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Citizenship and the Courts

Nancy Morawetz†

Over the past decade, Congress, the press, and the academy have devoted substantial attention to the system for judicial oversight of deportation matters. After Congress revamped the system in two separate laws in 1996, both courts and scholars wrote in depth about the potential constitutional issues raised by efforts to close off judicial review.¹ Congress’s further alterations of the judicial review scheme in 2005 led to additional scholarly attention.² This attention will no doubt continue, given the very serious questions presented by statutory provisions that strip or

† Professor of Clinical Law, New York University School of Law. I am greatly indebted to Hiroshi Motomura for valuable insights into an earlier draft of this paper. I also thank the participants in the conference at the University of Chicago Legal Forum’s Immigration Law and Policy Symposium, and the Legal Forum for its editorial work. This article benefited from excellent research assistance by Annie Lai, NYU Law ’06, and from conversations with Stephanie Welch, NYU Law ’06, and Rachel Coen, NYU Law ’06. The author gratefully acknowledges the financial support of the D’Agostino/Greenberg Research Fund.

¹ See, for example, Gerald L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum L Rev 961 (1998) (arguing that courts, in light of the Habeas Corpus Suspension Clause of the Constitution, ought to interpret recent immigration legislation so as to allow judicial inquiry in deportation proceedings); Richard H. Fallon, Jr., Applying the Suspension Clause to Immigration Cases, 98 Colum L Rev 1068 (1998) (calling for the public rights and plenary powers doctrines to be reexamined in the immigration context and asserting that preclusion of all judicial review of immigration deten-

constrain judicial review over issues of deportation and the separation of family members.³

There has been scant attention, however, to a parallel judicial role in determining whether a lawful permanent resident meets the standards for citizenship.⁴ This role concerns one of the paramount interests of immigrants. Through citizenship, immigrants gain many rights, including the right to vote, the right to engage in all forms of employment, and the right to be free from the threat of deportation.⁵

Although the judicial role in naturalization dates back to 1790,⁶ the current statutory scheme was put in place in 1990. This scheme places initial responsibility for adjudication of naturalization with agency officials, and sets up two routes to judicial intervention. One path to intervention is for cases in which the agency has failed to adjudicate the case within 120 days. In these cases, the statute provides that the court “has jurisdiction over

³ Under 8 USC § 1252(a)(2), for example, courts are not permitted to hear certain issues and claims by persons with specified convictions. Review is available under REAL ID, however, if the issue presented is a “question of law.” 8 USC § 1252(a)(2)(D). One major focus of ongoing litigation is the scope of 8 USC § 1252(a)(2)(D). Consider Chen v United States DOJ, 471 F3d 315, 326 (2d Cir 2006) (interpreting scope of the term “question of law” to avoid constitutional infirmity).


⁵ Consider Motomura, Americans in Waiting at 189–197 (cited in note 4) (describing limitations faced by permanent residents who are not yet citizens).

⁶ See Part I A.
the matter and may either determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter.\footnote{Immigration and Nationality Act of 1952 ("INA") § 336(b), Pub L No 82-414, 66 Stat 163, as amended by Immigration Act of 1990, Pub L No 101-649, 104 Stat 4978, codified at 8 USC § 1447(b).} The second path is for cases in which the person is denied naturalization initially and again following an administrative appeal. In these cases, the statute provides for a petition to a district court and states that “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.”\footnote{INA § 310(c), 8 USC § 1421(c).}

Courts exercising jurisdiction in naturalization cases have been unsure of their proper institutional role. At one extreme, some courts have concluded that the only appropriate remedy when a case has been delayed is to remand the case for an agency decision.\footnote{See Part II A.} In doing so, they have presumed that they should operate under an administrative review model where agency action is necessary prior to any court action. At the other extreme, some courts have presumed that the courts stand as parallel adjudicators who do not look to the record developed at the agency but instead hear naturalization cases on the merits after civil discovery.\footnote{See Part II B.} These courts have adopted a civil litigation model in which there is no review of the agency’s decision.

Recent congressional proposals to change the judicial review scheme for naturalization cases have simply assumed that the correct model is one in which the courts sit in review of agency action. In 2006, without any serious study of the matter,\footnote{House Adopts H.R. 4437, 82 Interp Rel 2014, 2014–15 (Dec 19, 2005) (describing rapidity of consideration of the House bill). The Senate offered more process, but like the House had no hearings. The bills were complex, and the citizenship provisions received minimal attention.} Congress came close to overturning the historic statutory authority of the courts to make de novo determinations about who should be afforded citizenship. In both houses of Congress, sweeping immigration bills included provisions that would have altered the administrative and judicial scheme for naturalization cases. These bills passed both chambers. The House sought to eliminate district court review of three longstanding requirements for citizenship: “good moral character,” “attachment to the principles of the Constitution,” and being “well disposed to the good order and
happiness of the United States.”12 In addition, the House bill proposed to add new criteria based on an expansive “terrorist activity” definition that would not be subject to any judicial oversight.13 It further proposed that courts be restricted to evaluating whether the agency’s rationale was “bona fide.”14 Finally, the House proposed curtailing the authority of the courts to decide the merits of a naturalization case when the agency had not issued a timely decision.15 The Senate bill adopted many of these provisions, although it preserved a greater degree of judicial review over naturalization denials.16 Under the Senate bill, courts would apply a deferential substantial evidence standard for review of “good moral character,” “understands and is attached to the Constitution,” and “is well disposed to the good order and happiness of the United States.”17 Either approach would greatly increase the substantive power of the administrative agency to determine who is and is not allowed to naturalize. Ultimately, the two chambers failed to reconcile their competing immigration reform bills. The fact that some version of these proposals passed both houses, however, shows that these past bills need to be taken seriously as Congress continues to debate immigration reform.

