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U.S. v. HOVSEPIAN

Nos. 99-50041, 99-56922, 00-55320, 01-55247.

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UNITED STATES of America, Plaintiff-Appellant, v. Viken Hovsepian; Viken Yacoubian, Defendants-Appellees. Viken Hovsepian, Plaintiff-Appellee, v. United States Of America; John Ashcroft, Attorney General, United States Department of Justice, Defendants-Appellants. Viken Hovsepian; Viken Yacoubian, Plaintiffs-Appellees, v. United States Of America; John Ashcroft, Attorney General, United States Department of Justice, Defendants-Appellants.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 17, 2003.

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Attorney(s) appearing for the Case

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Before MARY M. SCHROEDER, Chief Judge, and DOROTHY W. NELSON, ANDREW J. KLEINFELD, MICHAEL DALY HAWKINS, SIDNEY R. THOMAS, SUSAN P. GRABER, M. MARGARET McKEOWN, RONALD M. GOULD, RICHARD A. PAEZ, MARSHA S. BERZON, and RICHARD R. CLIFTON, Circuit Judges.

Argued and Submitted En Banc June 17, 2003 — San Francisco, California.

Opinion by Judge Graber.

OPINION

GRABER, Circuit Judge.

On August 18, 2000, the district court administered the oath of citizenship to Appellees Viken Hovsepian and Viken Yacoubian. That naturalization ceremony was the culmination of a 16-year struggle between Appellees and the Immigration and Naturalization Service ("INS"),¹ which had sought to deport them. In this appeal, the INS argues that the district court's decision to naturalize Appellees was fundamentally flawed. The district court dealt admirably with this complex case over a long period of time. Because, however, the district court committed legal errors that caused it to analyze Appellees' naturalization applications incompletely, we must reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

A. Hovsepian's and Yacoubian's Convictions and Sentencing

In 1982, the Federal Bureau of Investigation ("FBI") discovered, through intercepted telephone calls, that Appellees Viken Hovsepian and Viken Yacoubian were planning to bomb the offices of the Honorary Turkish Consul General in Philadelphia, Pennsylvania. Appellees allegedly were associated with the Justice Commandoes of the Armenian Genocide, an organization dedicated to exacting revenge against Turkey for atrocities committed against Armenians. Appellees had arranged for a conspirator to transport the

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bomb on a commercial airliner from Los Angeles to Boston. Although the conspirator managed to board a plane at Los Angeles International Airport, carrying the bomb in his checked baggage, the FBI arrested him and seized the bomb once the plane landed. The FBI later estimated that the bomb, if

detonated, likely would have killed between 2,000 and 3,000 people.

Appellees were arrested and charged with (1) conspiracy to transport explosive materials in interstate commerce and to damage by explosives property engaged in interstate commerce, in violation of 18 U.S.C. § 371; (2) transporting explosives in interstate commerce with intent to cause injury or damage, in violation of 18 U.S.C. § 844(d); and (3) possessing an unregistered firearm (an improvised explosive device), in violation of 26 U.S.C. § 5861(d). After a bench trial in 1984, Appellees were convicted on all three counts of the indictment.

On January 25, 1985, the district court sentenced Hovsepien. Because Hovsepien was younger than 26 when he committed the offenses, the district court had the option of sentencing him under the Federal Youth Corrections Act ("FYCA"). However, both Hovsepien and the district judge agreed that he would not benefit from a sentence under FYCA. Accordingly, the court sentenced him as an adult to one five-year and two six-year terms of imprisonment, to be served concurrently. In conjunction with the sentence, the district court issued a Judicial Recommendation Against Deportation ("JRAD"), which barred the INS from deporting Hovsepien on the basis of his convictions.

The district court granted Yacoubian a new trial on the ground that he had lacked an adequate opportunity to cross-examine some of the INS's witnesses. This court reversed, however. *United States v. Yacoubian*, 857 F.2d 1480 (9th Cir.1988) (unpublished disposition). After our remand, the district court sentenced Yacoubian on October 30, 1989. Although he, too, was eligible for a sentence under FYCA, the district court made no findings with respect to whether Yacoubian would benefit from a youth sentence. Instead, the court simply sentenced him as an adult to two concurrent three-year terms of imprisonment and an additional year of probation with a condition of 1,000 hours of community service. The court also issued a JRAD for Yacoubian, prohibiting the INS from deporting him because of his convictions.

B. Hovsepien's and Yacoubian's Subsequent Accomplishments

Appellees served their full prison terms. After being released from prison, both have led exemplary lives.

Viken Hovsepien earned a Ph.D. in international relations from the University of Southern California and manages a hedge fund in Southern California. He resides with his wife of many years, and their daughter, in Santa Monica. Dr. Hovsepien is viewed as a leader of the Armenian community in the Los Angeles area and has played an active role in serving his church.

Viken Yacoubian earned a master's degree in psychology from Loyola Marymount University and enrolled in a doctoral program in counseling and psychology at the University of Southern California. He serves as the principal of the Rose and Alex Pilibos Armenian High School in Los Angeles, a program praised for its rigorous preparation of students bound for college, and is an adjunct professor at Woodbury University. He volunteers his time to work with children in the Armenian community in Los Angeles. Mr. Yacoubian, too, has been married for many years, and he resides in Glendale with his wife.

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C. The INS's Efforts to Deport Hovsepien and Yacoubian

When the district court sentenced Hovsepien and Yacoubian, there was no deportation provision relevant to them. There is no dispute that Hovsepien and Yacoubian were convicted of a crime that qualified as a crime of moral turpitude as defined by the immigration law at the time of the criminal proceedings. However, under the former immigration scheme, when a lawful permanent resident committed a crime of moral turpitude, he or she became deportable if he or she committed the crime within five years of entry or committed two crimes of moral turpitude at any time. See 8 U.S.C. § 1251(a)(4) (1985) (now codified at 8 U.S.C. § 1227(a)(2)(A)(I) & (ii)). Because Hovsepien and Yacoubian had been lawful permanent residents for more than five years at the time of the offense, and because neither had a prior record, their convictions did not constitute deportable offenses under the operative immigration laws.

Nonetheless, as noted above, Hovsepien and Yacoubian sought, and the district court granted, their requests for issuance of a JRAD. If Hovsepien or Yacoubian had been convicted of another crime, the JRAD would have prevented the first conviction from serving as one of the two predicate crimes that were required to constitute a ground of deportability. See 8 U.S.C. § 1251(b)(2) (repealed 1990).

In 1988, Congress amended the immigration laws to render deportable any alien who had been convicted of possessing an unlawful destructive device or other firearm. Pub.L. No. 100-690, § 7348(b), 102 Stat. 4181, 4473 (1988). In 1990, Congress made this ground for deportation retroactive. Pub.L. No. 101-649, § 602(c), 104 Stat. 4978, 5081-82 (1990). Under those amendments, both Hovsepien and Yacoubian were subject to deportation because they had been convicted of possession of an unlawful destructive device. See 8 U.S.C. § 1227(a)(2)(c).

The INS placed a detainer on Yacoubian in May 1991 as a prelude to deporting him. In response, Yacoubian moved the district court for an injunction preventing his deportation, claiming that the JRAD that the court had issued in 1989 protected him from deportation on the basis of his 1984 convictions.

The district court issued an injunction, but this court reversed. *United States v. Yacoubian*, 24 F.3d 1 (9th Cir.1994). We held that Congress' amendment of the immigration laws provided a new ground for deporting Yacoubian that was not covered by the JRAD. *Id.* at 7, 10. Further, we held that Congress' retroactive amendment of the immigration laws did not violate due process, separation of powers, or the ex post facto clause. *Id.* at 7-10. Accordingly, we held that Yacoubian was deportable despite the district court's issuance of a JRAD at the time he was sentenced. *Id.* at 10.²

On August 12, 1997, the district director of the INS signed formal charging documents for removal proceedings, known as Notices to Appear, against Appellees. The INS also signed arrest warrants naming Appellees. However, the INS did not file those documents with the immigration court.

