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## A Truer Concept of Service for Citizenship: Reimagining Military Naturalization

Ryan P. Coleman

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## Note

### A Truer Concept of Service for Citizenship: Reimagining Military Naturalization

RYAN P. COLEMAN

*The Immigration and Nationality Act provides noncitizen service members and honorably discharged immigrant veterans a path toward United States citizenship. The Act allows those who have honorably served in the military to apply for naturalization with a considerably reduced residency requirement. However, the current military naturalization process is riddled with complexity, excessive and arbitrary vetting practices, misinformation, and an ever-growing backlog of naturalization applications that have precipitated processing delays. These flaws result in veteran deportations, which precipitate family separations and the deprivation of healthcare for veterans. Furthermore, requiring separate enlistment and naturalization processes leads to squandered government resources in the form of wasted work hours, duplicative background checks, and the addition of more applicants to an already overburdened immigration processing backlog. Moreover, the current system has arguably led to decreased noncitizen participation in the military and deterred eligible recruits with highly sought-after skills from enlisting. Although Congress has made attempts to address the shortfalls of the system with a patchwork of legislation aimed at addressing the process's consequences, it fails to target fundamental defects that cause them.*

*The most efficient and effective remedy is a bottom-up reimagining of military service for citizenship—replacing the existing framework for military naturalization with voluntary automatic citizenship upon taking the Oath of Enlistment. Such an approach can adequately incorporate the substantive requirements for citizenship, mitigate the shortcomings of the current framework, and advance both United States national security and governmental efficiency. The current enlistment process functionally duplicates the procedures for naturalization and fulfills the same substantive requirements through its application questions, military aptitude screening, background checks, and Oath of Enlistment. A voluntary automatic service for citizenship initiative would benefit immigrant service members, the United States military, and the nation as a whole.*

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# A Truer Concept of Service for Citizenship: Reimagining Military Naturalization

RYAN P. COLEMAN \*

## INTRODUCTION

One of the foremost responsibilities of United States citizenship is to “[d]efend the country if the need should arise.”<sup>1</sup> The cost of this commitment—potentially one’s life—is far greater than any other obligation of citizenship. This raises the question: Why are there U.S. service members fulfilling the most demanding duty of citizenship, while still being denied the title of “citizen”? For the several thousand noncitizen immigrants currently serving in the military,<sup>2</sup> there is the incentive of a promise—loyal service for a *chance* at citizenship. As codified under the Immigration and Nationality Act (INA), the current system allows lawful permanent residents (LPR)<sup>3</sup> who have served in the military during peacetime to shorten the necessary period of residency prior to applying for naturalization<sup>4</sup> and permits an even briefer requisite duration for those seeking naturalization during wartime.<sup>5</sup> But does the promise of naturalization actually come to fruition? For many of the 91,000 unnaturalized immigrant veterans,<sup>6</sup> the

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<sup>1</sup> U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP’T OF HOMELAND SEC., M-76, THE CITIZEN’S ALMANAC 8 (2014), <https://www.uscis.gov/sites/default/files/document/guides/M-76.pdf>.

<sup>2</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-416, IMMIGRATION ENFORCEMENT: ACTIONS NEEDED TO BETTER HANDLE, IDENTIFY, AND TRACK CASES INVOLVING VETERANS 1 (2019) [hereinafter GAO IMMIGRATION ENFORCEMENT], <https://www.gao.gov/assets/gao-19-416.pdf> (“Between fiscal years 2013 and 2018, more than 44,000 noncitizens enlisted in the military, according to Department of Defense (DOD) data.”).

<sup>3</sup> A “lawful permanent resident” is a noncitizen who is authorized to live and work in the United States, as well as travel in and out of the country with greater ease than other noncitizens. RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW 146 (5th ed. 2020). A noncitizen may obtain LPR status in many different ways, including paths that involve having certain familial relationships with a U.S. citizen or LPR; having employer sponsorship; being admitted as a refugee or asylee; or winning a visa lottery. *Id.* at 145–46.

<sup>4</sup> INA § 328(a), 8 U.S.C. § 1439(a).

<sup>5</sup> INA § 329(a), 8 U.S.C. § 1440(a).

<sup>6</sup> See Jie Zong & Jeanne Batalova, *Immigrant Veterans in the United States*, MIGRATION POL’Y INST. (May 16, 2019), <https://www.migrationpolicy.org/article/immigrant-veterans-united-states-2018> (stating that U.S. Census Bureau data indicated that there were 527,000 foreign-born veterans in 2018

answer is likely “no,” and, for some, there is potential for a more troubling response: “I’m not sure.”<sup>7</sup> The current process is riddled with complexity,<sup>8</sup> excessive and arbitrary vetting practices,<sup>9</sup> misinformation,<sup>10</sup> and an ever-growing backlog of naturalization applications that have delayed the granting of citizenship to service members.<sup>11</sup> These flaws result in veteran deportations,<sup>12</sup> which precipitate family separations and the deprivation of healthcare to treat service-related physical and psychological injuries.<sup>13</sup> Deportation also exposes noncitizen veterans to the threat of being targeted by gangs in their countries of origin.<sup>14</sup> Furthermore, requiring separate enlistment and naturalization processes leads to squandered government resources in the form of wasted work hours, duplicative background checks,<sup>15</sup> and the addition of more applicants to an already overburdened immigration processing backlog.<sup>16</sup> Moreover, there is reason to believe that

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and 436,000 of them were naturalized citizens). Zong and Batalova noted that, “[b]ecause the Census Bureau data are collected on households, its surveys are likely to undercount homeless veterans.” *Id.*

<sup>7</sup> See BARDIS VAKILI, JENNIE PASQUARELLA & TONY MARCANO, AM. C.L. UNION OF CAL., DISCHARGED, THEN DISCARDED: HOW U.S. VETERANS ARE BANISHED BY THE COUNTRY THEY SWORE TO PROTECT 24 (2016) [hereinafter ACLU REPORT], <https://www.aclusocal.org/sites/default/files/dischargedthendiscarded-acluofca.pdf> (“Many of the veterans we interviewed said they never applied for naturalization because they thought their military service automatically made them U.S. citizens. Some thought that their oath of enlistment triggered citizenship, while others were misinformed by recruiters. Many did not realize that they were in fact not U.S. citizens until the federal government moved to deport them.”).

<sup>8</sup> See *id.* at 20 (noting the difficulty for service members to navigate the complexities of the U.S. immigration system).

<sup>9</sup> See *Tiwari v. Mattis*, 363 F. Supp. 3d 1154, 1172–73 (W.D. Wash. 2019) (holding that the Department of Defense requirement of enhanced background checks for immigrant recruits “display[ed] a general lack of trust . . . without needing to identify a basis for suspicion” and violated the equal protection rights of noncitizen enlistees).

<sup>10</sup> See *infra* notes 91–93 and accompanying text (discussing how some veterans were misinformed about how military naturalization operates).

<sup>11</sup> See Ming H. Chen, *Citizenship Denied: Implications of the Naturalization Backlog for Noncitizens in the Military*, 97 DENV. L. REV. 669, 678 (2020) (“Recent statistics show that wait times for military naturalizations have increased from the FY 2017 average of 8.1 months to the FY 2018 average of 10.3 months.”).

<sup>12</sup> See GAO IMMIGRATION ENFORCEMENT, *supra* note 2, at 16 (finding that “approximately 250 veterans were placed in removal proceedings or removed from the United States from fiscal years 2013 through 2018”).

<sup>13</sup> See ACLU REPORT, *supra* note 7, at 41 (stating that deported veterans are “permanently separated from their families” in the United States and cut off from their ability to obtain “VA medical care and benefits”).

<sup>14</sup> See Ali Swenson, *Deployed, Then Deported: How a US Navy Vet from Phoenix Was Exiled to Mexico*, PHX. NEW TIMES (Nov. 7, 2019, 6:30 AM), <https://www.phoenixnewtimes.com/news/deployed-then-deported-how-us-vets-who-served-their-country-get-kicked-out-11390471> (stating that veterans deported to Mexico are “targeted by gangs and cartels who recruit them for their military skills, threaten their families, or—in the publicized case of at least one veteran—kill them”).

<sup>15</sup> See *infra* notes 268–271, 283 and accompanying text (discussing government waste caused by the military naturalization process).

<sup>16</sup> See COLO. STATE ADVISORY COMM. TO THE U.S. COMM’N ON C.R., CITIZENSHIP DELAYED: CIVIL RIGHTS AND VOTING RIGHTS IMPLICATIONS OF THE BACKLOG IN CITIZENSHIP AND

the current system has led to decreased noncitizen participation in the military and deterred eligible recruits with highly sought-after skill sets from enlisting.<sup>17</sup>

Congress has thus far chosen to address the complexities and shortfalls of the system with an elaborate patchwork of legislation aimed at addressing the process's consequences, but not the fundamental flaws that caused them. Although there have been some governmental efforts to address shortfalls in the existing scheme,<sup>18</sup> they do not go far enough to solve the systemic dilemmas that will continue to plague this mechanism for obtaining citizenship unless the problems are addressed head-on.

The most efficient and effective remedy is a bottom-up reimagining of military service for citizenship—replacing the existing framework for military naturalization with voluntary automatic citizenship upon taking the Oath of Enlistment.<sup>19</sup> The idea of granting automatic citizenship for noncitizens that join the U.S. Armed Forces is not a novel concept,<sup>20</sup> but prior proposals have only cursorily addressed how it would work and have been met with opposition on several grounds, including a concern that it would have the effect of diluting the substantive requirements for naturalization.<sup>21</sup> This concern is misplaced. This Note will illustrate how such an approach can adequately incorporate the substantive requirements for citizenship, mitigate the shortcomings of the current framework, and operate to benefit both U.S. national security and government efficiency.

Part I discusses the negative byproducts of the current U.S. military

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NATURALIZATION APPLICATIONS 9 (2019) (indicating that there is a processing backlog of over 700,000 naturalization applications).

<sup>17</sup> See *infra* Section I.B (discussing the issue of decreased immigrant participation in the U.S. Armed Forces).

<sup>18</sup> See *infra* notes 114–116 and accompanying text (discussing the Veteran Deportation Prevention and Reform Act).

<sup>19</sup> The enlistment process culminates in the Oath of Enlistment ceremony, which is the last procedural requirement before admission into military service. See U.S. MIL. ENTRANCE PROCESSING COMMAND, U.S. DEP'T OF DEF., USMEPCOM REGUL. NO. 601-23, PERSONNEL PROCUREMENT ENLISTMENT PROCESSING ¶ 5-15 (2020) [hereinafter USMEPCOM REGUL.] (suggesting that the Oath of Enlistment is the last step in the enlistment process); 10 U.S.C. § 502(a) (“Each person enlisting in an armed force shall take the . . . oath [of enlistment].”).

<sup>20</sup> See MARGARET MIKYUNG LEE & RUTH ELLEN WASEM, CONG. RSCH. SERV., RL31884, EXPEDITED CITIZENSHIP THROUGH MILITARY SERVICE: CURRENT LAW, POLICY, AND ISSUES 23 (2009) [hereinafter CONG. RSCH. SERV. MILITARY NATURALIZATION] (“Some proposals would make naturalization automatic for persons who are deployed to a combat zone, waiving any requirement for demonstrating good moral character or knowledge of civics or English.”); Craig R. Shagin, *Deporting Our Troops*, FED. LAW., July 2013, at 46, 50 (“The preferred solution is to make all those who serve in an American uniform United States citizens upon taking the oath of service.”); Chen, *supra* note 11, at 702 (“A more ambitious reform is to make naturalization occur by operation of law under the INA in cases where enlisting immigrants expect to become eligible for citizenship.”).

<sup>21</sup> See CONG. RSCH. SERV. MILITARY NATURALIZATION, *supra* note 20, at 23 (“Critics of . . . [proposals for automatic citizenship], although acknowledging the sacrifice and contribution of military personnel in a combat zone, urge caution when considering eliminating substantive requirements such as good moral character.”).

naturalization process and the systemic faults that precipitate them. Part II provides background information on the policies and procedures that currently govern the naturalization and military enlistment processes, as well as their underlying rationales. Part III advocates for replacing the existing military naturalization scheme with a new initiative that grants voluntary automatic citizenship for noncitizen military recruits upon their taking of the Oath of Enlistment; argues that the preliminary requirements for enlistment adequately address all of the primary concerns justifying the existing protracted naturalization process; and shows that the current enlistment process functionally duplicates the procedures for naturalization and fulfills the same substantive requirements through its application questions, military aptitude screening, background checks, and Oath of Enlistment. The Conclusion outlines how an automatic service for citizenship initiative would benefit immigrant service members, the U.S. military, and the nation as a whole.

## I. FRAMEWORK FALLOUT: FAILURES OF THE MODERN MILITARY NATURALIZATION PROCESS

The current military naturalization process leaves gaps, inefficiencies, and uncertainties that operate to the detriment of both noncitizen service members and the entire U.S. military. The most egregious failures take the form of veteran deportations and decreased immigrant participation in the armed forces.

### A. *Deportation of Veterans*

According to a 2019 Government Accountability Office (GAO) report, between 2013 and 2018, approximately 250 veterans were deported.<sup>22</sup> This figure is based on the limited information the GAO could glean from the Immigration and Customs Enforcement (ICE) Office of the Principal Legal Advisor's (OPLA) database, but the report noted that "ICE has not developed a policy to identify and document all military veterans it encounters, [and] ICE does not maintain complete electronic data on veterans who have been placed in removal proceedings or [have been] removed."<sup>23</sup> Therefore, this figure provides a floor, not a ceiling, on how many prior members of the armed forces were removed during that period.<sup>24</sup> Other authorities, such as the Texas Civil Rights Project and the Congressional Hispanic Caucus, have estimated that over 3,000 veterans

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<sup>22</sup> GAO IMMIGRATION ENFORCEMENT, *supra* note 2, at 16.

<sup>23</sup> *Id.* at 14, 16.

<sup>24</sup> *See id.* at 16 ("[B]ecause the entry of veteran status data in [the OPLA database] is not mandatory, there could be additional veterans who were placed in removal proceedings or removed during the timeframe of our review who were not noted in [the OPLA database] or included in our analysis . . .").

have been deported, but provided no time frame during which the removals occurred.<sup>25</sup> Removal causes harms that are uniformly suffered by all deportees, regardless of veteran status, including the separation of families, employment issues, and social integration difficulties. But the deportation of prior U.S. service members gives rise to some uniquely deleterious circumstances, including the exposure of veteran deportees to atypical dangers in their countries of origin due to their prior military service.<sup>26</sup> Furthermore, deported veterans are dispossessed of medical care that they were promised for injuries that the government precipitated.<sup>27</sup>

The impact on the families of deported veterans is undeniable. In 2016, the American Civil Liberties Union (ACLU) published a report on its findings from interviews conducted with fifty-nine U.S. military veterans from twenty-two countries who had either been deported or were fighting deportation at the time.<sup>28</sup> The ACLU noted that “the vast majority [of the interviewed veterans] are entirely separated from their families” and that, “[i]n nearly all of the cases, the parents, siblings, spouses, and children of the veteran were either U.S. citizens, by birth or naturalization, or LPRs.”<sup>29</sup> Almost all of the interviewees were LPRs deported for being convicted of “aggravated felonies,”<sup>30</sup> which barred their readmission into the United States after removal.<sup>31</sup>

Although some families may be able to follow their spouse or parent to the country to which they are deported, many practical considerations prevent this. The ACLU noted that, “[i]n most cases, spouses and children remained in the [United States] after the [veteran]’s deportation for

<sup>25</sup> EMMA HILBERT, TEX. C.R. PROJECT, *LAND OF THE FREE, NO HOME TO THE BRAVE: A REPORT ON THE SOCIAL, ECONOMIC, AND MORAL COST OF DEPORTING VETERANS 1* (2018) [hereinafter *TEX. C.R. PROJECT*], <https://txcivilrights.org/wp-content/uploads/2020/05/2018-VeteransReport-FINAL.pdf>; Letter from Michelle Lujan Grisham, Chairwoman, Cong. Hisp. Caucus, to David J. Shulkin, Sec’y, U.S. Dep’t of Veterans Affs. (June 20, 2017), <https://chc.house.gov/media-center/press-releases/chc-congressional-hispanic-caucus-requests-urgent-meeting-on-deported>.

<sup>26</sup> See Laurie Roberts, *ICE Secretly Departs Troubled Iraq War Veteran to El Salvador. That’s a Disgrace*, USA TODAY, <https://www.usatoday.com/story/opinion/2019/10/26/ice-deported-jose-segovia-benitez-el-salvador-disgrace-column/2455006001/> (Oct. 30, 2019, 11:16 AM) (quoting Texas attorney Roy Petty) (noting that “[g]angs [in foreign countries] target former U.S. military”).

