MATERIALITY: WHY IT IS CRUCIAL TO THE UNITED STATES’ DENATURALIZATION PROCESS

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I. INTRODUCTION

On April 6, 2016, the U.S. Court of Appeals for the Sixth Circuit handed down a decision that unwound decades of precedent. The decision had the ability to lead to the United States denaturalizing and deporting more immigrants in a way that would violate the domestic goals of the country for immigration and naturalization, as well the United States’ obligations of non-refoulement in the international community. In the court’s decision in United States v. Maslenjak, the Sixth Circuit ruled testimonial or documentary representations in the naturalization process need not be material to trigger criminal liability under 18 U.S.C. § 1425(a). Luckily, the Supreme Court reversed this decision in 2017, holding any misstatements must be material for criminal liability to be present.

Divna Maslenjak was born in a predominately-Serbian village in what is now the nation of Bosnia. Muslims in the surrounding region often clashed with ethnic Serbs in the area like the Maslenjak family. As the former Yugoslavia began to break up, the United States sent immigration officials to assist refugees that were fleeing the violent ethnic cleansing in Bosnia. In an interview to determine refugee eligibility, Divna Maslenjak (the primary applicant for her family’s asylum application) stated under oath that her family feared persecution because her husband, who lived apart from her from 1992 to 1997 to avoid being conscripted, did not serve in the military during the war. The Maslenjaks were given refugee status in 1999.

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2 18 U.S.C.S. § 1425(a) (LexisNexis 2016) (stating that “(a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship; or (b) Whoever, whether for himself or another person not entitled thereto, knowingly issues, procures or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of nationalization or citizenship, documentary or otherwise, or duplicates or copies of any of the foregoing—Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title [18 USCS § 2331])), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title [18 USCS § 929(a)]), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.”).
4 United States v. Maslenjak, 821 F.3d at 680.
5 Id.
6 Id.
7 Id.
immigrated to the United States and settled in Ohio in 2000 where they were granted permanent resident status in 2004.8

In 2006, the Department of Homeland Security investigated Divna’s husband, Ratko, for failing to disclose military service in Serbia on his immigration application.9 Ratko served in a brigade that committed war crimes, although there is no evidence he was personally involved in the crimes.10 Nevertheless, he was arrested in December 2006 for making a false statement on a government document.11 A week after Ratko’s arrest, Divna Maslenjak filed a N-400 Application for Naturalization that stated she had never “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” or “lied to any U.S. government official to gain entry or admission into the United States.”12 Divna Maslenjak was naturalized on August 3, 2007.13

Ratko Maslenjak was convicted and thus subject to removal, so he filed a petition for asylum.14 Divna filed an I-130 Petition for Alien Relative and testified in her husband’s asylum hearing. During the hearing, she admitted to lying to immigration officers about her husband’s military service. Further, she admitted to lying when she told immigration officers the pair had lived apart while in Bosnia.15 Divna Maslenjak was subsequently indicted by a federal grand jury for “knowingly procuring her naturalization contrary to law in violation of 18 U.S.C. § 1425(a)” and “knowingly misusing her unlawfully issued certificate of naturalization to file a Form I-130 Petition for Alien Relative on February 6, 2009, to obtain lawful permanent resident status for her husband, in violation of 18 U.S.C. § 1423.”16 A jury found her guilty on both charges and granted the government’s motion to revoke her naturalized status under 8 U.S.C. § 1451(e).17

The case was appealed to the Sixth Circuit. The first issue before the court was whether 18 U.S.C. § 1425(a) contained an implied requirement of materiality when naturalized citizens face mandatory denaturalization after

8 Id.
9 Id.
10 Id. at 675.
11 Id.
12 Id. at 680.
13 Id.
14 Id.
15 Id. at 675.
16 Id.
17 Id.
conviction.18 The Sixth Circuit held that proof of a material false statement is not necessary to sustain a conviction under 18 U.S.C. § 1425(a).19 The court reasoned there is no statutory support for the materiality requirement because it is not in the text of the statute.20 The court dismissed the position of previous courts, particularly the Ninth Circuit, which had read in a materiality requirement. The Sixth Circuit said that reading in a materiality requirement would be “inconsistent with other laws criminalizing false statements in immigration proceedings and regulating the naturalization process.”21 The court also reasoned that the Immigration and Nationality Act (INA) created a two track system that has both civil and criminal denaturalization, and the lack of a materiality requirement would be justified by the fact a higher burden (beyond reasonable doubt) must be met to trigger mandatory denaturalization in the criminal context.22 As a result of the court’s ruling, Divna Maslenjak filed a writ of certiorari in September 2016 to have her case heard by the Supreme Court.23 The Maslenjaks were deported to Serbia at the end of September 2016.24 Despite their deportation, the Maslenjak’s case was argued before the Supreme Court on April 26, 2017.25 The Supreme Court issued a slip opinion on June 22, 2017 in which the Court vacated the Sixth Circuit’s decision and remanded the case to be decided in a manner consistent with the Supreme Court’s approach.26

According to the text of the statute, any conviction under 18 U.S.C. § 1425(a) triggers the mandatory criminal denaturalization under 8 U.S.C. § 1451(e).27 In making its ruling to not read in a requirement of materiality, the Sixth Circuit broke with every other circuit that had previously

18 Id. at 682.
19 Id. at 683.
20 Id. at 682.
21 Id. at 683.
22 Id. at 683–84.
23 Id.; see Petition for Writ of Certiorari, Maslenjak, 137 S. Ct. 1918 (2017) (No. 16-309).
26 Id.
27 8 U.S.C.S. § 1451(e) (LexisNexis 2016) (stating that “[w]hen a person shall be convicted under section 1425 of title 18 of the United States Code of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication.”).
considered the issue. The result would have been anyone convicted under 18 U.S.C. § 1425(a) would be subject to mandatory criminal denaturalization under 8 U.S.C. § 1451(e) regardless of whether the misstatements made to procure naturalization were material. The Supreme Court overturned the Sixth Circuit decision, although two opinions merely concurring in the judgment could suggest a different result could be possible under different factual circumstances if the Supreme Court is ever asked to reconsider this statutory scheme.

Generally, there are two types of statutory construction courts can use to interpret statutes when there is more than one plausible reading. The two categories are the textual/language canons of construction and the substantive canons of construction. The outcome of the inquiry into the canons of statutory construction will determine what possible solutions there are to the issues outlined above when mandatory criminal denaturalization is the result of a conviction under 18 U.S.C. § 1425(a) regardless of materiality. Although the Sixth Circuit thought it had a more accurate reading of the statutory scheme between 18 U.S.C. § 1425 and 8 U.S.C. § 1451 under the textual canons of construction, Justice Kagan argued in her majority opinion that the “procure, contrary to law” language meant that any misstatement had to necessarily be material. In addition, the Ninth Circuit and Supreme Court’s readings are supported even more by the substantive canons of construction.

The Supreme Court resolved the circuit-split to the advantage of several policy-based considerations. First, by following the Sixth Circuit’s interpretation, the United States would have risked violating its own longstanding domestic policies of immigration, robbing itself of productive members of society. The United States has long sought to promote robust immigration that would lead to productive immigrants becoming part of the nation’s citizenry. George Washington, for example, sought to attract immigrants to the United States that would be “sober, industrious, and

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28 See United States v. Puerta, 982 F.2d 1297 (9th Cir. 1992); see, e.g., United States v. Aladekoba, 61 Fed. App’x 27 (4th Cir. 2003); United States v. Alferahin, 433 F.3d 1148 (9th Cir. 2006).
31 Maslenjak v. United States, 137 S. Ct. 1918 (2017); see generally Eig, supra note 30.
32 Eig, supra note 30.
virtuous members of Society.”33 James Madison advocated for immigrants so long as they would be “a real addition to the wealth or strength of the United States” and were willing to assimilate and incorporate themselves into the American society.34 Today, the goals of the United States in the immigration system are to

reunite families . . . admit workers with specific skills and to fill positions in occupations deemed to be experiencing labor shortages . . . provide a refuge for people who face the risk of political racial, or religious persecution . . . [and] ensure diversity by providing admission to people from countries with historically low rates of immigration to the United States.35

