations to the plenary power doctrine also developed early on.

1. *The procedural due process exception*

The Court first diverged from classic plenary-centric immigration law in the early twentieth century. In *Yamataya v. Fisher (The Japanese Immigrant Case)*,⁴⁷ the Court, for the first time, upheld a challenge to a deportation determination by employing a procedural surrogate—holding that the procedures employed to make the determination violated due process.⁴⁸ In so doing, the Court drew a distinction between substance and procedure that continues today: substantive powers include defining what criteria make a person eligible or ineligible to naturalize, to enter the country, or to be deported; and procedural powers include the method for deciding whether a given individual meets those criteria.⁴⁹ Whereas decisions made under the substantive powers are almost exclusively at the discretion of the political branches, decisions made under the procedural powers are subject to review.⁵⁰

Yamataya's scope was primarily confined to the deportation (not exclusion) context. Thus, noncitizens already in the country could, at least in theory, challenge the procedural mechanisms for kicking them out, but those outside the country wanting to be let in could not.⁵¹ Courts rarely applied *Yamataya*, however, which made

46. See Motomura, *supra* note 4, at 551–53; see also *The Chinese Exclusion Case*, 130 U.S. at 606, 609 (stressing the foreign policy and sovereignty considerations involved in such decisions).

47. 189 U.S. 86 (1903).

48. *Id.* at 99–101; Motomura, *supra* note 1, at 1637. *Yamataya* involved a challenge from a Japanese citizen the government had attempted to deport four days after she arrived in the United States. *Yamataya*, 189 U.S. at 87. Although the Court upheld Congress's creation of substantive criteria defining what makes a noncitizen deportable, it nevertheless held she could challenge the administrative procedures that were employed in determining whether she met those criteria. *Id.* at 97, 100. Thus, while she could not challenge Congress's substantive decision to make noncitizens who were "likely to become a public charge" deportable, she could challenge the procedures employed to identify her as such. See *id.* at 97–101.

49. Motomura, *supra* note 1, at 1637–39.

50. *Id.* Substantive immigration decisions have been shielded from judicial scrutiny in part because of their relationship to the political question doctrine—that is, they conceivably implicate foreign policy and sovereignty concerns. *Id.* at 1646–50, 1697–98. Procedural matters, however, are traditionally within the judiciary's competence. *Id.* at 1646.

51. Motomura, *supra* note 4, at 554–60. There were at least two rationales behind this distinction. First, the Court had already established that the Constitution applies to all people within U.S. borders, including noncitizens. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (extending Fourteenth Amendment due process to noncitizens); see also Motomura, *supra* note 4, at 565–66 (discussing *Yick Wo* as the

procedural process arguments largely ineffective until the Court's 1982 *Landon v. Plasencia* decision.⁵² In that case, the Court opened the door to procedural due process challenges, which had flourished outside of the immigration context in the 1970s.⁵³ Statutory entitlements to noncitizens then became recognized as forms of property that the government could only deprive using adequate procedures.⁵⁴ Noncitizens seeking to enter the country also found more protection under the procedural due process exception at this point.⁵⁵ Nevertheless, courts have been still much more willing to provide procedural due process protections in the deportation context than in the exclusion context.⁵⁶

case protecting lawfully present noncitizens "from invidious discrimination at state hands"). However, the Court did not apply such protections to noncitizens seeking to enter the country and were therefore outside U.S. jurisdiction. *Motomura*, *supra* note 4, at 565–69; *see also* *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (continuing to uphold this distinction).

Second, persons currently in the United States have, in theory, established greater ties to the country and thus have more at stake when facing removal than persons denied entry at the border. *See* *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (describing how noncitizens "ha[ve] been accorded a generous and ascending scale of rights as [they] increase[their] identit[ies] with our society"). This reasoning was significantly undermined, however, when the Court held that exclusion authority applies every time a noncitizen crosses the border, regardless of whether the person is a permanent resident who had left the country only briefly. *See* *United States ex rel. Volpe v. Smith*, 289 U.S. 422, 425 (1933); *Motomura*, *supra* note 4, at 557 & n.57 (noting that the Court in *Volpe* made no distinction between excludable and deportable noncitizens and that the noncitizen's long-term ties to the country were inconsequential); *see, e.g.*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 208, 213 (1953) (denying procedural due process rights to a twenty-five-year lawful permanent resident who, after briefly leaving the United States to visit his dying mother in Eastern Europe, was detained at Ellis Island for two years based on confidential information because he, unlike the noncitizen in *Yamataya*, was seeking to "enter" the United States rather than to prevent his deportation).

52. 459 U.S. 21 (1982).

53. *Id.* at 32 (finding that the plaintiff could assert due process rights when returning to the country but declining to clarify the particular protections afforded); *Motomura*, *supra* note 1, at 1652–56.

54. *Motomura*, *supra* note 1, at 1651–54 (identifying *Goldberg v. Kelly*, 379 U.S. 254 (1970) as the beginning of a "due process revolution" that entered the immigration context via *Plasencia*). The Court began to analyze three factors to test the adequacy of procedures: (1) the nature of the private interest that the official action affects; (2) the risk that the procedures employed would lead to erroneous deprivation of that interest and the likelihood that other procedures would have lessened that risk; and (3) the government's interest in employing those procedures, taking into account the financial or administrative burden of performing the same function with added or different procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); 16B AM. JUR. 2D *Constitutional Law* § 957 (2013); *see infra* notes 304–320 and accompanying text (discussing courts' applications of this test).

55. *See* *Motomura*, *supra* note 1, at 1630, 1653–55 (noting that noncitizens' lawyers began making the tactical decision to construct constitutional challenges as procedural instead of substantive).

56. *See, e.g.*, *Zadvydas*, 533 U.S. at 682, 693 (asserting that procedural rights are applicable within the deportation setting and using this determination to read a "reasonable time" limitation into a statute concerning post-removal-decision

One of the key difficulties in applying the procedural due process exception is drawing a distinction between “substantive” and “procedural” powers. However, there are some rhetorical methods of distinguishing between the two. Laws that are quintessentially substantive typically involve the establishment of categories.⁵⁷ Examples include statutes that define which types of people should be admitted into the country and which should be deported or excluded.⁵⁸ Laws that are quintessentially procedural, however, typically dictate the manner in which the substantive categorization is to be applied.⁵⁹ Examples of the latter include statutes that require a hearing on whether a person should be placed in the “admit” category or the “exclude” category.⁶⁰

2. *Phantom constitutional norms*

The trend of applying phantom constitutional norms to interpret statutes emerged subtly.⁶¹ For example, although the Court has always refused to characterize deportation as “punishment,” which would invoke constitutional safeguards common to criminal law, it has come close.⁶² Writing for the majority in *Bridges v. Wixon*⁶³ and

detentions); *Plasencia*, 459 U.S. at 26–34 (noting several differences between rights afforded to the deportation and exclusion contexts).

57. Motomura, *supra* note 1, at 1629, 1664 n.200; see also *Resendiz-Alcaraz v. U.S. Att’y Gen.*, 383 F.3d 1262, 1271 (11th Cir. 2004) (stating that substantive challenges of this nature are only subject to rational basis review).

58. See, e.g., 8 U.S.C. §§ 1182, 1227 (2012) (defining deportable and excludable noncitizens, respectively).

59. See Motomura, *supra* note 1, at 1629 (noting that a procedural challenge involves a claim that a noncitizen has not been given the opportunity to challenge whether he or she qualifies under a particular substantive category).

60. *Id.* at 1629, 1664 n.200; see, e.g., 8 U.S.C. § 1229 (outlining procedures that must be followed when placing someone in removal proceedings); see also *Escobar v. INS*, 896 F.2d 564, 567 (D.C. Cir. 1990) (“[A] substantive provision is one that grants a status, whereas a procedural provision is one subordinate to the substantive grant and focusing on how or when a decision is to be made to award the previously authorized substantive status.”), *withdrawn, reh’g en banc granted*, No. 89-5037 (D.C. Cir. Apr. 25, 1990), and *appeal dismissed, vacated as moot*, 925 F.2d 488 (D.C. Cir. 1991). This point is illustrated further below using *Escobar*. *Infra* notes 276–95.

61. See Motomura, *supra* note 4, at 564–73 (tracing the practice of applying phantom constitutional norms to interpret statutes by reviewing pro-immigrant cases outside the immigration context as strictly defined—that is, outside of the naturalization/exclusion/removal context—such as *Yick Wo*).

62. See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (referring to removal as a “penalty” but not a “criminal sanction”); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (establishing that “deportation is not a punishment for crime”); see also Motomura, *supra* note 4, at 553 (detailing that *Fong Yue Ting* “dismiss[ed] the idea that deportation should trigger the more substantial constitutional safeguards associated with punishment” (internal quotations omitted)).

63. 326 U.S. 135 (1945).

Fong Haw Tan v. Phelan,⁶⁴ Justice Douglas based a pro-noncitizen interpretation of deportation statutes on the severe, punishment-like consequences of deportation, considering it “a drastic measure” that could be “at times the equivalent of banishment or exile.”⁶⁵ Emphasizing the extreme nature of deportation, the Court in *Fong Haw Tan* established that ambiguous deportation statutes or regulations must be read in the light most favorable to the person facing deportation.⁶⁶ In these cases, the Court appeared to let constitutional norms applicable in criminal law subtly affect its interpretation of deportation statutes, even though the most directly applicable constitutional norm would have been the plenary power doctrine.⁶⁷

Using phantom constitutional norms in this way represents a departure from the typical relationship between constitutional law and statutory interpretation. Typically, under the principle of constitutional avoidance, judges avoid direct interpretation of the Constitution by construing challenged statutes in a way that brings them in line with applicable constitutional norms.⁶⁸ Thus, the applicable constitutional norms stand in the background, subtly exerting a “pull,” or influence, molding the statutes into conformity with the constitution.⁶⁹ What is unusual about phantom constitutional norms, however, is that they “pull” the statutes away from the underlying background constitutional doctrine—the plenary power doctrine—and toward other, more mainstream

64. 333 U.S. 6 (1948).

65. *Id.* at 10; *Bridges*, 326 U.S. at 147 (“[A]lthough deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling.” (citations omitted)); Motomura, *supra* note 4, at 567–68. See generally *Padilla*, 130 S. Ct. at 1481 (stating that removal is a “particularly severe penalty” that has been “intimately related to the criminal process,” despite its status as a civil proceeding (internal quotation marks omitted)).

66. *Fong Haw Tan*, 333 U.S. at 10 (asserting that the impact that deportation has upon individuals is so strong as to necessitate a stricter standard than might otherwise be appropriate). See generally Motomura, *supra* note 4, at 568 (arguing that *Fong Haw Tan* was an important step in the development of the use of statutory interpretation for protecting individual rights of immigrants).

67. Motomura, *supra* note 4, at 567–68.

68. *Id.* at 560–61; see, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (“[I]t is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)) (internal quotation marks omitted)). Though commonly employed, the practice is not without its critics. See, e.g., RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 285 (1985) (asserting that a canon that encourages judges to avoid constitutional conflict does not actually constrain them but instead encourages “judge-made ‘penumbra[s]’” that expand the reach of the Constitution too far).

69. Motomura, *supra* note 4, at 564.

constitutional norms.⁷⁰ In other words, phantom norms tend to render statutes inconsistent with the plenary power doctrine and more consistent with norms commonly followed outside the immigration context.⁷¹

*Nagahi v. INS*⁷² provides an example of phantom norms guiding statutory interpretation and invokes the statutes relevant to this Comment. In *Nagahi*, the petitioner challenged a rule limiting the time period in which noncitizens could file claims for judicial review of naturalization applications under 8 U.S.C. § 1421(c) after an administrative denial of the application for citizenship.⁷³ The government contended that the Immigration and Naturalization Service (INS)⁷⁴ had the authority to limit access to judicial review under 8 U.S.C. § 1421(a), which gave the INS the “sole authority to naturalize persons,”⁷⁵ and under other statutes that granted the INS general authority to establish regulations necessary for carrying out its responsibilities.⁷⁶

Applying norms from outside the plenary power and immigration contexts, the U.S. Court of Appeals for the Tenth Circuit held that the INS did not have the authority to limit the scope of judicial review over its decisions.⁷⁷ The court relied on the Supreme Court’s statement in *Bowen v. Georgetown University Hospital*⁷⁸ that “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate [limits on judicial review] unless that power is conveyed by Congress in express terms.”⁷⁹ The court also applied *Adams Fruit Co. v. Barrett*,⁸⁰ in which

70. *Id.* at 564–65, 573–74.

71. *Id.* at 549–50; *see, e.g., Zadvydas*, 533 U.S. at 689 (applying phantom norms almost explicitly by rejecting the literal meaning of the statute and interpreting it in a way that conformed to constitutional norms uninfluenced by the plenary power doctrine).

72. 219 F.3d 1166 (10th Cir. 2000).

73. *See id.* at 1168–69 (explaining that the petitioner’s counsel continued with an administrative action within the INS rather than filing an appeal with the district court within the 120-day limitation created by the INS regulation); *see also* 8 C.F.R. § 336.9(b) (2013) (indicating that since 1991, there has been a time limit of 120 days).

74. The INS was an agency within the DOJ until 2003 when its immigration enforcement and services responsibilities were transferred to newly created DHS. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

75. 8 U.S.C. § 1421(a) (2012).

76. *Nagahi*, 219 F.3d at 1169–70 (citing 8 U.S.C. §§ 1103(a)(3), 1443(a)).

77. *Id.* at 1170–71 (noting that limitation authority was beyond the scope of the congressionally delegated authority).

78. 488 U.S. 204 (1988).

79. *Nagahi*, 219 F.3d at 1170 (alteration in original) (quoting *Bowen*, 488 U.S. at 208) (noting that the Court was referring to retroactive rules, not judicial review).

80. 494 U.S. 638 (1990).

the Court stated that an agency could not control the scope of statutorily mandated judicial review.⁸¹

Thus, under these exceptions to the plenary power doctrine, immigrants facing deportation can seek judicial review of adverse naturalization decisions in at least two ways: they can claim that denying judicial review violates procedural due process, or they can seek an interpretation of the relevant statutes that bring them in line with mainstream constitutional norms.

B. Historical Development of the Current Laws Affecting Judicial Review of Naturalization Applications While Removal Proceedings Are Pending

Until 1990, Congress gave federal district courts the exclusive authority to naturalize noncitizens and the Attorney General the power to deport them if they were not yet naturalized.⁸² Under the pre-1990 framework, naturalization occurred in two steps after a noncitizen filed an application. First, the Attorney General made a recommendation to the court that the noncitizen was prima facie eligible for naturalization.⁸³ Second, the court held a final hearing on naturalization, and, if appropriate, naturalized the noncitizen.⁸⁴

Because the requirements for naturalization only partially overlapped with the grounds for deportability, many noncitizens were both eligible for naturalization and deportable at the same time.⁸⁵

81. See *id.* at 650 (holding that the U.S. Department of Labor could not limit a statutory cause of action granted to migrant workers injured due to their failure to comply with vehicle safety provisions); *Nagahi*, 219 F.3d at 1170 (asserting that the INS was similarly constrained in regulating its judicial review authority).

82. Compare 8 U.S.C. § 1421 (1988) (“Exclusive jurisdiction to naturalize persons as citizens of the United States is conferred upon . . . District courts of the United States . . .”), with Immigration Act of 1990, Pub. L. No. 101-649, § 401, 104 Stat. 4978, 5038 (codified as amended at 8 U.S.C. § 1421(a) (2012)) (“The sole authority to naturalize persons as citizens of the United States is conferred upon the Attorney General.”).

83. 8 U.S.C. § 1446(a)–(d) (1988).

84. *Perriello v. Napolitano*, 579 F.3d 135, 138 (2d Cir. 2009) (identifying the pre-1990 naturalization and removal process); see 8 U.S.C. § 1421(a) (1988).

85. Compare 8 U.S.C. §§ 1423, 1427(a) (1952) (providing the core requirements of eligibility), with *id.* § 1251 (codified as amended at 8 U.S.C. § 1227 (2012)) (providing the grounds for deportation).

Currently, the core requirements of eligibility for naturalization are (1) five years of continuous residence after becoming a lawful permanent resident; (2) evidence of good moral character during that period; and (3) an understanding of the English language, history, principles, and form of government of the United States. 8 U.S.C. §§ 1423, 1427(a) (2012).

Some of the grounds for deportation include (1) being inadmissible or otherwise unlawfully present at the time of entry or adjustment of status or violating status (including securing a visa by fraud, marrying for the purpose of procuring admission, etc.); (2) engaging in criminal activity, including commission “of a crime involving moral turpitude” within five years of admission (or ten years in the case of a legal permanent resident) that has a possible prison sentence of one year or longer,

Thus, at times, noncitizens would successfully obtain the Attorney General's recommendation of prima facie eligibility but the INS would initiate deportation proceedings before the noncitizen was naturalized.⁸⁶ In this situation, prior to 1950, the naturalization proceedings and deportation proceedings would progress simultaneously until the completion of one naturally foreclosed the possibility of the other.⁸⁷ This led to a "race" in which immigrants would seek to be naturalized by the court before the Attorney General could deport them.⁸⁸

Congress intended to end this race in 1950 by enacting what became 8 U.S.C. § 1429, which at that time prohibited the courts from holding a final hearing on petitions for naturalization once the INS had begun deportation proceedings.⁸⁹ The provision also prohibited noncitizens from being naturalized if the Attorney General had issued a final order of deportation.⁹⁰ This statute was termed the "priority provision" because Congress intended it to give deportation proceedings priority over naturalization proceedings so that the latter could not be conducted unless and until the former had been resolved in the noncitizen's favor.⁹¹

By 1955, the Attorney General had balanced the priority given to deportation proceedings by granting the BIA authority to terminate deportation proceedings to allow a court to hear a noncitizen's naturalization petition.⁹² In 1974, the government added standards for the BIA's exercise of its discretion by promulgating 8 C.F.R. § 1239.2(f).⁹³ Under this regulation, an IJ can only terminate

commission of two or more of such unconnected crimes any time after admission, and commission of an aggravated felony; (3) failing to register or falsifying documents; (4) posing a security threat; (5) becoming a public charge within five years of admission; and (6) voting unlawfully. *Id.* § 1227.

86. *Perriello*, 579 F.3d at 139.

87. *Shomberg v. United States*, 348 U.S. 540, 543-44 (1955).

88. *Id.*

89. Congress initially passed the priority provision in the Subversive Activities Control Act of 1950, Pub L. No. 81-831, § 27, 64 Stat. 987, 1015. This provision was adopted, unchanged, in the Immigration and Nationality Act of 1952, Pub L. No. 82-414, § 318, 66 Stat. 163, 244 (codified as amended at 8 U.S.C. § 1429). See *Shomberg*, 348 U.S. at 543-44.

90. 8 U.S.C. § 1429 (1952).

91. See *Shomberg*, 348 U.S. at 543-45 (analyzing priority sections from the Subversive Activities Control Act of 1950 and giving the priority section here the same meaning—namely, giving it "immediate prospective and retroactive effect").

92. *Perriello v. Napolitano*, 579 F.3d 135, 139 (2d Cir. 2009) (explaining this history); *Zayed v. United States*, 368 F.3d 902, 907 (6th Cir. 2004) (explaining that to terminate removal proceedings, there must be a pending application because regulations only authorize termination to allow the DHS to consider a noncitizen's application (citing 8 C.F.R. § 1239.2(f) (2003))); *In re B—*, 6 I. & N. Dec. 713, 720 (B.I.A. 1955) (citing 8 C.F.R. § 6.1(d)(1) (1952)).

93. *Perriello*, 579 F.3d at 139.

deportation proceedings if (1) the noncitizen “has established prima facie eligibility for naturalization” and (2) “the matter involves exceptionally appealing or humanitarian factors.”⁹⁴ If these two elements are not met, the DHS must issue a final order of deportation as soon as possible.⁹⁵

The year after enactment of the rule, however, the BIA narrowed the scope of § 1239.2(f) in *In re Cruz*⁹⁶ by holding that the “prima facie eligibility” requirement could only be satisfied by either an affirmative communication from the Attorney General (via the INS) or a declaration from a district court.⁹⁷ IJs, therefore, could not determine an applicant’s prima facie eligibility on their own authority.⁹⁸ Thus, IJs could no longer terminate deportation proceedings absent a communication from the Agency or a court that the noncitizen was prima facie “eligible for naturalization but for the pendency of the deportation proceedings.”⁹⁹

Then, in 1990, Congress conducted a massive overhaul of the immigration and naturalization systems, making three relevant changes.¹⁰⁰ First, Congress transferred exclusive authority to naturalize noncitizens from the district courts to the Attorney General, thus giving the Attorney General the authority both to naturalize and to deport.¹⁰¹ Second, Congress updated the language in 8 U.S.C. § 1429 to state that the Attorney General, rather than the court, was now prohibited from considering applications for

94. 8 C.F.R. § 1239.2(f) (2013).