<sup>27</sup> See Lello Tesema & Stephen Merjavy, *Deported Veterans Should Not Be Denied the Health Care They’ve Earned*, STAT (Dec. 19, 2017), <https://www.statnews.com/2017/12/19/veterans-immigrants-deported-health-care/> (“[O]nce deported, veterans can no longer access the VA health care system, depriving them of the VA benefits to which they are entitled.”).

<sup>28</sup> ACLU REPORT, *supra* note 7, at 9.

<sup>29</sup> *Id.* at 42.

<sup>30</sup> *Id.* at 7 (“The overwhelming majority of these veterans were Lawful Permanent Residents . . .”); *id.* at 8 (“Their deportations have largely been the result of the harsh 1996 amendments to immigration laws that mandate detention and deportation for a vast list of crimes deemed ‘aggravated felonies.’”).

<sup>31</sup> 8 U.S.C. § 1182(a)(9)(A)(i) (“Any alien who has been ordered removed . . . and who again seeks admission . . . at any time in the case of an alien convicted of an aggravated felony[] is inadmissible.”); BOSWELL, *supra* note 3, at 64.



economic, educational, and cultural reasons.<sup>32</sup> For many of these veterans, their children only spoke English, attended school in the United States, and never knew any other country as home.<sup>33</sup>

It is also likely that veterans who are deported to relatively dangerous countries have concerns about the safety of raising their children in such environments. While non-veteran deportees share many of the same safety concerns associated with removal, a hazard that is unique to deported service members is the high risk of being targeted for recruitment by local criminal organizations. In Mexico and Central America, gangs and cartels actively seek U.S. veterans for conscription because of their military training—threatening the lives of service members and their families if they refuse to join.<sup>34</sup> One Texas immigration attorney stated that, in El Salvador, “[g]angs target former U.S. military . . . . They’ll kidnap a person, they may hold a person for ransom, [and] they may torture an individual.”<sup>35</sup> Notably, these gang and cartel tactics for recruitment have forced some deported veterans into a life of crime beyond U.S. borders.<sup>36</sup>

The majority of veterans interviewed by the ACLU were brought to the United States when they were young children.<sup>37</sup> Several of the deported veterans were unable to speak the native language of the country to which they were deported,<sup>38</sup> which undoubtedly affected their ability to integrate into society, seek medical treatment for service-related disabilities, and secure employment.<sup>39</sup> For some deported veterans, this problem was further compounded by a lack of social or familial ties in their countries of origin.<sup>40</sup> It is incredibly difficult for deported veterans facing these challenges to support a household, which likely motivates a decision for their families to remain in the United States.

These difficulties and the prospect of perpetual separation from spouses and children lead many removed service members to attempt to reenter the United

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<sup>32</sup> ACLU REPORT, *supra* note 7, at 42.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 50; see Nicole Acevedo, *The Ultimate Threat for Deported U.S. Veterans? Drug Cartels, New Documentary Says*, NBC NEWS, <https://www.nbcnews.com/news/latino/ultimate-threat-deported-u-s-veterans-drug-cartels-new-documentary-n1086186> (Nov. 22, 2019, 4:36 PM) (discussing how a Mexican cartel threatened to kill the family of a deported Army veteran if he did not join them).

<sup>35</sup> Roberts, *supra* note 26 (quoting Texas attorney Roy Petty).

<sup>36</sup> See Acevedo, *supra* note 34 (discussing an Army veteran nicknamed “El Vet” who was deported and joined the Mexican Juárez cartel after they threatened to kill his family if he refused to join).

<sup>37</sup> ACLU REPORT, *supra* note 7, at 7. In fact, thirty-one of the fifty-nine deported veterans interviewed were brought to the United States before the age of ten. *Id.* at 12.

<sup>38</sup> *Id.* at 44.

<sup>39</sup> There is some irony to this, considering that one of the primary reasons that U.S. immigration policy requires naturalizing citizens to be proficient in reading, writing, and speaking English is to ensure that they can secure employment and contribute to the national economy. See *infra* note 199 and accompanying text (discussing contemporary justifications for testing the English proficiency of naturalization applicants).

<sup>40</sup> ACLU REPORT, *supra* note 7, at 44.

States, only to be caught and convicted of federal unlawful reentry.<sup>41</sup> Deportation can devastate families and ruin the lives of those left behind—potentially causing a family to become homeless,<sup>42</sup> a family member to commit suicide,<sup>43</sup> a child to have developmental issues due to the absence of a parent,<sup>44</sup> or a marriage to end.<sup>45</sup>

Furthermore, removal severely impedes, or completely eliminates, a veteran's access to both healthcare treatment for service-related disabilities and compensation to pay for treatment. Tragically, many deported veterans have succumbed to ailments from which they could have recovered if they had been provided access to Department of Veterans Affairs (VA) medical treatment.<sup>46</sup> When service members carry out their duties on behalf of the nation, there is a clear risk of being injured—either physically or mentally. In turn, the nation should be duty-bound to make injured veterans whole.

For many deported service members that were convicted of an aggravated felony, the very conviction that led to their deportation was likely attributable to service-related Post-Traumatic Stress Disorder (PTSD).<sup>47</sup> PTSD can manifest in many ways, including aggressive behavior and Substance Use Disorder (SUD),<sup>48</sup> which is often a byproduct of veterans attempting to self-medicate their undiagnosed PTSD.<sup>49</sup> A significant number of veterans

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<sup>41</sup> *Id.* at 51.

<sup>42</sup> *See id.* at 34 (discussing how, after Specialist Hans Irizarry was deported to the Dominican Republic, his wife and two daughters, all U.S. citizens, “were forced to move into a [homeless] shelter”).

<sup>43</sup> *See id.* at 15, 42 (discussing Private Felix Alvarez's belief that his separation from his family, caused by his deportation to Mexico, contributed to his daughter's suicide); *id.* at 43–44 (discussing how Seaman Salomon Loayza's son attempted to commit suicide after learning his father was being deported).

<sup>44</sup> *See id.* at 42 (discussing Private Alvarez's belief that his absence due to removal prevented his son from having a stable home life, which led to his son being in and out of jail); *id.* at 42–43 (discussing how, after Private Chavez Medina was deported, his family struggled without his income, leading to one son dropping out of school to get a job and another son simultaneously holding down a job and attending high school); Maria Ines Zamudio, *Deported U.S. Veterans Feel Abandoned by the Country They Defended*, NPR (June 21, 2019), <https://www.npr.org/local/309/2019/06/21/733371297/deported-u-s-veterans-feel-abandoned-by-the-country-they-defended> (discussing how Gulf War veteran Alex Murillo's two sons were deeply impacted by his deportation and became addicted to opioids).

<sup>45</sup> *See* ACLU REPORT, *supra* note 7, at 39 (discussing how Seaman Howard Dean Bailey's wife left him after he was deported to Jamaica and how he can now only speak with his two children on the phone).

<sup>46</sup> *Id.* at 46 (discussing deported veterans Jose Solorio, Hector Barrios, and Gonzalo Chaidez, all of whom died from ailments that could have been treated if they had access to VA medical facilities).

<sup>47</sup> *See* B. Ryan Byrd, Comment, *On Behalf of an Ungrateful Nation?: Military Naturalization, Aggravated Felonies and the Good Moral Character Requirement*, 15 SCHOLAR 603, 629 (2013) (“It is now known that many of those who deploy to combat zones may suffer from the effects of [PTSD]. With respect to alien veterans, their subsequent legal problems could be linked to this condition as a direct result of their combat service . . .”).

<sup>48</sup> *See* TEX. C.R. PROJECT, *supra* note 25, at 17 (drawing a correlation between PTSD and SUD); *Post-Traumatic Stress Disorder (PTSD)*, MAYO CLINIC (July 6, 2018), <https://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/symptoms-causes/syc-20355967> (stating that angry outbursts and aggressive behavior are symptoms of PTSD).

<sup>49</sup> *See* TEX. C.R. PROJECT, *supra* note 25, at 17 (stating that some veterans “may turn to drugs to try to cope with [their] PTSD”).

have been removed for aggravated felonies that may be related to these characteristic symptoms,<sup>50</sup> such as crimes of violence<sup>51</sup> and drug offenses.<sup>52</sup> Moreover, many of the deported service members were either diagnosed with PTSD after removal or believe that they have undiagnosed PTSD.<sup>53</sup>

It seems tragically ironic that those service members who were deported under such circumstances were not only punished for crimes precipitated by mental illness, but were then cut off from the available treatment that might assist in their recovery. In order to qualify for benefits from the VA, a veteran must first undergo a compensation and pension (C&P) exam.<sup>54</sup> C&P exams are conducted to appraise the severity of a veteran's ailments and assess whether the injuries were likely suffered during time in service or aggravated by it.<sup>55</sup> C&P exam determinations affect a veteran's VA benefits, including that veteran's eligibility for VA healthcare,<sup>56</sup> access to treatment for specific injuries, and availability of VA compensation.<sup>57</sup> C&P exams may only be conducted by physicians authorized by the VA.<sup>58</sup> Veterans living outside of the United States are unable to receive C&P exams from VA medical providers, but they can receive examinations from VA contractors or private providers scheduled through U.S. embassies or consulates in countries where VA contractors do not operate.<sup>59</sup>

This process presents significant issues for deported service members. The ACLU noted in its report that "there appears to be no working relationship

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<sup>50</sup> Christine Hauser, *Afghanistan War Veteran's Deportation Is a 'Shocking Betrayal,' Senator Says*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/us/army-veteran-deported.html> (discussing Miguel Perez-Montes, an Afghanistan war veteran, who self-medicated his PTSD with drugs and alcohol before he was deported to Mexico on a drug conviction); ACLU REPORT, *supra* note 7, at 15 (discussing Private Felix Alvarez, who struggled with drugs and alcohol and was deported after being convicted of aggravated assault); *id.* at 33 (discussing Lance Corporal Antonio Reyes Romo, who was convicted of aiding and abetting a drug crime, consequently deported, and later diagnosed with PTSD).

<sup>51</sup> INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).

<sup>52</sup> INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).

<sup>53</sup> See ACLU REPORT, *supra* note 7, at 12 (including Lance Corporal Enrique Salas Garcia); *id.* at 33 (including Lance Corporal Antonio Reyes Romo); *id.* at 34 (including Specialist Hans Irizarry); *id.* at 43 (including Specialist Mauricio Hernandez); *id.* at 51 (including Specialist Fabian Rebollo).

<sup>54</sup> GAO IMMIGRATION ENFORCEMENT, *supra* note 2, at 9.

<sup>55</sup> U.S. DEP'T OF VETERANS AFFS., YOUR VA CLAIM EXAM: KNOW WHAT'S NEXT (2021), <https://www.benefits.va.gov/COMPENSATION/docs/claimexam-factsheet.pdf#>.

<sup>56</sup> VA health care provides for "regular checkups with [a] primary care provider and appointments with specialists" and grants "access [to] Veterans health care services like home health and geriatric (elder) care, and . . . medical equipment, prosthetics, and prescriptions." *VA Health Care*, U.S. DEP'T OF VETERANS AFFS., <https://www.va.gov/health-care/> (Mar. 15, 2021).

<sup>57</sup> VA disability compensation is "[a] tax-free monetary benefit paid to Veterans with disabilities that are the result of a disease or injury incurred or aggravated during active military service." *Compensation*, U.S. DEP'T OF VETERANS AFFS., <https://www.benefits.va.gov/COMPENSATION/types-compensation.asp> (Jan. 19, 2018).

<sup>58</sup> GAO IMMIGRATION ENFORCEMENT, *supra* note 2, at 9.

<sup>59</sup> *Id.* at 27.

between the VA and the U.S. embassies to facilitate [C&P] exams.”<sup>60</sup> The GAO’s 2019 report noted that “veterans who receive embassy-scheduled exams from private providers abroad may receive lower-quality exams than veterans who live in the United States.”<sup>61</sup> This is because “providers abroad may misinterpret VA exam requirements due to language barriers or unfamiliarity with U.S. medical terminology.”<sup>62</sup> Furthermore, providers abroad “do not have access to veterans’ service records, and therefore cannot assess whether a particular condition is service-connected.”<sup>63</sup>

The appeals process further compounds this problem. If a veteran receives an unfavorable C&P exam determination, the veteran may appeal the decision, but appeal hearings are exclusively held in the United States.<sup>64</sup> “Veterans living abroad cannot attend an appeals hearing unless they are willing and able to travel to the United States at their own expense.”<sup>65</sup> This is impossible for a veteran who is strictly barred from reentry, and it is extremely difficult for those who cannot afford travel because of an inability to secure employment.<sup>66</sup> Additionally, VA disability claims submitted by veterans outside of the United States take significantly longer to process.<sup>67</sup>

Even if a veteran living abroad receives a favorable C&P exam determination that their injuries are service-connected, they encounter additional difficulties in realizing VA benefits. Veterans living abroad are not eligible to receive comprehensive health care, and instead they must rely on the Foreign Medical Program (FMP).<sup>68</sup> Through the FMP, the VA reimburses veterans for private physician treatment, but only for the treatment of conditions that are service-connected.<sup>69</sup> This presents issues on two fronts. By not having access to U.S. medical treatment, and being forced to rely on the medical practices of their countries of origin, veterans may not receive the best care possible.<sup>70</sup> Additionally, it has historically taken the VA

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<sup>60</sup> ACLU REPORT, *supra* note 7, at 48.

<sup>61</sup> GAO IMMIGRATION ENFORCEMENT, *supra* note 2, at 28.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* Although VA staff submit C&P exams conducted by private providers to a statewide VA medical center for additional medical opinions to address this issue, the process increases the chances of a faulty evaluation. *Id.*

<sup>64</sup> *Id.* at 25.

<sup>65</sup> *Id.* at 24.

<sup>66</sup> Many deported veterans may be prevented from obtaining employment in their countries of origin because of a service-related mental illness, an inability to speak the native language, or an absence of a local social network. *See supra* notes 37–40 and accompanying text (discussing the difficulties faced by veterans in their countries of origin).

<sup>67</sup> The GAO noted that, “as of September 2018, VA was not meeting its timeliness goal of 125 days for processing foreign claims and VA took an average of [twenty-nine] days longer to process foreign [disability] claims than domestic claims.” GAO IMMIGRATION ENFORCEMENT, *supra* note 2, at 26.

<sup>68</sup> *Id.* at 23.

<sup>69</sup> *Id.*

<sup>70</sup> *See* ACLU REPORT, *supra* note 7, at 44–45 (“In addition to the comprehensive medical care available to veterans in the [United States], the VA provides a range of specialized care for service-

approximately two months to reimburse veterans through the FMP.<sup>71</sup> This may be a significant amount of time to wait for reimbursement if the veteran has become indigent as a result of deportation.

The reasons service members are deported are multifaceted. The primary causes lie in federal administrative agency carelessness,<sup>72</sup> a lack of judicial discretion in deportation hearings,<sup>73</sup> and insufficient Department of Defense (DoD) leadership engagement in assisting noncitizen service members with the military naturalization process.<sup>74</sup>

Failure to follow procedure, an absence of appropriate protocols, and a significant gap in the necessary training for immigration officers are the major reasons why veterans are being deported without appropriate consideration and why accurate data on the scope of how many veterans have been removed cannot be obtained. The 2019 GAO report found that ICE has developed specific guidelines to be followed when officers encounter potentially removable veterans, requiring “additional assessments, creat[ing] additional documentation, and obtain[ing] management approval in order to proceed” with removal processing.<sup>75</sup> But it also found that the agency does not follow, disseminate, or train its staff on these directives.<sup>76</sup> One ICE policy implemented in 2004 directs ICE officials to consider several factors<sup>77</sup> about an immigrant veteran prior to issuing a Notice to Appear (NTA), and complete a memorandum summarizing the facts of the veteran’s case for inclusion in their alien file.<sup>78</sup> Additionally, a directive introduced in 2015 that established procedures for investigating whether an encountered individual is potentially a U.S. citizen

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related disabilities. The VA also provides mental health treatment and counseling services for combat and other veterans that, unfortunately for the men we interviewed, veterans abroad cannot access. Without being able to reenter the [United States], these programs and treatment services are unavailable to deported veterans.”)

<sup>71</sup> GAO IMMIGRATION ENFORCEMENT, *supra* note 2, at 26 n.52.

<sup>72</sup> *See id.* at 10–15 (detailing ICE’s failure to adhere to its own “[p]olicies for [h]andling [c]ases of [p]otentially [r]emoveable [v]eterans;” the absence of any “policy to identify and document all military veterans [ICE] encounters;” and the agency’s consequent lack of “complete electronic data on veterans who have been placed in removal proceedings or removed”).

<sup>73</sup> *See id.* at 16 n.35 (explaining that, in “2018, the Attorney General determined that . . . immigration judges . . . lack general authority to administratively close removal proceedings”).

<sup>74</sup> *See id.* at 20–22 (“USCIS and DOD officials attributed the decline in military naturalization applications to several DOD policy changes. . . . USCIS’s processing time for military naturalizations also increased . . . . USCIS officials attributed this increase to the backlog in DOD background checks . . . .”).

