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Citizenship Denied: Implications of the Naturalization Backlog for Noncitizens in Military

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CITIZENSHIP DENIED: IMPLICATIONS OF THE NATURALIZATION BACKLOG FOR NONCITIZENS IN THE MILITARY

BY MING H. CHEN†

ABSTRACT

The immigration system is in crisis. Long lines of asylum seekers at the border and immigrants in the interior spend years waiting for their day in immigration court. This is true in the agencies that process applications for immigration benefits from legal immigrants as well. Since 2016, delays in naturalization have increased to historic proportions. The problem is even worse for military naturalizations, where delays are accompanied by denials and overall declines in military naturalizations. It is the latest front in the battle on legal migration and citizenship.

These impediments to citizenship demonstrate an extreme form of policies collectively dubbed the "second wall." These policies are animated by mistrust of foreigners and immigrant restrictionism, bureaucratic bungling and institutional neglect for service members, and overreliance on national security justifications. These changes affront civil and voting rights for immigrants, diminish military enlistment, and undermine the institutions of citizenship and democracy. This Article documents barriers to citizenship. More specifically, it analyzes the causes and consequences of citizenship denials in general and military naturalization. It offers solutions that bolster immigrants, the military, and the meaning of citizenship.

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INTRODUCTION

Every year, hundreds of thousands of people apply for citizenship in the United States. Their pursuit of citizenship is premised on a right to naturalize created by the Constitution[1] and codified by federal law.[2] The U.S. Citizenship and Immigration Service (USCIS) is the agency within the U.S. Department of Homeland Security (DHS) that processes immigration benefits, including naturalization applications.[3] Processing times that exceed the six-month timeline compromise these individuals' path to naturalization and the other rights that citizenship provides. Yet the timely processing of naturalization applications has proved elusive.

In advance of Citizenship Day (September 2019), the Colorado State Advisory Committee to the U.S. Commission on Civil Rights released a report on the civil rights implications of the USCIS's naturaliza-

1. *See* U.S. CONST. art. I, § 8, cl. 4 (empowering Congress to "establish an uniform Rule of Naturalization"); *see also id.* amend. XIV, § 1 (providing for birthright citizenship).
2. *See* Immigration and Nationality Act § 316, 8 U.S.C. § 1427 (2018).
3. 8 C.F.R. § 310.2 (2020).

tion backlog in Colorado. In its report, it finds that the USCIS's "national backlog in naturalization applications is 738,148 and the [USCIS's] national average wait times range from [ten] months to nearly three years."[4] The national figures show a predictable increase in applications that contributed to the backlogs that occurred leading up to national elections. These backlogs remained high in many places.[5] In Colorado, the USCIS "Denver Field Office backlog in naturalization applications is 9,325 and wait times range from 10 to 19.5 months."[6] The backlog persists in the USCIS Denver Field Office "despite the number of applications received by the U.S. Citizenship and Immigration Service returning to pre-election levels and [an] increase[ ] made to staffing and . . . other . . . resources[.]"[7] These figures improved slightly as the fiscal year 2019 wrapped up—the wait time was seven months to thirteen months in Colorado—but given the expected increase in applications leading up to the presidential election the backlog is unlikely to be resolved and may worsen.

A secondary finding in the report is that the delays are particularly pronounced for noncitizens in the military.[8] Despite Congress's intent for military service members to gain quick and easy access to citizenship, veterans and service members are worse off than civilians.[9] Service members face longer wait times, and many applications stall during U.S. Department of Defense background checks before they can be adjudicated on the merits.[10] If their applications make it to the USCIS, they face increased denials for reasons endemic to their immigrant status and the national security context on war.[11] Declining applications for military naturalization indicate that the application requirements are taking a toll: they have become so burdensome that they function as impassible barriers to citizenship.[12] This Article highlights the troubling state of military naturalization as a case study of the attack on legal migration and citizenship. It describes the scope of the problem, building on *Citizenship Delayed* and related reports in Part I.[13] It extends these reports by analyzing the causes and consequences of the impediments to the naturalization

4. COLO. STATE ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, CITIZENSHIP DELAYED: CIVIL RIGHTS AND VOTING RIGHTS IMPLICATIONS OF THE BACKLOG IN CITIZENSHIP AND NATURALIZATION APPLICATIONS 5 (2019) [hereinafter CITIZENSHIP DELAYED].
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 11.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *See generally* Zachary R. New, *Ending Citizenship for Service in the Forever Wars*, 129 YALE L.J. FORUM 552, 554–61 (2020) (describing the history of "citizenship for service" and recently enacted policies that are creating obstacles to and "effectively ending, this centuries-old pathway to citizenship").

backlog in Parts II and III. The Article concludes with policy solutions in Part IV.

I. THE NATURALIZATION PROCESS

A. Naturalization Generally

There are two paths to citizenship: birthright citizenship or naturalized citizenship.[14] Those who naturalize typically become eligible through a family member or employer, though in some cases noncitizens become eligible through service to the military.[15]

The requirements for naturalization are detailed in the Immigration and Nationality Act (INA).[16] First, an applicant must have legal permanent resident (LPR) status.[17] In most cases, applicants must also demonstrate that they have five years of continuous residence in the United States; that they are at least 18 years of age at the time of filing; that they have a basic understanding of U.S. history and government; that they have maintained good moral character; and that they demonstrate the ability to read, write, and speak English at a basic level.[18]

The USCIS is the agency within the DHS that processes immigration benefits, including naturalization applications. The U.S. Citizenship and Immigration Service was formed after the September 11, 2001, attacks and the passage of the Homeland Security Act of 2002, which reorganized the Immigration and Naturalization Service into three components within the DHS.[19] On March 1, 2003, the USCIS "assumed responsibility for the immigration service functions of the federal government[,]" including the processing of naturalization applications and other immigration benefits.[20] USCIS field offices conduct interviews and provide other applicant services related to processing these benefits, a task known as agency adjudication.[21]

In addition, Congress has established special provisions that apply to immigrants who obtain LPR status through military service. INA §

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14. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."); *see also id.* art. I, § 8, cl. 4 ("The Congress shall have power . . . To establish a uniform Rule of Naturalization . . . . "); 8 U.S.C. § 1427 (2018) (providing requirements for naturalization).

15. 8 U.S.C. § 1439.

16. *Id.* § 1427.

17. *Id.* § 1427(a); *see generally id.* § 1101(a)(20) (defining LPR status for purposes of the Immigration and Nationality Act).

18. *Id.* § 1423(a)(1)–(2) (understanding of English and history); *id.* § 1427(a), (c)–(d) (residence, physical presence, good moral character); *id.* § 1445(b) (age).

19. The Homeland Security Act of 2002, Pub. L. No. 107–296 § 451, 6 U.S.C. § 271 (2018); *see also Our History*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/our-history (last updated Jan. 8, 2020).

20. *Our History*, *supra* note 19.

21. *See Field Offices*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/find-uscis-office/field-offices (last updated Apr. 30, 2020).

328 and INA § 329 establish the modern requirements for military naturalization.[22] INA § 328, often referred to as the "peacetime military naturalization statute," permits applicants who are LPRs and who have served in the armed forces for at least one year in aggregate, or have been discharged honorably, to naturalize without establishing the five years of continuous residence typically required.[23] This provision encompasses Reservists and National Guard members who may not have served in an active-duty capacity.[24] INA § 329, the so-called "wartime" statute, provides an accelerated naturalization process for individuals who serve during wartime, as early as the completion of basic training, and it waives physical presence and continuous residence requirements.[25] The wartime statute applies only to applicants who have "served honorably as a member of the Selected Reserve of the Ready Reserve or in an "active-duty status in the military, air, or naval forces of the United States."[26] The United States has been in a "period of hostility" since the "War on Terror" began in earnest nearly two decades ago with the post-September 11, 2001, conflicts in Iraq and Afghanistan.[27]

Immigrants who serve in the military, whether under the regular provisions or Military Accessions Vital to National Interest (MAVNI), have an expedited path to naturalized citizenship. Most noncitizens who serve in the military become eligible for LPR status and naturalization simultaneously. Typically, these will be LPRs who become eligible to adjust status in a short time. INA § 328 and § 329, in combination with programs that permit the USCIS to adjudicate military naturalizations after basic training, shorten the usual waiting time of nearly a decade to a matter of days or weeks.

From 2008 to 2016, refugees, asylees, and noncitizens with select temporary visas or temporary protected status could become citizens through the MAVNI program.[28] Armed services had previously allowed non-LPRs to serve and gain citizenship, though the requirements have

22. 8 U.S.C. §§ 1439, 1440; *see* MARGARET D. STOCK, IMMIGRATION LAW & THE MILITARY 37 (2d ed. 2015) (explaining that expedited naturalization procedures for military service have existed since the Civil War era, dating back to a July 17, 1862, statute providing expediting naturalization for army service).

23. 8 U.S.C. § 1439(a).

24. STOCK, *supra* note 22, at 44.

25. Immigration & Nationality Act § 329(a), (b)(2); 8 U.S.C. § 1440(a), (b)(2).

26. Immigration & Nationality Act § 329(a); 8 U.S.C. § 1440(a).

27. *See* New, *supra* note 13, at 555 (providing a more extensive history of citizenship for service dating back to the Revolutionary War).

28. MARGARET D. STOCK, TEN THINGS THAT IMMIGRATION LAWYERS SHOULD KNOW ABOUT THE ARMY'S NEW NON-CITIZEN RECRUITING PROGRAM 1–2 (2009); *see also* Richard Gonzales, *Mattis: 'DREAMers' in the Military Won't be Deported*, NPR (Feb. 8, 2018, 10:23 PM), https://www.npr.org/sections/thetwo-way/2018/02/08/584424541/mattis-dreamers-in-the-miliary-won-t-be-deported (discussing the impact of the MAVNI cancellation on recipients of DACA).

not been uniform.[29] It was not until 2006 that Congress consolidated all enlistment eligibility into one statute for all branches and permitted the Secretary of Defense to authorize enlistment of non-LPRs via the national interest exception in 10 U.S.C. § 504(b)(2).[30] This is the provision that authorized the MAVNI program to give the U.S. military access to immigrants with vital skills. Through this program, immigrants and nonimmigrants would be given a way to enlist in the military, and thus be given a pathway to citizenship that would not normally be available to them.[31] However, the MAVNI program was hindered by background checks instituted by President Obama in 2016, and it was indefinitely suspended under President Trump in 2019.

B. Changing Trends in Naturalization

Target times for naturalization adjudication vary depending on the type of case and field office assigned, but six months is considered a reasonable time by statute.[32] Against this baseline, a backlog is statutorily defined as the "number of pending applications that exceed acceptable or target pending levels for each case type."[33] According to this definition, the USCIS has a long-standing history of backlogs for immigration benefits, spanning over multiple administrations, which it formally acknowledged in 2005.[34] This backlog was eliminated in 2006 when Congress imposed a timeline and earmarked funding for this purpose.[35] The backlog has steadily grown since then and spiked leading up to and during the Trump Administration.[36]

There are a number of explanations for the growing backlog. The number of applicants for naturalization, and the rate of processing those applications, change with agency procedures and policy developments.[37] At the hearings conducted by the Colorado State Advisory Committee to the U.S. Commission on Civil Rights regarding naturalization backlogs, immigration attorneys described these intensified vetting practices, which include expanded requests for information and more frequent re-

29. STOCK, *supra* note 22, at 9–10. For example, the U.S. Department of Defense prohibited the Navy and Marine Corps from enlisting non-LPRs by a 1993 U.S. Department of Defense "directive" despite no statute or regulation requiring all enlistees to be LPRs.

30. 10 U.S.C. § 504(b)(2)(A) (2018); STOCK, *supra* note 22, at 9–10.

31. *See The MAVNI Program: Military Accessions Vital to the National Interest*, CITIZENPATH (May 1, 2018), https://citizenpath.com/mavni-program.

32. 8 U.S.C. § 1572 (2018).

33. U.S. CITIZENSHIP & IMMIGRATION SERVS., BACKLOG ELIMINATION PLAN: FISCAL YEAR 2006, 3RD QUARTER UPDATE 1 (2006) [hereinafter USCIS BACKLOG ELIMINATION PLAN].

