IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VICTOR MOCANU

V.

ROBERT S. MUELLER, ET. AL.

CIVIL ACTION
No. 07-0445

ANDREW NEWTON, M.D.

V.

DONALD MONICA, ET. AL

CIVIL ACTION
No. 07-2859

SAID HUSSAIN

V.

MICHAEL B. MUKASEY, ET. AL

CIVIL ACTION
No. 08-195

PLAINTIFFS' JOINT OPPOSITION TO DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL OF THIS COURT'S INJUNCTIVE ORDER

Plaintiffs, by and through their respective counsel, oppose the Government's Emergency Motion for a stay. The Government Motion is premature, in that it is seeking a stay of a Court order that simply prevents it from making these cases moot by completing adjudication. The Government desires to adjudicate by using an investigative method (the complete FBI "name check") that the Court has found is without basis in the law. In addition, the Government Motion fails to meet the basic standard for a stay of the Court's Order in any case. First, the Government has little likelihood of success. Second, the Government will not be irreparably injured by the Court's Order which merely presents the Government the option of keeping these cases in *status*

quo until the scheduled conference on March 18, 2008 or adjudicating them without the use of an investigative technique that has no basis in law and has no history of effective utilization. Third, the Plaintiffs have a continuing injury due to the lack of personal security and ability to petition for family members. Additionally, the continuing delay places the Plaintiffs' potential ability to vote in a presidential election in jeopardy. Finally, the assertion of public interest appears to more a political or litigation tactic than a reasoned legal position. The Government actions actually contravene the public interest.

I. THE GOVERNMENT MOTION IS PREMATURE

The Government Motion is premature. At its most basic, the Government position is that it seeks a stay of an order that prevents it from completing adjudication of the Plaintiffs' applications. It appears that the Government is not concerned that it is prevented from adjudication and completion of the Plaintiffs' claims, as much as it is concerned that it not be told to engage in formal rulemaking as a precondition. In other words, the Government Motion is a continuation of its litigation strategy in these cases, which is to provide individual relief when forced to do so; but leaves the broader problem of its unlawful investigative processes unaddressed. In other words, the Government appears to oppose the Court's attempt to address these larger issues in this litigation and would prefer they never be addressed or that they get addressed at a later time – possibly after November, 2008.

We agree with the Court that in the absence of a statute or regulation requiring name checks as a condition of criminal background checks (to the extent those are authorized or required), the current FBI name check procedure is not lawfully authorized. Therefore, we agree with that portion of the Court's Order that finds relief is available, as a matter of law, without the completion of those name checks. Nothing in the Government Motion supports a position that

the FBI "name check" process is required. Throughout its Motion the most the Government attempts to say is that the "name check" process is authorized as part of required background checks. Gov't. Mot. at 8. However, such a process cannot be implemented lawfully without the notice and comment which is the process of rulemaking. Rulemaking cannot be ordered, but without a duly adopted formal rule the requirement of the "name check" as a condition of adjudication of a naturalization petition is devoid of lawful status

The Defendants are arguing against the injunction on adjudication of individual applications. Gov't Mot. at 4. That injunction was issued so that they cannot make this case – and the broader issues – moot, case-by-case. The Court seeks to prevent mootness in order to address the underlying issue in a definitive way, recognizing that these cases are clogging up the Courts. The Defendants' position appears to be withholding of naturalization with a consequent effect on elections and yielding only on a case-by-case basis. This transfers the burden of adjudication to the Courts, which have every obligation to address the issue without compromising judicial economy or appropriate national security (as opposed to fear-mongering for political objectives).

II. THE GOVERNMENT MOTION FAILS TO JUSTIFY A STAY

The Government Motion fails to meet the standard required for a stay of the Court's Order. The Plaintiffs are likely to succeed on the merits because the Government has no lawful basis for implementation of an investigative technique that creates delays so extensive they are longer than the original delay that were cited for the creation of the current administrative naturalization scheme. *See Immigration Act of 1990*, Pub. L. No. 101-649 401. 407(d), 104 Stat

5038 (Nov. 29, 1990).[1] The balancing of relative harms to the Government and these individual Plaintiffs weighs decidedly in favor of the individuals in this matter. Finally, the Government assertion of public interest in a situation in which it appears that appropriately serious safety and security issues are being perverted by protracted delay for a perceived political gain is nothing short of shameful.

