# SUBSTANTIALLY JUSTIFIED? THE U.S. GOVERNMENT'S USE OF NAME-CHECK TECHNOLOGIES IN NATURALIZATION PROCEDURES

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ABSTRACT

*The U.S. Citizenship and Immigration Services relies upon the Federal Bureau of Investigation to administer the National Name Check Program, which conducts background checks on applicants for naturalization. Backlogs have led to long delays for aspiring citizens and significant legal problems for the government.*

*This iBrief examines the First Circuit's ruling in* Aronov v. Napolitano *that an eighteen-month delay in adjudicating a naturalization application was substantially justified. While the government's inefficiency can be explained partly by an understaffed bureaucracy, overwhelming evidence suggests that these problems are exacerbated by a technological infrastructure that is ill-equipped to handle the scope of the backlog. This iBrief argues that the government should be held liable for its failures; and that long-overdue technological improvements should be implemented to prevent these issues from recurring in the future.*

## INTRODUCTION

¶1 In June 2009, the U.S. Citizenship and Immigration Services (USCIS) announced that it had cleared the FBI National Name Check Program (NNCP) backlog, seemingly putting an end to a problem that had plagued USCIS in recent years.[2] The optimism of this announcement, however, belies major concerns: Has the government solved the problem, or merely forestalled a

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[2] Press Release, U.S. Citizenship and Immigration Services, USCIS, FBI Eliminate National Name Check Backlog (June 22, 2009), *available at* http://www.uscis.gov/files/article/NNCP_backlog_elim_22jun09.pdf.

crisis? Is the government technologically competent to handle the increased demand which could produce another such backlog? Is it "substantially justified" in causing delays in the adjudication of adjustment of status and naturalization applications?[3]

¶2 In 2009, Acting USCIS Ombudsman Richard E. Flowers declared that he "no longer considers FBI name checks to be a pervasive and serious problem."[4] After *Aronov*, however, it is clear that FBI name checks continue to stymie the naturalization process in the United States. This iBrief analyzes *Aronov* in light of the USCIS's and the FBI's efforts to combat a serious technological challenge, and will show that the government's response is not legally defensible because of its equally serious technological shortcomings.

## I. THE NAME-CHECK PROCESS

### *A. Technology*

¶3 The NNCP reviews the FBI's files for background information about individuals and provides it to various government agencies including the USCIS, which uses the program to vet applicants for naturalization.[5] The name check proceeds as follows:

> The name is electronically checked against the FBI Universal Indices (UNI). The searches seek all instances of the individual's name and close date of birth, whether a main file name or reference. . . . [A] main file name is that of an individual who is, himself, the subject of an FBI investigation, whereas a reference is someone whose name appears in an FBI investigation. . . . The names are searched in a multitude of combinations, switching the order of first, last, middle names, as well as combinations with just the first and last, first and middle, and so on. It also searches different phonetic spelling variations of the names, [which is] especially important considering that

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[3] Aronov v. Napolitano, 562 F.3d 84, 87 (1st Cir. 2009) (en banc).
[4] 2009 USCIS OMBUDSMAN ANN. REP. 35, *available at* http://www.dhs.gov/xlibrary/assets/cisomb_annual_report_2009.pdf.
[5] *Foreign Travel to the United States: Testimony Before the H. Comm. On Gov. Reform*, 108th Cong. 2 (2003) (statement of Robert J. Garrity, Jr., Assistant Director, Records Management Division, Federal Bureau of Investigation), *available at* 2003 WL 21608243.

> many names in our indices have been transliterated from a language other than English.
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> If there is a match with a name in a FBI record, it is designated as a "Hit," meaning that the system has stopped on a possible match with the name being checked, but now a human being must review the file or indices entry to further refine the names "Hit" on. . . .
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> Approximately 85% of name checks are electronically returned as having "No Record" within 72 hours. A "No Record" indicates that the FBI's Central Records System contains no identifiable information regarding to [sic] this individual. . . . A secondary manual name search usually identifies an additional 10% of the requests as having a "No Record," for a 95% overall "No Record" response rate. . . . The remaining 5% are identified as possibly being the subject of an FBI record. The FBI record must now be retrieved and reviewed. . . . The information in the file is reviewed for possible derogatory information. Less than 1% of the requests are identified with an individual with possible derogatory information. These requests are forwarded to the appropriate FBI investigative division for further analysis.[6]