This article seeks to unpack the origins of the current statutory scheme for judicial review, provide some initial evaluation of whether it is working to achieve the goals Congress sought to achieve in 1990, and explore criteria for the judicial role in naturalization cases. Part I discusses the evolution of the current statutory scheme for judicial intervention in naturalization cases. Part II describes how the 1990 changes in the structure of administrative and judicial review have led to judicial confusion about the proper role of the courts and have failed fully to meet the objectives of the 1990 reforms. Finally, Part III argues that

12 See HR 4437 § 609(f), 109th Cong, 1st Sess (Dec 6, 2005), in 151 Cong Rec H 11800 (Dec 15, 2005).
13 Id at § 609(a) (adding new bars to naturalization for any person who is “described in” INA §§ 212(a)(3) or 237(a)(4); further allowing the determination to be based on any information, including classified evidence, and making the agency’s evaluation of the evidence unreviewable).
14 Id at § 609(f) (“The burden shall be upon the petitioner to show that the Secretary’s denial of the application was not supported by facially legitimate and bona fide reasons.”).
15 Id at § 609(e).
17 See id.
the root of the courts’ confusion in naturalization cases is their effort to fit the cases into either a standard model of court review of agency action or a parallel civil litigation model. I argue that neither model works well in light of the special nature of claims to citizenship. I further argue that a hybrid model that combines features of each is well designed to protect the interest in fair access to citizenship and best explains the structure of the current law.

I. EVOLUTION OF THE SYSTEM OF ADMINISTRATIVE AND JUDICIAL REVIEW OF NATURALIZATION CASES

Many aspects of the current statutory scheme governing the judicial role in naturalization cases, including the express authority to take jurisdiction over a case that has not completed the agency process and the standard of de novo review, are unusual in the administrative state. The first step towards making sense of this system is to examine how it evolved. This history makes clear that Congress has viewed naturalization as a different kind of right than most matters handled by agencies and has responded to the special nature of citizenship claims through procedures meant to afford enhanced protections to those seeking citizenship.

A. The History of Judicial Naturalization

The history of judicial naturalization dates back more than two centuries. Under the first naturalization act in 1790, petitions for naturalization were to be filed in court. Petitions could be filed in “any common law court of record” in the state where the person had resided for the previous year. Later statutes altered some of the requirements for citizenship, but the basic process of taking cases to any court in the petitioner’s state of residence remained through the next century.

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18 Although unusual, they are not unprecedented. Appeals of denials of Freedom of Information requests also go to district court and are reviewed on a de novo standard. 5 USCS § 552(a)(4)(B) (2000) (providing for de novo district court review of agency withholding of records).
19 Act of Mar 26, 1790, An Act to Establish a Uniform Rule of Naturalization, 1 Stat 103, repealed by Act of Jan 29, 1795, 1 Stat 414.
20 Id.
As Luis DeSipio and Harry Pachon have described, the decentralized system of naturalization provided ample room for abuse. They describe one study, for example, that found that Tammany Hall bosses arranged for naturalization of Irish immigrants the day they arrived in the United States; these immigrants could not possibly have met the residence requirements for citizenship. A 1905 report by the Commission on Naturalization found fraud by political machines that would pay naturalization fees and sometimes additional bribes for the votes they expected immigrants to cast. The report also concluded that there was no effective oversight of false statements regarding the date that immigrants arrived in the country. In response to the Commission’s report, Congress altered the naturalization system to strip many state courts of the authority to naturalize, and it established a requirement that petitioners provide advance notice of their petition to allow for government investigation of their qualifications for citizenship.

By the late 1980s, when Congress was considering proposals for reform that led to the Immigration Act of 1990, the agency played an increasingly important role in the process for naturalization. Nevertheless, the ultimate authority to decide naturalization cases continued to rest with the courts. The statute provided that exclusive jurisdiction to naturalize lay in the district courts and some state courts. Petitioners were required to file an application for naturalization with the clerk of the naturalization court. This was followed by a preliminary examination conducted by an employee of the Immigration and Naturalization Service (“INS”) who was authorized to take testimony, administer oaths, subpoena witnesses, and order production of documents. At the conclusion of this examination, the preliminary

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23 Report to the President of the Commission on Naturalization, HR Doc No 46, 59th Cong, 1st Sess 11 (Dec 5, 1905).
24 Id at 12.
25 See Act of June 29, 1906, An Act: To establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States, Pub L No 59-338, 34 Stat 596.
27 8 USC § 1421(b) (1988).
29 8 USC § 1446(b) (1988).
examiner would submit a recommendation to the naturalization court to grant, deny, or continue the petition.\textsuperscript{30} In practice, INS examiners encouraged many petitioners whose applications were opposed by the agency to withdraw their applications.\textsuperscript{31} Once a court received a recommendation to approve or deny an application, it would generally follow the recommendation.\textsuperscript{32} The statute provided several circumstances under which a hearing would be required in open court: if no preliminary examination had been completed, if the petitioner demanded examination of herself under oath, or if the court, in its discretion, concluded that it was appropriate to initiate an examination under oath.\textsuperscript{33}