a. **The Government is Unlikely to Prevail on the Merits on its Claims that the Investigative Practice at Issue is either Mandated or Authorized by Law**

The Government has provided no persuasive or controlling legal authority or factual basis for its claim of potential success on the merits. The Government is correct that a Court Order cannot be conditioned upon rulemaking and that in as much as the Order mandates that rulemaking it may be a violation of separation of powers. However, as discussed below this is an area of law in which the Courts have a co-equal, indeed an original, jurisdiction with the

[1] The creation of administrative naturalization was proposed because of "growing backlogs in the naturalization area," which were marked by delays of "up to 2 years." S. REPT. 101-55, at 4 (June 19, 1989). The expressed purpose behind administrative naturalization was to streamline the application review and approval process:

> This legislation, while technical in nature, addresses a very substantial concern that so many of all of our constituents have faced, and that is the problem of long backlogs in moving through the naturalization process once the time period for naturalization has been accomplished and the various requirements of naturalization have been met, delay often runs into the months and sometimes beyond a year before an individual can actually take his or her oath of allegiance to the United States and become a citizen. All of us have had the experience of being contacted as elections approach … and we find ourselves unable to move the process forward because of the backlog resulting from the current system.

135 CONG. REC. H4539, H4542 (daily ed. July 31, 1989) (statement of Rep. Morrison); *see also* 56 Fed. Reg. 50475, 50476 (INS) (Oct. 7, 1991). In removing the courts from the naturalization process, Congress sought to avoid "subject[ing] [applicants] to the long delays involved in scheduling these matters for court approval." 135 CONG. REC. at H4542 (statement of Rep. Morrison).

agency. The Court may consider amending its order to provide whatever alternate relief is appropriate should the Defendants engage in formal "notice and comment" rulemaking. Without such rulemaking, adjudication on this record is appropriate. However, in the absence of a proper regulation there is no basis to sustain the Defendants' position because a name check is not the same as a criminal investigation. It is for this reason and others discussed below that the Government is unlikely to prevail on the merits.

The Government assertion that the Court has overstepped it bounds and violated general principles of administrative law as stated in *Skidmore*[2] and *Chevron*[3] is incorrect. Gov't Mot at 6-8. This is not a situation in which deference is applicable. The Government argument is invalid in cases of naturalization because the Courts have independent jurisdiction to hear and adjudicate, *de novo,* naturalization applications. That jurisdiction is embodied in the INA at 8 U.S.C. §1447(b). More significantly, although the initial jurisdiction over naturalization was transferred from the Courts to the Agency by the 1990 amendments to the INA, the statutory requirements for an alien seeking naturalization were not changed.

In order to ensure that the new process would remain a streamlined system and to avoid the delays characteristic of the system prior to 1990, Congress provided for a 120-day deadline governing the adjudication of applications. *See* 135 CONG. REC. at H4542 (statement of Rep. Smith); *see also* 56 Fed. Reg. at 50476. The current statute, unamended since 1990, reads:

> If there is a failure to make a determination under section 335 [§ 1446] before the end of the 120-day period after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter.

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[2] *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944).

[3] *Chevron U.S.A. Inc. v. Natural Res. Defense Counsil, Inc.*, 467 U.S. 837, 844 (1984)

Pub. L. No. 101-649, § 407(d)((14)(B) (codified at 8 U.S.C. § 1447(b) (2000)). Defendants seek to avoid this statutory requirement by "descheduling" cases or not scheduling them unless and until the "name check" is completed

Congress has never delegated to the agency the interpretation of statutory naturalization requirements because at the time of the transfer of initial jurisdiction a substantial number of Federal Court decisions comprised an authoritative interpretation of these requirements. Those decisions remain applicable today. Nothing in the 1990 amendments gave any interpretive power to the agency. *See*, 135 CONG. REC. H4539, H4542 (daily ed. July 31, 1989), *supra* (referring to 1990 legislation as being "technical in nature"). Its power was, and remains, exclusively administrative. For that reason, ultimate *de novo* jurisdiction is maintained with the U.S. District Courts through 8 U.S.C. §1447(b).[4] "Congress, in the 1990 IMMACT, specifically *retained* District Courts' power to adjudicate naturalization applications, at a time when Congress could easily have eliminated that power." Etape v. Chertoff, 497 F.3d 379, 387 (4th Cir. 2007). As a result, this Court properly interpreted the statutory and regulatory language itself.

