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## Give and Take? Procedure, Practicalities, and Policy in Naturalization Appellate Jurisdiction

“Naturalization is an act of great personal consequence to American Immigrants, involving major reorganizations in their sense of identity and offering a new beginning for many. Accordingly, the Committee emphasizes that the *paramount consideration* of this legislation and its implementation should be *the applicants*.”<sup>1</sup>

These words, from a 1989 House Report on the Immigration and Nationality Act, provide a clear and significant reminder of the import of naturalization—a matter not simply of being a resident of the United States of America, but of *becoming* an American citizen. They remind us of what is at stake in conversations about naturalization—the identities, relationships, and aspirations of individuals who have relocated their lives and reoriented their very selves to become American.

The road to citizenship is complex and exacting,<sup>2</sup> and Congress has shown an intent to allow federal courts to aid in this valuable process. Nonetheless, there exists a deep circuit split over immigration proceedings and federal subject-matter jurisdiction. Specifically, the divide centers upon the effect of a United States Citizenship and Immigration Services (Immigration Services) request to a district court to defer to pending removal proceedings by dismissing an alien’s pending naturalization appeal.

Circuits have responded in four different ways, and in *Klene v. Napolitano* the Seventh Circuit issued the most recent decision on the issue.<sup>3</sup> The *Klene* court briefly discussed each potential approach before adopting the Third Circuit’s stance that no such dismissal is required because “subject-matter jurisdiction continues and . . . a remedy is possible—a declaratory judgment of entitlement to citizenship.”<sup>4</sup>

Competing with this declaratory-judgment approach are the approaches that other circuits have adopted. These alternative views include the mootness-doctrine approach of the Tenth Circuit<sup>5</sup>; the lack-of-jurisdiction

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1. Zaranska v. U.S. Dep’t of Homeland Sec., 400 F. Supp. 2d 500, 510-11 (E.D.N.Y. 2005) (emphasis added) (quoting H.R. REP. NO. 101-187, at 11 (1989)).

2. 135 CONG. REC. 16996 (1989) (statement of Rep. Brooks) (“Once applicants have made their way through the mysterious Immigration and Naturalization Service procedure, their path to citizenship is delayed once again. . . . I urge my fellow [m]embers to join me in making naturalization an enriching rather than discouraging experience . . . .”)

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

4. *Id.* at 668.

5. Awe v. Napolitano, 494 F. App’x 860 (10th Cir. 2012).

approach of the Fourth and Fifth Circuits<sup>6</sup>; and the failure-of-relief approach of the Second, Sixth, and Ninth Circuits.<sup>7</sup>

Because Congress exhibited an intent for the judiciary to hold review power over naturalization applications, and because the preservation of this review power is consistent with a healthy immigration system, a proper interpretation of 8 U.S.C. § 1421 will grant courts the jurisdiction to hear naturalization appeals under a de novo standard of review.

### *I. Background and History: Shifting Structures Cause Confusion*

Relatively recent developments in immigration law have given rise to the interpretive question at issue in *Klene* and related cases. The structure of U.S. immigration agencies and processes has seen significant change within the last seventy years, and discussions of the system must acknowledge its complex and multifaceted nature. There is no single federal agency or department governing immigration, but rather, the Department of Homeland Security (Homeland Security), the Department of Justice, the Department of State, the Department of Labor, and the Department of Health and Human Services all play a part in defining and maintaining the field.<sup>8</sup>

Homeland Security involves three separate agencies in immigration matters: Immigration Services, U.S. Customs and Border Protection, and U.S. Immigration and Customs Enforcement.<sup>9</sup> At the most basic level, Customs and Border Protection regulate traffic into and out of the United States, while Immigration and Customs Enforcement enforces immigration-related laws within the country's border.<sup>10</sup> Immigration Services, on the other hand, is the Homeland Security agency that governs benefits, status, and naturalization<sup>11</sup> and is, therefore, the agency that oversees the type of proceedings involved in *Klene* and its sister cases.

Immigration Services is one of two Homeland Security agencies that entirely replaced the Immigration and Naturalization Service (INS) in

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6. *Barnes v. Holder*, 625 F.3d 801 (4th Cir. 2010); *Saba-Bakare v. Chertoff*, 507 F.3d 337 (5th Cir. 2007).

7. *Ajlani v. Chertoff*, 545 F.3d 229 (2d Cir. 2008); *De Lara Bellajaro v. Schiltgen*, 378 F.3d 1042 (9th Cir. 2004); *Zayed v. United States*, 368 F.3d 902 (6th Cir. 2004).

8. Janet B. Beck, *Immigration Law: Myths and Realities*, HOUS. LAW., Mar.-Apr. 2009, at 8, 9.

9. *Id.*

10. *Id.*

11. *Id.*

2003.<sup>12</sup> The 2003 restructuring is significant for both theoretical and practical reasons. First, following the change, “backlogs and processing delays have reached . . . ‘unprecedented levels,’” causing significant adverse effects for immigrants, businesses, and families.<sup>13</sup> This was a matter of concern in *Klene* and similar cases where agency action could keep potential plaintiffs in a state of unreviewable limbo regarding their status.<sup>14</sup> Second, some advocates have identified a “culture of no” within Immigration Services following the restructuring.<sup>15</sup> Third, the Title VIII statutes in question, along with the court cases interpreting these statutes, refer to the Attorney General as the head of the naturalizing and removing agency.<sup>16</sup> Technically, such cases should now be addressed to the Secretary of Homeland Security.<sup>17</sup> Nonetheless, most texts discussing the issue—including recent case law—have continued the convention of referring to the attorney general to indicate Immigration Services as an agency and party to proceedings.<sup>18</sup> This Comment will follow the same convention.

*A. Relevant Statutes Supply Granting and Limiting Language*

*Klene* and its counterpart cases wrestle with the relationship between 8 U.S.C. §§ 1421(c) and 1429 as amended in 1990.<sup>19</sup> Both statutes speak to the review of naturalization applications, and their amended language has left their interaction in a state of confusion.<sup>20</sup>

Section 1421(c) (Granting Statute) grants the right of judicial review to individuals whose naturalization applications have been denied by Immigration Services, stating that these individuals:

[M]ay 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

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12. Peter M. Isbister, Current Developments, *Developments in the Executive Branch*, 18 GEO. IMMIGR. L.J. 595, 595 (2004).

13. *Id.*

14. *See, e.g.*, *Gonzalez v. Sec’y of Dep’t of Homeland Sec.*, 678 F.3d 254, 260-61 (3d Cir. 2012).

15. Isbister, *supra* note 12, at 596.

16. *See Ajlani v. Chertoff*, 545 F.3d 229, 231 n.2 (2d Cir. 2008).

17. *Id.*

18. *See, e.g., id.*

19. *See, e.g., Klene v. Napolitano*, 697 F.3d 666, 668-69 (7th Cir. 2012).

20. *Id.*

findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application.<sup>21</sup>

In short, through this Granting Section Congress gave the federal court system valid subject-matter jurisdiction over final Immigration Services denials of immigrants' naturalization applications.<sup>22</sup>

The second relevant statute, § 1429 (Limiting Section) prevents the attorney general from deciding a naturalization application while a removal proceeding is ongoing: “[N]o application of naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding pursuant to a warrant of arrest . . . .”<sup>23</sup> Thus, the attorney general's power to review applications is expressly limited.

The language of these statute sections appeared in the 1990 update from the original Immigration and Naturalization Act of 1952, under which courts maintained sole authority over naturalization and the Attorney General held the authority to remove aliens.<sup>24</sup> As courts have explained, “[T]his bifurcation of authority sometimes led to ‘a race between the alien to gain citizenship and the Attorney General to deport him.’”<sup>25</sup> Consequently, Congress enacted the Limiting Section to address this situation by preventing action on a naturalization application until removal proceedings were closed, effectively prioritizing such removal proceedings.<sup>26</sup>

### *B. Courts Now Face an Interpretive Challenge*

The challenge facing courts attempting to navigate the interaction between the Granting and Limiting Sections results from ambiguities this amendment introduced. With the 1990 update, Congress intended to increase efficiency and decrease adverse district-court docket effects.<sup>27</sup> This

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21. 8 U.S.C. § 1421(c) (2012).

