Immigration — Naturalization Law — False Statements to Immigration Officials — Maslenjak v. United States

Fifty years ago, in the landmark decision *Afroyim v. Rusk*,[1] the Supreme Court enshrined a fundamental guarantee: the government cannot involuntarily strip native-born U.S. citizens of citizenship.[2] Naturalized citizens are similarly protected, with an essential exception: if they procured citizenship "contrary to law."[3] Courts have grappled with delineating the precise contours of that window for denaturalization. For instance, when the predicate crime is a false statement to immigration officials,[4] the circuit courts had split on the question of whether the false statement must be material to the granting of citizenship.[5] Last Term, in *Maslenjak v. United States*,[6] the Supreme Court resolved that circuit split, holding that if the underlying illegal act is a false statement to government officials, the government must show that the falsehood influenced the decision to grant citizenship.[7] The outcome in *Maslenjak* echoes that of two recent statutory interpretation cases in which overcriminalization concerns drove the Court to reject broad government readings of criminal statutes: *Bond v. United States*[8] and *Yates v. United States*.[9] However, while *Bond* and *Yates* were borne of outlandish prosecutions characterized by the use of statutes whose primary purposes were unrelated to the defendants' conduct, the *Maslenjak* statute raised the specter of a different kind of mismatch: one between the gravity of

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[1] 387 U.S. 253 (1967).

[2] *Id.* at 268; *see also* PATRICK WEIL, THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC 9 (2012).

[3] 18 U.S.C. § 1425(a) (2012); *see also* 8 U.S.C. § 1451(a) (2012) (authorizing civil denaturalization proceedings against a naturalized citizen whose citizenship was "illegally procured or . . . procured by concealment of a material fact or by willful misrepresentation").

[4] 18 U.S.C. § 1015(a) (prohibiting "knowingly mak[ing] any false statement under oath" in a naturalization proceeding).

[5] *Compare* United States v. Maslenjak, 821 F.3d 675, 685–86 (6th Cir. 2016) (holding that any false statement, regardless of impact on the naturalization decision, justifies a conviction under 18 U.S.C. § 1425(a)), *with* United States v. Munyenyezi, 781 F.3d 532, 536 (1st Cir. 2015) (requiring that the government prove that the false statement was material to the naturalization decision), United States v. Latchin, 554 F.3d 709, 712–15 (7th Cir. 2009) (same), United States v. Alferahin, 433 F.3d 1148, 1154–56 (9th Cir. 2006) (same), *and* United States v. Aladekoba, 61 F. App'x 27, 28 (4th Cir. 2003) (per curiam) (same).

[6] 137 S. Ct. 1918 (2017).

[7] *Id.* at 1923.

[8] 134 S. Ct. 2077 (2014). The Court overturned a conviction under the Chemical Weapons Convention Implementation Act of 1998. *Id.* at 2083, 2086, 2094. The defendant was a "jilted wife," *id.* at 2083, who exposed her husband's lover to chemicals with the hope of causing "an uncomfortable rash," *id.* at 2085.

[9] 135 S. Ct. 1074 (2015). The Court overturned a conviction under a provision of the Sarbanes-Oxley Act of 2002. *Id.* at 1089 (plurality opinion). The defendant was a fisherman who threw undersized fish overboard in the course of an investigation enforcing federal conservation regulations. *Id.* at 1079–80.

the offense and the severity of the consequences, due to mandatory denaturalization upon conviction. By taking up this new aspect of the overcriminalization problem, the Court demonstrated the vitality of its concerns in this realm and underscored the need to articulate a clear approach for interpreting broadly worded criminal statutes.

Divna Maslenjak, an ethnic Serb, lived in Bosnia during its civil war in the 1990s.[10] In 1998, she sought refugee status in the United States.[11] Maslenjak stated under oath that her family faced persecution from both sides of the war: from Muslims, because of the family's Serbian ethnicity; and from Serbs, because her husband had fled conscription in the Bosnian Serb Army.[12] Based on her testimony, the family was granted refugee status.[13] Six years after arriving in the United States, Maslenjak applied for naturalization.[14] On the application form, Maslenjak replied "no" under oath to two questions asking whether she had ever lied to government officials during immigration proceedings.[15] She affirmed those responses under oath in a subsequent interview.[16]

