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COMMENTS

VETERANS BANISHED: THE FIGHT TO BRING THEM HOME

ALEJANDRA MARTINEZ*

"They spent their lives in the United States and honorably served this country, only to be treated harshly and unjustifiably punished based solely on where they were born."[1]

—David Garcia, U.S. Army Veteran and President of SEIU Local 221

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* St. Mary's University School of Law, Candidate for Juris Doctor, May 2018; University of Texas–Pan American, B.S., Criminal Justice, May 2013. I would like to thank my colleagues in *The Scholar*, Volume 19, for the work they contributed in editing this Comment. In particular, thanks to Volume 19 Editorial Board members Claudia Galan and Mary Larakers for their invaluable guidance during the writing process and St. Mary's Clinical Professors of Immigration Law Lee J. Terán and Erica B. Schommer for helping me understand the complex issues surrounding military naturalization. Special thanks to the American Civil Liberties Union of California for their advocacy and efforts to bring deported veterans home. Finally, I thank my family for their endless love and support throughout my legal career and in all my endeavors—especially my sister, Annette Martinez, for always encouraging me and helping me achieve my goals.

1. *ACLU Report Details How U.S. Has Failed Deported Veterans*, AM. CIVIL LIBERTIES UNION (July 6, 2016), https://www.aclu.org/news/aclu-report-details-how-us-has-failed-deported-veterans [https://perma.cc/U8TB-CZHN].

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I. INTRODUCTION

They served in the U.S. Armed Forces and bravely fought on battlefields from Korea to Iraq.[2] After spending their entire lives in the United States, swearing an oath to defend and protect this country, risking their lives to abide by that oath, and after being honorably discharged, many non-U.S. citizen veterans were deported and exiled due to harsh immigration laws and the federal government's failure to naturalize such service members during their military service.[3] Consequently, today many deported U.S veterans are fighting to return home and share their disorienting experiences.[4]

In Tijuana, Mexico, a group of U.S. military veterans gather in a place called the "Deported Veterans Support House," also known as the "Bunker."[5] The Bunker provides shelter for deported veterans and physical and mental health services to those unable to receive their Veterans Affairs (VA) benefits.[6] Veteran Hector Barajas founded the Bunker in 2013.[7] Barajas and other veterans living in the Bunker are establishing a new life in Tijuana after being deported.[8] Their stories are similar: "each [veteran] was honorably discharged from the military, but was later charged with a deportable offense."[9] Some veterans believe posttraumatic stress stemming from their military service triggered their offenses.[10]

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2. Hollie McKay, *Banished U.S. Veterans Lean on Each Other South of Border*, FOX NEWS (Jan. 31, 2016), http://www.foxnews.com/us/2016/01/31/banished-us-veterans-lean-on-each-other-south-border.html [https://perma.cc/LA85-52MU].

3. BARDIS VAKILI ET AL., DISCHARGED THE DISCARDED: HOW U.S. VETERANS ARE BANISHED BY THE COUNTRY THEY SWORE TO PROTECT 7, AM. CIV. LIBERTIES UNION (2016), https://www.aclusandiego.org/wp-content/uploads/2017/04/DISCHARGED-THEN-DISCARDED-fixed.pdf [https://perma.cc/RD4H-EMP8].

4. *Id.* at 3.

5. Gabe Ramirez & Daniella Diaz, *Deported Veterans Fight to Return 'Home' From Mexico*, CNN POLITICS (Apr. 26, 2016, 6:57 PM), http://www.cnn.com/2016/04/26/politics/deported-veterans-support-house-hector-barajas-tijuana-mexico [https://perma.cc/4F76-XNUM].

6. James Bennett, Jr., *Former Marine Gains Citizenship, Advocates for Deported Veterans*, MILITARY.COM (May 23, 2016), http://www.military.com/daily-news/2016/05/23/former-marine-gains-citizenship-advocates-deported-veterans.html [https://perma.cc/YU94-NXUE]; Joanna S. Kao, *Deported Vets: Life in 'The Bunker'*, ALJAZEERA AM. (Sept. 26, 2014), http://projects.aljazeera.com/2014/deported-veterans [https://perma.cc/MPH5-EF9N].

7. Ramirez & Diaz, *supra* note 5.

8. Kao, *supra* note 6.

9. *See id.* (providing perjury and drug possession as examples of deportable offenses).

10. *Id.*; *see also* Bennett, *supra* note 6 (reporting many veterans are deported due to issues arising from their time serving the military).

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Barajas entered the United States in 1984 at the age of seven.[11] He grew up in Compton, California with a dream of one day becoming an American soldier.[12] In 1992, Barajas applied for legal permanent resident (LPR) status and enlisted in the U.S. military three years later.[13] He proudly and honorably served in the 82nd Airborne Division from 1995 to 2001.[14] Additionally, Barajas served during the attacks on September 11, 2001[15] and has "two Army commendation medals, a national defense ribbon, and a humanitarian award."[16] Like many other veterans returning home from serving abroad, it was difficult for Barajas to transition from military life to civilian life.[17] Toward the end of his service, Barajas battled drug and alcohol abuse.[18] Not long after Barajas was honorably discharged, he was arrested and "pled guilty to a felony in Los Angeles: firing a gun into a vehicle."[19] Barajas' criminal defense attorney did not advise him that pleading guilty to a crime could result in deportation.[20] Although the sentencing judge mentioned this consequence to him, Barajas believed he was a U.S. citizen and not subject to deportation.[21]

Barajas paid his debt to society by completing his sentence, but that was not enough for the federal government.[22] Upon his release from prison, immigration officials deported and exiled him from the very country he swore to protect.[23] Only after his death may Barajas return to the

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11. Ramirez & Diaz, *supra* note 5.

12. *Id.*

13. E-mail from Hector Barajas, Dir. & Founder, Deported Veterans Support House, to author (Nov. 16, 2016, 6:23 PM) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) [hereinafter Barajas e-mail].

14. Ramirez & Diaz, *supra* note 5.

15. Barajas e-mail, *supra* note 13.

16. David Gotfredson, *Banned from America: U.S. Veterans Deported to Mexico*, CBS8 (Apr. 26, 2013, 6:27 PM), http://www.cbs8.com/story/22092596/banned-from-america [https://perma.cc/S7J9-252G].

17. *About the Documentary*, DEPORTEDVETERANS.WORDPRESS.COM, https://deportedveterans.wordpress.com/about [https://perma.cc/6SF9-M343] (last visited Feb. 13, 2017); *see also* Constantina Aprilakis, Note, *The Warrior Returns: Struggling to Address Criminal Behavior by Veterans with PTSD*, 3 GEO. J. L. & PUB. POL'Y 541, 541 (2005) (explaining how traumatic experiences of warfare undoubtedly spill over into civilian life).

18. *U.S. Military Veterans Being Deported Back to Mexico*, KRGV (Apr. 27, 2016, 6:14 AM), http://www.krgv.com/story/31827105/us-military-veterans-being-deported-back-to-mexico [https://perma.cc/5QQ7-XSLJ] [hereinafter *Veterans Being Deported*].

19. Gotfredson, *supra* note 16.

20. Barajas e-mail, *supra* note 13.

21. *Id.*

22. Gotfredson, *supra* note 16

23. *Id.*

United States[24] because honorably discharged service members are entitled to burial in a VA National Cemetery.[25]

Like others, Barajas mistakenly assumed that, by taking the oath of enlistment, he automatically became a U.S. citizen.[26] In an interview with CNN, Barajas stated, "[c]itizenship was never mentioned . . . I was never counseled, there's no program for it."[27] Barajas was deported to Tijuana, Mexico and was separated from his wife and daughter, both of whom are U.S. citizens living in Los Angeles, California.[28] Now a fierce advocate for deported veterans,[29] Barajas has helped deported veterans finally gain a collective voice to share their stories.[30] Barajas' story is one of many that have inspired a movement urging the federal government to bring its soldiers home, provide the medical benefits the VA owes them, and halt future deportation of U.S. veterans.[31]

Foreign-born soldiers have served in the U.S. Armed Forces since the Revolutionary War.[32] Moreover, while foreign-born soldiers share the same dedication and commitment to service as U.S.-born soldiers, they are often greeted with deportation upon returning home from service abroad.[33] In fact, as of 2007 roughly 3,000 U.S. veterans have been de-

24. *Veterans Being Deported*, *supra* note 18.

25. *Federal Benefits for Veterans, Dependents and Survivors: Chapter 8 Burial and Memorial Benefits*, U.S. DEP'T OF VETERANS AFF., https://www.va.gov/opa/publications/benefits_book/benefits_chap08.asp [https://perma.cc/W2MC-Z9HD] (last updated Apr. 21, 2015; *see also* Gotfredson, *supra* note 16 ("When I die, I can be buried as an American and drape my coffin with an American flag; but only when I die will I have any rights as an American.").

26. Ramirez & Diaz, *supra* note 5; VAKILI ET AL., *supra* note 3, at 24.

27. Ramirez & Diaz, *supra* note 5. *But see Naturalization Through Military Service: Fact Sheet*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/news/fact-sheets/naturalization-through-military-service-fact-sheet [https://perma.cc/WXR8-XAS6] (last updated Dec. 22, 2016) [hereinafter *Naturalization*] (claiming the USCIS gives "noncitizen enlistees the opportunity to naturalize when they graduate from basic training" by "conduct[ing] all naturalization processing including the capture of biometrics, the naturalization interview and administration of the Oath of Allegiance on the military installation").

28. Gotfredson, *supra* note 16.

29. *See* VAKILI ET AL., *supra* note 3, at 1 (recognizing U.S. Army Specialist Hector Barajas for his tireless advocacy for veteran deportees).

30. *See id.* (acknowledging that Barajas' work created a "growing global network of deported veterans whose organization, power and voice will eventually stop the United States from deporting its own soldiers").

31. *See id.* at 9 (attributing this new movement to Barajas and sharing his story).

32. Jeanne Batalova, *Immigrants in the U.S. Armed Forces*, MIGRATION POL'Y INST. (May 15, 2008), http://www.migrationpolicy.org/article/immigrants-us-armed-forces#1 [https://perma.cc/T95N-KVHU].

33. VAKILI ET AL., *supra* note 3, at 9.

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ported.[34] Of those deported, most were LPRs whose parents brought them to the United States as children.[35] Some are combat veterans who sustained physical wounds and emotional trauma during their service.[36] Their service record, however, is not considered when they are exiled from the country.[37]

Nearly all foreign-born veterans who have been deported were eligible for naturalization during their military service.[38] The U.S. Immigration and Nationality Act (INA) provides non-U.S. citizens in the armed forces the opportunity to gain citizenship with lesser residency requirements than other LPRs.[39] Nonetheless, citizenship is not automatic or guaranteed.[40] Interestingly, according to the American Civil Liberties Union (ACLU), the federal government often fails to provide adequate resources and assistance necessary to complete and file citizenship paperwork.[41] The ACLU further suggests the federal government has misplaced or failed to file many foreign-born veterans' citizenship applications.[42] Moreover, military recruiters sometimes mislead many foreign-born soldiers to believe that enlistment automatically entitles them to citizenship.[43] Often, soldiers who begin the naturalization process are later deployed or transferred, which disrupts the application review process.[44] As a result, veterans who fail to become U.S. citizens during their military service, or shortly thereafter, are subject to deportation[45] and some are

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34. Levi Newman, *Veteran Deportation Continues Under Strict Immigration Laws*, VETERANS UNITED (Feb. 29, 2012) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*); Jorge Rivas, *It's Veteran's Day and U.S. Veterans Are Getting Deported*, FUSION (Nov. 11, 2013), http://fusion.net/it-s-veterans-day-and-u-s-veterans-are-getting-deporte-1793840071 [https://perma.cc/VV2D-8VKE].