22. *See id.*

23. *Id.* § 1429.

24. Jessica Schneider, Comment, *Waiting to Be an American: The Courts' Proper Role and Function in Alleviating Naturalization Applicants' Woes in 8 U.S.C. § 1447(B) Actions*, 29 ST. LOUIS U. PUB. L. REV. 581, 584-86 (2010).

25. *Gonzalez v. Sec'y of Dep't of Homeland Sec.*, 678 F.3d 254, 257 (3d Cir. 2012) (citing *Shomberg v. United States*, 348 U.S. 540, 544 (1955)); *see also Ajlani v. Chertoff*, 545 F.3d 229, 235-36 (2d Cir. 2008).

26. *Ajlani*, 545 F.3d at 236.

27. *See*, 135 CONG. REC. 16995 (1989) (statement of Rep. Morrison) (“This legislation, while technical in nature, addresses a very substantial concern . . . and that is the problem of long backlogs in moving through the naturalization process . . . .”); *Etape v. Chertoff*, 497 F.3d 379, 386 (4th Cir. 2007).

modification granted the Attorney General sole authority over naturalizations and redefined the court's role in the process.<sup>28</sup> The amendment also allowed district courts de novo review power over naturalizations that the Attorney General denied or upon which the Attorney General failed to make a determination within 120 days.<sup>29</sup> To reflect these changes in the respective roles of the courts and the Attorney General, Congress amended the Limiting Section's language. Where the section previously stated that "no petition for naturalization shall be finally heard *by a naturalization court* if there is pending against the petitioner a deportation proceeding,"<sup>30</sup> it now states that "no application for naturalization shall be considered *by the Attorney General*" if removal proceedings are pending.<sup>31</sup>

These gradual adjustments to the naturalization and removal processes created uncertainty.

*1. Proper Application of 8 C.F.R. § 1239.2(f)*

One example of this uncertainty is the contention surrounding how 8 C.F.R. § 1239.2(f) (Declaration Regulation) ought to apply. That regulation, originally dating back to 2003, provides that even when removal proceedings are open, an immigration judge may terminate them—thereby allowing the immigrant to move to a final hearing on her naturalization application—when that immigrant "has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors."<sup>32</sup> In 1975, the Board of Immigration Appeals determined that for purposes of this regulation,<sup>33</sup> an immigrant could establish prima facie eligibility only by an "affirmative communication from [Homeland Security] or by a declaration of a court that the alien would be eligible for naturalization but for the pendency of the deportation proceedings or the existence of an outstanding order of deportation."<sup>34</sup> The Board of Immigration Appeals further determined that neither the Board itself nor immigration judges could make this affirmative declaration due to

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28. 8 U.S.C. § 1421(a) (2012).

29. *Id.* §§ 1421(c), 1447(b).

30. 8 U.S.C. § 1429 (1952) (emphasis added).

31. 8 U.S.C. § 1429 (2012) (emphasis added).

32. 8 C.F.R. § 1239.2(f) (2014).

33. Actually, a preceding, but nearly identical regulation. 8 C.F.R. § 242.7(a) (1975).

34. *Barnes v. Holder*, 625 F.3d 801, 804 (4th Cir. 2010) (quoting *In re Cruz*, 15 I. & N. Dec. 236, 237 (B.I.A. 1975)).

a lack of “authority with respect to the naturalization of aliens.”<sup>35</sup> This language suggests that the federal court’s naturalization authority may be the reason the Board of Immigration Appeals also considered the courts capable of offering affirmative declarations.

When Congress updated the statute and transferred the powers of naturalization to the attorney general in 1990, it became unclear whether courts retained the capacity to offer these affirmative declarations of prima facie eligibility for naturalization.<sup>36</sup> The Board of Immigration Appeals offered its stance in *In re Hidalgo* in 2007.<sup>37</sup> There the Board held that only Homeland Security could provide the type of affirmative communication required to terminate removal proceedings under the Declaration Regulation.<sup>38</sup>

Then in 2010, the Fourth Circuit joined the Board of Immigration Appeals’ *In re Hidalgo* determination that federal courts may no longer make affirmative declarations of eligibility for naturalization.<sup>39</sup> To reach this conclusion, the Fourth Circuit held that the Board had correctly interpreted and applied the Declaration Regulation against the updated statutory scheme and that the regulation was not inconsistent with the relevant statute, namely the Granting Section.<sup>40</sup>

This Board of Immigration Appeals’ interpretation has not gone without criticism, however. In contrast with the Fourth Circuit, the Third Circuit held in 2012 that federal courts are, indeed, competent to make declarations of prima facie eligibility for naturalization.<sup>41</sup> The Third Circuit concluded that allowing courts to issue declaratory judgments as valid relief in denied naturalization appeals was not only consistent with the Granting Section but was required by Congress’ clear intent to provide federal courts with exactly this type of de novo review power.<sup>42</sup> The question then becomes: was the Third Circuit—and the other circuit courts that have reached the same conclusion—correct in asserting that valid jurisdiction to hear naturalization appeals is, in fact, the proper interpretation of congressional intent as expressed in the Granting and Limiting Sections of Title VIII?

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35. *Id.*

36. *Id.* at 804-05.

37. 24 I. & N. Dec. 103 (B.I.A. 2007).

38. *Id.* at 106.

39. *Barnes*, 625 F.3d at 806-07.

40. *Id.*

41. *Gonzalez v. Sec’y of Dep’t of Homeland Sec.*, 678 F.3d 254, 260-61 (3d Cir. 2012).

42. *Id.*

## 2. *Proper Interpretation of the Granting and Limiting Sections*

In addition to the lingering questions about the judiciary's capacity to make prima facie declarations, ambiguity as to congressional priorities and the scope of valid jurisdiction continues to result from the statutory amendments.<sup>43</sup> These uncertainties have led to continuing difficulties surrounding the role of courts in situations involving both de novo review of denied naturalization and open removal proceedings,<sup>44</sup> and it is on these ambiguities that this Comment will focus.

Specifically, courts addressing the issue have asked the following: (1) does the current statutory language preserve the INA's original prioritization of removal proceedings over naturalization proceedings<sup>45</sup>; (2) does the statutory prohibition upon the attorney general's consideration of naturalization applications during open removal proceedings similarly prohibit courts from acting<sup>46</sup>; and (3) if courts retain the power to act upon naturalization applications, do open removal proceedings limit the types of relief available?<sup>47</sup> Circuit courts have greatly varied in their answers to these questions, resulting in a four-way split among circuits that emphasize the mootness doctrine, deny the existence of jurisdiction, allow jurisdiction but refuse relief, and that provide full relief under valid jurisdiction.<sup>48</sup>

### II. *Current Circuit Precedents: A Four-Way Rift*

#### A. *The Tenth Circuit Applies the Mootness-Doctrine Approach*

The Tenth Circuit addressed the issue of jurisdiction in the unpublished decision of *Awe v. Napolitano*.<sup>49</sup> In *Awe*, the court determined that the suit failed to present a case or controversy because the Immigration Services removal proceedings rendered the naturalization appeal moot.<sup>50</sup>

Ahmed Awe became a legal permanent resident of the United States in 1968.<sup>51</sup> In 1976, when Awe was eighteen years old, he was convicted of

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43. Kirk L. Peterson, Note, "Final" Orders of Deportation, Motions to Reopen and Reconsider, and Tolling Under the Judicial Review Provisions of the Immigration and Nationality Act, 79 IOWA L. REV. 439, 441-42 (1994).

44. *Klene v. Napolitano*, 697 F.3d 666, 667-68 (7th Cir. 2012).