The pre-1990 act provisions contemplated a role for the court that fit neither the model of judicial review of agency action nor a full civil litigation model. The agency’s initial examination permitted the court to make a decision on naturalization without any further factual inquiry. The statute also guaranteed the applicant the right to a court hearing where the applicant could be examined by the judge under oath instead of the court relying solely on the report of the preliminary examiner. Nothing in the statute indicated that the court hearing would require a separate pre-hearing investigation of the qualifications of the applicant.

In the 1980s, delay and inaccessibility were the primary concerns voiced about the system for adjudicating naturalizations.\textsuperscript{34} The House Report for a bill that became the template for the 1990 reforms reported: “Fully qualified applicants must wait two years in some places to be sworn in as a U.S. citizen. This, of course, affects employment opportunities, travel plans, and conferring of immigration benefits on relatives, and most impor-

\textsuperscript{30} 8 USC § 1446(c) (1988).

\textsuperscript{31} See DeSipio and Pachon, 12 Chicano-Latino L Rev at 58–59 (cited in note 4) (reporting that inclusion of withdrawn cases in data from 1988 would increase denial rates from 2 percent to 25 percent).


\textsuperscript{33} 8 USC § 1447 (1988). Subsection (a) of the pre-1990 version of 8 USC § 1447 provided that an applicant would testify under oath in open court. Subsection (b), however, provided that this requirement would not apply when there had been a preliminary examination by the agency. In cases where there had been a preliminary examination, subsection (b) provided that “the court may, in its discretion, and shall, upon demand of the petitioner, require the examination of the petitioner under oath before the court and in the presence of the court.”

\textsuperscript{34} A major study of the American naturalization program concluded that it was filled with roadblocks that undermined the interest in assuring that eligible people were naturalized. See North, 21 Intl Migration Rev at 325–26 (cited in note 4).
tantly, deprives these individuals of their right to vote.” Only the courts could award naturalization, and the courts were backlogged. The House also expressed concern that the delayed process was a “quagmire” that discouraged immigrants from naturalizing and deprived the country of “a traditional source of productive and informed citizenry.”

The House Report also expressed concern with cases that experienced unusual delays. The Report stated that some cases were “placed on the ‘backburner’ due to indecisiveness on the part of an examiner.” In proposing the judicial review provisions subsequently enacted in 1990, the House Report explained that “citizenship is the most valued governmental benefit of this land and applicants should receive full recourse to the Judiciary when the request for that benefit is denied.” Thus, Congress sought to achieve two major goals: to “streamline” the process of acquiring citizenship so as to solve the problem of unnecessary delays, and to preserve full recourse to the courts.

B. Administrative and Judicial Roles under the 1990 Act

The Immigration Act of 1990, for the first time, provided an executive agency with the formal power to award citizenship. At the same time, it maintained robust provisions for court intervention both to review denials and to assure that applicants obtain a speedy evaluation of their claim to citizenship.

Under the 1990 Act, the basic process for adjudicating naturalization cases removes the courts from any involvement in cases in which the agency is prepared to award citizenship. Thus there is no advance notice to the courts of an application and citizenship can be granted by the executive branch following an examination by an agency adjudicator. The design of the administrative adjudication provisions basically substitutes executive authority to make a determination where the prior statute required the final recommendation to be sent to the court.

36 Id.
37 Id at 12.
38 Id at 14.
40 Id at 14.
41 INA § 335(d), 8 USC § 1446(d).
42 Id (providing that the “employee designated” shall determine whether to grant or deny application for citizenship).
43 See 8 USC § 1446.
When the initial examiner denies an application, however, the 1990 Act replaces the prior system of a direct review in court with an administrative hearing system. Under the 1990 Act, the denied applicant may request a “hearing” before an immigration officer. By regulation, however, the actual process that is provided is far less than the term “hearing” suggests. The regulation states that the hearing officer need only be of the same grade as the one who made the original decision. Although the statute refers to the appeal process as a “hearing,” the regulation provides that the reviewing officer may choose to conduct an informal review process or a de novo hearing. The officer may review “any administrative record which was created as part of the examination procedures” and may review any other “Service files and reports.” Thus, the regulations allow for a highly informal type of review. The agency appears to have continued to think of its adjudicatory role in a way that matched its role before the statutory change, namely, to conduct a preliminary investigation rather than to act as an adjudicator. Although Congress provided the agency with the authority to provide a hearing mechanism at the agency level, it never created a mechanism that could play the role that had previously been performed by the courts.

After the applicant has exhausted the administrative process, the 1990 Act provides that the applicant may seek review of the denial of the naturalization petition in district court. It further states that this 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.”