However, the government soon found that Maslenjak had in fact made such false statements.[17] Immigration officials uncovered records showing that far from evading service, Maslenjak's husband had been an officer in the Bosnian Serb Army and had served in a brigade involved in massacring approximately 8000 civilian Bosnian Muslims.[18] Within a year, he was convicted of making false statements on immigration documents.[19] Maslenjak, testifying in an attempt to stop his deportation, admitted that she had been aware of his role in the war.[20]

In response, the government charged Maslenjak with violating 18 U.S.C. § 1425(a) by "knowingly 'procur[ing]'" her naturalization "contrary to law."[21] The underlying illegality was making false statements under oath in a naturalization proceeding in violation of 18 U.S.C. § 1015(a) — namely, the answers in her naturalization application and interview assuring her past honesty.[22] Despite an objection by Maslenjak, the United States District Court for the Northern District of Ohio instructed the jury that any falsehood, regardless of whether it

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[10] *Maslenjak*, 137 S. Ct. at 1923.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* (alteration in original) (quoting 18 U.S.C. § 1425(a) (2012)).
[22] *Id.* at 1924.

influenced the decision to grant naturalization, would suffice for a conviction.[23] The jury found Maslenjak guilty, and the district court accordingly stripped her of citizenship.[24]

The Sixth Circuit affirmed, upholding the district court's jury instructions.[25] According to the Sixth Circuit, the plain language of the statute and the overall statutory scheme of denaturalization did not compel a materiality requirement.[26] Because making a false statement to immigration officials violated naturalization law, the court reasoned that the making of such a statement automatically constituted procuring citizenship "contrary to law" in violation of § 1425(a), regardless of whether the statement influenced the naturalization outcome.[27]

The Supreme Court vacated and remanded.[28] Writing for the Court, Justice Kagan[29] began with a close examination of the statutory text.[30] The Court first reasoned that "procur[ing], contrary to law, naturalization"[31] meant obtaining citizenship illegally.[32] The "most natural" reading of that phrase, in turn, was that "the illegal act must have somehow contributed to the obtaining of citizenship."[33] The government's contrary reading, that any illegality in the course of obtaining citizenship would transgress § 1425(a), did not comport with ordinary use of language — just as it would be unnatural to say that a man "procured [a] painting illegally" if he had happened to violate a traffic law while obtaining it.[34]

Though the government attempted to distinguish such examples by arguing that the statute's "contrary to law" language specifically referred to laws "pertaining to naturalization," the Court rejected the argument, finding this reading unsupported by the statute's plain text.[35] Furthermore, even if such a limitation applied, the "rules of language" would nevertheless compel a causal connection between the illegal act and the award of citizenship.[36]

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[23] *Id.*

[24] *Id.*

[25] United States v. Maslenjak, 821 F.3d 675, 686 (6th Cir. 2016).

[26] *Id.* at 682–83.

[27] *Id.* at 686.

[28] *Maslenjak*, 137 S. Ct. at 1931.

[29] Justice Kagan was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Sotomayor.

[30] *Maslenjak*, 137 S. Ct. at 1924–25.

[31] 18 U.S.C. § 1425(a) (2012).

[32] *Maslenjak*, 137 S. Ct. at 1923–24 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1809 (2002); *Procure*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

[33] *Id.* at 1925.

[34] *Id.* at 1925–26.

[35] *Id.* at 1926.

[36] *Id.* Though advanced by neither of the parties, the Court also acknowledged one other reasonable reading of the statute. *Id.* at 1925 n.2. The text of § 1425(a) could be plausibly read to mean "obtaining citizenship without the requisite legal qualifications." *Id.* However, such a reading

Looking more broadly, the Court found that the general statutory context reinforced Maslenjak's reading of § 1425(a).[37] Failing to require causation would create a "profound mismatch"[38] between the requirements for naturalization and those for denaturalization, since illegal acts that would not justify a denial of citizenship would justify its revocation.[39] This effect, coupled with the fact that many individuals may, for innocuous reasons, fail to be entirely truthful regarding inconsequential matters while navigating the citizenship process, would endow prosecutors with almost unlimited discretion to rescind naturalized citizenship.[40] Because finding that Congress intended such severe consequences would require "far stronger textual support" than that provided in the statutory text, § 1425(a) must require a causal relationship between the illegal act and the procurement of citizenship.[41]