45. See, e.g., *Ajlani v. Chertoff*, 545 F.3d 229, 239 (2d Cir. 2008).

46. See, e.g., *Klene*, 697 F.3d at 667-69.

47. See, e.g., *De Lara Bellajaro v. Schiltgen*, 378 F.3d 1042, 1046-47 (9th Cir. 2004).

48. *Klene*, 697 F.3d at 667-68.

49. 494 F. App'x 860 (10th Cir. 2012).

50. *Id.* at 866.

51. *Id.* at 861.



burglary.<sup>52</sup> Seven years later he pleaded guilty to multiple drug charges, but the Oklahoma governor ultimately pardoned him for this conviction in 2006.<sup>53</sup> Following the pardon, in 2007, Awe applied for naturalization.<sup>54</sup> Nonetheless, Immigration Services determined—based on the pardoned drug conviction—that Awe belonged to the class of removable aliens, per a statutory requirement of good moral character, and denied his application.<sup>55</sup>

In May 2010, Awe filed a petition with the district court for review of the denial of his naturalization application.<sup>56</sup> While his application was pending, in August 2010, Immigration Services placed Awe in removal proceedings, based again on his pardoned 1983 drug conviction.<sup>57</sup> The State then filed a motion to dismiss the district court case, arguing that pursuant to the Limiting Section, the initiation of removal proceedings precluded the court's proper exercise of jurisdiction.<sup>58</sup> The court agreed, holding in effect, that plaintiff Awe had failed to state a claim upon which relief could be granted.<sup>59</sup> The district court subsequently determined that the Limiting Section would prevent the court from remanding with instructions for the agency to naturalize.<sup>60</sup> Therefore, the court dismissed the action in accordance with Federal Rule of Civil Procedure 12(b)(6).<sup>61</sup>

Although, like the district court, the Tenth Circuit ultimately dismissed the case without prejudice, it rejected the lower court's reasoning.<sup>62</sup> The Tenth Circuit's opinion surveyed the relevant case law issuing from other circuits, stating, "Several circuits . . . have concluded that § 1429 [Limiting Section] does not strip jurisdiction, agreeing that the plain terms of the statute prohibit only the Attorney General . . . from considering a naturalization application when removal proceedings are pending against an alien."<sup>63</sup> The court further recognized the four circuits that have reached such a conclusion have nonetheless held that courts are precluded from granting relief in cases involving open removal proceedings, due to the

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52. *Id.*

53. *Id.* at 861-62.

54. *Id.* at 862.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 863.

61. *Id.* at 862-63.

62. *Id.* at 866-67.

63. *Id.* at 863.

ultimate effect of the Limiting Section.<sup>64</sup> The Tenth Circuit agreed that the Limiting Section does *not* function to invalidate district court jurisdiction over naturalization application reviews and concluded along with the four aforementioned circuits “that removal proceedings, whether in process at the time a § 1421(c) [Granting Section] petition is filed or initiated thereafter, effectively bar federal consideration . . . by virtue of § 1429 [Limiting Section].”<sup>65</sup> It reached this result, however, upon the “Doctrine of Constitutional Mootness” and not upon the lower court’s application of Federal Rule of Civil Procedure 12(b)(6).<sup>66</sup>

Specifically, then, the Tenth Circuit held that a district court order to Immigration Services to grant plaintiff Awe’s naturalization application could not be effective, due to the Limiting Section’s prohibition on Immigration Services action during open removal proceedings.<sup>67</sup> Thus, because such an order would be ineffective, the court articulated that “removal proceedings constituted a ‘change of circumstances’ that precluded any ‘conclusive’ or ‘specific relief.’”<sup>68</sup> Furthermore, the court determined that even if Awe had requested declaratory relief, that request would be similarly moot.<sup>69</sup> The court reached this conclusion because, pursuant to the Limiting Section, even a court declaration could not enable the agency to act on a naturalization request while removal proceedings were pending.<sup>70</sup>

Although the Tenth Circuit recognized that disallowing district court review could allow Immigration Services to evade judicial review by opening removal proceedings after any denial of a naturalization application, the court decided that consideration of this difficulty falls within the purview of Congress and not the courts.<sup>71</sup>

#### *B. The Fourth and Fifth Circuits Apply the Lack-of-Jurisdiction Approach*

The Fourth and Fifth Circuits have interpreted the Limiting Section even more stringently than the Tenth Circuit. That is, these courts have taken the Limiting language to mean that removal proceedings directly deprive

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64. *Id.*

65. *Id.* at 865.

66. *Id.* at 865-66.

67. *Id.* at 866.

68. *Id.*

69. *Id.* at 866-67.

70. *Id.* at 866.

71. *Id.* at 867.

district courts of the subject-matter jurisdiction required to hear naturalization appeals.<sup>72</sup>

### 1. Fifth Circuit

In *Saba-Bakare v. Chertoff*, the Fifth Circuit determined that it lacked subject-matter jurisdiction in a case involving a Nigerian resident alien seeking review of the denial of his naturalization application.<sup>73</sup> Appellant Kehinde Saba-Bakare became a legal permanent resident of the United States in early 1986.<sup>74</sup> When, in April 2003, Saba-Bakare attempted to reenter the United States following a brief trip, immigration authorities took note of a previous second-degree sexual assault conviction and refused to readmit Saba-Bakare.<sup>75</sup> Removal proceedings began that day.<sup>76</sup> During the pendency of these proceedings, Saba-Bakare filed a naturalization application with Immigration Services and a motion to terminate the removal proceedings with an immigration judge.<sup>77</sup> Following the immigration judge's denial of the motion, Immigration Services denied Saba-Bakare's naturalization application, despite the fact that a removal proceeding remained open and the Limiting Section should have functioned to prevent such a ruling.<sup>78</sup>

Consequently, Saba-Bakare initiated a federal suit, requesting de novo review of his application—as the Granting Section expressly permits—and a declaratory judgment of his prima facie eligibility for naturalization.<sup>79</sup> The district court “vacated [Immigration Service]’s decision denying Saba-Bakare’s application for naturalization” and remanded the application for Immigration Services to consider only once removal proceedings had closed, thereby acknowledging the mandate of the Limiting Section.<sup>80</sup> The district court denied Saba-Bakare’s request for declaratory judgment, however, stating that it lacked subject-matter jurisdiction and dismissing all of the claims it had not remanded.<sup>81</sup>

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72. See, e.g., *Barnes v. Holder*, 625 F.3d 801, 805-06 (4th Cir. 2010); *Saba-Bakare v. Chertoff*, 507 F.3d 337, 341 (5th Cir. 2007).

73. 507 F.3d at 340-42.

74. *Id.* at 338.

75. *Id.*

76. *Id.*

77. *Id.* at 339.

78. *Id.*

79. *Id.*

80. See *id.*

81. *Id.* at 340.

On appeal, the Fifth Circuit affirmed the district court's determination that it lacked valid jurisdiction over Saba-Bakare's remaining claims, specifically considering and rejecting three proposed sources of jurisdiction: the Granting Section, the Declaration Regulation, and 8 U.S.C. § 1447(b).<sup>82</sup>

First, the court addressed Saba-Bakare's contention that the Granting Section gave the court the ability to rule on his naturalization application by establishing district court review of application denials.<sup>83</sup> The circuit court drew attention to the fact that the Granting Section constrains courts' reviewing authority to that of *denials* of naturalization, and "[a]s the initial denial of [Saba-Bakare's] application ha[d] no continuing legal effect, neither it nor the underlying findings of the [Immigration Services could] be reviewed."<sup>84</sup> That is, because Immigration Services improperly denied Saba-Bakare's application while a removal proceeding was pending, there existed no valid denial for the circuit court to review.