D. The INS's Rule 36 Motion

On June 3, 1997, the INS filed a motion pursuant to Federal Rule of Criminal Procedure 36, seeking to correct typographical errors in Hovsepien's and Yacoubian's

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criminal judgments and commitment orders. The INS conceded that the purpose of the motion was to facilitate the initiation of deportation proceedings against Hovsepien and Yacoubian. On June 29, 1998, the district court denied the INS's Rule 36 motion.

E. Resentencing Under Rule 35 and Writ of Audita Querela

On October 6, 1997, while the INS's Rule 36 motion was pending, Hovsepian and Yacoubian filed motions to correct their sentences. Arguing that the sentences imposed by the district court were illegal, they sought relief through Federal Rule of Criminal Procedure 35, which provided that "[a] court may correct an illegal sentence at any time." Fed.R.Crim.P. 35(a) (repealed). They also argued that they were entitled to correction of their sentences by writ of audita querela.

The INS did not object to the district court's resentencing of Yacoubian. When Yacoubian initially was sentenced, the district court had failed to make a finding that he would not benefit from a sentence under FYCA. Because the court had the authority to sentence him as an adult only if it first made such a finding, Yacoubian's sentence was illegal. *Dorszynski v. United States*, 418 U.S. 424, 425-26, 94 S.Ct. 3042, 41 L.Ed.2d 855 (1974); 18 U.S.C. § 5010 (1982) (repealed 1984). The district court, therefore, had the power to resentence him "at any time." Fed. R.Crim.P. 35(a).

By contrast, the district court had made a finding at Hovsepian's initial sentencing that he would not benefit from a sentence under FYCA. Therefore, the INS argued that Hovsepian's sentence was not illegal and opposed his motion for resentencing.

Over the INS's objection, the district court granted Hovsepian's Rule 35 motion. It also held that the writ of audita querela provided an additional method by which the court could resentence Hovsepian.

F. Order Sealing Appellees' Conviction Records

When Appellees were convicted in 1984, FYCA provided for the setting aside of some youth convictions:

Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

18 U.S.C. § 5021(b) (1982) (repealed 1984).

The district court set aside Appellees' convictions pursuant to FYCA. Hovsepian and Yacoubian then moved the district court to seal all records related to their convictions. The district court granted their motion and issued a broad sealing order, which provided:

1. The records of the Federal Bureau of Investigation (FBI) will be corrected to reflect that the 1998 convictions in this matter of defendants Viken Yacoubian and Viken Hovsepian (the defendants) were set aside under the provisions of the Federal Youth Corrections Act (FYCA), 18 U.S.C. § 5021 (repealed in 1984);
2. All records, documents and materials relating to the defendants' conviction, sentencing, appeal and post-conviction proceedings shall be expunged by the FBI by physically removing all such items from its own files and from all law enforcement authorities and placed in a separate storage facility which is not to be opened other than in the course of a bona fide criminal investigation by law enforcement authorities, and only where necessary for such an investigation. Except for a bona fide criminal investigation, no governmental agency or official, including the INS, may use, directly or indirectly, any information or materials relating to, or derived from, the records and documents that were the subject of this case;
3. These records may not be disseminated to, or used by, anyone, public or private, for any other purpose;
4. In the event the FBI receives any inquiries about the defendants' FYCA conviction records, it shall not respond in the affirmative based on the set-aside convictions;
5. This Court's own records of this case, as to defendants Viken Yacoubian and Viken Hovsepian, shall be kept under seal and not opened except upon further order of this Court;
6. Viken Yacoubian and Viken Hovsepian may, and all others must, consider, for all purposes, the aforesaid conviction as expunged and as never having occurred.

G. Injunction Barring Hovsepian's Deportation

As an added safeguard against deportation, Hovsepian filed a complaint in the district court on June 14, 1999, seeking (among other things) a permanent injunction barring the INS from applying the 1988 and 1990 statutory changes to him. The district court granted Hovsepian's motion. It enjoined the INS from "[t]reating Mr. Hovsepian any differently than they would be entitled to treat him under the standards in force in 1985 for individuals convicted of a crime from whom recommendation against deportation was entered by the court." The injunction forbade the INS from deporting Hovsepian based on the 1988 and 1990 amendments to the immigration laws. Thus, the practical effect of the injunction was to make the district court's previously issued JRAD a complete bar to the INS's attempts to deport Hovsepian.

H. Naturalization Proceedings

In the midst of the litigation, Hovsepian and Yacoubian filed naturalization applications with the INS. On January 15, 1999, the INS interviewed Appellees in connection with their applications. In both their interviews and their applications, Appellees refused to answer some questions about their backgrounds, claiming that the questions violated the district court's sealing order. The INS determined that a second interview was necessary and scheduled it for May 6, 1999. Appellees' lawyer had a scheduling conflict, so they requested that the interview date be changed. The INS rescheduled the interviews for May 13, but Appellees did not receive notice until the day before the interviews were to take place. Therefore, they again requested a change of date. Although they suggested May 14 as a possible alternative, the INS was not able to interview Yacoubian and Hovsepian until May 18 and May 25, respectively.

More than 120 days elapsed between Appellees' first and second interviews. On June 14, 1999, Hovsepian and Yacoubian asked the district court to adjudicate their naturalization applications pursuant to 8 U.S.C. § 1447(b). That statute provides that, if the INS fails to make a decision regarding a naturalization application within 120 days of an applicant's first interview,

the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter. Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter.

8 U.S.C. § 1447(b).

The district court took jurisdiction over Appellees' naturalization applications. Shortly thereafter, the INS purported to deny the applications. Nonetheless, the district court continued to consider the applications, eventually holding a de novo hearing on them. After the hearing, the court issued an order requiring the INS to grant Appellees' naturalization applications and, on August 18, 2000, the court administered the oath of citizenship to Appellees.

I. Panel Opinion

A three-judge panel of this court reversed the district court in almost every respect.³ See *United States v. Hovsepian*, 307 F.3d 922 (9th Cir.2002). The panel held that neither Rule 35 nor the writ of audita querela offered an appropriate vehicle for resentencing Hovsepian under FYCA. *Id.* at 928. Accordingly, the panel held that the district court erred in setting aside Hovsepian's conviction and in sealing the records of that conviction. *Id.* The panel also held that the district court erred in issuing an injunction barring the INS from deporting Hovsepian on any ground not in existence at the time of his original sentencing. *Id.* at 930-31.

With respect to Yacoubian, the panel held that, although he was properly resentenced under FYCA, the district court's order sealing the records of his conviction was too broad. *Id.* at 930.

The panel also held that the district court erred in naturalizing Hovsepian and Yacoubian. *Id.* at 933. It held that, although the district court did gain jurisdiction over the naturalization applications through § 1447(b), the court did not gain exclusive jurisdiction. *Id.* at 932-33. Instead, it held, the district court shared concurrent jurisdiction with the INS. *Id.* Thus, the panel held that when the INS denied Appellees' naturalization applications, the district court should have remanded the matter to the INS and should have refused to act until after the Appellees exhausted their administrative remedies. *Id.* at 933-34.

The court then took this case en banc. *United States v. Hovsepian*, 326 F.3d 1041 (9th Cir.2003).

DISCUSSION

As noted, the district court handled this long and complicated case masterfully in most respects. Nonetheless, we hold that the district court erred in a few particulars, which we will discuss in turn:

- The court committed errors of law by resentencing Hovsepian and by sealing the records of his conviction.
- The court erred in granting an injunction barring the INS from deporting Hovsepian on any ground not in existence at the time of his original sentencing.
- Although the court properly resentenced Yacoubian under FYCA, the order that it issued sealing Yacoubian's conviction records was too broad.
- Finally, although the district court properly exercised exclusive jurisdiction over Appellees' naturalization applications pursuant to 8 U.S.C. § 1447(b), the court failed to undertake a complete analysis of those applications because it did not consider certain evidence.

For these reasons, we reverse and remand for further proceedings, while retaining jurisdiction.