The 1990 Act also enacted a special judicial review provision to address cases that languish at the agency. Under this provision, an applicant is able to go to district court if the immigration agency fails to issue a decision within 120 days of the initial examination. When a petition is filed on the basis of agency delay,

44 INA § 336, 8 USC § 1447.
45 8 USC § 1447(d).
47 Id.
48 Id.
49 8 USC § 1421(c).
50 Id.
51 8 USC § 1447(b).
“Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter.”52

Although worded slightly differently from the pre-1990 statute, the 1990 Act’s provision for the substantive judicial role contains the same basic structure as prior law. Unlike typical agency review statutes, the 1990 Act contemplates a role for the court in conducting factual hearings. But it does not require a factual hearing. The added delay provision contemplates a role for the court either as an adjudicator of fact or as a supervisory body that can instruct the agency to issue a decision on the merits. While maintaining the same basic structure of judicial intervention, Congress created an agency empowered to resolve naturalization cases. That change has led to considerable confusion in sorting through the proper role for the courts in naturalization cases.

II. THE FAILED PROMISE OF EFFECTIVE JUDICIAL REVIEW OF NATURALIZATION

In 1990, Congress clearly stated its intent to ensure robust judicial oversight of naturalization for those who are wrongly denied, or who suffer delay in, the adjudication of their applications. The system Congress created has achieved only partial success. By providing a route to court, the system has highlighted many important problems with administrative naturalization decisions and has precipitated some changes in agency practices. An initial examination of the cases that are emerging in the courts53 suggests that there are problems both in the design of the provisions for judicial intervention and in the implementation of those provisions by the courts.

52 Id.

53 Data from the Office of Immigration Litigation at the Justice Department indicate that while the caseload of naturalization cases is growing, it remains small. In 1997, 83 cases were filed in federal district courts concerning delays or denials of naturalization applications. In 2005, that number increased to 398 cases. And a little more than half way through 2006, the number reached 586 cases. E-mail from David McConnell, Office of Immigration Litigation (July 27, 2006). These higher numbers reflect nationwide backlogs in naturalization, frustration with those backlogs, and a campaign by lawyers to take backlogged cases to court. See Sarah Karush, Speeding Up Naturalization: US to Change Procedures amid Litigation Threat, Boston Globe (April 26, 2006), available at <http://www.boston.com/news/nation/articles/2006/04/26/speeding_up_naturalization/> (last visited Apr 14, 2007) (noting that an Arab-American rights group was threatening mass court filings due to delays in the administrative naturalization process).
A. Cases Involving Delayed Adjudications

The House Report leading to the 1990 Act explained that the purpose for creating jurisdiction over cases delayed at the agency level was to prevent cases from languishing on the back burner. By allowing for access to courts after 120 days, the Act provided a prompt route to a judicial forum for resolving the naturalization question.

The design adopted by Congress, however, only provides an express remedy for delay at one stage of the process: the time between an initial examination and a decision. There is no similar provision when the examination itself has been delayed. Similarly, there is no express statutory provision to go to court if the agency’s appeal process is delayed after the agency renders an initial decision. Delay is only expressly recognized as a basis for immediate judicial access when that delay has occurred at one particular stage of the process.

The problem of delays, and of delays operating as de facto denials, is present at all stages of the administrative process. If the agency is only held responsible for delays that post-date the examination, it can shift the delay to before the examination. Indeed, the Department of Homeland Security changed its policy under pressure of lawsuits and now conducts interviews only after background checks.54 This kind of manipulation obviously undermines Congress’s concern with assuring timely adjudications. A more effective provision on judicial review in cases of delays would be worded to accommodate these differing situations in which the delay of the agency has become unreasonable.

But even where Congress expressly provided a mechanism for judicial intervention, courts have been confused about the role they should play. With respect to cases involving delays, some courts see their role as adjudicating the cases due to the agency’s delay.55 Others simply remand the case for a speedy adjudication.56 The confusion about how to handle the interrela-

54 Juliana Barbassa, Immigrants Sue Over Delays in Processing Citizenship Applications, AP Alert - Business (Feb 9, 2007) (“Immigration officials now conduct name checks before interviews, following the letter of the law but violating applicants’ due process rights, said Sin Yen Ling staff attorney with the Asian Law Caucus.”).
56 See, for example, Daami v Gonzales, 2006 WL 1457862, *6 (D NJ); Eng v Chertoff, 2006 WL 2442894, *1 (S D Tex); Khelifa v Chertoff, 433 F Supp 2d 836, 842–45 (E D Mich 2006); Martinez v Gonzales, 2006 WL 3477985, *3 (E D Va) (finding the court lacked
tionship of administrative and judicial systems is illustrated by
the dispositions of federal court delay cases when the agency
subsequently issues an administrative denial. Some courts have
concluded that the petitioner must exhaust the administrative
process and have dismissed the delay case as moot.\textsuperscript{57} Other
courts have exercised the authority to decide the case without
any further administrative process.\textsuperscript{58} Each approach reflects a
fundamentally different view of the relationship between the
agency and court processes in the area of naturalization.