<sup>75</sup> *Id.* at 10.

<sup>76</sup> *Id.* at 10–15.

<sup>77</sup> Under the 2004 policy, prior to issuing a veteran a NTA, ICE officials must consider the veteran’s “overall criminal history, evidence of rehabilitation, family and financial ties to the United States, employment history, health, and community service. [ICE officials] must also consider factors related to the veteran’s military service, such as duty status (active or reserve), assignment to a war zone, number of years in service, and decorations awarded.” *Id.* at 10–11.

<sup>78</sup> *Id.* at 11.

included “military service” among the indicators of potential citizenship.<sup>79</sup> The policy further dictates that, prior to issuing a veteran a NTA, a “factual examination, legal analysis, and a check of all available [Department of Homeland Security (‘DHS’)] systems” must be conducted to evaluate the individual’s citizenship status.<sup>80</sup> The policy also requires that an assessment and recommendations memorandum be generated and placed in the veteran’s alien file.<sup>81</sup>

Of the files that the GAO reviewed, ICE failed to follow the 2004 requirement twenty-one percent of the time and failed to follow the 2015 policy seventy percent of the time.<sup>82</sup> DHS’s only defense for these failures to follow protocol was that “they were unaware of the policies prior to [the GAO’s] review.”<sup>83</sup> The GAO further concluded that, because of ICE’s oversight, “some veterans who were removed may not have received the level of review and approval that ICE has determined is appropriate for cases involving veterans.”<sup>84</sup>

Although ICE has policies for when agents encounter veterans, it has no guidance in place for actually identifying and documenting immigrants with prior military service.<sup>85</sup> The form that ICE officers use when they encounter an individual does not have a section for noting military service; officers are not required to ask about military service; and agency training does not adequately instruct officers to do so.<sup>86</sup> Consequently, “[b]ecause ICE has not developed a policy to identify and document all military veterans it encounters, ICE does not maintain complete electronic data on veterans who have been placed in removal proceedings or removed.”<sup>87</sup>

The second primary reason for the removal of veterans is a lack of judicial discretion. Under current immigration law, judges presiding over deportation hearings only have discretion to cancel the removal of an LPR if the individual has been an LPR for a minimum of five years; has continuously resided in the United States for at least seven years; and has not been convicted of an aggravated felony.<sup>88</sup> If any of these elements are not present, a judge is prohibited from reflecting on any extraneous factors in making a removal determination, including the noncitizen’s family ties,

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 12.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 13.

<sup>86</sup> *Id.* The solitary training module for ICE officers that mentions inquiry into an immigrant’s military service only directs that it *should* be recorded, but it does not include such inquiry in the list of mandatory questions that officers are to ask. *Id.*

<sup>87</sup> *Id.* at 14.

<sup>88</sup> INA § 240A(a), 8 U.S.C. § 1229b(a).

work history, or prior military service.<sup>89</sup> This acutely impacts immigrant combat veterans convicted of aggravated felonies that were potentially precipitated by undiagnosed PTSD, but immigration judges are unable to consider any such correlation in deciding whether to order removal or grant relief.<sup>90</sup> Without judicial safeguards in place to prevent this injustice, service members will continue to be banished from the United States without recognition that the very government that casts them out contrived the circumstances leading to their removal.

The third key issue leading to the deportation of veterans is a lack of DoD leadership engagement in both educating immigrant service members on the military naturalization process and facilitating their applications for citizenship. The ACLU noted that several interviewed veterans were unaware that they were not U.S. citizens prior to their removals.<sup>91</sup> Some believed that citizenship was automatically granted upon taking the Oath of Enlistment,<sup>92</sup> while others were expressly told by their recruiters that enlistment would make them U.S. citizens.<sup>93</sup>

However, a significant amount of time has passed since a majority of the interviewees served in the military. Since then, some initiatives have been implemented in an attempt to mitigate these issues. For enlisted immigrants serving abroad, the U.S. Citizenship and Immigration Services (USCIS) has begun providing the option to complete the naturalization process at certain U.S. embassies, consulates, and military installations.<sup>94</sup> USCIS also maintains a toll-free helpline and email account for members of the military to ask naturalization questions.<sup>95</sup> Additionally, USCIS publishes an “Immigration 101” presentation for DoD personnel and provides the DoD with a checklist of the required documents and communication guidelines for service members to naturalize.<sup>96</sup>

Although these resources may make the naturalization process easier for *proactive* noncitizen service members who seek them out, they do not adequately address the issues of misunderstanding and misinformation. Checklists and presentations are only as helpful as the knowledge that they exist and that they are needed. Why would someone ask how to naturalize if they do not know that they *need* to naturalize? In 2017, Congress enacted

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<sup>89</sup> INA § 240(c)(1)(A), 8 U.S.C. § 1229a(c)(1)(A).

<sup>90</sup> See *supra* notes 47–53 and accompanying text (discussing the connection between PTSD and deportable offenses).

<sup>91</sup> ACLU REPORT, *supra* note 7, at 24.

<sup>92</sup> *Id.*

<sup>93</sup> See *id.* at 26 (quoting Specialist Clayton Gordon, who stated that part of the reason he joined the National Guard was because “[his] recruiter told [him] that by being in the military [he] would automatically become a citizen”).

<sup>94</sup> GAO IMMIGRATION ENFORCEMENT, *supra* note 2, at 19.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

legislation requiring the DoD to ensure that noncitizen service members are informed that military naturalization is available,<sup>97</sup> but this relatively new congressional mandate has yet to appear in official guidance for recruiters or Military Entrance Processing Station (MEPS) personnel.<sup>98</sup> This makes it very unlikely that Congress's intent will be carried out by the rank and file during the recruitment and entry processing of noncitizens.

USCIS created a helpful program in 2009, the Naturalization at Basic Training Initiative, which streamlined the naturalization process for service members by allowing them to complete their biometrics, conduct their naturalization interview, and take the Oath of Allegiance while at boot camp.<sup>99</sup> This program was a significant success,<sup>100</sup> but it was scuttled in 2018 after a DoD policy was implemented that required service members to complete 180 days of active service before being eligible to request a form needed for initiating the military naturalization process.<sup>101</sup> USCIS reasoned that, because recruits were unable to receive this required document prior to the completion of boot camp, the program lost its efficacy.<sup>102</sup> The DoD policy was vacated in August 2020,<sup>103</sup> and there has been no indication that USCIS intends to reinstate the program.

The misunderstanding on the part of immigrant recruits is reasonable. When the media and schools collectively push a sentiment that there is nothing more “red, white, and blue” than military service to the country, how could an eighteen-year-old without a college education or a background in immigration law *not* assume that enlisting bestows citizenship? Absent DoD policies directing personnel in charge of military accession to ensure noncitizen recruits are informed of how military naturalization operates, veterans will continue to be deported because they never even knew that they had to apply for citizenship.

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<sup>97</sup> National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 530, 131 Stat. 1383.

<sup>98</sup> Neither the latest version of the MEPS Manual nor the most current regulations for personnel procurement enlistment processing include any direction for accession personnel to ensure that noncitizen applicants for military entry are informed about military naturalization. See U.S. DEP'T OF DEF., MANUAL 1145.02: MILITARY ENTRANCE PROCESSING STATION (MEPS) (2018) [hereinafter MEPS MANUAL], <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/114502m.pdf?ver=2018-07-23-121425-917> (noting that the purpose of the manual is to “provide[] direction for processing civilians into the Military Services”); USMEPCOM REGUL., *supra* note 19 (providing the policies and procedures for enlistment processing). Although individual service branch regulations may direct leadership to ensure that noncitizens under their command are informed about military naturalization at some point during their time in service, such initiatives do little to educate noncitizens or manage their expectations *prior* to entry.

<sup>99</sup> ACLU REPORT, *supra* note 7, at 30.

<sup>100</sup> USCIS naturalized 8,693 service members in fiscal year 2012 alone. WILLIAM A. KANDEL, CONG. RSCH. SERV., R43366, U.S. NATURALIZATION POLICY 9–10 (2014).

<sup>101</sup> GAO IMMIGRATION ENFORCEMENT, *supra* note 2, at 22. This 2018 change in DoD policy is discussed in greater detail in Section II. See *infra* notes 155–158 and accompanying text.

<sup>102</sup> GAO IMMIGRATION ENFORCEMENT, *supra* note 2, at 22.

<sup>103</sup> See *infra* notes 157–158 and accompanying text (discussing the United States District Court for the District of Columbia ruling to vacate the October 2017 DoD policy).



Some legislative efforts have recently been made to address issues associated with veteran removals. In 2019 and early 2020, several bills were introduced in Congress, including the Healthcare Opportunities for Patriots in Exile (HOPE) Act,<sup>104</sup> the Immigrant Veterans Eligibility Tracking System (I-VETS) Act,<sup>105</sup> the Repatriate Our Patriots Act,<sup>106</sup> the Strengthening Citizenship Services for Veterans Act,<sup>107</sup> and the Veterans Visa and Protection Act.<sup>108</sup> This patchwork of legislation was intended to provide healthcare services to deported veterans,<sup>109</sup> mandate better identification and tracking of immigrants with prior military service,<sup>110</sup> prohibit the removal of certain veterans,<sup>111</sup> and establish programs for identifying and readmitting deported veterans.<sup>112</sup> Unfortunately, all of these bills died in Congress without a vote and have not since been reintroduced.<sup>113</sup> An additional recent effort, the Veteran Deportation Prevention and Reform Act, was introduced in February 2021.<sup>114</sup> The bill has the potential to go a long way in preventing the removal of noncitizen veterans and assisting previously deported service members,<sup>115</sup> but the prospects of the bill being enacted are slim.<sup>116</sup>

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<sup>104</sup> Healthcare Opportunities for Patriots in Exile Act, S. 1042, 116th Cong. (2019) [hereinafter HOPE Act].

<sup>105</sup> Immigrant Veterans Eligibility Tracking System Act, S. 1040, 116th Cong. (2019) [hereinafter I-VETS Act].

<sup>106</sup> Repatriate Our Patriots Act, H.R. 1078, 116th Cong. (2019).

<sup>107</sup> Strengthening Citizenship Services for Veterans Act, S. 3294, 116th Cong. (2020) [hereinafter Strengthening Services for Veterans Act].

<sup>108</sup> Veterans Visa and Protection Act of 2019, H.R. 2098, 116th Cong. (2019) [hereinafter Veterans Visa Protection Act].

<sup>109</sup> HOPE Act, *supra* note 104.

<sup>110</sup> I-VETS Act, *supra* note 105.

<sup>111</sup> Repatriate Our Patriots Act, *supra* note 106.

<sup>112</sup> *Id.*; Strengthening Services for Veterans Act, *supra* note 107; Veterans Visa Protection Act, *supra* note 108.

<sup>113</sup> *S. 1042 (116th): Healthcare Opportunities for Patriots in Exile Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/s1042> (last visited July 8, 2021); *S. 1040 (116th): Immigrant Veterans Eligibility Tracking System Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/s1040> (last visited July 8, 2021); *H.R. 1078 (116th): Repatriate Our Patriots Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr1078> (last visited July 8, 2021); *S. 3294 (116th): Strengthening Citizenship Services for Veterans Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/s3294> (last visited July 8, 2021); *H.R. 2098 (116th): Veterans Visa and Protection Act of 2019*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr2098> (last visited July 8, 2021).

<sup>114</sup> Veteran Deportation Prevention and Reform Act, H.R. 1182, 117th Cong. (2021).

<sup>115</sup> The bill would require DHS to maintain information on potentially deportable veterans; to establish better ICE personnel training programs on handling noncitizen veterans; and to establish an initiative allowing eligible veterans abroad to be lawfully admitted for permanent residence. Press Release, United States Congressman Juan Vargas, Reps. Vargas, Takano, and Grijalva Introduce Comprehensive Legis. Package to Prevent the Deportation of Veterans (Feb. 18, 2021), [https://vargas.house.gov/media-center/press-releases/rep-vargas-takano-and-grijalva-introduce-comprehensive-legislative#:~:text=Grijalva%20\(AZ%2D3\)%20reintroduced,introduced%20in%20the%20116th%20Congress.](https://vargas.house.gov/media-center/press-releases/rep-vargas-takano-and-grijalva-introduce-comprehensive-legislative#:~:text=Grijalva%20(AZ%2D3)%20reintroduced,introduced%20in%20the%20116th%20Congress.)

<sup>116</sup> See *H.R. 1182: Veteran Deportation Prevention and Reform Act*, GOVTRACK (last visited July 9, 2021) (estimating that the bill has a three percent chance of being enacted).

For all that, rather than providing simple and effective solutions, the legislation proposed thus far adds more complexity to an already complex problem. Moreover, the bills presented are aimed at mitigating the consequences of the current regulatory framework, but do not address its actual root causes. The pursuits of the proposed legislation are admirable, but none of these measures go far enough in preventing the removal of service members in the future.

### B. *Decreased Immigrant Participation in the Armed Forces*

An issue precipitated by the current military naturalization process, which also presents a serious threat to U.S. national security, is decreased immigrant participation in the armed forces. In the same way that citizens join the military to pay for college, many noncitizens join the military in order to obtain citizenship. But, for some noncitizens, the naturalization processing backlog and current DoD policies have made seeking citizenship through the civilian process faster and less burdensome than through military service.<sup>117</sup> Applications for military naturalization fell from 3,132 to 1,069 between the fourth quarter of the 2017 fiscal year (Q4 FY17) and the first quarter of the 2018 fiscal year (Q1 FY18)<sup>118</sup>—directly coinciding with the implementation of the previously mentioned October 2017 DoD policy requiring enlistees to complete 180 days of active service prior to initiating the military naturalization process. Notably, the Q4 FY17 data is not historically anomalous,<sup>119</sup> and the average number of applications for

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<sup>117</sup> Chen, *supra* note 11, at 671; *see also* IMMIGRANT LEGAL RES. CTR., CHANGES TO THE EXPEDITED NATURALIZATION PROCESS FOR MILITARY SERVICE MEMBERS 3 (2018), [https://www.ilrc.org/sites/default/files/resources/changes\\_expedited\\_natz\\_process\\_military-20180329.pdf](https://www.ilrc.org/sites/default/files/resources/changes_expedited_natz_process_military-20180329.pdf) [hereinafter ILRC Practice Advisory] (“[C]urrently it may be advisable for a potential naturalization applicant who is nearing five years of permanent resident status (three if married to a U.S. citizen) to apply for citizenship as a civilian before enlisting in the military, as it may take less time to finish the N-400 process than the current ‘expedited’ military naturalization process.”).

<sup>118</sup> *Number of Form N-400, Applications for Naturalization, by Category of Naturalization, Case Status, and USCIS Field Office Location July 1 - September 30, 2017*, U.S. CITIZENSHIP & IMMIGR. SERVS., [https://www.uscis.gov/sites/default/files/document/data/N400\\_performancedata\\_fy2017\\_qtr4.pdf](https://www.uscis.gov/sites/default/files/document/data/N400_performancedata_fy2017_qtr4.pdf) (last visited Mar. 8, 2021); *Number of Form N-400, Application for Naturalization, by Category of Naturalization, Case Status, and USCIS Field Office Location October 1 - December 31, 2017*, U.S. CITIZENSHIP & IMMIGR. SERVS., [https://www.uscis.gov/sites/default/files/document/data/N400\\_performancedata\\_fy2018\\_qtr1.pdf](https://www.uscis.gov/sites/default/files/document/data/N400_performancedata_fy2018_qtr1.pdf) (last visited Mar. 8, 2021). Note that the federal government’s fiscal year starts on October 1, not January 1. *Budget of the U.S. Government*, USA GOV, <https://www.usa.gov/budget> (Oct. 26, 2021).

<sup>119</sup> There were 3,212 applications for military naturalization in the third quarter of fiscal year 2017 (Q3 FY17) and 3,069 applications in the second quarter of fiscal year 2017 (Q2 FY17). *Number of Form N-400, Application for Naturalization, by Category of Naturalization, Case Status, and USCIS Field Office Location April 1 - June 30, 2017*, U.S. CITIZENSHIP & IMMIGR. SERVS., [https://www.uscis.gov/sites/default/files/document/data/N400\\_performancedata\\_fy2017\\_qtr3.pdf](https://www.uscis.gov/sites/default/files/document/data/N400_performancedata_fy2017_qtr3.pdf) (last visited Mar. 8, 2021); *Number of Form N-400, Application for Naturalization, by Category of Naturalization, Case Status, and USCIS Field Office Location - January 1 - March 31, 2017*, U.S.

military naturalization following Q1 FY18 has remained incredibly low.<sup>120</sup> This indicates that either noncitizen service members are joining the military at the same rate and being impeded from applying for citizenship, or they are enlisting at a far lower rate than historical norms. In either case, there is a concern. Several factors likely led to this decline—in particular, the emergence of greater barriers to military naturalization and poor publicity.