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A. Rule 36 Motion

For the reasons stated by the three-judge panel, *Hovsepian*, 307 F.3d at 934, the district court did not abuse its discretion in denying the Federal Rule of Criminal Procedure 36 motion.

B. Hovsepian's Resentencing

In response to the INS's efforts to deport him, Hovsepian filed a motion asking the court to resentence him under Federal Rule of Criminal Procedure 35 or, alternatively, by writ of audita querela.⁴ The district court granted Hovsepian's motion on both grounds.

Because Hovsepian committed his offense before November 1, 1987, we review the district court's decision to resentence him pursuant to Rule 35 for "illegality or gross abuse of discretion." *United States v. Stump*, 914 F.2d 170, 172 (9th Cir.1990). We review de novo the district court's decision to grant a writ of audita querela. *United States v. Valdez-Pacheco*, 237 F.3d 1077, 1079 (9th Cir.2001) (per curiam).

1. Rule 35

At the time of Hovsepian's resentencing, Rule 35(a) provided that "[a] court may correct an illegal sentence at any time." Fed.R.Civ.P. 35(a) (repealed). We have defined an "illegal sentence" as "one which is not authorized by the judgment of conviction, or is in excess of the permissible statutory penalty for the crime, or is in violation of the constitution." *United States v. Johnson*, 988 F.2d 941, 943 (9th Cir.1993). A mistake of fact of "constitutional magnitude" made by a sentencing court also can render a sentence illegal. *United States v. Tucker*, 404 U.S. 443, 447, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972).

Hovsepian's sentence was certainly authorized by his judgment of conviction and was not in excess of the permissible statutory penalty for his crime. Thus, Hovsepian argued before the district court that his sentence was "illegal" because the court had made a mistake of fact of constitutional magnitude when it assumed that a JRAD would categorically bar the INS from deporting him on the basis of his conviction. As relief for the court's alleged mistake of fact, Hovsepian sought resentencing under FYCA and expungement of his conviction.

The district court granted Hovsepian's Rule 35 motion on two grounds. First, it held that it had made mistakes of fact in Hovsepian's original sentencing that had rendered his sentence illegal. Second, the court held that subsequent changes in immigration law had frustrated the district court's sentencing intentions. Neither justification was a valid basis for granting Hovsepian's motion.

First, although the court did make an erroneous assumption that the JRAD would forever bar the INS from deporting Hovsepien, this assumption was not a mistake of fact of "constitutional magnitude." We are not faced here with a situation like that in *Tucker*, in which a sentence was imposed based at least in part on an earlier conviction that was unconstitutionally obtained without the assistance of counsel. *Tucker*, 404 U.S. at 444-45, 92 S.Ct. 589. Similarly, we are not faced with a situation like that in *Davis v. United States*, 417 U.S. 333, 340-41, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974), in which a change in the substantive law established that the conduct for which the petitioner had been convicted and sentenced was actually lawful. Instead, Hovsepien's acts were and are

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crimes, his convictions were constitutionally obtained, and his sentence was perfectly legal both before and after Congress amended the INA to add new grounds for deportation. The amendments merely "affected the way in which the court's judgment and sentence would be performed but ... did not affect the lawfulness of the judgment itself — then or now." *United States v. Addonizio*, 442 U.S. 178, 187, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979).

Second, the fact that the district court did not anticipate a future change in immigration law that frustrated the court's sentencing intentions is simply not an event that can make a sentence "illegal." Later changes that affect the collateral consequences flowing from a lawful sentence do not transform the sentence into an illegal one. In rejecting a similar argument, the Supreme Court noted that "the subjective intent of the sentencing judge would provide a questionable basis for testing the validity of [a] judgment." *Id.* at 187, 99 S.Ct. 2235; *see id.* (holding that the defendants were not entitled to relief even though a post-sentencing change in the policies of the United States Parole Commission prolonged the defendants' imprisonment beyond the period intended by the sentencing judge). We, too, have held that frustration of the subjective intent of the sentencing judge is an insufficient ground to justify vacation or amendment of a sentence. *Jones v. United States*, 783 F.2d 1477, 1478 (9th Cir.1986).

For these reasons, the district court committed an error of law in resentencing Hovsepien pursuant to Federal Rule of Criminal Procedure 35.

2. Writ of Audita Querela

In addition to granting Hovsepien's Rule 35 motion, the district court held, in the alternative, that it could resentence him by granting his request for a writ of audita querela. *Hovsepien*, 307 F.3d at 926. Audita querela was a common law writ issued "to afford relief to a judgment debtor against a judgment or execution because of some defense or discharge arising subsequent to the rendition of the judgment or the issue of the execution." *United States v. Fonseca-Martinez*, 36 F.3d 62, 63-64 (9th Cir.1994) (per curiam) (internal quotation marks omitted).

A person seeking a writ of audita querela must show a legal defense or discharge to the judgment. *Doe v. INS*, 120 F.3d 200, 204 (9th Cir.1997). A "legal defense" concerns a "legal defect" in the underlying sentence or conviction. *Id.* at 203. The writ is unavailable to those who seek it on purely equitable grounds. *Id.* at 204.

Hovsepien argues that the district court's misunderstanding of the immigration consequences of sentencing him as an adult constitutes such a legal defect in his sentence. As discussed above, however, the district court's erroneous assumption that the immigration laws would remain constant cannot constitute a "legal defect" in Hovsepien's sentence. In fact, in *Doe* we expressly held that the fact that a conviction will have negative immigration consequences is *not* a valid ground for granting the writ. *Id.* at 202; *see also United States v. Tablie*, 166 F.3d 505, 507 (2d Cir.1999) (per curiam) (applying *Doe* and holding that a district court could not grant a writ of audita querela to an alien who had received a JRAD but, like Appellees, was nonetheless facing deportation). Along the same lines, we recently noted that

vacation of a conviction on the ground that a federal court thinks it is unfair that an alien will be deported as a result of that conviction usurp[s] the power of Congress to set naturalization and deportation standards and the power of the INS to administer those standards in each individual case. Congress has the power to create collateral consequences of a criminal conviction.

United States v. Bravo-Diaz, 312 F.3d 995, 998 (9th Cir.2002) (citation and internal quotation marks omitted).

Therefore, the district court erred in resentencing Hovsepien under a writ of audita querela.

C. Injunction Barring Hovsepien's Deportation

The district court issued an injunction barring the INS from deporting Hovsepien on any ground not in existence at the time of his original sentencing in 1985. Because Hovsepien improperly was resentenced under FYCA, the district court erred in setting aside his conviction and ordering the records of that conviction sealed. Thus, the only thing standing between him and deportation is the district court's order barring the INS from commencing deportation proceedings on any ground not in existence at the time of his initial sentencing. Unfortunately for Hovsepien, the district court also erred in issuing that order.

1. Jurisdiction

Whether a district court possesses the authority to issue an injunction is a question of law that we review de novo. *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868, 874 (9th Cir.1999).

Title 8 U.S.C. § 1252(g) provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." That provision does not bar the injunction proceeding here, however, because the gravamen of Hovsepien's claim does not arise from the Attorney General's decision or action to commence proceedings, adjudicate cases, or execute removal orders.

In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999), the Supreme Court emphasized that the provision applies only to the discrete listed actions. As the Court noted, "Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Id.* at 485 n. 9, 119 S.Ct. 936. In other contexts, we have followed the Court's instruction to interpret § 1252(g) narrowly. *See, e.g., Barahona-Gomez v. Reno*, 236 F.3d 1115, 1120-21 (9th Cir.2001) (holding that § 1252(g) did not bar issuance of a preliminary injunction restricting the implementation of a directive that had halted the grant of suspensions of deportation); *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1149-50 (9th Cir.2000) (en banc) (rejecting claim that statute deprived the district court of jurisdiction to enter a preliminary injunction); *Barapind v. Reno*, 225 F.3d 1100, 1109-10 (9th Cir.2000) (holding that statute does not preclude jurisdiction over habeas petition for stay of asylum proceedings).