¶4 This system, which has its origins in the Eisenhower administration as a means of vetting prospective federal employees, was placed under immense strain in the aftermath of the September 11, 2001 terrorist attacks, when new immigration-related security programs caused the volume of name-check requests to grow dramatically.[7] Before September 11, the NNCP handled approximately 2.5 million name checks annually; after the attacks, in fiscal years 2002 and 2003, that number grew to 3.2 million and 5.6 million respectively.[8]

*B. The NNCP Backlog*

¶5 By May 2007, the USCIS was overwhelmed, facing "a staggering 329,160 FBI name check cases pending, with approximately 64 percent (211,341) of those cases pending more

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[6] *Id.* at 3–4.
[7] *Id.* at 2–3.
[8] *Id.* at 2.

than 90 days and approximately 32 percent (106,738) pending more than one year."[9] The agency considered a number of solutions to this backlog, including the implementation of a Background Check Service (BCS) which would track the status of security checks in pending applications.[10] As USCIS Ombudsman Prakash Khatri explained in the 2007 annual report to Congress:

> USCIS has limited capability to produce reports detailing the status of long-pending FBI name check cases. In addition, USCIS systems do not automatically indicate when a delayed name check is complete and the case can be adjudicated. Often, this leads to a situation where the validity of other checks expire before USCIS reviews the case.[11]

¶6 The 2007 report also stated the need for tools including "wrap-around" or "wrap-back" security checks, which are "real time security updates from the law enforcement community on applicants who violate criminal laws."[12] Such a system would give the USCIS access to updated data about a person's criminal record without the need for additional name checks.[13] The report noted, however, that "it appears that USCIS is focused on providing the FBI name check program with resources, rather than concentrating on the necessary wrap-back service."[14]

¶7 Indeed, the USCIS chose to commit additional resources to the NNCP, allowing the FBI to increase its personnel; "[m]ost of the improvements in name check processing times and the reductions in the backlogs have resulted from this increase in resources and personnel."[15] The BCS, which was already overdue when it was described in the 2007 report, had not been implemented by the publication of the 2008 report, and was not

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[9] 2007 USCIS OMBUDSMAN ANN. REP. 37, *available at* http://www.dhs.gov/xlibrary/assets/CISOMB_Annual%20Report_2007.pdf.
[10] *Id.* at 43.
[11] *Id.*
[12] *Id.* at 57.
[13] *Id.* at 57–58.
[14] *Id.* at 58.
[15] 2008 USCIS OMBUDSMAN ANN. REP. 7, *available at* http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2008.pdf.

mentioned in the 2009 report.[16] Similarly, the USCIS in 2008 was still operating without wrap-around security checks; the Ombudsman stated "that it does not expect this feature to be available in the near future."[17]

## II. THE DECISION IN ARONOV V. NAPOLITANO

¶8 Besides illustrating the shortcomings of employing the FBI's NNCP in the naturalization process, an analysis of *Aronov* and its case history reveals that the USCIS was not substantially justified in its tardiness in processing a naturalization application pending an FBI name check. Given the predictable slowness of the process and the aforementioned technological unpreparedness of the USCIS, the government should not have violated the applicable statute by imposing an unnecessary delay.

### *A. Facts*

¶9 In May 2004, Alexandre Aronov, a Russian native and U.S. legal permanent resident, applied for U.S. citizenship.[18] In February 2005, the USCIS interviewed Mr. Aronov without receiving a "full criminal background check" from the FBI, despite the agency's own regulation that such an examination may be undertaken only after conducting such a check.[19] Mr. Aronov was told that he could not be naturalized until the check was complete, even though he was entitled by statute to adjudication of his application within 120 days of the interview.[20] In 2006, after more than eighteen months, he filed suit in the U.S. District Court for the District of Massachusetts, demanding action on his application.[21] The government settled the case and moved to remand to the

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[16] 2007 USCIS OMBUDSMAN ANN. REP., *supra* note 9, at 37; 2008 USCIS OMBUDSMAN ANN. REP., *supra* note 15, at 7; 2009 USCIS OMBUDSMAN ANN. REP., *supra* note 4.

[17] 2008 USCIS OMBUDSMAN ANN. REP., *supra* note 15, at 45.

[18] Aronov v. Napolitano, 562 F.3d 84, 87 (1st Cir. 2009) (en banc).