95. *Id.* The regulation requires this even if the noncitizen has a pending application for naturalization or a pending claim for judicial review. *Id.*; see *Campos v. INS*, 16 F.3d 118, 122 (6th Cir. 1994) (deciding that the BIA is not required to stay a removal order until a noncitizen obtains judicial review of his application denial).

96. 15 I. & N. Dec. 236 (B.I.A. 1975).

97. *Id.* at 237; see also *Nolan v. Holmes*, 334 F.3d 189, 192, 202–03 (2d Cir. 2003) (upholding the requirement even though the noncitizen presented evidence that his discharge from the military was honorable and the removal proceedings were premised on his alleged “other than honorable” discharge).

98. *Cruz*, 15 I. & N. Dec. at 237. Even though IJs reviewed citizenship claims, the BIA reasoned that because Congress had not given them the authority to naturalize aliens, they also did not have the authority to determine prima facie eligibility. *Id.*

99. *Id.* at 237. This requirement appears to be only sporadically followed or enforced, as IJs often do terminate removal proceedings even without an affirmative communication from the DHS. See *Perriello v. Napolitano*, 579 F.3d 135, 139, 141 (2d Cir. 2009); e.g., *Nesari v. Taylor*, 806 F. Supp. 2d 848, 854 (E.D. Va. 2011) (stating that an IJ had terminated removal proceedings without the DHS or apparent censure from the BIA); *Fretas v. Hansen*, No. 1:06CV1475, 2008 WL 4404276, at *12 (N.D. Ohio, Sept. 23, 2008) (noting that the IJ terminated removal proceedings due to humanitarian factors).

100. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

101. *Id.* § 401(a), 104 Stat. at 5038 (codified as amended at 8 U.S.C. § 1421(a) (2012)) (providing the sole authority to naturalize); *Ajlani v. Chertoff*, 545 F.3d 229, 236 (2d Cir. 2008) (detailing the consolidation of authority).

naturalization while deportation proceedings were pending.¹⁰² Third, Congress gave federal district courts the power to review applications when they had been denied¹⁰³ or had taken more than 120 days to come to a decision.¹⁰⁴ This last provision was intended to preserve recourse for aliens who could not get their applications approved.¹⁰⁵ It also placed a check on the Attorney General's otherwise nearly unreviewable discretion over naturalization.¹⁰⁶

On March 1, 2003, the newly created U.S. Department of Homeland Security assumed the Attorney General's responsibilities over naturalization and removal.¹⁰⁷ The DHS divided these responsibilities between two of its agencies: U.S. Citizenship and Immigration Services (USCIS) would have authority to naturalize noncitizens under § 1421(a),¹⁰⁸ and U.S. Immigration and Customs Enforcement (ICE) would have authority to initiate removal proceedings.¹⁰⁹ Power to adjudicate removal proceedings was left with the Executive Office of Immigration Review (EOIR), an agency under the Attorney General, and ICE could only execute a removal following a final removal order from the EOIR.

The combination of the 1990 statutory changes and the 2003 changes to the relevant administrative structure have created an

102. *Gonzalez v. Sec'y of DHS*, 678 F.3d 254, 257 (3d Cir. 2012). Compare 8 U.S.C. § 1429 (1952) (“[N]o petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding” (emphasis added)), with 8 U.S.C. § 1429 (2012) (“[N]o application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding” (emphasis added)).

103. Pub. L. No. 101-649, § 401(a), 104 Stat. at 5038 (codified as amended at 8 U.S.C. § 1421(c) (2012)).

104. *Id.* § 407(d)(14), 104 Stat. at 5044 (codified as amended at 8 U.S.C. § 1447(b)).

105. *Gonzalez*, 678 F.3d at 260 & n.9.

106. See *Ngwana v. Att’y Gen.*, 40 F. Supp. 2d 319, 321–22 (D. Md. 1999) (explaining the limited options for noncitizens if judicial review can be circumvented). The only other statute granting courts jurisdiction to review the DHS decisions of any kind is 8 U.S.C. § 1252, which allows for a very limited review of final orders of removal and for review of alleged constitutional violations at any time. No other statute authorizes review of naturalization applications.

107. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. As a result, the term “Attorney General” in each of the statutes discussed in this Comment can now be substituted with “the DHS,” or, more specifically, with the relevant agency within the DHS. *Awe v. Napolitano*, 494 F. App’x 860, 862 n.3 (10th Cir. 2012).

108. 6 U.S.C. § 271(b).

109. See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, STRATEGIC PLAN FY 2010–2014, at 3, 5–7 (2010), available at <http://www.ice.gov/doclib/news/library/reports/strategic-plan/strategic-plan-2010.pdf> (indicating that one of ICE’s key priorities is to detect and remove individuals seeking to enter the United States illegally as well as those individuals who pose a national security threat); see also 6 U.S.C. §§ 452(a), 542(b) (providing the authority for the creation of this Agency).

interesting interplay between 8 U.S.C. §§ 1429, 1421(a), and judicial review under §§ 1421(c) and 1447(b). Under § 1421(a), USCIS has exclusive authority to naturalize noncitizens.¹¹⁰ However, § 1429 prohibits USCIS from considering naturalization applications if ICE has initiated removal proceedings against the applicant.¹¹¹ Section 1421(c) allows naturalization applicants to seek judicial review when USCIS denies their applications after exhausting administrative remedies.¹¹² Section 1447(b) allows applicants to seek judicial review when USCIS does not make a determination in a timely manner.¹¹³ Even though the text of § 1429 makes no facial reference to the courts, a plurality of circuits have held that it nevertheless limits the courts' powers of judicial review under §§ 1421(c) and 1447(b) when removal proceedings are pending.¹¹⁴

Furthermore, all of these changes occurred without corresponding changes to 8 C.F.R. § 1239.2(f), which authorizes IJs to terminate removal proceedings.¹¹⁵ For many years, courts doubted whether the *Cruz* interpretation of this regulation—that prima facie eligibility determinations must come from either the agency (now the DHS) or the courts—was still valid after the 1990 changes.¹¹⁶ The U.S. Courts of Appeals for the Fifth, Sixth, and Ninth Circuits doubted that district courts still have the authority to issue declarations of prima facie eligibility given that the DHS now has the sole authority to naturalize.¹¹⁷ In *Apokarina v. Ashcroft*,¹¹⁸ the U.S. Court of Appeals for the Third Circuit took the opposite approach—questioning whether the DHS could make these declarations now that § 1429 prevented the DHS from even considering applications.¹¹⁹ The Third Circuit reasoned that a determination of whether noncitizens are prima facie eligible for naturalization would involve at least some consideration of their applications.¹²⁰

110. 8 U.S.C. § 1421(a).

111. *Id.* § 1429.

112. *Id.* § 1421(c).

113. *Id.* § 1447(b).

114. *See infra* Part I.C.1.

115. 8 C.F.R. § 1239.2(f) (2013); *Perriello v. Napolitano*, 579 F.3d 135, 140 (2d Cir. 2009).

116. *Perriello*, 579 F.3d at 140 (explaining this split).

117. *See, e.g., Saba-Bakare v. Chertoff*, 507 F.3d 337, 341 (5th Cir. 2007); *De Lara Bellajaro v. Schiltgen*, 378 F.3d 1042, 1047 (9th Cir. 2004); *Zayed v. United States*, 368 F.3d 902, 907 n.6 (6th Cir. 2004).

118. 93 F. App'x 469 (3d Cir. 2004).

119. *Id.* at 470, 472.

120. *Id.* at 471–72; *see also Perriello*, 579 F.3d at 138 (explaining that considering an application is a prerequisite to determining prima facie eligibility).

In the estimation of some courts, the BIA resolved this question in 2007 in *In re Acosta Hidalgo*.¹²¹ In that case, the BIA stated in dictum that district courts could not declare that an alien was prima facie eligible for naturalization to satisfy § 1239.2(f) because the courts no longer had “authority over naturalization proceedings.”¹²² According to the BIA, only the DHS could satisfy this requirement by issuing an affirmative declaration.¹²³ The BIA did not address how the DHS could make these declarations when the DHS was prohibited from considering applications under § 1429.¹²⁴

In its central holding,¹²⁵ The BIA in *Acosta Hidalgo* reaffirmed its prohibition from *Cruz* against IJs establishing prima facie eligibility on their own.¹²⁶ In *Acosta Hidalgo*, the BIA reasoned that the DHS had more expertise than IJs to determine an applicant’s eligibility.¹²⁷ In dissent, BIA member Filppu criticized the decision as allowing the DHS to veto termination of deportation proceedings merely by remaining silent.¹²⁸

Acosta Hidalgo put in place the final piece of a statutory, regulatory, and interpretive shield that effectively blocks district courts from exercising judicial review over the DHS’s decisions when removal

121. 24 I. & N. Dec. 103 (B.I.A. 2007). For a discussion of subsequent courts’ treatment of this case, see *infra* notes 217–239 and accompanying text.

122. *Acosta Hidalgo*, 24 I. & N. Dec. at 103, 105. This rendering of § 1421(a) overstates the DHS’s authority and perhaps misled the BIA’s decision. Section 1421(a) only states that “[t]he sole authority to naturalize persons as citizens of the United States is conferred upon [the DHS].” 8 U.S.C. § 1421(a) (2012). Courts are not precluded from having a role in the naturalization process simply because the DHS has “[t]he sole authority to naturalize,” as courts can still make prima facie eligibility determinations or even order the DHS to naturalize a person. See *infra* Part III.A.2.

123. *Acosta Hidalgo*, 24 I. & N. Dec. at 105–06.

124. *Perriello*, 579 F.3d at 140. Mistakes like the BIA’s misstatement of 8 U.S.C. § 1421(a), see *supra* note 122, and failure to consider § 1429 might be inevitable considering the BIA’s caseload. In 2007, for example, the eleven members of the BIA issued 35,393 decisions. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2007 STATISTICAL YEAR BOOK, at S1 (2008), available at <http://www.justice.gov/eoir/statspub/fy07syb.pdf>; Lenni B. Benson, *You Can’t Get There From Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405, 417 (indicating that the number of BIA members fluctuates but that in 2007, there were eleven members). For a description of how this volume might affect the quality of the BIA’s decision making, see *supra* notes 315–319 and accompanying text.

125. The statement about district courts not being able to issue prima facie eligibility declarations was dictum because the petitioner was only seeking to have an IJ—not a federal district court—declare him prima facie eligible to naturalize. See *Acosta Hidalgo*, 24 I. & N. Dec. at 103–06. Dicta is not binding on future cases. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (observing that statements in opinions that “go beyond the case . . . may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision”).

126. *Acosta Hidalgo*, 24 I. & N. Dec. at 105–06.

127. *Id.* at 106 & n.8.

128. *Id.* at 110 (Filppu, Board Member, concurring in part and dissenting in part).

proceedings are in process. In sum, the BIA in *Acosta Hidalgo* asserted that courts could no longer declare a noncitizen's prima facie eligibility for naturalization to help terminate removal proceedings.¹²⁹ Instead, according to the BIA, only the DHS could make these declarations, even though the DHS was the entity that initiated removal proceedings in the first place and rarely, if ever, made such declarations.¹³⁰ This makes it extremely unlikely under *Acosta Hidalgo* that a noncitizen can ever have removal proceedings terminated under § 1239.2(f).¹³¹ Additionally, having removal proceedings pending also means that, in many circuits, noncitizens cannot obtain meaningful judicial review of their denied or delayed applications under §§ 1421(c) or 1447(b).¹³² This lack of judicial review is due to many courts' decisions that § 1429, which prevents the DHS from considering noncitizens' applications after it has initiated removal proceedings against them, limits the courts' ability to grant relief.¹³³

These interpretations have given the DHS the ability to effectively circumvent congressional and agency-created avenues of relief for noncitizens by initiating removal proceedings.¹³⁴ Although Congress provided noncitizens a right to judicial review by enacting 8 U.S.C. §§ 1421(c) and 1447(b), the DHS can shield itself from these provisions in most circuits by initiating removal proceedings.¹³⁵ Additionally, 8 C.F.R. § 1239.2(f) provides noncitizens a means of terminating removal proceedings, but the DHS can withhold an element necessary for terminating the proceedings merely by remaining silent.¹³⁶ The federal court interpretations approving this procedure authorize the DHS to effectively nullify the statutory and

129. *Id.* at 105–06 (majority opinion).

130. *See infra* notes 455–457 (detailing examples of the DHS unresponsiveness); *see also Prosecutorial Discretion: A Statistical Analysis*, IMMIGR. POL'Y CENTER 1 (June 1, 2012), http://www.immigrationpolicy.org/sites/default/files/docs/pd_-_a_statistical_assessment_061112.pdf (discussing the DHS's lack of willingness to close removal proceedings itself, which it does in less than eight percent of cases, despite the Department's authority to close low-priority removal proceedings).

131. *See infra* Part I.C.3 (describing the *Acosta Hidalgo* chilling effect).

132. *See infra* Part I.C.1.

133. *See infra* Part I.C.1.

134. *Gonzalez v. Sec'y of DHS*, 678 F.3d 254, 260–61 (3d Cir. 2012) (noting that the possibility that judicial review could be cut off by the Attorney General is contrary to congressional intent).

135. *Id.*

136. *In re Acosta Hidalgo*, 24 I. & N. Dec. 103, 109 (B.I.A. 2007) (Filppu, Board Member, concurring in part and dissenting in part) (finding fault with previous BIA decisions that constrain its authority despite the regulatory language).

regulatory protections.¹³⁷ The cases that follow demonstrate several examples of courts wrestling with the implications of these interpretations and the justifications for maintaining them. They also display a growing movement to upend these interpretations.¹³⁸

C. The Split over Judicial Review of Naturalization Applications While Removal Proceedings Are Pending

The central question that has surfaced from the evolution of these statutes and regulations is whether and to what degree noncitizens can still obtain effective judicial review of their naturalization applications after the DHS has initiated removal proceedings against them. Courts have construed the relevant statutes in a variety of ways. A plurality of jurisdictions have concluded that courts cannot provide noncitizens with a remedy in this situation. However, other courts have come to the opposite conclusion and provided certain remedies to noncitizens. Additionally, courts have taken opposing positions on whether the BIA's statement in *Acosta Hidalgo* is effective to limit their ability to grant declaratory judgments. Finally, while a few courts have considered due process challenges to denying judicial review, none of these courts have attempted a serious analysis of the potential due process arguments available to noncitizens.

1. Jurisdictions in which district courts cannot grant relief

Five out of seven circuits have construed 8 U.S.C. § 1429 to prevent courts from exercising effective judicial review of naturalization determinations when the applicants are in removal proceedings. The DHS, however, appears to still review naturalization applications even though § 1429 explicitly prohibits the Department, not the courts, from doing so.

a. Limitations on courts

The U.S. Courts of Appeals for the Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits have decided that pending removal proceedings prevent the courts from awarding any form of relief.¹³⁹

137. See *Kestelboym v. Chertoff*, 538 F. Supp. 2d 813, 818 (D.N.J. 2008) (noting that allowing the Department to avoid judicial review would "trump" the regime intended by Congress).

138. See *infra* Part I.C.2.

139. See *Awe v. Napolitano*, 494 F. App'x 860, 861, 866 (10th Cir. 2012); *Barnes v. Holder*, 625 F.3d 801, 806–07 (4th Cir. 2010) (dicta); *Ajlani v. Chertoff*, 545 F.3d 229, 240 (2d Cir. 2008); *Saba-Bakare v. Chertoff*, 507 F.3d 337, 340–41 (5th Cir. 2007); *De Lara Bellajaro v. Schiltgen*, 378 F.3d 1042, 1046 (9th Cir. 2004); *Zayed v. United States*, 368 F.3d 902, 906 (6th Cir. 2004).

Readers interested in civil procedure may find interesting the various methods by which these courts have dismissed the cases. A variety of procedural mechanisms have been explored.

Lack of Subject Matter Jurisdiction

As a technical matter, a consensus of these courts hold that they have *subject matter jurisdiction* to review the naturalization applications but are nevertheless prevented from granting any remedy. See, e.g., *Awe*, 494 F. App'x at 866–67; *De Lara Bellajaro*, 378 F.3d at 1046; *Zayed*, 368 F.3d at 906.

In *Barnes*, the Fourth Circuit stated that district courts lacked jurisdiction when removal proceedings were pending. *Barnes*, 625 F.3d at 805–06. However, its reasoning was entirely based on the court's inability to grant effective relief. See *id.* at 806–07. Furthermore, the statement was made in dictum because *Barnes* did not involve a petitioner seeking judicial review of a naturalization application; rather, the petitioner sought review of an IJ's decision that the IJ could not terminate removal proceedings under *Acosta Hidalgo*. *Id.* at 803–05; see also *Ka Lok Lau v. Holder*, 880 F. Supp. 2d 276, 279 (D. Mass. 2012) (“The Fourth Circuit [in *Barnes*] reviewed a completely separate issue . . .”). The question arose because the noncitizen argued that *Acosta Hidalgo* deprived him of his right to judicial review under 8 U.S.C. § 1421(c). *Id.* at 806. The court concluded that noncitizens in removal proceedings simply did not have the right to this kind of judicial review. *Id.*

Additionally, the Fifth Circuit in *Saba-Bakare* dodged the jurisdiction issue in relation to the noncitizen's claim under § 1447(b), reasoning that, regardless of whether the court had jurisdiction, it could not grant relief. *Saba-Bakare*, 507 F.3d at 340–41; accord *Agarwal v. Napolitano*, 663 F. Supp. 2d 528, 535 (W.D. Tex. 2009). Also, when reviewing the challenge under § 1421(c), the court held it did not have jurisdiction but not because the noncitizen was in removal proceedings. *Saba-Bakare*, 507 F.3d at 340. It instead denied jurisdiction because there was not a valid “denial”—an element required by 1421(c). *Id.* at 339–40. In that case, the DHS had issued a denial of the noncitizen's application, but the court declared the denial invalid because the DHS was not authorized to consider the noncitizen's application while he was in removal proceedings. See *id.* Thus, without a valid denial, the court held it could not assert jurisdiction under § 1421(c). See *id.*; *infra* note 350 (analyzing this approach); see also *infra* Part I.C.1.b (discussing the DHS's practice of disregarding § 1429 and considering applications regardless of whether removal proceedings are pending).

Furthermore, the Second Circuit also dodged the jurisdiction issue when an applicant brought a claim under § 1447(b) in *Ajlani*, 545 F.3d at 237–38. The court accepted jurisdiction merely because the parties did not contest it but expressed serious doubts over whether it in fact had jurisdiction. *Id.* For a discussion of this case, see *infra* note 377.

Failure to State a Claim and Mootness

If the court finds it has subject matter jurisdiction but cannot grant a remedy, dismissal under FED. R. CIV. P. 12(b)(6) for “failure to state a claim upon which relief can be granted” appears most appropriate. See, e.g., *Ajlani*, 545 F.3d at 233, 241 (upholding the district court's dismissal on this ground); see also *Gonzalez*, 678 F.3d at 259 n.5 (explaining that if a court cannot grant a remedy, dismissal under Rule 12(b)(6) is proper). If a court cannot remedy the petitioner's situation, there is no “claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6) (emphasis added).

The Tenth Circuit, however, took a different approach in *Awe*, 494 F. App'x at 865–66. It concluded that claims for judicial review become moot the moment the DHS initiates removal proceedings against the claimant and thus fail Article III's requirement of a case or controversy. *Id.* Under the court's test, cases become moot if courts can no longer order effective relief due to a change in circumstances after the claim was filed. *Id.* at 866. In *Awe*, the petitioner filed his claim for judicial review with the court, and the DHS then initiated removal proceedings and moved to dismiss. *Id.* at 862, 866. The Tenth Circuit construed the DHS's initiation of removal proceedings as a change of circumstances that mooted the petitioner's claim. *Id.* at 866.

Generally speaking, these circuits have reasoned that because § 1421(a) gives the DHS exclusive authority to naturalize noncitizens, the scope of judicial review under § 1421(c) and 1447(b) cannot exceed the DHS's authority to make naturalization decisions.¹⁴⁰ Thus, because § 1429 prevents the DHS from considering the applications of persons in removal proceedings, it must also limit courts' ability to review the DHS's actions concerning these applications.

