Immaterial Misrepresentation as a Ground for Naturalization Denial and Denaturalization

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Introduction

At all three phases of the naturalization process, an applicant makes sworn statements under penalty of perjury. The first phase is a written application known as Form N-400 to which the applicant must subscribe. The second phase is an interview that the applicant must personally attend. The third phase is an oath ceremony where the applicant confirms the truth of what was previously stated about his or her crimes or offenses, despite the intervening passage of time.

Form N-400 contains three questions that are usually asked anew at interview and oath ceremony. Misrepresentations on these questions have resulted in criminal denaturalization under a mandatory federal sentencing paradigm upon conviction because there is no express materiality element in 8 U.S.C. § 1451(e). On one hand, there is a tendency to grant naturalization to rehabilitated applicants who make accurate representations about immaterial matters in response to Question 22 of Part 12 of the current Application for Naturalization (Form N-400) states: "Have you EVER committed, assisted in committing, or attempted to commit a crime or offense for which you were NOT arrested?"[1] On the other hand, immaterial misrepresentations made by similarly-rehabilitated applicants in response to the same question may lead to federal criminal prosecution; at sentencing, denaturalization would be mandatory.

The other two questions relevant to this article are whether the applicant has ever "knowingly given false or misleading information to any U.S. government official while applying for any immigration benefit or to avoid deportation, exclusion, or removal;" and whether the applicant has ever "lied to any U.S. government official to gain entry or admission into the United States." The United States Court of Appeals for the Sixth Circuit recently affirmed a criminal denaturalization of a defendant who allegedly made immaterial misrepresentations in response to these questions. (*United States v. Maslenjak*, 821 F.3d 675 (6th Cir. 2016), *reh'g den.*, 2016 U.S. App. LEXIS 9984 (6th Cir. 2017), *cert. granted*, 196 L. Ed. 2d 595 (2017).)

The Supreme Court of the United States (SCOTUS) recently granted certiorari in *Maslenjak* on whether the alleged immateriality of misrepresentations should result in a remand to the Federal Court of Appeals for the Sixth Circuit. There is a gross disparity between the civil denaturalization statute containing an express element of materiality, and the criminal denaturalization statute omitting materiality as an element. Whether a materiality element should be imputed into the criminal denaturalization statute should be a product in part of who in the criminal justice system is entrusted with informing defendants of their rights and how such information should be conveyed in the form of admonishments and advice where criminal denaturalization looms.

An initial question is whether district courts have the expertise, given Congress's choice in ImmAct90 to displace district courts from adjudicating naturalization applications, to thoroughly admonish a defendant about criminal denaturalization as a mandatory consequence of conviction under 18 U.S.C. § 1425(a). Without a materiality element, criminal denaturalization is a clear consequence; criminal trial counsel must accordingly provide foreign nationals with immigration advice about criminal denaturalization under *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). By declining to distinguish immigration consequences from traditional penal consequences, the *Padilla* opinion furthered an agenda to incorporate immigration consequences into the fold of penal consequences about which a defendant must receive advice from trial counsel as a product of the right to counsel under the Sixth Amendment of the U.S. Constitution. Imputing a materiality element into 8 U.S.C. § 1451(e) would further the agenda to extend beyond criminal sentencing the advice to which a defendant is entitled.

I. Jurisprudence has developed from criminal and civil denaturalization of naturalization applicants who testified to never committing crimes or offenses for which they were not arrested.

The Form N-400's Question 22 poses a threat not only to applicants, but to individuals who have lived in

[1] Question 22 of Part 12 extends to expunged, sealed, or cleared records.

the U.S. as naturalized U.S. citizens for decades. (*United States v. Dang*, 488 F.3d 1135 (9th Cir. 2007) (claim brought 5 years after naturalization); *Costello v. United States,* 365 U.S. 265, 268 (1961) (27 years); *Kungys v. United States,* 485 U.S. 759 (1988) (34 years.).) Again, the materiality element in civil denaturalization proceedings subjects the Government to a heavy burden of proof. Caselaw provides a test so the Government can identify naturalized citizens to whom such denaturalization applies. (*U.S. v. Zhou*, 815 F.3d 639, 643 (9th Cir. 2016) (Applicant physically seized and stole from his business partner while his naturalization application was pending. Applicant was not arrested until after he was admitted into citizenship. The court held that Applicant "exhibited a lack of moral character committing a serious crime—robbery.").)