Over the past decade, several new obstacles to military naturalization have emerged, including the October 2017 DoD policies requiring all background checks for noncitizens to be completed prior to enlistment and obligating service members to complete 180 days of honorable service prior to requesting the form needed to initiate the military naturalization process.<sup>121</sup> However, the latter policy was struck down by a district court as unlawful in August 2020.<sup>122</sup> Even so, these policies have severely hampered the enlistment process for noncitizens<sup>123</sup> and, in turn, the military naturalization process. Furthermore, military naturalization has been impeded by the elimination of programs and infrastructure that facilitate the process. In September 2019, USCIS announced that the number of overseas facilities through which noncitizen service members may naturalize would be reduced from twenty-three to four.<sup>124</sup> For those enlisted noncitizens serving abroad that are not stationed in close proximity to South Korea, Japan, Germany, or Italy, this presents a substantial hurdle in the path toward

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CITIZENSHIP & IMMIGR. SERVS., [https://www.uscis.gov/sites/default/files/document/data/N400\\_performancedata\\_fy2017\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/document/data/N400_performancedata_fy2017_qtr2.pdf) (last visited Mar. 8, 2021).

<sup>120</sup> The number of average quarterly applications for military naturalization between the second quarter of fiscal year 2018 (Q2 FY18) and the third quarter of fiscal year 2020 (Q3 FY20) was approximately 950. *Immigration and Citizenship Data*, U.S. CITIZENSHIP & IMMIGR. SERVS., [https://www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data?topic\\_id%5B33684%5D=33684&ddt\\_mon=&ddt\\_yr=&query=Military%20Naturalization&items\\_per\\_page=10&options%5Bvalue%5D&page=1](https://www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data?topic_id%5B33684%5D=33684&ddt_mon=&ddt_yr=&query=Military%20Naturalization&items_per_page=10&options%5Bvalue%5D&page=1) (select “Quarterly Data” from dropdown; search in search bar for “Military Naturalization”; click “search”; select the hyperlink for every spreadsheet from from the second quarter of fiscal year 2018 to the third quarter of fiscal year 2020; average the values of the “Grand Total” of “Applications Received” under “Naturalization (Military)” for all spreadsheets) (last visited Mar. 8, 2021).

<sup>121</sup> See *infra* notes 155–156, 241–245 and accompanying text (discussing the October 2017 DoD policy changes).

<sup>122</sup> See *infra* notes 157–158 and accompanying text (discussing the United States District Court for the District of Columbia’s decision in *Samma*). It should be noted that removing this policy may significantly improve noncitizen military participation. However, due to the recency of the court decision vacating the policy, there is not enough data yet to determine the impact that eliminating the directive may have in returning military naturalization numbers to historical norms.

<sup>123</sup> See *infra* note 245 and accompanying text (noting that it could take up to one year for a noncitizen to complete the background checks required for enlistment under the October 2017 DoD policies); see also *supra* notes 118–120 and accompanying text (noting a direct correlation between a significant drop in applications for military naturalization and the implementation of the October 2017 DoD policy changes).

<sup>124</sup> Richard Sisk, *The Naturalization Process Just Got Harder for Noncitizen Troops Stationed Overseas*, MILITARY.COM (Sept. 30, 2019), <https://www.military.com/daily-news/2019/09/30/naturalization-process-just-got-harder-noncitizen-troops-stationed-overseas.html>.

citizenship.<sup>125</sup> Ending the Naturalization at Basic Training Initiative further hindered noncitizen service members from naturalizing by depriving them of what proved to be an effective tool for streamlining the process.<sup>126</sup> Additionally, the suspension of the Military Accessions Vital to the National Interest (MAVNI) program in 2016 removed an important program for immigrants seeking citizenship through service,<sup>127</sup> which, in turn, eliminated the only military naturalization option available to non-LPR immigrants<sup>128</sup>—severely limiting the number of noncitizens that can seek enlistment. With the recent reduction in resources to facilitate naturalization and the addition of further policy barriers, enlisted immigrants are obstructed from obtaining citizenship and likely dissuaded from even trying.

Press coverage of veteran deportations has also contributed to the decline in military naturalization and noncitizen enlistments. One of the reasons that immigrants sought military naturalization was the perception that it offered a viable path toward obtaining citizenship, but, over the past several years, the press has painted a very different picture. Extensive news coverage of veterans being deported,<sup>129</sup> as well as the U.S. military renegeing on its promise not to discharge recruits of the defunct MAVNI program,<sup>130</sup> has created a damning image of military service in the eyes of potential noncitizen recruits. Undeniably, this publicity has left an impression on some immigrants that seeking citizenship through military service will only lead to wasted efforts, a more difficult path toward naturalization, or even deportation. In the wake of this negative press, regardless of what the military might try to sell noncitizens in the coming years to promote recruitment, it is likely that many immigrants will not buy it.

Based on immigrant military performance and the contemporary needs of the U.S. Armed Forces, the DoD should be seeking out and actively courting noncitizens for recruitment. Providing a faster and less rigorous means of obtaining citizenship through military service would undoubtedly spur noncitizen interest in joining the armed forces. Statistics have shown that, on average, noncitizens not only have a lower rate of attrition than their

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<sup>125</sup> *Id.* (“Noncitizen service members will now have to apply at four ‘hubs’ at Camp Humphreys, South Korea; Commander Fleet Activities, Yokosuka, Japan; U.S. Army Garrison Stuttgart, Germany; and Naval Support Activity Naples, Italy . . .”).

<sup>126</sup> *See supra* notes 99–103 and accompanying text (discussing the USCIS Naturalization at Basic Training Initiative).

<sup>127</sup> *See infra* notes 159–165 and accompanying text (discussing the purpose, success, and suspension of MAVNI).

<sup>128</sup> *See infra* notes 159–162 and accompanying text (noting that MAVNI provided a means for lawfully present non-LPR immigrants to join the military and apply for military naturalization).

<sup>129</sup> *See supra* notes 14, 34–35, 50 (illustrating news coverage on the deportation of veterans).

<sup>130</sup> Vanessa Romo, *U.S. Army Is Discharging Immigrant Recruits Who Were Promised Citizenship*, NPR (July 9, 2018, 6:01 PM), <https://www.npr.org/2018/07/09/626773440/u-s-army-is-discharging-immigrant-recruits-who-were-promised-citizenship>; *see also infra* notes 159–165 and accompanying text (discussing the success and suspension of the MAVNI program).

fellow citizen recruits,<sup>131</sup> but are more likely to stay in the military for longer periods of service, hold higher academic qualifications, and outperform their citizen peers.<sup>132</sup>

The military should not disincentivize top performers from joining the military when the armed forces has struggled or failed to meet their recruitment goals in recent years. For example, the U.S. Army fell short of its enlistment goal by the thousands in 2018.<sup>133</sup> Studies from 2009 and 2018 found that seventy-five percent of Americans between the ages of seventeen and twenty-four were ineligible for military service.<sup>134</sup> The military branches' difficulties meeting recruitment numbers have led the Army to increase financial incentives for enlisting, lower its standards for entry, and "grant[] 506 waivers to recruits for previous marijuana use in 2017, an increase of more than 300 from 2016."<sup>135</sup> In light of the limited pool of eligible citizen recruits, it seems imprudent to deter the estimated more than 1.2 million noncitizens that meet entry requirements from enlisting.<sup>136</sup>

Noncitizens are also uniquely capable of providing skill sets that are invaluable to national defense. Noncitizens offer language and cultural aptitudes, which the military has voiced an urgent need to acquire.<sup>137</sup> This is also a major fiscal consideration. In 2010 alone, the DoD was budgeted \$550 million to provide language and cultural training to military personnel, and, in 2017, \$9.86 billion in government contracts was awarded to companies tasked with the identification and placement of civilian translators.<sup>138</sup> Moreover, noncitizens are statistically more likely to have computer-related

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<sup>131</sup> MUZAFFAR CHISHTI, AUSTIN ROSE & STEPHEN YALE-LOEHR, *MIGRATION POL'Y INST., NONCITIZENS IN THE U.S. MILITARY: NAVIGATING NATIONAL SECURITY CONCERNS AND RECRUITMENT NEEDS 11* (2019) [hereinafter *MPI POLICY BRIEF*], <https://www.migrationpolicy.org/sites/default/files/publications/MPI-Noncitizens-Military-Final.pdf>.

<sup>132</sup> *Id.*; Mark Thompson, *Non-Citizens Make Better U.S. Soldiers*, *TIME* (Apr. 6, 2012), <https://nation.time.com/2012/04/06/non-citizens-make-better-u-s-soldiers/> (noting that a Center for Naval Analyses report showed "[o]nly [four percent] of non-citizens drop out of the military within three months, half the rate of citizens," and that "[b]y the four-year mark, one in three citizen recruits has bailed, compared to one in five non-citizens").

<sup>133</sup> *MPI POLICY BRIEF*, *supra* note 131, at 9; *Facts and Figures*, U.S. ARMY RECRUITING COMMAND, [https://recruiting.army.mil/pao/facts\\_figures/](https://recruiting.army.mil/pao/facts_figures/) (last visited July 9, 2021) (showing that, in 2018, the Army recruited 69,972 individuals to the Regular Army, with a goal of 76,500, and recruited 11,327 individuals to the Army Reserve, with a goal of 15,600).

<sup>134</sup> *MPI POLICY BRIEF*, *supra* note 131, at 9.

<sup>135</sup> *Id.*

<sup>136</sup> MOLLY F. MCINTOSH, SEEMA SAYALA & DAVID GREGORY, *CNA, NON-CITIZENS IN THE ENLISTED U.S. MILITARY 1* (2011) [hereinafter *CNA REPORT*], [https://www.cna.org/cna\\_files/pdf/D0025768.A2.pdf](https://www.cna.org/cna_files/pdf/D0025768.A2.pdf).

<sup>137</sup> *MPI POLICY BRIEF*, *supra* note 131, at 10; *see also* *CNA REPORT*, *supra* note 136, at 14 ("[F]oreign language ability among non-citizen recruits might be of strategic interest to the military.").

<sup>138</sup> *MPI POLICY BRIEF*, *supra* note 131, at 10.

skills, making them ideal recruitment candidates for addressing the military's desperate need for cyberwarfare professionals.<sup>139</sup>

## II. PROCESS RUNDOWN: MILITARY NATURALIZATION, NATURALIZATION, AND ENLISTMENT

### A. *Military Naturalization*

The military naturalization process is primarily governed by sections 328 and 329 of the INA. INA section 328 provides a route toward naturalization based on participation in the armed forces during times of peace.<sup>140</sup> Under the statute, LPRs who serve honorably in the military for a year or more during a time of peace may apply for citizenship during their time of service or within six months after an honorable discharge without being required to meet normal residency requirements.<sup>141</sup> This saves the applicant from having to complete five years of residency prior to application,<sup>142</sup> which is generally required,<sup>143</sup> or the three years required of spouses of U.S. citizens.<sup>144</sup> Under INA section 328, an applicant must also demonstrate “good moral character,”<sup>145</sup> but proof of honorable service is usually sufficient to satisfy this requirement.<sup>146</sup>

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<sup>139</sup> *Id.* at 11. Protecting the military's computer networks has been problematic for the armed forces: “Military recruiters are struggling to recruit and retain soldiers for cyberwarfare. In a March 2018 congressional hearing, Vice Admiral Michael M. Gilday testified that high salaries in the private sector are making it difficult to attract enough people to staff the U.S. Fleet Cyber Command.” *Id.* It was further noted that “[c]ompared to the U.S. population generally, noncitizens are disproportionately likely to have computer-related skills and educational training.” *Id.*

<sup>140</sup> INA § 328(a), 8 U.S.C. § 1439(a).

<sup>141</sup> *Id.*

<sup>142</sup> INA § 316(a), 8 U.S.C. § 1427(a) (“No person . . . shall be naturalized unless such applicant . . . immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application has been physically present therein for periods totaling at least half of that time . . .”).

<sup>143</sup> *See I Am a Lawful Permanent Resident of 5 Years*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/citizenship/learn-about-citizenship/citizenship-and-naturalization/i-am-a-lawful-permanent-resident-of-5-years> (Nov. 18, 2020) (“The most common path to U.S. citizenship through naturalization is being a lawful permanent resident (LPR) for at least five years.”).

<sup>144</sup> INA § 319(a), 8 U.S.C. § 1430(a) (“Any person whose spouse is a citizen of the United States . . . may be naturalized . . . if such person immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least three years, and during the three years immediately preceding the date of filing his application has been living in marital union with the citizen spouse . . .”).

<sup>145</sup> INA § 328(e), 8 U.S.C. § 1439(e); *see* INA § 316(a), 8 U.S.C. § 1427(a) (stating that a naturalization applicant must be “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”); *see also infra* notes 182–183 and accompanying text (discussing how “good moral character” is a substantive requirement for naturalization).

<sup>146</sup> ACLU REPORT, *supra* note 7, at 21; INA § 328(e), 8 U.S.C. § 1439(e); *see also* 8 C.F.R. § 328.2(d)(1) (2021) (stating that there is a presumption of good moral character during periods of honorable service).

INA section 329 provides for naturalization based on honorable service in the armed forces during “periods of military hostilities.”<sup>147</sup> By Executive Order, the United States has been in a “period of military hostilities” since September 11, 2001, due to the global war on terror—making all military service since that time governed by INA section 329.<sup>148</sup> Under the statute, any noncitizen who honorably serves in the U.S. military for any amount of time (even a single day) during a “designated . . . period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force” may apply for naturalization at any time during or after their time of service.<sup>149</sup> Although INA section 329 does not expressly compel an applicant to demonstrate good moral character, USCIS requires an additional showing of good moral character for at least one year prior to filing for naturalization under section 329.<sup>150</sup> Additionally, if a citizen who obtains citizenship pursuant to either section 328 or section 329 is separated from military service under other than honorable conditions before honorably completing five years of service, the individual’s citizenship will be revoked.<sup>151</sup>

Noncitizen service members seeking naturalization by way of INA sections 328 or 329 must submit two forms to USCIS: Form N-400, Application for Naturalization, and Form N-426, Request for Certification of Military or Naval Service.<sup>152</sup> The latter form affirms that the applicant’s period of service was both honorable and for the requisite amount of time, and it must be signed by an actively serving military officer of paygrade O-6 or above.<sup>153</sup> Veterans seeking to naturalize under INA sections 328 or 329 provide their DD Form 214 or NGB 22 discharge papers in lieu of Form N-426 as proof of honorable service.<sup>154</sup>

In October 2017, the DoD implemented policy changes that imposed additional requirements for noncitizen service members seeking naturalization under INA section 329.<sup>155</sup> Under the new guidelines, service

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<sup>147</sup> INA § 329, 8 U.S.C. § 1440.

<sup>148</sup> Exec. Order No. 13,269, 67 Fed. Reg. 45,287 (July 3, 2002) (“Those persons serving honorably in active-duty status in the Armed Forces . . . during the period beginning on September 11, 2001, and terminating on the date to be so designated, are eligible for naturalization . . . as provided in section 329 of the Act.”).

<sup>149</sup> *Id.*; INA § 329(a), 8 U.S.C. § 1440(a).

<sup>150</sup> 8 C.F.R. § 329.2(d) (2021).

<sup>151</sup> INA § 328(f), 8 U.S.C. § 1439(f); INA § 329(c), 8 U.S.C. § 1440(c).

<sup>152</sup> *Policy Manual Volume 12, Part I, Chapter 5 – Application and Filing for Service Members (INA 328 and 329)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-12-part-i-chapter-5> (June 17, 2021).

<sup>153</sup> *Id.*; U.S. CITIZENSHIP & IMMIGR. SERVS., DEP’T OF HOMELAND SEC., OMB NO. 1615-0053, INSTRUCTIONS FOR REQUEST FOR CERTIFICATION OF MILITARY OR NAVAL SERVICE (2019), <https://www.uscis.gov/sites/default/files/document/forms/n-426instr.pdf>.

<sup>154</sup> GAO IMMIGRATION ENFORCEMENT, *supra* note 2, at 6.

<sup>155</sup> Memorandum from A. M. Kurta, Under Sec’y of Def. for Pers. & Readiness, Off. of the Under Sec’y of Def., for Sec’ys of the Mil. Dep’ts Commandant of the Coast Guard, Certification of Honorable

members must complete a minimum of 180 days of active-duty service prior to obtaining a Form N-426.<sup>156</sup> This policy markedly lengthened the time that service members must wait prior to applying for citizenship after enlisting. However, in August 2020, the United States District Court for the District of Columbia vacated the policy in a class action lawsuit because “the Minimum Service Requirements are contrary to [INA section 329] and . . . [the] DOD’s refusal to certify [service members’] N-426s because they have not met those requirements [therefore] constitutes agency action unlawfully withheld.”<sup>157</sup> The DoD has appealed the court’s decision.<sup>158</sup> There is no indication yet as to whether the DoD under the Biden administration will drop the appeal or continue to push for the policy’s reinstatement.