The Government Motion asserts that the Court's Order intrudes into an Executive function and places an undue burden on it. Gov't. Mot. at 11 (citing *INS v. Legalization Assist. Proj.*, 510 U.S. 1301 (1993)). The case cited by the Government related only to a Court's Order that was based in possibly incorrect standing by a third party agency. In this case, each of the named Plaintiff is an affected individual. More importantly, as discussed above, the Courts maintain a direct statutory *de novo* authority over agency action in naturalization cases.

[4] This is not to say that the instant case necessarily involves §1447(b). Rather, this history is provided to show that the Court has its own jurisdiction to provide a non-deferential interpretation of a statute. We also note that at least two Plaintiffs, Mr. Cusumano and Mr. Hussain, have claims that as post-interview applicants §1447(b) may trigger jurisdiction, should the Court feel the need to assert it.

The Government states in its motion that the vast majority of courts have construed 8 C.F.R. 335 to authorize USCIS to include the FBI name check as part of the required "full criminal background check." Govt. Mot. at 8. It then cites to various cases that it claims support that statement. A careful reading of theses cases reveals that the Court merely reiterated the Government's statement that it considers the name check to be a requirement. Although Plaintiff agrees that the regulation's language is not "all inclusive," none of the opinions cited addressed the legality of adding a requirement that is not in the statute or regulation, with unclear and vague correlation to security concerns, which significantly delays the adjudication of applications for naturalization, without the notice and comment requirements for new rules.[5]

The Government's assertion that this Court's interpretation of the reach of 8 C.F.R. §335.2(b) conflicts with that of other Courts is simply incorrect. The "vast majority" of cases that it cites consist of unreported decisions from five District Courts, none of which are in this Circuit. As the Court itself noted a number of decisions support its position that 335.2 does not require a full FBI name check as asserted by the Government. Dec. at 16-18 (addressing each of the cases cited by the Government and examining the plain language of the regulation).

Additionally, a plain reading of the regulation demonstrates that the "complete" FBI name check is not either required or authorized by the statute or the regulations. In particular, 8 C.F.R. 335.2(b)(3) as cited by the Court on page 13 of its Opinion, clearly permits completion of an adjudication with "rejected" fingerprints. In other words, in cases where an individual's fingerprints are unclassifiable the Agency does not need to take any further steps and the

[5] Of the cases cited by the Government, the decision which most nearly addressed the issue only noted that the "conditions that follow the term [in 8 C.F.R. 335.2(b)] are not exclusive." *Aman v. Gonzales*, 2007 U.S.Dist.LEXIS 66598 (Sept. 10, 2007 Dist. Co.). This position correctly recognizes that the FBI 'Name check" may be authorized, but does not – as this Court's opinion did – examine the issue of whether that check is **required.** *See*, Dec. at 19.

criminal background check is considered completed. The plain language of the regulation contravenes the Government position that INA sec. 335, on its face, authorizes and requires a full FBI name check during adjustment and naturalization adjudications.

b. **There is no harm to the Government in Withholding Adjudication until the Scheduled Conference**

The Government assertion that it will be harmed before this Court's next scheduled conference is incorrect. The Government's position in this and like cases ignores or abandons any pretext of complying with regulations. It has never asserted to this Court that its delays – some in excess of 30 months – are in conformity with its own standards and procedures, stated in 8 C.F.R. 103.2(b)(18). A memorandum of February 4, 2008 reflects an informal policy change that is inconsistent with authority on continuing appropriate investigation. However, the fact that the Agency is attempting to address these issues through such informal means, even after protracted litigation, supports this Court's position that formal "notice and comment" rulemaking may be appropriate. The applicable regulation permits delay but requires regular review by increasingly senior personnel of the agency. There is no evidence of such review in any of these cases. It appears that the agency is seeking to evade its own regulations.