35. VAKILI ET AL., *supra* note 3.

36. *Id.* at 2.

37. *Id.*

38. *Id.* at 19.

39. Craig R. Shagin, *Deporting Private Ryan: The Less Than Honorable Condition of the Noncitizen in the United States Armed Forces,* 17 WIDENER L.J. 245, 248 (2007); *Citizenship for Military Members*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/military/citizenship-military-personnel-family-members/citizenship-military-members [https://perma.cc/2XX5-TQ9D] (last updated Dec. 22, 2016).

40. Shagin, *supra* note 39.

41. VAKILI ET AL., *supra* note 3, at 3.

42. *Id.*

43. *See id.* at 20 (urging the Department of Defense to investigate corrupt practices of luring non-citizen soldiers into enlistment with false promises of citizenship).

44. *Id.*

45. *See, e.g.*, INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2012) (listing criminal offenses involving moral turpitude that result in deportation). For example, a noncitizen is deportable if he or she committed a crime involving moral turpitude (CIMT) within 5 years of admission, which carry a possible sentence of one year or more. *Id.* § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i). "Any alien who at any time after admission is convicted of two

permanently barred from obtaining citizenship after being convicted of certain crimes[46] that most likely resulted from their PTSD and combat experience.[47]

Deportation not only deprives honorably discharged veterans from residing in the United States, it strips them of their right to medical treatment and other benefits typically given to veterans through the U.S. Department of Veteran Affairs.[48] This leaves many veterans to die or suffer without treatment.[49] For example, Former Marine Jose Solorio was dying from pulmonary fibrosis[50] when the U.S. Customs and Border Protection (CBP) paroled[51] Solorio from Mexico into the United States for two weeks to seek medical care at a VA hospital.[52] The hospital advised Solorio that he needed a lung transplant and would need more than two weeks in the country to recover.[53] Initially, CBP refused to extend

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or more CIMTs not arising out of a single scheme of criminal misconduct, regardless of whether confined and regardless of whether the convictions were in a single trial, is deportable." *Id.* § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii). "An alien who is convicted of an aggravated felony at any time after admission is deportable." *Id.* § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(iii). "Any alien who at any time after admission has been convicted of violation of any law or regulation of a State, U.S. or foreign country relating to a controlled substance, other than a single offense involving possession for one's own use of 30 grams or less of marijuana is deportable." *Id.* § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). "Any alien being convicted under any law of purchasing, selling, or offering for sale, exchanging, owning, possessing, or carrying . . . conspiring to purchase . . . any weapon, or accessory, which is a firearm or destructive device . . . is deportable." *Id.* § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C). Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable." *Id.* § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).

46. VAKILI ET AL., *supra* note 3, at 20; *see, e.g.*, 8 C.F.R. § 316.10(b)(1)(i)–(ii) (2016) (requiring an applicant to possess a good moral character and listing offenses that result in permanent bars to naturalization, such as a murder conviction or an aggravated felony conviction on or after November 29, 1990).

47. Cathy Ho Hartsfield, Note, *Deportation of Veterans: The Silent Battle for Naturalization*, 64 RUTGERS L. REV. 835, 852 (2012).

48. *See* Newman, *supra* note 34 (indicating deported veterans are eligible for medical service provided to U.S. veterans but are unable to visit U.S. hospitals to utilize their medical benefits).

49. VAKILI ET AL., *supra* note 3, at 9.

50. *Id.*

51. *See* U.S. CITIZENSHIP AND IMMIGR. SERVS., HUMANITARIAN PAROLE PROGRAM (2011), https://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/Humanitarian%20Parole%20Program.pdf [https://perma.cc/YZ28-ANEH] [hereinafter HUMANITARIAN PAROLE] ("Parole is discretionary authority that allows for the temporary entry of individuals into the United States for urgent humanitarian reasons or significant public benefit.").

52. VAKILI ET AL., *supra* note 3, at 9.

53. *Id.*

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Solorio's parole and only changed its decision after being contacted by the ACLU of California.[54] By that time, it was too late, as Solorio's condition had worsened and the hospital could no longer perform the extensive transplant operation.[55] Mr. Solorio died a few days later.[56]

To understand fully how many veterans are denied their basic rights, this Comment begins by discussing military naturalization and the history leading up to current naturalization provisions in Part II. Part III discusses the creation of aggravated felonies in immigration law. Part IV examines the Immigration Act of 1990 (IMMACT) and how it expanded grounds of deportation and limited the relief available for non-citizens. Part V discusses the Immigration and Nationality Technical Corrections of 1994 and the lead-up to changes in immigration law that took place in 1996, which further expanded the grounds for deportation. Part VI describes how veterans adapt to life after military service. Part VII discusses the relationship between criminal law and immigration law and the consequences of criminal convictions. Part VIII explains the adverse consequences of deportation, such as family separation, lack of access to VA benefits, and the dangers posed by criminal organizations abroad. Finally, Parts IX and X propose steps lawmakers and governmental agencies can take both to bring deported veterans home and to avoid the future deportation of foreign-born veterans.

II. MILITARY NATURALIZATION

A. *A History of Immigrant Service Members*

Immigrants have made significant contributions to the United States Armed Forces since the country's inception,[57] having served from the Revolutionary War to the current conflicts in Iraq and Afghanistan.[58] According to recent data from the Department of Defense, more than 16,000 non-U.S. citizens served on active duty as of June 2010.[59]

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54. *Id.*

55. *Id.*

56. *Id.*

57. Catherine N. Barry, *New American in Our Nation's Military*, CTR. FOR AM. PROGRESS (Nov. 8, 2013), https://www.americanprogress.org/issues/immigration/reports/2013/11/08/79116/new-americans-in-our-nations-military [https://perma.cc/9542-3TGB].

58. Margaret D. Stock, *Essential to the Fight: Immigrants in the Military Eight Years After 9/11*, AM. IMMIGR. COUNCIL (Nov. 9, 2009), https://www.americanimmigrationcouncil.org/research/essential-fight-immigrants-military-eight-years-after-911 [https://perma.cc/9Y4Q-LQ34].

59. In 2008, there were over 60,000 non-U.S. citizen soldiers enlisted in the military. Jeanne Batalova, *supra* note 32. However, this number drastically decreased to 16,500 in 2010 to due to executive orders and limits on accession. DEP'T OF DEFENSE, POPULATION REPRESENTATION IN THE MILITARY: FISCAL YEAR 2010 SUMMARY REPORT 39 (2010),

Recruiters partly seek out foreign-born soldiers because they offer the U.S military "greater racial, ethnic, linguistic, and cultural diversity than U.S. citizen recruits."[60] After the 9/11 attacks on the World Trade Center, U.S. military policy shifted greatly because prolonged involvement in Afghanistan and Iraq created a strong need for cooperation with allies in those regions.[61] However, military leadership did not possess the appropriate cultural and linguistic competencies required for these regions.[62] Policymakers and military leaders, recognizing the essential linguistic and cultural diversity of foreign-born soldiers, thus recruited "immigrants from these and other regions projected to be of national interest."[63]

In 2009, the U.S. military implemented U.S. Military Accessions Vital to the National Interest (MAVNI), a program aimed at recruiting immigrants "whose skills are considered to be vital to the national interest."[64] Under MAVNI, a military applicant is only required to have legal immigration status—such as asylee, refugee, or Temporary Protected Status (TPS)—or to hold certain nonimmigrant visas.[65] The creation of MAVNI demonstrates that immigrant soldiers are a vital component in today's U.S. Armed Forces.[66]

Furthermore, foreign-born soldiers are less likely to drop out of military service as compared to U.S. citizen soldiers.[67] According to Marine General Peter Pace, "[i]mmigrant soldiers . . . are extremely dependa-

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http://prhome.defense.gov/portals/52/Documents/POPREP/poprep2010/summary/PopRep10Summ.pdf [https://perma.cc/9KUQ-NE95].

60. *Immigrants in the Military – Fact Sheet*, ONEAMERICA, http://www.weareoneamerica.org/immigrants-military-fact-sheet [https://perma.cc/PJ96-SS4C] (last visited Feb. 13, 2017) [hereinafter *Immigrants in the Military*].

61. Barry, *supra* note 57.

62. *Id.*

63. *Id.*

64. U.S. DEP'T OF DEF., MILITARY ACCESSIONS VITAL TO NATIONAL INTEREST (MAVNI) RECRUITMENT PILOT PROGRAM (2015), https://www.defense.gov/news/MAVNI-Fact-Sheet.pdf [https://perma.cc/2GR2-3PB2]; Margaret D. Stock, *Frequently Asked Questions About the Army's New Non-Citizen Recruiting Program for Foreign Health Care Professionals*, BINGHAMTON UNIV., http://www.binghamton.edu/isss/employment/USArmy.pdf [https://perma.cc/RX4P-UZAA] (last visited Feb. 16, 2017).

65. *Military Accessions Vital to the National Interest (MAVNI)*, CITIZENPATH https://citizenpath.com/mavni-program [https://perma.cc/N3DN-6DZH] (last visited Apr. 19, 2017).

66. Although MAVNI has been extended through 2017, it is currently suspended. *FY2017 MAVNI Program Updates*, MAVNI CTR., https://mavnicenter.com/topic/48/fy2017-mavni-program-updates [https://perma.cc/9PED-35XK] (last visited Apr. 19, 2017).

67. Barry, *supra* note 57. For example, four percent of foreign-born recruits versus 8.2 percent of U.S. citizen recruits drop out after three months of service. *Id.* In addition, only 18.2 percent of foreign-born recruits, as opposed to 31.9 percent of U.S. citizen recruits, drop out after forty-eight months of service. *Id.*

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ble . . . some 8, 9, or 10 percent fewer immigrants wash out of our initial training programs than do those who are currently citizens."[68] Foreign-born soldiers are also recognized for their outstanding performance on the battlefield.[69] The Congressional Medal of Honor award—one of the highest military decorations—is awarded to twenty percent of all foreign-born service members, which illustrates the great lengths they go to in upholding their military duties and serving the United States.[70] Today, they serve in all branches of the armed forces and are a vital component of the Department of Defense.[71]

B. *The Road Toward the Immigration and Nationality Act of June 27, 1952*

The U.S. Constitution expressly grants Congress the power to "establish a uniform Rule of Naturalization."[72] On May 26, 1790, Congress first exercised that power by passing the Naturalization Act.[73] The Act set forth a two-year residency requirement and was limited to "free white person[s]."[74] Further, non-citizens were required to demonstrate they had "good character," take an oath of affirmation prescribed by law, and vow to support the U.S. Constitution.[75] Within five years, Congress increased the residency requirement from two to five years and added the term "moral" to the good character requirement.[76]

In 1802, Congress repealed the previous naturalization statutes and adopted a revised uniform rule of naturalization.[77] The 1802 Act allowed a "free white person" who was not a U.S. citizen to attain citizenship if they declared their intention of becoming a U.S. citizen at least three years before being admitted and resided within the United States for at

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68. *Immigrants in the Military*, *supra* note 60.

69. Barry, *supra* note 57.

70. *Id.* Marine Sergeant Rafael Peralta enlisted in the U.S. Armed Forces after becoming a LPR. *Id.* He saved the lives of six fellow Marines by grabbing a grenade that was thrown at them and pressing it to his body. *Id.* In a letter to his younger brother, Peralta expressed his motivations for serving in the armed forces and his love for the United States. *Id.* Peralta stated, "I'm proud to be a Marine, a U.S. Marine, and to defend and protect the freedom and Constitution of America. You should be proud of being an American citizen." *Id.*

71. Stock, *supra* note 58.

72. U.S. CONST. art. 1, § 8, cl. 4.

73. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795).