34. *Id.* at 9.

35. *Id.*; News Release, U.S. Citizenship & Immigration Servs., USCIS Announces Elimination of Naturalization Application Backlog (Sept. 15, 2006) (on file with author); *see also* USCIS BACKLOG ELIMINATION PLAN, *supra* note 33, at 4 (stating that the N-400 processing time was less than six months as of the third quarter of fiscal year 2006).

36. CITIZENSHIP DELAYED, *supra* note 4, at 11, 19, 32.

37. *See id.* at 11.

quests for interviews.[38] Additionally, a representative from the USCIS stated that the agency regularly projects rising naturalization application submissions prior to presidential elections and makes staffing decisions based on those projections, but that they underestimated the number of applications in 2016.[39] The anti-immigrant rhetoric and policies of President Trump will likely sustain the trend of heightened interest in naturalization leading up to the 2020 presidential election.

At a time when applications are surging, the Trump Administration has implemented policies that place applications under additional scrutiny and screening for fraud or national security concerns. The USCIS has acknowledged that additional interview requirements required in the "Buy American and Hire American" executive order may further increase the backlog in employer-based naturalization applications.[40] Policies laid out in Presidential Proclamation 9645, the Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists and Other Public Safety Threats,[41] have intensified vetting practices.[42] According to a DHS report to Congress, the staff increase of 143 positions, 136 full-time equivalents, and more than $43 million for changes in operations can be attributed to the Executive Orders on border security and immigration enforcement.[43] Additionally, rather than increasing the number of adjudicators in anticipation of increased application receipts, new officers hired in field offices have been assigned to Fraud Detection and National Security positions.[44] Despite the various policy changes, the approval rate for naturalization applications has remained consistent with the historical average of around 84%–85%.[45] The consistency of this approval rate suggests that the policy changes were unnecessary. There were not large numbers of applicants that posed national security risks or submitted fraudulent documents, otherwise they would have been detected under increased scrutiny and denied.

Although the policy changes do not, by themselves, cause lower approval rates, they undoubtedly contribute to increased adjudication times and the accumulation of a backlog of applications that, in turn, can im-

38. *Id.* at 12–13, 27–28.
39. *Id.* at 16, 31–32.
40. Letter from L. Francis Cissna, Dir., U.S. Citizenship and Immigration Servs., to Charles E. Grassley, Chairman, U.S. Senate Comm. on the Judiciary (Apr. 4, 2018) (on file with author).
41. *See* Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).
42. U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. CITIZENSHIP AND IMMIGRATION SERVICES RESPONSE TO REPRESENTATIVE GARCIA'S FEBRUARY 12, 2019 LETTER 2 (2019) [hereinafter USCIS RESPONSE LETTER].
43. DEP'T OF HOMELAND SEC., UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES IMMIGRATION EXAMINATIONS FEE ACCOUNT: FISCAL YEAR 2018 CONGRESSIONAL JUSTIFICATION 10 (2018).
44. CITIZENSHIP DELAYED, *supra* note 4, at 29.
45. *Id.* at 30.

pact individuals' ability to vote in the upcoming election.[46] Much like the right to vote, the right of eligible persons to naturalize is not subject to agency discretion.[47] Individuals that meet the eligibility requirements have a right to be naturalized within the congressionally defined reasonable period of 180 days.[48] Nevertheless, backlogs that far exceed that six-month adjudication period have been a consistent problem for the USCIS.[49] The backlog grew significantly at the beginning of the Trump Administration and persisted such that the adjudication time ranged as long as twenty months in May 2019.[50] That means that those applicants who submitted their applications in May 2019 may be prevented from voting in November 2020.

If the USCIS were consistently meeting its statutory timeline, applicants would still be able to submit their naturalization applications in April 2020 and expect that they would be citizens in time for the 2020 presidential election. The Denver Field Office has made progress in reducing the backlog of naturalization applications; the estimated range for processing time at the end of 2019 was five and a half to twelve months.[51] But the average range for the almost ninety field offices across the country was roughly seven months and three weeks to almost thirteen months and three weeks, a range which remained in excess of the statutory goal of six months.[52] And the backlog may worsen with the 2020 presidential election coming up.

These problematic naturalization trends grow more worrisome when studying the subset of naturalization applications for noncitizens in the military. Historically, noncitizens in the military seeking citizenship under the expedited process have enjoyed high rates of naturalization.[53] This trend began changing in 2017.[54] The scope of the problem can initially be seen in the declining overall number of military naturalizations. It can be understood with greater clarity in the declines in naturalization,

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46. *Id.* at 20–21.

47. *Id.* at 23; *see also* 8 U.S.C. § 1422 (2018) ("*The right of a person to become a naturalized citizen of the United States* shall not be denied or abridged because of race or sex or because such person is married.") (emphasis added).

48. 8 U.S.C. § 1572.

49. CITIZENSHIP DELAYED, *supra* note 4, at 9.

50. *Id.* at 10.

51. *Check Case Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://egov.uscis.gov/processing-times/ (last visited May 4, 2020).

52. *See id.* (average range is calculated based on the reported ranges of all the offices as of Feb. 1, 2020).

53. Catherine N. Barry, *New Americans in Our Nation's Military*, CTR. AM. PROGRESS (Nov. 8, 2013, 9:01 AM), https://www.americanprogress.org/issues/immigration/reports/2013/11/08/79116/new-americans-in-our-nations-military/.

54. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-416, IMMIGRATION ENFORCEMENT ACTIONS NEEDED TO BETTER HANDLE, IDENTIFY, AND TRACK CASES INVOLVING VETERANS 19 (2019) [hereinafter GAO IMMIGRATION ENFORCEMENT REPORT].

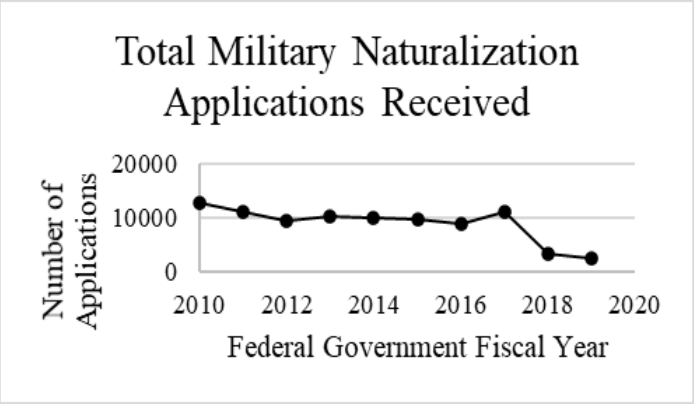
the length of delays, and the increased denials in military naturalization applications.

1. Declines in Military Naturalization

The transition from fiscal year 2016 to fiscal year 2017 marks an inflection point at which the annual number of military naturalization applications and the overall number of resulting naturalizations drop dramatically. This timeframe coincides with the U.S. Department of Defense's announcement on October 13, 2017, that enlistees must complete the entire security screening prior to naturalization.[55] The timing also closely follows the suspension of the MAVNI program in September 2016.[56]

Part of the decline in naturalizations relates to the raw number of applications filed. The Government Accountability Office observed that "the number of applications received declined sharply from fiscal years 2017 to 2018," as illustrated by the following figure.[57]

Figure 1. Total Military Naturalization Applications Received.



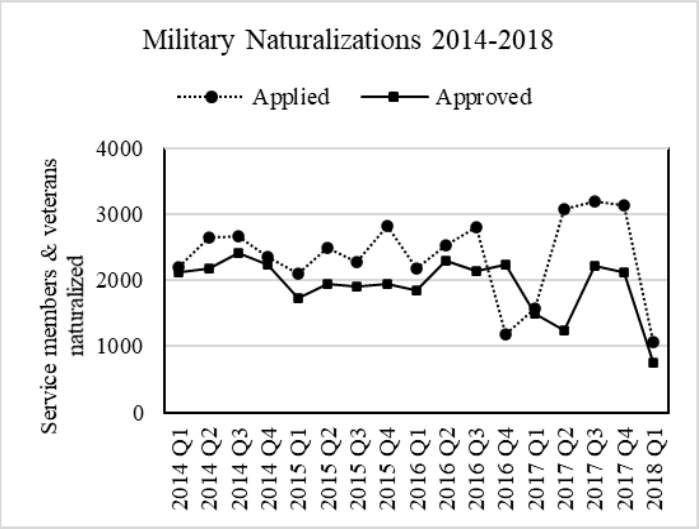
Source: Quarterly data, U.S. Citizenship and Immigration Services

55. Press Release, U.S. Dep't of Def., DoD Announces Policy Changes to Lawful Permanent Residents and the Military Accessions Vital to the National Interest (MAVNI) Pilot Program (Oct. 13, 2017) (on file with author).

56. GAO IMMIGRATION ENFORCEMENT REPORT, *supra* note 54, at 20.

57. *Id.* at 19.

Figure 2. Declining Military Naturalizations.



Source: Quarterly data, U.S. Citizenship and Immigration Services

The decline in applications cannot solely account for decreased naturalizations. And it cannot be attributed to lack of interest. By comparison, about 19,800 noncitizens serve in active duty status in various branches of the armed forces.[58] Likely, it indicates that the 2016 and 2017 procedural burdens have increased to the level that applications cannot be filed, that applicants feel discouraged from pursuing citizenship, or that applications are backlogged in the process leading up to approval.

2. Delays in Military Naturalization

One way of measuring that backlog is to consider wait times. Recent statistics show that wait times for military naturalizations have increased from the FY 2017 average of 8.1 months to the FY 2018 average of 10.3 months.[59] As noted, the backlog has also climbed for civilian naturalization applications: processing times have increased from 8.1 months in FY 2017 to three years in some places in FY 2019.[60] Some states have worse processing times. For example, the Colorado State Advisory Committee to the U.S. Commission on Civil Rights found that in Colorado, the average wait time spanned 9.5 to 20 months as of the

58. Dan Lamothe, *Pentagon Faces Internal Questions about Program to Screen Recruits with Foreign Ties, Emails Show*, WASH. POST (Mar. 12, 2019, 8:51 AM), https://www.washingtonpost.com/national-security/2019/03/12/pentagon-faces-internal-questions-about-program-screen-recruits-with-foreign-ties-emails-show/.

59. *Historical National Average Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://egov.uscis.gov/processing-times/historic-pt (last visited May 4, 2020).

60. *Id.*; *see also Check Case Processing Times*, *supra* note 51.

time of their report.[61] As such, military naturalization processing times exceed civilian times in many cases. The long wait contravenes the clear legislative intent to provide expedited pathways to citizenship for noncitizens in the military. Indeed, the Military Personnel Citizenship Processing Act provided that the USCIS must adjudicate military naturalization applications in six months, though the statute's sunset date has elapsed.[62] However, it is a more complicated inquiry to determine whether naturalization applications fall outside normal processing times because the USCIS takes the position that no processing time accrues when such applications remain in the "pre-examination" stage of the agency's adjudication process.[63] The USCIS's practice of waiting for the pre-examination stage before processing N-400 applications extends the overall time beyond official backlog figures—if the applications even make it to the USCIS.[64]

As a functional matter, the combination of U.S. Department of Defense and USCIS policies not only slow but halt the expedited military program because a service member cannot file an N-400 while background checks are pending. In some cases, as when a potential naturalization applicant is nearing five years of LPR status (three if eligible through marriage to a U.S. citizen), it might be more advantageous for LPRs seeking citizenship to remain civilians while applying for naturalization.[65] Indeed, "immigration lawyers are now advising LPRs not to join the military because it will make their naturalization process more difficult."[66]

3. Denials of Military Naturalization

Another component of decreased total naturalizations is denials of military applications. Whereas denial rates for naturalization generally have not changed very much, the increased denial of applications for military naturalization is unique. Denial rates increased from 2016–2019; this makes the denial rate higher than civilian applications. In total, 17% of military naturalization applications were denied compared to 11% of

61. CITIZENSHIP DELAYED, *supra* note 4, at 10 (citing *Check Case Processing Times*, *supra* note 51).

62. Immigration and Nationality Act § 328(a), 8 U.S.C. § 1439(a) (2018).

63. The Impact of Current Immigration Policies on Service Members and Veterans, and Their Families: Hearing Before the Subcomm. on Immigration and Citizenship of the Comm. on the Judiciary, 116th Cong. 14 (2019) [hereinafter Stock Statement] (statement of Margaret D. Stock, Attorney, Cascadia Cross Border Law Group LLC, Lieutenant Colonel (Retired), Military Police Corps, U.S. Army Reserves).