Most recently, we held that the consideration of a purely legal question, which does not challenge the Attorney General's discretionary authority, supports jurisdiction. *Ali v. Ashcroft*, 346 F.3d 873, 878-79 (9th Cir.2003). Although that holding arose in the context of a habeas petition, while this one

does not, the same principle applies here. The district court may consider a purely legal question that does not challenge the Attorney General's discretionary authority, even if the answer to that legal question — a description of the relevant law — forms the backdrop against which the Attorney General later will exercise discretionary authority. *Cf. Spencer Enters., Inc. v. United States*, [345 F.3d 683](#),

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689–90 (9th Cir.2003) (holding that the jurisdictional bar in § 1252(a)(2)(B)(ii) applies only to acts over which a statute gives the Attorney General pure discretion unguided by legal standards or statutory guidelines).

2. Merits

The injunction issued by the district court required that the law as it existed in 1985 apply to all subsequent proceedings and sought to implement the sealing order.⁵ With respect to the first point, we hold that the statute is not impermissibly retroactive, so the post-1985 law properly applies. The second point will be considered in the next section of this opinion.

We review a district court's decision to issue a permanent injunction for abuse of discretion, but we review any determination underlying the court's decision by the standard that applies to that determination. *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, [251 F.3d 814](#), 826 (9th Cir.2001). Whether a statute may be applied retroactively is an issue of law that we review de novo. *Chenault v. United States Postal Serv.*, [37 F.3d 535](#), 537 (9th Cir.1994). Therefore, we review de novo the district court's injunction barring the INS from retroactively applying later immigration statutes to Hovsepian.

To determine whether 8 U.S.C. § 1227 is impermissibly retroactive, we must examine the statute under the two-part analysis of *Landgraf v. USI Film Products*, [511 U.S. 244](#), 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). See *INS v. St. Cyr*, [533 U.S. 289](#), 315–24, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (applying *Landgraf* to Congress' retroactive amendment of the INA). The first step of the retroactivity analysis requires us "to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively." *Jimenez-Angeles v. Ashcroft*, [291 F.3d 594](#), 601 (9th Cir.2002) (quoting *St. Cyr*, [533 U.S.](#) at 316, 121 S.Ct. 2271). The statute must be "so clear that it could sustain only one interpretation." *Id.* (internal quotation marks omitted). Only if the statute does not contain an "express command" describing its "proper reach" do we proceed to step two of the analysis, which is to determine whether application of the statute would have a retroactive effect within the meaning of *Landgraf*. *Id.* (quoting *Landgraf*, [511 U.S.](#) at 280, 114 S.Ct. 1483). A retroactive effect is one that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* (quoting *Landgraf*, [511 U.S.](#) at 280, 114 S.Ct. 1522). A statute that has such a retroactive effect cannot be applied to the litigant before the court. *Id.*

Section 1227 satisfies the first step of the *St. Cyr* analysis because "Congress has directed with the requisite clarity that the law be applied retrospectively." *St. Cyr*, [533 U.S.](#) at 316, 121 S.Ct. 2271. Section 602(c) of the 1990 amendments, which added possession of a destructive device to the list of deportable offenses, provided that the amendments should apply even if an alien's conviction "occurred before the date of the enactment of this Act." Pub.L. No. 101-649, § 602(c), 104 Stat. 4978, 5081–82 (1990).

Thus, unlike in *St. Cyr*, we can presume that "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." [533 U.S.](#) at 320, 121 S.Ct. 2271 (internal quotation marks omitted). There is, therefore, no need to proceed to the second step of the *Landgraf*

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analysis. See *Landgraf*, [511 U.S.](#) at 264, 266, 114 S.Ct. 1483; *Magana-Pizano v. INS*, [200 F.3d 603](#), 612 (9th Cir.1999).

The fact that Congress did not elaborate on the intended effect of § 1227's retroactivity on a pre-existing JRAD does not alter this analysis. Congress was certainly aware that, by creating new deportable offenses and making them retroactive, it was altering the statute to make previously nondeportable persons subject to deportation. Congress has the power to create such a retroactive effect. See *St. Cyr*, [533 U.S.](#) at 316, 121 S.Ct. 2271.⁶ In fact, Congress specifically provided for the elimination of JRADs in the same statutory enactment in which it retroactively made possession of a destructive device a deportable offense. Pub.L. No. 101-649, § 505, 104 Stat. 4978 (1990). Congress thus consciously took from courts the power to prohibit the executive branch from deporting particular aliens. It is therefore unavailing to argue, as Hovsepian does, that Congress might not have considered the fact that the 1990 amendments would render deportable some aliens who previously had been nondeportable by virtue of a JRAD.

Accordingly, the district court erred in entering an injunction barring the INS from deporting Hovsepian on any ground not in existence at the time of his original sentencing.⁷ We leave the injunction in place, however, pending the conclusion of all proceedings in this case, in aid of the court's jurisdiction. See, e.g., *Gerling Global Reins. Corp. v. Low*, [240 F.3d 739](#), 754 (9th Cir.2001) (holding that the district court erred by granting a preliminary injunction, but leaving the injunction in place so that, on remand, the district court could consider whether an alternative ground supported the injunction), amended by [296 F.3d 832](#) (9th Cir.2002), reversed on other grounds by *Am. Ins. Ass'n v. Garamendi*, [539 U.S. 396](#), 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003); *Hilo v. Exxon Corp.*, [997 F.2d 641](#), 647 (9th Cir.1993) (concluding that the district court erred by denying preliminary injunctive relief and ordering the district court to make further findings of fact and determine whether a preliminary injunction should issue, but leaving its own preliminary injunction in place pending the district court's ruling).

We turn next to the sealing order, which the injunction sought to implement.

D. The Order Sealing Yacoubian's Conviction Records

After resentencing Hovsepian and Yacoubian under FYCA, the district court sealed the records of their convictions. The court ordered the FBI to physically remove the conviction records from its files and to place those records in a "separate

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storage facility which is not to be opened other than in the course of a bona fide criminal investigation by law enforcement, and only where necessary for such an investigation." Further, the court ordered that, "[e]xcept for a bona fide criminal investigation, no governmental agency or official, including the INS, may use, directly or indirectly, any information or materials relating to, or derived from, the records and documents that were the subject of this case." In addition, the court ordered that "Viken Yacoubian and Viken Hovsepian may, and all others must, consider, for all purposes, the aforesaid conviction as expunged and as never having occurred."

We review de novo whether a district court has the authority to order expungement of a record or conviction. *United States v. Sumner*, [226 F.3d 1005](#), 1009 (9th Cir.2000). Because the district court erred in resentencing Hovsepian under FYCA, it also necessarily erred in setting aside his conviction and sealing his conviction records pursuant to FYCA. Nonetheless, because the INS did not challenge the district court's resentencing of Yacoubian, we must address whether the court properly sealed the records of his conviction under FYCA.⁸ We conclude that the district court's sealing order is excessively broad.

The district court held that the INS could not "use, directly or indirectly, any information or materials relating to, or derived from, the records and documents that were the subject of this case." We believe, however, that information relating to expunged convictions can be used in the immigration context.

In order to obtain the privilege of naturalization, an applicant affirmatively must establish good moral character. 8 U.S.C. § 1427(a)(3); 8 C.F.R. § 316.2(b). Whether or not a person is convicted of a crime, the underlying acts that resulted in a conviction bear on the person's character. The fact that an alien's conviction was expunged does not mean that the alien did not commit the crime or engage in behavior calling into question his or her good character. A person who was convicted, but whose conviction was expunged or set aside, should be in no better position than a person who committed the identical acts but escaped detection and prosecution.

Other circuits agree,⁹ holding that expunged convictions can be used in assessing an alien's "good moral character."¹⁰ For example, the Eighth Circuit has explained

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that "an Immigration Judge may consider expunged convictions in making a moral character determination." *Ikenokwalu-White v. INS*, 316 F.3d 798, 804 (8th Cir.2003). Similarly, the Eleventh Circuit has held that extrinsic evidence underlying a conviction that had been expunged under FYCA can render a petitioner "statutorily ineligible for voluntary departure as a person lacking in good moral character." *Castano v. INS*, 956 F.2d 236, 237 n. 2 (11th Cir.1992).