Second, the court held that, when an administrative delay is necessary because of the Limiting Section's requirements, that delay will not satisfy the 120-day window referenced in 8 U.S.C. § 1447(b).<sup>85</sup> Thus, the district court may not maintain jurisdiction on these grounds.<sup>86</sup>

Third, the court addressed Saba-Bakare's request for a declaration of *prima facie* eligibility pursuant to the Declaration Regulation.<sup>87</sup> Under this regulation, an immigration judge may terminate a removal proceeding, thereby enabling an alien to proceed to a final naturalization hearing if that alien (1) establishes *prima facie* eligibility and (2) presents "exceptionally appealing or humanitarian factors."<sup>88</sup>

Prior to the 1990 amendments to the Immigration and Naturalization Act, the Board of Immigration Appeals held, in *In re Cruz*, that "prima facie eligibility may be established by an affirmative communication from [Immigration Services] or by a declaration of a *court*."<sup>89</sup> The *Saba-Bakare* court, however, determined that "in light of the 1990 amendment to § 1421 [Granting Section], *In re Cruz* indicates that only an affirmative

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82. *Id.* at 340-41.

83. *Id.* at 340.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 340-41.

88. 8 C.F.R. § 1239.2(f) (2014).

89. *Saba-Bakare*, 507 F.3d at 341 (quoting *In re Cruz*, 15 I. & N. Dec. 236, 237 (B.I.A. 1975)).

communication from [Immigration Services] may establish prima facie eligibility.”<sup>90</sup>

In so ruling, the Fifth Circuit effectively held that Immigration Services may sidestep review of a naturalization application denial by declining to rule on the application and initiating removal proceedings within 120 days.<sup>91</sup> Under the Fifth Circuit’s reasoning in *Saba-Bakare*, (1) district courts cannot review a naturalization application without a previous denial, where the simple initiation of removal proceedings will ensure such a denial will never be necessary, and (2) only Immigration Services itself may make a determination of prima facie eligibility for naturalization.<sup>92</sup> Consequently, the Fifth Circuit may have replaced the previous “race” to deport with a waiting game of sorts, in which Immigration Services may use strategic timing to entirely deny an immigrant any meaningful naturalization appeal.

That is not to say that the Fifth Circuit failed to consider the equitable ramifications of its decision. In fact, it acknowledged that without the possibility of district court review, an Immigration Services finding that an alien lacks prima facie eligibility could “render the . . . eligibility issue unreviewable by any court” and called this point “Saba-Bakare’s most compelling argument.”<sup>93</sup> Nonetheless, the court reiterated what it considered to be a correct interpretation of the existing statutory framework and stated that even a “persuasive equitable concern” would be an issue for Congress to resolve and not an appropriate means by which to establish jurisdiction in these cases.<sup>94</sup>

## 2. Fourth Circuit

Likewise, the Fourth Circuit, in *Barnes v. Holder*, held that any right to a district court review that plaintiff Barnes had under the Granting Section was subject to the boundaries the Limiting Section established.<sup>95</sup> Barnes, who had been a permanent resident of the United States since 1979, was convicted of a drug crime in 1982 while serving in the U.S. Army.<sup>96</sup>

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90. *Id.* at 341 (citing *In re Hidalgo*, 24 I. & N. Dec. 103, 105 (B.I.A. 2007)).

91. *See* 8 U.S.C. §§ 1421(c) (2012) (allowing district courts de novo review power over naturalizations that the Attorney General denied or failed to make a determination upon within 120 days).

92. *Id.* at 341-42.

93. *Id.* at 341.

94. *Id.*

95. 625 F.3d 801, 806 (4th Cir. 2010).

96. *Id.* at 802.

Twenty-two years later, in 2004, Immigration Services began removal proceedings against Barnes, based on the 1982 conviction.<sup>97</sup> Barnes filed a motion with an immigration judge, requesting a termination of removal proceedings pursuant to the Declaration Regulation.<sup>98</sup> The immigration judge denied this motion, and the Board of Immigration Appeals affirmed, dismissing Barnes' appeal.<sup>99</sup>

In assessing Barnes' subsequent appeal to the federal courts, the Fourth Circuit reached the same conclusion as the Fifth and held that *In re Hidalgo* correctly characterized the state of the Declaration Regulation following the 1990 statutory amendments.<sup>100</sup> In *In re Hidalgo*, the Board of Immigration Appeals held that courts could no longer make declarations of prima facie eligibility for naturalization, as the attorney general now holds exclusive authority over naturalization.<sup>101</sup> The Fourth Circuit then addressed Barnes' assertion that the Granting Section firmly provided a right to judicial review by holding that any such right possibly granted is curtailed by the Limiting Section.<sup>102</sup> The court reached this conclusion by referencing canons of construction that require harmonious readings where possible<sup>103</sup> and stating that such a reading of the Granting and Limiting Sections yields "the conclusion that an alien has a statutory right to review of his naturalization application, *unless he is in removal proceedings*."<sup>104</sup> The court suggested this was the natural, logical conclusion, as a lack of right to initial adjudication must result in a lack of right to judicial review.<sup>105</sup>

Thus, in both the Fourth and Fifth Circuits, district courts lack subject-matter jurisdiction to review denied naturalization applications when a removal proceeding is pending.<sup>106</sup>

### *C. The Second, Sixth, and Ninth Circuits Apply the Lack-of-Remedy Approach*

In contrast to the Fourth and Fifth Circuits, the Second, Sixth, and Ninth Circuits have held that district courts do, in fact, retain valid subject-matter

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97. *Id.*

98. *Id.* at 802-03.

99. *Id.* at 803.

100. *Id.* at 805-07.

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

102. *Barnes*, 625 F.3d at 806.

103. *Id.* (citing *United States v. Fisher*, 58 F.3d 96, 99 (4th Cir. 1995)).

104. *Id.* (emphasis added).

105. *Id.* at 806-07.

106. *Id.* at 807-08; *Saba-Bakare v. Chertoff*, 507 F.3d 337, 338 (5th Cir. 2007).

jurisdiction.<sup>107</sup> Nonetheless, these circuits have determined that district courts have no power to offer effective relief, holding that removal proceedings will prevent a remedy and require that “judgment must go for the agency on the merits.”<sup>108</sup> In other words, these three circuits have determined that, despite valid subject-matter jurisdiction, they can neither remand with instructions to the attorney general—as the Limiting Section *does* prevent agency action even where it does not so burden the court—nor make an appropriate and effective declaration.<sup>109</sup>

### 1. Sixth Circuit

In *Zayed v. United States*, the Sixth Circuit heard the appeal of Dalal Zayed.<sup>110</sup> Zayed was admitted to the United States in 1991 as the unmarried daughter of a lawful permanent resident.<sup>111</sup> Then, in 1996, Zayed applied for naturalization.<sup>112</sup> On her application, Zayed stated that she resided with her parents from 1988 until 1991.<sup>113</sup> In addition, she stated that she and her husband had divorced in 1988 before remarrying in 1992.<sup>114</sup> During its investigation of Zayed’s application, the Immigration and Naturalization Service (the predecessor of today’s agency) discovered that Zayed had resided with her husband for at least two years while the couple was purportedly divorced.<sup>115</sup> After determining that Zayed’s application responses were false, along with the possibility that her divorce was a “sham . . . to obtain lawful permanent residence [in the United States] as an unmarried daughter,” the agency informed Zayed of its intention to deny her naturalization application.<sup>116</sup> Following the official denial and the exhaustion of administrative appeal procedures, Zayed filed a petition for

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107. *Klene v. Napolitano*, 697 F.3d 666, 667-68 (7th Cir. 2012) (citing *Ajlani v. Chertoff*, 545 F.3d 229 (2d Cir. 2008); *De Lara Bellajaro v. Schiltgen*, 378 F.3d 1042, 1047 (9th Cir. 2004); *Zayed v. United States*, 368 F.3d 902, 905-06 (6th Cir. 2004)).

108. *Klene*, 697 F.3d at 667; *see also Ajlani*, 545 F.3d at 238-41; *Zayed*, 368 F.3d at 905-06; *Bellajaro*, 378 F.3d at 1047.