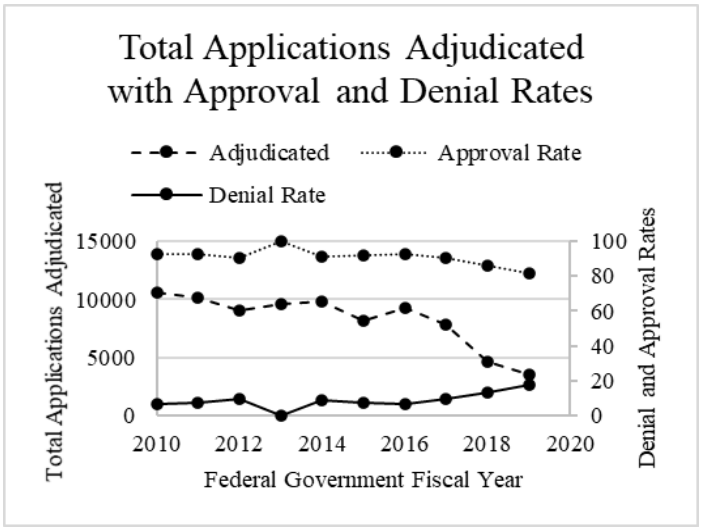
64. *See id.*

65. IMMIGRANT LEGAL RESOURCE CTR., CHANGES TO THE EXPEDITED NATURALIZATION PROCESS FOR MILITARY SERVICE MEMBERS 3 (2018) [hereinafter ILRC PRACTICE ADVISORY].

66. Stock Statement, *supra* note 63, at 22.

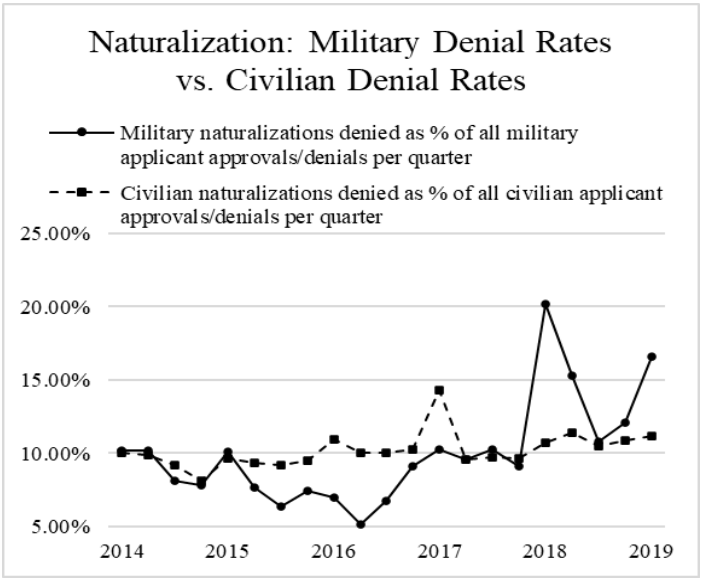
civilian naturalization applications over the course of the first half of FY 2019.[67]

Figure 3. Total Applications Approved and Denied.



Source: Quarterly data, U.S. Citizenship and Immigration Services

Figure 4. Comparison of Military Denial Rates with Civilian Denial Rates.



Source: Quarterly data, U.S. Citizenship and Immigration Services

67. Brittany Blizzard & Jeanne Batalova, *Naturalization Trends in the United States*, MIGRATION POL'Y INST. (July 11, 2019), https://www.migrationpolicy.org/article/naturalization-trends-united-states#Military.

II. CAUSES OF THE MILITARY NATURALIZATION DECLINE

A. General Changes to Naturalization Procedures

As described in *Citizenship Delayed*, the Trump Administration implemented a number of procedural changes that critics consider an "invisible wall" for immigrants.[68] These policies impact processing outcomes for naturalization, generally, and for military naturalization, specifically. The USCIS announced a change to its deference practices in a memorandum titled "Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status."[69] This memorandum rescinded two previous policy memoranda—one from 2004 and one from 2015—that directed USCIS adjudicators to defer to prior determinations of eligibility in certain, commonly occurring circumstances.[70] The Trump Administration argued that the old policies unduly limited adjudicators, and the new policy emphasized that adjudicators "should not feel constrained in requesting additional documentation in the course of adjudicating a petition extension[.]"[71] The policy shift away from deference to prior adjudications concerning the same material facts places additional burdens on both the adjudicators and the applicants.[72] Some immigration practitioners believe that this policy change results in "'double screening' and that this form of intensified vetting is a significant cause in delays for applicants."[73] This policy change encompasses naturalization. Additionally, USCIS officers that spend more time adjudicating nonimmigrant visa petitions or green card applications that previously would have received deference have less time to adjudicate naturalization applications.

Another generally applicable policy change is the USCIS's increased requests for interviews and expanding use of requests for evidence (RFEs) for petitions it is adjudicating. During the summer of 2018, the USCIS issued a new policy memorandum regarding when the agency will issue RFEs.[74] Preexisting policy held that if there were an issue per-

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68. AM. IMMIGRATION LAWYERS ASS'N, DECONSTRUCTING THE INVISIBLE WALL: HOW POLICY CHANGES BY THE TRUMP ADMINISTRATION ARE SLOWING AND RESTRICTING LEGAL IMMIGRATION 3 (2018).

69. Policy Memorandum from U.S. Citizenship and Immigration Services, Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status 1 (Oct. 23, 2017) (on file with author).

70. *Id.* at 1–2.

71. *Id.* at 3.

72. 6 U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MANUAL, pt. G, ch. 6 (2020) (noting that the Trump Administration does allow deference for immigrant investor visa petitions for the explicit purpose of conserving "scarce agency resources, which should not ordinarily be used to duplicate previous efforts").

73. CITIZENSHIP DELAYED, *supra* note 4, at 28.

74. *USCIS Updates Policy Guidance for Certain Requests for Evidence and Notices of Intent to Deny*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/news/news-releases/uscis-updates-policy-guidance-certain-requests-evidence-and-notices-intent-deny (last updated July 13, 2018).

taining to statutory eligibility, an adjudicator would seek additional evidence from an applicant before denying a petition.[75] The use of these provisions expanded as agency adjudicators increasingly sought evidence pertaining to matters that, previously, would have been considered trivial. For example, an NPR report describes USCIS requests to translate birth certificates and verify the legitimacy of well-known employer sponsors such as the arch diocese of San Antonio.[76]

Staffing decisions and funding allocations to increase the capacity to detect fraud, rather than to maximize the total number of naturalization applications adjudicated, also affect naturalization outcomes. In 2017, the USCIS started making decisions that would allow the agency to meet the new requirements imposed by President Trump's Executive Order "Protecting The Nation From Foreign Terrorist Entry Into The United States."[77] In 2018, the USCIS began hiring "several dozen lawyers and immigration officers to review cases of immigrants" suspected of defrauding the naturalization process.[78] In 2019, USCIS Director Ken Cuccinelli boasted that "[r]eferrals to the Fraud Detection and National Security Directorate from field offices surpassed [fiscal year] 2018 levels by more than 22%."[79] On a local level, the Colorado State Advisory Committee found that the Denver Field Office operationalized the restrictionist mission by hiring several new officers and assigning them to the Fraud Detection and National Security Directorate (FDNS).[80] In response to a Congressional inquiry, USCIS leadership acknowledged "extreme vetting" and new, in-person interview requirements as contributing factors to the continued backlog. At the time, more than five million immigrant benefit applications were pending at the USCIS.[81] Rather than hiring more general adjudicators to address the backlog, the USCIS is focusing resources on validating President Trump's questionable claim that mass fraud is being perpetrated in our immigration system.

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75. OFFICE OF THE INSPECTOR GEN., REPORT NO. 03-14, IMMIGRATION AND NATURALIZATION SERVICE'S PREMIUM PROCESSING PROGRAM app. IX (2003).

76. Ira Glass, *Let Me Count the Ways: Kitchen Sink*, THIS AM. LIFE (Sept. 14, 2018), https://www.thisamericanlife.org/656/let-me-count-the-ways; *see also* Monica Campbell, *Under Trump, Immigrants Face Increasingly Long and Complicated Road to Citizenship*, PUB. RADIO INT'L: THE WORLD (Dec. 6, 2019, 12:45 PM), https://www.pri.org/stories/2019-12-06/under-trump-immigrants-face-increasingly-long-and-complicated-road-citizenship.

77. *See* Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

78. Amy Taxin, *APNewsBreak: US Launches Bid to Find Citizenship Cheaters*, AP NEWS (June 11, 2018), https://apnews.com/1da389a535684a5f9d0da74081c242f3.

79. *Cuccinelli Announces USCIS' FY 2019 Accomplishments and Efforts to Implement President Trump's Goals*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 16, 2019), https://www.uscis.gov/news/news-releases/cuccinelli-announces-uscis-fy-2019-accomplishments-and-efforts-implement-president-trumps-goals.

80. CITIZENSHIP DELAYED, *supra* note 4, at 29.

81. USCIS RESPONSE LETTER, *supra* note 42, at 2–3.

B. Bureaucratic Bungling and Institutional Neglect of Service Members

In addition to USCIS procedural changes, the U.S. Department of Defense's procedural changes have made naturalizing harder for service members—a surprising outcome given longstanding political support for the military. It could be that these outcomes are the result of bureaucratic bungling rather than malintent toward service members and veterans. Even if it is not intentional, the willingness to tolerate adverse outcomes indicates institutional neglect of the needs of service members and veterans. At the U.S. Department of Defense, some procedures designed to make background checks more uniform may have been well-intentioned, but they still have had the unintentional consequence of depressing military naturalization. For example, some veterans believe that policies requiring fingerprints from superiors result from civilian government officials being unfamiliar with the military. Though they may have good intentions of improving military naturalization procedures, their lack of understanding leads to inefficient implementation.[82] This lack of understanding of the average levels of contact between a solider and the superior required to sign off on certificates of honorable service leads to an impracticable standard. The impracticability remains even if the policy may not be directed at eliminating applications from USCIS consideration.

Another form of institutional neglect that displays a lack of concern for the vulnerable position of noncitizens in the military is the government's release of identifying information. The U.S. Department of Defense inadvertently released names and other identifying details relating to more than 4,000 MAVNI recruits in *three* separate emails between in 2017 and 2018—the same time frame in which the Pentagon was implementing its procedural changes.[83] This kind of personally identifying information endangers the lives of these recruits who have served the U.S. military.[84] The U.S. Department of Defense's breach included at least a dozen asylum applications premised on the danger that the recruits would face if returned to their country of citizenship.[85] The U.S. Department of Defense acknowledged responsibility for the breach but did not issue an apology to recruits whose lives may have been put at risk.

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82. *See* Alex Ward, *Why Trump May Not be to Blame for Immigrants Being Booted from the Military*, VOX (July 9, 2018, 4:42 PM), https://www.vox.com/2018/7/9/17540114/immigrants-discharged-kicked-military-daca.

83. Aline Barros, *US Military Data Breach Prompts Immigrant Recruits to Apply for US Asylum*, VOA NEWS (May 1, 2019, 10:06 AM), https://www.voanews.com/usa/us-military-data-breach-prompts-immigrant-recruits-apply-us-asylum; Alex Horton, *Hundreds of Immigrant Recruits Risk 'Death Sentence' After Army Bungles Data, Lawmaker Says*, WASH. POST (Mar. 7, 2019, 10:03 AM), https://www.washingtonpost.com/national-security/2019/03/06/hundreds-immigrant-recruits-risk-death-sentence-after-army-bungles-sensitive-data/.