74. *Id.*

75. *Id.*

76. *See id.* ("The court admitting such alien, shall be satisfied that he . . . has behaved as a man of good moral character[.]"); Darlene C. Goring, *In Service to America: Naturalization of Undocumented Alien Veterans*, 31 SETON HALL L. REV. 400, 409 (2000) (discussing the significance of these changes to the restrictions of naturalization in the 1795 Act).

77. Act of Apr. 14, 1802, ch. 28, § 1, 2 Stat. 153; Goring, *supra* note 76, at 410.

least five years.[78] With regard to the non-citizen's five-year U.S. residency, the 1802 Act also required them to show they were a person of "good moral character" during that time and required all applicants to swear an oath of allegiance to the United States.[79]

After Congress passed the 1802 Act, the United States' immigrant population grew dramatically.[80] Such growth continued throughout the 1800s and, along with the Civil War, led Congress to adopt the Alien Soldiers Naturalization Act of 1862 (ASNA).[81] ASNA encouraged foreigners to join the military during the Civil War by offering expedited naturalization and allowed military service men to naturalize without any previous declaration of their intent to become a U.S. citizen.[82] Although ASNA reduced the five-year residency requirement to one year, it still required proof of "good moral character" and an honorable discharge.[83] Additionally, ASNA limited its application to non-U.S. citizens who served in the U.S. Army.[84] However, Congress subsequently extended naturalization to U.S. Navy and Marine Corps.[85]

The outbreak of World War I (WWI) increased the need for soldiers in the U.S. Armed Forces.[86] In response, Congress required all males who resided in the United States—including non-citizens—to enlist in the military.[87] To ensure these veterans naturalized, Congress adopted the Act of May 26, 1926.[88] The 1926 Act offered foreign-born veterans two additional years from the date of its enactment to naturalize.[89] However, after WWI, Congress imposed heightened morality requirements on foreign-born soldiers.[90] Previously, foreign-born soldiers were required to demonstrate "good moral character" for a period of two years preced-

78. Act of Apr. 14, 1802, ch. 28, § 1, 2 Stat. 153. This five-year residency requirement has been carried on to the current naturalization requirements in INA § 316(a). Goring, *supra* note 76, at 410.

79. Act of Apr. 14, 1802, ch. 28, § 1, 2 Stat. 153, 154.

80. Goring, *supra* note 76, at 410.

81. Act of July 17, 1862, ch. 201, § 21, 12 Stat. 597.

82. *Id.*

83. *Id.*

84. *Id.*; *see also* In re Bailey, 2 F. Cas. 360, 362 (S.D.N.Y. 1842) (denying a U.S. Marine Corps veteran's petition for naturalization on the ground that marines and seamen were not considered a part of the U.S. Army).

85. Act of July 26, 1894, ch. 165, § 1, 28 Stat. 123, 124 (amended by Act of Mar. 15, 1948, 62 Stat. 80).

86. Goring, *supra* note 76, at 414.

87. *Id.*

88. Act of May 26, 1926, Pub. L. No. 69-294, ch. 398, § 7, 44 Stat. 654; Goring, *supra* note 76, at 415.

89. Act of May 26, 1926, Pub. L. No. 69-294, ch. 398, § 7, 44 Stat. 654, 655; Hartsfield, *supra* note 47, at 840.

90. Act of June 21, 1939, Pub. L. No. 76-146, ch. 234, § 2, 53 Stat. 851.

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ing the filing of the naturalization petition.[91] The extension provisions increased this requirement to five years.[92]

After revising the immigration and naturalization statutes, Congress adopted the Nationality Act of 1940.[93] The 1940 Act exempted veterans from the five-year residency requirement if they filed their petition while still serving or six months after their service ended.[94] Nevertheless, foreign-born soldiers were still required to show "good moral character" and pledge allegiance to the U.S. Constitution.[95] In 1952, Congress repealed the Nationality Act of 1940 and enacted the Immigration and Nationality Act of 1952 (INA of 1952).[96] By removing all racial prohibitions,[97] the INA of 1952 broadened the class of persons eligible for military naturalization.[98] The INA of 1952 also provided discretionary relief for non-citizens who were facing deportation through judicial recommendation against deportation (JRAD).[99] Under JRAD, if the court sentencing a non-citizen for a crime involving moral turpitude—at the time of sentencing, or within thirty days thereafter—made a recommendation to the Attorney General that such non-citizen shall not be deported, that recommendation was binding and those in charge of the deportation process, including the Attorney General, could not use that conviction as a basis for deportation.[100]

Today, the INA contains the original provisions in the INA of 1952 along with the amendments set forth in the INA of 1965, both of which have been codified in Title 8 of the U.S. Code (U.S.C).[101] There are currently two paths to naturalization for military service members under the INA: sections 328 and 329.[102] Each of them varies with regard to whether

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91. Act of May 25, 1932, Pub. L. No. 72-149, § 1, 47 Stat. 165 (amended by Act of June 21, 1939, 53 Stat. 851).

92. Act of June 21, 1939, Pub. L. No. 76-146, ch. 234, § 1, 53 Stat. 85.

93. Nationality Act of 1940, Pub. L. No. 76-853, § 324, 54 Stat. 1137, 1149; Goring, *supra* note 76, at 418.

94. Nationality Act of 1940, Pub. L. No. 76-853, § 324, 54 Stat. 1137, 1149.

95. *Id.* at 1142; Hartsfield, *supra* note 47, at 840.

96. INA of 1952, Pub. L. No. 82-414, ch. 477, §§ 101–407, 66 Stat. 163.

97. Hartsfield, *supra* note 47, at 840.

98. Goring, *supra* note 76, at 424.

99. INA of 1952, Pub. L. No. 82-414, ch. 5, § 241(b)(2), 66 Stat. 204, 208.

100. Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986) (citing 8 U.S.C. 1251(b)).

101. INA of 1952, Pub. L. No. 82-414, ch. 477, §§ 101–407, 66 Stat. 163, *amended by* INA of 1965, Pub. L. No. 89-236, §§ 1–23, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.). For the purposes of this Comment, the author refers to the current version simply as the "INA."

102. INA § 328, 8 U.S.C. § 1439 (2012); INA § 329, 8 U.S.C. § 1440 (2012); Goring, *supra* note 76, at 424; *see also* Hartsfield, *supra* note 47, at 841 (explaining the naturalization process under both provisions).

the non-U.S. military service member served during peacetime or wartime.[103]

C. *Military Naturalization During Peacetime: INA Section 328*

Under section 328, a person who has served honorably in the U.S. Armed Forces for an aggregate period of at least one year may apply for naturalization.[104] To qualify, and in addition to general requirements such as showing they are an LPR of at least eighteen years of age,[105] an applicant must establish the following: (1) they served honorably in the U.S. Armed Forces for at least one year;[106] (2) they demonstrated good moral character for at least five years prior to filing the application;[107] and (3) they "have an attachment to the principles of the U.S. Constitution and be well disposed to the good order and happiness of the U.S. during all relevant periods under the law."[108]

Additionally, under section 328, military naturalization applicants "[are] exempt from the residence and physical presence requirements [normally required] for naturalization."[109] Moreover, for these applicants, showing they served honorably in the armed forces will generally satisfy the "good moral character" requirement.[110]

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103. Hartsfield, *supra* note 47, at 841.

104. INA § 328, 8 U.S.C. § 1439 (2012); *One Year of Military Service During Peacetime (INA 328)*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartI-Chapter2.html [https://perma.cc/H7ZR-VVAT] (last updated Dec. 21, 2016) [hereinafter *Service During Peacetime*].

105. *See* INA § 328(b), 8 U.S.C. § 1439(b) (2012) (stating that military naturalization applicants must fulfill the normal requirements for naturalization, with some exceptions).

106. "Honorable service" means "only military service which is designated as honorable service by the executive department under which the applicant performed that military service. Any service that is designated to be other than honorable will not qualify under this section." 8 C.F.R. § 328.1 (2016). U.S. citizenship may be revoked if the military service member "separates from the military under 'other than honorable conditions' before completing five years of honorable service . . . ." *Naturalization*, *supra* note 27. "Service" means, "(1) Active or reserve service in the United States Army, United States Navy, United States Marines, United States Air Force, or United States Coast Guard; or (2) Service in a National Guard unit during such time as the unit is Federally recognized as a reserve component of the Armed Forces of the United States." *Id.*

107. INA § 328(c), 8 U.S.C. § 1439(c) (2012); *Service During Peacetime*, *supra* note 104.

108. INA § 328(e), 8 U.S.C. § 1439(e) (2012); *Service During Peacetime*, *supra* note 104 (emphasis added).

109. INA § 328(a), 8 U.S.C. § 1439(a) (2012); *Service During Peacetime*, *supra* note 104; *see also* 8 C.F.R. § 328.2(e)(1) (2016) (listing the residency requirements for naturalization applicants).

110. *See, e.g.*, INA § 328(e), 8 U.S.C. § 1439(e) (2012) ("Any such period or periods of service under honorable conditions, and good moral character . . . shall be proved by duly authenticated copies of the records of the executive departments having custody of the

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However, an applicant who files after six months from the termination of their military service must comply with the regular naturalization residency requirements—that is, they must show at least five years of continuous residence in the United States.[111] Additionally, an applicant must establish physical presence in the United States for at least thirty months out of the five years preceding the date of the application.[112] Nevertheless, honorable service within the five years preceding the date of the application counts towards the residency and physical presence requirements.[113] If an applicant's qualifying service was not continuous, they must prove they satisfied the good moral character requirement during the period of time not in the service within the five years preceding the date of the application.[114]

D. *Military Naturalization During Hostilities: INA Section 329*

Under section 329, a non-citizen who served honorably in the Selected Reserve of the Ready Reserve or in an active-duty status[115] for *any* period of time during specifically designated periods of hostilities[116] may be eligible to naturalize if (1) at the time of enlistment, reenlistment, extension of enlistment, or induction such person was in the United States, regardless of whether such person was a LPR, or (2) at any time subsequent to enlistment or induction such person became a LPR.[117]

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records of such service, and such authenticated copies of records shall be accepted in lieu of compliance with the provisions of section 1427(a) of this title."); *see also* 8 C.F.R. § 328.2(e)(1) (2016) ("An applicant is presumed to satisfy the [good moral character] requirements during periods of honorable service . . . ").

111. INA § 328(d), 8 U.S.C. § 1439(d) (2012).

112. *Service During Peacetime*, *supra* note 104.

113. INA § 328(d), 8 U.S.C. § 1439(d) (2012); *Service During Peacetime*, *supra* note 104.

114. INA § 328(c), 8 U.S.C. § 1439(c) (2012); VAKILI ET AL., *supra* note 3, at 21.

115. *See* 8 C.F.R. § 329.1 (2016) (defining active duty status as service in the Army, Navy, Marines, Air Force, Coast Guard, or a National Guard unit that is called for active duty).