Next, the Court turned to the "more operational" question of how the causation requirement should apply in practice for prosecutions in which a false statement to government officials was the predicate illegal act.[42] Adopting an objective approach, the Court articulated the two means by which a false statement could have the required effect on the naturalization decision: first, if the misrepresented facts themselves justified denying citizenship; and second, if the misrepresentation threw investigators off a trail that could have led to disqualifying facts.[43] In the first scenario, "an obvious causal link" exists between the falsehood and the granting of citizenship.[44] In the second scenario, dubbed the "investigation-based theory," the government can establish the requisite causal connection with a two-part showing.[45] First, the government must show that the misrepresented fact was "sufficiently relevant" to a qualification for citizenship, such that an immigration official seeking evidence about naturalization criteria would have been prompted to engage in further investigation.[46] Next, the government must establish

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was foreclosed by the overall statutory structure, as it would render superfluous the "highly specific language" of § 1425(b), a companion provision that separately criminalizes obtaining naturalization for oneself "or another person not entitled thereto." *Id.* (quoting 18 U.S.C. § 1425(b)).

[37] *Id.* at 1926.

[38] *Id.*

[39] *Id.* at 1926–27.

[40] *Id.* at 1927.

[41] *Id.*

[42] *Id.* Though Justice Gorsuch, joined by Justice Thomas, objected to the Court addressing the operationalization issue, *id.* at 1931–32 (Gorsuch, J., concurring in part and concurring in the judgment), the Court responded that articulating the requirement's practical application was necessary in order to "fulfill [its] responsibility to both parties and courts," *id.* at 1927 n.4 (majority opinion).

[43] *Id.* at 1928–29.

[44] *Id.* at 1928.

[45] *Id.* at 1929. The Court previously considered the investigation-based theory in the context of the civil denaturalization statute, 8 U.S.C. § 1451(a), in *Kungys v. United States*, 485 U.S. 759 (1988).

[46] *Maslenjak*, 137 S. Ct. at 1929.

that the ensuing investigation "would predictably have disclosed" a disqualifying fact.[47] Even if the government succeeds in this two-part showing, the defendant can overcome it by demonstrating that she is actually qualified for citizenship.[48]

Applying this analysis, the Court found error in the district court's jury instructions.[49] Because the instructions stated that no causal link was necessary between Maslenjak's false statements and the government's decision to grant her naturalization, the jury did not make any of the required findings regarding causation.[50] The Court vacated the judgment of the Sixth Circuit, leaving for resolution on remand the question of whether Maslenjak's misrepresentations would have affected the decision to grant her citizenship.[51]

Justice Gorsuch, joined by Justice Thomas, concurred in part and concurred in the judgment.[52] He agreed with the Court's reasoning that the statute's plain text and structure required the government to establish causation as an element of a conviction under § 1425(a).[53] However, Justice Gorsuch argued that the Court should have left to lower courts the task of fleshing out the precise causal relationship required between the illegality and the granting of citizenship.[54]

Justice Alito concurred in the judgment.[55] While the majority viewed the statute's plain text as containing a causation requirement, Justice Alito eschewed that framing. Instead, he reasoned that when the predicate crime is a false statement, the language of § 1425(a) contains an implied materiality element.[56] To be material, the false statement must have a "natural tendency to influence" the outcome of a naturalization decision, with no requirement that the government prove that the falsehood actually affected the outcome.[57]

In holding that § 1425(a) requires a causal link between false statements and the decision to grant citizenship, the Court, motivated in part

[47] *Id.* (quoting *Kungys*, 485 U.S. at 774). This "demanding but still practicable" standard, *id.* at 1930, accounts for the difficulty of proving the path of a hypothetical investigation, as well as the fact that the defendant, rather than the government, would have caused that evidentiary difficulty, *id.* at 1929.

[48] *Id.* at 1930. Meeting the legal criteria for citizenship "is a complete defense" to a prosecution under § 1425(a). *Id.*

[49] *Id.*

[50] *Id.* at 1930–31.

[51] *Id.* at 1931.

[52] *Id.* (Gorsuch, J., concurring in part and concurring in the judgment).