A presumption of remand in delay cases undermines the
statutory scheme of ready access to the courts in those cases.
Because the naturalization statute contemplates court adjudication
of the factual issues in a naturalization case, there is no reason
to suppose that an agency decision must precede a court adjudication. Once the agency has failed to act in a timely manner, the
statute contemplates the court as an alternative venue for a
speedy determination of citizenship. In addition, if the only remedy
for delay is a remand for a decision, the agency has little incentive to comply with the statutory time limit. Noncompliance
simply leads to more time to make a decision. The issue here is
how courts understand and use their authority, not how the
statute is structured. Although the 1990 statute, as in effect today,
states that a court “may either determine the matter or re-
mand the matter,”\textsuperscript{59} some courts have turned to classic administra-
tive law cases for guidance. These cases are based on agency
processes in which there are developed hearings on the record
and the role of the courts is simply to review the agency’s deci-
sions.\textsuperscript{60} The courts presume that the same logic applies under the

\textsuperscript{57} See \textit{Etape v Chertoff}, 446 F Supp 2d 408, 417–18 (D Md 2006).
\textsuperscript{58} See \textit{United States v Hovsepian}, 359 F3d 1144, 1159–64 (9th Cir 2004); \textit{Meyersik},
\textsuperscript{59} 8 USC § 1447(b).
\textsuperscript{60} See, for example, \textit{Khelifa}, 433 F Supp 2d at 844 (stating that the agency has “the experience and the expertise” to assess the meaning of findings in a background check “while the Court has neither”); \textit{Stepchuk}, 2006 WL 3361776 at *5 (citing \textit{INS v Ventura},
537 US 12 (2002), for the proposition that “the agency can bring its expertise to bear upon
the matter; it can evaluate the evidence; it can make an initial determination; and in
doing so, it can, through informed discussion and analysis, help a court later determine
whether its decision exceeds the leeway that the law allows.”).
naturalization statute. The naturalization statute, however, contemplates a very different kind of judicial role in which the courts have de novo authority over naturalizations. Thus, while remand is permitted, it is hardly required, and it may in fact undermine the fundamental purpose of ensuring that naturalization is not unduly delayed.

Despite these limitations, the delay provisions have served an important role in providing judicial oversight of delayed naturalization applications. Some courts refuse to agree to remands and have proceeded, as the statute contemplates, to adjudicate the cases. In addition, courts often retain jurisdiction and monitor what happens at the agency in cases that are remanded. This oversight can serve to speed agency action. In addition, the delay provision has provided a basis for systemic litigation in situations where there have been widespread delays, and it has heightened public awareness of the problem of delayed adjudications.

B. Cases Involving Standards and Procedures for Court Adjudications on the Merits

Congress also expressed concern in 1990 about preserving “full recourse to the Judiciary” when citizenship is denied. Congress did not, however, elaborate on how that full recourse was meant to work. Some courts have responded by reviewing naturalization cases on the basis of the agency record or following a hearing in court. Other courts take the view that full-scale civil discovery is appropriate before the court can make a decision on naturalization. As with the delay cases, these approaches re-

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61 See, for example, Said, 2006 WL 2711765, *4 (remanding and requiring a status report within four weeks); Joint Status Report, Said v Gonzales, Civil Action No 06-986 (granting citizenship to petitioners).

62 For class litigation, see, for example, Memorandum and Order, Yakubova v Chertoft, Civil Action No 06-3203, *8–9 (E D NY filed Nov 2, 2006) (denying dismissal of preliminary injunction and reporting expedited processes for class members). For public attention, see, for example, Kathy Kiely, For Legal Immigrants, Wait Can Be Daunting: The Road to Citizenship Can Take a Generation, USA Today 1A (May 16, 2006) (noting that the American-Arab Anti-Discrimination Committee has gone to federal court in 13 states over “undue delays in processing citizenship applications”).


64 See, for example, Butt v United States Citizenship and Immigration Service, 2007 WL 446922 (D NJ) (dismissing petition for review on the basis of the agency record).

65 See, for example, Epie v Caterisano, 402 F Supp 2d 589, 591 (D Md 2005) (expressing view that case cannot be remanded and scheduling a hearing).

66 See, for example, Order Permitting Discovery, Zaranska v DHS, Civil Action No 04-169 (E D NY Dec 8, 2005) (permitting discovery); Hoosepian, 359 F3d at 1162–64 (dis-
reflect fundamentally different views about the institutional role of the courts.

A central institutional issue is the relationship between the agency’s fact development process and any additional fact development in the courts. In some courts, the government argues that the court case is a new proceeding in which the administrative record is irrelevant and the court is obliged to permit discovery. In districts that accept these arguments, defending a deposition of a naturalization petitioner has become a standard part of the cost of filing a judicial petition for naturalization. One attorney estimates that as a result of discovery demands, he would charge at least $10,000 to file a naturalization case in the Eastern District of New York.

When courts permit full discovery in naturalization petitions, they undermine full recourse to the courts in two ways. First, they make the recourse too expensive. The basic fact-gathering tools of civil litigation—interrogatories, document demands, and depositions—cost money. If discovery is routinely available to the government in naturalization cases, the petitioners must be prepared to pay for legal representation to answer these discovery requests. Second, courts that authorize full discovery permit a double standard for naturalization investigations. Those who have been denied are subjected to a more extensive and intrusive form of investigation, whether or not that denial was improper on the basis of the record developed at the agency. This scenario is particularly problematic since the requirements for citizenship have long included expansively worded standards such as “good moral character.” Given the broad-based nature of civil discovery in which a party may request anything “reasonably calculated to lead to the discovery of admissible evidence,” depositions pose the danger of becoming full interrogations into petitioners’ lives.