[19] *Id.*; *see* 8 C.F.R. § 335.2(b) ("The [USCIS] will notify applicants for naturalization to appear before a [USCIS] officer for initial examination . . . only after the Service has received a definitive response from the [FBI] that a full criminal background check of an applicant has been completed.").

[20] *Aronov*, 562 F.3d at 87; *see* 8 U.S.C. § 1447(b) (2006) ("If there is a failure to make a determination . . . before the end of the 120-day period after the date on which the examination is conducted . . . the applicant may apply to the United States district court for the district . . . for a hearing on the matter.").

[21] *Aronov*, 562 F.3d at 86.

USCIS so that the agency could grant him citizenship. The district court granted the motion, and Mr. Aronov was naturalized later that year. Mr. Aronov subsequently applied for attorney's fees for his mandamus action under Section 2412 of the Equal Access to Justice Act (EAJA); according to this provision, a plaintiff is entitled to such fees unless the government was "substantially justified" in its position.[22]

*B. Procedural History*

*1. The District Court's Decision*

¶10 The district court awarded attorney's fees to Mr. Aronov, holding that the government's position was not "substantially justified" under the EAJA.[23] Substantial justification is defined as an explanation which has a "reasonable basis in law and fact."[24] The court noted that the government's own internal policy provides for expediting the FBI name check if a mandamus action has been filed, and thus encourages such actions as a way to gain priority.[25] It rejected the argument that the delay was justified by a backlog in the FBI's NNCP, explaining that the delay itself, regardless of the agency responsible, "renders the government's pre-litigation position not 'substantially justified.'"[26]

¶11 The court concluded that the government's unreasonable delay in completing the name check forced Mr. Aronov to sue at personal expense "to slightly mitigate the already unlawful delay in that processing."[27]

*2. The First Circuit's Panel Decision*

¶12 A divided panel of the U.S. Court of Appeals for the First Circuit affirmed the district court.[28] The majority explained that even when applying *Chevron* deference to the government's

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[22] *Id.*; 28 U.S.C. § 2412(d)(1)(A) (2006).
[23] Aronov v. Chertoff, No. 06-11526-NG, 2007 U.S. Dist. LEXIS 40455, at *8 (D. Mass. January 30, 2007); The district court and the First Circuit also discuss whether Mr. Aronov is a "prevailing party" under the same statute, an issue beyond the scope of this iBrief.
[24] *Id.* at *5–6.
[25] *Id.* at *7–8.
[26] *Id.* (quoting Smirnov v. Chertoff, No. 06-10563-RWZ, 2007 U.S. Dist. LEXIS 9598, at *9 (D. Mass. Jan. 18, 2007)).
[27] *Id.* at *8.
[28] Aronov v. Chertoff, 536 F.3d 30, 32 (1st Cir. 2008).

general policy, the court is not required to find substantial justification in the particular delay with Mr. Aronov's application.[29] The court's "assessment of what is reasonable is informed by the relevant statutes and regulations," and the government's own regulation interprets the relevant statute as imposing 120-day deadline.[30] The USCIS offered no "particularized justification" for noncompliance, giving only policy justifications for the FBI NNCP.[31] Finally, the court noted that although the USCIS attributed the delay to the FBI name-check backlog, the failure was caused by the agency's premature and unexplained examination of Mr. Aronov in violation of its own regulation.[32]

¶13 The dissent countered that the government was substantially justified because the USCIS's use of the FBI NNCP as part of its criminal background check "was a reasonable interpretation of a legislative command and that interpretation was committed to the agency's expertise."[33] Furthermore, it argued that the relevant statute did not mandate adjudication within 120 days of Mr. Aronov's interview, but merely established "the timing of suits" to encourage fast action by the USCIS.[34] The majority's demand for a particularized justification for the delay in Mr. Aronov's case was unnecessary "because the entire point of

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[29] *See id.* at 43; *see also* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

[30] *Aronov*, 536 F.3d at 44–45; *see also* 8 U.S.C. § 1447(b) (2006); *see also* 8 C.F.R. § 335.3(a) ("A decision . . . shall be made at the time of the initial examination or within 120-days after the date of the initial examination of the applicant for naturalization.").

[31] *Aronov*, 536 F.3d at 47.

[32] *Id.* at 49; *see also* § 335.2(b).

