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YOU ASK A SILLY QUESTION, AND YOU GET A SILLY ANSWER: SPEEDING, TERRORIST BABIES, AND WHY DHS SHOULD CONSIDER REVISING OR ELIMINATING CERTAIN FORM QUESTIONS

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During the recent Supreme Court oral argument in *Maslenjak v. United States*, Chief Justice John Roberts pointed out that the government's interpretation of the statute at issue there implies that a naturalization applicant who has driven 60 miles per hour in a 55-mile-per-hour zone, and does not reveal this on the application form, could be subject to prosecution and denaturalization years later. The government argued in *Maslenjak* that even an immaterial misstatement on a naturalization application, if proven to have been intentional, is a basis for criminal conviction under 18 U.S.C. § 1425, which automatically results in revocation of naturalization under INA § 340(e). As Chief Justice Roberts pointed out, Question 22 on the Form N-400, Application for Naturalization, asks whether the applicant has "**EVER** committed, assisted in committing, or attempted to commit a crime or offense for which you were **NOT** arrested?" This is, as even the government admitted at oral argument, an extremely broad question. (A wonderful amicus brief filed by Professor Nancy Morawetz and Mitchell Kane of Washington Square Legal Services, on behalf of the Immigrant Defense Project and several immigrant-rights organizations, highlighted the existence of this and several other questions that are extremely expansive, unclear, or both.)

In what may at first seem to be unrelated news, Britain's *The Telegraph* recently reported on an incident in which " three month old baby was summoned to the US embassy in London after his grandfather accidentally ticked a box claiming the youngster was a terrorist." Harvey Kenyon-Cairns evidently had to go to a visa interview, and missed his scheduled flight, when his grandfather accidently

selected the "yes" answer on the ESTA application for travel under the Visa Waiver Program to the question: "Do you seek to engage in or have you ever engaged in terrorist activities, espionage, sabotage, or genocide?". It is, of course, highly unlikely that a three-month old baby would have such a history or such intentions. Nonetheless, this electronic selection apparently caused CBP to deny young Mr. Kenyon-Cairns authorization to travel under the Visa Waiver Program, meaning that he instead needed to apply for a visa at a U.S. consular post.

The briefs and oral argument in *Maslenjak* discuss many reasons why immaterial misrepresentations should not be considered a ground for criminal conviction or denaturalization. For one thing, the statute speaks of procuring naturalization contrary to law, and as Justice Ginsburg asked in oral argument: "how can an immaterial statement procure naturalization?" Based on the oral argument, several commentators have suggested that the Supreme Court is likely to reject the government's broad position. Moreover, it does not seem likely that Harvey Kenyon-Cairns will be subject to any consequence of similar magnitude to denaturalization owing to his grandfather's error, though he may face difficulty in seeking to use the Visa Waiver Program in the future. Even if neither the government's position in *Maslenjak* nor the Kenyon-Cairns incident prove to have lasting serious consequences, however, they do raise a different concern in this author's mind: why are questions like these being asked in the first place?

It would be a rather unusual combination of evil intent and scrupulous honesty that would result in someone answering "yes" to a question like the one on the ESTA form that inquires whether they "seek to engage in . . . terrorist activities, espionage, or genocide?" Perhaps the backward-looking portion of the ESTA question might gather more affirmative responses from honest and repentant former terrorists, although it still seems unlikely that this scenario arises often. Even if the government does want to screen out that small population of honest former terrorists, spies, or mass murderers, however, the portion of the question referring to future intentions seems superfluous. It might also be worth configuring the ESTA system so that it does not act on answers purporting to show terrorism by children under a certain age—a record which shows an infant as a terrorist is obviously the result of some kind of error.

It also seems unlikely that very many people answer Question 22 on the Form N-400 in the affirmative, and then disclose something which the government

would actually find useful in adjudicating their citizenship application. To start with, most non-lawyers, unlike the learned Chief Justice of the United States, may not be in a position to determine whether they have committed a "crime or offense" for which they have not been arrested. Of the people who do understand the question and are able to make such a determination, some very honest applicants might then disclose the sort of list of speeding incidents of which Chief Justice Roberts spoke in his hypothetical—incidents which should not bear on their naturalization in any event. Only a rare combination of legal acumen, past bad behavior, and current honesty would result in an applicant disclosing, in response to Question 22, a past crime which could potentially preclude their naturalization.

Nor are these the only questions on DHS application forms to which useful affirmative answers are likely quite rare. For example, Question 7 of Part 3 of the Form I-485, Application to Register Permanent Residence or Adjust Status, asks whether the applicant, "during the period from March 23, 1933 to May 8, 1945, in association with either the Nazi government of Germany, or any organization or government associated with the Nazi government of Germany, ever order, incite, assist, or otherwise participate in the persecution of any person because of race, religion, national origin political opinion?" Nearly 72 years after the end of the period mentioned, the number of initial applicants for immigration benefits old enough to have culpably engaged in such activity is likely vanishingly small, although it is possible that some teenage persecutors now in their 80s, or people who were in their 20s during the 1940s and are now in their 90s, might apply for adjustment. Question 5 of Part 3 of that same Form I-485 asks whether the applicant "intend to engage in the United States in: a. Espionage? b. Any activity a purpose of which is opposition to, or the control or overthrow of, the Government of the United States, by force, violence, or other unlawful means? c. Any activity to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information?" It seems unlikely that anyone with such malevolent intent would be so forthright as to admit it in the application. There are many other examples as well.

It may be that DHS includes these questions not so much in the hope of eliciting an affirmative response, but in the hope of being able to charge those who answer "no" with fraud or misrepresentation in the event that the answer ought to have been "yes". Given the sorts of circumstances in which this would

come up, however, it does not seem worth the hassle and potential for error that the inclusion of such questions imposes on the rest of the applicant population (and, for that matter, on the adjudicating officers who must review the answers). The underlying substantive points being asked about would generally, if proven, suffice to justify later adverse action; trying to get a terrorist, Nazi, or criminal on the record lying about their terrorism, Nazism or criminality is in some sense redundant.

Someone who committed acts of terrorism or Nazi persecution in the past, or does so in the future, is inadmissible and deportable on that basis alone, pursuant to INA §212(a)(3)(B), §212(a)(3)(E), §237(a)(4)(B) and §237(a)(4)(D). One who engages in attempts to overthrow the government by unlawful means, or espionage, sabotage or violation of export-control laws, as asked about on Question 5 of Part 3 of the I-485, would be deportable under INA §237(a)(4)(A) even if an immigration officer had not previously detected their intent and declared them inadmissible under INA §212(a)(3)(A). With respect to the infamous Question 22 at issue in *Maslenjak*, one who is naturalized despite having committed crimes which they did not reveal has either concealed a crime which would be material and grounds for denial of naturalization on the basis of lack of good moral character, in which case the broad request that they admit to it is beside the point, because their later conviction will show that they lacked good moral character; or has concealed only minor crimes or offenses which would not be a basis for denial of naturalization, in which case trying to denaturalize them for that concealment is problematic for the reasons explored at length in the *Maslenjak* oral argument.

DHS should reconsider whether what is gained by asking these sorts of questions outweighs what is lost in terms of time and opportunity for farcical error (as with young Mr. Kenyon-Cairns the infant terrorist). If the answer to a question on a form is a foregone conclusion in all but a vanishingly small percentage of cases involving improbable combinations of malfeasance and honesty, the question probably should not be on the form in the first place.