109. *See Ajlani*, 545 F.3d at 237-41; *Zayed*, 368 F.3d at 905-07; *Bellajaro*, 378 F.3d at 1045-47.

110. 368 F.3d at 904.

111. *Id.* at 903.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 904.

116. *Id.*

review with the district court.<sup>117</sup> The Immigration and Naturalization Service began removal proceedings soon after.<sup>118</sup>

The district court dismissed Zayed's petition on the theory that it lacked jurisdiction, pursuant to the Limiting Section.<sup>119</sup> The court used a purposivist approach to statutory interpretation and concluded that Congress actually intended to continue "to emphasize deportation proceedings over the naturalization process" and to prevent *any* consideration of naturalization applications during the pendency of open removal proceedings.<sup>120</sup>

Although the Sixth Circuit reached the same result as the district court, dismissing Zayed's petition without prejudice, it did so on different grounds. The Sixth Circuit, after briefly establishing appellate jurisdiction as a general matter,<sup>121</sup> established valid subject-matter jurisdiction based upon the Granting Section.<sup>122</sup> Contrary to the reasoning of the district court, the Sixth Circuit found it "difficult to square the agency's response with the plain language" of the Limiting Section as "[b]y its terms, the statute limits the authority of 'the Attorney General'—not the authority of the district courts—to act on applications for naturalization."<sup>123</sup> The court did, however, take the time to underscore the reasonableness of the district court's conclusion, noting that the 1990 statutory language does appear to preserve Congress' formerly established prioritization of removal proceedings over naturalization proceedings.<sup>124</sup> Despite its decision to acknowledge and maintain the priority of removal proceedings, the Sixth Circuit held that it did not "read the amended [Limiting Section] as divesting the district courts of the jurisdiction granted under [the Granting Section]."<sup>125</sup>

The court did not end its analysis there, however, but continued to analyze the effects of the Limiting Section on courts' ability to effectively

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117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* ("Adopting the approach to statutory interpretation urged upon it by the government . . . the district court elected to follow what it saw as the true intent of Congress without necessarily adhering to the letter of the statutory language.").

121. *Id.* at 904-05 ("We have jurisdiction of Ms. Zayed's appeal under 28 U.S.C. § 1291, the appeal having been taken from a final decision of the district court.").

122. *Id.* at 905-06.

123. *Id.* at 905.

124. *Id.* at 905-06.

125. *Id.* at 906.



provide relief.<sup>126</sup> Specifically, the court determined that the statutory language prevented the district court from either ordering the attorney general to naturalize Zayed or granting the application itself.<sup>127</sup>

## 2. *Second Circuit*

The Second Circuit held similarly in *Ajlani v. Chertoff*, deciding that there was no available relief.<sup>128</sup> In that case, Majed Ajlani, a Syrian national, entered the United States in 1987 and gained lawful permanent resident status in 1996 through his marriage to a U.S. citizen.<sup>129</sup> Despite the fact that Ajlani picked up four convictions—for forgery, false reporting, trespass, and fraud—during his twenty years in the United States, Immigration Services granted his naturalization application in 2006.<sup>130</sup> After his application was approved, but before he could take his oath of allegiance, Ajlani exited and attempted to reenter the United States via Canada.<sup>131</sup> The event caused border officials to examine Ajlani’s status, and Immigration Services soon opened removal proceedings.<sup>132</sup>

After a string of conflicting agency actions (e.g. notifying Ajlani of his naturalization oath opportunity before intercepting him at the oath ceremony with service of process), Immigration Services ultimately reopened Ajlani’s naturalization proceedings and began moving forward with removal proceedings.<sup>133</sup> Ajlani brought an action in the district court, acting pro se and making several claims, including a request for a judicial order to either compel a hearing upon or grant his naturalization.<sup>134</sup> The district court dismissed the case, pointing to Ajlani’s failure to “state a claim upon which relief may be granted” under the Federal Rules of Civil Procedure 12(b)(6).<sup>135</sup>

On appeal, the Second Circuit upheld the district court’s analysis, holding, in relevant part, that (1) subject-matter jurisdiction was valid under the Granting Section, but (2) the “scope of the court’s review” and capacity

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126. *Id.* at 906-07 (“The fact that the statute precludes the relief sought requires this result. . . . The petition having been dismissed without prejudice, Ms. Zayed will have an opportunity to file a new petition if she prevails in the removal proceedings.”).

127. *Id.* at 906.

128. 545 F.3d 229, 229-30 (2008).

129. *Id.* at 231.

130. *Id.* at 231-32.

131. *Id.* at 232.

132. *Id.*

133. *Id.* at 232-33.

134. *Id.* at 233.

135. *Id.*

to offer remedies was circumscribed by the Limiting Section so as to render the claim invalid under Federal Rules of Civil Procedure 12(b)(6) while removal proceedings were pending.<sup>136</sup> The Attorney General cannot grant naturalization when the Limiting Section forbids it.<sup>137</sup> This, in turn, prohibits the district courts from ordering such relief, because the “district court’s authority to grant naturalization under [the Granting Section] could not be greater than that of the Attorney General.”<sup>138</sup> The Second Circuit affirmed the district court’s dismissal of Ajlani’s case, upholding the district court’s reasoning that Ajlani failed to state a claim for which “naturalization relief could be granted while removal proceedings were pending.”<sup>139</sup>

### 3. Ninth Circuit

The Second Circuit’s analysis comports with that of the Ninth Circuit, which held in *De Lara Bellajaro v. Schiltgen* that pending removal proceedings do not undermine subject-matter jurisdiction but do limit the scope of review possible.<sup>140</sup> In *De Lara Bellajaro*, a Filipino man in the United States as a lawful permanent resident was convicted of a sex crime, imprisoned, and subsequently paroled.<sup>141</sup> In 1986, De Lara Bellajaro violated the terms of his parole by temporarily returning to his home country.<sup>142</sup> Following his return to the United States, and after the expiration of his parole, De Lara Bellajaro reapplied for naturalization in 1994.<sup>143</sup> In 1999, Immigration Services denied De Lara Bellajaro’s naturalization application for “failure to establish good moral character” and began removal proceedings.<sup>144</sup> De Lara Bellajaro filed yet another application for naturalization, as well as a motion to terminate the removal proceeding.<sup>145</sup> Immigration Services rejected both his application for

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136. *Id.* at 238 (quoting *Zayed v. United States*, 368 F.3d 902, 906 (6th Cir. 2004)).

137. *See id.* at 239.

138. *Id.* (“Thus, if § 1429 would preclude the Attorney General from granting naturalization to an alien because of pending removal proceedings, an alien could not secure that relief from a district court pursuant to § 1421(c).” (citing *Apokarina v. Ashcroft*, 232 F. Supp. 2d 415, 416 (E.D. Pa. 2002))).

139. *Id.* at 241. The claim was not dismissed, notably, for lack of jurisdiction. *Id.*

140. 378 F.3d 1042, 1043-44 (9th Cir. 2004).

141. *Id.* at 1044.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

naturalization and his motion to terminate, after which De Lara Bellajaro's appealed to the district court.<sup>146</sup>

The district court pointed to the congressional prioritization of removal over naturalization, opining that a comparative interpretation of the Granting and Limiting Sections required such prioritization, and reasoned that "[congressional] intent would be frustrated if judicial review of naturalization decisions were available under [the Granting Section] while the removal proceeding is pending."<sup>147</sup>

Although the Ninth Circuit affirmed the lower court's dismissal of De Lara Bellajaro's appeal, it did so for different reasons.<sup>148</sup> The Ninth Circuit validated federal district courts' subject-matter jurisdiction over these cases, declaring that the Granting Section "plainly confers" such jurisdiction and that there is "no textual basis for concluding that jurisdiction vested in district courts by [the Granting Section] is divested by [the Limiting Section]."<sup>149</sup> The circuit court clarified that grant of jurisdiction, however, by explaining that the scope of review provided in the Granting Section is limited to the denial of a naturalization application.<sup>150</sup> The court further stated that where—as in this case—such denial was premised upon the pendency of removal proceedings, courts may not expand their review power to declarations of eligibility for naturalization.<sup>151</sup>

In this vein, the Ninth Circuit denied De Lara Bellajaro's request for a declaration of prima facie eligibility to support the termination of his removal proceedings, saying that such declaration would be nothing more than advice, since "discretion to prosecute and to adjudicate removal proceedings is reposed exclusively in the Attorney General."<sup>152</sup> The court then declined to make any such "advisory" declaration and, consequently, affirmed the district court's dismissal for reasons of limited scope and unavailability of remedy.<sup>153</sup>

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146. *Id.*

147. *Id.* at 1043.