[53] *Id.*

[54] *Id.* at 1931–32.

[55] *Id.* at 1932 (Alito, J., concurring in the judgment).

[56] *Id.*

[57] *Id.* (quoting Kungys v. United States, 485 U.S. 759, 772 (1988)). Justice Alito also noted that because the statute applies to those who *attempt* to obtain naturalization, defendants who perform substantial acts that they believe will procure citizenship can be convicted under § 1425(a). *Id.*

by concerns regarding overcriminalization and unbounded prosecutorial discretion,[58] rejected a broad argument by the government that any lie told over the course of the naturalization process could be the basis for denaturalization. *Maslenjak* therefore parallels *Bond* and *Yates*, two key statutory interpretation decisions in which the Court, partly due to similar concerns, rejected broad government readings of criminal statutes.[59] However, while concerns about prosecutorial discretion and overcriminalization arose in *Bond* and *Yates* due to a mismatch between the statute used and the individual prosecuted, the concern in *Maslenjak* was over a potential incompatibility between the gravity of an offense and the attendant consequences. By considering this variant of the overcriminalization problem, the Justices demonstrated the ongoing robustness of the trend established by *Bond* and *Yates* and therefore accentuated the urgency of developing a coherent approach to interpreting statutes that raise overcriminalization and prosecutorial discretion issues.

Concerns regarding overcriminalization and prosecutorial discretion figured prominently at the *Maslenjak* oral arguments and subsequently animated the opinion. The Justices' hostility to the government's position at oral argument garnered widespread press attention[60] and evinced deep apprehension regarding the ramifications of the government's broad statutory reading. Justices Kagan and Sotomayor expressed incredulity at the government's stance that even seemingly inconsequential lies, like those about one's weight[61] or a childhood nickname,[62] could be the basis for denaturalization. Justice Breyer remarked that the government's reading "would throw into doubt the citizenship of vast percentages of all naturalized citizens."[63] Chief Justice Roberts was even

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[58] Overcriminalization refers to the vastly broad nature of American criminal law, which "covers far more conduct than any jurisdiction could possibly punish" and is characterized by "overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001). "As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors . . . ." *Id.* at 509. For background on the problem of overcriminalization, see generally Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 703–27 (2005).

[59] The Court has also recently rejected broad government interpretations in the white collar criminal law context. *See* McDonnell v. United States, 136 S. Ct. 2355, 2375 (2016); Skilling v. United States, 561 U.S. 358, 413 (2010). Those cases evince the Court's general discomfort with the structure of white collar criminal law, which is characterized by broadly worded statutes (designed to avoid the creation of loopholes) paired with a reliance on prosecutorial discretion. *See* Randall Eliason, *Supreme Court May Use the Bob McDonnell Case to Limit Federal Corruption Laws*, SIDEBARS (Apr. 28, 2016), https://sidebarsblog.com/supreme-court-may-use-the-bob-mcdonnell-case-to-limit-federal-corruption-laws/ [https://perma.cc/556K-5NT8].

[60] *See, e.g.*, Adam Liptak, *Justices Alarmed by Government's Hard-Line Stance in Citizenship Case*, N.Y. TIMES (Apr. 26, 2017), https://www.nytimes.com/2017/04/26/us/politics/supreme-court-naturalization.html [https://perma.cc/PMP5-XAKC].

[61] Transcript of Oral Argument at 36, *Maslenjak*, 137 S. Ct. 1918 (2017) (No. 16-309).

[62] *Id.* at 30–31.

[63] *Id.* at 32.

more direct, stating that there was "certainly a problem of prosecutorial abuse" under the government's reading, since "the government will have the opportunity to denaturalize anyone they want."[64] And Justice Kennedy delivered a withering rebuke, chiding the government lawyer for "demeaning the priceless value of citizenship."[65]