In general, statutory restrictions on enlistment only allow U.S. citizens and LPRs to join the military.<sup>159</sup> However, there is a narrow exception<sup>160</sup> authorizing the Secretary of Defense to enlist non-LPR individuals that possess expertise and skills that are vital to national interests.<sup>161</sup> This exception is what permitted the operation of MAVNI, which allowed *any* lawfully present noncitizens with critical skills (e.g., physicians, nurses, and language experts) to join the U.S. military and immediately apply for citizenship without the need to gain LPR status.<sup>162</sup> The program was established in 2008 under the Bush administration and was a relative success—enlisting approximately 10,400 noncitizens since its inception.<sup>163</sup> Although it provided an effective means for non-LPRs to obtain citizenship, the program was essentially frozen in 2016 following the implementation of additional recruit background-screening requirements, and it was suspended later that year due to reports indicating security concerns associated with

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Service for Members of the Selected Reserve of the Ready Reserve and Members of the Active Components of the Military or Naval Forces for Purposes of Naturalization (Oct. 13, 2017), <https://dod.defense.gov/Portals/1/Documents/pubs/Naturalization-Honorable-Service-Certification.pdf>.

<sup>156</sup> *Id.*

<sup>157</sup> *Samma v. U.S. Dep’t of Def.*, 486 F. Supp. 3d 240, 280 (D.D.C. 2020); see also Press Release, ACLU, Federal Court Rules Trump Can’t Block Citizenship Path for Military Service Members (Aug. 25, 2020), <https://www.aclu.org/press-releases/federal-court-rules-trump-cant-block-citizenship-path-military-service-members> (discussing the district court’s decision in *Samma*).

<sup>158</sup> Notice of Appeal, *Samma*, 486 F. Supp. 3d 240 (No. 1:20-cv-01104).

<sup>159</sup> 10 U.S.C. § 504(b)(1).

<sup>160</sup> See *id.* § 504(b)(3)(B) (stating that “[a] Secretary concerned may not authorize more than 1,000 enlistments” of non-LPR noncitizens on vital to national interest grounds “per military department in a calendar year until after” notice is provided to Congress and the statutory period following that notice has elapsed).

<sup>161</sup> *Id.* § 504(b)(2).

<sup>162</sup> *What Is MAVNI? Information for Designated School Officials*, U.S. DEP’T OF HOMELAND SEC., <https://studyinthestates.dhs.gov/schools/additional-resources/what-is-mavni-information-for-designated-school-officials> (last visited July 9, 2021) [hereinafter *What Is MAVNI?*].

<sup>163</sup> Whitney Appel & Isabel Soto, *Naturalizations for Non-Citizens in Military Service*, AM. ACTION F. (Oct. 29, 2020), <https://www.americanactionforum.org/insight/naturalizations-for-non-citizens-in-military-service/>.



falsified documents utilized for program entry.<sup>164</sup> Although the program remains suspended, it has not yet been completely scuttled.<sup>165</sup>

### B. *The Naturalization Process*

The naturalization process, in broad strokes, requires four primary procedural elements: (1) submission of a completed Form N-400, Application for Naturalization;<sup>166</sup> (2) a security and criminal background check with fingerprinting;<sup>167</sup> (3) an interview with an assigned USCIS officer who will assess the applicant's eligibility, evaluate their English proficiency, and administer a test on their knowledge of U.S. history and civics;<sup>168</sup> and (4) an Oath of Allegiance.<sup>169</sup>

The first procedural step toward naturalization is to submit a completed Form N-400, Application for Naturalization.<sup>170</sup> The twenty-page document<sup>171</sup> supplies critical information to reviewing authorities (i.e., USCIS and courts) for effective identification, tracking, investigation, and assessment of applicants.<sup>172</sup>

USCIS conducts an in-depth background and security check on all applicants.<sup>173</sup> This involves the collection of biometrics (e.g., fingerprints),<sup>174</sup> a Federal Bureau of Investigation (FBI) name check,<sup>175</sup> an FBI fingerprint

<sup>164</sup> See Zachary R. New, *Ending Citizenship for Service in the Forever Wars*, 129 YALE L.J.F. 552, 555 n.13 (2020) (“In 2016, the Obama Administration created additional background-screening requirements for MAVNI recruits, which effectively ended the program.”); see also Chen, *supra* note 11, at 687 (“The MAVNI program was suspended in 2016 due to concerns from Defense Secretary James Mattis and a U.S. Department of Defense Inspector General report detailing security risks associated with falsified identification documents used for enlistment and possible foreign infiltration.”).

<sup>165</sup> *What Is MAVNI?*, *supra* note 162 (“Note: The Department of Defense is not currently accepting MAVNI applications for FY 17 while it is revising its MAVNI implementation plan. Once it begins to accept enlistments, SEVP will provide additional information at that time.”).

<sup>166</sup> U.S. CITIZENSHIP & IMMIGR. SERVS., DEP’T OF HOMELAND SEC., OMB NO. 1615-0052, APPLICATION FOR NATURALIZATION (2019) [hereinafter FORM N-400], <https://www.uscis.gov/sites/default/files/document/forms/n-400.pdf>.

<sup>167</sup> *Policy Manual Volume 12, Part B, Chapter 2 – Background and Security Checks*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-12-part-b-chapter-2> (June 17, 2021).

<sup>168</sup> *Policy Manual Volume 12, Part B, Chapter 3 – Naturalization Interview*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-12-part-b-chapter-3> (June 17, 2021).

<sup>169</sup> INA § 337(a), 8 U.S.C. § 1448(a).

<sup>170</sup> 8 C.F.R. § 316.4(a) (2021); *Apply for Citizenship*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/citizenship/apply-for-citizenship> (Nov. 6, 2021).

<sup>171</sup> FORM N-400, *supra* note 166.

<sup>172</sup> Some of the information requested in the Form N-400 includes: eligibility for naturalization; country of birth; nationality; current and prior legal name; current residence; disabilities and/or impairments; contact information; family information; biographical information (e.g., ethnicity, eye color, hair color, height, and weight); employment; schooling; travel information; marital history; immoral conduct (e.g., genocide, torture, and killing); association with militant groups; criminal convictions; and conduct considered to show a lack of good moral character. *Id.*

<sup>173</sup> 8 C.F.R. § 335.1 (2021); INA § 335(a), 8 U.S.C. § 1446(a).

<sup>174</sup> 8 C.F.R. § 103.2(b)(9) (2021).

<sup>175</sup> *Policy Manual, Volume 12, Part B, Chapter 2 – Background and Security Checks*, *supra* note 167; U.S. DEP’T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE IMMIGRATION BENEFITS

check,<sup>176</sup> an IDENT fingerprint check,<sup>177</sup> and a TECS name check.<sup>178</sup> For service members going through the naturalization process, USCIS will not accept DoD fingerprints taken at the time of enlistment, thus requiring a separate USCIS biometrics appointment.<sup>179</sup>

Once the background check is complete, the applicant's in-person naturalization interview with a USCIS officer may be scheduled.<sup>180</sup> The interview consists of questioning by a USCIS officer on matters pertaining to the applicant's past conduct, criminal history, biographical information, immigration history, and "[a]ny other topic pertinent to the eligibility determination."<sup>181</sup> The results of the applicant's background check, their responses on the N-400 form, and their responses during the in-person naturalization interview are the chief mechanisms informing the USCIS determination as to whether the applicant demonstrates "good moral character,"<sup>182</sup> which is a substantive requirement for naturalization.<sup>183</sup>

The determination of good moral character is primarily based on the applicant's conduct over the five years preceding the date of application, but

BACKGROUND CHECK SYSTEMS 3 (2010) [hereinafter DHS IMMIGRATION BACKGROUND CHECK], [https://www.dhs.gov/sites/default/files/publications/privacy\\_pia\\_uscis\\_ibbcs.pdf](https://www.dhs.gov/sites/default/files/publications/privacy_pia_uscis_ibbcs.pdf) ("The FBI Name Check is a name-based search of the FBI's Central Records System (CRS) and Universal Index (UNI)."). "The CRS contains FBI investigative, administrative, criminal, personnel, and other files compiled for law enforcement and national security purposes. The UNI consists of administrative, applicant, criminal, personnel, and other law enforcement files." *Id.*

<sup>176</sup> DHS IMMIGRATION BACKGROUND CHECK, *supra* note 175, at 2 ("The FBI Fingerprint Check is a search of the FBI's Integrated Automated Fingerprint Identification System (IAFIS) to identify applicants who have an arrest record.").

<sup>177</sup> *Id.* at 3 ("The IDENT fingerprint check is conducted on applicants over the age of [fourteen] when the benefit allows them to remain in the United States beyond one year. IDENT is the official DHS-wide system for the biometric identification and verification of individuals encountered in DHS mission-related processes.").

<sup>178</sup> *Id.* at 4 ("The information in TECS includes records of known and suspected terrorists, sex offenders, people who are public safety risks and other individuals that may be of interest (e.g., individuals who have warrants issued against them, people involved in illegal gang activity, etc.) to the law enforcement community."). "The TECS (not an acronym) System is the updated and modified version of the former Treasury Enforcement Communications System." U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE TECS SYSTEM: PLATFORM DHS/CBP/PIA-021 2 (2016), <https://www.dhs.gov/sites/default/files/publications/DHS-PIA-ALL-021%20TECS%20System%20Platform.pdf>.

<sup>179</sup> Tara Copp, *Naturalizations Drop 65 Percent for Service Members Seeking Citizenship After Mattis Memo*, MIL. TIMES (May 3, 2018), <https://www.militarytimes.com/news/your-military/2018/05/03/naturalizations-drop-65-percent-for-service-members-seeking-citizenship-after-mattis-memo/> ("[P]olicy changes by USCIS . . . include[d] that it may no longer be accepting DoD-provided fingerprints of applicants . . .").

<sup>180</sup> *Policy Manual, Volume 12, Part B, Chapter 2 – Background and Security Checks*, *supra* note 167.

<sup>181</sup> *Policy Manual, Volume 12, Part B, Chapter 3 – Naturalization Interview*, *supra* note 168.

<sup>182</sup> *Policy Manual, Volume 12, Part F, Chapter 1 – Purpose and Background*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-1> (June 17, 2021) ("An officer's assessment of whether an applicant meets the [good moral character] requirement includes an officer's review of: [t]he applicant's record; [s]tatements provided in the naturalization application; and [o]ral testimony provided during the interview.").

<sup>183</sup> 8 C.F.R. § 316.10(a) (2021).

acts by the applicant at *any* time prior to application may be considered.<sup>184</sup> The definition of “good moral character” is derived from case law,<sup>185</sup> which defines it in broad and vague terms as “requir[ing] adherence to the generally accepted moral conventions of the community.”<sup>186</sup> However, the INA and the Code of Federal Regulations do provide some specific direction by supplying a non-exhaustive list of specific behaviors that exemplify a lack of good moral character.<sup>187</sup> The examples of behaviors that demonstrate a lack of good moral character span a wide spectrum. At one end lies convictions for murder or other aggravated felonies,<sup>188</sup> the list also includes lesser offenses<sup>189</sup> and even some behaviors that may not necessarily violate criminal laws, including polygamy,<sup>190</sup> involvement in prostitution,<sup>191</sup> earning income principally from illegal gambling activities,<sup>192</sup> and being a “habitual drunkard.”<sup>193</sup> The finding of good moral character is discretionary, allowing assessors to consider prior acts that fall outside those catalogued in making a determination.<sup>194</sup>

Two tests are also administered during the interview process: one evaluating the applicant’s ability to read, write, and speak English and another evaluating the applicant’s knowledge of U.S. history and civics.<sup>195</sup> The requirement that applicants demonstrate English-speaking skills was first introduced by the Naturalization Act of 1906<sup>196</sup> under the ostensible justification of “foster[ing] assimilation and improv[ing] the quality of

<sup>184</sup> INA § 316(e), 8 U.S.C. § 1427(e).

<sup>185</sup> See KANDEL, *supra* note 100, at 6 (“The definition of good moral character can be found not in the INA but in case law interpretation.”).

<sup>186</sup> *In re* Castillo-Perez, 27 Op. Att’y Gen. 664, 669 (2019) (“Good moral character requires adherence to the generally accepted moral conventions of the community, and criminal activity is probative of non-adherence to those conventions.”).

<sup>187</sup> See INA § 101(f), 8 U.S.C. § 1101(f) (specifying behavior that demonstrates a lack of good moral character); 8 C.F.R. § 316.10(b) (2021) (specifying behavior that evinces a lack of good moral character).

<sup>188</sup> INA § 101(a)(43), (f)(8), 8 U.S.C. § 1101(a)(43), (f)(8); 8 C.F.R. § 316.10(b)(1) (2021).

<sup>189</sup> Some examples of lesser offenses that demonstrate a lack of good moral character, but are not considered aggravated felonies, include: incarceration for an aggregate of 180 days or more; polygamy; two or more gambling convictions; providing false testimony to obtain an immigration benefit; and involvement in, but not supervision of, prostitution. 8 C.F.R. § 316.10(b)(2) (2021).

<sup>190</sup> INA §§ 101(f)(3), 212(a)(10)(A), 8 U.S.C. §§ 1101(f)(3), 1182(a)(10)(A); 8 C.F.R. § 316.10(b)(2)(ix) (2021).

<sup>191</sup> INA §§ 101(f)(3), 212(a)(2)D, 8 U.S.C. §§ 1101(f)(3), 1182(a)(2)D; 8 C.F.R. § 316.10(b)(2)(vii) (2021).

<sup>192</sup> INA § 101(f)(4), 8 U.S.C. § 1101(f)(4); 8 C.F.R. § 316.10(b)(2)(xi) (2021).

<sup>193</sup> INA § 101(f)(1), 8 U.S.C. § 1101(f)(1); 8 C.F.R. § 316.10(b)(2)(xii) (2021).

<sup>194</sup> BOSWELL, *supra* note 3, at 204.

<sup>195</sup> INA § 312(a), 8 U.S.C. § 1423(a); 8 C.F.R. §§ 312.1(a)–2(a), 335.2(a) (2021).

<sup>196</sup> Helene C. Colin, Comment, *No Hablo Inglés: Waivers to the English Language Requirement for Naturalization*, 37 CAL. W. INT’L L.J. 329, 333–34 (2007); Basic Naturalization Act of 1906, ch. 3592, § 8, 34 Stat. 596, 599 (1906).

naturalized citizens.”<sup>197</sup> It was not until 1950 that a demonstration of English literacy was also incorporated, as well.<sup>198</sup> Modern rationales for continuing the requirement draw support from the notion that “English language acquisition allows new Americans to attain employment or career advancement and be more active civic participants.”<sup>199</sup>

The U.S. history and civics test has been required by statute since 1950.<sup>200</sup> Before that, history and civics knowledge was tested orally at the discretion of the courts conducting the naturalization assessment.<sup>201</sup> Courts that administered history and civics questions reasoned that attachment to the Constitution, a cornerstone of naturalization, could not be adequately established if the applicant did not understand the provisions contained within it.<sup>202</sup>

The naturalization process culminates in the applicant’s oral taking of the Oath of Allegiance in a public ceremony.<sup>203</sup> Prior to taking the oath, the

<sup>197</sup> Colin, *supra* note 196, at 334 (internal quotations omitted). Although it is outside the scope of this discussion, it is worth noting that several scholars argue that the true underlying justifications for mandating a demonstration of English language proficiency is rooted in nativism. See Ricardo Gonzalez Cedillo, *A Constitutional Analysis of the English Literacy Requirement of the Naturalization Act*, 14 ST. MARY’S L.J. 899, 900 (1983) (suggesting that “the [English] literacy [requirement] is a by-product of ideas and attitudes that are linked more to nativism and ethnocentrism rather than to the rational purposes the common sense justification readily assumes”); Peter J. Spiro, *Questioning Barriers to Naturalization*, 13 GEO. IMMIGR. L.J. 479, 480–81 (1999) (“The only significant English-language provision in the entire United States Code, this requirement recalls a nativist past long since discredited in other areas of the law . . .”).

<sup>198</sup> Cedillo, *supra* note 197, at 928.

<sup>199</sup> Memorandum from President Barack Obama on Creating Welcoming Communities and Fully Integrating Immigrants and Refugees, 79 Fed. Reg. 70,765 (Nov. 21, 2014).

<sup>200</sup> Internal Security Act of 1950, Pub. L. No. 81-831, § 30, 64 Stat. 987, 1018 (1950).

<sup>201</sup> *Origins of the Naturalization Civics Test*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/origins-of-the-naturalization-civics-test> (Sept. 2, 2020).