148. *Id.*

149. *Id.* at 1043, 1046.

150. *Id.* at 1046-47.

151. *Id.*

152. *Id.* at 1047 (citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 487 (1999)).

153. *Id.* at 1047.

*D. The Third and Seventh Circuits Apply the Declaratory-Judgment Approach*

In *Klene*, the Seventh Circuit joined the Third Circuit, holding that removal proceedings do not affect federal subject-matter jurisdiction and that in these cases, district courts may grant the remedy of a declaratory judgment.<sup>154</sup>

*1. Third Circuit*

The Third Circuit considered the issue in *Gonzalez v. Secretary of Department of Homeland Security*, in which Jose Gonzalez appealed the district court's dismissal of his petition for review of a denial of naturalization.<sup>155</sup> Gonzalez entered the United States as a non-immigrant visitor in the late 1990s and subsequently married a U.S. citizen.<sup>156</sup> During a 2004 interview in support of his Form I-751 petition to convert his lawful permanent resident status from conditional to non-conditional, Gonzalez stated under oath that he had no children.<sup>157</sup> After the lifting of his conditional status, Gonzalez and his wife divorced, and he moved in with Margarete Picinin, with whom he had been romantically involved during his marriage.<sup>158</sup> In 2005, Gonzalez amended the birth certificates of Picinin's two young children to indicate he was the father.<sup>159</sup> He also listed the two minors as his children on a 2006 naturalization application, and in light of this inconsistency, Immigration Services denied his application, issuing a final denial in 2009.<sup>160</sup>

Twelve days after this denial, Immigration Services initiated removal proceedings, and Gonzalez appealed the denial to the federal district court.<sup>161</sup> The court dismissed Gonzalez' appeal in light of the "uncontradicted evidence . . . that [Gonzalez], while under penalty of perjury, gave false evidence in order to receive a benefit in an immigration proceeding."<sup>162</sup>

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154. *Gonzalez v. Sec'y of Dep't of Homeland Sec.*, 678 F.3d 254, 260 (3d Cir. 2012); *Klene v. Napolitano*, 697 F.3d 666, 668-69 (7th Cir. 2012).

155. 678 F.3d at 255-56.

156. *Id.* at 256.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 256-57 (quoting *Gonzalez v. Napolitano*, No. 2:09-cv-03426, 2011 WL 941299, at \*7 (D.N.J. Mar. 16, 2011)).

On appeal, the Third Circuit upheld the district court's ruling.<sup>163</sup> First, the circuit court asserted that the district court had valid jurisdiction to hear and decide the claim.<sup>164</sup> The court traced the history and development of the current statutory language and concluded that "[b]ased on the plain language of the statute, we concur with the Ninth Circuit that there is 'no textual basis for concluding that jurisdiction vested in district courts by § 1421(c) [(Granting Section)] is divested by § 1429 [(Limiting Section)].'"<sup>165</sup>

In the second portion of its analysis, however, the Third Circuit diverged from the Ninth.<sup>166</sup> When it addressed whether a district court can offer effective relief in these situations, the Third Circuit observed the apparent congressional prioritization of removal proceedings over naturalization proceedings and stated that the 1990 amendments did not alter this priority.<sup>167</sup> The court further acknowledged that district courts lacked the power to offer relief in the form of ordering the Attorney General to naturalize an alien with pending removal proceedings.<sup>168</sup> Nonetheless, the court recognized the viability of declaratory judgments as meaningful relief.<sup>169</sup>

In permitting declaratory relief, the Third Circuit countered two issues that the Sixth Circuit raised in *Zayed*.<sup>170</sup> First, the Third Circuit addressed the issue of whether district courts could make authoritative declarations of prima facie eligibility for naturalization in regard to the Declaration Regulation.<sup>171</sup> Despite the Board of Immigration Appeals' ruling in *In re Hidalgo*, wherein the Board determined that affirmative declarations as to prima facie eligibility were squarely—and solely—within agency discretion, the Third Circuit suggested that *In re Cruz* remains good law,

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163. *Id.* at 264.

164. *Id.* at 257.

165. *Id.* at 257-58 (quoting *De Lara Bellajaro v. Schiltgen*, 378 F.3d 1042, 1046 (9th Cir. 2004)).

166. *Id.* at 258-59 ("The Ninth Circuit ultimately concluded that the district court could not review the denial of naturalization . . . because, while § 1429 did not remove the court's jurisdiction, it did limit the scope of review. . . . Having decided that district courts have jurisdiction, we must now address the more difficult issue of what, if any, relief a district court may grant.")

167. *Id.* at 259.

168. *Id.*

169. *Id.* at 259-60.

170. *Id.* at 259-61.

171. *Id.* at 260-61.

even after the 1990 statutory amendments.<sup>172</sup> Under *In re Cruz*, either Immigration Services or a court may make such a declaration.<sup>173</sup> In *Gonzalez* the Third Circuit stated, “We are confident that the [Board of Immigration Appeals] would . . . accept the declaration of a district court properly exercising its jurisdiction under [the Granting Section].”<sup>174</sup> Despite this assertion, however, the court clarified that it rested its endorsement of declaratory judgment on a more fundamental basis: judicial ability to effect congressional intent.<sup>175</sup>

Specifically, the court held that “[d]eclaratory relief strikes a balance between the petitioner’s right to full judicial review as preserved by [the Granting Section] and the priority of removal proceedings enshrined in [the Limiting Section],” as Congress clearly granted district courts the power to conduct de novo reviews of application denials.<sup>176</sup> In other words, the court held that any other result would “raise[] the possibility that review may be cut off by the actions of the Attorney General. . . . Such a possibility is contrary to the intent of Congress as expressed in the structure of the statute.”<sup>177</sup>

Second, the court opined that declaratory relief would not undermine the prioritization of removal.<sup>178</sup> This is so because a declaration of prima facie eligibility for naturalization contributes to the record available for the removal proceeding but does not violate congressional intent by prioritizing naturalization over removal in any way.<sup>179</sup> In describing this effect, the Third Circuit held that declaratory relief preserved Congress’ two “mandated goals, a de novo review process and the elimination of the race to the courthouse.”<sup>180</sup>

## 2. Seventh Circuit

Like the Third Circuit in *Gonzalez*, the Seventh Circuit in *Klene* found that district courts have valid subject-matter jurisdiction because the statutory limitation on the Attorney General does not deprive a court of jurisdiction.<sup>181</sup> In that case, Trinidad Klene, a native of the Philippines,

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172. *Id.* at 260.

173. *Id.*

174. *Id.*

175. *Id.* at 260-61.

176. *Id.* at 260.