116. The INA and Presidential Executive Orders designated the following as periods of hostilities: World War I (Apr. 6, 1917 - Nov. 11, 1918); World War II (Sept. 1, 1939 - Dec. 31, 1946); Korean Conflict (June 25, 1950 - July 1, 1955); Vietnam Hostilities (Feb. 28, 1961 - Oct. 15, 1978); Persian Gulf Conflict (Aug. 2, 1990 - Apr. 11, 1991); War on Terrorism (Sept. 11, 2001 - Present). INA § 329, 8 U.S.C. § 1440 (2012); U.S. CITIZENSHIP AND IMMIGR. SERVS., *Military Service During Hostilities (INA 329)*, https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartI-Chapter3.html [https://perma.cc/3H7H-Z57U] (last updated Dec. 21, 2016) [hereinafter *Service During Hostilities*]. This current designation period of hostility for INA § 329 will continue to stand until terminated by the next executive order. *Id.*

117. INA § 329(a), 8 U.S.C. § 1440(a) (2012); *Service During Hostilities*, *supra* note 116.

Section 329 does not contain age or physical presence requirements.[118] Unlike section 328, an applicant does not need to be an LPR or file the application within six months of leaving service; even one day of qualifying service will establish eligibility.[119] Additionally, while section 329 does not explicitly require an applicant to demonstrate "good moral character,"[120] agency regulations have interpreted the statute as requiring applicants to demonstrate "good moral character" for at least one year prior to filing the application until the time of their naturalization.[121] Such regulation is a main reason why many non-U.S. citizen military service members have been deported.[122] In 1990, Congress passed legislation amending the INA that rendered the commission of an "aggravated felony" a lifetime bar to demonstrating "good moral character," thereby resulting in the deportation of many non-U.S. citizen veterans and LPRs.[123] Notwithstanding the reasons a non-citizen service member may have for committing the crime, such as PTSD resulting from their military service or rehabilitation, a service member who honorably served during wartime, but who thereafter commits an aggravated felony, will never be eligible to become a U.S. citizen.[124]

III. 1988: CREATION OF THE AGGRAVATED FELONY

Prior to 1988, a non-citizen veteran was far less likely to be deported than after the "aggravated felony" provision was promulgated.[125] At that time, a non-citizen was subject to deportation if they committed a crime involving moral turpitude within five years after the date of entry for which they received a sentence of at least one year, or if they committed two crimes involving moral turpitude not arising out of a single scheme.[126] A non-citizen was also subject to deportation for crimes involving narcotics[127] or for being convicted of unlawful possession of an

118. INA § 329(b)(1)–(2), 8 U.S.C. § 1440(b)(1)–(2) (2012).

119. *Service During Hostilities*, *supra* note 116.

120. INA § 329(a), 8 U.S.C. § 1440(a) (2012).

121. 8 C.F.R. § 329.2(d) (2016); VAKILI ET AL., *supra* note 3, at 22.

122. VAKILI ET AL., *supra* note 3, at 22.

123. Immigration Act of 1990, Pub. L. No. 101-649, § 509, 104 Stat. 4978, 5051 (codified as amended at 8 U.S.C. §1101(f)(8) (2012)); *see also* 8 C.F.R. § 316.10(b)(1)(ii) (2016) (finding lack of "good moral character" if applicant was convicted of an aggravated felony on or after Nov. 29, 1990).

124. 8 C.F.R. § 316.10(b)(1)(ii) (2016) (making it a lifetime bar to citizenship if one lacks moral character).

125. Shagin, *supra* note 39, at 263.

126. 8 U.S.C. § 1251(a)(4) (1952) (codified as amended at 8 U.S.C. § 1227 (2012)); Shagin, *supra* note 39, at 264.

127. 8 U.S.C. § 1251(a)(11) (1952) (codified as amended at 8 U.S.C. § 1227 (2012)); Shagin, *supra* note 39, at 264.

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automatic weapon.[128] However, there were several avenues of relief for non-citizens facing deportation.[129] To properly understand how immigration law evolved during the 1990s, it is important to note the type of relief available for non-citizens prior to 1988.

As mentioned in Part II, JRAD was available for non-citizens facing deportation.[130] Suspension of deportation was also an available form of relief.[131] To qualify for suspension of deportation, an applicant must have been physically present in the United States for seven years preceding the date of application, establish good moral character, and demonstrate that deportation would result in extreme hardship to the non-citizens spouse, parent, or child who is U.S. citizen or an LPR.[132] Another form of relief was the "212(c) waiver," which allowed LPRs, who continuously resided in the United States to retain their status if they could show "countervailing equities" to the immigration judge.[133]

In 1988, Congress passed the Anti-Drug Abuse Act (ADAA) and created a new class of deportable criminal offenses for non-citizens called "aggravated felonies."[134] The ADAA amended section 101(a) of the INA by adding section 101(a)(43), which defined an aggravated felony to include *only* crimes of murder, narcotics trafficking, or any illicit trafficking of firearms.[135] The ADAA required mandatory detention of non-citizens convicted of aggravated felonies after completion of their criminal sentences.[136] The ADAA also disqualified non-citizens convicted of aggravated felonies from eligibility for voluntary departure.[137] These

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128. 8 U.S.C. § 1251(a)(14) (1952) (codified as amended at 8 U.S.C. § 1227) (2012)); Shagin, *supra* note 39, at 264.

129. VAKILI ET AL., *supra* note 3, at 32.

130. *See* Hartsfield, *supra* note 47, at 841 (indicating the INA provided relief for veteran deportees through JRAD).

131. *See* 8 C.F.R. § 240.65(a) (2016) (allowing applicability to noncitizens eligible under the former section in effect prior to April 1, 1997).

132. *Id.* § 240.65(c).

133. T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 726–27 (West Academic Publishing 8th ed. 2016).

134. Shagin, *supra* note 39, at 264; NORTON TOOBY & JOSEPH JUSTIN ROLLIN, EVOLUTION OF THE DEFINITION OF AGGRAVATED FELONY (APPENDIX D) 1 (2006), http://nortontooby.com/pdf/FreeChecklists/EvoAggFelonyStatute.pdf [https://perma.cc/275R-A4QK].

135. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7341–42, 102 Stat. 4181, 4469 (codified as amended at 8 U.S.C. § 1101(a) (2012)); TOOBY & ROLLIN, *supra* note 134 (emphasis added).

136. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343, 102 Stat. 4181, 4470 (codified as amended at 8 U.S.C. § 1252(a) (2012)).

137. *Id.*

amendments applied to any non-citizen convicted of an aggravated felony on or after November 18, 1988.[138]

IV. IMMIGRATION ACT OF 1990 (IMMACT)

A. *The Immediate Impact of IMMACT*

Congress enacted the Immigration Act of 1990 (IMMACT) to increase the number of immigrants allowed to enter the United States each year.[139] In fact, while IMMACT set the annual ceiling for family-sponsored visas at 480,000, it actually allowed more people to be admitted because it did not place a cap on spouses and children of U.S. citizens.[140] As such, Congress intended to promote family reunification by passing IMMACT; indeed, it "favored a form of immigration that valued family, skills, and humanitarian interests."[141] Despite how family-friendly IMMACT seemed, it expanded the grounds of deportation and limited the relief available to non-citizens in deportation proceedings.[142]

IMMACT also amended the definition of "aggravated felony" under section 101(a)(43) of the INA to include money laundering, any crime of violence for which the imprisonment imposed is at least five years, and any violation of foreign law for which the term of imprisonment was more than fifteen years.[143] Moreover, the mandatory detention provision for aggravated felons under ADAA was also amended by IMMACT.[144] The new provision allowed an LPR convicted of an aggravated felony to be eligible for discretionary release on bond if determined not to be a threat to the community or a flight risk.[145]

Before 1990, Congress provided sentencing judges with a mechanism to make JRADs during the sentencing stage or thirty days thereafter.[146] Once a sentencing judge made a JRAD, their recommendation was considered binding on federal executive officials.[147] As such, JRADs served to provide judicial relief against deportation "when deportation would

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138. *Id.*

139. Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (codified as amended at 8 U.S.C. § 1101(a) (2012)); *The Immigration Act of 1990*, LAWS, http://immigration.laws.com/immigration-act-of-1990 [https://perma.cc/PY7Z-ZP2S] (last visited Feb. 20, 2017).

140. ALEINIKOFF ET AL., *supra* note 133, at 26.

141. *Id.* at 26–27.

142. *Id.* at 27.

143. Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (codified as amended at 8 U.S.C. § 1101(a) (2012)).

144. *Id.* § 504.

145. *Id.*

146. Jason A. Cade, *Return of the JRAD*, 90 N.Y.U. L. REV. ONLINE 36, 38 (2015).

147. Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986); Cade, *supra* note 146.

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constitute an unduly harsh penalty for the crimes committed."[148] As the Supreme Court stated, "deportation is a drastic measure and at times equivalent of banishment or exile."[149] Thus, JRAD was a powerful and efficient tool for sentencing judges to make knowledgeable recommendations against deportation based on the nature of the crime and the individualized circumstances of the defendant.[150] Yet, despite these positive factors, IMMACT repealed this judicial authority and eliminated JRADs.[151] To add insult to injury, this amendment retroactively applied to convictions entered before, on, or after November 29, 1990.[152]

B. *The Definition of "Good Moral Character"*

The "good moral character" requirement for naturalization has existed since Congress passed the first Naturalization Act on March 26, 1790.[153] Finding a lack of "good moral character" may occur (1) as a result of a statutory bar that precludes the applicant from establishing good moral character[154] or (2) through a discretionary finding of lack of good moral character by an adjudicating officer.[155] Interestingly, section 101(f) of the INA, which lays out the "good moral character" requirements, does not positively define what constitutes "good moral character;" rather, it lists certain characteristics that will regard a person as *lacking* "good moral character."[156] For example, a person is found to lack "good moral character" if they were a habitual drunkard,[157] obtained income through illegal gambling,[158] gave false testimony for the purpose of obtaining

148. Janvier, 793 F.2d at 453.

149. *Id.* at 455.

150. Cade, *supra* note 146.

151. *Id.* at 38–39.

152. Immigration Act of 1990, Pub. L. No. 101-649, § 505(b), 104 Stat. 4978, 5050 (codified as amended at 8 U.S.C. § 1251(b) (2012)).

153. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795).

154. 8 C.F.R. § 316.10(b)(1)(ii) (2016).

155. *See Citizenship & Naturalization, Part F—Good Moral Character*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartF-Chapter1.html [https://perma.cc/URY5-3K49] (last updated Jan. 5, 2017) (providing that an immigration officer's assessment includes looking through the "applicant's record; statements provided in the naturalization application; and oral testimony provided during the interview").

156. INA § 101(f)(1)–(9), 8 U.S.C. § 1101(f)(1)–(9) (2012); Shagin, *supra* note 39, at 255 (emphasis added).

157. INA § 101(f)(1), 8 U.S.C. § 1101(f)(1) (2012).

158. *Id.* § 101(f)(4), 8 U.S.C. § 1101(f)(4).

benefits,[159] committed a crime involving moral turpitude,[160] or were convicted of an aggravated felony.[161]

Conviction of an aggravated felony was not always included in section 101(f)'s definition of a lack "good moral character."[162] However, with the passage of IMMACT, a person who is convicted of an aggravated felony is *permanently* barred from establishing good moral character and therefore prohibited from seeking naturalization.[163] Furthermore, as explained in Part II, naturalization under section 328 of the INA—military service during peacetime—requires applicants to demonstrate "good moral character."[164] Additionally, although naturalization under section 329 of the INA—military service during hostilities—does not explicitly require a showing of "good moral character," it has been interpreted to require a showing of "good moral character" for at least one year prior to filing the naturalization application.[165] After IMMACT, a non-citizen who would otherwise be eligible to naturalize under either section 328 or 329 of the INA would *never* be able to become a U.S. citizen if they were convicted of an aggravated felony.[166]

By effectively establishing such lifetime ban, a non-U.S. citizen military service member who is convicted of an aggravated felony will be foreclosed from demonstrating they have been rehabilitated or are now a person of good moral character.[167] Consequently, IMMACT has created an unduly harsh bar to naturalization for many military service members who have honorably served our country.[168] Indeed, the possibility of obtaining citizenship is miniscule, if not impossible, unless applicants are

159. *Id.* § 101(f)(6), 8 U.S.C. § 1101(f)(6).

160. *Id.* § 101(f)(3), 8 U.S.C. § 1101(f)(3).

161. *Id.* § 101(f)(8), 8 U.S.C. § 1101(f)(8).

162. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 509, 104 Stat. 4978, 5051 (codified as amended at 8 U.S.C. § 1101(f)(8) (2012)) (amending the definition of "good moral character" to exclude people convicted of an aggravated felony).

163. *Id.*; *see also* 8 C.F.R. § 316.10(b)(1)(ii) (2016) (establishing a lifetime bar to "good moral character" if convicted of an aggravated felony).

164. *Service During Peacetime*, *supra* note 104. Recall that, if an applicant under section 328 files their naturalization application during their military service or within six months thereafter, a showing that they served honorably will generally satisfy the "good moral character" requirement. INA § 328(e), 8 U.S.C. § 1439(e) (2012).

165. *See* VAKILI ET AL., *supra* note 3, at 22 (noting court decisions that impose a one-year requirement to good moral character under section 329).

166. Adriane Meneses, Comment, *The Deportation of Lawful Permanent Residents For Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment*, 14 SCHOLAR 767, 796 (2012).

167. VAKILI ET AL., *supra* note 3, at 33.

168. *Id.*

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granted a waiver.[169] As will be explained below, the only waiver currently available for certain aggravated felons is the 212(c) waiver.[170] However, the applicant's conviction must have occurred on or before April 1, 1997.[171] Otherwise, non-citizens are ineligible for any type of relief and are permanently barred from attaining citizenship.[172]

C. *Limitation of 212(c) Waiver for Returning LPRs Convicted of Aggravated Felonies*

The first version of the 212(c) waiver traces back to the Immigration Act of 1917.[173] That Act authorized discretionary relief from exclusion at the border for certain LPRs.[174] The INA codified this discretionary relief in section 212(c).[175] The section provided as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provision of subsection (a) [describing classes of excludable aliens].[176]

By its terms, section 212(c) only applied to returning LPRs who left the country and were found excludable at the border for being convicted of a crime; it did not apply to LPRs in deportation proceedings who remained in the country.[177] However, in *Francis v. INS*,[178] the Second Circuit extended the applicability of 212(c) to LPRs who were in deportation proceedings after being convicted of a crime that would render them

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169. *See* INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996) (making an aggravated felon eligible for 212(c) relief, unless he or she served a term of imprisonment of five years or more); *see generally* Immigration Act of 1990, Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 511(a) (codified as amended at 8 U.S.C. § 1882 (2012)) (discussing section 212(c)).

170. *See* INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996) (excluding from eligibility only non-citizens convicted of one or more aggravated felonies for which the sentence served was an aggregate of five years or more).

171. *Id.*; ALEINIKOFF ET AL., *supra* note 133.

172. *See, e.g.*, ALEINIKOFF ET AL., *supra* note 133, at 681 (stating aggravated felons are ineligible for asylum under INA §§ 208(b)(2)(B)(i), cancellation of removal under INA § 240A(a)(3), or voluntary departure under INA § 240B(a)(1), (b)(1)(C)).

173. Sarah Koteen Barr, *C is for Confusion: The Tortuous Path of Section 212(c) Relief in the Deportation Context*, 12 LEWIS & CLARK L. REV. 725, 729 (2008).

174. *Id.*

175. *Id.* at 730.

176. *Id.*

177. *Id.*

178. 532 F.2d 268 (2d Cir. 1976).

excludable, without ever leaving the country.[179] In 1990, IMMACT limited the reach of 212(c) by eliminating eligibility to non-citizens who had been convicted of an aggravated felony and served a term of imprisonment of at least five years.[180]

V. IMMIGRATION AND NATIONALITY TECHNICAL CORRECTIONS ACT OF 1994 AND 1996 IMMIGRATION LAWS

In 1994, Congress once again amended the definition of "aggravated felony" with the Immigration and Nationality Technical Corrections Act.[181] The previous definition was amended to add the following offenses to the aggravated felony list:

- Trafficking in certain firearms, destructive devices or explosive materials;
- Theft and burglary offenses for which the term of imprisonment is at least five years (regardless of whether any of the sentence was suspended);
- Certain ransom offenses;
- Certain offenses related to child pornography or running a prostitution business;
- Certain offenses related to Racketeer Influenced and Corrupt Organizations Act (RICO);
- Income tax evasion in which revenue loss to the government is in excess of $ 200,000; and
- Certain offenses related to peonage, slavery, involuntary servitude, espionage, sabotage or national security.[182]

Two years later, Congress enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[183] Both laws took effect in 1996 after political pressure prompted Congress to amend existing immigration laws.[184] As previously stated, prior to the 1990s, only a narrow class of deportable offenses existed.[185] After the enactment of AEDPA

179. *Id.* at 273.

180. Immigration Act of 1990, Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052 (codified as amended at 8 U.S.C. § 1882(c) (repealed 1996)). IMMACT applied to convictions occurring after November 29, 1990. *Id.*

181. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320 (codified at 8 U.S.C. § 1101(a)(43) (2012)).

182. *Id.*; TOOBY & ROLLIN, *supra* note 134, at 4.

183. TOOBY & ROLLIN, *supra* note 134, at 4–5.

184. ALEINIKOFF ET AL., *supra* note 133, at 27–28.

185. Meneses, *supra* note 166, at 778.

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and IIRIRA, the criminal grounds for which a non-citizen could be denied entry and removed from the country expanded enormously.[186]

A. *Events That Led to 1996 Immigration Reform*

Three events encouraged Congress to implement new immigration laws: the 1993 bombings of the World Trade Center, California's Proposition 187, and the 1995 Oklahoma City bombings.

The 1993 World Trade Center bombing occurred on February 26, 1993, when terrorists ignited a homemade bomb underneath the World Trade Center that caused two explosions, killing six people and injuring more than a thousand others.[187]

In 1994, federal efforts to control the number of undocumented immigrants in California and other states had proven unsuccessful.[188] At the time, California had roughly 1.6 million undocumented non-citizens, to which activists responded by introducing Proposition 187.[189] The preamble to Proposition 187 expressed California citizens' concerns over the hardship caused by the presence of undocumented non-citizens in the state.[190] In fact, California claimed personal injuries and damages supposedly caused by the criminal conduct of undocumented non-citizens.[191] Clearly Proposition 187 was "designed to discourage illegal immigration into California by denying education, health, and social services to people who did not have legal immigrant status."[192] Proposition 187's supporters felt they were sending a message to Congress to gain control over illegal immigration.[193]

On April 19, 1995, a bomb exploded outside a federal building in Oklahoma City.[194] The explosion blew off the building's north wall, destroyed more than three hundred surrounding buildings, and killed one-hundred and sixty-eight people, including nineteen children.[195] Until the

186. *Id.*

187. Jesse Greenspan, *Remembering the 1993 World Trade Center Bombing*, HISTORY (Feb. 26, 2013), http://www.history.com/news/remembering-the-1993-world-trade-center-bombing [https://perma.cc/JHC9-R4KE]. Subsequent arrests were made of four individuals who were convicted by a federal jury and sentenced to life in prison. *Id.*

188. *The Battle Over Proposition 187*, CONST. RTS. FOUND. (1998), http://www.crf-usa.org/bill-of-rights-in-action/bria-14-1c-the-battle-over-proposition-187 [https://perma.cc/R7VV-NBZT] [hereinafter *Proposition 187*].

189. *Id.*; ALEINIKOFF ET AL., *supra* note 133, at 27.

190. ALEINIKOFF ET AL., *supra* note 133, at 27.

191. *Id.*

192. *Proposition 187*, *supra* note 188.

193. ALEINIKOFF ET AL., *supra* note 133, at 27.

194. *Oklahoma City Bombings,* HISTORY, http://www.history.com/topics/oklahoma-city-bombing [https://perma.cc/2ZKB-GT84] (last visited Feb. 13, 2017).

195. *Id.*

attacks of September 11, 2001, the Oklahoma City bombing was the worst terrorist attack in the United States.[196]

In 1996, Congress responded to these events by enacting the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Anti-Terrorism and Effective Death Penalty Act (AEDPA).[197] To be sure, both IIRIRA and AEDPA were fueled by "a perceived connection between terrorists and non-citizens convicted of crimes."[198] Members of Congress made such connections explicitly or implicitly to immigrants involved in a crime, notwithstanding how minor the offense or how distinguishable the offense was from terrorism.[199]

B. *AEDPA & IIRIRA*

AEDPA and IIRIRA "weakened the due process rights of [LPRs].[200] For example, AEDPA "redefined crimes of 'moral turpitude' to include those *punishable* by imprisonment for one year or more, rather than including crimes for which the alien is *actually* sentenced for a year or more."[201] AEDPA also expanded the list of crimes that could be considered aggravated felonies by including seventeen additional types of crimes.[202]

Five months after AEDPA, the enactment of IIRIRA added four more types of crimes to the definition of aggravated felonies[203] and reduced the "term of imprisonment"[204] from five years to one year for violent

196. *Id.*

197. ALEINIKOFF ET AL., *supra* note 133, at 28.

198. *Forced Apart*, HUM. RTS. WATCH, (July 16, 2007), https://www.hrw.org/report/2007/07/16/forced-apart/families-separated-and-immigrants-harmed-united-states-deportation [https://perma.cc/6DJF-76K5] [hereinafter *Forced Apart*].

199. *Id.* For example, Representative Bill McCollum said, "[C]riminal alien provisions in this bill [AEDPA] . . . are also important to the terrorist issue, because oftentimes we find that terrorist or would-be terrorists are criminal aliens and were are not deporting them in a proper fashion . . . . The sooner we get them out of the country, the better procedures we have for that, the less likely we are to have that element in this country either create the actual acts of terrorism or directing them in some manner. We need to kick these people out of the country[.]" *Id.*

200. ALEINIKOFF ET AL., *supra* note 133, at 28.

201. *Id.* (emphasis added).

202. *Id.*; *Forced Apart*, *supra* note 198.

203. *Forced Apart*, *supra* note 198.

204. "Term of imprisonment" means that the crime carries a term of imprisonment of one year; it does not mean that the defendant must have actually served one year. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2012).

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crimes.[205] After Congress enacted these laws, the list of aggravated felonies expanded greatly.[206]

According to the ACLU, most deported veterans have been removed for committing crimes that were not considered aggravated felonies prior to the 1990s and, of those, many would have been otherwise eligible for a form of relief.[207] For example, immigration officials deported Marine Private Marco Antonio Chavez Medina for a 1988 animal cruelty conviction that carried a sentence of two years, which they deemed a "crime of violence."[208] Prior to 1996, an offense was considered a crime of violence only if it carried a sentence of five years, but IIRIRA reduced the sentence to one year, thus rendering Medina deportable.[209] Before IIRIRA repealed the 212(c) waiver in its entirety, Medina would have been eligible for some form of relief.[210]

It was not until 2001 that the Supreme Court held 212(c) relief would remain available for non-citizens who pled guilty to deportable offenses committed prior to April 1, 1997 and only if they "would have been eligible for section 212(c) relief at the time of their plea under the law then in effect."[211] Thus, Medina might have been eligible for 212(c) relief after 2001.[212]

IIRIRA also replaced "suspension of removal" with "cancellation of removal."[213] Cancellation of removal allows non-citizens to regularize their status as LPRs, despite their removability and is available to non-

205. *Forced Apart*, *supra* note 198.

206. Under AEDPRA and IIRIRA, the list of aggravated felonies expanded to include the following: murder, rape, or sexual abuse of a minor; illicit trafficking in a controlled substance; illicit trafficking of firearms or destructive devices; crimes of violence or a burglary offense; an offense that relates to the owning, controlling, managing, or supervising of a prostitution business; an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $ 10,000; an offense committed by an alien who was previously deported on the basis of a conviction for an offense; an offense relating to commercial bribery, counterfeiting, or forgery; an offense relating to obstruction of justice, perjury or subordination of perjury; an offense relating to a failure to appear before a court pursuant to a court order. INA § 101(a)(43)(A)–(U), 8 U.S.C. § 1101(a)(43)(A)–(U) (2012).