The Sixth Circuit was the first circuit court to directly confront this issue in *Zayed v. United States*.¹⁴¹ In that case, the INS denied Ms. Zayed's application for citizenship, stating that she lacked "good moral character."¹⁴² After exhausting administrative remedies, Ms. Zayed filed a claim for judicial review.¹⁴³ A few weeks later, the INS initiated removal proceedings against her and simultaneously filed a motion in the district court to dismiss the review of the naturalization decision, claiming that the court lacked subject matter jurisdiction because of the pending removal proceedings.¹⁴⁴ The district court accepted the government's argument and dismissed Ms. Zayed's petition.¹⁴⁵

Upon review, the Sixth Circuit disagreed with the district court's logic, observing that nothing in § 1429 had any bearing on the courts' subject matter jurisdiction under § 1421(c).¹⁴⁶ However, the court reasoned that if the DHS could not consider applications for citizenship, then the court could not by "judicial fiat" compel the

Under this reasoning, the mootness test might appear to apply only when the DHS initiates removal proceedings after the petitioner filed his claim for review. The court explained, however, that even if the DHS had initiated removal proceedings beforehand, it still would have dismissed the matter, but on different grounds: lack of standing. *Id.* at 866 n.8. To have standing, a petitioner must present a claim that the court can redress. *See id.* The Tenth Circuit reasoned that a court would not have been able to redress the claim because removal proceedings were pending. *See id.*

Just after *Awe*, Judge Easterbrook criticized the Tenth Circuit's mootness approach by observing that parallel civil proceedings often proceed simultaneously without raising mootness concerns until one is finally settled. *Klene v. Napolitano*, 697 F.3d 666, 667–68 (7th Cir. 2012). He noted, for example, that the same controversy can often be fought simultaneously in state and federal court or in different federal district courts, and neither proceeding moots the other until one of them reaches judgment. *Id.* Consequently, in his view, a noncitizen who was locked in an ongoing controversy over her removal proceedings could initiate a parallel proceeding in federal district court over the same matter without it being mooted. *Id.*

140. *See, e.g., Zayed*, 368 F.3d at 906.

141. 368 F.3d 902 (6th Cir. 2004).

142. *Id.* at 904. "[G]ood moral character" is one of the requirements of naturalization. 8 U.S.C. § 1427(a) (2012); *see supra* note 85.

143. *Zayed*, 368 F.3d at 904.

144. *Id.*

145. *Id.*

146. *Id.* at 906 (citing *Grewal v. Ashcroft*, 301 F. Supp. 2d 692, 696 (N.D. Ohio 2004)).

Attorney General to naturalize a person.¹⁴⁷ The court stressed that Congress passed § 1429 to give priority to removal proceedings over naturalization proceedings and it was “aware of no suggestion that Congress intended th[is] priority . . . to be altered by the 1990 amendments.”¹⁴⁸

The court further noted in dictum that had the Agency initiated removal proceedings prior to making a determination on Ms. Zayed’s application and denied the application based on the pending removal proceedings, the district court would also have been prohibited from granting a remedy, but for different reasons.¹⁴⁹ The court observed that when the Department denies an application, 8 U.S.C. § 1421(c) only permits review “of such denial.”¹⁵⁰ The court interpreted this to mean that district courts could only review the reasons the Department denied the application.¹⁵¹ If the denial had been premised upon the pendency of removal proceedings, the court would be limited to determining whether the noncitizen was, in fact, in removal proceedings.¹⁵² It would not be able to proceed to the merits of the application.¹⁵³

Only months after the *Zayed* decision, the Ninth Circuit was confronted with exactly this situation in *De Lara Bellajaro v.*

147. *Id.* at 906 & n.5 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .” (quoting U.S. CONST. art. VI, cl. 2)).

148. *Id.* at 905–06. The court also reasoned that a declaration of prima facie eligibility would be futile. *Id.* at 906–07 (distinguishing *Gatcliffe v. Reno*, 23 F. Supp. 2d 581, 583, 585 (D.V.I. 1998), in which the court granted this form of relief). According to the court in *Zayed*, such a declaration could only be used in an 8 C.F.R. § 1239.2(f) hearing to terminate removal proceedings. *Id.* at 907. However, that regulation only authorized termination of removal proceedings to permit the DHS to consider a noncitizen’s pending application for citizenship. 8 C.F.R. § 1239.2(f) (2013) (“An immigration judge may terminate removal proceedings to permit the alien to proceed to a final hearing on a pending application or petition for naturalization . . .” (emphasis added)); see *Zayed*, 368 F.3d at 907. The DHS had already denied Ms. Zayed’s application, so the court reasoned she no longer had one pending for the DHS to consider. *Zayed*, 368 F.3d at 907. Thus, the court concluded that the IJ would not have had authority to use the court’s declaration of her prima facie eligibility to terminate removal proceedings. *Id.* The court apparently did not consider that Ms. Zayed could have filed another naturalization application in the interim before seeking a hearing before an IJ.

149. *Zayed*, 368 F.3d at 907.

150. 8 U.S.C. § 1421(c) (2012); *Zayed*, 368 F.3d at 906.

151. *Zayed*, 368 F.3d at 906.

152. See *id.* (“Where the INS has denied an application for naturalization on the ground that removal proceedings are pending, therefore, the district court’s de novo review is limited to review of that threshold determination.”). For a critique of this reasoning, see *infra* text accompanying notes 342–351.

153. *Zayed*, 368 F.3d at 906. But see *Apokarina v. Ashcroft*, 93 F. App’x 469, 471–72 (3d Cir. 2004) (“[District courts] may review denials of naturalization petitions, without regard to the basis for the denial.” (citing 8 U.S.C. § 1421(c))).

*Schiltgen*¹⁵⁴—a denial based on the pendency of removal proceedings. In that case, De Lara Bellajaro filed two applications. The INS denied the first, claiming he failed to establish good moral character, and commenced removal proceedings.¹⁵⁵ De Lara Bellajaro then filed another application for naturalization with the INS and moved to terminate the removal proceedings.¹⁵⁶ The motion was denied and De Lara Bellajaro sought review from the district court on the merits of his application—asking the court for an order granting his naturalization or, in the alternative, a declaration that he was prima facie eligible to naturalize but for the pending removal proceedings.¹⁵⁷

Following the *Zayed* reasoning, the Ninth Circuit determined that it could not review the merits of the application because 8 U.S.C. § 1421(c) only permitted review of “such denial.”¹⁵⁸ Thus, the court was limited to the threshold determination of whether De Lara Bellajaro was, in fact, in removal proceedings.¹⁵⁹ De Lara Bellajaro was therefore precluded from having his application reconsidered.¹⁶⁰

Additionally, the Ninth Circuit decided it could not issue a declaration of prima facie eligibility because such a declaration would be “purely advisory.”¹⁶¹ Even though *Acosta Hidalgo* had not yet been decided, and *Cruz* would presumably have allowed such a declaration to satisfy 8 C.F.R. § 1239.2(f), the court reasoned that *Cruz* was

154. 378 F.3d 1042 (9th Cir. 2004).

155. *Id.* at 1044.

156. *Id.*

157. *De Lara Bellajaro*, 378 F.3d at 1043–44.

158. *Id.* at 1046–47.

159. *Id.* at 1047.

160. *See id.* at 1043–44.

161. *Id.* at 1047; accord *Awe v. Napolitano*, 494 F. App'x, 860, 866–67 (10th Cir. 2012). Citing substantial authority, the U.S. District Court for the District of Massachusetts recently made a similar argument. *Ka Lok Lau v. Holder*, 880 F. Supp. 2d 276, 280–81 (D. Mass. 2012) (citing 28 U.S.C. § 2201(a) (2006); *Hewitt v. Helms*, 482 U.S. 755, 761 (1987); *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)) (noting that courts can only issue declaratory judgments when they affect the behavior of the parties to a current controversy within the court's jurisdiction, not a hypothetical future controversy). However, in *Ka Lok Lau*, the court apparently only considered that the noncitizen might use this declaration to supplement a future application determination. *Id.* at 282. It seemed unaware that the declaration might be useful to terminate the pending removal proceedings pursuant to 8 C.F.R. § 1239.2(f). *See id.* at 281–82 (“[I]n order for declaratory relief to have any effect, the court must work with the hypothesis that Lau will not be removed. . . . Because the effectiveness of the desired relief in this case hinges upon the outcome of removal proceedings, there is no real and substantial controversy, which is a necessity for declaratory judgment.”); *see also* 8 C.F.R. § 1239.2(f) (2013) (stating that an immigration judge may terminate removal proceedings upon the establishment of prima facie eligibility for naturalization).

probably no longer valid.¹⁶² Congress had chosen to confer authority to naturalize on the administrative agency (previously the INS and now the DHS) and not the courts; thus, according to the Ninth Circuit, courts could not make *prima facie* eligibility determinations.¹⁶³ The court further concluded that in any case, only Congress, not the BIA, could expand the courts' scope of review.¹⁶⁴ Therefore, according to the court, the BIA in *Cruz* could not give the courts the power to make *prima facie* eligibility determinations when Congress had limited their ability to do so.¹⁶⁵

b. The DHS's self-application of 8 U.S.C. § 1429

Notwithstanding § 1429, the DHS does in fact often consider and make final determinations on applications while removal proceedings are pending.¹⁶⁶ In these situations, the DHS has objected to judicial review of its decisions by still claiming that § 1429 prevents the court from reviewing the denial while removal proceedings are pending—even though § 1429 only explicitly refers to the DHS, not the courts.¹⁶⁷

Courts seem to invalidate the DHS's violative adjudication only when the DHS requests that they do so. For example, in *Saba-Bakare v. Chertoff*,¹⁶⁸ the DHS considered and denied Mr. Saba-Bakare's application while he was in removal proceedings.¹⁶⁹ This allowed Mr. Saba-Bakare to file a petition for judicial review under § 1421(c).¹⁷⁰ The DHS, realizing the mistake it made, informed Mr. Saba-Bakare

162. *De Lara Bellajaro*, 378 F.3d at 1047 (declining to directly overturn *Cruz*, but noting that it was decided prior to the 1990 statutory change through which Congress took naturalization authority away from district courts and granted it solely to the Attorney General (now the DHS)); *accord* *Zayed v. United States*, 368 F.3d 902, 907 n.6 (6th Cir. 2004).

163. *De Lara Bellajaro*, 378 F.3d at 1047; *accord* *Zayed*, 368 F.3d at 906–07.

164. *De Lara Bellajaro*, 378 F.3d at 1047.

165. *Id.*

166. *See, e.g.*, *Perriello v. Napolitano*, 579 F.3d 135, 140–41 (2d Cir. 2009); *Saba-Bakare v. Chertoff*, 507 F.3d 337, 339 (5th Cir. 2007); *Apokarina v. Ashcroft*, 93 F. App'x 469, 471–72 (3d Cir. 2004); *Tellez v. INS*, 91 F. Supp. 2d 1356, 1360 (C.D. Cal. 2000); *Gatcliffe v. Reno*, 23 F. Supp. 2d 581, 582 (D.V.I. 1998); *Mosleh v. Strapp*, 992 F. Supp. 874, 876 (N.D. Tex. 1998).

167. *See, e.g.*, *Apokarina*, 93 F. App'x at 471–72; *see also* 8 U.S.C. § 1429 (2012) (referencing, on its face, “the Attorney General”); *supra* notes 107–114 and accompanying text (explaining how, since 2003, the prohibition in § 1429 has been shifted from the Attorney General to the DHS).

168. 507 F.3d 337 (5th Cir. 2007).

169. *Id.* at 338–39. As explained above, *supra* text accompanying notes 120–127, USCIS (an agency within the DHS) reviews applications, and ICE (also an agency within the DHS) initiates removal proceedings. For simplicity, “the DHS” is referenced consistently throughout this Comment as carrying out both functions except when the specific agency is particularly relevant.

170. *See Saba-Bakare*, 507 F.3d at 339.

that it did not have the authority to make the determination it made under § 1429 and reopened his naturalization application.¹⁷¹ The district court agreed that the DHS did not have this authority and vacated the DHS's original denial.¹⁷² The court then held that it no longer had jurisdiction to review Mr. Saba-Bakare's application under § 1421(c) because there was no longer a "denial" that triggered its jurisdiction.¹⁷³ The Fifth Circuit affirmed.¹⁷⁴

2. *Courts that have held that district courts can provide a remedy while removal proceedings are pending*

Contrary to the five circuit courts described above, the U.S. Courts of Appeals for the Third and Seventh Circuits recently concluded that district courts reviewing naturalization applications can still grant relief even while removal proceedings are pending against the applicant.¹⁷⁵ These holdings build upon several district court opinions, some of which have held that they can even order the DHS to naturalize applicants in removal proceedings.¹⁷⁶

Ngwana v. Attorney General,¹⁷⁷ one of the first cases to rule in favor of granting relief, asserted the most expansive powers for the courts and influenced later cases in other jurisdictions. In that case, the district court concluded that it could order the INS to naturalize an applicant based on a plain reading of the statutes and on policy concerns over ruling otherwise.¹⁷⁸ After the INS denied Mr. Ngwana's naturalization application and initiated removal proceedings against him, he sought review of the denial under 8 U.S.C. § 1421(c).¹⁷⁹

171. *Id.*

172. *Id.*

173. *Id.* at 339–40.

174. *Id.* at 341–42.

175. See *Klene v. Napolitano*, 697 F.3d 666, 669 (7th Cir. 2012); *Gonzalez v. Sec'y of DHS*, 678 F.3d 254, 258 (3d Cir. 2012).

176. *Gonzalez v. Napolitano*, 684 F. Supp. 2d 555, 564 (D.N.J. 2010), *aff'd on other grounds*, 678 F.3d 254; *Kestelboym v. Chertoff*, 538 F. Supp. 2d 813, 818 (D.N.J. 2008); *Ngwana v. Att'y Gen.*, 40 F. Supp. 2d 319, 321–22 (D. Md. 1999).

177. 40 F. Supp. 2d 319 (D. Md. 1999).

178. See *id.* at 321–22; *accord Gonzalez*, 684 F. Supp. 2d at 560. However, the Fourth Circuit, which has appellate jurisdiction over the U.S. District Court for the District of Maryland, subsequently stated in dictum that district courts cannot grant any remedy to applicants in removal proceedings. *Barnes v. Holder*, 625 F.3d 801, 805–06 (4th Cir. 2010); see *supra* note 139 (explaining why this statement was dictum). However, as dictum, this statement does not bind courts in the Fourth Circuit's jurisdiction. See *supra* note 125 (noting that dicta is not binding on subsequent cases).

179. *Ngwana*, 40 F. Supp. 2d at 319–20.

The court determined that § 1429 did not affect its power to grant relief.¹⁸⁰ It first observed that nothing in the text of § 1429 referred to judicial review.¹⁸¹ The court also noted that § 1429 actually provided two subtly distinct prohibitions, each directed at different classes of noncitizens: the first prohibition was directed at those who had final orders of removal issued against them—those noncitizens could not be naturalized under any circumstances.¹⁸² The second was directed at those who had removal proceedings still pending—they could not have their naturalization applications *considered by the DHS*.¹⁸³

Because there was no final order of removal issued against Mr. Ngwana, the court observed that § 1429 only prevented the INS from “considering” Mr. Ngwana’s application; the statute did not prevent the court from complying with an order to naturalize.¹⁸⁴ Considering an application involved pondering its merits, whereas complying with an order to naturalize would not require such an act.¹⁸⁵ Thus, according to the court, an order to naturalize would not be the same as an order to consider Mr. Ngwana’s application, which would violate § 1429.¹⁸⁶

Most crucial to the court’s reasoning, however, was its concern that holding otherwise would allow the INS to “effectively circumvent the congressionally mandated *de novo* judicial review of naturalization decisions simply by initiating removal proceedings.”¹⁸⁷ The court noted that if a final order of removal was issued, review of that order would be “extremely limited.”¹⁸⁸ In such circumstances, Mr. Ngwana would need to first appeal to the BIA and, if unsuccessful, appeal

180. *Id.* at 321–22.

181. *Id.* at 321 (noting that the text of the statute only refers to the Attorney General and the INS and therefore is not relevant to district court jurisdiction).

182. *Id.*

183. *Id.*

184. *Id.* at 322.

185. *See id.* at 321–22; *accord* *Gonzalez v. Napolitano*, 684 F. Supp. 2d 555, 561–64 (D.N.J. 2010) (elaborating that Congress’s use of “consider” in § 1429 does not impede on a court’s authority to order the Attorney General to naturalize the applicant), *aff’d on other grounds*, 678 F.3d 254 (3d Cir. 2012).

186. *Ngwana*, 40 F. Supp. 2d at 322. Furthermore, the court reasoned that the prohibition against the INS’s considering his application was also irrelevant when, as in Mr. Ngwana’s case, the application had already been rejected and there was nothing pending. *See id.* Thus, the statute would not prevent enforcement of a court order overturning the Department’s decision. *See id.*

187. *Id.* at 321–22; *accord* *Kestelboym v. Chertoff*, 538 F. Supp. 2d 813, 818 (D.N.J. 2008) (“If this Court were to read the statute as Defendants suggest, Congress’s grant of jurisdiction to the district courts to review the denial of naturalization applications would be effectively rendered void. The Attorney General could then trump all applications for naturalization by simply instituting removal proceedings.”).

188. *Ngwana*, 40 F. Supp. 2d at 322.

directly to a U.S. court of appeals.¹⁸⁹ By statute, circuit courts are required to review a *removal appeal* based only on the administrative record, without taking additional evidence, and accepting administrative findings of fact as “conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”¹⁹⁰ The court in *Ngwana* determined that allowing the applicant only this type of review over his *naturalization application* would deprive him of his statutory right to de novo review under § 1421(c).¹⁹¹

The Third and Seventh Circuits have effectively rejected the *Ngwana* court’s holding that district courts can order the INS (now the DHS) to naturalize a noncitizen in removal proceedings. Yet both circuit courts have determined that district courts can award declaratory relief to the applicant.¹⁹² In *Gonzalez v. Secretary of DHS*,¹⁹³ the Third Circuit conceived of this judgment as a declaration of an applicant’s prima facie eligibility for naturalization.¹⁹⁴ The court stated that this declaration should provide sufficient basis for an IJ to terminate removal proceedings against the applicant, regardless of the BIA’s interpretation of § 1239.2(f).¹⁹⁵ The Third Circuit dismissed the reasoning in *Acosta Hidalgo* requiring declarations of prima facie eligibility to come from the DHS, stating, “We are confident that the BIA would also accept the declaration of a district court properly exercising its jurisdiction under 8 U.S.C. § 1421(c).”¹⁹⁶

The Third Circuit further reasoned that declaratory relief harmonized the relevant statutes by allowing for judicial review of naturalization applications and not upsetting the priority given to

189. *Id.*; see 8 C.F.R. § 1240.15 (2013) (authorizing the BIA to review an IJ’s decision).

190. 8 U.S.C. § 1252(b)(4)(B) (2012); see *Ngwana*, 40 F. Supp. 2d at 322 (invoking this provision).

191. See *Ngwana*, 40 F. Supp. 2d at 322. After denying the government’s motion to dismiss, the court ultimately declared Mr. Ngwana eligible for naturalization. *Ngwana v. Att’y Gen.*, No. 8:98-cv-03479-AW (D. Md. Feb. 1, 2000) (Bloomberg Law, Dockets) (granting Ngwana’s appeal and remanding with instructions to grant his naturalization application); see Skype Interview with Albert Agha Ngwana, Pro Se Litigant (Jan. 13, 2012) (notes on file with author). The INS then terminated removal proceedings and naturalized him. See Skype Interview with Albert Agha Ngwana, *supra*.

192. See *Klene v. Napolitano*, 697 F.3d 666, 668–69 (7th Cir. 2012); *Gonzalez v. Sec’y of DHS*, 678 F.3d 254, 259–60 (3d Cir. 2012).

193. 678 F.3d 254 (3d Cir. 2012).

194. *Id.* at 260–61.

195. *Id.* at 260.

196. *Id.* The court also noted, however, that even if the BIA would not accept such a declaration to terminate removal proceedings, the declaration would still supplement the record for removal proceedings. *Id.* Ultimately, the court affirmed the DHS’s denial of the application on the merits, leaving unanswered how an IJ would have handled such a declaration in light of *Hidalgo*. *Id.* at 264. For the practical effect of such judgments when courts have issued them, see *infra* notes 209–210 and accompanying text.

removal proceedings or the DHS's sole authority to naturalize.¹⁹⁷ By granting declaratory relief, the court reasoned that district courts would merely be supplementing the record for future administrative decisions concerning the noncitizen's pursuit of citizenship.¹⁹⁸ Thus, the court held that declaratory relief would not exceed the district courts' authority, as would be the case if federal judges either terminated removal proceedings or naturalized noncitizens themselves.¹⁹⁹

Similar to *Gonzalez*, the Seventh Circuit in *Klene v. Napolitano*²⁰⁰ ignored the BIA's interpretation of § 1239.2(f) from *Acosta Hidalgo*, yet the court contemplated declaratory relief in an entirely different way.²⁰¹ In *Klene*, the DHS had initiated removal proceedings against a noncitizen to whom the Department had also denied naturalization after finding that her marriage to a U.S. citizen was fraudulent.²⁰² Chief Judge Easterbrook, who wrote the court's opinion, concluded that the district court could declare that the applicant's marriage was, in fact, valid for purposes of reviewing her naturalization application.²⁰³ He reasoned that this declaration concerning her marriage would have preclusive effect over the marriage's validity in all future removal proceedings or naturalization decisions.²⁰⁴ Because doubt over whether the marriage was bona fide motivated both the DHS's denial of the naturalization application and its initiation of the removal proceedings, Judge Easterbrook reasoned that such a declaration would, as a matter of course, resolve both the removal proceedings and the naturalization application denial.²⁰⁵

In sum, the courts in *Ngwana*, *Gonzalez*, and *Klene* suggested three different options for relief. The Maryland District Court in *Ngwana* contended that courts could order the DHS to naturalize the applicant.²⁰⁶ The Third Circuit in *Gonzalez* stated that district courts could declare that a noncitizen is prima facie eligible for naturalization.²⁰⁷ Finally, in *Klene*, the Seventh Circuit asserted that

197. *Gonzalez*, 678 F.3d at 259–60.