We, too, believe that the facts underlying expunged convictions are relevant in the context of "good moral character" determinations.¹¹ We already have held above that expungement or set-aside under FYCA does not make the records of the crimes disappear; a fortiori the conduct in which the applicant engaged does not disappear. As the Eleventh Circuit has noted:

Because expunction does not entitle its recipient to the concealment of a conviction, neither does it conceal the facts underlying a conviction. Expunction means that the conviction itself will not stand as an impediment to a youthful offender in the future. We conclude that expunction does not entitle petitioner to secrete the fact of his conviction, or the facts underlying that conviction, from immigration officials.

Castano, 956 F.2d at 239. Similarly, we hold that, even if a conviction is set aside under FYCA, the facts underlying that conviction remain relevant in determining whether an applicant for naturalization can satisfy the requirement that he or she is of "good moral character."

Accordingly, the district court's sealing order was overbroad because it prohibited the INS from considering the facts underlying Yacobian's FYCA conviction as evidence that he was not a person of "good moral character." We vacate that order.

E. Naturalization Proceedings

Relying on 8 U.S.C. § 1447(b), the district court exercised exclusive jurisdiction over Appellees' naturalization applications even after the INS had purportedly denied them. Further, the district court continued to evaluate the applications despite the fact that the INS had expressed an intention to deport Appellees. Finally, the district court granted Appellees' naturalization applications but refused to consider their convictions or the facts underlying those convictions. We turn now to each of those aspects of the court's decision.

1. Jurisdiction

Based on the text of § 1447(b), the context of related statutory provisions, and Congress' policy objectives, we hold that the district court had exclusive jurisdiction over Appellees' naturalization applications.

(a) Statutory Text

We begin our analysis of the jurisdictional issue by looking to the text of 8 U.S.C. § 1447(b),¹² which provides:

If there is a failure to make a determination under section 1446 of this title before the end of the 120-day period after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter. Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter.

The INS concedes that, when a naturalization applicant makes a timely request for a hearing on his or her application, the district court has jurisdiction over the naturalization matter pursuant to § 1447(b). However, the INS further asserts that the statute does not give the district court *exclusive* jurisdiction to decide the matter once the court acquires jurisdiction but, instead, creates only *concurrent* jurisdiction. Thus, it claims that the INS retains the power to grant or deny a naturalization application even after the district court has assumed jurisdiction over it.

The INS's interpretation is inconsistent with the remaining text of § 1447(b), which states that, once a district court has jurisdiction over the matter, the court "may either determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter."

That phrasing bestows on the district court the power to pursue either of two options. The first option is to "determine the matter." How can the court "determine the matter" if the INS has the option to "determine the matter," too, and essentially force the court to accept its view? If Congress had intended for the INS to retain power to make a naturalization decision even after the district court acquires jurisdiction, why would the statute expressly give the district court the option to *decide* the matter? This wording shows that Congress intended to vest power to decide languishing naturalization applications in the district court *alone*, *unless* the court chooses to "remand the matter" to the INS, with *the court's* instructions.

That brings us to the second statutory option. Section 1447(b) allows the district court, in lieu of the first option of "determin[ing] the matter," to "remand the matter" with instructions that, presumably, the INS is required to heed. Why would Congress need to provide for a "remand" to the INS "to determine the matter" if the INS retained jurisdiction "to determine the matter" all along?

When we "remand" a case to the district court, for example, we do so because the district court has lost jurisdiction once we acquire it upon the filing of a proper notice of appeal. *Stein v. Wood*, 127 F.3d 1187, 1189 (9th Cir.1997). The most natural reading of the statute is that Congress used the term "remand" in the same sense.

Moreover, Congress empowered the district court to remand the matter to the INS with *the court's* instructions. The INS's proposed scheme would, in essence, reverse that hierarchy by allowing the INS to dictate, or at least severely limit, the conditions of remand.

Additionally, the statute provides that the district court may remand the matter, with instructions, "to the Service to determine the matter." If the INS already had the power "to determine the matter" in the meantime, this phrase would be surplusage. We interpret statutes so as to avoid making any phrase meaningless or unnecessary. *N.W. Forest Res. Council v. Glickman*, [82 F.3d 825](#), 834 (9th Cir.1996).

By providing that the court may "remand the matter, with appropriate instructions, to the Service to determine the matter," § 1447(b) allows the district court to order the INS to adopt the court's fact-finding

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and conclusions, a hierarchical result that is more consistent with exclusive jurisdiction than with concurrent jurisdiction.

Our statutory analysis is consistent with *Brock v. Pierce County*, [476 U.S. 253](#), 106 S.Ct. 1834, 90 L.Ed.2d 248 (1986). *Brock* held that an agency does not lose jurisdiction unless the statute at issue requires that the agency act within a particular time period *and* the statute specifies a consequence for failure to comply with the time limit. *Id.* at 259, 266, 106 S.Ct. 1834; *see also Intercont'l Travel Mktg., Inc. v. FDIC*, [45 F.3d 1278](#), 1284-85 (9th Cir.1994) (applying *Brock*). Here, 8 U.S.C. § 1447(b) requires the INS to make a decision regarding a naturalization application within 120 days of the INS's initial interview of the applicant. Further, § 1447(b) specifies a consequence for failure to meet this deadline, namely, that the district court gains jurisdiction over the matter (upon the applicant's request) until the district court decides the case or exercises its discretion to remand the matter to the INS. Under *Brock*, therefore, § 1447(b) is an effective jurisdiction-stripping statute. *See Friends of Crystal River v. EPA*, [35 F.3d 1073](#), 1075 n. 3, 1080 (6th Cir.1994) (holding that a similar statute divested the EPA of jurisdiction and gave exclusive jurisdiction instead to the Army Corps of Engineers).

Sze v. INS, [153 F.3d 1005](#) (9th Cir.1998), is distinguishable. The complaint in *Sze* did not ask the district court to decide the applicants' naturalization petitions. Instead, the plaintiffs had brought a test case urging the court to declare that the INS had violated the statute and regulations by failing to make determinations within 120 days of their examinations and, upon that declaration, to issue a writ of mandamus requiring *the INS* to act faster on applications. *Id.* at 1007. Because the whole premise of the litigation was to ask the court to force the INS to act, and because the plaintiffs never asked the district court itself to review the naturalization applications *de novo*, the court had no occasion to examine whether it, in the alternative, could act. And, because the requested relief was INS action and the INS had acted definitively in the plaintiffs' favor by the time the case reached us (the applicants had become citizens), mootness was the only possible conclusion we could draw. We therefore dismissed the appeal for lack of Article III jurisdiction. *Id.* at 1010. *Sze* did not make any substantive holding concerning the naturalization procedures that we expressly did not consider.¹³

In short, the INS's proposed interpretation of § 1447(b) cannot be squared with the text of the statute and, accordingly, must be rejected. *See FDIC v. County of Orange (In re County of Orange)*, [262 F.3d 1014](#), 1018 (9th Cir.2001) ("In construing a statute, we first consider its text. When the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms." (internal quotation marks omitted)).

(b) Statutory Context

In addition to being inconsistent with the text of § 1447(b) itself, the INS's interpretation makes little sense in the light of the statute's context.¹⁴ Another statutory provision defines the district court's role in reviewing INS naturalization decisions. It states:

A person whose application for naturalization under this subchapter is denied, after a hearing before an immigration officer under section 1447(a) of this Title, may seek review of such denial before the United States district court for the district in which such person resides in accordance with chapter 7 of Title 5. Such review shall be *de novo*, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing *de novo* on the application.

8 U.S.C. § 1421(c).

That statutory provision allows unsuccessful naturalization applicants to ask the district court to review the INS's denial of their applications.¹⁵ Upon request, the district court must undertake a full *de novo* review of the INS's denial. The court may not rely on the INS's findings of fact or law and, on request, must hold its own hearing on the naturalization application. Accordingly, *even if the INS is allowed to make the initial decision on a naturalization application, the district court has the final word* and does not defer to any of the INS's findings or conclusions.