When seen in this context, and keeping in mind that the only negative result to the Government of the Court's Order is a continuing inability to adjudicate cases it did not think merited consideration for an already extended period of time, there is no harm to the Government. There are three alternatives in this case: 1) the Government admits it has used the FBI name check to improperly delay cases like the Plaintiffs' and adjudicates the claims without reference to that name check; 2) the Government chooses to initiate formal notice and comment rulemaking prior to the March 14, 2008 date set by the Court; or 3) the Government explains to

the Court on March 18, 2008 why it has done neither of the first two actions. None of these possibilities provides any serious or irreparable harm to the Government.

c. **The Harm to the Plaintiffs is Significant**

The Plaintiffs have all already suffered greatly from extensive delays. They will continue to suffer as long as the Government continues its stubborn and unwarranted defense of a practice at is neither lawful nor useful. There is no indication in the record that any of these plaintiffs pose any danger to the public or risk to national security. The principal case of Mr. Mocanu has been pending with the agency almost four years and in this Court for almost a year. Mr. Cusumano has waited almost two years since his interview when the statute requires a decision within 120 days. Mr. and Mrs. Barikbin have waited almost three and half years since filing with the Agency and their case in this Court has been pending for close to eight months. Ms. Zhang filed her application with the agency more than two and half years ago. Dr. Newton filed almost four years ago. Mr. Hussain was interviewed almost two years ago. If proper and normal processing of these cases had been undertaken, then each of these individuals would almost certainly be U.S. citizen at this time. Instead, they are left feeling like outsiders in the country they call home and to which – as part of their written application – they have already indicated allegiance.

There is no indication that Defendants or any of them have sought to complete the name check or even made any investigative reports on any of these cases. While that it is true that they have been enjoined from making this case moot with a final decision, they have never been enjoined from conducting and/or completing the required investigation (or even the investigation they assert should be required). The Government is completely incorrect in asserting that little or no harm will visit these plaintiffs as a result of further delay.

d. **The Government Position is Harmful to the Public Interest in that it Erodes Confidence in the Executive Branch of our Government**

The Government has continued to pursue its claims to engage in a practice of complete FBI name checks in immigration matters even after the Plaintiffs' have proven the practice has no legal basis and does not help to effectively achieve the very aims it purports to support.

To the extent that Defendants argue that name checks are essential to protect "public safety and national security," (Gov't Mot. at 11) the argument is in consummate bad faith. Each of these individuals have been waiting an extensive period of time. The Court correctly notes that such delays actually impede national security. It is hard to justify national security or public safety concerns when the delay for protecting those concerns range up to four years.

The Government position in its most recent Motion appears to contradict statements made by Defendants Chertoff and Gonzalez. They have publicly espoused risk assessment, the balancing benefits of investigations of all potential applicants with the likelihood of finding any disqualified applicant.

The Defendants argue that name checks assist in identifying individuals barred from naturalization under 8 U.S.C. §1424. Gov't Mot. at 6. The Defendants have offered no evidence to support that proposition. The District Judge has observed that national security interests and public safety interests have been checked thoroughly, including name checks, when aliens apply for lawful permanent residence either by immigration or adjustment of status.

Recently – possibly in response to this litigation – the US CIS placed a 180-day limit on name check delays in adjustment of status cases. This informal policy change made one of the individual claims in this matter moot. The position reflected in the recent US CIS Memorandum also mirrors the already-existing six month review period for investigations in the regulations at

8 C.F.R. 103.2(b)(18). Most importantly, it belies the assertion that name checks relate to national security, if the Government would only make them an absolute requirement after an individual has been living legally in the U.S. for a minimum of three to five years. Such a position makes a mockery of serious national security concerns by creating a system in which potentially dangerous individuals are allowed to live and work lawfully in the U.S. for years before they are completely vetted.

Again, the likely reason this recent policy change was made probably has less to do with national security than with a continuing legal and political strategy to force individual applicants to go through the Court if they want their claims addressed in time for their U.S. citizenship to have any meaning. Such a position is not in the public interest. It is important to recognize that the context of this Motion is that the Government is only being prevented from making these cases moot – and not from any other action or inaction.

WHEREFORE, the Plaintiffs respectfully request that this Court's Order and its injunction remain in effect in accordance with the Court's Order of February 8, 2008.

Respectfully submitted,

(JJO3063)

JAMES J. ORLOW

In the above captioned case and for Mr. Landau in *Barakbin v. INS*, Civ. Act.07-3223 and for Mr. Anna in *Newton v. Monica*, Civ. Act. 07-2859 and Ms. Ryan in *Hussain v. Mukasey*, Civ. Act. 08-195.

PROOF OF SERVICE

I hereby certify that on February 20, 2008 I caused a copy of PLAINTIFFS' JOINT OPPOSITION TO DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL OF THIS COURT'S INJUNCTIVE ORDER to be served via first class mail, postage prepaid on:

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