[33] *Aronov*, 536 F.3d at 62 (Lynch, C.J., dissenting); § 1446(a) ("Before a person may be naturalized, an employee of the [USCIS] . . . shall conduct a personal investigation of the person applying for naturalization."); Dep'ts of Commerce, Justice & State, the Judiciary & Related Agencies Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2448–49 ("[N]one of the funds appropriated or otherwise made available to the [USCIS] shall be used to complete adjudication of an application for naturalization unless the [USCIS] has received confirmation from the [FBI] that a full criminal background check has been completed.").

[34] *Aronov*, 536 F.3d at 64–65 (Lynch, C.J., dissenting).

conducting name checks is that the government does not know what the check will uncover."[35] The dissent supports as reasonable the agency's choice to "to postpone a decision on Aronov's citizenship until obtaining information about whether the name check revealed risks to national security or public safety."[36]

*C. Holding*

¶14 The First Circuit, sitting en banc, reversed the panel decision and dismissed Mr. Aronov's EAJA application.[37] The court explained that substantial justification is not necessarily achieved by being legally correct, but merely by taking a position that a reasonable person would think is correct.[38] Such was the case, the court reasoned, with the USCIS's decision to include the NNCP as part of the required full criminal background check.[39] Although Congress did not include the NNCP in that check, the delegation of that choice to USCIS "is entirely sensible for a number of reasons, including the sometimes rapidly evolving law enforcement technologies."[40] Given that Congress did not terminate the FBI NNCP in the face of the backlog, "but rather provided funding to expedite the process USCIS had chosen," the government's decision to employ the NNCP was reasonable given *Chevron* deference.[41]

¶15 Finally, the court rejected the district court's reasoning that the USCIS's policy of expediting applications for those who file mandamus actions "unreasonably forces applicants to sue."[42] It explained that the agency's policy of giving preferential treatment to litigants was merely "a rational allocation of resources," not a grant of a statutory right to priority in adjudicating cases.[43]

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[35] *Id.* at 66–67.
[36] *Id.* at 67–68.
[37] Aronov v. Napolitano, 562 F.3d 84, 86 (1st Cir. 2009) (en banc). Lynch, C.J., the dissenter in the panel decision, wrote the en banc majority opinion.
[38] *Id.* at 94; *see also* Pierce v. Underwood, 487 U.S. 552, 565 (1988) ("[Substantially justified] is not 'justified to a high degree,' but rather 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person.").
[39] *Aronov*, 562 F.3d at 95.
[40] *Id.*
[41] *Id.* at 96; *see also* 467 U.S. at 843.
[42] *Aronov*, 562 F.3d at 99.
[43] *Id.*

## III. ANALYSIS

### *A. The Dissents in* Aronov v. Napolitano

#### *1. Torruella's Dissent*

¶16 Judge Torruella's dissent decried the majority's willingness to accept "amorphous policy interests alleged by the government through bombastic exaggeration and doomsday predictions" instead of compensating Mr. Aronov for the mandamus action he filed to obtain citizenship.[44] It argued that his modest EAJA award did not threaten the government's policy, but merely recovered costs incurred in filing suit "after an excessive delay attributable to backlog and a failure to follow protocol."[45]

#### *2. Lipez's Dissent*

¶17 Judge Lipez, who wrote the reversed panel opinion, pointed out that even if the USCIS were entitled to *Chevron* deference the government still lacked substantial justification for its eighteen-month delay in Mr. Aronov's application.[46] Judge Lipez insisted that the 120 days in the relevant statute and regulation was a deadline, dismissing the view that such a time frame was "merely aspirational."[47] He argued that Congress's adoption of the option of bringing suit made "such a related view" impossible, and that the government's own regulation treated the 120-day period as a deadline.[48]

¶18 Judge Lipez further explained that Mr. Aronov's premature interview was not an isolated error, but rather part of the USCIS's "*regular practice* [of violating] its own regulations by examining candidates before receiving NNCP results" and inviting lawsuits by missing the subsequent deadline.[49] "That is an indulgent reasonable person," he concludes, "who would view [such] conduct so benignly."[50] He also wrote that the USCIS was not in a "hopeless bind" as it claimed to be, since it could have addressed

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[44] *Id.* (Torruella, J., dissenting).
[45] *Id.* at 100–01.
[46] *Id.* at 110 (Lipez, J., dissenting). Judge Lipez wrote the majority opinion in the earlier panel decision.
[47] *Id.* at 111; *see also* 8 U.S.C. § 1447(b) (2006); 8 C.F.R. § 335.3(a).
[48] *Aronov*, 562 F.3d at 111.
[49] *Id.* at 112.
[50] *Id.*

its national-security concerns and the 120-day deadline "in a manner consistent with the applicable laws and regulations."[51]

