UNPACKING THE RISE IN CRIMMIGRATION CASES AT THE SUPREME COURT

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I. INTRODUCTION

Why has the Supreme Court recently granted more writs of certiorari in cases concerning the complex legal test known as the categorical analysis than it has in the last ten years? As background for the uninitiated, the categorical analysis is a tool used by adjudicators to determine when immigration consequences or federal sentencing enhancements are triggered by prior convictions. It is an often misunderstood—and consequently misapplied—analysis that has befuddled adjudicators for decades. The Supreme Court has decided to reaffirm and refine the legal test in several cases over the last few terms. The Court will have the opportunity to do so again this term in two cases, *Pereida v. Barr* and *Shular v. United States*. This Article examines several factors that may elucidate why the Court has recently taken a growing interest in the categorical analysis.[1]

The purpose of the categorical analysis is to preclude adjudicators from evaluating the factual basis of an underlying criminal conviction and instead simply determine whether the elements of a violated criminal statute trigger a statutory ground of removal. The test requires adjudicators to first determine if the elements of the criminal offense match the elements of the charged grounds for removal. If—and only if—those elements match, then the individual with a criminal conviction will face removal. The analysis is often the source of much confusion, as it can be incredibly difficult to determine the elements of a criminal offense, or the elements of a federal removal ground. When the language of the criminal and the immigration statute use different terms to define similar elements (e.g., "possession of a pistol" v. "possession of a firearm"), then the analysis becomes even more knotty. It is an intricate analysis, but the full contours of the categorical analysis are beyond the scope of this Article.

The analysis is a legal test that is well over a century old, but despite its long history,[2] the Supreme Court has decided or granted certiorari in approximately only fourteen cases that relate to the application of the categorical analysis over the last decade. Ten of those cases have landed on the Court's docket in just the last three terms. Why has there been such a significant increase in the number of cases concerning the categorical analysis finding their way onto the Supreme Court's

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1 The impetus for this Article was a thought-provoking question posed to me by Engy Abdelkader in a recent webinar sponsored by the American Bar Association concerning immigration-related Supreme Court cases.

2 *See generally* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011) (discussing the history of the categorical analysis from its inception in defamation law to its application in immigration law and criminal sentencing).

docket? Is there something more behind the developing circuit splits that have continually required the Supreme Court to intervene?

This Article discusses four factors that might be fueling the recent increase in categorical analysis cases at the Supreme Court. Those factors include (1) the versatile nature of the categorical approach, which means that the test is relevant in multiple areas of jurisprudence, which subsequently increases opportunities for circuit splits and Supreme Court review; (2) the increased volume of removal cases requiring application of the categorical analysis; (3) the increase in universal immigration representation programs that provide lawyers to individuals in removal proceedings who can push arguments concerning the categorical analysis's applicability; and (4) recent Supreme Court decisions that have caused further confusion amongst the circuits, which creates a self-perpetuating need for further Supreme Court clarification.

It is likely that the reasons for the rise in these types of cases at the Supreme Court is the result of a complicated confluence of these and perhaps other factors. This Article proceeds by examining each above-mentioned factor and specifically analyzes why the factor is contributing to the rise in categorical analysis cases at the Supreme Court. While a deep dive into each of these factors is beyond the scope of this introductory Article, the topic is certainly ripe for further research.

II. THE FOUR FACTORS

A. *The Versatility of the Categorical Analysis*

Although the increased volume of cases at the Supreme Court concerning the categorical analysis might be explained by the multiple jurisprudential pipelines through which this legal test may end up on the Court's docket, I ultimately do not think the test's versatility is a significant factor. The categorical approach is not only a central aspect of immigration law, but it is also critical in the criminal sentencing context. If the Court grants certiorari in cases involving criminal sentencing or the crime-based grounds of removal, or criminal bars to immigration relief, then chances are the case raises issues concerning the proper application of the categorical approach. Issues concerning the categorical analysis may therefore make their way to the Supreme Court either via immigration jurisprudence or criminal sentencing jurisprudence.