Although an inquiry into qualifications for naturalization is appropriate and has been authorized since 1906, there is no clear

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67 See, for example, Order Permitting Discovery, Zaranska, Civil Action No 04-169; Chan v Gantner, 1:05-CV-04378 (E D NY May 5, 2006) (permitting discovery).
68 Affidavit of Matthew Guadagno, dated Feb 9, 2006, attached to Letter of Rachel S. Coen and Stephanie Welch, dated Feb. 10, 2006, Chan v Gantner, 1:05-CV-04378. The author served as the supervising attorney for the petitioner in Chan.
69 Id.
70 FRCP 26(a)(5).
71 INA § 316(a)(3), 8 USC § 1427(a)(3).
72 FRCP 26(b)(1).
basis for more intrusive investigation of those individuals who take their cases to court than for those whose cases are adjudicated at the agency. Thus, to the extent factual development is needed, it ought to be part of the agency record and should not require further development in court. Courts that nonetheless permit such discovery appear to presume that a naturalization petition is simply another civil case subject to the general rules under the Federal Rules of Civil Procedure.\footnote{The Federal Rules contain a provision that states that they apply to citizenship “to the extent that the practice in such proceedings is not set out in the statutes of the United States.” FRCP 81(a). The procedure for naturalization is set out in 8 USC §§ 1421(c) and 1447(b), which provide for a decision on the record or a hearing but not for a new round of investigation.}

Ironically, courts that accede to government requests to use a civil litigation model in cases that come to them on the merits are adopting the opposite approach from courts that accept the government’s arguments for remand in delay cases. In these remand cases, courts that insist on remand accept a model where the agency must make a decision first so that the court can review the decision. If there is reason to have the agency act first, why would the court assume that the record developed at the agency should be set aside and a new record developed in court? Furthermore, why would the record need to be augmented by testimony at a court hearing? Any such augmentation would suggest that there is an independent role for the courts in adjudicating naturalization and there would be no need for the agency to act first on a more limited record.

III. UNDERSTANDING THE JUDICIAL ROLE IN NATURALIZATION CASES

At the root of the courts’ confusion over naturalization cases is an effort to force these cases into the mold of either standard review of agency action or into general models of civil litigation. Neither of these models fits the statutory scheme Congress enacted in 1990. The text of the 1990 Act contemplates a mixed role for the court in which it can make de novo findings on the record or conduct a hearing at the request of the petitioner in cases heard on the merits, and in which the court has the power to engage in substantive adjudication of a naturalization application when the agency has not issued a timely decision. In addition, neither the civil litigation nor the administrative review models are well-suited to achieve the statute’s legitimate goal: an expe-
ditious and nondiscriminatory system for assuring that petitioners who are eligible for citizenship can actually become citizens. Yet the models are so familiar that some judges and legislators operate on the assumption that these cases must conform to one of those models.

A. Five Goals

An adjudicatory system for naturalization cases should accommodate five goals. These goals are rooted in the importance of citizenship, its role in determining access to the franchise, and the realities of the size of the immigrant population that is eligible to naturalize. First, the system should protect the interests of applicants and provide safeguards against arbitrary and discriminatory denials of citizenship. Equal treatment norms take on special significance with citizenship. Although the history of United States citizenship laws is replete with de jure discrimination, the statute now expressly repudiates discriminatory treatment. As Justice Brandeis stated, those who meet the criteria for citizenship are entitled to become citizens. Thus, a system that does a reasonably good job may not be good enough. Instead, the system must provide adequate checks to protect the rights of those who are eligible for citizenship.

Second, the system should avoid politicization of access to the franchise. Citizenship allows for voting, and voting is the
quintessential political right. A system that allows access to the franchise to be politicized threatens to undermine basic fairness in our political institutions. The scandals of the turn of the twentieth century highlight the dangers of a system that too easily allows political interests to facilitate naturalizing ineligible immigrants.78 Similarly, recent delays in granting citizenship suggest that a party that does not expect to do as well with recent immigrants could take advantage of its power over the citizenship process to delay applications.79 Judicial review that provides robust access to the judiciary for those denied citizenship serves to check such politicization.

Third, the system should be designed to accommodate the large numbers of persons who are eligible to seek citizenship. Total petitions for citizenship are running at a rate of over half a million a year.80 Such a large system requires an institution that is capable of adjudicating large numbers of cases.

Fourth, the system should provide methods of oversight that provide feedback for adjudicators who make erroneous decisions or apply improper standards. Because adjudicators must handle large numbers of cases, it is important that they know when they are applying the wrong standards. Feedback, from superiors or from courts, can assure that the next application is adjudicated under the correct standards.

Finally, the system should be accessible. Judicial review that imposes high costs on those who seek review threatens to operate as a poll tax. Those who can afford the tax will have access to the franchise. Those who do not will be left with erroneous denials of their naturalization applications.

B. Comparing Models

Viewed against these goals, the current statutory scheme compares favorably against the pure administrative review and civil litigation models. Neither of these conventional models ad-

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78 See DeSipio and Pachon, 12 Chicano-Latino L Rev at 55–56 (cited in note 4) (describing Tammany Hall bosses arranging for naturalization of Irish immigrants in return for their political support).
79 Kathy Kiely, *Immigration Bills Curb Court Reviews*, USA Today 1A (June 1, 2006) (quoting attorney Robert Gibbs, “Should you have a political branch of the government deciding who gets to vote?”).
dresses the multiplicity of appropriate goals for a system that governs access to citizenship.