<sup>202</sup> See *In re Vasicek*, 271 F. 326, 329 (E.D. Mo. 1921) (“[T]he law-making body still recognized that a reasonable probationary term should be prescribed to enable candidates to get rid of foreign and to acquire American attachments, to learn the principles and imbibe the spirit of our government, and to admit of a probability, at least, of their feeling a real interest in our affairs.”); *In re Meakins*, 164 F. 334, 334 (E.D. Wash. 1908) (“While it may not be impossible for one to be attached to the principles of the Constitution of the United States who is without definite knowledge of the workings of the government in detail, he must have sufficient general information concerning it as to enable him to give a reason for his faith . . .”).

<sup>203</sup> INA § 337(a), 8 U.S.C. § 1448(a). The text of the oath, set forth in 8 C.F.R. § 337.1(a) (2021), is as follows:

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when

applicant must declare that the applicant intends, in good faith, to “assume and discharge the obligations of the oath of allegiance, and that his or her attitude toward the Constitution and laws of the United States renders him or her capable of fulfilling the obligations of [the] oath.”<sup>204</sup> The Oath of Allegiance embodies five principles to which the applicant swears to: (1) support the Constitution; (2) renounce all prior sovereign allegiances; (3) support and defend the Constitution and laws of the U.S. against all enemies; (4) bear true faith and allegiance to the Constitution; and (5) bear arms on behalf of the United States when required.<sup>205</sup>

### C. *The Enlistment Process*

Entry into the military also requires working through a series of steps that overlap with and accomplish the same objectives as the naturalization process. Federal law requires commissioned officers in the U.S. military to be U.S. citizens, so the only route toward military naturalization for a noncitizen is through enlistment.<sup>206</sup> The enlistment process varies slightly among the different branches of service, but, in general, the mandatory steps for enlisting consists of five procedural elements: (1) completion of the Armed Services Vocational Aptitude Battery (ASVAB);<sup>207</sup> (2) completion and submission of several required forms;<sup>208</sup> (3) fingerprinting, a background check, and a drug test;<sup>209</sup> (4) a pre-enlistment interview,<sup>210</sup> and

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required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.

8 C.F.R. § 337.1(a) (2021).

<sup>204</sup> 8 C.F.R. § 337.1(c) (2021). The pre-oath declaration, which is contained in Form N-400, is made when the candidate signs his or her naturalization application during the naturalization interview. *Policy Manual, Volume 12, Part J, Chapter 1 – Purpose and Background*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-12-part-j-chapter-1> (June 17, 2021); FORM N-400, *supra* note 166, pt. 18.

<sup>205</sup> INA § 337(a), 8 U.S.C. § 1448(a).

<sup>206</sup> 10 U.S.C. § 532(a)(1).

<sup>207</sup> See U.S. DEP’T OF DEF., INSTRUCTION NO. 1304.12E, DOD MILITARY PERSONNEL ACCESSION TESTING PROGRAMS § 3 (2005) [hereinafter ACCESSION TESTING PROGRAMS] (“It is DoD policy that the ASVAB is the only aptitude test battery authorized for determining enlistment eligibility.”).

<sup>208</sup> U.S. DEP’T OF DEF., INSTRUCTION NO. 1304.02, ACCESSION PROCESSING DATA COLLECTION FORMS 1–2 (2011) [hereinafter DOD DATA COLLECTION FORMS], <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130402p.pdf> (outlining the required forms to be completed for “entrance processing and accession into the Military Services”).

<sup>209</sup> See U.S. DEP’T OF DEF., INSTRUCTION NO. 1304.23, ACQUISITION AND USE OF CRIMINAL HISTORY RECORD INFORMATION FOR MILITARY RECRUITING PURPOSES § 4 (2005) [hereinafter DOD CRIMINAL HISTORY RECORD] (“It is DoD policy that the Military Services review the background of applicants for enlistment . . . .”); *Learn How to Join*, U.S. ARMY, <https://www.goarmy.com/learn/your-visit-to-meps.html> (last visited Oct. 10, 2021) (“[F]ingerprinting for an FBI check and pre-enlistment briefing will be completed before you take the oath of enlistment.”).

<sup>210</sup> MEPS MANUAL, *supra* note 98, § 6.1(i).

(5) taking the Oath of Enlistment.<sup>211</sup> A physical medical examination is also required for enlistment,<sup>212</sup> but, because no similar evaluation is required for naturalization, it is immaterial to this discussion.<sup>213</sup>

Before applying for enlistment, a potential recruit must first take the ASVAB.<sup>214</sup> The ASVAB is a multiple-choice exam<sup>215</sup> used by military service branches to determine a recruit's enlistment eligibility and available career paths.<sup>216</sup> The ASVAB consists of ten tests, four of which—Word Knowledge, Paragraph Comprehension, Arithmetic Reasoning, and Mathematics Knowledge—are combined to provide a recruit's Armed Forces Qualification Test (AFQT) score.<sup>217</sup> Each branch requires a minimum AFQT score to qualify for enlistment.<sup>218</sup> The ASVAB is only administered in English, with no exceptions.<sup>219</sup> One reason for this is that recruits are required to have an advanced understanding of the English language because “[s]ervice regulations, technical manuals, operations orders, etc., are [all] written in English.”<sup>220</sup> In fact, non-native English speakers must also pass an English Comprehension Level Test (ECLT) prior to entering military service.<sup>221</sup>

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<sup>211</sup> See 10 U.S.C. § 502(a) (“Each person enlisting in an armed force shall take the . . . oath [of enlistment] . . .”).

<sup>212</sup> 32 C.F.R. § 66.6(b)(5) (2021) (“In accordance with DoD Instruction 6130.03, ‘Medical Standards for Appointment, Enlistment, or Induction in the Military Services’ . . . the pre-accession screening process will be structured to identify any medical condition, including mental health, that disqualifies an applicant for military service.”); see U.S. DEP’T OF DEF., INSTRUCTION 6130.03, VOL. 1, MEDICAL STANDARDS FOR MILITARY SERVICE: APPOINTMENT, ENLISTMENT, OR INDUCTION § 1.2 (2020) (discussing generally the medical standards that recruits are evaluated for during enlistment processing).

<sup>213</sup> Applicants seeking LPR status must undergo a medical evaluation conducted by a civil surgeon to prove that they do not have an inadmissible health condition. See 8 C.F.R. § 1245.5 (2021) (stating that “applicant[s] for adjustment of status shall be required to have a medical examination by a designated civil surgeon”).

<sup>214</sup> Seraine Page, *Ready to Take the ASVAB? Here’s What to Expect + How to Prepare*, SANDBOXX (Oct. 30, 2019), <https://www.sandboxx.us/blog/prepare-to-take-the-asvab/>.

<sup>215</sup> *Enlisting in the Military*, TODAY’S MIL., <https://www.todaymilitary.com/joining-eligibility/enlisting-military> (last visited July 23, 2021).

<sup>216</sup> *ASVAB Fact Sheet*, ARMED SERVS. VOCATIONAL APTITUDE BATTERY, [https://www.officialasvab.com/wp-content/uploads/2020/07/ASVAB-Fact\\_Sheet.pdf](https://www.officialasvab.com/wp-content/uploads/2020/07/ASVAB-Fact_Sheet.pdf) (last visited July 23, 2021); see also 32 C.F.R. § 66.6(b)(4) (2021) (“Overall aptitude requirements for enlistment . . . are based on applicant scores on the [Armed Forces Qualification Test] derived from the [ASVAB].”).

<sup>217</sup> *ASVAB Fact Sheet*, *supra* note 216.

<sup>218</sup> Taylor Sienkiewicz, *What Your ASVAB Scores Mean*, PETERSON’S (Dec. 20, 2018), <https://www.petersons.com/blog/what-your-asvab-scores-mean/>.

<sup>219</sup> MEPS MANUAL, *supra* note 98, § 6.1(f); *ASVAB Questions*, MILITARY.COM, <https://www.military.com/join-armed-forces/asvab/asvab-questions.html> (last visited July 9, 2021).

<sup>220</sup> *ASVAB Questions*, *supra* note 219.

<sup>221</sup> U.S. DEP’T OF DEF., INSTRUCTION NO. 5160.71, DOD LANGUAGE TESTING PROGRAM 18 (2019) [hereinafter DOD LANGUAGE TESTING PROGRAM], <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/516071p.pdf?ver=2019-04-09-115734-410>.

After obtaining an AFQT score sufficient to qualify for enlistment, a recruit must complete and submit a long list of Directive Division (DD) Forms that necessitate a thorough disclosure of personal information.<sup>222</sup> These forms supply essential details to service branch evaluators for the assessment and processing of applicants. One of the documents—the DD Form 370, Request for Reference—is not actually completed by the recruit, but is sent to an employer, school official, or individual selected by the applicant.<sup>223</sup> The selected reference must attest that the prospective recruit is “mature, intelligent, and possess[es] high moral qualifications.”<sup>224</sup> The reference is further asked to grade the applicant’s trustworthiness, adaptability, judgment, maturity, and dependability on a relatively simple scale from “outstanding” to “unsatisfactory.”<sup>225</sup>

The background check is an important and invasive portion of the enlistment process. It is designed to ensure that all recruits are “reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States.”<sup>226</sup> These checks may reveal a felony conviction that precludes an applicant from serving in the military<sup>227</sup> or other forms of adverse conduct that must be adjudicated for either waiver or disqualification.<sup>228</sup>

All applicants must submit two documents in support of their background investigation: (1) DD Form 369, Police Record Check,<sup>229</sup> and

<sup>222</sup> Some examples of information that recruits provide on their enlistment forms include: marital status and spouse’s identity; familial relationships; citizenship status; criminal record; biographical data (e.g., gender, race, and ethnicity); prior education; domestic character references; and past drug use or abuse. DoD DATA COLLECTION FORMS, *supra* note 208, at 1–2; U.S. DEP’T OF DEF., OMB NO. 0704-0173, DD FORM 1966, RECORD OF MILITARY PROCESSING – ARMED FORCES OF THE UNITED STATES (2019) [hereinafter FORM 1966], <https://www.mepcom.army.mil/Portals/112/Documents/PubsForms/Forms/f-0000-dd-1966.pdf>; U.S. DEP’T OF DEF., DD FORM 93, RECORD OF EMERGENCY DATA § 1 (2008); U.S. DEP’T OF DEF., OMB NO. 0704-0007, DD FORM 369, POLICE RECORD CHECK § 1 (2011) [hereinafter FORM 369]; U.S. DEP’T OF DEF., OMB NO. 0704-0167, DD FORM 370, REQUEST FOR REFERENCE (2009) [hereinafter FORM 370].

<sup>223</sup> DoD DATA COLLECTION FORMS, *supra* note 208, enclosure 3 § 6(b).

<sup>224</sup> FORM 370, *supra* note 222.

<sup>225</sup> *Id.*

<sup>226</sup> Exec. Order No. 10,450, 18 Fed. Reg. 2,489 (Apr. 27, 1953).

<sup>227</sup> “No person . . . who has been convicted of a felony, may be enlisted in any armed force.” 10 U.S.C. § 504(a).

<sup>228</sup> See U.S. DEP’T OF DEF., INSTRUCTION NO. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION enclosure 3 § 2(h)(6) (2018) [hereinafter ENLISTMENT QUALIFICATION STANDARDS] (“[A]n applicant will be considered ineligible if he or she . . . [r]eceive[s] an unfavorable final determination by the DoD Consolidated Adjudication Facility on a completed National Agency Check with Law and Credit (NACLC) or higher-level investigation . . .”). In conducting a “whole person review[] of enlistment eligibility,” an applicant may be granted a “Conduct Waiver.” *Id.* enclosure 4 § 1(c).

<sup>229</sup> DoD DATA COLLECTION FORMS, *supra* note 208, enclosure 3 § 5; FORM 369, *supra* note 222.

(2) Standard Form 86 (SF-86).<sup>230</sup> The DD Form 369 requests and authorizes law enforcement agencies to check for police records concerning an enlistment applicant and to provide any pertinent results to accession personnel for evaluating enlistment eligibility.<sup>231</sup> The SF-86 is a lengthy document that requests extensive information going back several years and requires the disclosure of the applicant's past associations, drug use, employment history, education, finances, history of mental health, history of residence, family ties, and more.<sup>232</sup> The form also calls for the applicant to provide several references to confirm the information supplied in the document, who may be interviewed at the discretion of the assigned investigator.<sup>233</sup> The rigor of background checks and investigations vary depending on the security clearance level required for an applicant to accomplish the prospective job.<sup>234</sup> All applicants, at a minimum, are subjected to a National Agency Check with Law and Credit (NACLC) or its successor, the Federal Investigative Standards Tier 3 Investigation.<sup>235</sup> MEPS recruiters collect and send an applicant's fingerprints, along with their personal identifying data, to the Defense Counterintelligence and Security Agency (DCSA), which conducts a T3 investigation.<sup>236</sup> A T3 investigation involves running an applicant's information through several automated databases to search for criminal conduct and any other adverse information

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<sup>230</sup> U.S. OFF. OF PERS. MGMT., NOTICE NO. 16-02, FEDERAL INVESTIGATIVE STANDARDS FOR TIER 3 AND TIER 3 REINVESTIGATION (2015) [hereinafter NOTICE NO. 16-02], <https://www.dcsa.mil/Portals/91/Documents/pv/GovHRSec/FINs/FY16/fin-16-02.pdf>; U.S. OFF. OF PERS. MGMT., OMB NO. 3206 0005, STANDARD FORM 86, QUESTIONNAIRE FOR NATIONAL SECURITY POSITIONS (2016) [hereinafter SF-86], [https://www.opm.gov/forms/pdf\\_fill/sf86.pdf](https://www.opm.gov/forms/pdf_fill/sf86.pdf).

<sup>231</sup> DoD DATA COLLECTION FORMS, *supra* note 208, enclosure 3 § 5; FORM 369, *supra* note 222.

<sup>232</sup> SF-86, *supra* note 230.

<sup>233</sup> *Id.*; *Investigations, Adjudications and Clearance Processes at a Glance*, DEF. COUNTERINTELLIGENCE & SEC. AGENCY, <https://www.dcsa.mil/mc/pv/mbi/gicp/> (last visited July 23, 2021) [hereinafter *Investigations*].

<sup>234</sup> *Investigations*, *supra* note 233.

<sup>235</sup> U.S. DEP'T OF DEF., DOD MANUAL 5200.02, PROCEDURES FOR THE DOD PERSONNEL SECURITY PROGRAM (PSP) §§ 4.2(b), 7.6(b)(2) (2020) [hereinafter PERSONNEL SECURITY PROGRAM]. T3 background checks replaced the prior NACLC background screening as the standard for entry into the military in October 2015. DANIEL G. YOUNG, JESSICA A. BAWEJA, DIVYA R. VARGHEESE, LEISSA C. NELSON & SUSAN C. REED, OFF. OF PEOPLE ANALYTICS, OPA-2018-038, TIER 1 AND TIER 3 EADJUDICATION BUSINESS RULE VALIDATION, at v (2018) [hereinafter T3 EADJUDICATION], <https://apps.dtic.mil/sti/pdfs/AD1053060.pdf>; NOTICE NO. 16-02, *supra* note 230. In the course of researching this Note, it became apparent that most DoD and service branch instructions have not fully updated the language of their instructions and manuals to reflect this change. That being said, T3 background checks and NACLC background checks are predominantly the same with only slight differences in their operation. T3 EADJUDICATION, *supra*, at 1.

<sup>236</sup> MEPS MANUAL, *supra* note 98, § 3.2(c)(3)(c). NACLC background checks were previously conducted by the U.S. Office of Personnel Management (OPM), but a 2019 Executive Order transitioned background checks and security investigations from the National Background Investigations Bureau (an agency housed within OPM) to the Defense Security Service (DSS), and it further redesignated the DSS as the Defense Counterintelligence and Security Agency (DCSA) (an agency housed within the DoD). Exec. Order No. 13,869, 84 Fed. Reg. 18,125 (Apr. 24, 2019).



that may affect enlistment eligibility.<sup>237</sup> Some of the database checks include: the Social Security Administration (SSA) to verify the applicant's social security number; the USCIS to verify authenticity of the applicant's Alien Registration Number; the FBI's Criminal Justice Information System (CJIS) to check for criminal records; and a name check of the National Crime Information Center (NCIC) to search for criminal activity, wants, and warrants.<sup>238</sup> Credit checks are also conducted on all enlistment applicants<sup>239</sup> because they may reveal aliases, problematic credit scores and finances, unlisted residences, or financial criminal activity.<sup>240</sup>

There is one significant difference between the background checks conducted for enlisting U.S. citizens and noncitizens. In October 2017, the DoD implemented a policy that any noncitizen seeking entry into a military service must additionally receive a favorable Military Service Suitability Determination (MSSD) and National Security Determination (NSD) from the DoD Consolidated Adjudications Facility (DoD CAF)<sup>241</sup> prior to enlistment.<sup>242</sup> These determinations are only made after an applicant's T3 investigation is complete.<sup>243</sup> Therefore, the new policy significantly protracts the enlistment process for noncitizens because noncitizens are unable to fully enlist until their background investigations are complete,

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<sup>237</sup> KELLY R. BUCK, ANDRÉE E. ROSE, MARTIN F. WISKOFF & KAHLILA M. LIVERPOOL, DEF. PERS. SEC. RSCH. CTR., SCREENING FOR POTENTIAL TERRORISTS IN THE ENLISTED MILITARY ACCESSIONS PROCESS 31 (2005) [hereinafter BUCK REPORT], <https://irp.fas.org/eprint/screening.pdf>.