The current Supreme Court term illustrates this point. As previously mentioned, the Court granted certiorari in *Pereida v. Barr*, which involves the proper application of the categorical analysis when determining whether a criminal bar to immigration relief is triggered. And in February, the Court decided a criminal sentencing case involving the categorical analysis, *Shular v. United States*.[3] In that case, the Court reasoned that the language of the "serious drug offense" enhancement in the Armed Career Criminal Act (ACCA) does not require a strict categorical analysis in which the qualifying offense must match a generically

[3] Shular v. United States, 736 Fed. Appx. 876 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 2773 (June 28, 2019) (No. 18-6662).

defined federal drug offense. Rather, it only requires a determination that the underlying offense necessarily *involved* the type of drug-related conduct ACCA deems serious, such as manufacturing and distributing.[4] While the distinction may seem semantic, it will likely significantly increase the number of individuals who are now eligible for the sentencing enhancement. It is arguably far easier to show that an offense involved ACCA's serious drug-related conduct than to show that an offense squarely matches a predetermined federally-defined offense.

Despite the versatility of the categorical analysis, which creates multiple jurisprudential pools of potential cases that could find their way onto the Supreme Court's docket, it is difficult to see how this has contributed to the rise in categorical analysis cases on the Court's docket in any significant way. Cases like *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005) are both criminal sentencing cases in which the central issues related to the categorical approach were decided thirty and fifteen years ago, respectively.[5] Criminal sentencing jurisprudence has embraced the categorical analysis for decades.[6] Categorical analysis's versatility is therefore not a recent phenomenon that would explain the rise in cases at the Supreme Court concerning it.

B. *Increased Volume of Removal Cases*

It may simply be that there are now more cases in the removal system requiring the categorical approach, which consequently increases the likelihood that one of these cases will make it to the Supreme Court. According to some estimates, the number of immigration cases in the removal system has nearly doubled in the last three years[7]—up from approximately 542,000 cases in 2017—such that the immigration court backlog now exceeds more than one million cases.[8] Opportunities for issues to make their way to the Supreme Court obviously increase as the volume of cases involving the issue increases.

Although the volume of removal cases has increased, the number of removal cases in which the government has sought an individual's deportation because of a criminal conviction has significantly decreased. For example, in 1992, the government initiated removal proceedings because of prior criminal activity in almost 30% of cases.[9] In 2019, just over two percent of new removal cases were

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4 *Id.* at 782, 784.

5 Shepard v. United States., 544 U.S. 13, 19–23 (2005); Taylor v. United States, 495 U.S. 575, 599–602 (1990).

6 Taylor v. United States, 495 U.S. 575, 599–602 (1990).

7 Michelle Hackman, *U.S. Immigration Courts' Backlog Exceeds One Million Cases*, WALL ST. J., (Sept. 18, 2019), https://www.wsj.com/articles/u-s-immigration-courts-backlog-exceeds-one-million-cases-11568845885 [https://perma.cc/FQ7B-UEWH].

8 *See id.*; *Immigration Court Backlog Tool*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, https://trac.syr.edu/phptools/immigration/court_backlog/?mod=article_inline [https://perma.cc/93ZA-2ZLE] (last visited Apr. 1, 2020) (noting that there were approximately 1,122,824 immigration cases pending in the U.S. as of February 2020).

9 *Nature of Charge in New Filings Seeking Removal Orders Through February 2020*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, https://trac.syr.edu/phptools/immigration/charges/apprep_newfiling_charge.php [https://perma.cc/CX47-GVFN] (last visited Apr. 1, 2020). Thus far in 2020, the rate is 3%. *Id.*

initiated due to alleged criminal activity.[10] Most cases involving crime-based removal require applying the categorical analysis. The significant decline in crime-based removal would thus suggest that there are actually fewer cases concerning the categorical analysis than in years past. But the categorical analysis is not relevant only to crime-based removal, but also to whether individuals are eligible for different forms of immigration relief. In fact, *Pereida v. Barr*, currently pending before the Supreme Court, concerns the application of the categorical analysis in the context of a form of relief known as cancellation of removal.[11] It is therefore unclear whether the decline in the percentage of cases initiated because of criminal activity has resulted in fewer overall cases that might require use of the categorical analysis. But the significant increase in removal cases generally is likely fueling the need for courts to clarify aspects of the categorical analysis.