84. Barros, *supra* note 83; Horton, *supra* note 83.

85. Horton, *supra* note 83.

Also, despite the Pentagon's own policy memoranda altering the procedures for military naturalizations, many recruiters remain unaware of departures from prior policy. As a result, they continue to promise potential noncitizen enlistees that they can naturalize at basic training.[86] Thus, the bureaucracy has not adequately disseminated crucial information about policy changes to its public-facing personnel who set expectations for enlistees seeking naturalization through military service.

Outside the U.S. Department of Defense, USCIS officials would say that the decrease in applications is not caused by their agency.[87] From the perspective of the USCIS, the agency processes the applications as it receives them and delays preceding their processing are not its responsibility.[88] It is true that the USCIS receipt of these applications has been impacted by U.S. Department of Defense policy changes. But it is also true that inadequate communication and inconsistent standards between the USCIS and the U.S. Department of Defense contribute to many of the gaps in processing of military naturalization.[89]

Also, the closure of offices by the USCIS on several bases and continuous monitoring have made it more difficult for noncitizen service members to pursue naturalization.[90] A Government Accountability Office (GAO) report sought better tracking of noncitizens in the military to understand the problem and create avenues for intervention.[91] A Congressional inquiry on September 12, 2019, requested further information regarding the military naturalization process given the "precipitous drop" (65%) in the number of service members applying for and earning U.S. citizenship in recent years.[92] These documents express concern that, beyond substantive changes, there might be a lack of awareness among service members about what is needed to seek naturalization or that ser-

86. Stock Statement, *supra* note 63, at 23.

87. Tara Copp, *Immigrant Soldiers Now Denied US Citizenship at Higher Rate Than Civilians*, MCCLATCHY DC (May 15, 2019, 11:05 AM), https://www.mcclatchydc.com/latest-news/article230269884.html.

88. *Id.*

89. *Id.*

90. MUZAFFAR CHISHTI ET AL., MIGRATION POL'Y INST., NONCITIZENS IN THE U.S. MILITARY: NAVIGATING NATIONAL SECURITY CONCERNS AND RECRUITMENT NEEDS 7 (2019). N-426 changes and the cessation of MAVNI in October 2017 have led to discharging noncitizen service members and cancelling enlistment due to foreign ties of family members, including "foreign nexus," or ties to foreign government and military (Chinese, Russian, Arabic). Some delays are long enough to transform legal immigrants on visas into undocumented immigrants with expired credentials. Calixto v. U.S. Dep't of the Army, No. 18-1551, 2019 WL 2139755 (D.D.C. May 16, 2019). The "continuous monitoring" of naturalized citizen soldiers was ruled unlawful. Tiwari v. Mattis, 363 F. Supp. 3d 1154, 1173 (W.D. Wash. 2019); ILRC PRACTICE ADVISORY, *supra* note 65, at 2; *Resources Related to DOD's Tightening of Rules and Discharges of Immigrants from the Military*, AM. IMMIGR. LAW. ASS'N (May 26, 2020), https://www.aila.org/infonet/dod-tightens-rules-for-immigrants-joining-military.

91. GAO IMMIGRATION ENFORCEMENT REPORT, *supra* note 54, at 19.

92. Letter from Congress to Mark T. Esper, Sec'y of Def., U.S. Dep't of Def., and Kevin McAleenan, Acting Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec. (Sept. 12, 2019) (on file with author).

vice members may be confused about procedures in light of heightened requirements. There might also be a "chilling effect" on unit leaders that would have previously provided assistance for service members filling out required paperwork for naturalization.

C. National Security

In terms of substantive policy changes, national security dwarfs all other concerns in the context of military naturalization. In the wake of killings of soldiers at Fort Hood,[93] threats to service members from allied troops,[94] and evolving concerns about "foreign nexus" breaches of the U.S. military following the September 11, 2001, terrorist attacks,[95] national security measures have tightened within the military ranks.[96] In general, these policies' increasing emphasis on national security have led to higher scrutiny of military naturalization applications. Cognizant of the need for loyalty and the risk of conflict, the U.S. Department of Defense must certify a service member's military service as honorable. This requires the service member to complete USCIS Form N-426 before qualifying for expedited citizenship under INA § 329.[97] The service member must then submit Form N-426 alongside their application for naturalized citizenship (N-400).[98]

1. U.S. Department of Defense Policies

On October 13, 2017, the U.S. Department of Defense implemented several key changes pertaining to background checks and honorable service certifications. Background screenings must not only be initiated but also completed before basic training.[99] The National Background Investigations Bureau (NBIB) was recently transferred from the Office of Personal Management into the U.S. Department of Defense to address the large backlog of background checks and security clearance applications.[100] The U.S. Department of Defense Memo also implemented a new

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93. *The Shootings at Fort Hood*, NPR, https://www.npr.org/series/120206378/the-shootings-at-fort-hood (last visited May 5, 2020).

94. Lolita C. Baldor, *US Digs into Saudi Shooting Suspect Motive in Navy Shootin*g, ASSOCIATED PRESS (Dec. 6, 2019), https://apnews.com/1102076110d04018176b4f7f12017347; W.J. Hennigan, *'I Don't Have Seven Arms to Hug Them All.' A Year After Their Father's Death in Afghanistan, a Mother and Her Children Struggle to Move On*, TIME (Oct. 10, 2019, 6:16 AM), https://time.com/5696969/family-of-fallen-soldier/.

95. Lamothe, *supra* note 58.

96. Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135 (2002).

97. *Naturalization for Military Members and Their Families*, U.S. CITIZENSHIP & IMMIGR. SERV., https://my.uscis.gov/exploremyoptions/naturalization_through_military (last visited May 5, 2020).

98. *Id.*

99. Memorandum from A.M. Kurta, Performing the Duties of the Under Sec'y of Def. for Pers. and Readiness, to the Sec'ys of the Military Dep'ts Commandant of the Coast Guard 2 (Oct. 13, 2017) [hereinafter Oct. 13 DoD Memo] (on file with author).

100. Richard Sisk, *DoD Takes Over Troubled Background Check Agency and its Backlog*, MILITARY.COM (Oct. 3, 2019), https://www.military.com/daily-news/2019/10/03/dod-takes-over-troubled-background-check-agency-and-its-backlog.html.

requirement that service members must complete at least 180 days of active duty before receiving certifications of honorable service.[101] At the same time, the U.S. Department of Defense implemented a policy change that only a high-level officer in the pay grade of O-6 (colonel or Navy captain) or higher may sign the N-426 form (certification of honorable service), and they must provide an original signature.[102] Prior to the U.S. Department of Defense's policy interventions, any commanding officer with access to the applicant's military personnel file could have signed off on the certification.[103] Shortly thereafter in January 2018, the Trump Administration terminated the popular and highly successful Basic Training Naturalization Initiative.[104] This program had previously operated for nearly ten years.[105]

These problematic policy changes put noncitizens that enlist in the military at risk of becoming stateless or facing retribution from the government of their original country of citizenship.[106] A noncitizen service member would previously have their naturalization promptly adjudicated by the USCIS.[107] Now the requisite U.S. Department of Defense background checks and signatures take longer to secure than the temporary visas that allowed these people to enlist.[108] Accordingly, the number of individuals able to complete the naturalization process before their visas expire is declining.[109] This dynamic may also disincentivize noncitizens from seeking to enlist in the military in the future if they fear the government's promise of citizenship will not be honored.

The new N-426 policies have been successfully challenged in class action lawsuits.[110] The most recent suit, *Samma v. U.S. Department of Defense*,[111] filed in April 2020, is the first to represent all noncitizen service members.[112] The suit alleges, among other things, that the policies "unlawfully obstructed the ability of thousands of service members to obtain U.S. citizenship, placing them in a state of personal and profes-

101. Oct. 13 DoD Memo, *supra* note 99, at 2.

102. *Id.* at 4.

103. The Impact of Current Immigration Policies on Service Members and Veterans, and Their Families: Hearing Before the Subcomm. on Immigration and Citizenship of the Comm. on the Judiciary, 116th Cong. 8 (2019) (statement of Jennie Pasquarella, Director of Immigrants' Rights and Senior Staff Attorney ACLU of Southern California).

104. Stock Statement, *supra* note 63, at 17.

105. *Id.* at 18.

106. MICHAEL J. SULLIVAN, EARNED CITIZENSHIP 79–80 (2019).

107. *Id*. at 80.

108. Stock Statement, *supra* note 63, at 26.

109. Copp, *supra* note 87.

110. *See generally* Kirwa v. U.S. Dep't of Def., 285 F. Supp. 3d 21 (D.D.C. 2017) (issuing a preliminary injunction enjoining the N-426 policy as applied to Selected Reserve MAVNI service members who have not received an N-426 certification); Nio v. U.S. Dep't of Homeland Sec., 323 F.R.D. 28 (D.D.C. 2017) (issuing a preliminary injunction enjoining N-426 policy as applied specifically to the plaintiff noncitizen service members.)

111. Samma v. U.S. Dep't of Def., No. 1:20-cv-01104 (D.D.C. filed Apr. 28, 2020).

112. Class Action Complaint for Declaratory and Injunctive Relief at 7, *Samma*, No. 1:20-cv-01104 (D.D.C. filed Apr. 28, 2020).

sional limbo."[113] Specifically, the suit alleges that the N-426 policy is unlawful because it "directly violates Congress's clear command that [the] DoD play a purely ministerial role in certifying honorable service."[114]

2. MAVNI

The underlying worries about national security can be seen particularly acutely in MAVNI. The MAVNI program was suspended in 2016 due to concerns from Defense Secretary James Mattis and a U.S. Department of Defense Inspector General report detailing security risks associated with falsified identification documents used for enlistment and possible foreign infiltration.[115] In June 2017, the Pentagon Inspector General issued a classified report titled "Evaluation of Military Services' Compliance with Military Accessions Vital to the National Interest Program Security Reviews and Monitoring Programs (Classified)."[116] Although its contents are not public at this time, various news outlets reported that the Inspector General "identif[ied] serious problems with Military Accessions Vital to the National Interest[.]"[117] Representative Steve Russell (R-OK), a former officer in the Army who sits on the Armed Services Subcommittee on Military Personnel in the House of Representatives, cited "foreign infiltration" as a concern.[118]

Since MAVNI was suspended when the new U.S. Department of Defense and U.S. Department of Justice policies went into effect, it cannot be the direct cause of the decreased applications so much as a parallel casualty of increased scrutiny.[119] Yet, it is illustrative of the national security that may be revived in other settings.[120]

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113. *Id.* at 5.

114. *Id.* at 6.

115. Recently, a federal district court found the severity of these concerns uncompelling based on the sole example presented by the government at trial. That individual was deceived into enrolling in "a fake school created by the Department of Homeland Security as part of a 'sting' operation aimed at trapping brokers who were unlawfully referring foreign students to academic institutions for a fee." Tiwari v. Mattis, 363 F. Supp. 3d 1154, 1168 (W.D. Wash. 2019).

116. DEP'T OF DEF. OFFICE OF INSPECTOR GEN., DODIG-2017-089, EVALUATION OF MILITARY SERVICES' COMPLIANCE WITH MILITARY ACCESSIONS VITAL TO THE NATIONAL INTEREST PROGRAM SECURITY REVIEWS AND MONITORING PROGRAMS (CLASSIFIED) (2017).

117. *Pentagon Investigators Find 'Security Risks' in Government's Immigrant Recruitment Program, 'Infiltration' Feared*, FOX NEWS (Sept. 26, 2017) [hereinafter *'Infiltration' Feared*], https://www.foxnews.com/politics/pentagon-investigators-find-security-risks-in-governments-immigrant-recruitment-program-infiltration-feared.

118. *Id.*

119. An ILRC practice advisory says MAVNI was not impacted by recent policy changes since the program was already suspended when the new policies went into effect. ILRC PRACTICE ADVISORY, *supra* note 65, at 5.