<sup>238</sup> *Id.* at 31–32. NCIC name checks include a search of the Violent Gang and Terrorist Organization File (VGTOF), which may not only show criminal activity, but may also indicate immoral extremist associations. *Id.* at 32.

<sup>239</sup> PERSONNEL SECURITY PROGRAM, *supra* note 235, § 5.4(d)(4).

<sup>240</sup> BUCK REPORT, *supra* note 237, at 50.

<sup>241</sup> “The Department of Defense (DoD) Consolidated Adjudications Facility (CAF) is the sole authority to determine security clearance eligibility of non-Intelligence agency DoD personnel occupying sensitive positions and/or requiring access to classified material including Sensitive Compartmented Information (SCI).” *DoD CAF*, DEF. COUNTERINTELLIGENCE & SEC. AGENCY, [https://www.dcsa.mil/mc/pv/dod\\_caf](https://www.dcsa.mil/mc/pv/dod_caf) (last visited July 9, 2021). Furthermore, DoD CAF's customers are “military service members, military applicants, civilian employees, and consultants affiliated with the Department of Defense . . . .” *Id.*

<sup>242</sup> Memorandum from A. M. Kurta, Under Sec'y of Def. for Pers. & Readiness, Off. of the Under Sec'y of Def., for Sec'ys of the Mil. Dep'ts, Commandant of the Coast Guard, Dir., Dep't of Def. Consol. Adjudications Facility, Military Service Suitability Determinations for Foreign Nationals Who Are Lawful Permanent Residents (Oct. 13, 2017) [hereinafter *Military Service Suitability Memo*]. Notably, this policy was challenged under the Administrative Procedure Act in 2019 on the grounds of being “arbitrary and capricious.” *Kuang v. U.S. Dep't of Def.*, 778 F. App'x 418, 419–20 (9th Cir. 2019). The Ninth Circuit held that the claim could not be subject to review because it failed the four-factor test set out in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), for determining the reviewability of claims against the military. *Kuang*, 778 F. App'x at 420–21. The court reasoned that there was “no grave injury that will result if the district court refuses to review Plaintiffs' arbitrary-and-capricious claim” and “that military decisions about national security and personnel are inherently sensitive and generally reserved to military discretion, subject to the control of the political branches.” *Id.* at 421.

<sup>243</sup> *Military Service Suitability Memo*, *supra* note 242.

which may take up to a year.<sup>244</sup> This varies from the treatment of U.S. citizen applicants, who are only required to have their background investigations initiated prior to enlistment.<sup>245</sup>

In addition to background checks, MEPS screens for the irresponsible use of alcohol and illegal drugs by breathalyzing applicants and requiring a urine test during entrance processing.<sup>246</sup> The urinalysis is geared toward detecting a wide range of illegal substances.<sup>247</sup> Having “[a] current or history of alcohol dependence, drug dependence, alcohol abuse, or other drug abuse” is grounds for disqualification because such behavior “is incompatible with military life and does not meet military standards . . . .”<sup>248</sup>

Prior to taking the Oath of Enlistment, the applicant must undergo a Pre-Enlistment Interview, which must be conducted in English.<sup>249</sup> The purpose of the interview is to safeguard against “fraudulent entry into the Armed Forces.”<sup>250</sup> During the interview process, the MEPS interviewer examines all of the applicant’s submitted entrance processing documents for uniformity, accuracy, and identification of any issues or areas requiring further explanation.<sup>251</sup> It is required that several Articles of the Uniform Code of Military Justice (UCMJ) are explained to the applicant in the course

<sup>244</sup> GAO IMMIGRATION ENFORCEMENT, *supra* note 2, at 21; Jim Garamone, *DoD Announces Policies Affecting Foreign Nationals Entering Military*, U.S. DEP’T OF DEF. (Oct. 13, 2017), <https://www.defense.gov/Explore/News/Article/Article/1342430/dod-announces-policies-affecting-foreign-nationals-entering-military>.

<sup>245</sup> ENLISTMENT QUALIFICATION STANDARDS, *supra* note 228, enclosure 3 § 2(h)(6)(a). Considering the recent inauguration of President Biden and the relatively progressive immigration policies of Democratic administrations, this DoD guidance may be reversed. *See* Craig Kafura & Bettina Hammer, *Republicans and Democrats in Different Worlds on Immigration*, CHI. COUNS. ON GLOB. AFFS. (Oct. 8, 2019), <https://www.thechicagocouncil.org/research/public-opinion-survey/republicans-and-democrats-different-worlds-immigration> (“Republicans see immigration as a critical threat to the country, [and] say restricting immigration makes the US safer . . . . Democrats, on the other hand, do not consider immigration a critical threat, and their views on policy actions substantially and consistently differ from Republicans.”). In fact, President Biden recently signed an Executive Order directing the Secretary of State, the Attorney General, and the Homeland Security Secretary to “review existing regulations, orders, guidance documents, policies and any other similar agency actions (collectively, agency actions) that may be inconsistent with’ the new administration’s approach to immigration.” Michael D. Shear & Miriam Jordan, *Undoing Trump’s Anti-Immigrant Policies Will Mean Looking at the Fine Print*, N.Y. TIMES, <https://www.nytimes.com/2021/02/10/us/politics/trump-biden-us-immigration-system.html> (July 16, 2021) (quoting Exec. Order No. 14,012, 86 Fed. Reg. 8,277).

<sup>246</sup> MEPS MANUAL, *supra* note 98, § 3.2(e)(4).

<sup>247</sup> *See* Lisa Ferdinando, *DoD Implements Expanded Drug Testing for Military Applicants*, U.S. DEP’T OF DEF. (Mar. 9, 2017), <https://www.defense.gov/Explore/News/Article/Article/1108009/dod-implements-expanded-drug-testing-for-military-applicants> (stating that applicants are drug tested for “marijuana; cocaine; amphetamines, including methamphetamine; and designer amphetamines . . . as well as heroin, codeine, morphine, hydrocodone, oxycodone, hydromorphone, oxymorphone, and a number of synthetic cannabinoids and benzodiazepine sedatives”).

<sup>248</sup> ENLISTMENT QUALIFICATION STANDARDS, *supra* note 228, enclosure 3 § 2(i).

<sup>249</sup> USMEPCOM REGUL., *supra* note 19, ¶ 5-10.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*; MEPS MANUAL, *supra* note 98, § 6.1(i)(3).

of the interview and that the interviewer must receive acknowledgement that the applicant understands the regulations.<sup>252</sup>

The interviewer confirms the information that the applicant provided and poses several scripted questions, but the interviewer “may also ask subsequent questions, as necessary, to clarify situations or to clarify an applicant’s statement(s).”<sup>253</sup> Additionally, the interviewer is responsible for reporting any details obtained during the interview that might affect the applicant’s military service suitability to the cognizant adjudicative authority for determining enlistment eligibility.<sup>254</sup>

The last step in the enlistment process is taking the Oath of Enlistment.<sup>255</sup> The oath must be administered in English by an enlisting officer authorized to do so under federal law.<sup>256</sup> The Oath of Enlistment manifests four promises: (1) to support and defend the Constitution of the United States against all enemies; (2) to bear true faith and allegiance to the Constitution; (3) to obey the orders of superior officers appointed over the vower; and (4) to adhere to the laws established by the UCMJ.<sup>257</sup> Upon completion of the oath, both the applicant and the enlisting officer sign the DD Form 4-Series, Enlistment/Reenlistment Document,<sup>258</sup> which then becomes a legally binding agreement between the signee and the U.S. government,<sup>259</sup> officially making the applicant a member of the U.S. Armed Forces.

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<sup>252</sup> MEPS MANUAL, *supra* note 98, § 6.1(i)(4). The interviewer explains to the applicant the UCMJ Articles addressing fraudulent enlistment, desertion, and absent without leave. *Id.* This required discussion is likely meant to provide a form of notice to the applicant in the event that the applicant intends to lie on the enlistment application or later chooses to abandon enlistment obligations.

<sup>253</sup> USMEPCOM REGUL., *supra* note 19, ¶ 5-10.

<sup>254</sup> MEPS MANUAL, *supra* note 98, § 6.1(i)(5).

<sup>255</sup> See 10 U.S.C. § 502(a) (“Each person enlisting in an armed force shall take the following oath: ‘I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.’”).

<sup>256</sup> MEPS MANUAL, *supra* note 98, § 6.1(k)(2); 10 U.S.C. § 502(b) (outlining who may administer the Oath of Enlistment). Prior to taking the oath, the applicant is provided a Pre-Oath Briefing, in which they are refreshed on UCMJ Articles 85 and 86 (desertion and absence without leave); provided a briefing on DoD separation policy and restrictions on personal conduct in the armed forces; instructed on proper conduct during the administering of the oath; informed that they may either “swear” or “affirm” to the oath and that they may omit the words, “[s]o help me God,” if desired. USMEPCOM REGUL., *supra* note 19, ¶ 5-14. After the briefing, applicants will be asked if they fully understand the information provided, which they must respond to affirmatively. *Id.* ¶ 5-15(d).

<sup>257</sup> 10 U.S.C. § 502(a).

<sup>258</sup> MEPS MANUAL, *supra* note 98, § 6.1(m)(1); DoD DATA COLLECTION FORMS, *supra* note 208, enclosure 3 § 2(a)(2).

<sup>259</sup> See MEPS MANUAL, *supra* note 98, § 6.1(m)(1) (“The enlistment contract is legally binding after the oath and must be maintained; the enlistment contract will not be destroyed.”).

### III. TRUE SERVICE FOR CITIZENSHIP: MAKING MILITARY NATURALIZATION AUTOMATIC

In evaluating the enlistment and naturalization processes side-by-side, it becomes apparent that it is redundant, wasteful, and overly complex to require them both. The enlistment process comprehensively addresses the substantive requirements for naturalization: proficiency in English, civic knowledge, good moral character, and permanent allegiance to the nation.

The enlistment process more than adequately ensures that recruits are able to sufficiently read, write, and speak the English language. Not only is the ASVAB administered exclusively in English, but the Oath of Enlistment is required to be given in English and the pre-screening interview must be done in English, as well.<sup>260</sup> A comparison between the ASVAB and the English portion of the citizenship test illustrates that the language competency called for by the ASVAB is far more demanding, requiring a greater level of proficiency than the USCIS citizenship test. The ASVAB test-taker must complete all of either 135 or 225 questions in English,<sup>261</sup> while an applicant for naturalization only needs to be capable of “read[ing] one sentence out of three sentences” and “writ[ing] one of the three sentences in a manner that the [USCIS] officer understands.”<sup>262</sup> Moreover, the citizenship test only requires a test taker to be capable of understanding words in their “ordinary usage,” which means only “comprehensible and pertinent communication.”<sup>263</sup> The ASVAB, on the other hand, is comprised of ten separate tests spanning a wide spectrum of subject matter.<sup>264</sup> Moreover, non-native English speakers are required to pass an ECLT prior to entering the military, which comprehensively evaluates a recruit’s English language proficiency.<sup>265</sup> These much higher standards and more rigorous evaluations indicate that it is unnecessary for an enlisted immigrant to take the English portion of the citizenship test.

If the primary purpose of the U.S. history and civics portion of the citizenship test is to ensure that a naturalization candidate understands the

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<sup>260</sup> See *supra* notes 219, 249, 256 and accompanying text (discussing portions of the enlistment process that are required to be completed in English).

<sup>261</sup> See *ASVAB Fact Sheet*, *supra* note 216 (explaining that the P&P-ASVAB allows the test taker 149 minutes to complete 225 pre-determined questions and the CAT-ASVAB allows the examinee 173 minutes to complete 135 questions); see *supra* note 219 and accompanying text (stating that the ASVAB is only administered in English).

<sup>262</sup> *Policy Manual, Volume 12, Part E, Chapter 2 – English and Civics Testing*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-12-part-e-chapter-2> (June 17, 2021).

<sup>263</sup> *Id.*

<sup>264</sup> *ASVAB Fact Sheet*, *supra* note 216.

<sup>265</sup> See DOD LANGUAGE TESTING PROGRAM, *supra* note 221, at 18 (stating that the ECLT is “[a] paper-and-pencil or computer adaptive test used to assess the English language proficiency, in listening and reading, of international military students being considered for assignment or training in the United States. The ECL is also used for US military personnel who are non-native speakers of English as a prerequisite qualification for entry into the military services.”).

provisions of the Constitution sufficiently to demonstrate attachment to its principles,<sup>266</sup> an immigrant recruit more than demonstrates this proficiency by enlisting. In taking the Oath of Enlistment, a recruit swears to “support and defend the Constitution of the United States against all enemies.”<sup>267</sup> There is no greater attachment to the Constitution than a willingness to fight and die for it. Thus, the attachment to constitutional principles justifying the citizenship history and civics test is sufficiently evidenced by taking the Oath of Enlistment. However, if Congress believes that the actual *testing* of one’s civic knowledge is necessary for naturalization, this can be easily and cheaply remedied by incorporating a civics portion into the ASVAB—both satisfying the requirement and mitigating the need for noncitizens to schedule and take an additional exam.

Currently, noncitizens seeking to naturalize through military service must undergo background checks both prior to enlistment and after applying for citizenship.<sup>268</sup> This is redundant, unnecessary, and wasteful because the enlistment process requires an equivalent or even *stronger* showing of “good moral character” than that called for by naturalization regulations. Enlistment standards are implemented to “minimize [the] entrance of persons who are likely to become disciplinary cases,”<sup>269</sup> and federal regulations state that military services are to avoid enlisting “those who have not subscribed to the legal and moral standards of society at-large.”<sup>270</sup> This criterion bears a striking resemblance to the requirement that naturalization applicants “adhere[] to the generally accepted moral conventions of the community.”<sup>271</sup>

There is a substantial overlap between the criminal convictions and conduct that would preclude an individual from naturalization and from enlistment, although the scope of disqualifying convictions is not precisely identical.<sup>272</sup> Moreover, just as the naturalization process may look to

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<sup>266</sup> See *supra* note 202 and accompanying text (discussing the rationale for the naturalization history and civics test).

<sup>267</sup> 10 U.S.C. § 502(a).

<sup>268</sup> See DOD CRIMINAL HISTORY RECORD, *supra* note 209, § 5.2.2. (directing the military branches to “[o]btain criminal history record information for applicant processing through the applicant’s self-disclosure during pre-accession interviews, from the criminal justice system, and from the OPM for enlistment applicant processing as part of Entrance National Agency Checks (ENTNACs)”; *Policy Manual, Volume 12, Part I, Chapter 6 – Required Background Checks*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-12-part-i-chapter-6> (June 17, 2021) (“USCIS conducts security and background checks on all applicants for naturalization. Members or former members of the U.S. armed forces applying for naturalization must comply with those requirements.”).

<sup>269</sup> 32 C.F.R. § 66.6(b)(8) (2021).

<sup>270</sup> *Id.*

<sup>271</sup> See *supra* note 186 and accompanying text (discussing how courts have interpreted good moral character).

<sup>272</sup> The federal guidelines for what conduct and criminal convictions render a noncitizen ineligible for citizenship are more clearly defined than those that preclude entry into the military. Individuals are prohibited from enlisting if they are under any form of judicial restraint; have a significant criminal record; have a prior felony conviction, which may be waivable; have a prior felony conviction for a

behavior beyond criminal activity in determining that an individual lacks good moral character,<sup>273</sup> the military similarly requires that evaluative authorities disqualify those who “exhibit[] antisocial behavior or other traits of character that may render the applicant unfit for service.”<sup>274</sup>

To the extent that the moral standards for military entry might be interpreted as less stringent, it is fair to say that an immigrant’s willingness to serve the nation in a life-threatening role acts as a positive indicator of good moral character sufficient to overcome any deficiency that may have precluded naturalization. To assert that the standard of character necessary for enlistment is not equal to or greater than that which is called for by citizenship standards sends a reprehensible message to noncitizen service members: your character is morally sufficient to kill and die for us, but not adequate to be one of us. Furthermore, if the moral standards for military entry are considered to be lower than those required of our citizenry, what would that conclusion say about the people being permitted to join our military? The U.S. Armed Forces operate globally in over 170 countries worldwide.<sup>275</sup> In representing the United States on the world stage, would it not make sense that these *de facto* ambassadors be held to the *highest* standards of conduct?