II. A remand is essential to consider prejudice that Maslenjak suffered because the Sixth Circuit distinguished criminal denaturalization from civil denaturalization on materiality grounds.

In the record on appeal in *Maslenjak*, the federal district court had convicted a female defendant of 18 U.S.C. § 1425(a). At sentencing, the district court imposed criminal denaturalization. The Sixth Circuit in *Maslenjak* affirmed on the basis that such denaturalization has no materiality element.

In contrast, the civil denaturalization statute expressly contains a materiality element. The Sixth Circuit thus distinguished denaturalization under § 1451(e) from denaturalization under 8 U.S.C. § 1451(a) by excepting § 1451(e) from the materiality element described in *Kungys v. U.S.*, 485 U.S. 759, 772-773 (1988).

The emphasis of *Kungys* on materiality calls for a construction broad enough to encompass § 1451(e). No legislative history establishes that Congress intended to exclude materiality from § 1451(e), so a broad construction of materiality is reasonable. Such a construction would provide naturalized citizens with means to defend against denaturalization regarding interviews at which there were misrepresentations made or misrepresentations incorporated by reference. The facts of *Maslenjak* militate in favor of such a construction because the prosecution of the female defendant therein by the U.S. Attorney was arguably a product of vindictiveness. The U.S. Attorney secured a federal conviction against her husband for misrepresentations related to immigration. The U.S. Immigration Court would not have had jurisdiction to consider her husband's applications for relief unless she was a U.S. citizen. The U.S. Attorney could be perceived as vindictive in seeking to convict her as a means of denaturalizing her and accordingly undermining her husband's eligibility for relief before the U.S. Immigration Court. She should be found to have suffered prejudice if, absent a vindictive prosecution, the civil denaturalization ground requiring materiality would have been the only applicable means to denaturalize her. Prejudice is an equity that may motivate SCOTUS to impute an element of materiality into § 1451(e). Society cannot tolerate the possibility of a vindictive prosecutor who would prosecute only to ensure criminal denaturalization due to the absence of a materiality element therein. Such vindictiveness is manifest where, as in *Maslenjak*, a given defendant would have a strong possibility of escaping civil denaturalization due to the materiality element.

III. Historical significance: How IMMACT 90 bears on materiality and how to counsel clients.

Naturalization (USCIS Form N-400) and adjustment of status (USCIS Form I-485) applications ask foreign nationals to disclose any crimes they have committed for which they have never been arrested. However, N-400 naturalization applications present the question broadly, in sharp contrast to the narrow question listed on the I-485 adjustment application.[2] This broadening of the N-400's question, beyond what the adjustment application asks, coincided with IMMACT 90 and subsequent Federal Register publication of a rule implementing IMMACT 90's grounds[3] for adverse findings on good moral character. Another impact of IMMACT 90 was the aforementioned delegation of naturalization adjudication to legacy INS, rather than the district court. By taking away primary adjudication authority for naturalization from district courts, Congress arguably disavowed the authority of the district court to act alone in denaturalization proceedings. If so, then such disavowal of authority for the district court to act alone in the context of naturalization would reinforce materiality as an element applicable to criminal denaturalization.

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[2] Question 1(a) of Part 3 of the Form I-485 Application to Register Permanent Residence or Adjust Status contains a question limited to "knowing" commission of crimes involving moral turpitude and drug-related offenses for which the foreign national had not been arrested.

[3] IMMACT 90 added these grounds for adverse finding on good moral character by amending Immigration and Nationality Act § 101(f)(3); 8 U.S.C. § 1101(f)(3).

- **Applicants for naturalization should look to their adjustment of status application when answering Question 22 on USCIS Form N-400.**

Good moral character is the overarching standard governing review of crimes or offenses for which an applicant has not been arrested. Failure of naturalization applicants to disclose crimes does not just put them in jeopardy of immediate denial of naturalization For those applicants whose undisclosed crimes come to light after their participation in oath ceremonies at which there has been no disclosure, these naturalized citizens become subject to denaturalization. Naturalization applicants and naturalized citizens should accordingly beware of criminal charges, issuance of a notice to appear[4] before the United States Immigration Court, removal on deportability grounds, and rescission of permanent residency if similar non-disclosure of crimes involving moral turpitude or controlled substance offenses occurred in the context of adjustment of status or consular processing.[5] A countervailing source of jeopardy is full disclosure, which may give the adjudicating USCIS officer ammunition to find a reason to deny the application.[6] There is manifest injustice in asking an applicant with limited knowledge of the law to review his or her own conduct and determine whether such conduct has met all elements of a criminal offense in order to constitute a crime or offense for which he/she has not been arrested. This challenge is especially apparent when the question relates to crimes involving moral turpitude.[7]