C. *Universal Representation Initiatives*

Individuals in removal proceedings are never appointed counsel, so they have no representation if they cannot afford it. But as part of the backlash against increased immigration enforcement, some municipalities around the country have funded universal representation initiatives in which nearly all individuals in immigration detention are provided free legal counsel.[12] Research has shown that having representation in removal proceedings significantly improves an individual's likelihood of avoiding deportation.[13] Might it also be the case that the increased number of individuals receiving legal representation benefit from well-crafted and creative arguments concerning the categorical analysis, and that those arguments strike at the categorical analysis's fault lines and eventually create circuit splits that require resolution from the Supreme Court? Perhaps access to immigration counsel plays a role in the recent increase in categorical-analysis-related cases at the Supreme Court.

The New York Immigrant Family Unity Project (NYIFUP) was the first universal representation initiative of its kind in the country. The project was first piloted in 2013 with limited funding, before it was fully funded the following year.[14] NYIFUP's goal is to provide universal representation to all detained immigrants in

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10 *Id.*

11 Pereida v. Barr, 916 F.3d 1128 (8th Cir. 2019), *cert. granted*, 140 S. Ct. 680 (U.S. Dec. 18, 2019) (No. 19-438).

12 *E.g.*, Karen Berberich, Annie Chen, Corey Lazar, & Emily Tucker, *The Case for Universal Representation*, VERA INST. (Dec. 2018), https://www.vera.org/advancing-universal-representation-toolkit/the-case-for-universal-representation-1 [https://perma.cc/A8U9-PBHS] (discussing New York City's universal representation program, the New York Immigrant Family Unity Project); Ramon Valdez, *Statewide Expansion of Oregon's Universal Representation Program for Immigrants Begins*, INNOVATION LAW LAB (Sept. 30, 2019), https://innovationlawlab.org/press-releases/equity-corps-statewide-expansion/ [https://perma.cc/N3W6-5WBB] (announcing the launch of an Oregon-wide universal representation model).

13 *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 9 (2015).

14 *New York Immigrant Family Unity Project*, THE BRONX DEFENDERS, https://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/ [https://perma.cc/QL94-VFYB] (last visited Feb. 6, 2020).

the New York City area regardless of income, criminal history, or immigration relief eligibility.[15] The project is funded by the New York City Council, and it has inspired other municipalities, including Boston, Chicago, San Francisco, and Los Angeles, to start similar projects.[16] These newly funded programs consequently increase the number of individuals in removal proceedings who can access immigration counsel.

Like the preceding two factors, it is difficult to assess the impact of increased legal representation on the rise of categorical analysis cases at the Supreme Court without more data. To determine how much of an impact these universal representation initiatives are having, it would be necessary to determine whether other aspects of immigration law are also seeing a bump in activity at the Supreme Court. It would also be important to track whether some of the cases percolating up to the federal appellate courts and creating splits amongst the circuits originated with attorneys who are part of a new universal representation initiative.

D. *The Categorical Analysis's Complexity*

The Supreme Court's recent decisions may have caused more confusion amongst the lower courts than they did to clarify the categorical analysis. Consequently, the continued circuit splits and recent Supreme Court cases settling those splits may be a product of the Court's own making. If the Supreme Court is unable to provide clear direction, there is little wonder why lower courts have struggled to consistently and uniformly apply the categorical analysis.