120. The GAO Report cites suspension of MAVNI as a cause for decreased naturalizations. GAO IMMIGRATION ENFORCEMENT REPORT, *supra* note 54, at 19. The program suspension has been challenged in court, with many individuals thrust into a legal limbo as it works its way through the courts. *See generally* Kirwa v. U.S. Dep't of Def., 285 F. Supp. 3d 257, 264 (D.D.C. 2018). Many of these individuals were told their discharge was the result of being labeled "security risks because they have relatives abroad," or that the Department of Defense had not completed background

3. CARRP

If naturalization applicants pass military background checks with the U.S. Department of Defense, they encounter another vetting program within the USCIS called the Controlled Application Review and Resolution Program (CARRP).[121] CARRP requires adjudicating officers to identify applications that raise national security concerns and thoroughly investigate the applicant's background, in consultation with supervisors and other agencies, to determine whether the applicant is statutorily eligible to naturalize.[122] Resolution may require communication with law enforcement or intelligence agencies to determine whether information is relevant to an applicant and, if so, whether the information has an impact on eligibility for the benefit.[123] The full processing of an application flagged for national security involves four steps: (1) identification of the national security concern, (2) assessment of applicant's eligibility for the benefit sought, (3) completion of external vetting, and (4) approval from a USCIS deputy director and a member of the leadership for the Headquarters' Office of Fraud Detection and National Security.[124] During this process, the applicant does not have access to information regarding where their application is in the adjudicatory process.[125]

While CARRP is not designed specifically for military naturalizations, the criteria suggest that some immigrants in the military seeking naturalization may be flagged. CARRP flags naturalization applications for national security concerns or if an officer finds an applicant to be a "Known or Suspected Terrorist," which can result in placement on the Terrorist Watch List.[126] According to a report by the ACLU, most of these applications originate in Muslim-majority and Middle Eastern countries.[127]

The interplay between military naturalizations and CARRP is cloaked in secrecy given that there are few public test cases. However, a

checks on them. Despite acknowledgement that "[i]mmigrant recruits are already screened far more than any other recruits we have," according to Naomi Verdugo, a former senior recruiting official for the Army at the Pentagon, the U.S. Department of Defense continues to explore strategies for expanding its vetting process for immigrant recruits. Alex Horton, *U.S. Army Kills Contracts for Hundreds of Immigrant Recruits. Some Face Deportation*, WASH. POST (Sept. 15, 2017, 4:14 PM), https://www.washingtonpost.com/news/checkpoint/wp/2017/09/15/army-kills-contracts-for-hundreds-of-immigrant-recruits-sources-say-some-face-deportation/.

121. Memorandum from Don Neufeld, Acting Assoc. Dir., U.S. Citizenship and Immigration Servs., to Field Leadership, U.S. Citizenship and Immigrations Servs. 1–2 (June 5, 2009) [hereinafter Neufeld CARRP Guidance Memo] (on file with author).

122. *Id.* at 1–2, 4.

123. *Id.* at 4–5.

124. *Id*. at 2–8.

125. *See* CITIZENSHIP DELAYED, *supra* note 4, at 26, 29–30.

126. Memorandum from Jonathan R. Scharfen, Deputy Dir., U.S. Citizenship and Immigrations Servs., to Field Leadership, U.S. Citizenship and Immigrations Servs. 1 (Apr. 11, 2008) [hereinafter Scharfen CARRP Guidance Memo] (on file with author).

127. KATIE TRAVERSO & JENNIE PASQUARELLA, ACLU OF S. CAL., PRACTICE ADVISORY: USCIS'S CONTROLLED APPLICATION REVIEW AND RESOLUTION PROGRAM 1 (2017).

USCIS Memo to Field Office leadership discusses CARRP procedures.[128] In the context of concurrent I-485 and N-400 filings, the USCIS memo clarifies that the field office processing the N-400 has jurisdiction over the consolidation of the pending military naturalization application and the I-485 application for LPR status in the USCIS electronic Fraud Detection and National Security-Data System.[129] CARRP memos suggest that if an officer identifies a Known or Suspected Terrorist security issue but can identify a separate ground of ineligibility that is not based on national security, the application should be denied on that separate ground. This policy seeks to optimize efficient adjudication as well as avoid exposure of sensitive national security information.[130] Thus, applicants flagged for CARRP may never know the part CARRP played in their adjudication.

Also, the USCIS offers broad guidance to field offices that under CARRP "actions that do not meet the threshold for criminal prosecution (e.g., indicators of fraud, foreign travel, and information concerning employment or family relationships) may be relevant to a benefit determination."[131] While records of military naturalization applications flagged for CARRP are not publicly available, the sweeping requirements for CARRP suggest that military applicants may be impacted and subsequently delayed or denied.

4. Military Service Suitability Determination and Foreign Nexus

In January 2019, news media reported that the Pentagon was instituting a new vetting process to scrutinize its recruits' potential ties to foreign adversaries.[132] Reportedly known as Foreign Nexus Screening and Vetting (FNSV), the Pentagon added this additional screening mechanism out of concern that a noncitizen recruit's foreign ties could expose the U.S. military to a national security risk. Stephanie P. Miller, who manages recruitment policy for the Pentagon, stated in court filings that "[f]oreign nationals, including those with [green-card] status, raise unique counterintelligence and counterterrorism concerns because of the heightened susceptibility to influence by foreign governments and organizations and because of the difficulty in verifying information about them

128. *See* U.S. CITIZENSHIP AND IMMIGRATIONS SERVS., OPERATIONAL GUIDANCE FOR VETTING AND ADJUDICATING CASES WITH NATIONAL SECURITY CONCERNS 25 n.15 (2008) (defining national security criteria and noting "the facts of the case do not need to satisfy the legal standard used in determining admissibility or removability" under those provisions of the INA that give rise to a "national security concern").

129. *Id.*

130. *Id.* at 25.

131. *Id.* at 20.

132. Dan Lamothe, *Pentagon Developing Plan to Scrutinize Recruits with Green Cards and Other Foreign Ties, Memos Show*, WASH. POST (Jan. 16, 2019, 4:33 PM), https://www.washingtonpost.com/national-security/2019/01/16/pentagon-developing-plan-scrutinize-recruits-with-green-cards-other-foreign-ties-memos-show/.

that is maintained overseas[.]"[133] The additional layer of background vetting under FNSV, however, would apply to all recruits, regardless of their citizenship status.[134] Thus, the Pentagon's concerns about foreign-born recruits contributing to an increased threat to national security appears to extend beyond the security concerns specifically cited with reference to MAVNI.

Nevertheless, the Pentagon has not formally announced a rollout of FNSV, and it is not clear whether "foreign nexus" screening has been implemented in practice. As recently as March of 2019, FNSV remained under consideration in a "pre-decisional state" within the U.S. Department of Defense.[135] The Pentagon's concerns about national security, however, seem likely to precipitate intensified background checks of noncitizen recruits. Regardless of whether the U.S. Department of Defense formally implements the proposed FNSV vetting program, concerns over noncitizen service members with foreign ties persist in existing Pentagon background check procedures, as illustrated by outcomes from the background check process for noncitizen enlistment. Prolonged background checks for MAVNI recruits—involving a determination made by U.S. Department of Defense officials known as the "Military Service Suitability Determination" (MSSD)—not only hinder naturalization, but they prevent recruits from reporting for basic training until the background check process is complete. To report to basic training, noncitizen enlistees must complete the MSSD screening and obtain a favorable determination.[136] The outcomes generated by these background checks include incongruous and sometimes "patently absurd" results, whereby noncitizens fail background checks because of their relatives' history of military service in countries that engage in joint military operations with the United States, such as South Korea.[137] Currently, there is a case challenging failed background checks that is pending in the U.S. District Court for the District of Columbia, *Calixto v. U.S. Department of the Army*.[138]

The military also follows background procedures for noncitizens based on the adjudicative guidelines which provide that any tie to a foreign country is "disqualifying."[139] For example, recruits have been discharged for having parents from foreign countries, which triggers a finding of "derogatory information."[140] Similar issues result when noncitizens possess foreign bank accounts or have relatives who have served in

133. *Id.*
134. *Id.*
135. CHISHTI ET AL., *supra* note 90, at 8.
136. ILRC PRACTICE ADVISORY, *supra* note 65, at 3.
137. Stock Statement, *supra* note 63, at 24 n.43.
138. No. 18-1551, 2019 WL 2139755 (D.D.C. May 16, 2019).
139. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, EXECUTIVE AGENT DIRECTIVE 4: NATIONAL SECURITY ADJUDICATIVE GUIDELINES 9–10 (2016).
140. Stock Statement, *supra* note 63, at 24.

foreign military organizations—all of which are common to the backgrounds of noncitizen recruits, but nevertheless trigger abrupt discharge.[141]

Each of these existing and proposed programs leads, or would lead, to delays, denials, and overall declines in military naturalizations.

D. Immigration Enforcement

Another substantive change reckons with an obvious fact: noncitizens in the military are immigrants and may be included in the broader immigration policy agenda that casts an aura of suspicion toward foreigners, despite their veteran status. Indeed, suspicion toward immigrants' foreign status may be even higher in the high-stakes arena of military affairs that frequently involves national security. Assuredly, it can be hard to determine whether discriminatory intent motivates specific policies that hinder noncitizen soldiers or if the harmful impacts of these policies are incidental. The *Citizenship Delayed* report noted no direct evidence of intentional delay, though it acknowledged copious contextual evidence.[142] Alleged national security concerns can be conflated with racism, islamophobia, and mistrust of foreigners. And suspicion toward foreigners can result in disparate impacts toward noncitizens without running afoul of anti-discrimination law that requires direct evidence of intent.[143] It is often especially hard to assess national security justifications for pretext given that evidence linking terrorist incidents with policy changes can be, and often is, classified. Moreover, courts give broad deference to the justifications for adopting policies in the military, if they are reviewed at all.[144] Still, there is some evidence that national security justifications may not be based on actual evidence. A recent study analyzing the immigration status and country of origin of perpetrators of violent terrorist acts found that attacks by American-born perpetrators considerably outnumber those committed by foreign-born individuals: 788 American-born terrorists either planned, attempted, or carried out attacks on U.S. soil compared to 192 foreign-born individuals from 1975 through 2017.[145]

There are additional enlistment restrictions for citizens and permanent residents with undocumented family. Some branches of the armed services have policies and practices pertaining to enlistees with undocumented immediate family members. For example, the U.S. Army and Air Force have no official regulations to this effect, but a spokesperson confirmed the Army has an unwritten policy prohibiting U.S. citizens or

141. *Id.* at 24 n.43.
142. CITIZENSHIP DELAYED, *supra* note 4, at 22, 31.
143. *See* Jiahao Kuang v. U.S. Dep't of Def., 340 F. Supp. 3d 873, 899, 901 (N.D. Cal. 2018).
144. *See id.*
145. ALEX NOWRASTEH, CATO INST., TERRORISTS BY IMMIGRATION STATUS AND NATIONALITY: A RISK ANALYSIS, 1975–2017 at 1 (2019).

LPRs from enlisting if their spouses or children are present in the United States without lawful immigration status.[146] The Marine Corps bars the enlistment of applicants whose spouses or children do not have legal status by policy: "[a]pplicants with dependents (spouse and/or children) will not be enlisted . . . if any dependent (spouse and/or child(ren) is an undocumented illegal alien [*sic*]."[147] Similarly, a Navy regulation provides, "[a]pplicants with foreign alien dependents residing in the United States illegally are not enlistment eligible until their dependents become properly admitted into the United States and obtain a Social Security card, or no longer reside unlawfully in the United States."[148]

The combination of procedural and substantive changes to military naturalization collectively contributes to the troubling portrait of citizenship denials, delays, and declines.

III. CONSEQUENCES OF THE MILITARY NATURALIZATION BACKLOG

The consequence of these delays, denials, and decreases in military naturalization are worrisome for the service members seeking to naturalize and for the core institutions of citizenship and democracy. This Section details the costs for individual service members' civil rights, voting rights, and due process rights. It goes on to describe the collective costs for the core institutions of citizenship: Congress's mandate to grant citizenship for military service, the military ideal of earned citizenship, and the meaning of citizenship for those seeking to obtain it but for institutional barriers.