177. *Id.* at 261.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Klene v. Napolitano*, 697 F.3d 666, 668 (7th Cir. 2012).

lawfully resided in the United States after her marriage to a U.S. citizen.<sup>182</sup> Immigration Services denied her application for naturalization, concluding that her marriage had been fraudulent.<sup>183</sup> Klene appealed the denial to the district court, pursuant to the Granting Section, and Immigration Services subsequently opened removal proceedings.<sup>184</sup> Immigration Services requested the court dismiss the suit, arguing that the Limiting Section required the court to do so.<sup>185</sup> The district court agreed with the agency and dismissed Klene's suit.<sup>186</sup>

Klene appealed the district court's decision to the Seventh Circuit, which drew a distinction between "[w]hat the Attorney General may do—and derivatively what a court may order the Attorney General to do" and jurisdiction itself.<sup>187</sup> It did so by stating that the Attorney General's authority "concerns the merits . . . [and] there is a fundamental difference between mandatory rules, such as the one in § 1429, and jurisdictional limits," which Congress crafted to expressly include the authority to "decide whether aliens are entitled to naturalization" in these cases.<sup>188</sup>

The *Klene* court also espoused declaratory relief as a valid means of court action,<sup>189</sup> stating that the "approach preserves the alien's entitlement under [the Granting Section] to an independent judicial decision while respecting the limit that [the Limiting Section] places on the Attorney General's powers."<sup>190</sup> The court further acknowledged that appellate review is deferential and while "[t]he existence of overlapping proceedings does not diminish a district court's power[,] . . . [it] does present a question on which the judge should exercise sound discretion."<sup>191</sup> Thus, the Seventh Circuit remanded with instructions to decide whether declaratory judgment would be appropriate in this particular case.<sup>192</sup>

Finally, *Klene* responded to the issue of mootness, on which the Tenth Circuit based its decision in *Awe*.<sup>193</sup> The *Klene* court held that mootness was not an issue, as there exists in this case and others a valid case or

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182. *Id.* at 667.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 668.

188. *Id.*

189. *Id.* at 668-69.

190. *Id.* at 669.

191. *Id.* at 669-70.

192. *Id.* at 670.

193. *Id.* at 668.

controversy: “[P]arties are locked in conflict . . . . If Klene is right, she can become a citizen; if the agency is right, Klene [cannot] . . . . Parallel civil proceedings are common[, and] . . . [u]ntil one of the proceedings reaches judgment, neither makes the other moot. . . .”<sup>194</sup>

Thus, the *Klene* court appropriately decided the issue in light of congressional intent and sound policy.

### *III. Suggested Approach: Valid Jurisdiction Allows Declaratory Judgments*

The Third and Seventh Circuits adopted the correct approach to interpreting the interaction between the Granting and Limiting Sections as amended. Maintaining valid jurisdiction for federal courts to conduct de novo review over denials of naturalization applications is not only proper, but it is also the best option in light of procedural, practical, and policy-based concerns.

#### *A. Procedural Concerns Support Jurisdiction*

The 1990 amendment to the Limiting Section had no effect on federal jurisdiction:

Nothing in the [Granting Section] limits the jurisdiction so conferred . . . . By the same token, the text of [the Limiting Section] . . . clearly applies to the Attorney General. There is no hint in the language of [the Limiting Section] that it also applies to the courts.<sup>195</sup>

This is the result that a plain reading and direct interpretation of Congress’ language effects. Both a reading of the text itself and a look at its underlying purpose reveal a congressional intent to provide de novo review in the federal court system to all immigrants whose naturalization applications have been denied. The text of the Granting Section states that such immigrants “may seek review” *and* goes so far as to say that these reviews will occur “*de novo*, and the court *shall make its own findings of fact and conclusions of law.*”<sup>196</sup> The phrasing is decisive. The standard of review is generous. The option to place limits or exceptions upon the grant

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194. *Id.*

195. *De Lara Bellajaro v. Schiltgen*, 378 F.3d 1042, 1046 (9th Cir. 2004); *see also Klene*, 697 F.3d at 668.

196. 8 U.S.C. § 1421(c) (2012) (emphasis added).



is unexercised. As the majority of circuits that have spoken to the issue have found, the grant of jurisdiction is unequivocal.<sup>197</sup>

This textual interpretation is clear, and a purpose-based reading of the statute only cements the conclusion that valid federal subject-matter jurisdiction exists. Congress' 1990 update to the statutory scheme authorized this robust review avenue at the same time that it removed naturalization authority from the courts.<sup>198</sup> This conscious decision to preserve the judiciary's role in the process, despite Immigration Service's new role, demonstrates what others have identified as an intentionally "bicameral approach to the naturalization process."<sup>199</sup> Congress explicitly directed the language of the Limiting Section at the Attorney General, not the courts,<sup>200</sup> and applying that limitation to the judiciary would effect a massive exception nowhere indicated in the statute itself. Thus, allowing the section to divest courts of jurisdiction requires a skewed interpretation of the Granting Section.

Moreover, the Supreme Court's articulation of the deference due to agency interpretations of statutes supports valid jurisdiction.<sup>201</sup> In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>202</sup> the Court explained the proper judicial approach in these situations:

When a court reviews an agency's construction . . . [f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.<sup>203</sup>

This "unambiguously expressed intent" is manifest in both the statute and the congressional record that supports it.<sup>204</sup> The Act's sponsor,

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197. See *supra* Part III. Of the six circuits that have refused to rule on these cases, four have done so because of a lack of remedy and not because of a perceived lack of jurisdiction. See *supra* Part III.

198. See *supra* Part II.B.

199. Daniel Makled, Note, *De Novo: A Proposed Compromise to Closing the Naturalization Review Loophole*, 90 U. DET. MERCY L. REV. 367, 376 (2013).

200. 8 U.S.C. § 1429 ("[N]o application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding . . . .") (emphasis added).

201. Makled, *supra* note 199, at 375.

202. 467 U.S. 837 (1984).

203. *Id.* at 842-43.

204. Makled, *supra* note 199, at 375-77.

Representative Morrison, clarified that the Act would “not take away any of the judicial review rights accorded applicants today.”<sup>205</sup> In addition, the Senate Judiciary Committee expressed its strong belief that “although few cases for naturalization have been denied, citizenship is the most valued governmental benefit of this land and applicants should receive full recourse to the [j]udiciary when the request for that benefit is denied.”<sup>206</sup> This clear legislative intent counsels in favor of maintenance of valid jurisdiction.

Finally, it is the judiciary’s duty to fully and fairly exercise the jurisdiction Congress has seen fit to grant it.<sup>207</sup> And it is squarely within this duty to protect the methods of justice, generally, and of due process, specifically.<sup>208</sup>

#### *B. Practical Considerations Reinforce Jurisdiction*

The retention of federal subject-matter jurisdiction in naturalization cases is not only consistent with statutory language, but it also addresses overarching concerns<sup>209</sup> by promoting structural efficiency and efficacy. Academics have identified at least five intersecting sources of difficulty within immigration adjudication: “substantive immigration law; the conflicting signals of immigration adjudication; the lack of de facto independence; the use of diversions from the system; and weakened judicial review.”<sup>210</sup> Nonetheless, this Comment endeavors to examine a particular struggle in the realm of immigration law that—though narrow in scope—carries weighty and immediate consequences for the individual immigrants affected, as well as enduring consequences for views on the judiciary’s role in the process. Immigration law functions primarily in the legislative and

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205. *Id.* at 377 (quoting 135 CONG. REC. 16996 (1989) (statement of Rep. Morrison)).

206. *Id.* (quoting H.R. REP. NO. 101-187, at 14 (1989)).

207. The federal courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them,” as the Supreme Court has long recognized “the principle that ‘When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.’” *Colo. River Water Conserv’n Dist. v. United States*, 424 U.S. 800, 817 (1976); *England v. La. State Bd. of Med. Examiners*, 375 U.S. 411, 464-65 (1964) (quoting *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909)).

208. For cogent arguments on the due process concerns at play in the naturalization process, see Josh Adams, *Federal Court Jurisdiction over Visa Revocations*, 32 VT. L. REV. 291, 308-13 (2007); Makled, *supra* note 199, at 386.