Unsurprisingly, these themes resurfaced forcefully in the Court's opinion. Despite having already decided that the plain text of the statute required a causal link between false statements and the granting of citizenship, Justice Kagan's opinion for the Court nevertheless lingered on the disastrous consequences of the government's broad statutory reading.[66] The Court criticized the government's reading of the statute as "open[ing] the door to a world of disquieting consequences."[67] Taking the hypothetical of a woman who, while applying for citizenship, failed to disclose "membership in an online support group or . . . a prior speeding violation," the Court balked at the prospect that "a prosecutor could scour her paperwork and bring a § 1425(a) charge on that meager basis, even many years after she became a citizen."[68] Permitting such prosecutions "would give prosecutors nearly limitless leverage" — a result the Court could not countenance without an explicit, textual expression of congressional intent.[69] Overcriminalization and prosecutorial discretion concerns were thus a key driver propelling the Court toward a seemingly inexorable conclusion: the government's reading must be rejected.[70]

In this sense, *Maslenjak* falls comfortably alongside *Bond* and *Yates* into a line of statutory interpretation cases in which the Court, concerned about the ever-expanding criminal code and the attendant shift of power into the hands of prosecutors, has spurned broad government readings of federal criminal statutes. The oral arguments in *Bond* and *Yates* paralleled those of *Maslenjak* in tenor and substance, signaling significant concerns about prosecutorial overreach and indicating that the Justices found the government's position untenable on that basis.[71] And, just as in *Maslenjak*, the opinions in *Bond* and *Yates* referenced

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[64] *Id.* at 54.

[65] *Id.* at 55.

[66] *See Maslenjak*, 137 S. Ct. at 1927.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *See id.* at 1931.

[71] During oral argument in *Bond*, Justice Kennedy told the Solicitor General that it "seems unimaginable that you would bring this prosecution." Transcript of Oral Argument at 28, Bond v. United States, 134 S. Ct. 2077 (2014) (No. 12-158). Justice Alito remarked that "[i]f you told ordinary people that you were going to prosecute [the defendant] for using a chemical weapon, they would be flabbergasted." *Id.* at 37. Similarly, at the *Yates* oral argument, Justice Scalia questioned "[w]hat kind of a mad prosecutor" would bring the case, Transcript of Oral Argument at 28, Yates v. United States, 135 S. Ct. 1074 (2015) (No. 13-7451), and jokingly asked if he was "the same guy that . . . brought the prosecution in *Bond* last term," *id.* at 27.

those concerns in their reasoning.[72] Scholars and commentators have seized upon this thread within *Bond* and *Yates*, recognizing both opinions as indicative of the Court's growing anxiety about these features of criminal law.[73] However, *Maslenjak* did more than merely pick up the thread that winds throughout those cases, because the abuses of prosecutorial discretion that concerned the Justices in *Bond* and *Yates* differ subtly from those at issue in *Maslenjak*.

Unlike *Maslenjak*, *Bond* and *Yates* involved "mismatched" prosecutions under statutes ill suited for the defendants in those cases. In *Bond*, many took note of the obvious absurdity of the government using an international chemical weapons treaty's implementation statute to prosecute a woman seeking only to inflict discomfort upon a romantic rival with the aid of relatively quotidian chemicals.[74] Similarly, in *Yates*, there was a palpable incompatibility in using an evidence-shredding provision of the Sarbanes-Oxley Act, a statute designed in the wake of the Enron scandal to address financial fraud, to pursue a fisherman guilty of throwing away undersized fish.[75] The Court grappled with this incongruity problem in both opinions, with its reasoning partially driven by the readily apparent prosecutorial overstep inherent in undertaking such mismatched prosecutions.[76] Commentators, while recogniz-

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[72] *See, e.g.*, *Yates*, 135 S. Ct. at 1087 (plurality opinion) (citing *Bond*, 134 S. Ct. at 2089–90, for the proposition that "boundless reading[s]" of statutory terms should be rejected if they entail "deeply serious consequences"); *id.* at 1088 (criticizing the government's reading as encompassing "tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense"); *id.* at 1100 (Kagan, J., dissenting) (identifying "overcriminalization and excessive punishment in the U.S. Code" as the "real issue" motivating the plurality); *Bond*, 134 S. Ct. at 2091 (rejecting the government's reading as "sweep[ing] in everything from the detergent under the kitchen sink to the stain remover in the laundry room" into the definition of "chemical weapons").