The mandatory criminal denaturalization process would be too rigid in many instances if materiality is not required and could lead to the deportation of formerly-naturalized citizens that have been nothing but “sober, industrious, and virtuous” members of the United States since immigrating to the country.36

Further, if the United States were to deport denaturalized citizens, it could violate the 1967 Protocol to the Refugee Convention to which it is a party. The 1967 Protocol to the Refugee Convention incorporates the first thirty-four articles of the original Refugee Convention in 1951.37 Articles 32 and 33 of the Refugee Convention, which the United States is bound to follow as a party to the 1967 Protocol, may present particular trouble within the global community if the United States mandatorily denaturalized and then deported immigrants that did not give material false statements but were still convicted under 18 U.S.C. § 1425(a).38 In addition, the United Nations High

36 Letter from President George Washington to Rev. Francis Adrian Vanderkemp, supra note 33.
38 Convention Relating to the Status of Refugees art. 32, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention] (stating that refugees can only be expelled for compelling reasons of national security, the expulsion process must afford refugees due process of law, and expelled refugees have to be given a “reasonable period” to seek entry into another country); id. art. 33 (stating that refugees cannot be expelled back into a country where they
Commissioner for Refugees (UNHCR) currently maintains that the principle of non-refoulement is customary international law due to widespread state practice. Therefore, if naturalized citizens were to be mandatorily denaturalized and yet still maintained refugee status, the United States would have either subjected those people to life as second-class or shadow-class citizens in the United States or risked violating its international obligations by deporting former citizens that are denaturalized.

This Note will first discuss the Maslenjak case as well as United States v. Puerta and their disparate impacts on the United States’ immigration scheme. This will require a look into the denaturalization process as a whole, including a comparison of the civil and criminal denaturalization processes. Comparing the two is necessary because of the different burdens of proof in criminal and civil cases. Further, criminal denaturalization in this context is mandatory, while civil denaturalization is at the discretion of the court.

In part, this Note will also discuss and evaluate the canons of statutory construction in order to demonstrate how they support either the Sixth or Ninth Circuit readings. In part, this Note will explain why the mandatory criminal denaturalization process, as interpreted by the Sixth Circuit, would have raised complications for the United States both domestically and internationally. The Sixth Circuit ruling ran afoul of the longstanding domestic policies in favor of bringing immigrants into the country and giving them the chance to become naturalized citizens in the first place. The United States would also have risked a choice between subjecting formerly-naturalized citizens to second-rate citizenship or violating obligations under the 1967 Protocol by deporting them. Finally, in part, this Note will examine the Supreme Court’s decision and comment on why there could still be cause for concern despite the fact that the Court overturned the Sixth Circuit. Ultimately, the only way to resolve this issue conclusively may be a change to the text of the statutory scheme by Congress.

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would be threatened on grounds of “race, religion, nationality, [or] membership of a particular social group or political opinion”).


40 United States v. Puerta, 982 F.2d 1297 (9th Cir. 1992).
II. THE LAW OF DENATIONALIZATION AND DEPORTATION

A. United States v. Puerta

The Sixth Circuit in *Maslenjak* acknowledged its reasoning differed from *Puerta* and its progeny.41 The *Puerta* court cited the materiality requirement in 8 U.S.C. § 1451(a), as well as the fact that both parties had previously agreed on a materiality requirement, as the reasons for finding that a false statement had to be material in order to convict under 18 U.S.C. § 1425(a).42 The *Puerta* court also argued that the Supreme Court’s ruling in *Kungys v. United States* supported the conclusion that there was an implied materiality requirement in 18 U.S.C. § 1425(a), citing the “‘gravity of the consequences,’”43 The court in *Maslenjak* criticized these justifications, noting that “material” does not appear in either § 1425(a) or § 1451(e) and other statutes pertaining to false statements made in immigration proceedings do not require materiality.44 Further, the Sixth Circuit pointed out that while the parties in *Puerta* agreed that there was a materiality requirement, the parties did not agree in *Maslenjak*.45 According to the Sixth Circuit, the final reason why the court in *Puerta* was wrong was the heightened burden of proof in criminal denationalization (compared to the civil proceeding) negated the concerns of the *Puerta* court about the “gravity of consequences.”46

B. Proliferation of a Circuit Split After the Sixth Circuit Decision

Since the *Maslenjak* decision was handed down by the Sixth Circuit in April 2016, several courts have reacted to the court’s holding that immaterial false statements are enough to evidence a violation of 18 U.S.C. § 1425(a) and trigger mandatory criminal denationalization under 8 U.S.C. § 1451(e). A few examples that preceded the Supreme Court’s decision to overturn the Sixth Circuit are presented here. The Sixth Circuit handled a similar case in which the court emphatically reaffirmed its opinion of the materiality requirement from *Maslenjak*.47 The Southern District of Florida expressly

42 *Puerta*, 982 F.2d at 1297.
43 *Id.* at 1301 (quoting *Kungys* v. United States, 485 U.S. 759 (1988)).
44 *Maslenjak*, 821 F.3d at 675.
45 *Id.*
46 *Id.* at 692.
47 United States v. Al-Kadumi, 661 Fed. App’x 340 (6th Cir. 2016). The court in this case held that an Iraqi man who knowingly assumed the identity of someone else in order to obtain refugee status through the UNHCR and the United States had violated § 1425(a) and was subject to mandatory denationalization, regardless of the materiality of his misrepresentation. *Id.*
found that 18 U.S.C. § 1425(a) does not include an implied element of materiality. They more courts, while not directly addressing the issue of whether materiality is an implied element of 18 U.S.C. § 1425(a), commented at least somewhat favorably in dicta on the *Matilev* court’s holding that the elements of criminal and civil denaturalization are different. A district court in Iowa expressly rejected the *Matilev* court’s approach, finding that there is a materiality requirement for both § 1425(a) and § 1425(b). Of course, the Supreme Court also read-in a materiality requirement, foreclosing the issue for the immediate future.

C. The Supreme Court’s Decision

At first glance, it would seem the Supreme Court’s 9–0 decision would foreclose many of the issues expected to result from the Sixth Circuit’s reading of the statutory scheme. Justice Kagan, writing for the majority, held the word “procure” meant that false statements had to be material to the naturalization process, as otherwise they would not have been used to “procure” naturalization. However, the Court did not stop there. Justice Kagan also established a few standards to be used by the lower courts going forward to determine whether mistakes are material. Kagan says the lie by a defendant “must have played a role in her naturalization” or the true facts behind the lie must be of a nature that, when investigated, would lead “to the

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49 United States v. Nguyen, 829 F.3d 907 (8th Cir. 2016) (mentioning the *Matilev* court’s holding that the materiality requirements were different for criminal and civil denaturalization, but determined that they did not have to reach that question to rule that most of the defendant’s convictions should be upheld); United States v. Haultain, No. 5:15-CV-6141-FJG, 2016 U.S. Dist. LEXIS 122792 (W.D. Mo. Sept. 12, 2016) (endorsing the differences in the criminal and civil denaturalization processes in order to make the point that even if the government declined to pursue criminal denaturalization in connection with a criminal conviction, the government could still later pursue civil denaturalization for related events).

50 United States v. Ngombwa, No. 14-CR-123-LRR, 2016 U.S. Dist. LEXIS 118926 (N.D. Iowa Jan. 10, 2016). The court in this case rejects the government’s contention that § 1425(b) has no materiality requirement, and further goes on to assert that § 1425(a) has no materiality requirement either, finding the *Kungys* ruling applicable and in conflict with the *Matilev* court’s ruling. *Id.*


52 *Id.*

53 *Id.* at 1920.

54 *Id.* at 1929.
discovery of other facts which would" change the naturalization decision.\textsuperscript{55} If the government relies on the investigation theory going forward, it must prove that the “misrepresented fact was sufficiently relevant to one or another naturalization criterion that it would have prompted reasonable officials . . . to undertake further investigation.”\textsuperscript{56} Plus, the government would have to establish the investigation “would predictably have disclosed some legal disqualification.”\textsuperscript{57} Taking Kagan’s opinion on its own, it seems airtight and appears to avoid many of the potential issues that could have been caused by the Sixth Circuit’s ruling.