207. VAKILI ET AL., *supra* note 3, at 36.

208. Id.

209. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321(a), 110 Stat. 3009-546, 627 (codified at 8 U.S.C. § 1226 (2012)) (striking "is at least 5 years" each place it appears and inserting "at least one year").

210. *See id.* § 304 (codified at 8 U.S.C. § 1224 (2012)) (repealing § 212(c), 8 U.S.C. § 1182(c)).

211. INS v. St. Cyr, 533 U.S. 289, 326 (2001).

212. *See* INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996) (listing an aggravated felon is eligible, unless he or she served an actual imprisonment term of five years or more); VAKILI ET AL., *supra* note 3, at 36 (introducing the story of Private Medina).

213. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308, 110 Stat. 3009-546, 620 (codified at 8 U.S.C. § 1226 (2012)).

LPRs as well.[214] However, a non-citizen who is convicted of an aggravated felony is ineligible for relief under cancellation of removal.[215] Thus, a non-citizen, including a veteran, convicted of an aggravated felony has no form of relief unless their conviction occurred prior to April 1, 1997.[216] In that case, a non-citizen would be eligible for 212(c) relief.[217]

Lastly, IIRIRA mandated detention of non-citizens convicted of an aggravated felony.[218] Under IMMACT, an LPR convicted of an aggravated felony was eligible for discretionary release on bond if determined not to be a threat to the community or a flight risk.[219] But today, if a person is convicted of an aggravated felony, they will be transported to a detention center after serving their criminal sentence[220] and will not be eligible for release on bond.[221] A non-citizen in this situation not only pays the price to society by serving their criminal sentence, but also has to endure a second form of punishment—deportation.[222] In an interview with the ACLU of California, Navy Seaman Howard Dean Bailey stated as follows:

> The first stop, beginning in June 2010, was the Hampton Regional Jail, where I shared a cell with one other guy and didn't see daylight or get a chance to exercise for weeks at a time. I spent one year and 20 days inside that cell. Then I was shackled in chains with a group of other men and flown 2,000 miles to the Otero immigration processing center; a private facility run under contract with ICE in the high desert outside of Las Cruces, New Mexico . . . . From New Mexico I was moved first to Arizona and then to Louisiana. Each time, we were chained together like slaves and kept handcuffed and shackled for seven hours before boarding and ICE chartered

214. INA § 240A(a)(3) & (b)(1)(c), 8 U.S.C. § 1229(b)(a)(3) & (b)(1)(C) (2012); ALEINIKOFF ET AL., *supra* note 133, at 726.

215. INA § 240A(a)(3) & (b)(1)(c), 8 U.S.C. § 1229(b)(a)(3) & (b)(1)(C) (2012).

216. *See* St. Cyr., 533 U.S. at 326 (concluding relief under § 212(c) remains for respondent because at the time of his plea, the previous law was in effect).

217. *See id.* (explaining that eligibility prior to the enactment to repeal 212(c) does not affect respondent).

218. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 303, 110 Stat. 3009-546, 586 (codified at 8 U.S.C. § 1226 (2012)).

219. Immigration Act of 1990, Pub. L. No. 101-649, § 504, 104 Stat. 4978, 5049 (codified as amended at 8 U.S.C. § 1252(a)(2)).

220. VAKILI ET AL., *supra* note 3, at 34.

221. *See* INA § 236(c)(1)(B), 8 U.S.C. § 1226(c)(1)(B) (2012) (making detention mandatory for any non-citizen convicted under INA § 237(a)(2)(A)(iii)).

222. *Cf.* Ting v. United States, 149 U.S. 698, 730 (1893) (stating "an order of deportation is not punishment for crime.").

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> plane . . . . We all sat in silence, terrified of what lay ahead. None of us knew what we would encounter upon landing.[223]

As demonstrated by Mr. Bailey's statement, foreign-born soldiers may be incarcerated and detained by immigration officials for long periods of time. The federal government should not treat those who have served our country this way; instead, they should consider the fact that foreign-born soldiers took an oath to defend this country and risked their lives to adhere to the oath. Foreign-born soldiers should not be denied the opportunity to remain in the United States after completing their criminal sentence, especially when many of those crimes might have stemmed from their time in the military.

VI. Life After Military Service

Veterans returning home from their military service face numerous psychological and legal challenges.[224] Many returning veterans are likely to suffer from posttraumatic stress disorder (PTSD) due to severe trauma associated with warfare and combat.[225] PTSD is an anxiety disorder that may develop after an individual experiences a traumatic event.[226] Military service members are highly exposed to traumatic events,[227] some of which include facing life-threatening danger, threats, or other types of injuries.[228] In fact, a 2008 RAND Corporation study found that almost one-in-five veterans suffered from PTSD or major depression.[229] Additionally, substance abuse and suicide rates among veterans have increased in recent years.[230] Thus, when military service members return home their negative combat experiences often return with them.[231]

Marco Werman, who served in the U.S. military, was deported after being convicted of a drug-related crime.[232] When Werman returned from Iraq, he suffered from nightmares and felt haunted by the men he

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223. Vakili et al., *supra* note 3.

224. Aprilakis, *supra* note 17, at 565.

225. *Id.*

226. *Id.* A traumatic event "is one that involves serious injury, death, or emotional imbalance to one's self or another." *Id.* at 541.

227. *Post-Traumatic Stress Disorder*, PBS, http://www.pbs.org/pov/soldiersofconscience/post-traumatic-stress-disorder [https://perma.cc/CJH5-EVPC] (last visited April 19, 2017).

228. *Id.*

229. Matthew Wolfe, *From PTSD to Prison: Why Veterans Become Criminals*, Daily Beast (July 28, 2013 3:45 AM), http://www.thedailybeast.com/articles/2013/07/28/from-ptsd-to-prison-why-veterans-become-criminals.html [https://perma.cc/EB42-EW6X].

230. *Id.*

231. Aprilakis, *supra* note 17.

232. Angilee Shah, *At the Bunker, Deported Veterans Recover From War—and Look For A Way Back Home*, Pub. Radio Int'l (Mar. 18, 2016), https://www.pri.org/stories/

killed.[233] Instead of getting help to work through his trauma, Werman resorted to drugs and eventually became homeless.[234] He served seven years in federal prison, and upon release was deported to Mexico.[235]

Like Werman, there are many veterans who come into contact with the criminal justice system after their military service.[236] According to the American Psychological Association, "forty percent of veterans who suffer from PTSD are noted to have committed a violent crime since their completion of military service."[237] Such behavior is due to an apparent link between crime and symptoms of PTSD, specifically "hyper-vigilance and hyper-aggression."[238] As a result, veterans who are charged with committing violent crimes resulting from their PTSD must face charges in court that may result in incarceration.[239] In response, the federal government has created specialty courts that only handle veteran cases.[240] The VA has reached out to these courts in effort to help veterans with PTSD get treatment and avoid jail time.[241] Evidently, the government recognizes that veterans deserve additional assistance and discretion in the criminal justice system.[242] However, because immigration judges do not consider veterans' military service and any resultant PTSD as mitigating factors in immigration court,[243] veterans facing deportation after a criminal conviction are not given much discretion.[244]

At criminal proceedings, veterans are provided with legal counsel as required by the Sixth Amendment of the U.S. Constitution.[245] Of course,

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2016-03-18/bunker-veterans-recover-war-and-look-way-back-home [https://perma.cc/6QEZ-LFY7].

233. *Id.*

234. *Id.*

235. *Id.*

236. Brandt A. Smith, *Posttraumatic Stress Disorder (PTSD) in the Criminal Justice System*, MIL. PSYCHOLOGIST (2014), http://www.apadivisions.org/division-19/publications/newsletters/military/2014/04/ptsd.aspx [https://perma.cc/84M6-VG8X].

237. *Id.*

238. *Id.*

239. *See id.* ("[N]ine percent of the national prison population is composed of veterans.").

240. Meneses, *supra* note 166, at 819.

241. *Id.*

242. *See, e.g.*, *id.* (claiming officials have worked with courts in an effort to give veterans treatment and avoid prison sentences).

243. SOFYA APTEKAR, ROAD TO CITIZENSHIP: WHAT NATURALIZATION MEANS FOR IMMIGRANTS AND THE UNITED STATES 36 (2015).

244. *See* INA § 237(a)(2)(iii), 8 U.S.C. § 1227(a)(2)(iii) (2012) (requiring mandatory deportation of non-citizens convicted of aggravated felonies); *Id.* § 208(b), 8 U.S.C. § 1158(b) (excluding applicants from asylum consideration if convicted of aggravated felonies); *see also* Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (acknowledging deportation, for many non-citizen veterans, is "virtually inevitable").

245. U.S. CONST. amend. VI.

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criminal law is based on the notion that a defendant's punishment should be proportionate to the crime, but the idea of proportionality is not present in immigration law.[246] For example, in a criminal proceeding, a judge will impose lesser sanctions for less severe crimes and impose harsher sanctions for more serious crimes.[247] In contrast, every immigration violation, no matter how inconsequential, results in removal from the country.[248] Unlike criminal proceedings, non-citizen veterans in removal proceedings do not have a right to counsel at the expense of the U.S. government,[249] even though the reason for their removability often resulted from their service to that same government.[250] Coupled with the fact that most non-citizen veterans cannot afford to hire an immigration attorney, they are forced to face deportation charges *pro se*.[251]

VII. Criminal Consequences

As stated above, all defendants are entitled to appointed counsel at the expense of the government in a criminal proceeding.[252] However, the legislative expansion of criminal grounds of deportation has made it difficult for criminal defense attorneys to represent non-citizens effectively because it has complicated immigration law by making it more difficult to interpret.[253] Moreover, criminal defense attorneys often lack the necessary immigration law expertise to advise their non-citizen veteran clients properly on how any criminal convictions will impact their immigration status.[254]

In 2010, the U.S. Supreme Court decided *Padilla v. Kentucky*,[255] a landmark decision that had major implications regarding the relationship between criminal and immigration law and the consequences of criminal convictions.[256] *Padilla* involved a non-U.S. citizen military service member, Jose Padilla, who was convicted for transporting a large amount of marijuana and thus became subject to mandatory deportation.[257] Padilla claimed that prior to entering his plea, his criminal defense attorney

246. Aleinikoff et al., *supra* note 133, at 667.
247. *Id.*
248. *Id.*; *see also* INA § 237(a), 8 U.S.C. § 1227(a) (listing grounds for deportability).
249. INA § 240A(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2012).
250. *See* Smith, *supra* note 236 (claiming 120,000 criminal acts are committed by veterans suffering with PTSD).
251. Vakili et al., *supra* note 3, at 35.
252. U.S. Const. amend. VI.
253. Vakili et al., *supra* note 3, at 37.
254. *Id.*
255. 559 U.S. 356 (2010).
256. Aleinikoff et al., *supra* note 133, at 667.
257. Padilla v. Kentucky, 559 U.S. 356, 359 (2010).

failed to advise him that his criminal conviction could result in deportation.[258] In fact, Padilla's criminal defense attorney advised him that he was *not* subject to deportation because he had been in the United States for a long time.[259] Consequently, Padilla pleaded guilty to drug charges and faced deportation.[260]

The Court concluded that Padilla's counsel could have easily determined that Padilla's plea would result in deportation by simply reading the immigration statute.[261] The statute specifically demanded deportation for all narcotics-related convictions except for those resulting from possession of thirty grams of marijuana or less.[262] Ultimately, the Court held criminal defense attorneys have a duty to inform their non-citizen clients of the immigration consequences arising from their guilty pleas.[263] Failure to do so, the Court stated, could violate the Sixth Amendment.[264] The Court established the following test to determine the level of advice attorney's should give to a non-citizen in a criminal proceeding:

> When the law is not succinct and straightforward, a criminal defense attorney need do not more than advise a non-citizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.[265]

The *Padilla* decision has prompted some criminal defense attorneys to seek immigration law training so they can advise their clients properly before entering guilty pleas.[266] Yet, despite *Padilla,* many criminal defense attorneys fail to inform their non-citizen clients that some criminal convictions can result in deportation.[267] As a result, many non-citizens, including veterans, have been deported.[268] For example, deported veteran Hector Barajas was convicted for a firearms offense,[269] and his attorney never advised him that his conviction would result in

258. *Id.*

259. *Id.* (emphasis added).