The Supreme Court's recent series of cases concern two intertwined aspects of the categorical analysis that are sometimes confused as unrelated—the "modified categorical analysis" and the "divisible statute" that it requires. A divisible statute is one which sets out elements of a crime in the alternative; some of those elements may trigger removal or a sentencing enhancement and others may not. For example, as the Court stated in *Descamps*, a criminal statute stating that "burglary invol[ves] entry into a building or an automobile" is divisible because entry into a building matches the elements of a removal ground or sentencing enhancement, while entry into an automobile generally does not.[17] To determine which part of a divisible statute an individual has violated, an adjudicator must apply the "modified categorical analysis," which simply allows the adjudicator to consult the record of conviction to see if it reveals which element was violated. In 2013, the Court applied the categorical analysis to a Georgia-controlled substances statute to determine whether a conviction for violating that statute triggered a removal ground.[18] In doing so, the Court seemed to apply the modified categorical analysis without first determining whether the statute was divisible.[19] Generally, the court must first determine whether a statute is divisible at all, as a divisible statute requires a court to apply the modified categorical analysis. Thus, the Court's failure to determine if

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15 *Id.*

16 *Id.*

17 *See* Descamps v. United States, 570 U.S. 254, 257 (2013).

18 Moncrieffe v. Holder, 569 U.S. 184, 190–94 (2013).

19 *See id.* at 192.

the statute was divisible prior to applying this analysis muddied the waters in this jurisprudential space.

Later that same year, the Court issued another opinion, *Descamps v. United States*, in which it further discussed the modified categorical approach and briefly addressed the issue of divisibility.[20] In its opinion, the Court included a footnote that caused significant confusion about how to determine whether a statute is divisible.[21] In fact, Justice Kennedy noted in his concurring opinion that the issue of divisibility was still "not all that clear" despite the Court's efforts to clarify the issue.[22]

Two years later, Justice Kennedy's concern was validated when the Eighth Circuit relied on the Court's footnote in *Descamps* to erroneously find an Iowa burglary statute divisible.[23] That decision was subsequently reversed by the Supreme Court, and the proper divisibility test was finally articulated by the Court.[24] However, Justice Alito noted in his dissenting opinion that the lower courts had struggled to understand *Descamps* and that the Court's new attempt to clarify the concept of divisibility fared no better.[25]

As previously mentioned, the Court has another opportunity to clarify the categorical analysis this term in *Pereida v. Barr*. But until lower courts clearly understand the categorical analysis, splits among the circuits that require resolution by the Supreme Court will continue, and so the cycle will go.

III. CONCLUSION

In sum, determining why there has been an increase in categorical analysis cases at the Supreme Court is more of an art than a science. The fact that the categorical analysis is used in different bodies of law is perhaps the least likely reason for the increase, while the complexity and resulting confusion about how to properly apply the analysis appears to be a significant factor. Regardless of why there has been a recent increase, the increase itself is significant. The Court is paying close attention to how lower courts are using the analysis and tightening up any loose ends in its application. That may soon result in less wiggle room for prosecutors to poke holes in the analysis that allow adjudicators to look beyond statutory text and

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20 *Descamps*, 570 U.S. at 263–64.

21 *See id.* at 264 n.2. Specifically, this footnote muddied the water with regards to how courts determine whether a given statute is divisible. Writing for the majority, Justice Kennedy seemed to render the distinction between separate elements and separate means irrelevant. Yet only statutes with distinct elements are divisible because they delineate distinct criminal offenses. Statutes with separate means, by contrast, simply outline a single set of elements that can be satisfied in multiple ways; they do not truly specify alternative ways of committing a given crime. Thus, despite this footnote's suggestion to the contrary, alternative *elements* are the key to determining whether a statute is divisible (and thus, whether the modified categorical analysis is triggered).

22 *See id.* at 279 (Kennedy, J., concurring).

23 United States v. Mathis, 786 F.3d 1068, 1074–75 (8th Cir. 2015), *rev'd* 136 S.Ct. 2243, 2248 (2016).

24 Mathis v. United States, 136 S.Ct. 2243, 2256–57 (2016). The divisibility test requires adjudicators to look to other sources, such as state common law, jury instructions, or sentencing provisions, to determine whether a criminal statute is divisible. *Id.* at 2256. As a last resort, an adjudicator can consult the underlying record of conviction, but only to determine whether it elucidates the divisibility of a statute. *Id.* at 2257.

25 *See id*. at 2268 (Alito, J., dissenting).

into underlying criminal documents like police reports. Reaffirming the categorical approach's rigidity and clarifying the steps in its application will likely be a positive development for immigration practitioners and their clients.