However, both Justice Gorsuch and Justice Alito wrote opinions concurring in the judgment that cast doubt on how the extent the denaturalization and deportation issues described in this Note will be avoided. Justice Gorsuch’s opinion, which Justice Thomas joined, concurred with the result of the majority.\textsuperscript{58} Gorsuch also attacked the standards established by the Kagan opinion, saying they were an overreach; Gorsuch wanted the court to simply rule that causation was required, but allow the district courts and courts of appeal to sort out the exact standards to apply.\textsuperscript{59} Alito, concurring only in the judgment, took it a step further. He still wanted to prevent denaturalization based on purely immaterial false statements, but maintained that no causation was necessary to denaturalize a citizen as long as the statement was material.\textsuperscript{60} Thus, under Alito’s opinion concurring in the judgment, “if a defendant knowingly performs a substantial act that he or she thinks will procure naturalization, that is sufficient for conviction.”\textsuperscript{61} This falls far short of the standard of proof required by Justice Kagan.

The opinions concurring in the judgment could re-open this split and cause many of the same problems as the Sixth Circuit opinion might have caused. For one, lower courts could seize on the Gorsuch opinion and determine that Kagan’s standards established in Part B of her opinion are mere dicta.\textsuperscript{62} If that happens, the case could come back up to the Supreme Court, and on facts less egregious than the Maslenjak facts, the Court might

\begin{footnotes}
\footnotetext{55}{\emph{Id.}}
\footnotetext{56}{\emph{Id.} at 1918.}
\footnotetext{57}{\emph{Id.}}
\footnotetext{58}{\emph{Id.} at 1931 (Gorsuch, J., concurring).}
\footnotetext{59}{\emph{Id.} at 1932.}
\footnotetext{60}{\emph{Id.} (Alito, J., concurring).}
\footnotetext{61}{\emph{Id.} at 1932–33.}
\footnotetext{62}{See Pierre N. Leval, Madison Lecture: Judging Under the Constitution, 81 N.Y.U. L. REV. 1249 (2006) (explaining how courts often find holdings to be dicta and vice versa).}
\end{footnotes}
come out differently.63 Such a result would have the potential to subject many naturalized citizens to the ill results discussed in this Note. The Alito opinion concurring in the judgment is even more problematic, and in a similar way. The Alito opinion could encourage courts to challenge Kagan’s standard as mere dicta, which would likely result in an appeals process that would land a similar case right back in the Supreme Court. If this dispute were to come up in a few more years with a more conservative Supreme Court, it seems possible the court could seize on one of these opinions concurring in the judgment and re-open the problems caused by the Sixth Circuit opinion detailed throughout this Note.

D. The History and Procedure of Denaturalization

It is necessary to delve into the differences of the civil and criminal denaturalization process in order to demonstrate that quick, ministerial criminal denaturalization is unfair for defendants accused of making immaterial false statements to procure naturalization. The process is unfair, since it does not allow judges to examine the particulars of each case. While the civil denaturalization process is procedurally complex, the criminal denaturalization process is straightforward. The Sixth Circuit in Maslenjak noted that the criminal denaturalization process is mandatory and endorsed the view of other circuits that the process is purely ministerial.64 The burden of proof that the government must meet, as in all criminal proceedings, is beyond reasonable doubt.65

On the other hand, the civil denaturalization process is far more complex.66 Congress originally gave the Attorney General (now the

63 James F. Spriggs II & Thomas G. Hansford, Explaining the Overruling of U.S. Supreme Court Precedent, 63 J. Pol. 1091 (2001) (showing that cases with multiple opinions are about 22% more likely to be overturned per concurring opinion).
64 Id.; see United States v. Inocencio, 328 F.3d 1207, 1209 (9th Cir. 2003) (stating that the criminal denaturalization process is purely ministerial and thus, district courts have no oversight or discretion as to whether to denaturalize someone under 1451(e) who has been convicted under 1425(a)).
66 8 U.S.C. § 1451(a) (1994) (describing the civil denaturalization process as follows: “Concealment of material evidence; refusal to testify. It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation,
Department of Homeland Security) the full ability to naturalize, and the courts were given the full ability to denaturalize.\textsuperscript{67} The naturalization process did not provide an apparatus for revoking improperly procured naturalization until 1906, and the provisions of cancelling naturalization were reasserted in the Nationality Act of 1940.\textsuperscript{68} The Immigration and Nationality Act changed the ability to reverse illegally procured naturalizations, but Congress restored the ability in 1961.\textsuperscript{69} Ultimately, the policy behind the creation of denaturalization proceedings was to rectify improper judicial naturalizations.\textsuperscript{70} The denaturalization process only applies to grants of citizenship procured through the naturalization process; it does not apply to administrative certificates recognizing citizenship status.\textsuperscript{71}

A civil denaturalization suit occurs in equity and must adhere to the rigid statutory scheme.\textsuperscript{72} The civil denaturalization process adheres to the Federal Rules of Civil Procedure where procedure is not specified in the statutes.\textsuperscript{73} However, the Supreme Court has said that despite the civil denaturalization process being considered a suit in equity and district courts having some limited discretion, equitable principles cannot be applied in order to excuse illegal or fraudulent behavior.\textsuperscript{74}

With respect to the civil denaturalization process, misstatements surely must be material to trigger denaturalization. However, the standard for what may be material has not been definitely answered.\textsuperscript{75} In fact, in the \textit{United States v. Kungys} case, the eight justices who heard the case issued five different opinions, which produced greater uncertainty as to the dividing line between what is and is not material in denaturalization proceedings.\textsuperscript{76}

The first inquiry and investigation into the potential denaturalization of a naturalized citizen is brought forth by the District Directors of the U.S. Citizenship and Immigration Services.\textsuperscript{77} The matter then proceeds to a Regional Director, with a recommendation whether to institute

\footnotesize{and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively...”}.

\begin{footnotesize}
\textsuperscript{67} 7-96 \textsc{immigration law and procedure} § 96.08 (Matthew Bender ed., 2016).
\textsuperscript{68} \textit{Id}.
\textsuperscript{69} \textit{Id}.
\textsuperscript{70} \textit{Id}.
\textsuperscript{71} \textit{Id}.
\textsuperscript{72} \textit{Id} § 96.10.
\textsuperscript{73} \textit{Id}.
\textsuperscript{74} \textit{Id}.
\textsuperscript{75} \textit{Id} § 96.08.
\textsuperscript{76} \textit{Id}.
\textsuperscript{77} \textit{Id}.
\end{footnotesize}
In most instances, the Office of Immigration Litigation of the Civil Division, Department of Justice supervises the denaturalization proceedings. In most instances, the Office of Immigration Litigation of the Civil Division, Department of Justice supervises the denaturalization proceedings. When a naturalized citizen is denaturalized, the immediate effect of denaturalization is to revoke their status as a United States citizen, restore their former alien status, and make them subject to all consequences of alien status. They may not be subjected to deportation or removal unless they are deportable for illegal entry or other immigration violations. Some courts have applied a sort of relation-back principle to denaturalization, meaning that all benefits gained while a citizen would be revoked; in this sense, denaturalized citizens would not be able to benefit from their illegal actions. However, in practice, denaturalized citizens are often not subject to deportation for actions that occurred during the time they were naturalized citizens. Additionally, those who became naturalized by the preferred status of relatives that became citizens through deceptive practices are also not subject to deportation unless they participated in the deception that granted them preferred status. However, denaturalized citizens are certainly subject to deportation for past criminal offenses, such as former Nazis that gained naturalization in the United States and were subsequently deported. There is a split in the lower courts as to whether a denaturalized citizen’s spouse and children can still benefit from derivative rights of the person’s citizenship after it is revoked.