*B. Technological Solutions*

¶19 As the First Circuit noted in its original panel opinion, "[t]here is nothing in the language of *8 U.S.C. 1446(a)* or the 1998 Appropriations Act that requires USCIS to include the NNCP in the naturalization process."[52] In fact, even though the NNCP had already existed for decades when the relevant statutes were enacted, Congress made no provision for it in the 1998 appropriations bill calling for a "full criminal background check" by the FBI.[53] The USCIS had no reasonable basis for relying on the FBI's technology, given the certainty that it would not work fast enough to complete the name check on Mr. Aronov within the 120-day deadline.

¶20 Although the en banc majority is correct that Congress has delegated the task of choosing the appropriate tools for the background check of a naturalization applicant, it overlooks the fact that the USCIS's rate of technological development with regard to background checks may not live up to the original principle behind such delegations.[54] Although the USCIS deserves deference as to its policy choices, such deference should not extend so far as to contradict both statute and regulation—to do so would be clearly unreasonable and unacceptable even under *Chevron*.[55]

¶21 The government's response to the NNCP backlog was focused not on updating the FBI's tools, but rather on providing enough resources to secure additional staff.[56] Despite the inherently technological nature of the problem, the government ignored the more permanent solution of making important technological improvements like the BCS and wrap-around security checks, and stopped at securing more funding for

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[51] *Id.* at 113.
[52] Aronov v. Chertoff, 536 F.3d 30, 39 (1st Cir. 2008).
[53] *Id.* at 39–40; *see* 8 U.S.C. § 1446(a); 28 U.S.C. § 1447(b) (2006); *see also* Dep'ts of Commerce, Justice & State, the Judiciary & Related Agencies Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2448–49.
[54] *See supra* text accompanying note 40.
[55] *See supra* text accompanying note 29.
[56] 2008 USCIS OMBUDSMAN ANN. REP., *supra* note 15, at 7.

personnel. This choice reflects ominously on USCIS's ability to deal with large workloads in the future. The Ombudsman's Report in 2007 pointed to three main concerns:

> (1) [M]ost USCIS adjudications processes are paper-based; (2) existing USCIS information management systems do not provide robust data analysis tools necessary to monitor productivity and make changes when necessary; and (3) most USCIS information management systems are stand-alone systems with little or no interconnectivity.[57]

¶22 Moreover, the report expresses the overarching concern that comprehensive immigration reform could overwhelm USCIS's information systems.[58] It is clear, therefore, that new investments in technology are needed to solve these problems.

## CONCLUSION

¶23 The USCIS is ill-equipped for future crises. The agency's information technology falls far short of what is necessary to handle potential workload issues like the recently resolved NNCP backlog. As the 2007 Ombudsman's Report explains:

> USCIS remains entrenched in a cycle of continual planning with limited progress toward achieving its long-term transformation goals. Until USCIS addresses this issue, the bureau will not be in a position to manage existing workloads or handle the potentially dramatic increase in immigration benefits processing workloads that could result from proposed immigration reform legislation.[59]

¶24 The intervening years have seen the USCIS triumphant over its elimination of the NNCP backlog, but largely silent on the topic of its technological transformation. The backlog in *Aronov* may be gone, but the underlying sources of the problems remain inadequately addressed. Until the USCIS takes the steps it

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[57] 2007 USCIS OMBUDSMAN ANN. REP., *supra* note 9, at 66.
[58] *Id.* at 11–12.
[59] *Id.* at 55 (quoting *An Overview of Issues and Challenges Facing the Department of Homeland Security: Statement before the H. Comm. on Homeland Security* (Feb. 7, 2007) (statement of Inspector General Richard L. Skinner, Dept. of Homeland Sec.) *available at* http://www.dhs.gov/xoig/assets/testimony/OIGtm_RLS_020707.pdf (last visited June 3, 2007).

considered but did not implement,[60] it will remain ill-equipped to handle new crises and prevent lawsuits like *Aronov*.

[60] For example, the BCS and wrap-around security checks described in 2007 USCIS OMBUDSMAN ANN. REP., *supra* note 9, at 66.