[73] *See, e.g.*, Adeel Bashir, *Fish Jokes Aside:* Yates *Hints at the Court's View of Prosecutorial Discretion*, 30 CRIM. JUST., Fall 2015, at 18, 18–20; Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191, 1194 (2015); Michael P. Kelly & Ruth E. Mandelbaum, *Are the Yates Memorandum and the Federal Judiciary's Concerns About Over-Criminalization Destined to Collide?*, 53 AM. CRIM. L. REV. 899, 899, 923–24 (2016) (citing *Bond* and *Yates* as indicia of "growing concern by federal courts, led by the Supreme Court, that federal prosecutors are interpreting the law too broadly . . . and attempting to criminalize conduct that is not criminal," *id.* at 899).

[74] *See, e.g.*, Michal Buchhandler-Raphael, *What's Terrorism Got to Do with It?: The Perils of Prosecutorial Misuse of Terrorism Offenses*, 39 FLA. ST. U. L. REV. 807, 809 (2012); Heather K. Gerken, *The Supreme Court, 2013 Term — Comment: Slipping the* Bond*s of Federalism*, 128 HARV. L. REV. 85, 93 (2014) (stating that the real problem in *Bond*, "as the Chief pretty clearly hints, was an overzealous U.S. Attorney" (footnote omitted)). *But see* Marty Lederman, *Seven Observations About the Oral Argument in* Bond, OPINIO JURIS (Nov. 6, 2013, 12:24 AM), http://opiniojuris.org/2013/11/06/seven-observations-oral-argument-bond/ [https://perma.cc/E3CK-562P] (emphasizing the seriousness of the defendant's crimes to critique the prevailing view that the case involved absurd prosecutorial overreach).

[75] *See, e.g.*, John G. Malcolm, *Hook, Line & Sinker: Supreme Court Holds (Barely!) that Sarbanes-Oxley's Anti-Shredding Statute Doesn't Apply to Fish*, 2014–2015 CATO SUP. CT. REV. 227, 227–30.

[76] *See Yates*, 135 S. Ct. at 1079 (plurality opinion) (refusing to "cut [the statute] loose from its

ing the Court's growing discomfort with prosecutorial overreach, explicitly tied those anxieties to the mismatched nature of the prosecution at the heart of the cases.[77] To be sure, potential high penalties played a role in the Court's concerns;[78] however, the discretion afforded to sentencing judges under those statutes reduced that threat by operating as a check on prosecutorial discretion.[79] Ultimately, the *Bond* and *Yates* prosecutions were aberrant because they targeted behavior utterly unrelated to the original statute, resulting in problems of notice[80] and an overreach of federal jurisdiction due to the creation of overlapping crimes.[81]

In *Maslenjak*, the Court once again expressed anxiety about peripheral cases involving prosecutorial abuse; however, the hypothetical cases that provoked concern in *Maslenjak* were problematic not because of a mismatch between statute and defendant, but rather due to a potential incompatibility between the gravity of an offense and the consequences. *Maslenjak*, unlike *Bond* and *Yates*, involved a straightforward application of a denaturalization statute to the type of person contemplated by that statute.[82] Future prosecutions under the statute, rather than looping in wholly unrelated behavior, will likewise involve naturalized citizens accused of immigration-related crimes. However, because a conviction under § 1425(a) automatically results in denaturalization,[83] the Court recognized that a broad reading would allow for a different kind

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financial-fraud mooring" by extending it to apply to a fisherman's destruction of fish); *Bond*, 134 S. Ct. at 2092 (referring to *Bond* as an "unusual case" and noting that most prosecutions under the statute in question "involved either terrorist plots or the possession of extremely dangerous substances with the potential to cause severe harm to many people," rather than the "purely local crimes" at issue in the case); *id.* at 2093 (referring to the federal government's "zeal to prosecute Bond").

[77] *See, e.g.*, Todd Haugh, *SOX on Fish: A New Harm of Overcriminalization*, 109 NW. U. L. REV. ONLINE 152, 161 (2015) (linking the overcriminalization themes in *Yates* to the fact that the Justices were "struggl[ing] with a criminal statute that clearly did not fit with how it was being used by the government"); Michael Pierce, Essay, *The Court and Overcriminalization*, 68 STAN. L. REV. ONLINE 50, 51 (2015) (describing *Bond* and *Yates* as applying a new "overcriminalization canon . . . triggered when the government prosecutes an individual . . . under a criminal statute whose main purpose has nothing to do with the defendant's conduct, yet which contains broadly worded provisions with words that, read literally, encompass it").