Once a former citizen has lost their citizenship through denaturalization, they become subject to deportation and removal laws and can more easily be deported. Noncitizens in the United States are still afforded due process of the law under the Fifth Amendment. However, deportation is considered a civil, administrative proceeding, which means certain constitutional rights reserved for criminal proceedings will not apply. An important point to note is that deported former citizens can be left stateless or may have to be

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78 Id.
79 Id.
80 Id. § 96.13.
81 Id.
82 Id.
83 Id.
84 Id.
85 Id.
86 6-71 id. § 71.03.
87 6-72 id. § 72.04.
expelled to a third country if they cannot return to their home country due to political or economic circumstances.\textsuperscript{89}

\textbf{E. Application of the Law to the Maslenjak Case}

The \textit{Maslenjak} case is admittedly a poor factual example for the issues the United States could have faced if the Sixth Circuit’s reading of the relationship between 18 U.S.C. § 1425(a) and 8 U.S.C. § 1451(e) had prevailed. This is because a jury, properly instructed, might find that Divna Maslenjak’s false statements were material in securing naturalization contrary to law.\textsuperscript{90} Divna and Ratko Maslenjak lied about the primary reason their family was seeking asylum when Divna said that they feared persecution due to her husband dodging the conscription efforts of the Bosnian Serb army.\textsuperscript{91} Without a legitimate reason to fear persecution, the Maslenjaks would not have met the definition of refugee under the 1951 Convention or 1967 Protocol updates.\textsuperscript{92} If the Maslenjaks had no reason to fear persecution and thus did not meet refugee status, it seems unlikely that the United States immigration services officials that met with them would have allowed them to immigrate to the United States. As previously stated, both Divna and Ratko Maslenjak have already been deported to Serbia.\textsuperscript{93}

Further, even if the Maslenjaks did originally have refugee status, it is unclear whether they still would have maintained refugee status after Divna Maslenjak was naturalized and then later denaturalized. By the time that Divna Maslenjak was denaturalized in 2016, the Bosnian Civil War was long over.\textsuperscript{94} Although the Maslenjak case is not an exemplar case of the risks of mandatory criminal denaturalization for material false statements used to procure naturalization, similar cases where the false statements are immaterial to naturalization and yet still trigger mandatory criminal denaturalization run the risk of violating both domestic immigration policies and international obligations of the United States. Some examples of cases where the United States could violate domestic or international interests are discussed later in this Note.

\textsuperscript{89} Id. at 26.

\textsuperscript{90} See Maslenjak v. United States, 137 S. Ct. 1918, 1931 (2017).

\textsuperscript{91} United States v. Maslenjak, 821 F.3d 675, 680 (6th Cir. 2016).

\textsuperscript{92} See 1951 Convention art. 1, supra note 38; 1967 Protocol, supra note 37.


The split between the circuits seemed to draw a contrast between some of the statutory canons of construction. Typically, the canons are vital to statutory interpretation by the courts. For example, the Ninth Circuit read in a materiality requirement where the Sixth Circuit refused to, as previously discussed. There are a broad range of canons, and either reading could be justified depending on the canon that judges choose to lean on in their interpretation of the statutory scheme. Further, the way judges frame the canons themselves could have a bearing on which canons they use to justify their reading of the text of a statute. The canons of construction are interpretive tools that have been developed by judges to help clarify statutory uncertainty. Canons fall into two categories: language or linguistic and substantive. The language canons primarily help judges reach an interpretation through conventions like syntax, grammar, and word usage. In contrast, the substantive canons reach broad judicial concerns and often help justices interpret beyond the four corners of the statutory text. At times, canons may overlap and even conflict with each other.

The list of canons discussed here is not an exhaustive list of language canons of construction, but merely a list of a few of the vital ones. First and foremost is the plain meaning rule. This canon of construction is exactly what it sounds like: the statement should be construed as it is written. There is also the ordinary meaning rule, which again is exactly what it sounds like: if a word or phrase is not a term of art, then it should be read as part of the statute in the way that particular word or phrase is ordinarily understood.

Somewhat related to the ordinary meaning rule is the rule for interpreting “may” and “shall.” May should be interpreted as permissive, while shall should be read as a mandatory requirement. However, it is important to note that these two words have to be read within the ultimate statutory

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95 Eig, supra note 30.
96 Id. The canons have been used in Anglo-American law since at least 1584, and one recent study has found that the usage of canons is actually increasing, with the Supreme Court relying on the canons in over 40% of their majority opinions. Jacob Scott, Codified Canons and the Common Law of Interpretation, 98 Geo. L.J. 341, 344 (2010).
97 Eig, supra note 30.
98 Id. at 2.
99 Id. at 3.
100 Id.
101 Id.
102 Id.
103 Id.
scheme, and it should be taken into account whether the statute seems to compel mandatory or permissive behavior. In the instant case, the statutes contain strong “shall” language, which could be read to demonstrate criminal denaturalization is mandatory, not permissive.

The final language canon of construction discussed here examines how a court will handle a similar word or phrase appearing multiple times in a statute. If a word or phrase is used several times in the same statute, then that word or phrase will generally be given the same meaning each time. Similarly, if a word appears in one part of a statute but not another, it will generally be read as though Congress intentionally left the word out where it is not present. Thus, the word will not be read into the statute.

The substantive canons, on the other hand, tend to be overarching principles beyond the text of the statute that are used to justify a particular substantive result. For example, the Supreme Court assumes Congress enacts statutes with the common law in mind, and further assumes Congress is wary of overturning common law for the benefit of a statute unless there is a clear statutory indication that the two are incompatible. The Court also tends to avoid finding a statute unconstitutional if at all possible. This tends to hold true even if there is a plausible reading of the statute that would make it unconstitutional. However, the Court will not read the statute in the unconstitutional manner, unless the clear intent of Congress is for the statute to be read in that manner.

The rule of lenity is one of the most important substantive canons of statutory construction. In regards to criminal statutes, the rule of lenity dictates any ambiguities should be resolved in favor of the person being charged under the statute. The justification behind this principle is that Congress (and state legislatures), rather than the courts, should speak clearly and unambiguously when it comes to criminal laws.

The Charming Betsy presumption is a substantive canon of statutory construction that has particular applicability to international law. The standard, first espoused by Chief Justice John Marshall in 1804, requires that

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104 Id.
106 Eig, supra note 30, at 18.
107 Id. at 19.
108 Id. at 22.
109 Id. at 23.
110 Id. at 27.
111 Id.
112 Id.
113 Id. at 34.
114 Id.
statutes enacted by Congress be read, whenever possible, so as not to conflict with international law.\textsuperscript{115} Recently the Charming Betsy presumption has received some pushback from the Chevron doctrine, which states the Supreme Court should side with administrative agencies that have given a reasonable construction to an unambiguous statute because some agency readings conflict with the principles and obligations of international law.\textsuperscript{116} However, it seems that the Charming Betsy presumption remains in force, at least for now.\textsuperscript{117} All of the canons discussed above could have bearing on the interpretation of the statutory scheme between 8 U.S.C. § 1451 and 18 U.S.C. § 1425.

G. Theories of Statutory Interpretation

Although theories of statutory interpretation may be grouped in a variety of ways, one scholar posits a scheme where there are three theories of statutory interpretation which seem to guide decision-makers (justices, agencies, or even just citizens) on which canons to rely on most heavily.\textsuperscript{118} Over time, it seems likely that individual decision-makers will use a mixture of language and substantive canons depending on the case in front of them. The three theories are the intentionalist theory, the new textualist theory, and the pragmatic theory.\textsuperscript{119}

Intentionalism, or the intentionalist theory, emphasizes applying the canons of statutory construction to reveal the intent of the legislature above all else.\textsuperscript{120} Intentionalism holds that statutes are the product of representative democracy, so the will of the people is represented by the legislature, which constitutes intent.\textsuperscript{121} Proponents of intentionalism recognize the inherent flaws and inconsistencies of searching for subjective intent within statutes, so they look to the text, structure, history, and purpose surrounding a statute in an attempt to glean the objective intent of the legislature.\textsuperscript{122} Therefore,\

\textsuperscript{115} Alex O. Canizares, Is Charming Betsy Losing Her Charm? Interpreting U.S. Statutes Consistently with International Trade Agreements and the Chevron Doctrine, 20 EMORY INT’L L. REV. 591 (2006); see Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804) (applying the Charming Betsy presumption for the first time).


\textsuperscript{117} Canizares, supra note 115, at 648.


\textsuperscript{119} Id. at 347.

\textsuperscript{120} Id. at 348.

\textsuperscript{121} Id.