Because § 1421(c) requires the district court to undertake the *same* analysis that it must make under § 1447(b), it makes sense to interpret the latter statutory provision as giving district courts the last word, too. Under § 1421(c), the district court has the last word with respect to denied applications, by conducting its own hearing and reviewing the application *de novo*. Under § 1447(b), the court has the last word by exercising exclusive jurisdiction over those naturalization applications on which the INS has failed to act in a timely fashion. It is illogical to hold, as the INS urges us to, that § 1447(b) gives district courts jurisdiction to decide naturalization applications but, at the same time, allows the INS to truncate the courts' decision-making process by making factual findings and drawing conclusions about the applications, because reviewing courts may not defer to those findings and conclusions.

In the light of § 1421(c), therefore, § 1447(b) is best viewed as a mechanism by which naturalization applicants who are impatient with INS delay may skip the agency's analysis of their application and proceed directly to the step in which the district court conducts a *de novo* review of the application. In other words, under our reading of the statutory text and context, the district court has the final word concerning denial of a naturalization application in one of two ways: either the INS fails to act in a timely manner, in which case the applicant may obtain a hearing and *de novo* proceeding in district court;¹⁶

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or the INS acts unfavorably, in which case the applicant may obtain a hearing and *de novo* review in district court.

Under a scheme of concurrent jurisdiction, an applicant who has received no answer from the INS could go to court under § 1447(b). In the meantime, however, the INS could decide the matter against the applicant. But the applicant then would have the option to appeal the INS's denial under § 1421(c), and the district court would have *de novo* review. We do not believe that Congress intended such a judicially uneconomical procedure.

(c) Congress' Policy Objectives

Finally, acceptance of the INS's interpretation of 8 U.S.C. § 1447(b) would undermine four main public policy objectives that Congress sought to further¹⁷ by enacting the Immigration Act of 1990.

A central purpose of the statute was to reduce the waiting time for naturalization applicants. *See* H.R.Rep. No. 101-187, at 8 (1989); 135 Cong. Rec. H4539-02, H4542 (1989) (statement of Rep. Morrison). This purpose of § 1447(b) will be frustrated if district courts are required to share concurrent

jurisdiction with the INS. The INS will no longer have much incentive to act on a naturalization application within the 120-day period. That is so because the INS will retain jurisdiction even when an applicant requests a hearing from the district court until the district court grants or denies the application, which takes significant additional time even in the most current of districts. Thus, allowing the INS to retain jurisdiction over a naturalization application even after the INS fails to act will frustrate Congress' intent to require the INS to make a determination within 120 days of an applicant's examination.

Further, in enacting the statute Congress intended to streamline the process of applying for naturalization and intended to reduce the burdens on courts and the INS. See H.R.Rep. No. 101-187, at 8; 135 Cong. Rec. H4539-02, H4543 (statement of Rep. Smith). If we were to accept the INS's reading of § 1447(b), the resulting procedure would lead to a waste of time and resources because district courts and the INS would often engage in unnecessary duplication of factual investigations and legal analyses. In cases in which the INS eventually denied an application, the district court would be required to dismiss or stay an applicant's § 1447(b) action, wait for the applicant to exhaust administrative remedies and, if the applicant requested it, engage in a de novo review of the INS's decision and hold another hearing under § 1421(c). Further, should the applicant

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change the district of his or her residence, the court hearing the § 1421(c) appeal probably would not be the same one that oversaw the § 1447(b) proceedings. See 8 U.S.C. § 1421(c) (stating that the applicant "may seek review of such denial before the United States district court for the district in which such person resides"); *id.* § 1447(b) (stating that "the applicant may apply to the United States district court for the district in which the applicant resides for a hearing"). The district courts and the INS are both overburdened with other pressing matters, and giving them concurrent jurisdiction over delayed naturalization applications frustrates Congress' intent to reduce the burdens on the INS and the district courts.

Third, representatives drafting the statute were concerned with the consistency and fairness of naturalization decisions. See H.R.Rep. No. 101-187, at 12-13. Acceptance of the INS's reading of the statute could exacerbate these problems. Were we to give the INS and district courts concurrent jurisdiction over naturalization applications, this would sometimes result in a race to decide a given case. When, as here, the INS and the district court disagree as to the merits of a naturalization application, the first to decide would prevail. Thus, concurrent jurisdiction might cause a rushed decision-making process and might increase the possibility that mistakes will be made. Further, participants would likely question the legitimacy of a process in which they may gain or lose something so important as citizenship simply because one entity rushes to issue a decision before the other. By contrast, under our reading of § 1447(b), the goal of consistency is furthered; Congress gave the last word to the district courts for delayed or denied applications.

Finally, the sponsors of the legislation intended to give naturalization applicants the power to choose which forum would adjudicate their applications. As the representative who introduced the proposed statute on the House floor noted, "[i]n this legislation, *it is the applicant, not the government, who decides the place and the setting and the timeframe in which the application will be processed.*" 135 Cong. Rec. H4539-02, H4542 (statement of Rep. Morrison) (emphasis added). Allowing the INS to continue to exercise jurisdiction over an application even after the naturalization applicant has elected to have the district court decide the application would frustrate the sponsors' intent.

(d) Conclusion

Section 1447(b) allows the district court to obtain exclusive jurisdiction over those naturalization applications on which the INS fails to act within 120 days if the applicant properly invokes the court's authority. Thus, we hold that the district court did not err in retaining jurisdiction over Appellees' applications even after the INS had denied them.

2. Effect of the INS's Efforts to Remove Hovsepian and Yacoubian

Although we hold that § 1447(b) gave the district court exclusive jurisdiction over Appellees' naturalization applications, there is yet another potential barrier to the district court's consideration of those applications. Title 8 U.S.C. § 1429 provides that "no application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding pursuant to a warrant of arrest." Because the INS was seeking to remove Appellees from the United States when they filed their naturalization applications, we must consider whether § 1429 barred the district court from granting their applications.

As discussed above, the INS filed its Rule 36 motion to correct clerical errors in

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the judgments and commitment orders in order to facilitate Appellees' removal. In addition, the district director of the INS signed formal charging documents for removal proceedings and arrest warrants naming Appellees.

These facts might lead one to conclude that there were "removal proceeding[s] pursuant to a warrant of arrest" "pending against" Hovsepian and Yacoubian. However, a removal proceeding does not "commence" against an alien until the INS actually files a Notice to Appear with the immigration court. *Jimenez-Angeles*, 291 F.3d at 600. The INS never filed any charging documents in this case and, therefore, removal proceedings against Appellees never commenced. Because, logically, a removal proceeding cannot be "pending" before it has "commenced," § 1429 does not have any application in the circumstances of this case.

The INS argues that the only reason why it did not file Notices to Appear with the immigration court was that it was waiting for the district court to grant its Rule 36 motion. The INS claims that, as soon as the errors in Appellees' judgments and commitment orders were corrected, it would commence removal proceedings against Appellees. The INS's intentions are irrelevant, however. Regardless of the reasons for failing to file the charging papers,¹⁸ the fact remains that no removal proceedings were "pending" against Hovsepian or Yacoubian when the district court naturalized them. Thus, § 1429 did not bar the district court from considering their naturalization applications.

3. Merits of the District Court's Naturalization Decision

The INS argues that, even if the district court did not err in exercising jurisdiction over Appellees' naturalization applications, the court nonetheless erred in granting the applications. It is to that issue that we now turn.

We analyze the merits of the court's naturalization decision under our usual standard of review. Thus, we review for clear error the district court's findings of fact, *Freeman v. Allstate Life Ins. Co.*, 253 F.3d 533, 536 (9th Cir.2001), including findings pertaining to good moral character, *Yuen Jung v. Barber*, 184 F.2d 491, 497 (9th Cir.1950). We review de novo the district court's conclusions of law. *United States v. Carranza*, 289 F.3d 634, 643 (9th Cir.2002).