198. *Id.* at 261.

199. *Id.* at 259–60.

200. 697 F.3d 666 (7th Cir. 2012).

201. *Id.* at 668–69.

202. *Id.* at 667.

203. *Id.* at 669.

204. *Id.*

205. *Id.*

206. *Ngwana v. Att'y Gen.*, 40 F. Supp. 2d 319, 322 (D. Md. 1999).

207. *Gonzalez v. Sec'y of DHS*, 678 F.3d 254, 258 (3d Cir. 2012).

courts could decide some question of fact that would have an issue-preclusive effect on all subsequent proceedings.²⁰⁸

3. *The legal effect of declaratory relief*

Even if relief were granted under the preceding theories, it is difficult to know precisely what legal effect the relief would have. When courts have rendered decisions in favor of noncitizens' naturalization appeals, the INS (now the DHS) has typically responded by terminating removal proceedings and naturalizing the applicant, rather than resisting the court order.²⁰⁹ In doing so, the government appears to be avoiding unfavorable precedent, which could result if the matter were challenged further.²¹⁰ Thus, as a practical matter, court-ordered remedies have a significant impact, though little or no case law is available to gauge its legal influence.

The BIA's decision in *Acosta Hidalgo* suggests that even a court-issued declaration of prima facie eligibility cannot be used by an IJ to terminate removal proceedings under 8 C.F.R. § 1239.2(f).²¹¹ Furthermore, even if an IJ did terminate removal proceedings, 8 U.S.C. § 1429 states that the findings made in a decision to terminate removal proceedings "shall not be deemed binding in any way" on the decision to naturalize the noncitizen.²¹² Thus, the *Acosta Hidalgo* precedent conceivably might prevent a district court's declaratory

208. *Klene*, 697 F.3d at 669.

209. In *Gatcliffe v. Reno*, for example, the government appealed the district court's judgment declaring the applicant to have good moral character and be "fully qualified for naturalization." *Gatcliffe v. Reno*, 23 F. Supp. 2d 581, 585 (D.V.I. 1998). However, it backed down, terminated removal proceedings, and naturalized the applicant before the Third Circuit could decide the matter. Telephone Interview with James J. Orlow, Partner, Orlow, Kaplan & Hohenstein, LLP (Jan. 3, 2012) (notes on file with author). Additionally, in *Kestleboym*, the government terminated removal proceedings and naturalized the applicant after the district court denied its motion to dismiss. *See Kestleboym v. Chertoff*, 538 F. Supp. 2d 813, 818 (D.N.J. 2008); E-mail from Joshua Bardavid, Principal Attorney, Bardavid Law, to author (Jan. 3, 2012, 08:54 EST) (on file with author). In *Ngwana*, the INS similarly responded to the courts' judgment. *See supra* note 191 and accompanying text.

210. *See* E-mail from Joshua Bardavid, Principal Attorney, Bardavid Law, to author (Jan. 3, 2012, 21:27 EST) (on file with author). Even if the Department did continue to press the matter, it appears likely that an IJ would terminate removal proceedings based on a court's judgment, notwithstanding *Acosta Hidalgo*. *See id.*; *see also supra* note 99 (discussing courts that act without an affirmative communication from the DHS).

211. *See In re Acosta Hidalgo*, 24 I. & N. Dec. 103, 105–06 (B.I.A. 2007) (asserting that only the DHS, not federal courts, have the authority to make prima facie declarations of eligibility for naturalization).

212. *See* 8 U.S.C. § 1429 (2012); *see also Shewchun v. Holder*, 658 F.3d 557, 565 (6th Cir. 2011) (explaining that although the DHS may not consider naturalization applications, the Department may make prima facie eligibility determinations because such decisions are not binding on later consideration of the application under § 1429).

judgment from having any effect on either the removal proceedings or the naturalization determination if the DHS resists implementing it.

Even if *Acosta Hidalgo* is not legally controlling, it has had a chilling effect on courts' willingness to provide remedies. In *Barnes v. Holder*,²¹³ the Fourth Circuit relied on *Acosta Hidalgo* to conclude, in dictum, that district courts could not grant any remedy to applicants in removal proceedings.²¹⁴ In addition, as previously addressed, the Sixth and Ninth Circuits both denied declaratory relief even before *Acosta Hidalgo* because they predicted that a judicial declaration could no longer be used to terminate removal proceedings.²¹⁵

Furthermore, six circuit courts of appeals—the Second, Third, Fourth, Fifth, Sixth, and Ninth—have all upheld the central holding in *Acosta Hidalgo* that IJs cannot make prima facie eligibility declarations themselves. Reasoning that the BIA's decision in *Acosta Hidalgo* was an agency's interpretation of its own regulation, courts have generally granted the decision *Chevron* deference,²¹⁶ declaring that the BIA's holding could only be overturned if it was “arbitrary, capricious,” or “plainly erroneous [] or inconsistent with the [regulation].”²¹⁷ Generally speaking, these courts concluded that

213. 625 F.3d 801 (4th Cir. 2010).

214. See *id.* at 805–06 (deferring to BIA decisions as a gap-filler in interpreting regulations, and asserting that only the DHS has the authority to make prima facie determinations of naturalization for use in removal proceedings); see also *Awe v. Napolitano*, 494 F. App'x 860, 867 n.9 (10th Cir. 2012) (observing, “without expressing an opinion on the matter,” that the BIA in *Acosta Hidalgo* denied district courts the authority to declare prima facie eligibility).

215. See *supra* note 162 (explaining how naturalization authority was shifted from the district courts to the Attorney General (now DHS)).

216. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court articulated its famous framework for courts to employ when evaluating an agency's construction of a statute. This analysis, which has become known as *Chevron* deference, requires the court to defer to the agency and uphold any reasonable interpretation of an ambiguous statute. *Id.* at 843–44. An interpretation is reasonable unless it is “arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 844; see also Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner's Presumption that Interpretive Doubt Be Resolved in Veterans' Favor with Chevron*, 61 AM. U. L. REV. 59, 70–72 (2011) (describing *Chevron* deference in greater detail).

217. E.g., *Shewchun*, 658 F.3d at 563; *Barnes*, 625 F.3d at 804, 808; *Ogunfuye v. Holder*, 610 F.3d 303, 308 (5th Cir. 2010); *Zegrean v. Att'y Gen.*, 602 F.3d 273, 275 (3d Cir. 2010); *Perriello v. Napolitano*, 579 F.3d 135, 138, 142 (2d Cir. 2009); *Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 934 (9th Cir. 2007). See generally *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (illustrating the Supreme Court's adherence to this deferential standard in reviewing administrative regulations).

The Third Circuit's upholding of *Acosta Hidalgo* in *Zegrean* is interesting in light of its later explicit disregard of it in *Gonzalez*. See *supra* note 196. *Zegrean*, however, dealt with a petitioner who was seeking a prima facie eligibility declaration from an IJ, not from the court itself. *Zegrean*, 602 F.3d at 275. (This was also the situation in each of

Acosta Hidalgo withstood the plainly erroneous test because Congress had transferred to the DHS the authority to naturalize; thus, it was not plainly erroneous to require that prima facie naturalization eligibility determinations come from the DHS.²¹⁸ The Ninth Circuit further reasoned that *Acosta Hidalgo* promoted judicial efficiency because if the DHS was unwilling to declare an applicant's prima facie eligibility for purposes of removal proceedings, the Department would eventually most likely deny the applicant's naturalization application anyway.²¹⁹

Several courts also wrestled with how the DHS could even make prima facie naturalization determinations when § 1429 prohibits it from considering such applications while the applicant is in removal proceedings. In *Shewchun v. Holder*²²⁰ and *Barnes v. Holder*, the Sixth and Fourth Circuits, respectively, concluded that because 8 C.F.R. § 1239.2(f) and 8 U.S.C. § 1429 must be read harmoniously, the DHS simply must be able to make prima facie eligibility determinations without violating § 1429, even if there was no compelling explanation for how.²²¹ The Fourth Circuit additionally relied on the government's attorney's statement at oral arguments that the DHS could, and in fact did, make such determinations without violating § 1429.²²²

In *Perriello v. Napolitano*,²²³ however, the DHS took the opposite position, claiming it could not make a prima facie eligibility determination.²²⁴ In that case, the INS put Mr. Perriello in removal proceedings after discovering he had been convicted of a crime twenty-three years prior.²²⁵ Mr. Perriello then filed an application for

the cases listed above with the exceptions of *Barnes*.) Also, *Zegrean* was decided by three entirely different judges than *Gonzalez*. Compare *Gonzalez v. Sec'y of DHS*, 678 F.3d 254, 255 (3d Cir. 2012) (Judges Fuentes, Chaagares, and Pogue), with *Zegrean*, 602 F.3d at 274 (Judges Barry, Jordan, and Van Antwerpen). One way to reconcile *Zegrean* and *Gonzalez* would be to say that the Third Circuit upheld the portion of *Acosta Hidalgo* that prohibits IJs from making prima facie eligibility determinations but not the case's dictum statement that courts are also prohibited from making these determinations.

218. *E.g.*, *Perriello*, 579 F.3d at 142.

219. *Hernandez de Anderson*, 497 F.3d at 935.

220. 658 F.3d 557 (6th Cir. 2011).

221. *Id.* at 564–65; *Barnes v. Holder*, 625 F.3d 801, 807 (4th Cir. 2010).

222. *Barnes*, 625 F.3d at 807 & n.4 (noting that nothing requires the DHS to consider a noncitizen's application while determining prima facie eligibility, nor does anything prevent a noncitizen from supplying additional evidence of prima facie eligibility that was not in her application); see *infra* note 448 (critiquing the court's conclusion that the DHS *could* lawfully make such prima facie eligibility determinations because it regularly *did* make them in practice).

223. 579 F.3d 135 (2d Cir. 2009).

224. *Id.* at 142.

225. *Id.* at 137.

naturalization and moved to terminate removal proceedings.²²⁶ The IJ, following *Acosta Hidalgo*, denied the motion, and the BIA affirmed because the INS had not stated he was prima facie eligible for naturalization.²²⁷ When Mr. Perriello appealed to the district court, the Agency (by then the DHS) claimed that it could not have even made such a determination because § 1429 prevented it from considering Mr. Perriello's application while removal proceedings were pending.²²⁸

The Second Circuit agreed with the DHS's argument, finding that 8 U.S.C. § 1429 prevented the Department from making a prima facie eligibility determination for the purposes of terminating removal proceedings under 8 C.F.R. § 1239.2(f).²²⁹ Furthermore, because § 1429 prevented the DHS from acting, the statute also precluded the court from making such a determination—the court's ability to grant relief could not be greater than the DHS's.²³⁰ The court then reasoned that IJs could not make a prima facie eligibility determination because "it would be odd" to give IJs this power when the DHS and the district courts were barred from making the determination.²³¹

Consequently, the Second Circuit determined that § 1239.2(f) was inconsistent with § 1429.²³² Nonetheless, the court held that it was not in a position to remedy the conflict because "it is not a judicial role to save a regulation that now conflicts . . . with the underlying statute."²³³ Because the *Acosta Hidalgo* interpretation was "neither plainly erroneous [n]or inconsistent with the regulation," the court

226. *Id.*

227. *See id.* at 137–38.

228. *See id.* at 141. In this case, the DHS's position on § 1429 appears to conflict not only with its stance in other cases but also with its treatment of Mr. Perriello's application. Even though the DHS in *Perriello* claimed § 1429 prevented it from determining Mr. Perriello's prima facie eligibility for the purposes of terminating removal proceedings, it had nonetheless adjudicated his application and denied it despite the pendency of removal proceedings. *See id.* at 140–41. It is not clear how § 1429's bar on considering applications could prevent the DHS from determining his prima facie eligibility but not prevent it from conducting a full adjudication on his application. For other examples of the DHS's consideration of applications despite the prohibition in § 1429, see *supra* Part I.C.1.b.

229. *Perriello*, 579 F.3d at 138, 142; *accord Zegrean v. Att'y Gen.*, 602 F.3d 273, 274 (3rd Cir. 2010).

230. *Perriello*, 579 F.3d at 142. The court's reasoning was based on its previous holding in *Ajlani*, which was substantially the same as the Sixth Circuit's holding in *Zayed*. *See supra* notes 141–153 and accompanying text (discussing this case history).

231. *Perriello*, 579 F.3d at 142.

232. *Id.* at 140 & n.6.

233. *Id.* at 142.

concluded that it was up to either Congress or the DHS to remedy the “considerable confusion.”²³⁴

Thus, because courts have been unwilling to directly overrule *Acosta Hidalgo*, many have also declined to declare an applicant’s prima facie eligibility. Under *Acosta Hidalgo*, such a declaration would have no legal effect on the decision of whether to terminate removal proceedings.

4. Courts’ handling of due process claims

Although some petitioners have attempted due process claims, courts have only given scant attention to these arguments and have rejected them under the plenary power doctrine.²³⁵ For example, in *Hernandez de Anderson v. Gonzalez*²³⁶ and *Shewchun v. Holder*, the petitioners objected that their due process rights were violated by the DHS’s power to initiate removal proceedings, to unilaterally prevent termination of removal proceedings, to deny applications based on the pendency of removal proceedings, and to issue a final order of removal.²³⁷ However, the Sixth and Ninth Circuits decided that giving the DHS these powers was consistent with Congress’s plenary power over immigration.²³⁸ Furthermore, in both *Barnes* and *Shewchun*, the Fifth Circuit and Sixth Circuit, respectively, reasoned that because § 1239.2(f) was promulgated at the Department’s discretion—in that the DHS was not constitutionally or statutorily required to promulgate it—the DHS had the authority to limit its application.²³⁹

II. INTERPRETING STATUTES AND REGULATIONS TO PRECLUDE JUDICIAL REVIEW OF NATURALIZATION APPLICATIONS WHEN THE APPLICANTS ARE IN REMOVAL PROCEEDINGS VIOLATES PROCEDURAL DUE PROCESS

Although courts’ ability to directly protect substantive rights in the immigration context is extremely limited under the plenary power

234. *Id.* (alteration in original) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted)).

235. See generally *Motomura*, *supra* note 1, at 1626 (describing “[t]he stunted growth of constitutional immigration law”); *Motomura*, *supra* note 4, at 566 (noting “the cavalier treatment of constitutional claims in immigration law”).

236. 497 F.3d 927 (9th Cir. 2007).

237. See *Shewchun v. Holder*, 658 F.3d 557, 562–63 (6th Cir. 2011); *Hernandez de Anderson*, 497 F.3d at 935.

238. *Shewchun*, 658 F.3d at 563; *Hernandez de Anderson*, 497 F.3d at 935 (noting that the petitioner provided no case law to support a due process claim).

239. See *Shewchun*, 658 F.3d at 565; *Barnes v. Holder*, 625 F.3d 801, 807 n.3 (4th Cir. 2010); see also *infra* text accompanying notes 302–303 (critiquing this reasoning).

doctrine, the scope of the DHS's discretion under these rulings nevertheless raises important substantive concerns. The Supreme Court has repeatedly acknowledged the drastic consequences of deportation and has required significant protections before such an action can be carried out.²⁴⁰ Under the dominant interpretation of these statutes and regulations, however, removal proceedings have become a litigation tactic for avoiding review of the DHS's naturalization decisions.²⁴¹ In the process, removal proceedings strip noncitizens of the protections of having an independent review of both the proceedings themselves and of their naturalization application.²⁴²

This Part analyzes these substantive concerns indirectly through a procedural due process argument while also advancing a procedural surrogate vehicle for protecting these substantive concerns.²⁴³ Applying a procedural surrogate in this situation should not be difficult. The power to place people in removal proceedings is probably more so a *procedural* power than a *substantive* one.²⁴⁴

Additionally, courts should be especially open to applying the procedural due process exception to naturalization applicants in removal proceedings. As previously noted, courts have historically emphasized that noncitizens facing deportation have procedural due process rights.²⁴⁵ Because of people's location inside the United States, those facing deportation fall more so under the Constitution's protection and theoretically have stronger ties to the country.²⁴⁶

This Part applies the due process exception through three steps. First, it demonstrates that the combined effect of the relevant statutes

240. See, e.g., *Jordan v. De George*, 341 U.S. 223, 232 (1951) (Jackson, J., dissenting) (describing deportation as "a life sentence of banishment"); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (stating that deportation "may result . . . in loss . . . of all that makes life worth living"); *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) ("Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel."); see also *supra* notes 62–67 and accompanying text (describing the heightened protections afforded to noncitizens facing deportation, particularly in Justice Douglas's opinions).

241. See *infra* text accompanying notes 255–264 (arguing that the DHS may initiate removal proceedings to zealously defend itself after a noncitizen files a claim for judicial review).

242. See *infra* Part II.A (outlining how current statutes, regulations, case law, and DHS practices combine to prevent noncitizens from seeking judicial review when the Department denies naturalization applications).

243. See *supra* notes 7–12 and accompanying text (discussing procedural surrogates).

244. See *infra* Part II.B.

245. See *supra* Part I.A.1 (tracing the evolution of the procedural due process exception as related to deportation cases).

246. See *supra* note 51 (outlining cases that distinguish between rights of noncitizens inside the United States and rights of noncitizens seeking to enter the United States and pointing out the fallacies in this distinction).

confers a distinct power on the DHS—namely, a mechanism for denying applicants access to judicial review. Second, it explains why this power is more procedural than substantive in nature, which makes the procedural due process exception potentially applicable. Finally, it analyzes this power under the test for procedural due process violations.

A. *If the Majority of Courts Interpreting 8 U.S.C. § 1429 and 8 C.F.R. § 1239.2(f) Are Correct, the DHS Has a Mechanism for Denying Judicial Review*

In many ways, the DHS's powers under 8 U.S.C. § 1429 and 8 C.F.R. § 1239.2(f) present the same conflicts as were at issue in *Nagahi*. In *Nagahi*, the Tenth Circuit held that the INS (now the DHS) could not place limitations on the availability of judicial review.²⁴⁷ In contrast, the current interpretations of 8 U.S.C. § 1429 and 8 C.F.R. § 1239.2(f) give the DHS the authority to do exactly that.²⁴⁸

As explained above, many circuit courts have interpreted 8 U.S.C. § 1429 to strip district courts of the ability to grant any meaningful remedy when reviewing the DHS naturalization determinations while the applicant is in removal proceedings.²⁴⁹ Furthermore, many circuits have upheld the BIA's interpretation of 8 C.F.R. § 1239.2(f), which places a necessary element for terminating removal proceedings entirely at the DHS's discretion.²⁵⁰ Thus, by placing a person in removal proceedings, the DHS can unilaterally avoid judicial review of its naturalization determinations.²⁵¹ When taken together, 8 U.S.C. § 1429 and 8 C.F.R. § 1239.2(f) provide the DHS a mechanism whereby it can strip judicial review.

247. *Nagahi v. INS*, 219 F.3d 1166, 1170 (10th Cir. 2000); *see supra* notes 72–76 and accompanying text (illustrating how the court in *Nagahi* combined statutes and regulations to limit judicial review when the INS places a time restriction on filing a petition for review).

248. *See supra* Part I.C.1, 3 (explaining how courts have created this situation).

249. *See supra* Part I.C.1.a.

250. *See supra* notes 217–219 and accompanying text (describing courts that have applied deferential review to uphold the BIA's interpretation). Even worse, some courts have determined that determining *prima facie* eligibility is outside even the DHS's discretion. *See supra* note 229 and accompanying text.

251. *See supra* Part I.C.1, 3 (outlining the legal interpretations of statutes and regulations that prevent noncitizens from seeking judicial review of naturalization applications when the noncitizen is in removal proceedings).

However, on their faces, 8 U.S.C. § 1429 and 8 C.F.R. § 1239.2(f) appear to be different from the regulation at issue in *Nagahi*.²⁵² First, unlike the regulation in *Nagahi*, the decision to initiate removal proceedings by the DHS is not a direct attack on judicial review.²⁵³ Ostensibly, the DHS's decision must be a determination that the noncitizen is harmful to the national community.²⁵⁴

Many cases seem to indicate, however, that the DHS uses deportation as a litigation tool for battling a noncitizen's claim for judicial review. In several cases, the DHS did not initiate removal proceedings until after the applicant had filed a claim for judicial review.²⁵⁵ In *Kestelboym v. Chertoff*,²⁵⁶ for example, the DHS did not initiate removal proceedings until six days before its answer to the petitioner's complaint was due.²⁵⁷ Furthermore, in an adversarial legal system, the government will presumably use any

252. See generally *supra* note 73 and accompanying text (describing that the regulation limited the time period in which a noncitizen could file a claim for judicial review).