\textsuperscript{122} Id.
intentionalists typically attempt to show some manifest evidence of objective intent rather than attempting to *discover* what the legislature intended in enacting a given statute.\textsuperscript{123}

New textualists endorse the idea of illuminating the objective intent of legislatures, but they advocate a narrower version of intentionalism.\textsuperscript{124} New textualists find the theories of interpretation of intentionalists too indeterminate and as a result view the statutory language itself as the best evidence of legislative intent.\textsuperscript{125} Thus, new textualists disregard legislative history as a means of interpretation of legislative intent.\textsuperscript{126} New textualism, though, is less strict than traditional textualism because it disregards strict textual readings that would produce absurd results.\textsuperscript{127} The new textualists still rely on the statutory language, but they do so by looking at the statute in context.\textsuperscript{128}

The pragmatic theory is more flexible in the interpretive devices that it relies upon because pragmatists tend to use multiple supporting arguments rather than one central theme.\textsuperscript{129} Thus, a true pragmatist uses a multitude of canons of construction and weighs several competing interpretations and arguments against one another.\textsuperscript{130} The pragmatic theory is said to proceed from concrete to the abstract in seeking to interpret specific statutes.\textsuperscript{131} Pragmatism strives to consider a variety of approaches to statutory interpretation, but critics of the pragmatic theory are concerned that justices have too much leeway and their interpretive methodology is too undisciplined.\textsuperscript{132}

The circuit split on the reading of the statutory scheme at issue in *Maslenjak* also presents an opportunity to examine how the Supreme Court employs the canons of construction to elucidate the operation of statutory scheme created by Congress. As previously stated, the canons of statutory construction can be grouped in two ways: language and linguistic canons and substantive canons.\textsuperscript{133} At the circuit level, it seemed the language canons favored the Sixth Circuit reading, while the substantive canons favored the Ninth Circuit reading. The plain meaning rule dictates the word “material”

\textsuperscript{123} *Id.* (emphasis added).
\textsuperscript{124} *Id.*
\textsuperscript{125} *Id.*
\textsuperscript{126} *Id.*
\textsuperscript{127} *Id.*
\textsuperscript{128} *Id.*
\textsuperscript{129} *Id.* at 348–49.
\textsuperscript{130} *Id.* at 349.
\textsuperscript{131} *Id.* This movement from concrete to abstract is known as the “funnel of abstraction.” *Id.*
\textsuperscript{132} *Id.*
\textsuperscript{133} Eig, *supra* note 30.
should not be read into § 1451(e) or § 1425(a).\textsuperscript{134} Section 1451(e) requires denaturalization upon “knowingly procuring naturalization in violation of law.\textsuperscript{135} Section 1425(a) provides for violations only when someone “knowingly procures or attempts to procure, contrary to law . . . .”\textsuperscript{136} Arguably, the plain meaning rule is inapplicable and the statute is ambiguous, since neither § 1451(e) nor § 1425(a) contain a materiality standard. The Supreme Court maintained the word “procured” implied a material false statement was required, as citizenship could not be “procured” without the false statement having some impact.\textsuperscript{137} Therefore, the plain meaning rule was implicitly used by the Supreme Court justices to justify their decision, though it could have arguably supported the Sixth Circuit’s reading.

The similar words or phrases canon, as well as the logical converse of it, seems to also favor the Sixth Circuit’s ruling.\textsuperscript{138} In this instance, a materiality requirement is clearly stated in § 1451(a), but not § 1451(e) or § 1425(a). While it can be argued that this was a mistake by the legislature, there is no evidence supporting this argument. Since there is no evidence of a mistake by the legislature, the most obvious assumption based on the text is that Congress intended to leave out the materiality requirement in § 1451(e) and § 1425(a).\textsuperscript{139} In fact, this was a major component of the Sixth Circuit’s opinion in the \textit{Maslenjak} case. \textsuperscript{140} Though it would seem the strong weight of the language canons of construction seems supportive the Sixth Circuit’s reading of the statutory scheme, the Supreme Court justices apparently found otherwise.

In addition, the substantive canons clearly weighed more heavily in favor of the Ninth Circuit’s reading. Arguably, the Sixth Circuit’s reading would have violated the Charming Betsy presumption.\textsuperscript{141} However, the Charming Betsy presumption would not have been technically violated because the Sixth Circuit’s reading only makes denaturalization mandatory for immaterial misstatements, not deportation. Deportation is the only end-game for denaturalized former citizens other than allowing them to remain in the United States without citizenship rights and under a “deportable alien” classification. Therefore, the Supreme Court may have anticipated in its

\textsuperscript{134} See \textit{id.} (defining the plain meaning canon).
\textsuperscript{135} 8 U.S.C.S. § 1451(e) (LexisNexis 2016).
\textsuperscript{136} 18 U.S.C.S. §1425(a) (LexisNexis 2016).
\textsuperscript{137} \textit{Maslenjak} v. United States, 137 S. Ct. 1918, 1924–25 (2017).
\textsuperscript{138} See Eig, \textit{supra} note 30, at 14–15 (defining the similar words or phrases canon).
\textsuperscript{139} See 8 U.S.C.S. § 1451(e) (LexisNexis 2016); 18 U.S.C.S. § 1425(a) (LexisNexis 2016).
\textsuperscript{140} United States v. Maslenjak, 821 F.3d 675, 683 (2016).
\textsuperscript{141} See Canizares, \textit{supra} note 115 (explaining the history and context of the Charming Betsy presumption).
decision that the Sixth Circuit’s reading runs too much of a risk of violating Articles 32 and 33 of the 1951 Convention, which are later discussed in more detail.

The rule of lenity also weighed in favor of the Ninth Circuit’s reading. Section 1425(a) is seemingly ambiguous because it does not specify whether false statements must be material. If the statute is ambiguous, then the criminal defendant should prevail in the dispute. Siding with criminal defendants on this statutory scheme would have the practical result of upholding the Ninth Circuit’s reading and overruling the Sixth Circuit.

Courts are typically deferential to prior decisions. This pattern of deference is actually described by the court in Maslenjak when the court discusses the progeny of the Ninth Circuit’s decision in Puerta. The Court likely considered the potential to destabilize the immigration scheme and cause serious issues for the United States domestically and abroad when handing down its decision. The Court’s result was indeed consistent with the weight of authority that follows the Ninth Circuit’s reading of the statutory scheme.

Theoretically, a Supreme Court justice’s philosophy should weigh heavily on a decision involving such precise interpretation of a statutory scheme. This is seemingly evident with conservative justices like Gorsuch and Alito, writing in concurrence with the majority opinion, where they demonstrate their reliance on the text of the statute. It would be difficult to fit the intentionalist school securely into either of the Circuits’ readings of the statutory scheme. It seems the material requirement was intentionally left out of § 1451(e), since the materiality requirement appears in one part of the section but not another. However, the intentionalists could look at the history of immigration and determine that the Founders would not have advocated for such a reading given their desire for a robust immigration system. An intentionalist justice could further determine that the legislature made a mistake in omitting materiality. Justices subscribing to the pragmatic school of statutory interpretation would be more likely to overturn the Sixth Circuit’s decision. These justices would be willing to use the more

142 See Eig, supra note 30, at 30–31 (explaining the rule of lenity).
144 Eig, supra note 30, at 30–31.
145 See id.
147 Scott, supra note 118 (explaining the new textualist theory). See also Maslenjak v. United States, 137 S. Ct. 1918, 1931–32 (2017) (Gorsuch, J., concurring); id. at 1932–33 (Alito, J., concurring).
148 See Scott, supra note 118 (explaining the intentionalist theory).
149 See id. at 406–08 (explaining the pragmatic theory).
abstract substantive canons to reach the ideal reading of the statute. Here, justices that might be expected to be pragmatists in fact used both sets of canons, conceivably strengthening the majority’s decision to read in the materiality requirement.150

III. POTENTIAL VIOLATIONS OF DOMESTIC POLICY AND INTERNATIONAL OBLIGATIONS

A. Early Domestic Views on Immigration

Immigration and subsequent naturalization can be, and historically have often been, beneficial both to the individual entering the United States and to the United States itself. By denaturalizing citizens, the United States could jeopardize those former citizens’ ability to work and live within the country. Noncitizens who have lived in the United States for five years as lawful permanent residents and can demonstrate good moral character, proficiency in English, and knowledge of U.S. history are eligible for naturalization.151 The waiting period for noncitizens may be three years if they gained lawful permanent resident status through marriage to a citizen.152 Immigrants who become naturalized citizens receive new benefits such as security from deportation, the right to vote, the ability to obtain public sector jobs, and the ability to use a U.S. passport abroad.153 Citizens also tend to get priority when they attempt to bring family members who are seeking permanent resident status to the United States. In most circumstances, any children of U.S. citizens that are born abroad will also be citizens of the United States.154

The efficacy and scope of immigration and naturalization has been discussed since the founding of the country. First and foremost, the Founding Fathers left the regulation of naturalization to Congress.155 The Founding Fathers were quite liberal when it came to allowing immigrants into the country. When the first Congress passed the Naturalization Act of

153 Id.
155 U.S. CONST. art. I, § 8, cl. 4.
1790, there were almost no restrictions on immigration. This open immigration system flourished until at least 1880 because the United States was primarily occupied with filling out the vast expanse of the growing country and tapping its economic potential. After the Civil War, states began passing their own immigration laws, and the Supreme Court subsequently ruled that immigration was a federal responsibility. As the number of immigrants rose due to a streamlined immigration process run exclusively by the federal government, Congress began to pass statutes to slow the rate of immigration.