1. Administrative review model.

A pure administrative review model meets the concern with the size of the system. Agencies are well positioned to adjudicate large numbers of cases and achieve a form of “bureaucratic justice.” Agency adjudication can also be accessible, although recent increases in the fees for citizenship applications threaten to make the existing agency process less so. An agency-based system, however, fails on other counts. It is at serious risk of being influenced by politics if the incumbent administration is interested in hindering access to citizenship. By delaying naturalization, the executive can prevent future citizens from obtaining the franchise and can thereby prevent opposing votes. Even the appearance of such manipulation of the right to vote can be poisonous.

An administrative review model, with typical standards of deferential judicial review, also fails to serve as an effective check on discriminatory denials of citizenship. A line adjudicator’s assessment of “good moral character” could easily be influenced by discriminatory attitudes. Deferential review makes it difficult to unearth such attitudes and assess their role in factual determinations. A de novo assessment of the individual applicant in court offers a chance at an independent evaluation.

Even if there were no threat of bias, agency review models for important entitlements depend on systems of agency adjudication that are more formal and robust than those currently used in naturalization petitions. The current system for agency hearings allows an officer of equal grade to review the initial decision and does not even require that officer to make a decision on the record. To move to the kind of system envisioned by the 2006

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82 Consider Spencer S. Hsu and Darryl Fears, Immigration Application Fees to Rise by 80 Percent, Wash Post A2 (Jan 31, 2007).

83 For example, the system for evaluation of eligibility for Social Security benefits includes a hearing before an administrative judge who keeps a formal record of the proceedings. 20 CFR §§ 404.944–404.953 (2006). There are no comparable administrative hearings in naturalization cases. 8 CFR § 336.2 (2006) (authorizing a “less formal review procedure” than a hearing and providing for review by an officer of the same grade as the initial examining officer).
Senate bill,\textsuperscript{84} in which agency naturalization decisions are reviewed on the record established by the agency, would, at a minimum, require development of more complete agency records that can serve as the sole basis for evaluating eligibility for citizenship.

For an administrative review system to work properly, and provide feedback to agency adjudicators on erroneous decisions, the agency must develop and produce written records of its findings and the facts on which those findings are based. The agency must then have a way for adjudicators to learn when they have misapplied standards. This cannot happen unless agency adjudicators learn about judicial decisions on the proper meaning and application of the rules on eligibility.

Finally, a purely administrative model only offers a check on erroneous agency denials and does not address the problem of delays. As the delay cases illustrate, delay can be equivalent to denial. If we view citizenship as a critical right, and those who apply as "Americans in Waiting,"\textsuperscript{85} an administrative model cannot provide adequate protection for the timely adjudication of the rights of those who are eligible.

2. The civil litigation model.

A civil litigation model raises different issues. It provides a layer of protection against the workings of politics. If the court is the fact finder, it should be relatively free from the particular political calculations that would counsel against naturalizing a particular demographic group at a particular time. In addition, the court can provide an independent assessment of the individual's qualifications for citizenship and therefore offers the hope of a substantial check on wrongful denials of citizenship.

The use of civil discovery in the civil litigation model, however, undermines much of the promise of the courts' independent role. At the court stage, those who were denied by the agency are subject to a new round of investigation through the robust tools of civil discovery. No matter how well the court oversees the discovery process, discovery will be expensive and will threaten to intrude into all aspects of an individual's life. This intrusive discovery becomes the price of court review and therefore can serve

\textsuperscript{84} S 2611 (cited in note 16).

\textsuperscript{85} Consider Motomura, Americans in Waiting (cited in note 4).
to discourage persons who are eligible for citizenship and who were wrongly denied by the agency.

A civil litigation model is also not well suited to provide oversight of agency decisions. In the civil litigation model, the court issues a decision on a different record from the agency. As a result, its decision does not serve as an assessment of the correctness of the agency decision. Nor does the model serve to assess the believability of the petitioner after testimony in open court. Instead, the civil litigation model creates a wholly new record that has little to do with what happened at the agency and is unlikely to influence how the agency decides subsequent cases. By allowing the agency to conduct discovery and come up with new reasons for denying naturalization, the civil litigation model has the perverse effect of insulating agency decisions from review and permitting greater and potentially discriminatory scrutiny of those whose cases were wrongfully denied by the agency.

Similarly, the civil litigation model is generally not well suited to adjudicate large numbers of cases. Civil discovery is cumbersome, and the federal courts lack the capacity to manage large numbers of cases undergoing discovery. Indeed, the sheer expense of civil discovery has probably served to keep the number of cases down, thereby allowing those courts that use a civil discovery model to maintain that model and not be overwhelmed by the task of overseeing discovery in substantial numbers of cases. But the price of an effectively closed courthouse door for denied applicants is hardly desirable.