The *Citizenship Delayed* government report found:

> The substantial delay to naturalization created by the backlog negatively impacts voting rights, civil rights, and the administration of justice. The effect on voting rights is obvious; the right to vote depends on completing the naturalization process. By the time this report is released, applications in the queue for citizenship will not be processed in time for applicants to participate in the 2020 presidential elections. Immigrants, whose eligibility for employment and public benefits hinges on citizenship, may have their civil rights negatively impacted by the backlog. There may also be disproportionate impacts borne by certain classes of individuals based on U.S. Citizenship and Immigration Service's policies, but more information is needed about applicants' race, national origin, and religious background in order to make that determination. The existence of such a substantial backlog of naturalization applications and wait times raises concerns about

146. STOCK, *supra* note 22, at 18.
147. *Id.*
148. *Id.*

> the administration of justice and whether immigrants' due process rights are being violated.[149]

A. Voting and Civil Rights

These general consequences for the naturalization backlog are related to the military backlog. Noncitizens who do not naturalize cannot vote.[150] They cannot access a variety of economic and social benefits, such as specific government jobs, grants, financial aid, and public benefits.[151] Noncitizen veterans have access to special benefits, such as VA care, which can be negatively impacted if they are discharged from the military or lose their citizenship status.[152] Additionally, civil rights are impacted if the reasons for their military discharge or more heavily scrutinized naturalization applications relate to their place of birth.

Of particular note is the notion of dismissal of noncitizen service members for alleged foreign nexus. According to agency regulations:

> Foreign nexus means specific indications that a covered person is or may be engaged in clandestine or unreported relationships with foreign powers, organizations or persons, or international terrorists; contacts with foreign intelligence services; or other hostile activities directed against DOE facilities, property, personnel, programs or contractors by or on behalf of foreign powers, organizations or persons, or international terrorists.[153]

The *Washington Post* reported that a predecisional memo attributed to Joseph D. Kernan (Undersecretary of Defense for Intelligence) and James N. Stewart (Acting Undersecretary of Defense for Personnel and Readiness) circulated among senior officials within the U.S. Department of Defense and reportedly says, "[o]ne primary concern associated with qualifying for these positions relates to the potential counterintelligence or terrorism risks, . . . [t]he department must implement expanded foreign vetting and screening protocols to identify and mitigate the foreign nexus risks."[154] By definition, foreign contacts include persons, such as family members, and organizations, such as banks. To use these foreign ties as grounds for dismissal or disfavorable treatment unfairly excludes immigrants from the U.S. military. While discrimination on the basis of citizenship is not unlawful,[155] it is ironic since many are recruited to

149. CITIZENSHIP DELAYED, *supra* note 4, at 5.

150. U.S. CITIZENSHIP AND IMMIGRATION SERVS., *What are the Benefits and Responsibilities of Citizenship?*, *in* A GUIDE TO NATURALIZATION 3, 3 (2016).

151. *Id.*

152. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HRD-90-163FS, VETERANS' BENEFITS: INFORMATION ON NONCITIZEN VETERANS RECEIVING VA DISABILITY COMPENSATION (1990) (providing an overview of the number of noncitizens who receive disability compensation).

153. 10 C.F.R. § 709.2 (2020).

154. Lamothe, *supra* note 132 (quoting memo that was circulated among senior officials and others who oversee recruiting).

155. *See* Jiahao Kuang v. U.S. Dep't of Def., 340 F. Supp. 3d 873, 899 (N.D. Cal. 2018).

serve the U.S. military precisely because they possess knowledge, skills, and relationships deemed valuable to the U.S. military mission by virtue of their lives abroad. There may be additional discriminatory targeting on the basis of race, religion, or national origin when foreign nexus is construed to apply only to certain countries. When Chinese and Russian recruits face heightened scrutiny, the reasons may be related to unlawful discrimination rather than purported national security since terrorist organizations are not prevalent in these countries.

B. Vulnerability to Immigration Enforcement.

A key concern if noncitizens serving in the military do not naturalize is that they may lose their path to legal permanent residence and citizenship. The risk of immigration enforcement arises if the service members are discharged during enlistment, but before naturalization, or if they are denied naturalization altogether.[156] This leaves their citizenship status in limbo. For those beginning with a green card, delay or denial means losing the corollary rights and benefits of citizenship, such as voting. Delay or denial may expose immigrants to deportation if their pathway to citizenship exists only because of military service—for example, failure to naturalize could lead to expiration of their visa or green card and result in undocumented status. This could result in deportation to countries that the noncitizen has little connection with after leaving for the United States at a young age or after spending years living and serving in the military as a U.S. LPR.[157]

There is another way non-naturalized service members are acutely vulnerable to immigration enforcement: service members are prone to PTSD and substance abuse following deployment.[158] Substance abuse is among a variety of convictions that can trigger deportation, even after rehabilitation or jail time. One study estimated that 239 veterans have been deported to 34 countries.[159] Due to deceptive recruiting practices and institutional bungling described in this Article, some of these veterans were even eligible for citizenship at the time they were deported. Hector Barajas, for example, is a deported veteran who founded Support House in Rosarito, Baja California, Mexico. Due to the notoriety of his

156. As reported, the increased denial rate in 2019 was 17%, which is 6% higher than the civilian rate and reflects the seventh quarterly report out of the last nine showing a higher denial rate. There was an 11% increase in denials from end of FY 2017 to FY 2018. Copp, *supra* note 87.

157. A recent high-profile case involves the deportation to El Salvador of combat veteran Jose Segovia Benitez. Daniella Silva, *Marine Combat Veteran Recounts 'Crushing' Deportation to El Salvador*, NBC NEWS (Oct. 25, 2019, 4:53 PM), https://www.nbcnews.com/news/latino/marine-combat-veteran-recounts-crushing-deportation-el-salvador-n1072341.

158. *See generally* BARDIS VAKILI ET AL., ACLU OF CAL., DISCHARGED THEN DISCARDED: HOW U.S. VETERANS ARE BANISHED BY THE COUNTRY THEY SWORE TO PROTECT (2016) (documenting the pattern of deportation of veterans and offering policy solutions).

159. Miriam Jordan, *Hundreds of Veterans Were Deported, Rights Group Says*, WALL STREET J. (July 7, 2016, 7:35 PM), https://www.wsj.com/articles/hundreds-of-veterans-were-deported-rights-group-says-1467848127?ns=prod/accounts-wsj.

case, he was later pardoned by the governor of California, naturalized, and returned to the United States.[160] But there continue to be other cases of deported veterans. In 2019, Jose Segovia Benitez was removed in the dead of night, despite his pending case for citizenship, honorable service, and lack of connections to the conflict-ridden country he left as a toddler.[161] In some cases, deportation can even lead to statelessness, as service members can become ineligible for citizenship in their home countries as a result of their military service.[162]

There can be adverse spill-over effects for families of service members who would qualify for citizenship and its associated benefits as derivatives, but whose eligibility for benefits and immunity to deportation depend on their military family member naturalizing. For example, a MAVNI recruit who earns his pathway to citizenship through service will not be able to sponsor his spouse or children until his own naturalization is complete. Currently, the policy at the USCIS is to bar those applications of immigrants with undocumented family members, despite the continuing requirement for noncitizen men to register for military service in the event of a military draft.[163]

C. Undermining Congressional Mandate and Agency Mission

Beyond the harms to individual service members, Congress's aims are thwarted when noncitizens serving in the military are unable to access promised benefits. The Immigration and Nationality Act makes clear Congress's intention to expedite naturalized citizenship for those who serve in the military.[164] The high barriers to entry, long delays in processing, and unsupported denials of applications contravene this legislative intent.

In addition, the agencies charged with implementing expedited military naturalization neglect their delegated authority and statutory timeline when delaying and denying naturalization. In 2018, as part of the National Defense Authorization Act (NDAA),[165] Congress mandated that the armed services provide information to their members about the availability and the process of naturalizing through military service.[166] In Section 530 of the 2018 NDAA, the statute provides that:

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160. *Barajas is Believed to be the First Deported Vet to Receive Citizenship*, ACLU S. CAL. (Mar. 29, 2018), https://www.aclusocal.org/en/press-releases/breaking-deported-army-veteran-hector-barajas-granted-us-citizenship.

161. Silva, *supra* note 157.

162. SULLIVAN, *supra* note 106, at 80.

163. STOCK, *supra* note 22, at 6–7, 272.

164. Immigration and Nationality Act § 328(a), 8 U.S.C. § 1439(a) (2018); *id.* § 329(b)(1), 8 U.S.C. § 1440(b)(1).

165. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017).

166. *Id.* at 1383.

> The Secretary of Defense shall ensure that members of the Army, Navy, Air Force, and Marine Corps who are aliens lawfully admitted to the United States for permanent residence are informed of the availability of naturalization through service in the Armed Forces under section 328 of the Immigration and Nationality Act (8 U.S.C. 1439) and the process by which to pursue naturalization. The Secretary shall ensure that resources are available to assist qualified members of the Armed Forces to navigate the application and naturalization process.[167]

A unified telephone hotline and website (militaryonesource.mil) set forth the process and tout the benefits of naturalizing through military service.[168] The package of benefits is an important recruitment tool for the military and failures to deliver impede the realization of recruiting goals and the benefits awarded to those who serve.

Also, although responsibility for naturalizing ultimately lies with the USCIS (whose services are hyperlinked on the Military OneSource page), the USCIS's deference to military background checks and certifications of honorable service prior to processing the standard N-400 means that any bottlenecks in U.S. Department of Defense procedure have downstream impacts on naturalization.

If and when the applications reach the USCIS—and lately they may not—the immigration bureaucracy comes into play. The USCIS is lodged within the DHS and is specifically tasked with servicing immigration benefits such as naturalization applications. As described in the *Citizenship Delayed* report, the recent exclusionary emphasis and unprecedented backlogs at the USCIS constitutes "mission drift"[169] and may violate the agency's mandate. In 2003, Congress purposefully separated the enforcement functions and the service functions of the dissolved Immigration and Naturalization Service when it created the DHS.[170] This was done in response to concerns that the enforcement functions negatively impacted the agency's ability to provide services.[171] Although the statutory mandate of the USCIS has not changed, on February 22, 2018, the official USCIS mission statement removed references to customer service and added greater emphasis on the protection of Americans and securing the homeland.[172] USCIS officers have indicated that ensuring

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167. *Id.*

168. *Your Military Service Offers a Faster Track to US Citizenship*, MIL. ONESOURCE (Apr. 3, 2020, 6:28 PM), https://www.militaryonesource.mil/financial-legal/legal/citizenship-and-immigration/us-citizenship-through-military-service.

169. Ming H. Chen & Zachary New, *Silence and the Second Wall*, 28 S. CAL. INTERDISC. L.J. 549, 557 (2019).

170. Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (2002).

171. *See* 6 U.S.C. § 251 (2018) (transferring immigration enforcement functions to the Under Secretary for Border and Transportation Security); *see also id.* § 271 (providing for the establishment of the Bureau of Citizenship and Immigration Services).

172. U.S. CITIZENSHIP AND IMMIGRATION SERVS., PA-2019-03, POLICY ALERT SUBJECT: USCIS PUBLIC SERVICES (2019); *see also* 1 U.S. CITIZENSHIP AND IMMIGRATION SERVS., POLICY

compliance with immigration law and inspecting fraud and national security risks are part of their benefits adjudication function, not diversions from it. They assert it is in keeping with the FDNS program description stating that the directorate's primary mission is to investigate those who pose a threat to national security, public safety, or the integrity of the nation's legal immigration system.[173] This logic is dubious when applied to service members who have already been cleared for higher levels of security and whose fidelity to the United States has already been proven on the battlefield. In addition, the USCIS has its own processes in place for military naturalization that are thwarted when U.S. Department of Defense background checks impede applications from reaching their desk.[174]

Changes to military naturalization could also undermine the goals of the U.S. Department of Defense. The U.S. Department of Defense establishes recruiting targets for each year to fulfill the agency's traditional mission "to provide the military forces needed to deter war and to protect the security of our country."[175] Meeting these recruiting targets is an annual struggle for some branches of the armed forces. The average wait time for LPRs to join the U.S. military has grown to 354 days as opposed to 168 for U.S. citizens, raising the possibility that the Navy would miss its recruiting goals.[176] Both the Navy and the Marine Corps reported more than 1,000 LPR recruits awaiting background checks before being allowed to report for their training in 2016–2017, before the policy was

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MANUAL, pt. A, ch. 1 (2020) ("USCIS administers the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.").