In contrast, the values of the Founding Fathers suggested they wanted an immigration system that would allow foreign aliens to immigrate to the United States, especially when facing persecution in their home countries. To that end, President Washington said that he “had always hoped that this land might become a safe and agreeable [a]sylum to the virtuous and persecuted part of mankind, to whatever nation they might belong.” Thomas Jefferson echoed that sentiment in 1795. The Founding Fathers also advocated for immigrants that would work hard and assimilate to American society. They desired immigrants and naturalized citizens that would be industrious and virtuous. As long as immigrants did not intend to live a life of ease, the Founders welcomed them into the country. Ben Franklin said:

[A]ll that seems to be necessary is, to distribute them more equally, mix them with the English, establish English schools where they are now too thick settled. . . . I say I am not against the Admission of Germans in general, for they have their Virtues, their industry and frugality are exemplary;

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158 *Early American Immigration Policies*, U.S. Citizenship and Immigr. Servs. (Sept. 4, 2015), https://www.uscis.gov/history-and-genealogy/our-history/agency-history/early-american-immigration-policies; see *Chy Lung v. Freeman*, 92 U.S. 275 (1876) (holding California’s statute excluding certain aliens from entering the state without paying a toll was unconstitutional because it infringed upon the exclusive right of Congress to make laws on the admission of foreign citizens).
159 *Early American Immigration Policies, supra* note 158.
160 Portteus, *supra* note 156.
161 *See id.* at 12 (describing a letter to Jean Nicolas Demeunier from Thomas Jefferson indicating that he shared the same hopes as Washington).
162 *Id.*
163 *Id.*
George Washington largely echoed the other Founding Fathers’ industrious sentiments when he said he wanted immigrants to come to America “who are determined to be sober, industrious and virtuous members of society . . . a knowledge that these are the general characteristics of your compatriots would be a principal reason to consider their advent as a valuable acquisition to our infant settlements.” On assimilation, Washington was representative of the Founders’ views as well in saying that “[B]y an intermixture with our people, they, or their descendants, get assimilated to our customs, measures, and laws: in a word, soon become one people.” The requirement that all naturalized citizens swear an oath of loyalty to the Constitution further indicates the Founders’ belief in assimilation. The phrase *E Pluribus Unum* itself was a call to all citizens to assimilate for the greater good of the country. Ultimately, the Founding Fathers saw value in the naturalization of immigrants because immigrants had the potential to benefit society through their work ethic, diversity, and allegiance to the United States, which was an inherent requirement of citizenship.

**B. Modern Domestic Goals of Immigration**

Arguably, courts should care more about the modern domestic goals of the immigration system than the views of the Founding Fathers on immigration. However, most modern goals of the immigration system seem to be consistent with what the Founding Fathers wanted from immigration. As mentioned earlier, the modern goals of the immigration system are: reuniting families, admitting workers with skillsets to fill labor shortages, providing refuge for those that need shelter, and promoting diversity. True assimilation seems to be less of a concern now than it was previously as the

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164 Id.
166 Porteus, *supra* note 156, at 18.
167 Id.
170 *Immigration Policy in the United States, supra* note 35.
nation and world become more globalized. Yet, some still remain concerned about the slow integration of immigrants into their communities. The United States Citizenship and Immigration Services (USCIS), to that end, provides money and programs in order to better integrate immigrants into their communities. Of course, while the goals of immigration policy remain similar, there are far more restrictions now on immigration policy than there were in the late 1700s.

The most substantial restrictions in modern immigration policy are related to concerns about national security and illegal immigration. National security has been at the forefront of the immigration debate since the attacks that took place on September 11, 2001. Resulting legislation like the PATRIOT Act has made the immigration process more difficult. For example, the PATRIOT Act broadened the definition of “terrorist” and put the onus on the person being accused of terror to prove otherwise. The PATRIOT Act may also allow the Attorney General to indefinitely detain someone who is confined for a violation of conditions of entry into the United States but cannot be deported to his or her country of origin. These burdens on the immigration system may deter people from immigrating to the United States, especially from the Middle East. Illegal immigration has been at the forefront of political debates in the United States. However, it is not particularly relevant to the discussion in this Note, as illegal immigrants are clearly not candidates for naturalization in the same manner as the immigrants that come to the United States through the legal channels of immigration.

Despite the restrictions on immigration policy due to national security concerns, statistics demonstrate that the people becoming naturalized citizens

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175 See id. at 3 (discussing how students of Middle Eastern descent are watched more closely and questioned more often by government officials).
today meet the goals of both the Founding Fathers and modern immigration policy. In fact, naturalization is often an indicator of successful socioeconomic integration for foreign-born residents.\textsuperscript{177} For example, in the 1990 census, the rate of naturalization for foreign-born residents was higher among more educated foreign-born residents.\textsuperscript{178} While only 43.5\% of foreign residents without a high school degree were naturalized, 65.1\% of immigrants with college degrees were naturalized.\textsuperscript{179} In a similar vein, the higher the level of white collar occupation, the more likely a foreign-born resident was to be naturalized.\textsuperscript{180} Also related to educational experience and job prestige is income. Individual naturalized citizens made about $8,000 more per year than the average foreign-born noncitizen, and naturalized households made about $6,000 more per year than noncitizen households.\textsuperscript{181} Those foreign-born residents below the poverty line naturalized at a 38\% rate, while 60\% of those least likely to be poor were naturalized.\textsuperscript{182} Foreign-born residents that spoke English very well also naturalized at a rate of 59.4\%, while those residents that spoke English poorly or did not speak English at all are only naturalized at a rate of 27.4\%.\textsuperscript{183} These statistics demonstrate that the most productive and well-integrated immigrants are the ones that could be potentially deported and denaturalized.

The Sixth Circuit’s reading of the interaction between § 1451(e) and § 1425(a) could have led to significant violations of domestic policy on immigration. The Sixth Circuit’s decision would not have necessarily impeded immigration on the front-end, but it could have impeded the number of immigrants who seek to be naturalized. This could certainly put more naturalized citizens at risk of denaturalization and possibly deportation. Similarly, language in Justice Alito’s concurrence in the Supreme Court Maslenjak decision suggests that the door could later be opened to deportation in cases with less egregious false statements than that of Divna Maslenjak.\textsuperscript{184} Immigrants who know or are worried that they may have made immaterial false statements when entering the country may decline to naturalize because they do not want to risk the false statements coming to light, later leading to their denaturalization (if they decide to apply for naturalization) and possible deportation. It is important not to incentivize

\begin{itemize}
\item \textsuperscript{177} KANDEL, supra note 151.
\item \textsuperscript{179} Id.
\item \textsuperscript{180} Id.
\item \textsuperscript{181} Id.
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Id.
\item \textsuperscript{184} Maslenjak v. United States, 137 S. Ct. 1918, 1932 (2017).
\end{itemize}
ly so that immigrants can get in to the country. The United States, however, should be concerned of robbing immigrants who are content to remain as lawful permanent residents or those on valid work visas, of the full benefits of U.S. citizenship. Overall, the Sixth Circuit’s reading of the statutory scheme to not require material false statements would likely have been over-inclusive, because it would be likely to rid the country of good, productive citizens. The same risks, to a lesser extent, could exist if Alito’s concurrence gives rise to more denaturalized citizens.