If the potential crime or offense occurred prior to the I-485 application, counsel should analyze the facts for whether consistency with the answer on Form I-485 is possible. If a disclosure is required that was not mandated on the I-485 application, and if the client has an orientation toward full disclosure on Form N-400, the "failure" to disclose on Form I-485 should be explained on Form N-400. If the applicant has engaged in new criminal activity for which he or she has not been arrested since adjusting status, and the applicant acknowledges this misconduct on Form N-400, how the applicant is nevertheless eligible for naturalization should be explained. A naturalization applicant should disclose only those activities subject to open and pending investigation, rather than reading this question as calling for a litany of every possible mischief.[8] The applicant should not necessarily file Form N-400 if the applicant has an orientation toward full disclosure, if such disclosure would render a showing of prima facie eligibility impossible (*i.e.* a pending investigation of an alleged crime exists), and if there is no other affirmative evidence by which to demonstrate the applicant's good moral character.

- **The political climate, even before the election, was ripe for investigation of naturalized citizens about false testimony because of the denaturalization standard.**

On September 8, 2016 the Department of Homeland Security's Office of Inspector General (OIG) reported that "USCIS granted U.S. citizenship to at least 858 individuals ordered deported or removed under another identity when, during the naturalization process, their digital fingerprint records were not available."[9] On December 2, 2016, the House Judiciary

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[4] Form I-862 is entitled and colloquially known as a "notice to appear."

[5] 12 USCIS Policy Manual F.2, *available at* https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartF-Chapter2.html, addressing an applicant's commission of a crime for which he or she has not been arrested in question 22 on Form N-400 (2015). The USCIS Policy Manual is available through Lexis research services at Immigration Law and Procedure, USCIS Sources, and reproduced in Volume 15 of Gordon, et al., Immigration Law and Procedure,

[6] *See* Boutilier v. INS, 387 U.S. 118 (1967) (Officer denied naturalization application based on discretionary grounds after applicant disclosed in detail information which had not been previously disclosed at time of adjustment. Applicant's lawful permanent residency status was rescinded, and applicant was ordered deported based on the newly disclosed information. Applicant was rendered excludable because he was "afflicted with psychopathic personality" under former INA §212(a)(4), 66 Stat. 182, 8 U.S.C. § 1182(a)(4).).

[7] Gary Chodorow, Crimes Involving Moral Turpitude: Judge Posner's Blistering Concurrence in *Arias v. Lynch* (7th Cir. 2016), (Sept. 28, 2016) http://lawandborder.com/crimes-involving-moral-turpitude-posners-blistering-concurrence-arias-v-lynch-7th-cir-2016/.

[8] The attorney should question a client's recollection of events if the client now seeks to disclose a recollection that was not disclosed at the time of adjustment of status but would have been subject to disclosure at the time of adjustment. Without such corroboration of a recollection, and without a client who is a reliable historian, the attorney should discourage disclosure.

[9] U.S. Department of Homeland Security Office of Inspector General, Report OIG-16-130, Potential Ineligible Individuals Have Been Granted U.S. Citizenship Because of Incomplete Fingerprint Records (Sept. 8, 2016).

Committee Chairman Bob Goodlatte (R-VA) issued DHS a letter demanding more information about the department's failure to complete proper FBI Name Checks through the Electronic Immigration System (ELIS).[10] Because of this ELIS issue, USCIS temporarily ordered a halt on all adjudication of N-400 applications, as well as oath ceremonies, until USCIS could ensure ELIS worked properly. Additionally, the OIG's report prompted the House of Representatives to develop a bill that would halt adjudication of N-400 applications until U.S. Immigration and Customs Enforcement (ICE) completes digitization of paper-based fingerprint records.[11]

Naturalized citizens, who have given false testimony about offenses for which they were not arrested, may feel a heightened sense of jeopardy due to the post-election political climate. President Trump's political appointees[12] present a higher risk of a denaturalization trend. The creation of State and Major Urban Area Fusion Centers (Fusion Centers) has, as of 2005, authorized local and state agencies to share information among themselves and with federal agencies including the U.S. Department of Homeland Security.[13] This partnership between local, state and federal intelligence and law enforcement agencies raises the likelihood of applicants' undisclosed offenses coming to the attention of USCIS and resulting in denaturalization.