253. Compare 8 U.S.C. § 1227(a) (2012) (requiring the initiation of removal proceedings only when the noncitizen meets certain characteristics), with 8 C.F.R. § 336.9(b) (requiring petitioners for judicial review to file their claims within 120 days), and *Nagahi v. INS*, 219 F.3d 1166, 1171 (10th Cir. 2000) (holding that this time limit infringed on noncitizens' statutory right to judicial review).

254. See 8 U.S.C. § 1227(a) (listing the elements of deportability, which primarily concern threats to others); see also *supra* note 85 (summarizing some of the elements of deportability).

255. See, e.g., *Klene v. Napolitano*, 697 F.3d 666, 667 (7th Cir. 2012); *Awe v. Napolitano*, 494 F. App'x 860, 861 (10th Cir. 2012); *Zayed v. United States*, 368 F.3d 902, 904, 907 (6th Cir. 2004); *Moya de Leon v. Napolitano*, No. 10 Civ. 6176(DLC), 2011 WL 1990876, at *1 (S.D.N.Y. May 23, 2011); *Khempech v. U.S. Citizenship & Immigration Servs.*, No. 10-2738, 2011 WL 290706, at *1 (E.D. La. Jan. 27, 2011); *Kestelboym v. Chertoff*, 538 F. Supp. 2d 813, 814-15 (D.N.J. 2008); *Grewal v. Ashcroft*, 301 F. Supp. 2d 692, 694, 696 (N.D. Ohio 2004).

Designing a rule that prevents the DHS from waiting to see whether an applicant files a claim for review before initiating removal proceedings appears to have been rejected by the circuit courts. Early in this debate, some courts attempted to decide whether to grant relief based on how late in the process removal proceedings had been initiated, citing policy concerns over letting the DHS use deportation as a means of evading review. See, e.g., *Saad v. Barrows*, No. Civ. A. 3:03-CV-1342G, 2004 WL 1359165, at *5 (N.D. Tex. June 16, 2004) (noting that district courts tended to accept jurisdiction when the Department had initiated removal proceedings after denying the petitioners' applications); *Grewal*, 301 F. Supp. 2d at 696 (holding that courts could accept jurisdiction whenever the DHS initiated removal proceedings after the petitioner had filed a claim for review). There is little legal basis for drawing a line in this way. Consequently, the Sixth Circuit in *Zayed* held that the timing of the removal proceedings was irrelevant. *Zayed*, 368 F.3d at 907. Since then, few, if any, courts have based their decisions on the timing of the removal proceedings. In fact, several circuits have denied review even when the DHS initiated removal proceedings after the petitioners had filed claims for review. See, e.g., *Awe*, 494 F. App'x at 861; *Zayed*, 368 F.3d at 904, 907.

256. 538 F. Supp. 2d 813 (D.N.J. 2008).

257. *Id.* at 815; see also *Khempech*, 2011 WL 290706, at *1 (noting that the DHS commenced removal proceedings four months after the applicant filed his claim for judicial review).

technique it can to zealously defend itself in court.²⁵⁸ There is no reason to think that the choice to initiate removal proceedings would be an exception.²⁵⁹

Second, the DHS's power to cut off judicial review also appears to be distinct from the regulation at issue in *Nagahi* because the DHS's decision to initiate removal proceedings cannot be arbitrary. The DHS must find that the noncitizen meets certain requirements to make him or her subject to deportation.²⁶⁰

What is troubling, however, is that the bar for placing a noncitizen in removal proceedings is low enough that the DHS can arguably apply removal proceedings selectively—for example, when the noncitizen seeks judicial review.²⁶¹ For instance, in *Grewal v. Ashcroft*,²⁶² the INS denied the noncitizen's application based on three petty misdemeanors—at least two of which had been vacated.²⁶³ After the noncitizen filed a claim for judicial review, the INS initiated removal proceedings based merely on those petty crimes.²⁶⁴

Thus, despite these facial differences, the DHS's power to cut off judicial review by placing naturalization applicants in removal proceedings is substantively similar to the regulation at issue in *Nagahi*.²⁶⁵ Even without proceeding to the rest of the due process analysis, this similarity is arguably enough to end the discussion and seek a statutory interpretation that denies the DHS such unrestrained power.²⁶⁶ After all, the Tenth Circuit in *Nagahi*, concluded that to construe statutes so as to allow an immigration agency the power to limit a statutory grant of judicial review requires an explicit statement by Congress.²⁶⁷ The Immigration and Nationality Act (INA) does not

258. E-mail from Joshua Bardavid, Principal Attorney, Bardavid Law, to author (Jan. 3, 2012, 16:05 EST) (on file with author). Joshua Bardavid was the counsel for the petitioner in *Kestelboym*.

259. *See id.* (noting that while DHS attorneys, just as other lawyers, “us[e] any and all tools available within the law to succeed[, i]t is more complex . . . for DHS attorneys because their job is not supposed to be about ‘winning,’ but rather, about seeing that justice is done”).

260. *See generally* 8 U.S.C. § 1227(a) (2012) (providing elements necessary for a finding of deportability). For a brief summary of these elements, see *supra* note 85.

261. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (explaining that “immigration law ha[s] ma[de] removal nearly an automatic result for a broad class of noncitizen[s]”).

262. 301 F. Supp. 2d 692 (N.D. Ohio 2004).

263. *Id.* at 693–94 & n.1.

264. *Id.* at 694 (denying the government's motion to dismiss).

265. *See supra* notes 72–76 and accompanying text (discussing the regulation at issue in *Nagahi*, which limited claims for judicial review of a citizenship application denial).

266. *See infra* Part III.

267. *Nagahi v. INS*, 219 F.3d 1166, 1170 (10th Cir. 2000) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

contain any such statement.²⁶⁸ To the contrary, the INA explicitly mandates that noncitizens whose applications are denied have access to de novo review, which is uncommonly large in scope relative to the normal highly deferential standard for judicial review of agency decisions.²⁶⁹

Even if *Nagahi* is not sufficient to end the discussion, this section has demonstrated that the DHS possesses a mechanism for cutting off judicial review. The next section analyzes whether that mechanism violates due process.

B. The Department of Homeland Security's Powers To Deny Judicial Review Are Properly Framed as "Procedural" Rather than "Substantive"

Determining whether the DHS's power to circumvent judicial review is a procedural or a substantive power is crucial to analyzing whether the due process exception applies. Laws and regulations that are substantive in nature fall within the generally unreviewable discretion that the plenary power doctrine affords Congress and administrative agencies.²⁷⁰ In contrast, laws and regulations that are procedural in nature potentially fall under the procedural due process exception to the plenary power doctrine.²⁷¹

Distinguishing between substantive powers and procedural powers is not easy. As previously discussed, one method of making the distinction is to determine whether the relevant laws or regulations establish categories or establish procedures to sort between categories.²⁷² Substantive laws tend to establish categories defining what types of people are or are not entitled to certain rights, whereas procedural powers establish a mechanism for sorting individuals between those categories.²⁷³ The substantive categories and procedural sorting mechanisms can be distinguished by looking into the basis for either conferring or denying the right.²⁷⁴ If the

268. See *id.* at 1169–70 (rejecting the INS's contention that three provisions within the Immigration and Nationality Act provide congressionally delegated authority to the INS to limit judicial review). See generally Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.) (including no explicit limitation on judicial review).

269. 8 U.S.C. § 1421(c) (2012); see *Nagahi*, 219 F.3d at 1169; see also *infra* notes 352–358 and accompanying text (observing the extraordinary nature of de novo review over agency decisions).

270. See *supra* notes 7–13 and accompanying text.

271. See *supra* notes 7–13 and accompanying text.

272. See *supra* notes 57–60 and accompanying text.

273. See *supra* notes 57–60 and accompanying text.

274. See *Escobar v. INS*, 896 F.2d 564, 567–68 (D.C. Cir. 1990) (looking at the purpose behind a statutory provision to make this determination), *withdrawn, reh'g en*

underlying basis for conferring or denying the right is something other than terms the statute uses, then the statute is procedural.²⁷⁵

*Escobar v. INS*²⁷⁶ provides a useful illustration of how the distinction between a substantive and a procedural law might be made.²⁷⁷ In that case, Congress required all noncitizens who married U.S. citizens while they were in removal proceedings to live outside the United States for two years before immigrating based on their marriage.²⁷⁸ Congress passed the statute to filter out noncitizens who entered into "sham marriages" simply to gain lawful permanent resident status.²⁷⁹ Congress apparently assumed that noncitizens who married while in removal proceedings were more likely to be in "sham marriages" than those who married at other times.²⁸⁰

The U.S. Court of Appeals for the D.C. Circuit classified the statute as procedural because it used the timing of marriages as a method of sorting immigrants between two different substantive categories: (1) those whose marriages were presumptively valid and who should thus be entitled to remain in the country as immigrants, and (2) those whose marriages were more likely "sham[s]" and thus should not be entitled to that right.²⁸¹ If the statute was substantive, the categories would have been (1) those who married while in removal proceedings and (2) those who did not.²⁸²

banc granted, No. 89-5037 (D.C. Cir. Apr. 25, 1990), and *appeal dismissed, vacated as moot*, 925 F.2d 488 (D.C. Cir. 1991).

275. *See id.* (holding that section 5 of the Immigration Marriage Fraud Amendments of 1986, which provides that if a noncitizen marries a U.S. citizen while deportation proceedings are pending, the noncitizen must leave the country for two years before the INS will evaluate the marital status, "is procedural in purpose and effect").

276. 896 F.2d 564 (D.C. Cir. 1990), *withdrawn, reh'g en banc granted*, No. 89-5037 (D.C. Cir. Apr. 25, 1990), and *appeal dismissed, vacated as moot*, 925 F.2d 488 (D.C. Cir. 1991).

277. Although *Escobar* was later vacated and withdrawn and numerous other circuits came to the opposite conclusion regarding the statute the court found unconstitutional in *Escobar*, Judge Gesell's opinion provides a clear explanation of how to distinguish between procedural laws and substantive laws in the immigration context.

278. *See Escobar*, 896 F.2d at 566 (examining the constitutionality of the Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 5, 100 Stat. 3537, 3543).

279. *Id.*; *see Immigration Marriage Fraud: Hearing Before the Subcomm. on Immigration & Refugee Policy of the S. Comm. on the Judiciary*, 99th Cong. 6-10, 19 (1985) (statement of Sen. Alan K. Simpson, Chairman, Subcomm. on Immigration & Refugee Policy) (asserting the subcommittee members' goals in crafting the amendments).

280. *Escobar*, 896 F.2d at 572.

281. *Id.*

282. *See id.* at 567-68 (identifying the law as a procedural mechanism for sorting out sham marriages from valid marriages).

The underlying basis for conferring or denying the right to remain in the country demonstrates that the statute at issue in *Escobar* was not substantive.²⁸³ If the underlying basis was the timing of marriage, Congress would have been drawing a policy line indicating that peoples' choice of when to get married made them more or less entitled to remain in the country.²⁸⁴ In other words, it would have made the timing of a marriage a *determinant* of a noncitizen's worthiness to remain, rather than an *indicator* of whether the marriage was valid.²⁸⁵ It is much more likely that the underlying basis for granting or denying the right to stay was the presumptive validity of the marriage.²⁸⁶ Congress made the underlying substantive choice to give priority treatment to those people who were less likely to have entered into "sham marriages" by using the timing of marriages as a way to gauge the marriages' validity.²⁸⁷ Thus, this was a procedural statute because the timing of marriage was used to sort people between the presumptively valid and presumptively invalid categories of marriages.²⁸⁸

Even assuming that Congress intended § 1429 to limit judicial review, the provision seems procedural when analyzed within the *Escobar* framework. First, the underlying basis for conferring or denying the rights involved determines the substantive categories.²⁸⁹ Interpreting § 1429 as conferring a substantive power on the DHS would indicate that the underlying basis for conferring or denying review rights is whether noncitizens were in removal proceedings.²⁹⁰ But this seems highly unlikely. It seems more likely that the underlying basis is whether a person is likely to be a "good" citizen if naturalized.²⁹¹ Whether a person is in removal proceedings is merely a gauge for determining whether he or she is likely to be a good citizen if naturalized, just as the timing of a person's marriage in *Escobar* was a gauge for determining whether his or her marriage was

283. *Id.*

284. *See id.* (noting that the underlying concern of the statute is not the timing of a person's marriage, but whether the marriage is valid).

285. *See id.*

286. *See id.*

287. *See id.*

288. *Id.*

289. *See generally supra* text accompanying notes 281–288 (illustrating possible substantive categories for a law that withheld immigration benefits based on the timing of a noncitizen's marriage).

290. *See generally supra* text accompanying notes 281–288.

291. *Cf. Escobar*, 896 F.2d at 568 (explaining that the timing of the marriage indicated the likelihood of the marriage's validity, which reflected the noncitizens' worthiness to naturalize).

likely to be valid.²⁹² Thus, in § 1429, the pendency of removal proceedings is merely a method for categorizing people between those who are more likely and those who are less likely to be good citizens, which is the real underlying basis for granting or denying noncitizens the right to have their naturalization applications reviewed.²⁹³

The preceding observations lead to the conclusion that § 1429 uses the pendency of removal proceedings as a procedural mechanism for sorting people between two underlying substantive categories: (1) those who are likely to be better citizens and thus should have their naturalization applications reviewed by the DHS and, if denied, the courts; and (2) those who are less likely to be good citizens and thus should not have their naturalization applications reviewed by the DHS or (under many circuits' interpretations)²⁹⁴ the courts. Consequently, § 1429, and the DHS's powers to limit judicial review under it, are procedural in nature and not substantive. Accordingly, § 1429 and the DHS's powers can be scrutinized under the procedural due process test to determine whether they are constitutional.

C. The Department of Homeland Security's Powers To Deny Judicial Review Violates the Procedural Due Process Test

Once a government power is established as procedural, the distinction between immigration law and mainstream public law begins to fade. When analyzing procedural due process claims, courts have typically applied the same two-step test in both contexts: (1) whether the alleged interest was a liberty or property interest as protected under the Fifth or Fourteenth Amendment, and (2) whether the process given was adequate.²⁹⁵ The DHS's power to strip judicial review by initiating removal proceedings violates both of these prongs.

292. See *supra* text accompanying notes 285–286 (arguing that the timing of the marriage was more likely an indicator than a determinant of the person's worthiness to remain in the United States).

293. See *supra* text accompanying note 275 (explaining how laws that serve as methods for categorizing people are procedural).

294. See *supra* Part I.C.1.a (outlining holdings from the Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits stating that courts cannot award relief for challenges to naturalization denials when the noncitizen is in removal proceedings).

295. See, e.g., *Escobar*, 896 F.2d at 569–71 (holding that the statute that categorized people based on the timing of their marriage violated the Due Process Clause). See generally *Motomura*, *supra* note 1, at 1651–55 (providing examples of the procedural due process test's application in immigration cases).

As to the first step of the procedural due process test, the Supreme Court has held that statutory rights are a “species of property” and are thus entitled to due process protection.²⁹⁶ Both 8 U.S.C. §§ 1421(c) and 1447(b) are statutory rights that afford applicants a right to judicial review of their naturalization applications.²⁹⁷ Furthermore, 8 C.F.R. § 1239.2(f) provides noncitizens an additional administrative right to a hearing to terminate removal proceedings.²⁹⁸ Thus, these statutory and administrative rights clearly meet the test for property.

Because these rights are established as property, the DHS cannot selectively deprive individuals of their rights under these laws without due process as long as the laws remain in effect.²⁹⁹ Thus, to strip these rights, Congress or the DHS would need to change the laws through the legislative or rulemaking process and would need a rational basis for doing so.³⁰⁰ In other words, the DHS does not have constitutional authority to withhold from certain noncitizens judicial review or the ability to have removal proceedings terminated without adequate justification and procedures for doing so.

The DHS cannot withhold these property rights even though the Constitution did not require the DHS to grant them in the first place.³⁰¹ Even if rights are granted gratuitously, they still invoke due process protection.³⁰² Consequently, contrary to what the Fourth and Sixth Circuits suggested in *Barnes* and *Shewchun*, the fact that an

296. See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431–32 (1982) (holding that a statutory right to judicial review for terminated employees was property and entitled them to due process protections because the holding otherwise would allow virtually any state-created property interest to be destroyed at will); see also *Motomura*, *supra* note 1, at 1655 (explaining that courts consider statutory rights as property in the immigration context as well).

297. 8 U.S.C. §§ 1421(c), 1447(b) (2012); see *Ajlani v. Chertoff*, 545 F.3d 229, 236 (2d Cir. 2008) (explaining that an alien can seek de novo review of the denial of a naturalization application under § 1421(c) and can ask a district court to determine or remand a matter under § 1447(b)).

298. See 8 C.F.R. § 1239.2(f) (2013); *Perriello v. Napolitano*, 579 F.3d 135, 138 (2d Cir. 2009).

299. See generally U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or *property*, without due process of law . . .” (emphasis added)).

300. See *Logan*, 455 U.S. at 439 (plurality opinion) (“At the minimum level, . . . the Court ‘consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives.’” (quoting *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981))).

301. See *id.* at 431–32 (majority opinion) (correcting the view that gratuitous rights can be withheld without due process).

302. *Id.* at 432.

agency used its discretion to promulgate 8 C.F.R. § 1239.2(f) does not give the DHS the prerogative to limit its application.³⁰³

As to the second step, the type of process due is determined by balancing three factors: (1) the nature of the private interest that the official action affects; (2) the risk that the procedures employed would lead to an erroneous deprivation of that interest and the likely value of other possible procedures that could have been added; and (3) the government's interest in employing those procedures, taking into account the financial or administrative burden of performing the same function with added or different procedures.³⁰⁴

The DHS's exercise of power to cut off judicial review for noncitizen naturalization applicants in removal proceedings lacks sufficient process. First, the private interest of noncitizens is very high. Noncitizens in removal proceedings have few options if the DHS can block review under §§ 1421(c) and 1447(b).³⁰⁵ They will likely be deported from the country, a consequence that the Supreme Court has acknowledged as severe.³⁰⁶

Second, the risk of erroneous deprivation of noncitizens' abilities to become naturalized is high because cutting off judicial review leaves the DHS without oversight when making naturalization determinations.³⁰⁷ It thus becomes significantly more likely that the DHS mistakes will go unremedied.

Third, allowing judicial review for noncitizens in removal proceedings would impose only a small additional burden on the government.³⁰⁸ To counter this point, some legislators have claimed that the availability of judicial review is frustrating the enforcement of immigration laws.³⁰⁹ Those legislators cite the steep increases in the

303. See *supra* text accompanying note 239 (describing the courts' reasoning that because § 1239.2(f) was promulgated at the DHS's discretion, the Department ultimately had sole authority in determining its applicability and scope).

304. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

305. See 8 U.S.C. § 1252(b)(3)-(4) (2012) (denying noncitizens the right to challenge the DHS's decision to initiate removal proceedings, and permitting only a limited review of final orders of removal that is highly deferential to the DHS).

306. See cases cited *supra* note 240.

307. See generally 73A C.J.S. *Public Administrative Law and Procedure* § 320 (2004) (explaining that one of the purposes of judicial review of administrative action is to prevent mistakes).

308. See generally Benson, *supra* note 124, at 405-33 (describing how the availability of judicial review likely only plays a small part in explaining the size of the federal court docket taken up by challenges to immigration decisions).

309. See *id.* (contending that the problems described by these legislators are more complex than the availability of judicial review).

numbers of immigrants seeking judicial review in recent years, which have significantly taxed some circuits.³¹⁰

However, in truth, preventing the DHS from circumventing judicial review would only exacerbate this problem to a very limited degree. Rather than increasing the total federal docket of immigration matters, the availability of judicial review would only increase the immigration docket subset that specifically involves review of naturalization application denials and delays.³¹¹

Additionally, responding to the large volume of immigration matters in federal courts by limiting judicial review is short-sighted and ignores several factors that contribute to the increasing number of cases.³¹² For example, while the number of people seeking judicial review has increased, the number of people in removal proceedings has also increased.³¹³ Naturally, a rise in the number of people faced with removal would lead to a rise in the number of people seeking judicial review of removal decisions.

Also, the quality of administrative adjudications may have dropped in recent years, causing a greater number of immigrants to seek federal court review.³¹⁴ The eleven members of the BIA issued 35,294 decisions in 2011.³¹⁵ Assuming that the members each worked 220 days in the year,³¹⁶ each member produced roughly 14.58 decisions per day.³¹⁷ Therefore, if all BIA members spent the entire eight-hour workday deciding cases, each member would have decided roughly one case every thirty minutes. These numbers raise the concern that the quality of BIA decisions is low.³¹⁸ Lower quality decisions would increase the number of decisions appealed

310. *See id.* (refuting Congress's characterization of the increasing federal immigration cases as "unmanageable").

311. *See generally* 8 U.S.C. §§ 1421(c), 1429, 1447(b) (2012) (providing the potential types and limitations of judicial review available for naturalization applications).

312. *See generally* Benson, *supra* note 124 (elaborating on the many overlooked factors that may be contributing to this phenomenon).

313. *See id.* at 419.

314. *See id.* at 418 (indicating that to keep up with the BIA's caseload in 2005, each BIA member would have had to decide more than 2,375 cases per hour, and "immediately question[ing] the quality of decisions made at this rate").

315. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2011 STATISTICAL YEAR BOOK, at S1 (2012), available at <http://www.justice.gov/eoir/stats/pub/fy11syb.pdf>.

316. This estimate calculates the number of weekdays (260) subtracted by the number of federal holidays (ten) and the estimated days of leave (thirty). *See Snow & Dismissal Procedures: Federal Holidays*, U.S. OFFICE OF PERSONNEL MGMT. (2011), <http://www.opm.gov/policy-data-oversight/snow-dismissal-procedures/federal-holidays/#url=2011> (last visited Nov. 26, 2013) (listing the federal holidays in 2011).

317. *See* Benson, *supra* note 124, at 418 (applying this analysis to statistics from 2005).

318. *Id.*

to the courts, which may explain the high caseload under which courts are struggling.³¹⁹

Consequently, even assuming that the DHS does in fact possess all the powers it alleges, these powers still violate noncitizens' procedural due process rights. At the very least, the constitutionality of the DHS's actions is in serious doubt, which should prompt courts to interpret the relevant provisions so as to avoid constitutional concerns³²⁰—a task taken up by the next section.

III. DISTRICT COURTS HAVE THE STATUTORY AUTHORITY TO PROVIDE REMEDIES WHEN REVIEWING NATURALIZATION APPLICATIONS EVEN WHILE THE APPLICANTS ARE IN REMOVAL PROCEEDINGS

Applying the procedural due process exception is ultimately unnecessary because the statutory provisions and regulations can easily be read to avoid this constitutional question. Such avoidance requires little creativity; in fact, phantom constitutional norms are probably not necessary at all.³²¹ Normally, courts apply phantom constitutional norms to bend the interpretation of statutes away from the plenary power doctrine and into conformity with more mainstream constitutional norms.³²² Little to no bending is needed here—the simple application of canons of statutory construction demonstrates that district courts can grant at least three types of remedies when reviewing naturalization applications while an applicant is in removal proceedings: courts can order the DHS to naturalize the applicant and they can grant two types of declaratory relief—“*Klene*” declarations, which have an issue-preclusive effect; and declarations of prima facie eligibility, which should be effective to terminate removal proceedings.

319. *Id.*

320. See *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (articulating the “cardinal principle of statutory interpretation” that when a statute’s constitutionality is in “serious doubt,” courts should attempt to construe it to avoid the constitutional doubt (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)) (internal quotation marks omitted)); *supra* notes 61–71 and accompanying text (using “phantom norms” to aid the interpretation of a statute).

321. See *Motomura*, *supra* note 4, at 570 (noting that the application of “phantom norms” in some cases is very subtle and difficult to distinguish from simple statutory interpretations that favor noncitizens).

322. See, e.g., *Zadvydas*, 533 U.S. at 689 (rejecting the “literal” meaning of an INA provision and inferring a limitation in order to avoid constitutional transgression).

A. *Textual Basis for Providing District Courts the Ability To Order the DHS To Naturalize Noncitizen Naturalization Applicants While Removal Proceedings Are Pending*

Even though Congress stripped exclusive authority to naturalize aliens from the courts and placed it in the DHS's hands,³²³ Congress left courts the power of judicial review over naturalization applications.³²⁴ Courts may exercise this power in two instances³²⁵: when the DHS denies a naturalization application,³²⁶ or when the DHS fails to make a determination in a timely manner.³²⁷ Courts must, however, analyze the authority that grants judicial review in light of other relevant statutes to determine any limitations on providing relief.³²⁸ Any ambiguity that arises while analyzing these statutes must be resolved in favor of the person facing deportation.³²⁹

1. *8 U.S.C. § 1421(c): Judicial review of application denials*

Section 1421(c) provides:

A person whose application for naturalization under this subchapter 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 for the district in which such person resides Such review shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application.³³⁰

323. See 8 U.S.C. § 1421(a) (2012) (stating that this authority is vested in the Attorney General); see also *supra* note 107 and accompanying text (describing how the Homeland Security Act of 2002 allows “the DHS” to be substituted for “Attorney General” in these statutes).

324. See 8 U.S.C. §§ 1421(c), 1447(b).

325. Noncitizens may also seek judicial review for constitutional questions or questions of law at any time pursuant to 8 U.S.C. § 1252(a)(2)(D) and may seek a very limited review once a final order of removal has been issued against them under § 1252(b)(4). See *supra* note 305.

326. 8 U.S.C. § 1421(c).

327. *Id.* § 1447(b).

328. See *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 738–39 (1989) (Scalia, J., concurring in part and concurring in the judgment) (arguing for “harmonious[]” interpretation of statutes covering similar subjects).

329. See, e.g., *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (“[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the [statutory provision].”).

330. 8 U.S.C. § 1421(c). The sole administrative remedy that must be exhausted before obtaining judicial review is that applicants must request a hearing before an immigration officer who rules against them. *Id.* §§ 1421(c), 1447(a); 8 C.F.R.

The text of this provision indicates a few important features. First, it only authorizes jurisdiction after an application has been denied.³³¹ In some cases, the DHS will claim it cannot make a determination on an application while the applicant is in removal proceedings because § 1429 prevents it from doing so.³³² In these circumstances, a court cannot exercise jurisdiction under § 1421(c) because the application has not technically been denied.³³³ Such a situation makes affording judicial review under § 1447(b) especially important.³³⁴ If courts are not empowered to grant relief under § 1447(b), the DHS could block all judicial review by initiating removal proceedings, remaining silent, and never officially denying the application.³³⁵

Second, once an applicant seeks review under § 1421, the court's response is mandatory: "[s]uch review *shall* be de novo, and the court *shall* make its own findings of fact and conclusions of law and *shall* . . . conduct a hearing de novo on the application."³³⁶ The repeated use of the word "shall" indicates that these responses are required upon the applicant's filing for review.³³⁷

The force of this language becomes even stronger when viewed in light of the more permissive language in § 1447(b). Under § 1447(b), the courts "*may*" grant certain remedies.³³⁸ The choice to

§ 336.9(d) (2013); *see also* *Baez-Fernandez v. INS*, 385 F. Supp. 2d 292, 294 (S.D.N.Y. 2005) (denying jurisdiction to review the plaintiff's naturalization application because he had not exhausted administrative remedies as required by § 1447(a)).

331. 8 U.S.C. § 1421(c); *Saba-Bakare v. Chertoff*, 507 F.3d 337, 339–40 (5th Cir. 2007) (holding that the vacated denial of appellant's application had no continuing legal effect, and thus the court could not exercise jurisdiction to review it under § 1421(c)). *But see supra* Part I.C.2 (revealing cases in which the DHS has made decisions on naturalization applications despite pending removal proceedings and despite the language of § 1429).

332. *See, e.g., Saba-Bakare*, 507 F.3d at 339.

333. *See id.* at 340.

334. *See* 8 U.S.C. § 1447(b) (giving noncitizens the option for judicial review of naturalization determinations delayed more than 120 days).

335. The jurisdictional authority pursuant to § 1447(b) is discussed in more detail below. *Infra* Part III.A.2.

336. 8 U.S.C. § 1421(c) (emphasis added); *see United States v. Hovsepian*, 359 F.3d 1144, 1162, 1163 n.16 (9th Cir. 2004) (en banc) (underscoring the requisite nature of judicial review under § 1421(c) to prevent the DHS from adjudicating an application after the noncitizen filed for review under § 1447(b)); *Epie v. Caterisano*, 402 F. Supp. 2d 589, 590 (D. Md. 2005) (emphasizing the repeated use of the word "shall" in § 1421(c) to uphold a noncitizen's right to judicial review against remand to the Agency).

337. *See Hovsepian*, 359 F.3d at 1162, 1163 & n.16; *Epie*, 402 F. Supp. 2d at 591 ("Section 1421(c) is replete with language mandating the district court's review of the case.").

338. 8 U.S.C. § 1447(b) (emphasis added); *see Epie*, 402 F. Supp. 2d at 591 (explaining that if a petition is filed properly in accordance with § 1447(b), a district court has the option to either make a naturalization determination or remand the matter).

use stronger language in § 1421(c) further reflects Congress's intent to make courts' responses mandatory.³³⁹ Consequently, courts are not authorized to treat their jurisdiction as discretionary when reviewing application denials pursuant to § 1421(c).³⁴⁰ Rather, courts are to have "the final word" once a petitioner has sought review under the section.³⁴¹

Third, the text does not merely authorize review "of such denial." In *Zayed* and *De Lara Bellajaro*, the courts used the phrase "of such denial" to conclude that if the DHS denied the application because removal proceedings were pending, the court could only determine whether the denial was justified—namely, whether removal proceedings were in fact pending—but not the merits of the application.³⁴²

The text of § 1421(c), however, explicitly provides for two reviews, not one. The first is a de novo review of the *denial*, in which the court makes its own findings of fact and of law, and the second is a de novo hearing on the *application*.³⁴³ Accordingly, the first review concerns the merits of the denial and the second concerns the merits of the application itself.³⁴⁴

The plain language reading of § 1421(c) clearly supports two levels of review. The middle phrase "[s]uch review shall be de novo" must refer to the review stated just before it—the "review of such denial"—otherwise the word "such" would be meaningless.³⁴⁵ The next phrase, "and the court shall make its own findings of fact and conclusions of law," provides a definition of de novo review.³⁴⁶ The last phrase then indicates a second type of review—a review of the application itself.³⁴⁷ The words "and shall, at the request of the petitioner" separate the final phrase from the rest of the sentence, thus indicating the introduction of a second type of review that occurs in the event that

339. *Epie*, 402 F. Supp. 2d at 591.

340. *See id.* (applying this understanding to determine that the court could not remand the matter back to the DHS after the Department requested the court do so).

341. *Housepian*, 359 F.3d at 1162.

342. *See De Lara Bellajaro v. Shiltgen*, 378 F.3d 1042, 1046–47 (9th Cir. 2004); *Zayed v. United States*, 368 F.3d 902, 906 (6th Cir. 2004); *supra* text accompanying notes 149–160 (describing these cases' discussions on why review must be limited to whether the applicant was in removal proceedings and not include the merits of the application).

343. 8 U.S.C. § 1421(c).

344. *See Apokarina v. Ashcroft*, 93 F. App'x 469, 471–72 (3d Cir. 2004) ("[District Courts] may review denials of naturalization petitions without regard to the basis for the denial.").

345. 8 U.S.C. § 1421(c) (emphasis added).

346. *Id.*; *see* 5 C.J.S. *Appeal and Error* § 886 (2013) (describing de novo review similarly to the description in § 1421(c)).

347. *See* 8 U.S.C. § 1421(c).

the first review—the review of the denial—somehow did not also include a review of the application.³⁴⁸ The need for the dual review described in this provision arises when the DHS's stated reason for denying the application is the pendency of removal proceedings, as was the case in *De Lara Bellajaro*.³⁴⁹ When this scenario occurs, the statute requires the court to review not only the reason for the denial—whether removal proceedings were in fact pending—but also to review the application itself.³⁵⁰ Conducting both reviews prevents the DHS from deterring review of their naturalization decisions.³⁵¹

348. Interpreting the two phrases as referring to the same type of review would render one of the phrases surplusage, which is disfavored by the canons of statutory construction. See *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2043 (2012) (clarifying the rule against surplusage).

349. See *De Lara Bellajaro v. Schiltgen*, 378 F.3d 1042, 1044, 1046–47 (9th Cir. 2004) (holding that for a plaintiff whose naturalization application was denied by the Attorney General (now the DHS) because of pending removal proceedings and not the merits of the application, § 1421(c) only allows district courts to review whether removal proceedings were in fact pending, not the merits of the application).

350. In particular, the court should review the merits of the application when the DHS denies the application on the merits despite the pendency of removal proceedings. Theoretically, all denials made after removal proceedings are initiated would be based on § 1429 and not the merits because § 1429 explicitly forbids the DHS from considering applications while removal proceedings are pending. As seen in many cases, however, the DHS does not follow § 1429 so stringently. See *supra* Part I.C.1.b (discussing cases in which a final determination was made while removal proceedings were pending). These denials, even though they violate § 1429, are nonetheless denials on the merits. Thus, at the very least, they should trigger a full review of the reasons for the denial, regardless of whether removal proceedings were pending.

Furthermore, if § 1429 did not stop the DHS from considering the applications in those situations, it is difficult to see why § 1429 should prevent the courts from considering the applications. See *Apokarina v. Ashcroft*, 93 F. App'x 469, 471–72 (3d Cir. 2004) (demonstrating that if the Attorney General could consider an application despite the limits imposed by § 1429, the case for the court to review the decision would be even stronger). But see *Saba-Bakare v. Chertoff*, 507 F.3d 337, 339–40 (5th Cir. 2007) (vacating a the DHS decision to deny an application under § 1429 because the decision was made while removal proceedings were pending). *Saba-Bakare's* approach of vacating the opinion, though, ignores the mandate of § 1421(c). See *supra* text accompanying notes 336–341 (discussing how § 1421(c) requires a court to grant review de novo once an applicant seeks review); see also *supra* note 139 (discussing this case).

351. One scenario presents an additional reason why courts should be empowered to review denials based on the pendency of removal proceedings and not just when they are based on the merits: the DHS can place noncitizens in a never-ending cycle of initiating removal proceedings even after they have been terminated and continually denying each application based on the pending removal proceedings. In *Gatcliffe v. Reno*, for example, the DHS put the applicant in removal proceedings, an IJ then terminated the removal proceedings, the DHS subsequently re-initiated removal proceedings, and the DHS then denied Mr. Gatcliffe's second application, claiming that § 1429 prevented courts from reviewing it. *Gatcliffe v. Reno*, 23 F. Supp. 2d 581, 582 (D.V.I. 1998). Furious with the government's actions, the judge declared Mr. Gatcliffe to be of good moral character and eligible for naturalization. See *id.* at 585; Telephone Interview with James J. Orlow, *supra* note 209 (discussing his experience as Mr. Gatcliffe's counsel). If courts are not empowered to provide the applicant a remedy in such a scenario, the DHS can effectively obstruct judicial

Fourth, the type of judicial review Congress has chosen to mandate under § 1421(c) deserves the highest degree of defense.³⁵² Congress rarely provides for de novo review of agency decisions as it does under § 1421(c); normally, agency decisions are entitled to considerable deference.³⁵³ Yet the Supreme Court has held that even highly deferential judicial review cannot be denied except when there is a persuasive reason to believe the denial was intended by Congress.³⁵⁴ In § 1421(c), Congress stipulated that the review be de novo, which is the highest level of judicial review available and requires courts to “make [their] own findings of fact and conclusions of law.”³⁵⁵ Thus, judicial review under § 1421(c) should be preserved even more stringently than normal judicial review of agency actions.³⁵⁶

Moreover, the wording of the statute reflects a clear intent to strongly safeguard judicial review.³⁵⁷ Congress did not rest with merely inserting the phrase “de novo.” Instead, it emphasized the phrase by adding its definition and thus repeating it: “[A]nd the court shall make its own findings of fact and conclusions of law”³⁵⁸

Additionally, this de novo review should be protected because it is often the only opportunity for thorough judicial review.³⁵⁹ Generally, once a final order of removal is issued, the only review available is highly deferential to the agency and must be solely based on the administrative record.³⁶⁰

Consequently, analyzing § 1421(c) leads to the conclusion that once the DHS denies an application and the applicant files a claim for judicial review, the district court must review de novo both the

review by continuing to place the noncitizen in removal proceedings even after an IJ has terminated them.

352. *Gonzalez v. Napolitano*, 684 F. Supp. 2d 555, 561 (D.N.J. 2010) (citing *Stark v. Wickard*, 321 U.S. 288, 312–13 (1944) (Frankfurter, J., dissenting)), *aff'd on other grounds*, 678 F.3d 254 (3d Cir. 2012).

353. *Nagahi v. INS*, 219 F.3d 1166, 1169 (10th Cir. 2000).

354. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967); *accord Gonzalez*, 684 F. Supp. 2d at 561 (applying this principle to § 1421(c)).

355. 8 U.S.C. § 1421(c) (2012); 73A C.J.S. *Aliens* § 1912 (2013).

356. 8 U.S.C. § 1421(c); *Gonzalez*, 684 F. Supp. 2d at 561 (citing *Stark*, 321 U.S. at 312–13) (Frankfurter, J., dissenting); *see also De Lara Bellajaro v. Schiltgen*, 378 F.3d 1042, 1045 n.2 (9th Cir. 2004) (declining to give the INS *Chevron* deference).

357. *See Nagahi*, 219 F.3d at 1170.

358. 8 U.S.C. § 1421(c). The fact that review is to be de novo also further undercuts the reasoning in *Zayed* and *De Lara Bellajaro*. If the statute so repeatedly mandates that courts make their own findings of fact and law, how can Congress have intended review to be limited to merely whether removal proceedings were, in fact, pending?

359. *See Ngwana v. Att’y Gen.*, 40 F. Supp. 2d 319, 322 (D. Md. 1999) (“Appellate review of removal decisions is extremely limited.”).

360. *See* 8 U.S.C. § 1252(b)(4); *Ngwana*, 40 F. Supp. 2d at 322.

reasons for the denial and the merits of the application. Presumably, Congress intended this review to be safeguarded against any limitations based on the statute's repetitive and emphatic language mandating the court's full, unencumbered review.

2. 8 U.S.C. § 1447(b): *Judicial review of delayed decisions*

Section 1447(b) provides:

If there is a failure to make a determination [on an application for naturalization] before the end of the 120-day period after the date on which the examination [of the applicant] is conducted[,] . . . the applicant may apply to [a] United States district court . . . 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 the [DHS] to determine the matter.³⁶¹

This provision allows courts to issue naturalization orders, resolve legal or factual questions, remand decisions to the Department, or perform any combination of these powers, as long as two jurisdictional requirements are satisfied.

The power to issue naturalization orders arises under the clause allowing courts to “either determine the matter or remand the matter, with appropriate instructions, to [the DHS] to determine the matter.”³⁶² The option of “determine” *or* “remand the matter” implies that the word “determine” authorizes courts to make naturalization decisions themselves or issue declarations that bind the DHS's future decisions.³⁶³ If courts were forced to defer to the DHS to make all naturalization decisions, then courts could only “remand the matter” and not provide *de novo* review, which is contrary to § 1447(b)'s plain language.³⁶⁴

Courts can only exercise this power under § 1447(b) if jurisdiction is established in two ways. First, 120 days must have passed since the DHS examined the applicant.³⁶⁵ Second, the DHS must have *failed* to make a determination within that time.³⁶⁶

361. 8 U.S.C. § 1447(b).

362. *See id.*

363. *See United States v. Hovsepian*, 359 F.3d 1144, 1160–61 (9th Cir. 2004) (en banc) (holding that § 1447(b) allows courts to issue instructions and order the agency to “adopt the court’s fact-finding and conclusions”). For examples of declarations regarding applicants that bind the DHS's future decisions, see the discussion surrounding *Klene v. Napolitano*, 697 F.3d 666, 669 (7th Cir. 2012), and *Gonzalez v. Sec’y of DHS*, 678 F.3d 254 (3d Cir. 2012), *supra* text accompanying notes 193–205, and *infra* Part III.B.

364. *See Hovsepian*, 359 F.3d at 1160–61.

365. *Id.*; Kurtis A. Kemper, *Construction and Application of 8 U.S.C.A. § 1447(b) Governing Hearings in Federal District Court when No Determination Is Made on Application for Naturalization Within 120 Days of Examination of Applicant*, 45 A.L.R. FED. 2d 621

A significant question under the second requirement is whether the DHS can be said to have “failed” to have made a determination on an application if removal proceedings were pending during the 120-day period.³⁶⁷ Pending removal proceedings—at least theoretically³⁶⁸—prohibited the DHS from considering the application before the 120-day period ended.³⁶⁹ This limitation prompts the question of whether an agency can “fail” to do something that it is statutorily prohibited from doing.³⁷⁰

Black’s Law Dictionary defines “failure” in two ways: (1) “[d]eficiency; lack; want” and (2) “[a]n omission of an expected action, occurrence, or performance.”³⁷¹ If failure is taken to mean simply a deficiency, then the simple fact that the DHS did not make a determination is sufficient to trigger a court’s jurisdiction.³⁷² Under this definition, the DHS’s motivation for not acting—the pending removal proceedings and its dutiful obedience to § 1429—would be irrelevant.

However, if failure means the “omission of an *expected* action, occurrence, or performance,” then the court does not have jurisdiction.³⁷³ The DHS cannot be “expected” to make a determination on an application when it is statutorily prohibited from making the determination.³⁷⁴ Currently, the weight of authority appears to support this second definition of “failure,” though the first definition may be equally plausible.³⁷⁵

§§ 5–6 (2010) (explaining that, while the weight of authority holds that the 120-day clock begins at the date of the initial interview, a few courts have held that “examination” refers to the entire process of the investigation of the applicant); *see also* *Ajlani v. Chertoff*, 545 F.3d 229, 237 n.6 (2d Cir. 2008) (noting this ambiguity).