Title 8 U.S.C. § 1427 sets forth a number of requirements that a naturalization applicant must meet. Among them is the requirement that an applicant, "during the five years immediately preceding the date of filing his application[...], has been and still is a person of good moral character, attached to the

principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States." 8 U.S.C. § 1427(a)(3). In addition to meeting that requirement, a naturalization applicant must show that, during the 10 years preceding the filing of the application, the applicant was not affiliated with any of the groups enumerated in 8 U.S.C. § 1424(a), including terrorist groups. 8 U.S.C. § 1424(a), (a)(4).

The district court concluded that Hovsepien and Yacoubian met those requirements.

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In arriving at that conclusion, however, the district court did not consider Appellees' convictions because it had ruled that those convictions were expunged and that the records of those convictions were sealed.

As we have held, however, the district court erred in resentencing Hovsepien under FYCA and, therefore, had no power to seal the records of his conviction. Further, as discussed above, the district court's order sealing the records of Yacoubian's conviction was too broad. Accordingly, the district court erred by failing to consider the facts underlying Appellees' convictions when it made its decision regarding good moral character. We therefore must decide whether, considering all the relevant evidence, the district court's determination of good moral character must be reversed.

The term "good moral character" is not defined in the INA. However, 8 U.S.C. § 1101(f) sets forth a list of characteristics that, if present in a naturalization applicant, preclude a finding of good moral character. The statute provides that "[n]o person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character ... is, or was ... one who at any time has been convicted of an aggravated felony." 8 U.S.C. § 1101(f)(8).

The crimes of which Appellees were convicted are aggravated felonies. *See* 8 U.S.C. § 1101(a)(43)(E) (providing that crimes involving firearms and explosive materials are aggravated felonies). However, the district court did not err by failing to deny Appellees' naturalization applications on this ground. Hovsepien and Yacoubian were convicted of their crimes in 1984, and Congress explicitly limited the reach of § 1101(f)(8) to conduct occurring after November 29, 1990, the effective date of the statute. Pub.L. No. 101-649, § 509, 104 Stat. 4978 (1990).

Similarly, Appellees' naturalization is not barred by 8 U.S.C. § 1101(f)(7), which precludes a finding of good moral character with respect to one

who, during the period for which good moral character is required to be established, is, or was —

....

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period[.]

Although both Hovsepien and Yacoubian were incarcerated for more than 180 days as a result of their convictions, neither was confined during the "period for which good moral character is required to be established," namely, the five years preceding the filing of their naturalization applications. *See* 8 U.S.C. § 1427(a).

However, the fact that Appellees' convictions are not an *automatic* bar to a finding of good moral character does not mean that they are irrelevant to the moral character inquiry. To the contrary, 8 U.S.C. § 1427(e) provides that,

in determining whether the applicant has sustained the burden of establishing good moral character and the other qualifications for citizenship specified in subsection (a) of this chapter, the Attorney General shall not be limited to the applicant's conduct during the years preceding the filing of the application, but may take into consideration as a basis for such determination the applicant's conduct and acts at any time prior to that period.

Similarly, 8 C.F.R. § 316.10(a)(2) provides:

The Service is not limited to reviewing the applicant's conduct during the five years immediately preceding the filing of the application, but may take into consideration, as a basis for its determination, the applicant's conduct and acts at any time prior to that period, if the conduct of the applicant during the statutory period does not reflect that there has been reform of character from an earlier period or if the earlier conduct and acts appear relevant to a determination of the applicant's present moral character.

Further, this court has held that convictions from outside the regulatory time period may be considered when determining whether a naturalization applicant is, or has been, a person of good moral character. *See Santamaria-Ames v. INS*, 104 F.3d 1127, 1132 (9th Cir.1996) (noting that convictions from the pre-regulatory period are "highly relevant" to, but not determinative of, determination of good moral character).

In the light of the foregoing authorities, the district court erred by not considering Appellees' convictions when arriving at its conclusions about good moral character. Although the convictions do not automatically preclude a finding of good moral character, they are "highly relevant" to that inquiry and should have been considered.

Appellees' convictions are not the only relevant factor that the district court did not consider in its naturalization analysis. Section 1424 provides that no person shall be naturalized if, at any time during the 10 years preceding the filing of his or her application, he or she has been a member of, or affiliated with, any organization that advocates or teaches the assaulting or killing of officers of the United States government or any other organized government; unlawful damage, injury, or destruction of property; or sabotage. 8 U.S.C. § 1424(a)(4), (c).

The INS attempted to introduce evidence regarding a terrorist group with which Appellees allegedly were affiliated at the time that they were convicted. The district court excluded that evidence on hearsay grounds, a ruling that the INS does not appeal. Additionally, however, Hovsepien and Yacoubian were asked about their *current* affiliations, questions that they refused to answer. From our reading of the record, it appears that the district court gave no consideration to those refusals to disclose possible ties, within the statutory period, to terrorist groups described in § 1424. That was error.

4. Consequences of the District Court's Incomplete Naturalization Analysis

Because the district court did not consider Appellees' convictions or their possible affiliations with terrorist groups, the court failed to undertake a complete analysis of their naturalization applications. The parties draw two quite different conclusions from this fact.

Hovsepien and Yacoubian argue that the INS is to blame for the district court's truncated analysis. They point out that the INS did not introduce evidence of their group affiliations or of the facts underlying their convictions. Accordingly, they argue that, although the district court's analysis was incomplete, there is no need for a remand because the INS waived its right to introduce evidence of Appellees' moral character and group affiliations.

We are unpersuaded. The INS reasonably believed that it was barred from introducing such evidence by the district court's expansive sealing order. The

court's order provided that, "[e]xcept for a bona fide *criminal* investigation, no governmental agency or official, including the INS, may use, *directly or indirectly, any information or materials relating to, or derived from, the records and documents that were the subject of this case.*" (Emphasis

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added.) The court also ordered that "Viken Yacoubian and Viken Hovsepien may, and all others must, consider, for all purposes, the aforesaid conviction as expunged and *as never having occurred.*" (Emphasis added.)

In addition to issuing the sealing order, the district court made a number of statements demonstrating that the scope of its order was broad enough to prohibit the introduction of evidence regarding the facts underlying Appellees' convictions. Further, Appellees' counsel below repeatedly argued that questions about Appellees' contacts with law enforcement and about their group affiliations were barred by the sealing order.

A party need not violate a court order to preserve an issue for appeal. See *United States v. Galin*, 222 F.3d 1123, 1126-27 (9th Cir.2000). Accordingly, in view of the sealing order, we hold that the INS did not waive its right to introduce evidence regarding Appellees' convictions and group affiliations.

Although such a holding typically would require us to remand this case to the district court for further fact-finding, the INS requests that we not do so but, instead, simply deny Appellees' naturalization applications. It argues that this course of action is warranted because Hovsepien and Yacoubian bear the burden of proving that they are entitled to naturalization, and they have failed to carry their burden.

It is plainly true that a naturalization applicant must "bear the burden of establishing by a preponderance of the evidence that he or she meets all of the requirements for naturalization." 8 C.F.R. § 316.2(b). Thus, Hovsepien and Yacoubian were responsible for proving that they have been and are persons of good moral character, attached to the principles of the United States, and favorably disposed toward the good order and happiness of the United States. See 8 U.S.C. § 1427(a)(3); 8 C.F.R. § 316.2(a)(7).

The INS argues that Hovsepien and Yacoubian have not met their burdens of proving eligibility for citizenship because, in their naturalization applications and interviews, they refused to answer questions regarding their prior law enforcement contacts and possible affiliations with terrorist groups. Through their silence, the INS argues, Hovsepien and Yacoubian deprived the district court of the information it needed to make a complete analysis of their naturalization applications. Accordingly, the INS asserts, we should deny Appellees' naturalization applications due to their failure to carry their burden of proof.