209. Many of these concerns are addressed in other articles. *See, e.g., infra* notes 210-211, 213.

210. Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 542 (2011) [hereinafter Family, *Beyond Decisional Independence*].

executive branches; so far as Congress has deemed it appropriate to involve the judicial branch, the courts should take up that legislated mantle willingly, as they are uniquely positioned to act in ways both independent of political pressure and responsive to an ever-developing field.

In particular, one of the more cited concerns in discussions of immigration adjudication, whether regarding agency judges or Article III courts, is that of appeal rates and docket effects.<sup>211</sup> Between 2002 and 2006, administrative adjudication appeals increased from 6 percent to 29 percent of immigration cases,<sup>212</sup> and immigration appeals grew to represent approximately 20 percent of the federal court of appeals docket.<sup>213</sup> While the steadily increasing number of cases appearing on many courts' dockets is a substantial concern, a refusal to exercise valid jurisdiction (whether by holding jurisdiction invalid or by declaring relief to be unavailable) is neither an appropriate vehicle for managing docket effects nor the best approach to the problem at large.

First, these discussions of docket effects look at the entire field of immigration appeals arising from administrative rulings, not solely at cases involving denied naturalization applications coupled with open removal proceedings.<sup>214</sup> Second, while some scholars argue that there is too little transparency in the field to say with certainty why the surge in appeals has occurred,<sup>215</sup> other scholars have attributed the increase to inadequate administrative adjudication proceedings.<sup>216</sup> Judge Posner, for one, has directly stated, "The rise in federal appeals was the result of 'the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.'"<sup>217</sup> Third, courts hearing and ruling upon appeals could eventually contribute to efficiency within the process, as patterns of affirmations and reversals within federal courts may

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211. See, e.g., David C. Koelsch, *Follow the North Star: Canada as a Model to Increase the Independence, Integrity and Efficiency of the U.S. Immigration Adjudication System*, 25 GEO. IMMIGR. L.J. 763, 779-83 (2011).

212. This figure refers to appeals to the Board of Immigration Appeals from immigration judges.

213. Lenni B. Benson, *You Can't Get There from Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405, 411-12.

214. See *id.* at 411-13 (discussing studies that show all immigration administrative appeals as a portion of the entire appeals docket).

215. *Id.* at 424.

216. Koelsch, *supra* note 211, at 782.

217. *Id.* (quoting *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005)).

gradually begin to shape decisions of the originating judges, while providing much-needed clarity on the bases of decisions.<sup>218</sup>

As some have observed, it is largely the “harshness, complexity, and opacity of substantive immigration law” that fuels the creation of excess adjudication and gives rise to “huge backlogs in the system.”<sup>219</sup> In particular, recent “streamlining” attempted by internal agency action has decreased the availability of clear adjudication to immigrants with cases from immigration judges or the Board of Immigration Appeals.<sup>220</sup> Previously, the Board heard cases in three-member panels, but in 1999, a pilot program began allowing the Board to hear cases as individual judges and to rule on cases *without providing opinions*.<sup>221</sup> The lack of legal opinions not only increases the likelihood that individual litigants will be unsatisfied with their adjudicative experience,<sup>222</sup> but also lacks the benefit of issue clarification and well-grounded predictability.

Greater clarity and public transparency would likely provide the benefit of greater confidence in the adjudicative process,<sup>223</sup> while allowing immigrants and their counsel to make better-informed decisions about when and how to pursue appeals. In fact, increased transparency might even encourage more lawyers to enter the currently under-served practice area<sup>224</sup> and aid in providing more equal accessibility to diverse immigrant demographics.<sup>225</sup> If these effects were achieved, they would contribute to greater efficiency at a fundamental level—a permanent and preferable solution to the current burden on appellate courts.

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218. Benson, *supra* note 213, at 431-32.

219. Family, *Beyond Decisional Independence*, *supra* note 210, at 542.

220. See John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 26-31 (2005). According to the ABA Commission, summary decisions are “more likely than standard decisions to be either erroneous, perceived as erroneous, or simply unacceptable to litigants.” *Id.* at 54 (emphasis omitted).

221. Benson, *supra* note 213, at 417-18.

222. Palmer, Yale-Loehr & Cronin, *supra* note 220, at 54.

223. Addressing an issue that Family has labeled a “lack of esteem” in immigration adjudication that “both feeds on and helps to promote a negative mystique surrounding immigration law.” Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J. NAT’L ASS’N ADMIN. L. JUDICIARY 45, 47, 52-54 (2011).

224. Family, *Beyond Decisional Independence*, *supra* note 210, at 542.

225. *Id.*

*C. Policy Concerns Bolster Jurisdiction*

Even acknowledging, as circuit courts have, a congressional intent to prioritize removal proceedings over naturalization proceedings, allowing district courts to make declaratory judgments does not offend the intent underlying the Limiting Section.<sup>226</sup> In fact, allowing courts to make these judgments reinforces the intent that underlies the appeals process that the Granting Section clearly establishes.<sup>227</sup> For reasons discussed,<sup>228</sup> it is improbable that Congress' intent in crafting the appellate opportunity in the Granting Section was to provide a brand of jurisdiction so tenuous that it might be destroyed by strategic acts of the very agency over which review was granted.<sup>229</sup>

Not only does the exercise of federal subject-matter jurisdiction over these cases fall squarely within Congress' intent—as indicated by the statute, its history, and the legislative record—but the exercise of such jurisdiction also addresses broader policy concerns. As a number of legislators, commentators, and scholars have observed, many difficulties and flaws complicate the United States' immigration system.<sup>230</sup> Systemic problems such as administrative delays,<sup>231</sup> unsatisfactory agency appeals processes,<sup>232</sup> and a lack of clarity<sup>233</sup> threaten the efficacy and fairness of the naturalization process. Although the involvement of Article III courts in the process cannot remedy all that ails the system, it would be a significant step in the right direction by (1) giving proper consideration to expressed congressional intent,<sup>234</sup> (2) affirming the courts' role as protectors of judicial process,<sup>235</sup> (3) addressing specific practical concerns,<sup>236</sup> and (4) serving the aims of fairness and faith in the justice system.<sup>237</sup>

In other words, at the core of this question of jurisdiction sits “simple fairness.”<sup>238</sup> Congress, which represents the United States' citizenry, has

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226. *See* *Zayed v. United States*, 368 F.3d 902, 905-06 (6th Cir. 2004).

227. *See supra* Part III.A.

228. *See supra* Part III.A.

229. *See, e.g.*, *Gonzalez v. Sec'y of Dep't of Homeland Sec.*, 678 F.3d 254, 259 (3d Cir. 2012).

230. *See, e.g.*, Benson, *supra* note 213, at 405-06.

231. *See* Schneider, *supra* note 24, at 581-82.

232. *See* Koelsch, *supra* note 211, at 782.

233. *See* Family, *Beyond Decisional Independence*, *supra* note 210, at 542.

234. *See supra* Part III.A.

235. *See supra* Part III.A.

236. *See supra* Part III.B.

237. Makled, *supra* note 199, at 372-73.

238. *Id.* at 387.

clearly granted immigrants the right to a meaningful federal court review of naturalization denials.<sup>239</sup>

*IV. Conclusion: Declaratory Judgment Should Prevail as Proper*

The Third and Seventh Circuits' declaratory relief approach best serves the policies embodied in both the Granting and Limiting Sections (§§ 1421(c) and 1429) by maintaining congressional priorities without undermining the statutory grant of review power. As seen by the factual outcomes of cases entering the district courts under the Mootness-Doctrine, Lack-of-Jurisdiction, and Failure-of-Relief Approaches, any approach other than the Declaratory-Relief Approach creates a real possibility that strategic agency action will nullify the congressionally crafted grant of jurisdiction and meaningful review.

Because of the procedure clearly outlined in the Granting Statute, the practical concerns surrounding the issue, and the manner in which the Declaratory Relief Approach navigates competing policy concerns while implementing congressional intent, the federal court system should adopt the Declaratory-Relief Approach.

*Kelsey Frobisher*

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239. *Id.* at 388.