366. *See* 8 U.S.C. § 1447(b) (allowing applicants to apply for review “[i]f there is a failure to make a determination” on their applications).

367. *See id.*; *Ajlani*, 545 F.3d at 240 (refraining from defining “failure” for the purpose of the statute).

368. *See supra* Part I.C.1.b for examples of how the DHS disregards this prohibition in practice.

369. 8 U.S.C. § 1429; *Ajlani*, 545 F.3d at 240.

370. *See Ajlani*, 545 F.3d at 240 (stating that there can be no expectation of an action that is prohibited by law); *Saba-Bakare v. Chertoff*, 507 F.3d 337, 340 (5th Cir. 2007) (holding that the administrative delay is required by statute).

371. BLACK’S LAW DICTIONARY 673 (9th ed. 2009); *see also Ajlani*, 545 F.3d at 240 (providing only the second definition).

372. *Cf.* BLACK’S LAW DICTIONARY, *supra* note 371, at 673.

373. *Id.* (emphasis added); *see also Ajlani*, 545 F.3d at 240 (explaining the rare circumstances in which judicial review is permitted).

374. *Ajlani*, 545 F.3d at 240.

375. *See* Kemper, *supra* note 365, §§ 11–12. *Compare Ajlani*, 545 F.3d at 240 (holding that the district court could not review claims under § 1447(b) while removal proceedings were pending), *and Saba-Bakare*, 507 F.3d at 340 (same), *with Meraz v. Comfort*, No. 05 C 1094, 2006 WL 861859, at *4 (N.D. Ill. Mar. 9, 2006) (holding that the court retains jurisdiction to review claims under § 1447(b) but that it must stay the determination until removal proceedings are terminated).

Courts should be careful not to apply this reasoning, though, when the DHS does not initiate removal proceedings until *after* the 120-day clock has run. How can the DHS claim that removal proceedings prevented it from making a determination within 120 days when it did not commence removal proceedings until after 120 days had passed?³⁷⁶ This reasoning is especially problematic when the DHS not only waits to commence the removal proceedings until after the 120 days have passed but also waits until after the noncitizen files a claim for judicial review.³⁷⁷ Under a scenario such as this one, there is no plausible way the DHS can claim that the delay was caused by § 1429's prohibition on considering the application.

However, when removal proceedings are truly the cause of the delay, courts would only be able to assert jurisdiction under § 1447(b) if they embraced a definition of "failed" that means simply "deficiency, lack, or want." They would not be able to assert jurisdiction if "failed" means the "omission of an *expected* action." They should be careful to note, however, if the removal proceedings were initiated after the 120-day clock had run. If they were, the DHS

376. See *Saba-Bakare*, 507 F.3d at 340 (explaining that courts cannot award remedies under § 1447(b) when § 1429 *requires* the administrative delay).

377. The Second Circuit did exactly this in *Ajlani*. In that case, Mr. Ajlani applied for citizenship, and his application was granted approximately five months after the examination. *Ajlani*, 545 F.3d at 231–32. Before he could attend his oath ceremony, however, the DHS discovered that he had a prior conviction and reopened consideration of his naturalization application. *Id.* at 232. Two weeks later, Mr. Ajlani filed a claim for judicial review under § 1447(b). *Id.* at 233. Nearly two months after he filed this claim, the DHS formally commenced removal proceedings against Mr. Ajlani. *Id.* at 232–33.

The court concluded that it could not review the case under § 1447(b) because that statute only authorized review of "failure to make a determination." *Id.* at 240. The court reasoned that since removal proceedings were pending against Mr. Ajlani, the DHS was prohibited from considering his application. *Id.* Thus, the DHS could not be considered to have "failed" to make a determination on the application when it was statutorily prohibited from doing so. *Id.* However, in that case, the DHS did not commence removal proceedings until long after 120 days had allegedly run, meaning that the DHS's delay could not have been caused by the pending removal proceedings. See *id.* at 232–33, 237 (identifying the date that the 120-day clock ended and the date removal proceedings were commenced).

The Second Circuit's reasoning in this case may not be a good indication of how other courts will decide this issue when faced with similar facts. In *Ajlani*, the court expressed serious doubts about whether this 120-day clock had run because it was not sure when the clock should begin. See *id.* at 237 & nn.6–7. On one hand, 120 days had passed between the first examination (August 9, 2005) and when the DHS first granted his application (March 27, 2006). *Id.* at 231–32, 237 n.7. When naturalization proceedings were reopened, however, an initial examination had not even occurred before Mr. Ajlani filed a claim under § 1447(b). See *id.* at 233. Thus, when viewed from that perspective, the 120-day clock had not yet run. See *id.* at 237 n.7. In the end, the court chose to accept that 120 days had passed merely because neither party contested the issue. *Id.* at 237. Thus, the court's flawed reasoning that the DHS had not "failed" to act was probably motivated by its uncertainty over whether the 120-day clock had, in fact, concluded.

cannot plausibly claim the delay was necessitated by the pending removal proceedings.³⁷⁸

3. 8 U.S.C. § 1421(a): *The DHS and court authority*

Section 1421(a) confers upon the Secretary of Homeland Security “[t]he sole authority to naturalize persons as citizens of the United States.”³⁷⁹ “[S]ole authority,” however, must be understood in a way that leaves room for the courts to review the DHS’s decisions and, if appropriate, come to an opposing conclusion.³⁸⁰ Holding otherwise would render § 1421(c) ineffective, especially given that the provision requires courts to reach their own conclusions of law.³⁸¹

Additionally, court orders to naturalize would not violate § 1421(a) because § 1447(b) explicitly gives courts the authority to issue naturalization orders.³⁸² If the power to “determine the matter” and order naturalization under § 1447(b) does not intrude on the DHS’s sole authority to naturalize, neither would an order to naturalize made pursuant to § 1421(c).³⁸³ As a result, § 1421(a) cannot be construed to deprive the courts of the ability to order the DHS to naturalize an applicant.³⁸⁴

378. One question the text of this statute leaves unanswered is whether, after an applicant files for review under § 1447(b) because of a delay, the DHS can still act on the application. *See generally* Kemper, *supra* note 365, §§ 7–10 (examining various approaches to this question). The government has often argued that it still retains this authority and that the court’s jurisdiction over the matter is concurrent with the DHS’s. *See, e.g.,* Bustamante v. Napolitano, 582 F.3d 403, 406–07 (2d Cir. 2009). The Second, Fourth, and Ninth circuits have all disagreed, however, holding instead that once an applicant files a claim for review under § 1447(b), the court’s jurisdiction is exclusive. *Id.* at 407; Etape v. Chertoff, 497 F.3d 379, 384 (4th Cir. 2007); United States v. Hovsepian, 359 F.3d 1144, 1159, 1162–63 (9th Cir. 2004) (en banc).

The text of the statute makes this second interpretation necessary because it gives courts the authority to either “determine the matter or remand the matter.” 8 U.S.C. § 1447(b) (2012); *see, e.g.,* Hovsepian, 359 F.3d at 1160–61. If the DHS still retains the ability to deny the application once a claim is filed, the option of remanding the matter would be surplusage. *Id.* at 1160. The court would have no reason to remand the matter if the DHS could make its own decision at any time. *Id.* Consequently, the courts must have exclusive jurisdiction over the matter once a claim is filed. *Id.* at 1160–61.

379. 8 U.S.C. § 1421(a); *see supra* note 107 and accompanying text (explaining that although the provision refers to “the Attorney General,” the Secretary of Homeland Security has assumed these responsibilities and thus can be substituted).

380. *See* Gonzalez v. Napolitano, 684 F. Supp. 2d 555, 560 (D.N.J. 2010), *aff’d on other grounds*, 678 F.3d 254 (3d Cir. 2012).

381. *See* 8 U.S.C. § 1421(c); Gonzalez, 684 F. Supp. 2d at 560.

382. *See supra* text accompanying notes 362–364 (explaining why).

383. *Cf. Gonzalez*, 684 F. Supp. 2d at 560 (holding that DHS’s “sole authority to naturalize” does not preclude judicial orders to naturalize).

384. *See id.*

However, § 1421(a) does limit judicial review in at least one way: courts cannot naturalize noncitizens themselves. The text explicitly confers the responsibility to naturalize exclusively to the DHS.³⁸⁵ Nonetheless, nothing in the text prevents or limits courts' ability to *order* the DHS to naturalize a noncitizen when exercising judicial review.³⁸⁶

4. 8 U.S.C. § 1429: Effect of Pending Removal Proceedings

Sections 1421(c) and 1447(b) must also be harmonized with § 1429.³⁸⁷ Section 1429 provides that “no person shall be naturalized against whom there is outstanding a final finding of deportability[;] . . . and *no application for naturalization shall be considered by the [Secretary of Homeland Security] if there is pending against the applicant a removal proceeding.*”³⁸⁸ A careful examination of both the plain text of the statute and the changes made to it in 1990 reveals that § 1429 is not intended to limit judicial review for naturalization applicants in removal proceedings.³⁸⁹

a. Current § 1429

The text of the two clauses in § 1429 refers to two different situations and applies two different prohibitions.³⁹⁰ The first clause applies when removal proceedings have been completed and have resulted in a final order of removal.³⁹¹ In this situation, the statute states that “no person shall be naturalized.”³⁹² This prohibition applies regardless of how the person is naturalized.³⁹³ Section 1429 therefore prohibits courts from ordering the DHS to naturalize an

385. 8 U.S.C. § 1421(a); *see* De Lara Bellajaro v. Schiltgen, 378 F.3d 1042, 1046 (9th Cir. 2004) (noting that district courts “no longer have the authority to naturalize”); Ngwana v. Att’y Gen., 40 F. Supp. 2d 319, 322 (D. Md. 1999). *But see* Gonzalez, 684 F. Supp. 2d at 560 (concluding that courts can do this “at the outer limit” of their authority).

386. *See, e.g.,* Gonzalez, 684 F. Supp. 2d at 560; Ngwana, 40 F. Supp. 2d at 321–22.

387. *See* Gonzalez v. Sec’y of DHS, 678 F.3d 254, 258 (3d Cir. 2012); De Lara Bellajaro, 378 F.3d at 1046; Zayed v. United States, 368 F.3d 902, 906 (6th Cir. 2004).

388. 8 U.S.C. § 1429 (emphasis added). This quotation inserts “Secretary of Homeland Security” in place of “Attorney General,” to reflect the statute’s post-2003 applicability to the DHS. *See supra* text accompanying note 107.

389. *See* Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (“[I]f Congress has made its intent in the statute clear, we must give effect to that intent.” (quoting Miller v. French, 530 U.S. 327, 336 (2000))) (internal quotation marks omitted).

390. *See* Kestelboym v. Chertoff, 538 F. Supp. 2d 813, 818 (D.N.J. 2008); Ngwana, 40 F. Supp. 2d at 321.

391. 8 U.S.C. § 1429; Kestelboym, 538 F. Supp. 2d at 818; Ngwana, 40 F. Supp. 2d at 321.

392. 8 U.S.C. § 1429.

393. *See* Kestelboym, 538 F. Supp. 2d at 818.

applicant against whom a final order of removal has been issued unless the removal order was vacated.³⁹⁴

The second clause, however, applies when applicants' removal proceedings are still pending.³⁹⁵ Rather than using the same absolute prohibition against naturalization, Congress made two relevant changes: prohibiting (1) *the DHS* (instead of the courts) from (2) *considering* these applicants' applications (instead of from naturalizing them).³⁹⁶ These changes create at least two possibilities for noncitizen applicants currently in removal proceedings that would not be available to them if a final order of removal had issued.

First, the statute does not prevent recourse to judicial review under §§ 1421(c) or 1447(b) because the prohibition only blocks review by the DHS.³⁹⁷ Most circuit courts have followed this interpretation and have thus held that, as a technical matter, courts retain subject matter jurisdiction under these statutes while removal proceedings are still pending.³⁹⁸ However, even though § 1429 does not affect courts' subject matter jurisdiction, it may still affect the type of relief a court can grant while exercising such jurisdiction.³⁹⁹ Therefore, the text must be analyzed further to determine whether the statute limits courts' ability to grant relief.⁴⁰⁰

Second, the statute's use of the phrase "consider an application" leaves courts with the ability to order the DHS to naturalize a

394. See *id.* (explaining that the statute prohibits "all action pertaining to a naturalization application" in this situation).

395. 8 U.S.C. § 1429; *Kestelboym*, 538 F. Supp. 2d at 818; *Ngwana*, 40 F. Supp. 2d at 321.

396. 8 U.S.C. § 1429; see also *Kestelboym*, 538 F. Supp. 2d at 818 (suggesting that Congress could have used the "same, unambiguous language" as it had in the clause applying to noncitizens who had an order of removal if Congress had wanted noncitizens with pending removal proceedings to be treated the same way); *Ngwana*, 40 F. Supp. 2d at 321 (stating that § 1429 only prevents the INS's (now the DHS's) consideration of naturalization applications, not its power to naturalize).

397. See, e.g., *De Lara Bellajaro v. Schiltgen*, 378 F.3d 1042, 1046 (9th Cir. 2004).

398. See cases cited *supra* note 139. Furthermore, recent Supreme Court precedent probably prohibits courts from interpreting § 1429 as establishing a jurisdictional requirement. In numerous cases over the last decade, the Court has stressed that mandatory requirements, such as the prohibition against considering applications, only affect jurisdiction when the language of the statute contains a clear indication that Congress intended the requirement to affect jurisdiction. *Klene v. Napolitano*, 697 F.3d 666, 668 (7th Cir. 2012) (citing several Supreme Court cases, including *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011), and *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010)). This rule applies regardless of how emphatic the language is. There is no clear indication in the text of the immigration statutes that Congress intended § 1429 to affect the court's jurisdiction to exercise judicial review. See *Zayed v. United States*, 368 F.3d 902, 906 (6th Cir. 2004). Consequently, § 1429 does not satisfy the Court's test for affecting jurisdiction.

399. See *supra* Part I.C.1 (discussing cases holding that no relief can be granted).

400. See *Gonzalez v. Sec'y of DHS*, 678 F.3d 254, 259 n.5 (3d Cir. 2012) (contending that it must resolve this issue first before deciding on the merits).

noncitizen,⁴⁰¹ despite the opposite conclusions several circuit courts have reached.⁴⁰² In *Klene*, the Seventh Circuit concluded that it could not order the DHS to naturalize a noncitizen in removal proceedings because “[j]udges must not order agencies to ignore constitutionally valid statutes.”⁴⁰³ This reasoning is flawed. To “consider an application” means something very different than to naturalize a person.⁴⁰⁴ The word “consider” means “fix the mind on, with a view of careful examination; to examine; to deliberate about and ponder over.”⁴⁰⁵ If a district court ordered the DHS to naturalize a person against whom removal proceedings were pending, the DHS would not need to—and in fact should not—“consider” the person’s application.⁴⁰⁶ The DHS would only need to comply with the court’s order to naturalize.⁴⁰⁷ While the court would need to consider the noncitizen’s application before issuing an order to naturalize, no conflict would arise if the court did so because § 1429 only prohibits the DHS—and not the courts—from considering applications.⁴⁰⁸

b. 1990 textual changes to § 1429

Congress’s intent to avoid limitations on judicial review while removal proceedings are pending can also be seen in the changes it made in 1990 to the text of § 1429. In its original form, § 1429 prioritized removal proceedings by prohibiting final hearings on naturalization in the courts while removal proceedings were still

401. See *Gonzalez v. Napolitano*, 684 F. Supp. 2d 555, 560 (D.N.J. 2010), *aff’d on other grounds*, 678 F.3d 254.

402. See *supra* Part I.C (discussing the positions of the circuit courts).

403. *Klene*, 697 F.3d at 668.

404. See *Gonzalez*, 684 F. Supp. 2d at 562–63 (providing a lengthy discussion of the definition of “consider”).

405. *Id.* (quoting *United States v. Haynes*, 265 F. Supp. 2d 914, 916 (W.D. Tenn. 2003), and numerous other sources to expound on the term).

406. See *id.* at 563 (indicating that if “consider” in 8 U.S.C. § 1429 means the same thing as it does in other statutory contexts and as defined by several dictionaries, the Attorney General will not “consider” an application if the court orders relief for the petitioner).

407. See *id.* at 564.

408. 8 U.S.C. § 1429 (2012). None of the circuit courts have attempted to analyze this reasoning. When reviewing a lower court’s analysis along these lines, for example, the Third Circuit merely stated in a footnote that the argument did “not comport with the priority of removal proceedings.” *Gonzalez v. Sec’y of DHS*, 678 F.3d 254, 259 n.6 (3d Cir. 2012); see also *Zayed v. United States*, 368 F.3d 902, 906 n.5 (6th Cir. 2004) (stating, in response to the district court holding that the court could order the Department to naturalize a noncitizen, “[w]e are at something of a loss . . . to understand how judicial fiat can overcome the statutory bar of § 1429”). These cursory statements fail to adequately respond to this reasoning.

pending.⁴⁰⁹ In 1990, however, Congress chose to transfer the responsibility to naturalize noncitizens from the courts to an administrative agency—today, USCIS.⁴¹⁰ With this shift, Congress chose to change only one phrase in § 1429⁴¹¹: “*no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding*” was changed to “*no application for naturalization shall be considered by the [Secretary of Homeland Security] if there is pending against the applicant a deportation proceeding.*”⁴¹²

With this change, § 1429’s new purpose was to prevent USCIS—rather than the courts—from considering a noncitizen’s application while ICE (the agency responsible for deportation) attempts to deport the noncitizen.⁴¹³ Therefore, § 1429’s purpose is now to coordinate actions between the two agencies as opposed to handling conflicts between the courts and the deporting agency.⁴¹⁴ Consequently, § 1429 still serves to prioritize removal proceedings, but only over agency consideration of naturalization applications and not over court consideration.⁴¹⁵ If Congress had intended otherwise, it would have been more explicit, especially given that it concurrently added the option of *de novo* review in the courts.⁴¹⁶

Furthermore, interpreting § 1429 as depriving courts of the ability to exercise judicial review makes the statute say far more than Congress ever intended it to say, even in its pre-1990 form.⁴¹⁷ Beyond simply giving priority to removal proceedings, such an interpretation

409. See, e.g., *Shomberg v. United States*, 348 U.S. 540, 544 (1955); see *supra* text accompanying notes 82–91 (discussing the history of court authority to naturalize citizens).

410. See *supra* text accompanying notes 100–106 (summarizing the changes made in 1990 to the immigration process by Congress).

411. Immigration Act of 1990, Pub. L. No. 101-649, § 407(d), 104 Stat. 4978, 5041 (codified as amended at 8 U.S.C. § 1429).

412. Compare 8 U.S.C. § 1429 (1988) (emphasis added), with 8 U.S.C. § 1429 (2012) (emphasis added).

413. See *supra* text accompanying notes 107–114 (identifying the changes within the immigration system that led to the new purpose and role of § 1429).

414. See *Ngwana v. Att’y Gen.*, 40 F. Supp. 2d 319, 321 (D. Md. 1999) (stating that the priority provision now limits the INS (now the DHS) rather than the courts).

415. 8 U.S.C. § 1429 (2012); see *Ngwana*, 40 F. Supp. 2d at 321 (demonstrating the operation of the priority provision).

416. See *Gonzalez v. Napolitano*, 684 F. Supp. 2d 555, 562–63 (D.N.J. 2010), *aff’d on other grounds*, 678 F.3d 254 (3d Cir. 2012).

417. See *Grewal v. Ashcroft*, 301 F. Supp. 2d 692, 696 (N.D. Ohio 2004) (clarifying that the purpose of § 1429 is not to “divest district courts of the jurisdiction [§ 1421(c)] provides to review administrative denials of naturalization”).

would give the DHS the authority to trump the judicial review protections that Congress explicitly mandated.⁴¹⁸

Admittedly, in most situations, allowing district courts to order noncitizens to be naturalized might lessen some of the safeguards against the race “between naturalization and removal proceedings” that the 1950 Congress intended to end.⁴¹⁹ Applicants might still rush to the courts whenever their applications are denied.⁴²⁰ Congress, however, chose to lessen these protections in 1990 by implementing judicial review and altering the text of § 1429 to restrict USCIS and not the courts.⁴²¹

Consequently, an order to naturalize would not violate the intent behind § 1429, whether as expressed in the text itself or as inferred from the text’s history.⁴²² To the contrary, interpreting the statute in this way would give full effect to (1) § 1421(a) by giving the DHS sole authority to naturalize, (2) §§ 1421(c) and 1447(b) by providing judicial review for application denials and delays, respectively, and (3) § 1429 by prohibiting the DHS from considering applications while the applicant is in removal proceedings. If Congress had intended a different meaning, the words were well within its reach.⁴²³

418. *Id.* at 696–97. Additionally, even if it is still § 1429’s purpose to safeguard against a race to the courthouse once the DHS commences removal proceedings, that purpose would not be relevant when the DHS initiates removal proceedings *after* the noncitizen files a claim for judicial review. *See id.* at 697 (explaining that in Ms. Grewal’s case, she was not racing against any removal proceedings when she chose to seek judicial recourse).