Title 8 of the U.S. Code (U.S.C.), section 1451, subdivision (a) calls for civil denaturalization in cases in which the naturalization was "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation."[14] An N-400 applicant must establish good moral character for the five years immediately preceding the date of filing – and throughout the application process – in order to lawfully obtain U.S. citizenship. 8 U.S.C. § 1101(f) provides seven categories which preclude a finding of good moral character. One of the categories is giving "false testimony for the purpose of obtaining any benefits under this Act . . . ."[15] 8 C.F.R. § 316.10(b)(3)(iii) includes a catch-all provision stating that applicant shall be found to lack good moral character if he/she "committed unlawful acts that adversely reflect upon the applicant's moral character . . . ."[16] Failure to meet the good moral character standard renders the certificate of citizenship "illegally procured."

How materiality applies in civil denaturalization casts some light on criminal denaturalization. [17] A past answer of "no" on question 22 can only result in civil denaturalization if USCIS finds the applicant did in fact commit an offense that did not lead to arrest, if that offense was undisclosed, and if materiality can be established as to the omitted disclosure. It is no defense that the applicant was unaware of the illegality of the misconduct at the time that he or she naturalized. A naturalization application may still be initially denied or ultimately revoked on the basis that naturalization was illegally procured as a result of the applicant's lack of good moral character.[18]

- **The Development of Processes for Improved Screening of Naturalization Clients**

What practitioners undertake in the way of document retrieval about clients of foreign nationality may improve clients' odds of avoiding the exposure and mitigating immigration consequences. To the extent that practitioners obtain rap sheets which present any likelihood of law enforcement contact, further inquiry becomes necessary.[19] Obtaining a history of addresses in the U.S. from clients will allow practitioners to obtain

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[10] House Judiciary Committee Uncovers that USCIS Fails to Conduct Background Checks on Immigration Applicants, (Dec. 2, 2016), https://judiciary.house.gov/press-release/house-judiciary-committee-uncovers-uscis-fails-conduct-background-checks-immigration-applicants/.

[11] No Official Title Given, 114 H.R. 6198, 2016 H.R. 6198, 114 H.R. 6198 (2016).

[12] As of this writing, Congress has confirmed Senator Jefferson Sessions as United States Attorney General. Stephen Miller has become senior policy advisor on the transition team. Congress has confirmed General (Ret.) John Kelly as Secretary of the U.S. Department of Homeland Security.

[13] https://www.dhs.gov/fusion-center-success-stories.

[14] 8 U.S.C. § 1451(a).

[15] 8 U.S.C. § 1101(f)(6). 8 C.F.R. § 316.10(a)(2) offers further guidance for officials making character determinations.

[16] 8 C.F.R. § 316.10(b)(3)(iii).

[17] *Kungys v. United States*, *supra,* 485 U.S. at 764 (Petitioner made immaterial false statements as to his date and place of birth. The court clarified that 8 U.S.C. 1101(f)(6) does not require materiality, even though the civil denaturalization statute does. The court remanded for further proceedings to determine if misrepresentations were testimony and whether petitioner had the intent to procure citizenship benefits.).

[18] *U.S. v. Zhou*, 815 F.3d 639*, supra*.

[19] Fusion Center information sharing network poses an added obstacle in obtaining complete information from law enforcement agencies which may become key in an Applicant's record development. Agencies have engaged in policy shopping to store information within the agency which will have the highest form of protection against disclosure in the event of a request.

police certificates about an absence of criminal history from every jurisdiction. A natural progression, where law enforcement agencies decline to issue such police certificates, may be for practitioners to request or subpoena police reports. While the subpoena power is only available in a context of immigration court or criminal court proceedings, post-conviction relief will often be a necessary corollary to development of the record for naturalization. A client whose history leads to suspicions of wrongdoing should be referred to a private investigator in furtherance of developing a record to arm himself or herself.

Conclusion

The executive order flowing from the new administration departed from traditional norms and defied the underpinnings of a system on which practitioners relied. Denaturalization of already-naturalized citizens should similarly be expected on a grander scale. Practitioners should take extraordinary measures in obtaining and acting on information from clients and for clients.

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Karl Krooth, lead counsel and president of Immigrant Crime and Justice, offers consultations to discuss your potential for relief in criminal and immigration court. Karl as well as attorney **Julian Sanchez Mora** assist foreign nationals to seek post-conviction relief in criminal courts as well as avoid immigration consequences in pending criminal matters before state superior courts and federal district courts.