173. U.S. CITIZENSHIP AND IMMIGRATION SERVS., FRAUD DETECTION AND NATIONAL SECURITY DIRECTORATE (2020). USCIS Director Francis Cissna has said, "I just feel a strong commitment to the law, and to the rule of law. None of the things that we're doing . . . are guided by any kind of malevolent intent." Jonathan Blitzer, *The Unlawful Ambitions of Donald Trump's Immigration Policy*, NEW YORKER (Apr. 17, 2019), https://www.newyorker.com/news/news-desk/the-unlawful-ambitions-of-donald-trumps-immigration-policy. A similar rule of law justification for the more rigorous requirements associated with legal migration is given by USCIS Spokesman Michael Bars, who says that:

> Each year, immigration benefits are attainable for many law-abiding individuals legitimately seeking greater opportunity, prosperity, and security as newly entrusted members of society, and to this end USCIS takes great pride in helping these dreams become a reality. Ensuring that individuals who are subject to removal are placed in proceedings is fidelity to the law.

Amanda Holpuch, *Trump's Invisible Wall: How His 2018 Immigration Policies Built a Barrier*, GUARDIAN (Dec. 25, 2018, 1:00 PM), https://www.theguardian.com/us-news/2018/dec/25/trump-wall-immigration-policies-mexico-border.

174. U.S. CITIZENSHIP AND IMMIGRATION SERVS., NATURALIZATION THROUGH MILITARY SERVICE (2020).

175. *About the Department of Defense (DOD)*, U.S. DEP'T DEFENSE., https://archive.defense.gov/about/#mission (last visited May 8, 2020).

176. Dan Lamothe, *After Losing Court Battle, Pentagon will Send Green-Card Holders to Recruit Training*, WASH. POST (Dec. 3, 2018, 6:57 PM), https://www.washingtonpost.com/world/national-security/after-losing-court-battle-pentagon-will-send-green-card-holders-to-recruit-training/2018/12/03/3a858078-f742-11e8-863a-8972120646e0_story.html.

suspended in 2018.[177] Additionally, *McClatchy* reported that the Army fell short of its annual recruiting targets in 2018 by greater than 6,500 personnel.[178] The shrinking recruitment pools also constrain the military's long-established role as an institution of socialization and engine of equality.

D. Due Process and Administration of Justice

Basic principles of fairness and the administration of justice that arise under the due process clause and the APA are compromised when citizenship is not granted for military service.

The purpose of making naturalization an administrative process is to provide fair, efficient implementation of the right to naturalize set forth by Congress in the INA, to be executed by civil servants who gain expertise and act without an overtly partisan agenda. The irregularities in recruitment and long delays in processing applications deviate from these purposes. Furthermore, the vague grounds cited for denial, and the overall increase in denials, suggest arbitrariness in the decision-making process. The arbitrariness is exacerbated by the issuance of memorandums and policies that are not readily available to the public and that have not undergone notice and comment procedures required in the APA.[179] Due process may be implicated if military service members are being misled about their eligibility for naturalized citizenship. These due process concerns may also arise where military service members are discharged on questionable grounds, such as their foreign status, that made them attractive to the military for recruiting. These concerns are particularly pronounced because naturalization, as compared to visas, is not discretionary. If anything, Congress made it particularly clear that they wanted service members to have a path to citizenship through the military.[180]

For service members who have laid their lives on the line, or indicated a willingness to do so, these broken promises seem especially unfair.

E. Citizenship and Democracy

More generally, the willingness to thwart the principle of "citizenship for service" compromises the notion of *jus meritum*, or earned citizenship.[181] Representative Scanlon noted the "cost to our national securi-

177. *Id.* The Army refused to disclose data due to litigation.

178. Copp, *supra* note 87.

179. 5 U.S.C. § 553 (2018).

180. Afghan and Iraqi Allies Under Serious Threat Because of Their Faithful Service to the U.S. v. Pompeo, No. 18-cv-01388, 2019 WL 4575565, at *11 (D.D.C. Sept. 20, 2019); *cf.* Solis v. Cissna, No. 9:18-00083-MBS, 2018 WL 3819099, at *5 (D.S.C. Aug. 10, 2018) (U-visa case in which the court found no violation because that form of relief is discretionary).

181. Cara Wong & Grace Cho, *Jus Meritum: Citizenship for Service*, *in* TRANSFORMING POLITICS, TRANSFORMING AMERICA: THE POLITICAL AND CIVIC INCORPORATION OF IMMIGRANTS IN THE U.S., 71, 71–72 (Taeku Lee et al. eds., 2012).

ty and our national honor" of the current administration's policies during a House Judiciary Committee hearing on policies impacting noncitizens in the military.[182] This concept of citizenship for service refers to a theoretical justification for citizenship based on active commitment to the nation or earned citizenship.[183] While *jus sanguinis* and *jus solis* remain the primary routes to citizenship, the tradition of offering citizenship for service is historical and has a statutory basis.[184] Changing this important basis for citizenship undermines a long history of institutional affiliation via the loyalty of solider citizens.

Additionally, the notion of earned citizenship is seen as the normative ideal in the broader context of nonmilitary naturalization where the rhetoric of earning citizenship has been a prerequisite for legalization for more than a million undocumented immigrants.[185] Recent policy developments challenge the sincerity of the concept of earned citizenship. These troubling trends also strike at the durability of naturalized citizenship in lieu of a lesser form of citizenship under certain conditions—for example, when the military diversifies, when the United States is engaged in extended military conflicts, or when immigration policies are infected by a restrictionist fervor.[186]

IV. PROPOSED SOLUTIONS

A. General Recommendations for Naturalization

The *Citizenship Delayed* report to the U.S. Commission on Civil Rights made several recommendations to improve naturalization processing times and reduce the backlog. First, it recommended that individual applicants seek mandamus relief and other remedies in federal court to cure unreasonable agency delay.[187] The Administrative Procedure Act directs agencies to conclude matters presented to them "within a reasonable time,"[188] and stipulates that a reviewing court shall compel

182. Video Recording: The Impact of Current Immigration Policies on Service Members and Veterans, and their Families, H. Comm. on the Judiciary, 116th Cong. (Oct. 29, 2019) (statement of Rep. Scanlon, Member, H. Comm. on the Judiciary), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2252.

183. SULLIVAN, *supra* note 106, at 7 (discussing the concept of citizenship for service throughout American history).

184. 8 U.S.C. §§ 1439, 1440 (2018).

185. *Id.*; SULLIVAN, *supra* note 106, at 190; New, *supra* note 13.

186. Amanda Frost, *Alienating Citizens*, 114 NW. U. L. REV. 241, 246–47, 249 (2019); Cassandra Burke Robertson & Irina D. Manta, *(Un)civil Denaturalization*, 94 N.Y.U. L. REV. 402, 402 (2019); Cassandra Burke Robertson & Irina D. Manta, *Litigating Citizenship* 6–7 (Ctr. for the Study of the Admin. State, Working Paper No. 19-31, 2019); Jelani Cobb, *Donald Trump's Idea of Selective Citizenship*, NEW YORKER (July 21, 2019), https://www.newyorker.com/magazine/2019/07/29/donald-trumps-idea-of-selective-citizenship; Amanda Frost, *The New War on Naturalized Citizens*, AM. PROSPECT (Oct. 15, 2019), https://prospect.org/justice/the-new-war-on-naturalized-citizens/.

187. CITIZENSHIP DELAYED, *supra* note 4, at 34.

188. 5 U.S.C. § 555(b) (2018).

agency action unlawfully withheld or unreasonably delayed.[189] Individuals with applications that have been pending in the backlog for far past the recommended processing time of six months may merit mandamus relief, which would compel agency action.[190] These actions tend to be effective, even if they can be expensive to file and may require obtaining counsel. Individuals can also reach out to the U.S. Attorney's office or the USCIS Ombudsman for intervention.[191]

Second, the *Citizenship Delayed* report recommended the USCIS revisit policies that result in more intensive vetting and longer processing time at the cost of efficient adjudication.[192] It recommended that the agency streamline the adjudication process to focus on statutory and regulatory requirements for naturalization, especially in pre-election years.[193] It encouraged a better balance of service and screening in light of the primary mission of the agency to adjudicate benefits, and it expressed particular concern about the allocation of resources toward Fraud Detection and National Security and away from front-line adjudication.[194] The report noted that the DHS Office of Inspector General and InfoPass are sources of internal accountability for the USCIS's agency performance.[195]

Third, the report discussed the need for greater congressional accountability through letters of inquiry, oversight hearings, and monitoring.[196] The Government Accountability Office, which has looked into the military naturalization backlog, could assist Congress's effort.[197] Following the model of the 2005 intervention that led to a reduction of the backlog previously, the report suggested a temporary appropriation ear-

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189. *Id.* § 706(1). In order for the court to assess whether agency delay is "so egregious as to warrant mandamus" the court laid out a six-part standard:

> (1) the time agencies take to make decisions must be governed by a "rule of reason;" (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

Telecomms. Research & Action Ctr. v. Fed. Commc'ns Comm'n, 750 F.2d 70, 80 (D.C. Cir. 1984) (citations omitted).

190. In the Tenth Circuit, when an agency fails to act by a "statutorily imposed absolute deadline," the action has been "unlawfully withheld" and the court has no choice but to compel the agency to act. Forrest Guardians v. Babbitt, 174 F.3d 1178, 1188, 1190 (10th Cir. 1999).

191. 6 U.S.C. § 272 (2018).

192. CITIZENSHIP DELAYED, *supra* note 4, at 37.

193. *Id.*

194. *Id.* at 37.

195. *Id.* at 38–39.

196. *Id.* at 39–40.

197. *Id.* at 40.

marked for backlog.[198] Funds would need to be channeled toward adjudication as opposed to other USCIS Operations. Assistance with N-400 preparation from local government offices, community organizations, and immigration lawyers would encourage people to file for naturalized citizenship in the face of delays or mistrust of government.[199]

B. Specific Recommendations for Military Naturalization

This Article endorses all of these ideas and expands on them for military naturalization.

This Article recommends the following supplemental measures for the military naturalization process. Initially, the government should cure the collective costs of impeding citizenship for service by ensuring that the social contract with service members is honored regardless of noncitizen status. If the principle of citizenship for service cannot be honored due to national security or operational concerns, Congress should rewrite enlistment provisions to no longer require male immigrants to register for selective service if they cannot also earn citizenship through their military service.

If military naturalizations are delayed and denied, the USCIS should reopen military naturalization applications that were denied or abandoned because an individual was unable to follow through on the U.S. Department of Defense naturalization process as a result of their military service.[200]

Additional suggestions are tailored to the type of immigrant serving in the military.

1. Lawful Permanent Residents Serving in the Military

Beyond institutional streamlining of military naturalization, LPRs who serve in the military would benefit from harmonizing U.S. Department of Defense background checks and USCIS vetting. The USCIS's policy of automatically delaying their own processing of military N-400s until the U.S. Department of Defense process is complete should be revisited in lieu of crafting an interagency memorandum of understanding about how best to proceed in situations of delay or prejudicial findings. On its merits, the U.S. Department of Defense should reexamine the 2017 changes to MSDD policies that are impeding background checks. For the same reason, they should resist the proposed foreign nexus policies that would exacerbate delay and prejudicial findings.[201] Strengthen-

198. *Id.*
199. *Id.* at 41.
200. VAKILI ET AL., *supra* note 158, at 54.
201. In 2008, INA 328(g) required USCIS processing of military naturalizations within six months. The six-month mandate is not included in a subsequent version. *Compare* Immigration and Nationality Act § 328, 8 U.S.C. § 1439 (2008), *with* 8 U.S.C. § 1439 (2018).

ing pathways and increasing resources to compel agency adjudication at both the USCIS and the U.S. Department of Defense could help these agencies meet Congressional and agency timetables.[202] The usual naturalization process includes a writ of mandamus and a federal jurisdiction procedure for compelling action; a September 2019 lawsuit finding delays for military translators unlawful under the APA suggests these types of remedies could be extended or tailored for military service members.[203] Margaret Stock's Congressional Written Testimony includes other examples of military naturalization applicants initiating individual lawsuits against the USCIS to compel processing of their applications.[204]

A more ambitious reform is to make naturalization occur by operation of law under the INA in cases where enlisting immigrants expect to become eligible for citizenship.[205] Congress has already made eligibility for LPR status automatic and has consolidated the LPR and naturalization phases for military service members.[206] The next step is to further streamline the process so that service members who enlist become not only eligible but also automatically considered for LPR status and naturalization, whether at the time of enlistment or completion of basic training.[207] Whatever the particulars, more USCIS support and better coordination between the USCIS and the U.S. Department of Defense would smooth the military naturalization process. Examples include reversing USCIS office closures, strengthening appeals processes, and expanding the American Immigration Lawyers Association's military assistance program.[208]

For the service members who do not make it through the enlistment process due to the U.S. Department of Defense background check delays or denials, it will be important to consider ways to ameliorate the consequences. The U.S. Department of Defense has instituted an appeals pro-

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202. Congressional appropriations used to hire and train adjudicators helped dramatically reduce a backlog in naturalization applications in 2006. *See* USCIS BACKLOG ELIMINATION PLAN, *supra* note 33, at 9.