260. *Id.*

261. *Id.* at 368.

262. *Id.* at 359.

263. *Id.* at 374.

264. *Id.*

265. *Id.* at 369.

266. ALEINIKOFF ET AL., *supra* note 133, at 667.

267. *See, e.g.*, VAKILI ET AL., *supra* note 3, at 37 (reporting interviews of several veterans who were uninformed of the severe penalty of the charges).

268. *See id.* (explaining that many veteran deportees suffer due to the lack of adequate attorney representation).

269. Gotfredson, *supra* note 16.

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deportation.[270] Naturally, Barajas was surprised to learn that, after completing his sentence, he would be deported to Mexico.[271]

Unfortunately, Barajas' case is not the only instance that demonstrates the ineffective assistance of counsel.[272] Immigration officials deported U.S. Navy Seaman Salomon Loayza based on a mail fraud conviction.[273] Like Barajas, Loayza's criminal defense attorney also did not advise him that his conviction would have major consequences on his immigration status.[274] In an attempt to halt Loayza's deportation, Loayza's criminal defense attorney wrote to the Immigration and Nationality Service (INS) and stated that he "took no steps and made no requests on [Loayza's] part which might have prevented [Loayza from] being deported."[275]

Although *Padilla* represents a step forward in ensuring that non-citizens have effective assistance of counsel before entering a guilty plea, the ruling did not apply retroactively; thus, non-citizen veterans who were deported prior to *Padilla* cannot withdraw their guilty pleas, reopen their cases, or return to the United States.[276]

VIII. The Adverse Consequences of Deportation

Most deported veterans were banished from the United States due to a criminal conviction.[277] Of these veterans, many were convicted of aggravated felonies and are permanently barred from returning to the country they swore to protect.[278] Further, although most deported veterans paid their debt to society by completing their criminal sentences in the United States, deportation serves as an additional punishment.[279] According to the Supreme Court deportation is not a form of punishment,[280] but considering that deported veterans completed criminal sentences and honor-

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270. Barajas e-mail, *supra* note 13.

271. *Id.*

272. *See, e.g.*, Vakili et al., *supra* note 3, at 37 (reporting stories of veteran deportees who lacked proper attorney representation).

273. Nathan Fletcher, *Immigrants In the Military: Honorably Discharged Then Dishonorably Deported*, Huffington Post (Sept. 19, 2016 10:54 AM), http://www.huffingtonpost.com/nathan-fletcher/honorably-discharged-then_b_12085078.html [https://perma.cc/T42E-KUZX].

274. Vakili et al., *supra* note 3, at 37.

275. *Id.*

276. *See* Chaidez v. United States, 133 S. Ct. 1103, 1105 (2013) ("*Padilla* does not have retroactive effect").

277. *See, e.g.*, Vakili et al., *supra* note 3, at 41 (stating all veteran deportees interviewed were LPRs convicted of a criminal offense).

278. *Id.*

279. *Id.* at 41.

280. *See* Ting v. United States, 149 U.S. 698, 709 (1893) (holding deportation is not punishment).

ably served the United States, deportation effectively is a second form of punishment.[281] They risked their lives to protect this country, only to be banished and exiled from it.[282]

Beyond feeling betrayed by the country they swore to protect, deported veterans are torn apart from their families.[283] Many are forced to leave their spouses and children behind in the United States.[284] Additionally, deported veterans are denied access to entitlements such as VA medical care and benefits.[285] Stripped of their access to VA healthcare, many are unable to treat PTSD symptoms or other ailments caused by their military service, and many have died in recent years as a result.[286]

All veterans are entitled to (1) disability compensation, (2) reimbursement for medical expenses under the Foreign Medical Program, and (3) a pension.[287] However to receive such benefits, a VA doctor must perform a Compensation and Pension Examination (C&P exam) to determine eligibility.[288] Without this exam the benefits are not accessible.[289] Furthermore, the VA's ability to examine veterans abroad is limited due to the lack of VA medical facilities abroad.[290] If no VA medical facility exists, veterans may seek a C&P exam through a United States Embassy.[291] Even then, veterans abroad have reported that the relationship between the VA and U.S. is such that it is impossible for deported veterans to receive their VA benefits.[292]

Not only are deported veterans separated from their families and lack access to VA health care, they are also likely to experience threats and

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281. VAKILI ET AL., *supra* note 3, at 41; *see also* Ting, 149 U.S. at 740 (recognizing that deportation is a severe "penalty").

282. VAKILI ET AL., *supra* note 3, at 41; *see also* Fletcher, *supra* note 273 (emphasizing how some deported veterans serve their penalty, only to be permanently expelled from the country they took an oath to defend).

283. *See, e.g.*, Shah, *supra* note 232 (outlining the suffering veterans living in the Bunker experience after being stripped from families).

284. *See, e.g.*, Ramirez & Diaz, *supra* note 5 (pointing out that Hector Barajas was separated from his daughter and wife).

285. Newman, *supra* note 34.

286. *See* Guy Gambill, *Deported U.S. Veterans Turn in July 8th 2016 Humanitarian Parole Action*, USJAG (May 12, 2016), http://www.usjag.org/7936-2 [https://perma.cc/XU2A-J7TD] (listing several severe consequences of deportation).

287. VAKILI ET AL., *supra* note 3, at 45–47.

288. *Id.* at 48.

289. *Id.*

290. U.S. DEP'T OF VETERANS, VHA DIRECTIVE 1046—DISABILITY EXAMINATIONS 1 (2014), http://www.va.gov/vhapublications/viewpublication.asp?pub_id=2999 [https://perma.cc/83WG-Q5NY].

291. *Id.*

292. *See, e.g.*, VAKILI ET AL., *supra* note 3, at 50 (reporting Specialist Hernandez's battle with seeking assistance with his PTSD).

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violence on behalf of drug cartels attempting recruit them for their military experience.[293] For instance, Private Marin Pina, who was deported to Mexico, was threatened by the drug cartels.[294] He was told that, because he served in the U.S. military, he was a traitor to Mexico.[295] Pina tried escaping to the United Stated out of fear for his life, but upon return to the United States, he was arrested, charged with illegal entry, and sentenced to fifty-one months in prison.[296] The federal government should not treat its veterans so harshly. Deported U.S. veterans should have a second chance to reestablish their lives in the United States—the only country they have ever called home.

IX. Solutions for Bringing Deported Veterans Home

A. *Veterans Visa and Protection Act of 2016*

The very first step the federal government should take to bring deported veterans home is to enact legislation that would allow honorably discharged veterans who have been deported to return to the United States as LPRs. On July 8, 2016, the Veterans Visa and Protection Act of 2016 was introduced in the House of Representatives.[297] This bill requires the Department of Homeland Security (DHS) to (1) establish a veterans visa program that allows eligible deported veterans to return to the United States as LPRs, (2) permit foreign-born veterans who are in the United States and meet the eligibility requirements to adjust citizenship status to that of an LPR, and (3) cancel the removal of foreign-born veterans who have been ordered removed and allow them to adjust citizenship status if they satisfy the eligibility requirements.[298]

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293. *See* Gambill, *supra* note 286 (pronouncing veterans are being targeted for recruitment to criminal organizations as one of several consequences of deportation); *see also* Kao, *supra* note 6 (recounting that. in Tijuana. deported veterans are highly vulnerable to drug addiction and involvement in criminal organizations).

294. Vakili et al., *supra* note 3, at 50.

295. *Id.*

296. *Id.*

297. H.R. 5695, 114th Cong. (2016).

298. *Id.* § 3. Under the bill, an "eligible" veteran is someone who fulfills the following requirements:

> (A) was not ordered removed, or removed, from the United States due to a criminal conviction for
>
> (i) a crime of violence; or
>
> (ii) a crime that endangers U.S. national security for which the noncitizen has served a term of imprisonment of at least five years; and
>
> (B) is not inadmissible to, or deportable from, the United States due to such a conviction.

Id.

A non-citizen who becomes an LPR under this bill would be eligible to naturalize through U.S. military service under sections 328 and 329 of the INA.[299] Moreover, the ground on which the non-citizen was ordered removed would be disregarded when determining whether they demonstrated "good moral character," and any period of absence from the United States due to removal would also be disregarded when determining whether residency and physical presence requirements have been met.[300] Additionally, a non-citizen who obtains LPR status under the bill would be eligible for all military and veteran benefits.[301]

The latest action on the bill was referral to the Subcommittee on Military Personnel.[302] If the bill becomes law, it will be a victory for some deported veterans.[303] However, deported veterans who were convicted of "crimes of violence" would still not be eligible to return under the bill.[304] As previously noted, military service members may commit crimes of violence due to PTSD stemming from trauma experienced in the military.[305] These veterans should have the opportunity to return to the United States and receive medical care to treat their PTSD symptoms. As such, it is imperative to eliminate section 3(b)(1)(A)(i) of House Bill 5695, which makes a veteran ineligible to return to the United States if they were ordered removed due to a conviction for a crime of violence.[306] In the alternative, section 3(b)(1)(A)(i) could be amended to require the Secretary of Homeland Security to analyze the details of the crime of violence on a case-by-case basis to determine eligibility. This step is important in determining whether the non-citizen committed the crime of violence as a result of PTSD.[307]

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299. *Id.* § 5.

300. *Id.*

301. *Id.* § 6.

302. *H.R. 5695 – Veterans Visa and Protection Act of 2016,* CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/5695/actions [https://perma.cc/WYX8-WRKW] (last visited Apr. 19, 2017).

303. *See* H.R. 5695, 114th Cong. § 3 (2016) (refusing eligibility to a non-citizen convicted of a crime of violence).

304. *Id.*

305. Gambill, *supra* note 286; *see also* Smith, *supra* note 236 (explaining that forty percent of veterans with PTSD "have committed a violent crime since their completion of military service").

306. *See* H.R. 5695, 114th Cong. § 3 (2016) (prohibiting eligibility to a foreign veteran convicted of a violent crime).

307. *See generally* Smith, *supra* note 236 (reporting a significant majority of crimes committed by veteran deportees are a result of PTSD).

B. *Reopen Military Naturalization Applications Deemed "Abandoned"*

As determined by the ACLU, U.S. Customs and Immigration Services (USCIS) denied naturalization applications that were deemed "abandoned" for lack of prosecution when the applicant could not complete the naturalization process due to deployment.[308] USCIS deems an application abandoned when an applicant fails to appear to their initial naturalization examination or fails to appear for subsequent re-examination.[309] An applicant may request to reopen an administratively closed application within one year from the date the application was closed.[310] In an effort to bring deported veterans home, USCIS should allow them to file motions to reopen all naturalization applications that were deemed abandoned as a result of deployment.[311] Doing so will offer them the opportunity to return to the United States, reunite with their families, and have access to VA benefits and medical care.