86 One exception is when civil litigation is used to handle class litigation regarding the agency’s construction of the standards for citizenship. For instance, class litigation in Seattle challenged the overly harsh application of the good moral character standard. One of the named plaintiffs in that case, Kichul Lee, had been found to lack good moral character due to a single fine for harvesting too many oysters. Plaintiff’s Motion for Preliminary Injunction, Lee v Gonzalez, Civil Action No C04-449-RSL, *7 (W D Wash filed July 1, 2004). In the Seattle District alone, this litigation led to the identification of 1,213 persons who had been denied citizenship on good moral character requirement. Declaration of Michael P. Conricode, Lee v Gonzalez, Civil Action No C04-449-RSL, *7 (W D Wash filed Jan 27, 2006); 520 had subsequently reapplied and been granted citizenship. Id. Another 205 faced statutory bars to naturalization. Id. But at least 403 had been denied citizenship and had given up on their claims. Id. Through the class litigation, these individuals were provided an opportunity to have their cases reopened and readjudicated. Settlement Agreement, Lee v Gonzalez, Civil Action No C04-449-RSL (W D Wash filed Nov 2, 2005), available at <http://www.ghp-law.net/Lee-vs-Gonzales.html> (last visited Apr 14, 2007). Under the settlement, the agency agreed to examine both positive and negative factors in determining good moral character and not to require perfect character—a standard that was well-established under case law. The Seattle case’s use of class litigation is unusual.
3. The hybrid model.

The current statute can be read as rejecting both the agency review model and the civil litigation model, instead constructing a hybrid model that seeks to effectuate the many interests that naturalization poses. Under this hybrid model, the court sits first as a reviewer of an agency record. The court presides over a streamlined factual hearing only when the petitioner so requests or when the case has been delayed.

At the first stage, where the court reviews the record below on a de novo basis, the court can exercise the advantages of the agency review model. It can provide feedback by ruling on the basis of the record created at the agency. In addition, the court is relatively accessible. Because the court is looking at the record, there is no need for discovery and a disappointed citizenship applicant could plausibly go to court on a pro se basis.

At the second stage, the court may conclude that it is unable to evaluate some factor related to citizenship because, for example, it depends on an assessment of the credibility of the applicant. There may be a question about the degree of responsibility an applicant takes for some past act and whether that act provides ground for questioning the applicant’s “good moral character.” To stick with the agency model at that stage would compromise the court’s role in assuring that the denial was appropriate and was not made on discriminatory grounds or influenced by the political agenda of one of the political branches. The agency model would also constitute a major retreat in the historical role of courts as the final arbiters of whether an individual meets the standards for citizenship.

During the second stage, where the errors are not apparent on the record and a hearing is necessary, a streamlined hearing can serve to contain the accessibility problems that are posed by full-scale litigation. A streamlined hearing does not necessitate the expense of civil discovery. Although a streamlined hearing is more complex than a review of a record, a hearing on the issues that cannot be resolved on the basis of the record should be short and relatively accessible. There should be no need for further factual investigation, since the agency will have already had an opportunity to conduct an investigation. The hearing provides the applicant with the chance to have a judge, rather than a low level agency official, hear and evaluate the applicant’s testimony. Given the great importance of citizenship and the serious consequences of denial, this system provides crucial protection to those
who believe they have been unfairly denied the right to have rights.

A hybrid model matches the way that the Immigration and Nationality Act treats the cases of persons charged with removal who claim to be citizens. In the judicial review scheme for removal orders, those who claim to be citizens and who raise genuine factual questions about their citizenship are provided with an extra layer of protection. They are allowed by statute to have their factual claims sent to a district court to be evaluated de novo.\footnote{INA § 242(b)(5), codified at 8 USC § 1252(b)(5).} Those who are lawful permanent residents, who meet the criteria for citizenship, have a similar claim to be citizens but for the failure to adjudicate their cases properly. As putative citizens, they look to the courts, as they have since 1790, to ensure that their citizenship claims are properly adjudicated.

Properly applied, the hybrid model could lead to a greater number of cases in the district courts than we see today, and therefore could plausibly raise questions of the capacity of the courts. At this stage, however, the number of cases in the district courts is extremely small, especially in light of the number of claims being adjudicated at the agency. Applicants have incentives to file new applications rather than pursue appeals since even with increased fees, new applications may be less expensive than appeals. If capacity were to become a problem, a variety of solutions could address such issues short of effectively closing off access to the courts.\footnote{If there were capacity problems, Congress could authorize magistrate judges to hear citizenship cases. It could also authorize state courts to hear these cases. In some ways, state courts could be an ideal venue for evaluating whether an individual meets such standards as showing good moral character, which are supposed to be based on the standards of the community. Consider \textit{Posusta v United States}, 285 F2d 533, 535 (2d Cir 1961) (noting that good moral character “is a test incapable of exact definition; the best we can do is to improvise the response that the ‘ordinary’ man or woman would make, if the question were put whether the conduct was consistent with a ‘good moral character.’”).} These speculative possibilities provide no reason to depart from the hybrid model, which serves the objectives of providing rigorous protection of those who have met the requirements for citizenship.

**Conclusion**

As courts and Congress struggle to fit naturalization cases into pre-existing models of civil litigation or administrative review, they would do well to reconsider the hybrid model that Congress set forth in the naturalization statute. This model com-
ports with the history and complexity of naturalization cases and the courts’ special role in protecting access to full membership in our society. Before Congress intervenes and alters this system, it should be clear that it understands how the system works, how the system protects against unfair denials, and how the system wisely ensures meaningful judicial oversight.