We reject the INS's argument for the same reason that we reject Appellees' waiver argument. As discussed above, the district court's sealing order had an extremely broad scope. Because of it, Appellees had good reason to believe that the sealing order prohibited the INS from making any inquiries about the convictions or any of the circumstances underlying them. Their refusal to answer questions that they believed violated the sealing order was reasonable at the time and should not necessarily serve as grounds for denying their naturalization applications. Thus, we decline the INS's invitation to deny Appellees' naturalization applications outright, just as we reject Appellees' argument that the INS waived its right to introduce evidence of Appellees' convictions and possible affiliations with terrorist groups.

Instead, we remand this case to the district court for further proceedings limited to reconsideration of Appellees' eligibility for naturalization. On remand, the district court shall permit the parties to introduce additional evidence relevant to the issue of good moral character and

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shall reconsider Appellees' applications for naturalization accordingly.

Recognizing the "virtual certainty" that a simple remand would result in a second appeal regardless of the district court's conclusion, we retain jurisdiction hoping to "obviate the proliferation of motions and collateral proceedings" that has characterized this long and complicated case. *United States v. Hubbard*, 650 F.2d 293, 296 (D.C.Cir.1980). Within 120 days of the issuance of the mandate, or such further time as this court may allow, the district court shall forward its additional findings of fact and conclusions of law to this court, with copies to the parties, so that we may review the district court's assessment of *all* the relevant facts in reaching a final disposition. Within 30 days after the district court forwards its findings and conclusions, any party may request this court's further review of the naturalization issue.

REVERSED and REMANDED for further proceedings consistent with this opinion.

FootNotes

1. The INS is now called the Bureau of Citizenship and Immigration Services. For the sake of consistency, we will refer to it as the INS throughout this opinion.
2. Although Hovsepien was not a party to that case, the logic of our decision applies equally to him. Thus, the JRAD issued at the time of his sentencing does not bar the INS from deporting him on any ground subsequently enacted by Congress and made retroactive.
3. The panel affirmed the district court's ruling with respect to the INS's Rule 36 motion. *Hovsepien*, 307 F.3d at 934.
4. Yacoubian filed a similar motion. However, as discussed above, the INS concedes that the district court properly resentenced him under Rule 35. We therefore address only Hovsepien's resentencing.
5. The sealing order is quoted at p. 1150-51, above.
6. Even were this not the case, Hovsepien is not similarly situated to the petitioner in *St. Cyr* because he did not plead guilty but, instead, was convicted after a trial. Thus, Hovsepien did not waive any constitutional rights in reliance on the possibility of favorable immigration consequences, nor did he enter into a quid pro quo relationship with the INS that was unsettled by the retroactive application of 8 U.S.C. § 1251(a)(2)(C). *St. Cyr*, 533 U.S. at 321-23, 121 S.Ct. 2271; *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir.2002), *cert. denied*, ___ U.S. ___, 123 S.Ct. 2247, 156 L.Ed.2d 110 (2003); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 600-02 (9th Cir.2002).
7. Hovsepien asserts that the INS should be equitably estopped from deporting him on the basis of changes made to the immigration laws. He claims that, during his sentencing, INS counsel stated that the JRAD would effectively bar the INS from deporting Hovsepien on account of his conviction. However, the INS's statement was an accurate description of the state of the law at that time and does not rise to the level of "affirmative misconduct." See *Wenger v. Monroe*, 282 F.3d 1068, 1076 (9th Cir.2002) (holding that, in order for estoppel to be applied to the government, the government must have engaged in "affirmative misconduct going beyond mere negligence").

8. Yacoubian argued in the alternative that the district court had authority to expunge his conviction records as part of the court's "inherent authority."

We squarely rejected such an argument in *Sumner*, 226 F.3d at 1010, and do not wish to revisit that issue here.

9. Our own cases interpreting FYCA's set-aside provision outside the immigration context are not directly relevant to the inquiry in the immigration context. See, e.g., *United States v. Campbell*, 724 F.2d 812 (9th Cir.1984) (holding that a set-aside conviction could be considered when sentencing a FYCA offender for a later crime and noting that FYCA set-aside does not affect nonpublic records kept by the Department of Justice); *Fite v. Retail Credit Co.*, 537 F.2d 384 (9th Cir.1976) (upholding a refusal to enjoin a credit agency's dissemination of the facts of a defendant's set-aside FYCA conviction because a set-aside conviction under FYCA does not disappear); see also *United States v. Kammerdiener*, 945 F.2d 300 (9th Cir.1991) (holding that, under the sentencing guidelines, a conviction set aside under FYCA cannot be considered in calculating criminal history category); *United States v. Hidalgo*, 932 F.2d 805 (9th Cir.1991) (relying on FYCA by analogy when considering the effect of a conviction expunged pursuant to a California statute and holding that "set aside" means "expunged" under FYCA).

10. These cases typically arise in the context of the Attorney General's discretionary authority to suspend deportation or to allow voluntary departure. A statutory prerequisite for both types of relief is that the applicant demonstrate "good moral character."

11. In *Ramirez-Castro v. INS*, 287 F.3d 1172, 1173 (9th Cir.2002), we held that the expungement of a state conviction could not eliminate the immigration consequences of that conviction, namely, deportation on the basis of the conviction itself. We further held that an expunged conviction is not nullified for purposes of the immigration laws unless it falls within the narrow exception established for cases involving first-time simple possession of narcotics. *Id.* at 1174. However, we are not called on here to decide whether a conviction that was expunged under FYCA may be used per se to disqualify an applicant for naturalization. Instead, we address only the extent to which the facts underlying a set-aside conviction can be used.

12. When interpreting a federal statute, we first examine the statutory text. *United States v. Buckland*, 289 F.3d 558, 564 (9th Cir.2002) (en banc).

13. To the extent that anything said in *Sze* is inconsistent with our en banc decision today, this en banc case will govern.

14. In interpreting a statute, we consider Congress' words in the context of the overall statutory scheme. *A-Z Int'l v. Phillips*, 323 F.3d 1141, 1147 (9th Cir.2003).

15. Unsuccessful applicants must first take an administrative appeal of the denial and complete the INS's administrative process before seeking judicial review. 8 U.S.C. § 1421(c), (d); 8 U.S.C. § 1447(a); 8 C.F.R. § 336.2.

16. The INS argues that the district court erred in conducting a de novo hearing on the applications. It argues that, instead, "the district court steps into the role of the INS officer and proceeds to determine whether the application should be granted or denied based on the content of the application and the evidence presented to the INS during its examination of the applicant." This argument is unpersuasive for three reasons.

First, forcing the district court to limit its investigation to only those questions asked by the INS hearing examiner would limit the court's ability to exercise its jurisdiction. The district court would be forced to deny an application any time the INS officer failed to ask a question regarding an important ground for naturalization or chose to investigate further an applicant's incomplete answer in a later interview. Such an interpretation would give the INS power to force the district court's hand even if the INS delayed more than 120 days in making a decision on an application.

Second, INS examining officers have power to question applicants, call witnesses, issue subpoenas, and receive documentary or written evidence. See 8 C.F.R. § 335.2. Thus, if "the district court steps into the role of the INS officer," as the INS argues, then, pursuant to this regulation, the district court has the power to undertake what amounts to a de novo hearing.

Finally, under 8 U.S.C. § 1421(c), the district court is *required* to hold a de novo hearing after the INS denies an application. The district court's naturalization decisions under both § 1447(b) and § 1421(c) are final, so the district court's powers of investigation should be the same under each statutory provision. It makes little sense to require the district court to undertake a de novo inquiry after the INS has made a full investigation and arrived at a reasoned decision, but to bar a de novo hearing when the INS has not issued a decision and likely has not concluded its investigation.

For these reasons, we hold that the district court had power to conduct a de novo hearing on Appellees' naturalization applications.

17. When interpreting statutes, courts look to congressional intent revealed in the history and purposes of the statutory scheme. *Buckland*, 289 F.3d at 565.

18. The INS did not have to wait for a ruling on the Rule 36 motion but, instead, could have brought removal proceedings even in the absence of a correction of the criminal judgments and commitment orders. One ground for deportation listed in the INS charging documents was that Appellees had engaged in "terrorist activity." This ground could have been proved even in the absence of any conviction, corrected or otherwise.

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