Immigrants that do not have citizenship have less of a stake in society. It seems more likely that those immigrants, especially if they are productive and successful, could choose to move to another country if they have the financial means. Additionally, President Washington’s hope for the United States to be a haven for the virtuous but persecuted masses is unlikely to be realized if immigrants refuse to naturalize or leave the country due to concerns related to false statements that could lead to denaturalization and deportation. These potential results from the Sixth Circuit’s decision in *Maslenjak* essentially amounted to a violation of the domestic immigration policy because it would have reduced the number of good potential citizens that will enter the country and likely could have affected how many choose to remain or naturalize. Similarly, a less harsh but still problematic reality could be true if future courts seize on Alito’s concurrence.

Open immigration, like the Founders advocated for, is unrealistic for the United States today. For example, it has been documented how groups like ISIS have snuck terrorists into countries by disguising them as refugees. Regardless, once immigrants are admitted to the United States, work hard, and want to become citizens, it does not behoove the United States to denaturalize those immigrants for minor false statements used to procure naturalization. This is particularly true when there is a plausible way to construe the statutory scheme that would only make serious false statements criminal under 8 U.S.C. § 1451(e).

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185 Portteus, *supra* note 156, at 12.
Domestic immigration policy has long sought to incentivize productive immigrants to remain and integrate into society. By mandatorily denaturalizing citizens, the United States would be emphasizing the opposite. In fact, Ratko Maslenjak was demonstrably a productive immigrant. In 2014, he was given an award in Ohio for his job as a “‘hand finisher’ who carefully inspects and smooths out finished metal molds used by major rubber companies.” Again, the Maslenjaks are not an exemplar for the argument that immaterial false statements should not trigger mandatory denaturalization, since their false statements used to procure Divna Maslenjak’s naturalization were probably material. Still, immigrants like the Maslenjaks that have been productive, valued members of their communities during their residency in the United States likely satisfy the Founding Fathers’ goals of assimilation into American society. Therefore, the Sixth Circuit’s reading would not only have adverse effects on the productiveness of immigrants, but could also lead to the deportation of those that are doing a good job of integrating into society. In Ratko Maslenjak’s case, a productive immigrant (though he had not chosen to naturalize and become a citizen) who had not committed war crimes and was nothing but a model resident in the United States was deported for a single transgression. This case demonstrates the point that denaturalization and deportation are unduly harsh punishments for minor false statements used to procure naturalization.

Although the facts of the Maslenjak case is not great evidence that the Sixth Circuit’s reading would have been detrimental to refugees seeking entry into and eventually citizenship in the United States, it is easy to imagine other cases where the Sixth Circuit’s ruling could have significantly affected naturalized citizens. The Bosnian Civil War was quite short compared to some of the serious ongoing conflicts presently displacing people. Currently, over 65 million people are estimated to be refugees or other forcibly-displaced persons. In Iraq, a country that has been in near-constant turmoil for several decades, nearly 5 million people were dubbed “of concern” by the United Nations High Commissioner for Refugees.

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187 See Letter from President George Washington to Rev. Francis Adrian Vanderkemp, supra note 33; Naturalization, [3 February 1790], supra note 34; Portteus, supra note 156.
189 See Portteus, supra note 156; Spalding, supra note 165 (explaining the opinions of George Washington, James Madison, and Ben Franklin on assimilation).
190 United States v. Maslenjak, 821 F.3d 675 (6th Cir. 2016) (demonstrating that Ratko Maslenjak was not a U.S. citizen).
(UNHCR) as either refugees, asylum-seekers, or internally-displaced persons in recent years. In Colombia, the state has been in conflict with the rebel group FARC since 1964. The most extraordinary current case is in Syria, where the terrorist group ISIS displaced almost 7 million Syrians by the end of 2016. All of this is to say that it is possible that refugees in the future, considering the Alito concurrence in the Supreme Court’s decision, could maintain their refugee status even if they are denaturalized and lose their U.S. citizenship. If that does indeed happen, the United States is stuck in a situation where it has taken the refugees’ benefits of citizenship but subjected them to a second-class life labeled as “deportable aliens.”

C. International Obligations of the United States

Deportation of persons like the Maslenjaks could also potentially jeopardize the United States’ international law obligations. States that are parties to the treaties are bound internationally (even if not domestically) to not take any action to defeat the object and purpose of the treaty. The United States is not a party to the 1951 Convention, but it is a party to the 1967 Protocol, which incorporates the first thirty-four articles of the 1951 Convention. The United States ratified the 1967 Protocol in 1968. The ratification process makes the treaty part of the domestic law of the United States. The 1951 Convention was written, signed, and ratified in the aftermath of World War II, at which point various international states wanted to address the issue of the various refugees and other persons that had been displaced by the War. The parties to the 1951 Convention decided to set a temporal limit and allowed states to opt-in to a provision that would limit coverage only to events occurring in Europe for refugees that would be

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The parties to the treaty were primarily concerned about future influxes of refugees that could warrant protection under the terms of the treaty. Although the treaty was supposed to complement the UNHCR, the UNHCR’s mandate did not restrict the definition of protected refugees by time or geography. The 1967 Protocol was introduced in large part to eliminate the temporal limit on the definition of refugee in the original 1951 Convention.

The 1951 Convention and the 1967 Protocol are still central to the international community’s efforts to protect refugees. Article 1 of the 1951 Convention and 1967 Protocol defines refugees as:

any person who is outside their country of origin and unable or unwilling to return there or to avail themselves of its protection, on account of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular group, or political opinion. Stateless persons may also be refugees in this sense, where country of origin (citizenship) is understood as “country of former habitual residence.”

The 1951 Convention also sets the parameters for when refugee status ends. Refugee status lasts until and unless the refugee returns to their country of origin, acquires a new nationality, or circumstances change in their country of origin.

Beyond the provided definition of refugee, the 1951 Convention and 1967 Protocol laid out several principles that are still important to the treatment of refugees by the global community. Foremost among them, the UNHCR calls the principle of non-refoulement “the cornerstone of asylum and of international refugee law.” Non-refoulement is the broad principle that no refugee should be returned to a country where he would be at risk of persecution. The principle of non-refoulement was originally espoused in the non-binding Universal Declaration of Human Rights in 1948 but was not

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200 Id.
201 Id. The treaty only covered persons that were displaced by events that occurred before January 1, 1951. Id.
202 Id.
203 Id.
204 Id.
205 Id.
206 1951 Convention, supra note 38, art. 1 ¶¶ (C)(1)–(3).
207 UNHCR Note on the Principle of Non-Refoulement, supra note 39.
208 Goodwin-Gill, supra note 199.
a binding principle on any state until the 1951 Convention. The 1984 Convention Against Torture expanded the coverage of non-refoulement to prevent deportation of individuals to countries where the individual would be at substantial risk to be tortured. As previously stated, the principle of non-refoulement binds more than just the parties to the 1951 Convention and 1967 Protocol. In fact, it is also considered customary international law by the UNHCR. This means every state, regardless of whether it is a party to either convention, is bound to follow it. Some scholars even argue that non-refoulement is becoming non-derogable as *jus cogens*. In addition to protecting refugees and displaced persons from non-refoulement, the 1951 Convention also protects refugees from penalties for illegal entry and prevents most expulsions.