[78] For example, the *Yates* Court emphasized that the statute described "a felony punishable by up to 20 years in prison." 135 S. Ct. at 1087 (plurality opinion).

[79] *See, e.g.*, *id.* at 1100 (Kagan, J., dissenting) ("Let's not forget that Yates's sentence was not 20 years, but 30 days.").

[80] *E.g.*, *id.* at 1087 (plurality opinion) ("Yates would have had scant reason to anticipate a felony prosecution . . . .").

[81] *See, e.g.*, Stuntz, *supra* note 58, at 507.

[82] In fact, given the nature of Maslenjak's lies, it is possible — perhaps even likely — that on remand, the government will make the appropriate showing of causation and strip her of citizenship. Maslenjak's own lawyer acknowledged that the defendant would have "a very tough row to hoe on remand." Transcript of Oral Argument, *supra* note 61, at 21.

[83] *See* 8 U.S.C. § 1451(e) (2012); *Maslenjak*, 137 S. Ct. at 1923.

of incongruous prosecution in the future: one in which a minor lie would be met with the drastic punishment of denaturalization, without any opportunity for a mitigating exercise of discretion by the trial judge. By engaging in the logical extension of the *Bond*/*Yates* concerns to this type of peripheral prosecution, *Maslenjak* demonstrates that these anxieties are deeply held and likely to continue to impact the Court's reasoning.

Consequently, *Maslenjak* underscores the need for the Court to face head-on the debate about its proper role in addressing the problem of overcriminalization.[84] While Justice Kagan's *Yates* dissent forcefully disavowed the notion that the Court should take an active role in addressing the issue,[85] cases like *Maslenjak* demonstrate that these same anxieties are nevertheless continuing to arise in the Court's jurisprudence. If they are operating in the background to affect the Justices' reasoning, litigants would benefit from a clear, principled articulation of how those concerns impact the Court's statutory interpretation.

Maslenjak suggests a logical starting point for this endeavor. Given that Justice Kagan relied in part on the mitigating effect of the sentencing judge's discretion to conclude that the Court need not actively address overcriminalization concerns in *Yates*,[86] statutes like § 1425(a), which cut off that safety valve and instead vest all discretion in the prosecutor, offer fruitful territory for beginning to flesh out a firmer stance on overcriminalization. One option for the Court would be to articulate a new "anti-overcriminalization canon," wherein ambiguous statutes that provide for no sentencing discretion are construed in a manner that avoids overcriminalization and unchecked discretion problems.[87] Another option would be to constitutionalize concerns about overcriminalization by foregrounding the due process problems regarding notice embedded in such cases.[88] Regardless of the method chosen, establishing a definitive interpretive approach would impart much-needed clarity and predictability upon the criminal law landscape.

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[84] *Compare* Stuntz, *supra* note 58, at 510, 587–88 (arguing that due to "institutional competition and cooperation" between the political branches exacerbating the problem of overcriminalization, *id.* at 510, the "probably best" solution "is to increase judicial power over criminal law," *id.* at 587), *with Yates*, 135 S. Ct. at 1101 (Kagan, J., dissenting) (acknowledging that the statute at issue "is a bad law" and calling it "an emblem of a deeper pathology in the federal criminal code," but maintaining that judges who disagree with Congress "are perfectly entitled to say so — in lectures, in law review articles, and even in dicta," but not "to replace the statute Congress enacted with an alternative of our own design").

[85] *See Yates*, 135 S. Ct. at 1101 (Kagan, J., dissenting).

[86] *Id.* at 1100–01 ("Most district judges, as Congress knows, will recognize differences between [prosecutions] and will try to make the punishment fit the crime.").

[87] *See* Pierce, *supra* note 77, at 51 (arguing that a canon of construction focused on addressing the overcriminalization problem may be normatively justified by due process values).

[88] *See, e.g.*, Stuntz, *supra* note 58, at 588 (arguing that judges should engage in "aggressive constitutional regulation" of overcriminalization with the goal of controlling "criminal law's boundaries" using doctrines such as notice); *The Supreme Court, 2014 Term — Leading Cases*, 129 HARV. L. REV. 361, 361, 367 (2015) (arguing that the Court should have identified the due process notice problem in *Yates* and resolved the case on that basis).