X. Solutions for Avoiding Future Deportation of Veterans

A. *Legislative Solutions*

i. Repeal the "Good Moral Character" Requirement

Given how USCIS uses the "good moral character" requirement to exclude veterans from citizenship, the best way to ensure fairness is to repeal the requirement entirely.[312] This would allow veterans who are unable to demonstrate "good moral character" to qualify for naturalization through their military service. According to law professor Kevin Lapp, the elimination of the "good moral character" requirement would not affect public safety because there would still be "strict deportation provisions, limited relief granted only to those few who demonstrate reform and community ties, and widespread felon disenfranchisement."[313]

The complexity involved in determining "good moral character" is another reason to eliminate this requirement; it is not something that can be readily observed or verified.[314] Inquiry into a person's character necessarily requires assessment of behavior and reputation, but these attributes

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308. Vakili et al., *supra* note 3, at 54.

309. 8 C.F.R. § 335.6(a) (2016); U.S. Citizenship and Immigr. Servs., *Citizenship & Naturalization, Part B—Naturalization Examination*, https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartB-Chapter4.html#footnote-9 [https://perma.cc/SML3-7DY3] (last updated Jan. 5, 2017).

310. 8 C.F.R. § 335.6(b) (2016).

311. Vakili et al., *supra* note 3, at 54.

312. Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 Indiana L. J. 1571, 1630 (2012).

313. *Id.* at 1630–31.

314. *Id.* at 1631.

alone do not amount to "character."[315] The government itself has not been able to define "good moral character;" rather, it provides a list of certain characteristics that show a lack of "good moral character."[316] Eliminating the "good moral character" requirement is imperative to ensure the U.S. government rewards those who honorably served their country with a better opportunity to attain U.S. citizenship. At the very least, Congress should clarify that the "good moral character" requirement under INA § 329 can be satisfied by demonstrating the veteran served honorably in the U.S. Armed Forces—as provided under section 328 of the INA.[317] Congress should also repeal the lifetime bar on "good moral character" for veterans who have been convicted of aggravated felonies. Doing so would allow a convicted felon to rehabilitate and be able to demonstrate "good moral character" at the time of naturalization.

ii. Restore JRAD

Another step Congress can take is to amend the INA to restore JRAD for all service members. As stated in Part IV, a JRAD given by a sentencing judge would signal to immigration authorities that the non-citizen is a military service member and should not be deported.[318] Immigration authorities should not be allowed to object to the recommendation "because no judge would deliberately order that deportation be not made unless there was a good reason for it."[319] Honorable service in the military is an exceptional reason to make a JRAD. Consequently, Congress should restore JRAD and make clear that a judicial recommendation against deportation for all military service members is binding on immigration authorities as was provided by the U.S Supreme Court in *Janvier v. United States*.[320]

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315. *Id.*

316. INA § 101(f)(8), 8 U.S.C. § 1101(f)(8); Shagin, *supra* note 39, at 255.

317. The current state of the statute reads as follows:

> Any such period or periods of service under honorable conditions, and good moral character . . . shall be proved by duly authenticated copies of the records of the executive departments having custody of the records of such service, and such authenticated copies of records shall be accepted in lieu of compliance with the provisions of section 1427(a) of this title.

INA § 328(e), 8 U.S.C. § 1439(e) (2012). The language in the Code of Federal Regulations currently states, "[a]n applicant is presumed to satisfy the [good moral character] requirement during periods of honorable service . . . ." 8 C.F.R. § 328.2(d)(1) (2016).

318. *See* Cade, *supra* note 146 (arguing that a sentencing judge's decision to recommend against deportation has the potential to offer immigration authorities a reliable means of determining deportation).

319. Meneses, *supra* note 166, at 812.

320. *See* Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986) (pointing out that immigration authorities should not disregard the recommendation).

Alternatively, sentencing judges should continue making non-statutory judicial recommendations against deportation in criminal proceedings. Of course, such recommendations would not be binding on immigration officers, but they would provide immigration officers with a reliable means of assessing the positive and negative factors when determining whether removing the non-citizen veteran is an appropriate penalty.[321] The sentencing judge's JRAD would also signal to immigration officers that the non-citizen's military service record factors against deportation and their encounter with the criminal justice system should not lead to deportation.[322] This would be consistent with prior policy memoranda issued by the U.S. Immigration and Customs Enforcement (ICE), which allows ICE officers to consider relevant factors, such as military service, in deciding whether an exercise of prosecutorial discretion may be warranted.[323]

iii. Remove the Aggravated Felony Bar to Cancellation of Removal

A U.S. military service member convicted of an aggravated felony is ineligible for cancellation of removal.[324] Cancellation of removal would benefit veterans in deportation proceedings by allowing them to remain in the United States.[325] For LPRs, cancellation of removal maintains LPR status despite being subject to removability.[326] For non-citizens who have not attained LPR status, cancellation of removal confers permanent resident status for first-time non-citizens who were not admitted or paroled into the United States.[327] Additionally, for all non-citizens, cancellation of removal erases prior personal history of the non-citizen's removability.[328] Therefore, Congress should remove the aggravated felony bar to cancellation of removal for military service members. At the

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321. *See generally* Cade, *supra* note 146, at 39 (highlighting the positive factors of JRAD).

322. *See id.* (suggesting deportation should not be the default rule following a criminal conviction and Congress should allocate adjudicative discretion back to immigration judges).

323. Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf't on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [https://perma.cc/YU69-B64U].

324. INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2012).

325. *Cancellation of Removal Law and Legal Definition*, U.S. LEGAL, https://definitions.uslegal.com/c/cancellation-of-removal [https://perma.cc/L3JF-X43U] (last visited Feb. 9, 2017).

326. ALEINIKOFF ET AL., *supra* note 133, at 727.

327. *Id.*

328. *Id.*

very least, they should do so for those who can prove their actions were a result of PTSD or other issues caused by their military service.

iv. Codify Current Naturalization at Basic Training Initiative

In recent years, the federal government has taken steps to ensure that foreign-born service members are naturalized during their military service.[329] On August 2009, USCIS established the Naturalization at Basic Training Initiative with the U.S. Army.[330] Under this initiative, foreign-born veterans have the opportunity to naturalize upon graduating from basic training.[331] USCIS conducts all naturalization processing on the applicant's military base, including biometrics, the initial naturalization examination, and the administration of the Oath of Allegiance to the United States.[332] Since 2009, USCIS expanded the initiative to the Navy, Air Force, and the Marine Corps.[333] Any service member who obtains citizenship through military service may have their citizenship revoked if they separate from the military under "other than honorable conditions" before completing five years of honorable service.[334]

This initiative has been a successful method of ensuring foreign-born soldiers are naturalized during their military service, which eliminates the risk of future deportation upon completion of honorable service.[335] However, because the USCIS implemented this initiative on its own, Congress has yet to codify it.[336] It is of vital importance to have this initiative codified into law to ensure the existence of such assistance at basic training in all military installations.

B. *Agency Solutions*

i. Create a USCIS Position of Adjudication Officer Who Will Only Process Military Naturalization Applications

Military service members are required to complete and submit the application for naturalization (form N-400) and submit form N-426, which an applicant uses to request that the Department of Defense verify their military or naval service.[337] The applicant then mails the completed ap-

329. *Naturalization*, *supra* note 27.
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*
335. VAKILI ET AL., *supra* note 3, at 30.
336. *Id.*
337. *See, e.g.*, *Naturalization*, *supra* note 27 (providing instructions on how to apply for the basic training initiative).

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plication to a Service Center that reviews the application and conducts security checks.[338] After reviewing the application, the Service Center mails it to USCIS for an interview.[339] To process such military naturalization applications fully, USCIS should create an adjudication officer position and give that officer the sole duty of processing these applications. Upon receipt of the N-400 and N-426 form, the officer should have an affirmative duty to determine whether the applicant has been deployed or is in the United States. This will eliminate any possibility that the application will be deemed "abandoned" if the applicant fails to appear for their initial examination due to deployment.

ii. Establish a Program That Will Provide Veterans With Better Legal Representation in Immigration Court

As explained in Part VI, non-citizens in removal proceedings do not have access to legal counsel at the government's expense.[340] However, it is of utmost importance that military service members have legal representation in immigration court. As such, the Department of Defense should establish a program to provide legal representation to U.S. service members in removal proceedings. At the very least, PTSD resulting from one's military service should be considered a mitigating factor in deportation proceedings.[341] The Department of Defense should also provide training to educate military recruiters, including officers, about the naturalization process. This will ensure military personnel give accurate information regarding naturalization. The better-informed military recruiters are, the better-informed military service members will be.

iii. Facilitate VA Compensation and Pension Exams for Deported Veterans Who Cannot Return to the U.S.

Lastly, the U.S. Department of Veteran Affairs should facilitate VA C&P Exams for deported veterans who cannot return to the U.S. In the alternative, USCIS should provide an agency-wide policy that facilitates access to "humanitarian parole" for veterans who are currently deported.[342] Unless they are granted humanitarian parole, deported veter-

338. *Id.*

339. *Id.*

340. INA § 240A(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2012).

341. *See* APTEKAR, *supra* note 243, at 36 (stating immigration courts do not consider the effects of military service as a mitigating factor).

342. Humanitarian parole is "discretionary authority that allows for the temporary entry of individuals into the United States for urgent humanitarian reasons for significant public benefit." HUMANITARIAN PAROLE, *supra* note 51.

ans have no access to treat their medical conditions at VA care centers.[343] Further, because humanitarian parole is discretionary, many deported veterans are denied parole into the United States—even in life-threatening situations.[344] Making it easier to grant humanitarian parole for deported veterans will permit them to return to the United States to seek life-saving medical treatment before it is too late.

XI. CONCLUSION

Foreign-born soldiers have served in U.S Armed Forces for as long as the United States has existed as an independent country. Today, they serve in all branches of the armed forces and are a vital component of the Department of Defense. However, despite their honorable service, some foreign-born soldiers have been banished from the country they took an oath to defend. Nearly all foreign-born veterans who have been deported were eligible to naturalize under the Nationality Acts of the United States during their military service or shortly thereafter.

Upon conviction of a deportable offense—often stemming from psychological ailments caused by their military service—many non-citizen veterans become subject to deportation. Such a consequence arises from a combination of factors, including the enactment of harsh immigration laws and the federal government's failure to naturalize its service members during their military service. Enacting the Veterans Visa and Protection Act of 2016 would be a giant first step to bring deported veterans home. Additionally, all applications deemed "abandoned" when a non-citizen was unable to complete the naturalization process should be re-opened. Both of these proposals offer deported veterans the opportunity to return to the country they once called home.

Further, to prevent the future deportation of foreign-born veterans, Congress should repeal the "good moral character" requirement, restore JRAD, remove the aggravated felony bar to cancellation of removal, and codify the existing Naturalization at Basic Training Initiative. Lastly, the Department of Veteran Affairs should facilitate VA Compensation and Pension Exams for deported veterans who are currently unable to return

343. CJ Ciaramella, *They Served Their Country. Now They're Deported*, MEDIUM CORP. (June 16, 2016), https://medium.com/@cjciaramella/they-served-their-country-now-theyre-deported-353b2b42a19c#.hoahnrpm0 [https://perma.cc/NV7Y-EHG6].

344. *See, e.g.*, Gambill, *supra* note 286 (stating lack of proper medical care is a consequence of deportation that can sometimes result in deaths). Jose Solorio was diagnosed with pulmonary fibrosis and was initially denied parole. Christian De La Rosa, *Deported Marine Vet gets Access to VA Medical Care 'Too Late'*, FOX 5 (June 18, 2015 10:23 AM), http://fox5sandiego.com/2015/06/18/deported-marine-veteran-gets-access-to-va-medical-care [https://perma.cc/4CF2-K4FB]. When USCIS finally granted parole to Mr. Solorio, it was too late. *Id.*

to the United States. These are all steps we must take to ensure that non-citizen veterans are treated with dignity, loyalty, and respect. These veterans deserve nothing less.