In the United States, Senator Patrick Leahy of Vermont has attempted several times to update the United States’ domestic commitment to protecting refugees who are fleeing torture or persecution, but five bills of similar substance have died in the Senate since 1999. Senator Leahy has recently submitted another bill to the current Congress, which never reached a vote. That result is likely due to the current political climate. In general, reform on the treatment of refugees and asylum seekers has been tough for nations like the United States since the attacks on September 11, 2001. Since September 11, 2001, the United States has prioritized anti-terrorism measures over refugee protection measures. In doing so, the United States has relied on language in Article 33(2) of the 1951 Convention. According to one scholar, this trend of sacrificing refugee

209 UNHCR Note on the Principle of Non-Refoulement, supra note 39.
210 Goodwin-Gill, supra note 199.
211 UNHCR Note on the Principle of Non-Refoulement, supra note 39.
212 See Alice Farmer, Non-Refoulement and *Jus Cogens*: Limiting Anti-Terror Measures that Threaten Refugee Protection, 23 GEO. IMMIGR. L.J. 1, 25 (2008). Non-derogable rights are those that can never be waived under any circumstances. See generally *Jus Cogens*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/jus_cogens#.
213 Goodwin-Gill, supra note 199.
215 Id.
217 Farmer, supra note 212, at 13.
218 Id. at 3.
219 1951 Convention art. 33, supra note 38. Section (2) has an exception that waives the privileges of non-refoulement for refugees for whom there are reasonable grounds to suspect that they endanger national security. Id.
protections for anti-terrorism measures “could have a catastrophic effect, excluding legitimate refugees from protection, weakening the foundations of the refugee law regime, and undermining the legitimacy of the new peremptory norm.” Presumably, these anti-terrorism statutes enacted and justified under a broad reading of Article 33(2) of the 1951 Convention could lead to the United States violating their international law obligations in some instances.

If denaturalized former citizens maintain their refugee status, then the United States is at risk of violating both Articles 32 and 33 of the 1951 Convention. The UNHCR holds the position that refugees expelled under Articles 32 or 33 do not necessarily lose refugee status. Therefore, the United States would not be able to deport denaturalized citizens maintaining refugee status as non-citizens without violating international law. The United States would violate either their obligations under the 1967 Protocol or potentially the principles of non-refoulement as customary international law, assuming that the persons could establish they maintained refugee status. Thus, while the refugees could be denaturalized under domestic law and lose the benefits of citizenship, they could not be deported from the United States to their country of origin without violating international law. This possibility leaves the United States in a position of choosing between potentially violating Articles 32 and 33 of the 1951 Convention or allowing the denaturalized former-citizens to stay in the country without the rights of citizenship they previously would have maintained. These citizens would seemingly be second-class or shadow-class citizens.

The United States, if it expels former citizens who maintain their refugee status but were denaturalized for minor false statements used to procure naturalization, would be at risk of violating Article 32 of the 1951 Convention. Refugees are guaranteed due process. Under Article 32, refugees may only be expelled on grounds of “national security or public order.” The United States would risk violating the principles of non-refoulement as well. The United States could violate their obligations to not return refugees to areas where their life or liberty is at risk under Article 34

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220 Farmer, supra note 212, at 4.
221 Id.
222 See 1951 Convention arts. 32, 33, supra note 38.
224 See RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 87 (1972) (explaining “[a] state may not justify its expulsion or non-admission of its own former nationals by drawing attention to the fact that it first took the precaution of denaturalizing them”).
225 1951 Convention art. 32, supra note 38.
of the 1951 Convention. Under Article 34, refugees are protected unless they are convicted of a “particularly serious crime” that constitutes a danger to the security of the country that the refugee is in at the time. Further strengthening the United States’ obligations to the principle of non-refoulement is that the UNHCR sees the right to non-refoulement as non-derogable customary international law, meaning states can never waive the right of non-refoulement under any circumstance.

The UNHCR has commented that expulsion should be a last resort for “exceptional circumstances,” and suggests that refugees should be treated leniently because they have been uprooted and have no home country to which they can return.226 Looking to the Maslenjak pair, for example, it is hard to imagine how they might be a threat to national security or public order. The pair, regardless of their transgressions, seemed to be well-adjusted to their community. And the Maslenjaks, as previously noted, would not necessarily still be considered refugees because of the now-stable political situation in Bosnia. In a situation where persons still qualify for refugee status after denaturalization, the United States could not expel them from the country without risking violation of Article 32 unless the refugees had committed more criminal acts that demonstrated a propensity to be a threat to national security or public order.

The fair rebuttal to this argument is that just because more citizens could be denaturalized, it does not necessarily follow that denaturalized former citizens will be deported and put the United States at risk of violating its obligations under the 1951 Convention. However, this argument ignores the realities of former citizens that have been denaturalized. For one, they instantly become aliens that are subject for removal. The United States, according to the Supreme Court, cannot keep these aliens incarcerated for more than six months while waiting for another country to accept them for deportation purposes.227 Therefore, these former citizens are left with uncertainty about their status and would likely question whether or not they should continue their lives in the United States, given they can be removed at any time.

In fact, the anecdotal stories about people that have been denaturalized but remain in the United States paint a grim picture of what life is like as a denaturalized former citizen living within the country. Nada Prouty came to the United States from Lebanon and served as a CIA agent for several

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years. She was convicted of contriving a sham marriage in order to obtain citizenship and was denaturalized as a result. She was not deported to Lebanon due to non-refoulement problems, and thus remains in the United States. However, she is unable to get a job, open a bank account, or travel beyond fifty miles from her home as someone who maintains “deportable alien” status and remains under surveillance by immigration officials.

Lionel Jean-Baptiste arrived in the United States from Haiti and was naturalized. Later, a drug conviction led to his denaturalization because the government said that it evidenced that he did not have “good moral character” during the application process for citizenship. Jean-Baptiste’s potential deportation did not have non-refoulement concerns, but everywhere the United States attempted to deport him refused to take him. Haiti rejected him because he had renounced his Haitian citizenship, and attempts to deport him to France and the Dominican Republic were also unsuccessful. Jean-Baptiste was released to his family, but may not have been able to work or drive. Further, like Prouty, he would remain under watch by immigration officials.

Instances like these two will increase if naturalized citizens are subject to denaturalization for insignificant false statements used to procure naturalization. If the U.S. government does deport former citizens, it risks violating obligations under international law. If the United States does not deport denaturalized citizens, it leaves them in an uncertain holding pattern as a second-class or shadow-class citizen where they have few basic privileges and rights that someone residing in a country might expect but cannot return to their country of origin. These former citizens may be able to work if they can secure asylum status from within the United States. It is unclear why that was not possible for either of the citizens in the anecdotes above. What is indisputable, though, is that their rights within the United States were drastically restricted for what amounted to minor transgressions.

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229 Id.
230 Id.
231 Id.
233 Id.
234 Id.
235 Id.
236 Id.
This dilemma between making people second or shadow-class citizens or deporting them is just one example of the dangers of a reading of the statutory scheme that weakens the burden on the government to denaturalize citizens.

IV. CONCLUSION

The Sixth Circuit decision placed the enforcement of the statutory scheme in 18 U.S.C. § 1425(a) and 8 U.S.C. § 1451(e) in an untenable position. The statutory canons of construction illuminate the arguments that would be made in favor of and against the Sixth Circuit’s reading, but the Supreme Court employed both textual and substantive canons to rule against the Sixth Circuit. The justices may have overturned the Sixth Circuit’s ruling based on policy concerns. From a domestic viewpoint, the Ninth Circuit’s reading is far preferable because it will allow the United States to keep more productive, naturalized citizens in the country. From an international perspective, the United States will not risk violating international obligations under the 1967 Protocol that would result from mandatorily denaturalizing citizens for immaterial false statements and deporting them.

The Sixth Circuit’s reading of the statutory scheme also would have violated the domestic goal of promoting immigration of productive persons into the United States. Further, if the United States were to deport denaturalized former citizens, it would risk violating Articles 32 and 33 of the 1951 Refugee Convention. The United States is obligated to follow the 1951 Convention through the 1967 Protocol to the Refugee Convention. Further, the United States’ obligations to the principle of non-refoulement are even stronger because they are considered jus cogens and thus non-derogable by the UNHCR. If the United States denaturalized former citizens but did not deport them to avoid repercussions in international law, then it would subject these former citizens to a second-class lifestyle where they could not travel, work, or drive, and could not leave the United States for another country. This would be a patently unfair result for someone who gave immaterial false statements in order to procure naturalization for themselves or for someone else. For now, the Supreme Court has resolved these issues, but the fissures could easily open again due to the opinions concurring in the judgment that cast doubt on Justice Kagan’s majority opinion. The best solution, despite the fact that the Court found there is a materiality requirement for false statements made to government officials to trigger mandatory criminal denaturalization, would be a statutory amendment that would add the materiality requirement to the text and render this entire debate moot.