Not only are the character standards for enlistment sufficient to meet the substantive good moral character requirement for citizenship, but the evaluative mechanisms used to assess the character of a potential enlistee employs a higher level of scrutiny than the naturalization process. The good moral character requirement for citizenship is primarily informed by the details submitted in the Form N-400, the naturalization interview, and the

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sexual offense, which is not waivable; or exhibit “traits of character that may render the applicant unfit for service.” 32 C.F.R. § 66.6(b)(8) (2021). The regulations for military entry state that these are only *minimum* standards for ineligibility, indicating that conduct outside the specified scope may also preclude enlistment. *Id.* In contrast, immigration regulations provide clear guidance on a broad spectrum of both criminal and non-criminal behavior that are dispositive of an applicant’s good moral character. 8 C.F.R. § 316.10(b) (2021); INA § 101(a)(43), (f), 8 U.S.C. § 1101(a)(43), (f); *see also supra* notes 187–194 and accompanying text (discussing the spectrum of conduct that requires a finding of a lack of good moral character). Although some may interpret the naturalization prior conviction standards to be more demanding, even minor past offenses (or merely suspicions of offenses) can substantiate an unfavorable determination by the DoD CAS for a noncitizen’s T3 investigation, NSD, or MSSD, making them ineligible to enlist. 32 C.F.R. § 66.6(b)(8)(vi) (2021); U.S. OFF. OF THE DIR. OF NAT’L INTEL., SECURITY EXECUTIVE AGENT DIRECTIVE 4: NATIONAL SECURITY ADJUDICATIVE GUIDELINES 20 (2017) [hereinafter SECURITY DIRECTIVE 4], <https://sgp.fas.org/othersgov/intel/sead-4.pdf>.

<sup>273</sup> *See supra* note 194 and accompanying text (stating that discretion in the assessment of good moral character allows for the consideration of conduct beyond what is provided for in the relevant federal statutes and regulations).

<sup>274</sup> 32 C.F.R. § 66.6(b)(8)(v) (2021).

<sup>275</sup> Niall McCarthy, *All the Countries Worldwide with a U.S. Military Presence*, FORBES (Mar. 28, 2017, 8:56 AM), <https://www.forbes.com/sites/niallmccarthy/2017/03/28/all-the-countries-worldwide-with-a-u-s-military-presence-infographic/?sh=298c7f6f728c> (“According to data from the Defense Manpower Data Center, the U.S military has 200,000 active-service members deployed in at least 170 countries worldwide.”).

USCIS background check.<sup>276</sup> In contrast, the character of an enlisting noncitizen is evaluated using the substantial information provided in the SF-86 and numerous other enlistment forms, the impressions provided during the pre-enlistment interview, as well as the results of an invasive T3 investigation, a credit check, a urinalysis drug test, and a breathalyzer test.<sup>277</sup> Additionally, enlistees require a character reference to certify that the candidate is “mature, intelligent, and possess[es] high moral qualifications.”<sup>278</sup> Moreover, enlistees must offer references to verify the information they provided in their SF-86, who may *also* be personally interviewed.<sup>279</sup> For purposes of character evaluation, the pre-enlistment interview and the naturalization interview are not materially different,<sup>280</sup> and database information gleaned from T3 investigations and USCIS background checks are almost identical in character.<sup>281</sup> Also, the additional requirement of obtaining favorable MSSD and NSD determinations prior to enlistment has significantly increased the scrutiny of character review that noncitizens must undergo prior to enlisting.<sup>282</sup>

In sum, entry into the military entails a far more thorough assessment than the ordinary naturalization process. Therefore, subjecting an enlisted immigrant in pursuit of citizenship to undergo a second round of background checks and character evaluations is superfluous. It creates a needless additional barrier to citizenship and wastes limited government financial resources and personnel work-hours.<sup>283</sup>

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<sup>276</sup> See *supra* notes 182–183 and accompanying text (discussing sources of information used to evaluate good moral character).

<sup>277</sup> See *supra* notes 226–248 and accompanying text (discussing elements of the enlistment screening process).

<sup>278</sup> FORM 370, *supra* note 222.

<sup>279</sup> See *supra* note 233 and accompanying text (discussing SF-86 validator references).

<sup>280</sup> During both the pre-enlistment interview and the USCIS naturalization interview, the interviewer reviews the information provided by the applicant; asks probing questions about areas of concern within the applicant’s documents, including insufficiencies or gaps in the information, points of confusion, and suspicion of misinformation; assesses the candidate’s responses for fraudulent activity; and discusses any criminal history that was either volunteered or revealed by the background checks. See *supra* notes 180–181, 249–254 and accompanying text (discussing what comprises the pre-enlistment and USCIS naturalization interviews).

<sup>281</sup> Both the T3 investigation and the USCIS background check provide information on the applicant’s criminal history, identify any associations with criminal or terrorist organizations, and verify the applicant’s immigration status. See *supra* notes 173–179, 235–240 and accompanying text (discussing what information is gathered during the T3 investigation and the USCIS background checks).

<sup>282</sup> See *supra* notes 241–243 and accompanying text (discussing the October 2017 DoD policy requiring favorable MSSD and NSD determinations prior to enlistment). Evaluations for MSSD and NSD determinations are extremely comprehensive. In making MSSD and NSD determinations, DoD CAF assesses a candidate’s allegiance to the United States, financial conduct, foreign influences and preferences, alcohol and drug use, criminal conduct, sexual behavior, and psychological condition. SECURITY DIRECTIVE 4, *supra* note 272, at 6.

<sup>283</sup> The issue of costly redundancy is further exacerbated by the implementation of the October 2017 DoD policy requirement that LPRs “must complete a background investigation and receive a favorable

Enlistment can also fulfill the substantive naturalization requirement of demonstrating permanent allegiance to the United States.<sup>284</sup> The Oath of Enlistment calls for the enlistee to swear that they will “bear true faith and *allegiance* to the [Constitution].”<sup>285</sup> However, the Ninth Circuit has held that the Oath of Enlistment does not create a *permanent* allegiance to the nation, but an allegiance impliedly lasting only for the duration of military service.<sup>286</sup> The court’s decision was further based on the Oath of Enlistment lacking an express renunciation of foreign allegiances.<sup>287</sup> Both of these objections can be easily ameliorated by slightly modifying the Oath of Enlistment administered to noncitizens. For instance, pertinent language contained in the Oath of Allegiance could be incorporated into the Oath of Enlistment to provide the necessary affirmations.<sup>288</sup> An even easier approach would be to allow immigrant enlistees to take both the Oath of Enlistment and the Oath of Allegiance in the same ceremony.

A potential objection to the proposed reform is that it would require military personnel in charge of accession to act as immigration adjudicators, which would require a thorough understanding of immigration law. Such

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military security suitability determination (MSSD) prior to entry” into military service, which is predicted to further increase the costs associated with noncitizen enlistment background checks. *DoD Announces Policy Changes to Lawful Permanent Residents and the Military Accessions Vital to the National Interest (MAVNI) Pilot Program*, U.S. DEP’T OF DEF. (Oct. 13, 2017), <https://www.defense.gov/Newsroom/Releases/Release/Article/1342317/dod-announces-policy-changes-to-lawful-permanent-residents-and-the-military-acc/#:~:text=On%20October%2013%2C%202017%20DoD,the%20purposes%20of%20expedited%20naturalization;Are%20Immigrants%20Still%20Welcomed%20in%20Today%27s%20U.S.%20Military%3F>, FWD.US (Aug. 5, 2020), <https://www.fwd.us/news/are-immigrants-still-welcomed-in-todays-us-military> (discussing a RAND corporation study that found “the costs of background checks for some immigrant recruits were already 500% higher than the costs for other recruits, because of heightened screening requirements, and . . . that the increased screening will drive costs up more”).

<sup>284</sup> 8 U.S.C. § 1101(a)(22) (“The term ‘national of the United States’ means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, *owes permanent allegiance to the United States.*”) (emphasis added).

<sup>285</sup> 10 U.S.C. § 502(a) (emphasis added).

<sup>286</sup> *Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937, 940 (9th Cir. 2004).

<sup>287</sup> *Id.*

<sup>288</sup> For example, the language, “I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen,” could be added to the Oath of Enlistment. Also, the words “and laws” could be added after “Constitution” in order to read: “support and defend the Constitution and laws of the United States.” A potential counterargument to this proposal is that no one would be able to administer a hybridized oath. Only the Attorney General or delegated courts may administer the Oath of Allegiance. 8 U.S.C. § 1421(a)–(b). The Oath of Enlistment may only be administered by “[t]he President, the Vice-President, the Secretary of Defense, any commissioned officer, and any other person designated under regulations prescribed by the Secretary of Defense.” 10 U.S.C. § 1031. Therefore, there is currently no overlap in federal officials with the authority to administer both oaths, which likely indicates that a single person administering an oath that has the effect of both would run afoul of current legislation. That being said, the Secretary of Defense could implement DoD regulations permitting naturalization judges (who have also been delegated authority to administer the Oath of Allegiance) to administer the Oath of Enlistment. This would allow naturalization judges to administer an Oath of Enlistment that contains the necessary language to communicate permanent allegiance.



concerns are misplaced because granting automatic citizenship upon enlistment would call on military personnel that are responsible for enlistment eligibility determinations to do no more than what they are already doing. Because the current enlistment screening process addresses all the same substantive requirements and eligibility determinations as the naturalization process, no additional adjudicative measures or considerations would need to be incorporated into the existing process.

One might also object to the proposed reform out of a concern that the automatic operation of military naturalization would undermine the nation's ability to denaturalize citizens who commit fraud in procuring citizenship. But this concern is easily resolved by retaining the statutory language that currently appears in INA sections 328(f) and 329(e), which provide that if a service member who obtains citizenship through military naturalization is separated from the armed forces under other than honorable conditions prior to completing five years of honorable service, their citizenship status will be revoked.<sup>289</sup> One who "procures [one's] own enlistment or appointment in the armed forces by knowingly false representation or deliberate concealment as to his qualifications for that enlistment" would violate UCMJ Article 104a, Fraudulent Enlistment,<sup>290</sup> which provides for the dishonorable discharge of an offender.<sup>291</sup> Therefore, by fraudulently obtaining citizenship through military naturalization, the individual would be fraudulently enlisting—leading to a dishonorable discharge through the operation of UCMJ Article 104a, and a revocation of citizenship under INA sections 328(f) or 329(c).

There may also be opposition to the proposed reform on grounds that some noncitizens would enlist only to obtain citizenship with premeditated plans to seek an early honorable discharge on administrative grounds. This might be done by feigning mental illness or self-inflicting physical injuries to obtain a medical discharge, claiming to be a conscientious objector, or seeking a Military Hardship Discharge. However, it is no small feat to obtain a release from military service on these grounds. Discharge on each of these bases requires extensive evaluations, investigations, determination boards and hearings, and a history of documented proof. The process can take years. Moreover, even if it is determined that the basis for release is valid, a military branch has the authority to require a lateral transfer (a transfer to a new job), reassignment to a new duty station, or reassignment to a non-combat role in lieu of a discharge. Furthermore, if it is determined that the member is fraudulently seeking discharge from military service, they may violate

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<sup>289</sup> INA §§ 328(f), 329(c), 8 U.S.C. §§ 1439(f), 1440(c).

<sup>290</sup> UCMJ art. 104a(1), 10 U.S.C. § 904a(1).

<sup>291</sup> JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL UNITED STATES pt. IV ¶ 35(d)(1) (2019) [hereinafter MCM], [https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20\(Final\)%20\(20190108\).pdf?ver=2019-01-11-115724-610](https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610).

several articles of the UCMJ that are punishable by a punitive discharge (Other than Honorable or Dishonorable).<sup>292</sup> This would lead to the revocation of the service member's citizenship under INA sections 328(f) or 329(c).<sup>293</sup>

## CONCLUSION

Granting automatic citizenship to immigrants upon enlistment would both remedy the aforementioned issues created by the current framework and provide several benefits to the nation. The proposed scheme would eliminate the deportation of honorably discharged veterans. Without the need for added applications, background checks, citizenship testing, biometrics submissions, or interviews, there would no longer be a concern of service members misunderstanding the process, receiving inaccurate information, or being impeded from process completion by a lack of naturalization support facilities or inadequate DoD leadership support. Veterans with PTSD who commit crimes attributable to their ailments would no longer be cast out without judicial consideration—precluding a separation from their families and a deprivation of invaluable VA resources necessary to facilitate their recovery.

This would also be a boon for the U.S. government. USCIS is almost entirely funded by application fees,<sup>294</sup> but the fees for military naturalization applicants are waived.<sup>295</sup> Without the need to conduct background checks, process applications, conduct interviews, or maintain overseas facilities for military naturalization, work-hours and spending could be budgeted elsewhere. Also, military naturalization would become a more attractive option for noncitizens highly qualified in language, culture, and computer

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<sup>292</sup> Malingering under UCMJ Article 83 carries a maximum punishment of dishonorable discharge for both feigning mental illness and self-inflicted injuries. *Id.* pt. IV ¶ 7(d). A service member may also be convicted of attempted desertion for trying to “quit[] his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service,” which carries a maximum punishment of death (during wartime), but a more likely sentence of dishonorable discharge. UCMJ art. 85(a)(2), (c), 10 U.S.C. § 885(a)(2), (c).

<sup>293</sup> See *supra* note 289 and accompanying text (discussing provisions of the INA providing for the revocation of citizenship obtained through military naturalization). If it is determined *after a person is discharged* that they separated fraudulently, they would be in violation of UCMJ Article 104a, Fraudulent Separation, which would lead to a discharge recharacterization to Other than Honorable or Dishonorable, triggering a revocation of the person's citizenship. MCM, *supra* note 291, pt. IV ¶ 35(d)(2). A person fraudulently separates if they “procure[] [their] own separation from the armed forces by knowingly false representation or deliberate concealment as to [their] eligibility for that separation.” UCMJ art. 104a(2), 10 U.S.C. § 904a(2).

<sup>294</sup> Daniel Gonzalez, *The Cost of Applying for U.S. Citizenship Is Dramatically Increasing*, USA TODAY, <https://www.usatoday.com/story/news/politics/2020/08/05/immigration-cost-applying-u-s-citizenship-dramatically-increasing/3304675001> (Aug. 5, 2020, 6:38 PM); U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62,280, 62,281–82 (proposed Nov. 14, 2019).

<sup>295</sup> INA §§ 328(b)(4), 329(b)(4), 8 U.S.C. §§ 1439(b)(4), 1440(b)(4).

skills. By eliminating the barriers obstructing service members' paths toward naturalization, the program would seem truer to the name—providing both guaranteed employment and citizenship for those who qualify. Moreover, even though noncitizens are ineligible for a security clearance,<sup>296</sup> through the proposed reform, they would be able to apply for a clearance after service entry. This would provide service members with more job opportunities and endow service branches with greater manning flexibility.

The current regulatory framework for military naturalization is deeply flawed. The contemporary amalgamation of legislation, DoD directives, executive orders, and administrative policies that regulate military naturalization all but eviscerate the benefits of the initiative—operating to the detriment of both immigrants and the nation. For noncitizen service members, the faults of the system manifest in unnecessary processing delays; redundant administrative barriers; diminished facilitative resources; the potential for a removal order apathetic to honorable service; and a general uncertainty as to whether their naturalization will, in fact, come to fruition. Current federal guidance harms the nation by dissuading immigrants with skills crucial to national defense from participating in the armed forces and by wasting government resources on fundamentally superfluous measures.

Recent legislative proposals to ameliorate the problem of veteran deportations have offered only partial, piecemeal solutions.<sup>297</sup> Congress should get to the heart of the problem by simply granting citizenship to noncitizen service members upon entering the armed forces. This could be accomplished by amending sections 328 and 329 of the INA to incorporate language immediately granting citizenship upon taking the Oath of Enlistment, while leaving a vast majority of the statutes' provisions intact, including clauses permitting honorably discharged noncitizens to apply for naturalization. The statutory language could make clear that accepting citizenship is voluntary in order to retain immigrants' freedom of association<sup>298</sup> and to avoid disincentivizing immigrants who wish to retain their home country citizenship from joining the military. Such a minor adjustment to policy language could make a world of difference for those willing to shoulder the heaviest burdens of America—and it only seems right. Those who are willing to serve Americans, fight for Americans, and die for Americans have more of a right than any to be considered Americans.

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<sup>296</sup> *Security Assurances for Cleared Individuals and Facilities*, DEF. COUNTERINTELLIGENCE & SEC. AGENCY, <https://www.desa.mil/mc/ctp/int/security> (last visited July 9, 2021).

<sup>297</sup> See *supra* notes 104–116 and accompanying text (discussing recent legislative attempts to mitigate issues faced by immigrant veterans).

<sup>298</sup> Jennifer E. Lamm, *The Politics of Rights and Wrongs: Alien Soldiers, Veterans, and Their Families in the United States* 16 (Aug. 15, 2011) (unpublished manuscript prepared for the American Political Science Association's 2011 Annual Meeting) (available at <https://ssrn.com/abstract=1902093>) (“The United States has always observed the right of free association for immigrants seeking political membership . . .”).