203. Memorandum Opinion at *19, Afghan and Iraqi Allies Under Serious Threat Because of Their Faithful Service to the U.S. v. Pompeo, No. 18-cv-01388, 2019 WL 4575565 (D.D.C. Sept. 20, 2019).

204. *See* Stock Statement, *supra* note 63, at 13–14 (discussing *Mathenge v. Dep't of Homeland Sec.*, No. SA-18-CV-788-XR, 2019 WL 6876496 (W.D. Tex. 2019)).

205. 8 U.S.C. §§ 1439, 1440. A variation would be to screen enlistees for future eligibility for citizenship, permitting a subset to be prepped for naturalization and yet, retaining the prospect of enlisting individuals qualified for the military but not for citizenship. This would ensure that harmonization requirements do not shrink the pool of recruits for the military, nor force unwilling immigrants to accept U.S. citizenship, especially if doing so may jeopardize their first citizenship.

206. *Essentials of Naturalization for Military Service Members and Veterans*, NAT'L IMMIGR. F. (Oct. 24, 2018), https://immigrationforum.org/article/essentials-of-naturalization-for-military-service-members-and-veterans/.

207. SULLIVAN, *supra* note 106, at 80, 102; Travis Weiner, Reimagining *Jus Meritum*: An Appeal for Changes to the Service-to-Citizenship Pathway in the United States (2017) (unpublished paper) (on file with author) (suggesting rewriting INA 329 "period of hostilities").

208. Press Release, U.S. Citizenship & Immigration Servs., USCIS Announces New Locations for Onsite Overseas Military Naturalization Services (Sept. 30, 2019) (on file with author).

cess for discharged service members to learn why they were dismissed, which would serve as an additional check before the removal operation goes into full force.[209] The GAO report recommends better tracking of veterans flagged for removal and communication across the agencies involved in effectuating removal—for instance, ICE, the Executive Office for Immigration Review's immigration court, and the Board of Immigration Appeals. Additionally, the 2019 GAO report and the Congressional hearing on the impact of immigration policies on service members and veterans recommended policies to give veterans special consideration before deporting them[210]—for example, listing military service as a positive equity in deferred action or cancellation of removal, or making a statutory exception to other INA provisions that bar relief.[211] The DHS has agreed to the GAO recommendations to track veterans flagged for removal and said it would update its training and issue guidance for ICE agents by May 2020.[212]

2. Nonimmigrants and Undocumented Immigrants in the Military

Lawfully present persons, including formerly undocumented immigrants holding a temporary status and other nonimmigrants, were eligible to serve in the military in circumstances specified by statute[213] until MAVNI was suspended in 2016 due to national security concerns.[214]

Addressing the security concerns voiced by the Office of Inspector General that led to the suspension of the MAVNI program would allow the program to be restored, an outcome that former Defense Secretary Jim Mattis said in 2017 he would favor.[215] It is difficult to know all of the reasons MAVNI was terminated because some of this information remains classified. Some of the concerns may be valid. For example, the government has argued that there are certain vulnerabilities inherent in MAVNI. These vulnerabilities are attributable to the limited amount of time many MAVNI soldiers have spent in the United States and the susceptibility of MAVNI soldiers to exploitation due to their prior relationships.[216] These concerns can be addressed by fixing the forms of government vetting, rather than eliminating the program altogether.[217]

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209. Stock Statement, *supra* note 63, at 27.

210. GAO IMMIGRATION ENFORCEMENT REPORT, *supra* note 54, at 15, 29.

211. *See id.*

212. *Id.*

213. *See* STOCK, *supra* note 22, at 17 (describing MAVNI eligibility); STOCK, *supra* note 28, at 1–2 (describing the ways certain non-LPRs could be accessed to the military).

214. *See supra* Part II.C.2.

215. Lolita C. Baldor, *How Trump Administration Policies Stymie the Pentagon's Immigrant Recruit Program*, ASSOCIATED PRESS (Sept. 30, 2018), https://www.militarytimes.com/news/pentagon-congress/2018/09/30/how-trump-administration-policies-stymie-the-pentagons-immigrant-recruit-program/.

216. *'Infiltration' Feared*, *supra* note 117.

217. For example, in *Tiwari*, the government argued that the U.S. Department of Defense's inability to verify information volunteered by the subject, due to a lack of information-sharing

The U.S. Department of Defense operates other security programs with different procedures and standards that make access to classified information subject to an adjudicative process that "determines access level based on eligibility, need-to-know, and the requirements of the position held."[218] The U.S. Department of Defense could adapt their process for non-LPR recruits. They could also route these recruits into positions that do not require higher security clearances, such as military translator, biomedical equipment specialist, or artillery mechanic.

If avenues for enlisting non-LPRs are unworkable due to attempted exploitation by foreign adversaries, then alternative programs should be created that eliminate national security risks while allowing undocumented people to access citizenship through military service. A legislative path for undocumented people to earn a green card and citizenship through military service such as the ENLIST Act could be considered.[219] The Act would amend the citizenship or residency requirements for enlistment in the armed forces to allow enlistment for noncitizens continuously present since December 31, 2012, who were younger than fifteen on the date of initial entry, and who would be eligible for enlistment but for their unlawful status.[220] These individuals would be adjusted to LPR status subject to automatic rescindment if discharged under other than honorable conditions before serving the term of enlistment.[221] The ENLIST Act embodies an approach to modernizing the way that undocumented people can earn citizenship through military service. This approach would aid stranded noncitizens in the military and even Deferred Action for Childhood Arrivals recipients who have no path to citizenship and may lose limited protections now that the program has been rescinded.

3. Deported Veterans and Other Institutional Reforms

In light of the great sacrifice made, or pledged, by noncitizens in the military, stringent due process should be applied to their discharge and disqualification for military naturalizations. If the naturalization process is delayed or denied at either the U.S. Department of Defense or the

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agreements with other countries, is problematic. The State Department was able to work out ways to assess the vetting practices of other countries in the context of the travel ban and the U.S. Department of Defense has other ways to run security checks short of the National Intelligence Agency Checks (NIAC) that were found faulty in the context of MAVNI. Among other security checks, the MAVNI program required individuals to be subject to "continuous monitoring," which required a series of NIAC every two years in order to maintain security clearance, even after the individual left the military. Defendant's Trial Brief at 8, Tiwari v. Mattis, No. 2:17-cv-00242, 2018 WL 7585600 (W.D. Wash. Nov. 9, 2018). The court in *Tiwari* permanently enjoined this NIAC practice "in the absence of individualized suspicion." Tiwari v. Mattis, 363 F. Supp. 3d 1154, 1173 (2019).

218. U.S. DEP'T OF DEF., PROCEDURES FOR THE DOD PERSONAL SECURITY PROGRAM (PSP) MANUAL 5200.02 at 54 (2017).

219. ENLIST Act, H.R. 3400, 116th Cong. (2019). The Enlist Act was introduced and referred to the House Committee on Armed Services.

220. *Id.* § 2(a).

221. *Id.* § 2(b).

USCIS, the USCIS should reopen the affected military naturalization applications to investigate. In instances where the noncitizen was denied or abandoned because that person was unable to follow through on the U.S. Department of Defense naturalization process as a result of their military service, the USCIS should apply de novo, rather than deferential, review. Equitable principles associated with relief from deportation should be expanded. In instances where the noncitizen is ineligible due to subsequent substance abuse or criminal convictions, waivers from statutory bars to deportation should be considered.[222] Congress and the USCIS, in some cases, may strengthen the connection for noncitizens in the military to their asylum/refugee status, which may afford more avenues to adjust status.

In the most extreme cases, Congress should pass legislation to repatriate deported veterans.[223]

CONCLUSION

Citizenship is valuable for immigrants and for American society. The rights, benefits, and sense of belonging that accompany naturalized citizenship are important to protecting civil rights, voting rights, and due process rights for individuals. And the smooth operation of the processes permitting naturalized citizenship are important to protecting democratic values and regulatory institutions.

Citizenship for service is specifically designed to recognize the uniquely valuable contributions of noncitizens who serve in the U.S. military. Often these service members are held up as model citizens because of their manifest displays of loyalty and willingness to sacrifice for the nation. Their official recognition and special dispensation by the federal government should not be diluted because of their immigration status in an immigration restrictionist climate or pretextual national security concerns. Indeed, the special statutory provisions Congress designed to expedite service members' naturalizations are meant to ensure strong and stable citizenship in times of national conflict. Relations between the citizens of warring nations might be tense, and U.S. affiliation might be vital to their daily existence. The ratcheting up of requirements for noncitizen soldiers undermines those promises. Indeed, it makes possessing foreign ties—the definition of an immigrant and the reason for recruitment—a matter for mistrust and mistreatment by the U.S. government.

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222. VAKILI ET AL., *supra* note 158, at 3.

223. *See* Repatriate Our Patriots Act, H.R. 3429, 115th Cong. (2017) (one legislative solution for repatriation introduced by Representative Vicente Gonzalez of Texas's 15th Congressional District); Travis Weiner, Supporting Veterans Has Never Depended on Their Citizenship Status (2019) (unpublished op-ed) (on file with author).

Pulling back the lens, this Article describes the outcomes of policies disfavoring naturalization: worrisome slowdowns in naturalized citizenship for all categories of immigrants and especially worrisome delays, denials, and declines in military naturalization. Through a detailed analysis of possible causes, it suggests that the poor outcomes result from a combination of intentional policy goals and unintentional institutional neglect. Balancing concerns of fraud and national security with the goal of efficient and accurate processing is a challenge. Anti-immigrant sentiment directed toward noncitizens who have served the U.S. military is harder to justify given Congress's history and purpose of citizenship for service and the U.S. Department of Defense's reliance on foreign nationals to wage successful military campaigns. Inadvertent institutional bungling and neglect of service members and veterans are equally intolerable and represent a failure of the normative ideal of earned citizenship and legislative mandates for the USCIS.

The alarming deterioration of military naturalization indicates a need to reexamine the federal government's messages about what it takes to make America great again. The policy episodes recounted in this Article evince the tragic collision of President Trump's anti-immigrant agenda with his demand for a stronger sense of patriotism and commitment to a national identity. While one policy agenda might be seen to complement the other in most cases, in the instance of noncitizens in the military the agendas conflict. The Trump Administration's determination to protect the national borders from foreign threats by tolerating or forging blockages of military naturalization pits Americans against the very immigrants who are guarding the nation. The price is paid by noncitizen patriots in the name of national security but in a manner that, in reality, compromises national security. More generally, this cramped vision of what it takes to become American fails to recognize that immigrants are not perpetual foreigners whose national identity is fixed at birth. They can develop loyalty to a country other than the one of their birth by demonstrating certain qualifications. For that reason, they earn the rights of naturalized citizenship. What could be a normative ideal for citizenship as a meaningful national identity instead becomes threatened by a false choice that keeps immigrants forever outside: between patriotism and national belonging.