419. *Ajlani v. Chertoff*, 545 F.3d 229, 240 (2d Cir. 2008).

420. *See id.*

421. *See supra* text accompanying notes 409–412 (illustrating Congress’s decision to change only one portion of § 1429).

422. In addition to permitting courts to issue orders to naturalize, § 1429 must allow courts to issue declarations of prima facie eligibility. *See supra* notes 220–222 and accompanying text (noting that in their efforts to resolve *Acosta Hidalgo*’s determination that only the DHS could make prima facie eligibility declarations to terminate removal proceedings, the Sixth and Fourth Circuits in *Shewchun v. Holder*, 658 F.3d 557, 564–65 (6th Cir. 2011), and *Barnes v. Holder*, 625 F.3d 801, 807 (4th Cir. 2010), respectively, held that the DHS can make declarations of prima facie eligibility without violating § 1429). If the Sixth and Fourth Circuits’ holdings are correct, however, it means that courts can likewise make prima facie eligibility declarations without violating § 1429. *See Apokarina v. Ashcroft*, 93 F. App’x 469, 471–72 (3d Cir. 2004) (recognizing that because § 1429 restricts the DHS but makes no reference at all to the courts, it is still an open question whether courts can make prima facie eligibility declarations). After all, § 1429 does not even reference the courts; it only restricts the DHS. *Id.* at 471. Of course, whether such declarations will have any effect at terminating removal proceedings under *Acosta Hidalgo* is another question that will be discussed in the next section.

423. Indeed, they were in the same provision. *See* 8 U.S.C. § 1429 (2012) (“[N]o person shall be naturalized . . .”); *Gonzalez v. Napolitano*, 684 F. Supp. 2d 555, 562–63 (D.N.J. 2010) (arguing that had Congress intended to preclude the DHS “from ‘granting’ citizenship once removal proceedings ha[d] begun,” it would not have used the word “consider”), *aff’d on other grounds*, 678 F.3d 254 (3d Cir. 2012).

B. *Declaratory Judgments Would Be Effective Notwithstanding Acosta Hidalgo*

Aside from ordering the DHS to naturalize a petitioner, courts can also issue two kinds of declaratory judgments: “*Klene*” declarations and prima facie eligibility declarations. In *Klene*, the Seventh Circuit held that district courts can resolve a question of fact in the noncitizen’s favor and that such a resolution has preclusive effect on the question in subsequent removal proceedings and naturalization determinations.⁴²⁴ In *Gonzalez*, the Third Circuit held that courts could declare that a noncitizen is prima facie eligible for naturalization “notwithstanding whatever role [the declaration] may play in terminating removal proceeding[s].”⁴²⁵

Some courts have hesitated to issue declaratory judgments and held that the judgments would not have any binding legal effect and would, therefore, be “purely advisory.”⁴²⁶ However, courts can issue declaratory judgments as a remedy if such declarations resolve a dispute in a way that “affects the behavior of the defendant towards the plaintiff.”⁴²⁷ Otherwise, if this standard is not met, declaratory judgments are merely advisory opinions and thus impermissible.⁴²⁸

In practice, declaratory judgments have quite an effect, normally prompting the DHS to voluntarily terminate removal proceedings and naturalize the applicant.⁴²⁹ Notwithstanding, courts must analyze the effect of declaratory judgments before issuing them to determine whether they are binding as a matter of law or are purely advisory.⁴³⁰ The legal effect of each type of declaratory relief is discussed below.

1. “*Klene* declarations”: *Declarations that have issue-preclusive effect*

In *Klene*, Judge Easterbrook appeared to have paved the way for a new type of remedy: a declaration that resolves some factual

424. *Klene v. Napolitano*, 697 F.3d 666, 669 (7th Cir. 2012).

425. *Gonzalez*, 678 F.3d at 258, 260.

426. See *supra* text accompanying note 161 (discussing the limited effects of declaratory judgments).

427. *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (emphasis omitted); see also 28 U.S.C. § 2201 (creating declaratory judgments as an available remedy “[i]n a case of actual controversy within [the court’s] jurisdiction”); FED. R. CIV. P. 57 advisory committee’s note (internal quotation marks omitted) (stating that “[a] declaratory judgment is appropriate when it will terminate the controversy giving rise to the proceeding”).

428. *Ka Lok Lau v. Holder*, 880 F. Supp. 2d 276, 280 (D. Mass. 2012).

429. See *supra* notes 209–210 and accompanying text (noting how, as a practical matter, the DHS normally concedes to prevent an appeal, which might generate adverse precedent).

430. See *Ka Lok Lau*, 880 F. Supp. 2d at 281–82 (concluding that declaratory relief would only help in a hypothetical future controversy, not a present one); see also *supra* note 161 (illustrating competing views on the effects of declaratory judgments).

question that may have motivated either the application's denial or the initiation of removal proceedings.⁴³¹ Theoretically, the declaration would then have issue-preclusive effect on any subsequent proceedings, such as removal proceedings or application determinations.⁴³²

A "*Klene* declaration" would trigger mutual-issue preclusion, which requires a court's determination of an issue of fact or law in one proceeding to be conclusive on all subsequent actions between the parties.⁴³³ For example, if a judge declared that a noncitizen's marriage was valid, that holding would force the DHS and IJs to accept the validity of the marriage.⁴³⁴ Consequently, if the alleged fraudulent marriage was the sole reason for denying the application or initiating removal proceedings, an IJ would theoretically be forced to terminate the proceedings, and the DHS would be forced to accept the application.⁴³⁵

It is difficult to predict, however, what legal justification an IJ would have for terminating the proceedings. While an IJ might be bound to accept that an alleged fraudulent marriage is, in fact, valid, 8 C.F.R. § 1239.2(f) requires the IJ to only terminate removal proceedings upon a finding of prima facie eligibility for naturalization.⁴³⁶ Prima facie eligibility, according to the BIA, can only be found when the DHS has made an affirmative communication to that effect.⁴³⁷

431. See *Klene v. Napolitano*, 697 F.3d 666, 669 (7th Cir. 2012).

432. *Id.*

433. See *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008); Restatement (Second) of Judgments § 27 (1980); see also *Klene*, 697 F.3d at 669 (noting that issue preclusion applies in multiple contests between the federal government and the same adversary, and would therefore be applicable to a noncitizen challenging naturalization determinations and removal proceedings in both administrative and judicial fora (citing *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 169 (1984))).

434. *Klene*, 697 F.3d at 669.

435. See *id.* (claiming that such a declaration "would bring the removal proceeding to a prompt close"); see also 28 U.S.C. § 2202 (2012) ("Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."). Such a declaration would probably not work in reverse, however. See *Nesari v. Taylor*, 806 F. Supp. 2d 848, 854, 866, 868 (E.D. Va. 2011) (rejecting the argument that an IJ's declaration of a valid marriage and termination of removal proceedings should have preclusive effect because § 1421(c) mandates de novo review and thus the court is not bound by prior administrative proceedings). Also, § 1429 explicitly states that decisions to terminate removal proceedings have no effect on USCIS's determination of whether to naturalize. 8 U.S.C. § 1429; *Nesari*, 806 F. Supp. 2d at 868–69.

436. 8 C.F.R. § 1239.2(f) (2013).

437. *In re Acosta Hidalgo*, 24 I. & N. Dec. 103, 106 (BIA 2007). Again, practically speaking, it is likely that an IJ would terminate the removal proceedings anyway in response to a declaration from a federal court. See *supra* note 99 (listing cases in which IJs had terminated removal proceedings without an affirmative communication from the DHS). The question here, however, is whether the IJ

However, such a declaration might allow the noncitizen to challenge subsequent the DHS actions in federal court, even if the IJ could not terminate removal proceedings. For example, if the DHS later denied the noncitizen's application or kept the noncitizen in removal proceedings, when challenged, the DHS might need to justify its actions in light of the federal court's issue-preclusive finding of fact.⁴³⁸

2. *Declarations of prima facie eligibility*

Another remedy courts may grant when exercising judicial review while removal proceedings are pending is to declare the noncitizen "prima facie eligib[le] for naturalization."⁴³⁹ It is again arguable, however, that court-ordered declarations of prima facie eligibility do not have any legally binding effect with regard to terminating removal proceedings.⁴⁴⁰ The BIA in *Acosta Hidalgo* interpreted 8 C.F.R. § 1239.2(f) as preventing IJs from terminating removal proceedings unless the DHS first makes an affirmative communication that the noncitizen is "prima facie eligib[le] for naturalization."⁴⁴¹

Several circuit courts have suggested that the BIA's interpretation of 8 C.F.R. § 1239.2(f) is owed deference and therefore cannot be overturned unless plainly erroneous or inconsistent with the regulation.⁴⁴² These courts contend that *Acosta Hidalgo* met this standard.⁴⁴³

The BIA's interpretation does not, however, meet even this deferential standard because it both nullifies the regulation and renders it inconsistent with statutory authority. Courts have an obligation to interpret regulations harmoniously with each other

would technically have the legal authority to do so. *See supra* note 161–165 and accompanying text (explaining that doubt over this fact has discouraged some federal courts from granting declaratory relief).

438. *See* 28 U.S.C. § 2202 (providing that further relief based on a declaratory judgment may be granted); *Stauffer Chem. Co.*, 464 U.S. at 169 (establishing that mutual issue preclusion applies against the federal government when litigating against the same party).

439. *Gonzalez v. Sec'y of DHS*, 678 F.3d 254, 260 (3d Cir. 2012) (quoting 8 C.F.R. § 1239.2(f)).

440. *See supra* text accompanying notes 161, 208 (observing that while court-ordered declarations of prima facie eligibility are arguably "purely advisory," they tend to result in the government terminating removal proceedings and naturalizing the applicant).

441. *Acosta Hidalgo*, 24 I. & N. Dec. at 105–06; *see supra* notes 96–99, 121–128 and accompanying text (describing the development of this interpretation).

442. *See supra* notes 217–219 and accompanying text (explaining the position of the Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits).

443. *See supra* notes 217–219 and accompanying text.

and with relevant statutes.⁴⁴⁴ The interpretation at issue in *Acosta Hidalgo* violates this fundamental canon of construction and thus must not be followed.

First, if 8 U.S.C. § 1429 prohibits the DHS from making prima facie eligibility determinations while removal proceedings are pending, interpreting 8 C.F.R. § 1239.2(f) so as to allow only the DHS to make these determinations nullifies the regulation.⁴⁴⁵ Courts have thus far failed to sufficiently answer how the DHS can legitimately make a prima facie eligibility determination without even considering the noncitizen's application. In *Shewchun v. Holder* and *Barnes v. Holder*, the Fourth and Sixth Circuits reasoned that because 8 U.S.C. § 1429 and 8 C.F.R. § 1239.2(f) must be reconciled, the DHS simply must be able to make prima facie eligibility determinations.⁴⁴⁶

However, this conclusion was not necessary. Nothing in the text of 8 C.F.R. § 1239.2(f) limits the prima facie eligibility requirement to the DHS; only the BIA's subsequent interpretation of the regulation limits the requirement in this way. Thus, 8 C.F.R. § 1239(f) does not conflict with 8 U.S.C. § 1429 by itself—the BIA's interpretation makes it conflict.⁴⁴⁷ The exact opposite interpretation of the regulation would have avoided the conflict altogether—the BIA could have prohibited IJs from using *the DHS-issued* prima facie eligibility determinations to terminate removal proceedings but allowed IJs to use court-issued declarations, or, potentially, use their own judgment.⁴⁴⁸

444. *Jett v. Dall*, Indep. Sch. Dist., 491 U.S. 701, 739 (1989) (Scalia, J., concurring in part and concurring in the judgment) (“[W]here the text permits, statutes dealing with similar subjects should be interpreted harmoniously.”); *Rice v. Martin Marietta Corp.*, 13 F.3d 1563, 1568 (Fed. Cir. 1993) (applying this principle to regulations). Note that the Second Circuit's statement in *Perriello v. Napolitano*, 579 F.3d 135, 142 (2d Cir. 2009), is anomalous with this well-established principle: “it is not a judicial role to save a regulation that now conflicts . . . with the underlying statute.”

445. See *supra* text accompanying notes 248–251 (analyzing how 8 U.S.C. § 1429 and 8 C.F.R. § 1239.2(f), when read together, can result in the deprivation of judicial review).

446. *Shewchun v. Holder*, 658 F.3d 557, 564–65 (6th Cir. 2011); *Barnes v. Holder*, 625 F.3d 801, 807 (4th Cir. 2010); see *supra* notes 220–222 and accompanying text.

447. Even if the text of § 1239.2(f) did require prima facie eligibility determinations to come from the DHS, a much simpler answer would have been to simply strike the regulation down as exceeding statutory authority. The regulation's wording makes this unnecessary, however.

448. See *Apokarina v. Ashcroft*, 93 F. App'x 469, 472 (3d Cir. 2004) (questioning whether the DHS could make prima facie eligibility determinations now that § 1429 prevented the DHS but not the courts). The courts' other bases for upholding *Acosta Hidalgo* also seem weak. For example, courts cannot reasonably rely on the government's testimony that it *can* and *does* make prima facie eligibility determinations while removal proceedings are pending in order to answer the question of *how* it can do so without violating § 1429 as the Fourth Circuit did in *Barnes*. See *supra* note 222 and accompanying text.

In contrast to the Fourth and Sixth Circuits, the Second and Third Circuits in *Perriello* and *Zegrean v. Attorney General*⁴⁴⁹ respectively concluded that the conflict between 8 U.S.C. § 1429 and the BIA's interpretation of 8 C.F.R. § 1239(f) simply means that neither the DHS, nor anyone else, can make prima facie eligibility determinations.⁴⁵⁰ If these courts are correct, the BIA's interpretation forecloses any possibility of the regulation accomplishing its purpose, which is to allow a way for noncitizens to terminate removal proceedings and have their applications heard.⁴⁵¹ Therefore, such a rendering is inconsistent with the regulation.

Second, even if *Perriello* and *Zegrean* are wrong and the DHS can make prima facie eligibility determinations, the BIA's interpretation of 8 C.F.R. § 1239.2(f) still renders the regulation practically without effect because the DHS is unlikely to ever act this way. Because the DHS places noncitizens in removal proceedings and it can take them out under its own authority,⁴⁵² the DHS has no reason to affirmatively communicate a prima facie eligibility declaration. If the DHS wanted to terminate removal proceedings so that it could review the noncitizen's naturalization application, the Department would not go to an IJ to do so.⁴⁵³

This assumption appears to be supported by noncitizens' experiences.⁴⁵⁴ The DHS rarely, if ever, makes any determination on prima facie eligibility for the purposes of an 8 C.F.R. § 1239.2(f) hearing.⁴⁵⁵ Nothing requires the Department to respond to a request

449. 602 F.3d 273 (3d Cir. 2010).

450. *See id.* at 274; *Perriello v. Napolitano*, 579 F.3d 135, 140–42 (2d Cir. 2009).

451. 8 C.F.R. § 1239.2(f) (2013); *see Perriello*, 579 F.3d at 138 (suggesting that even though the law in effect seems to be contradictory and “chasing its tail,” the court must nevertheless give deference to the BIA's interpretation of its own regulations); *see also Zegrean*, 602 F.3d at 274–75 (agreeing with *Perriello*'s analysis and conclusion, and stating that the confusion created by § 1239.2(f) is not for the courts, but rather for Congress or the DHS, to resolve).

452. *See supra* note 109 and accompanying text (discussing the DHS's authority to remove noncitizens); *see also* note 209 and accompanying text (providing examples of the DHS taking noncitizens out of removal proceedings).

453. *Cf. supra* Part I.C.1.b. (providing examples of cases in which, despite § 1429's prohibition, the DHS has decided naturalization applications notwithstanding the pendency of removal proceedings).

454. *See generally infra* note 457 and accompanying text (listing cases in which applicants have unsuccessfully petitioned the DHS for prima facie eligibility determinations).

455. *Perriello*, 579 F.3d at 138 (listing other examples, in addition to itself, in which DHS has refused to respond to a request for a prima facie eligibility determination). Also, before *Acosta Hidalgo* reached the BIA, the IJ in that case became frustrated with the DHS's unresponsiveness to the noncitizen's request for a statement of prima facie eligibility and directed the government's attorney to present something in writing indicating the DHS's position on the motion to terminate removal proceedings. H. Raymond Fasano & Donald F. Madeo, *Holding by Administrative Fiat*:

for such a determination.⁴⁵⁶ In many cases, petitioners have sought writs of mandamus to compel a determination, but these attempts have routinely been unsuccessful.⁴⁵⁷ In at least one of these cases, the DHS replied that it *could not* comply with a writ of mandamus because to make such a determination would violate § 1429's prohibition on considering naturalization applications.⁴⁵⁸

CONCLUSION

For over 125 years, the plenary power doctrine has been an anomaly. It has frozen immigration law in a time when individual rights were not prioritized and courts exercised little control over Congress and executive agencies.

From this perspective, the DHS's power to limit judicial review is perhaps unsurprising. In most circuits, the DHS is able to use removal proceedings as a litigation tactic for blocking statutorily mandated judicial review of its naturalization decisions. The Department can do this because it has convinced courts that 8 U.S.C. § 1429 prohibits the courts from providing remedies to applicants while in removal proceedings. The DHS has done this even though § 1429 only prohibits the Department from considering these applications; the statute makes no reference to the courts. Furthermore, the DHS itself often violates § 1429 by fully adjudicating applications while removal proceedings are pending. At the same time, the Department has persuaded courts that § 1429 still prevents it from reviewing these adjudications.

Why Matter of Acosta Hidalgo Was Erroneously Decided, 84 INTERPRETER RELEASES 841, 842 (2007). The DHS failed to respond even to this order. *Id.*

456. *Perriello*, 579 F.3d at 138.

457. *E.g.*, *Fretas v. Hansen*, No. 1:06CV1475, 2008 WL 4404276, at *5 (N.D. Ohio, Sept. 23, 2008); *Sandoval-Valenzuela v. Gonzalez*, No. C 08-2361 RS, 2008 WL 3916030, at *4 (N.D. Cal. Aug. 25, 2008); *Escobar-Garfias v. Gonzales*, No. 06-CV-103-BR, 2007 WL 281657, at *9 (D. Or. Jan. 26, 2007); *Fuks v. Devine*, No. 05 C 5666, 2006 WL 2051321, at *2-4 (N.D. Ill. July 20, 2006).

458. *See Fretas*, 2008 WL 4404276, at *3-4. As perhaps an indication of the DHS's attitude toward this statute, the Department nonetheless advised that the noncitizen was not *prima facie* eligible for naturalization. *See id.* at *1-2.

Several authorities have also criticized the BIA's assertions in *Acosta Hidalgo* and *Cruz* that IJs have less expertise over naturalization eligibility than the DHS because, in fact, IJs regularly make decisions related to naturalization eligibility, such as character assessments. *See, e.g.*, *Shewchun v. Holder*, 658 F.3d 557, 563 (6th Cir. 2011) (noting petitioner's brief to this effect); *In re Acosta Hidalgo*, 24 I. & N. Dec. 103, 109 (B.I.A. 2007) (Filppu, Board Member, concurring in part and dissenting in part) (proposing more decision-making power for IJs to assess *prima facie* eligibility when the DHS does not address the issue); *Fasano & Madeo*, *supra* note 455, at 846 (arguing that IJs are actually often in a better position than the DHS to make *prima facie* eligibility determinations).

Additionally, the DHS has successfully persuaded the BIA that 8 C.F.R. § 1239.2(f) prevents IJs from terminating removal proceedings without an affirmative communication from the Department that the noncitizen is *prima facie* eligible for naturalization. Not only does this interpretation lack any basis in the text of the statute, it also nullifies the regulation. The DHS placed the person in removal proceedings in the first place, thus it is highly unlikely that the Department would ever issue the necessary communications to terminate those proceedings—especially considering it could terminate the removal proceedings unilaterally if it so desired. Thus, an initiation of removal proceedings effectively trumps any possibility of judicial review. Clearly, courts are not applying the normal rules of statutory and regulatory construction for the purposes of judicial review in these situations.

Nevertheless, the prospects for change are positive. The plenary power doctrine appears to be weakening as more and more courts avoid its application in an attempt to grant justice to noncitizens. Some courts have found ways of characterizing agency powers as *procedural* rather than *substantive* and thus have dismantled the DHS's powers to block judicial review under the procedural due process exception. Other courts have relied on subconstitutional approaches, such as interpreting immigration statutes in a way that avoids the plenary power doctrine's influence.

The DHS's control over judicial review of its naturalization decisions can be limited using both of these approaches. Additionally, courts have an obligation to review naturalization applications whenever a noncitizen meets the jurisdictional requirements of 8 U.S.C. §§ 1421(c) and 1447(b), regardless of whether removal proceedings are pending. Options for providing remedies include ordering the DHS to naturalize an applicant, making an issue-preclusive declaration of material fact, or declaring that the applicant is *prima facie* eligible for naturalization. Allowing these remedies not only secures noncitizens statutory and constitutional rights, but also helps introduce some measure of sensibility to an area of law that has been greatly distorted for many years.

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