DISCARDED LOYALTY: THE DEPORTATION OF IMMIGRANT VETERANS

by
Deenesh Sohoni[*] & Yosselin Turcios[**]

The United States has a long history of using the foreign born to meet its military demands. For many immigrants, military service served both as a way to demonstrate loyalty to their adopted country, and to facilitate their naturalization process. However, over the past several decades an increasing number of foreign-born veterans have found themselves being deported, despite their honorable service, for having committed criminal acts. In many cases, these veterans were never given a chance to contest their deportations due to their status as non-citizens. This Article compares the deportation of non-citizen veterans today, with the failure by the U.S. government to grant citizenship to Asian-American military veterans in the first half of the twentieth century, as a means to explore the role of the legal system in adjudicating between two competing views regarding immigration. The first view sees immigrants as potential contributors to American society, and seeks to attract those deemed necessary, beneficial, or worthy of becoming Americans, and facilitate their social/legal incorporation into the United States. The second view sees immigrants as a threat to national cohesiveness, and seeks to identify and remove those seen as problematic or dangerous. This Article argues that despite the United States' professed belief in the importance of patriotism for national belonging, support for granting citizenship to foreign-born veterans has frequently given way to broader racialized restrictionist tendencies which manifest explicitly and implicitly within the legal system.

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[*] Deenesh Sohoni is Professor of Sociology and Director of the Asian Pacific Islander American Studies Program at William & Mary.

[**] Yosselin Turcios graduated from William & Mary with degrees in Psychology and Kinesiology & Health Sciences. She is currently a graduate student at the Drexel Dornsife School of Public Health. The authors are grateful for valuable assistance and insightful comments from Lindsay Fullerton, Sarah Wasserman Rajec, and the editors of the Lewis & Clark Law Review. Support for initial research was provided by William & Mary through the WMSure program, which provides undergraduate research opportunities for members of underrepresented groups. An earlier version of this paper was presented at the Law and Society Association (LSA) Meetings in Toronto in 2018.

I. INTRODUCTION

In 1985, Vernon Lawson, a Jamaican immigrant living in New York, was convicted of manslaughter for killing his wife.[1] He was sentenced to prison and served a little over 13 years. During his incarceration, Lawson overcame his drug and alcohol problems, and upon release found gainful employment working as a drug abuse counselor helping others cope with their addictions. In August of 2006, Lawson petitioned to become a naturalized U.S. citizen based on his military service during the Vietnam War.[2] However, in 2004, two years prior to Lawson's petition for citizenship, the U.S. Immigration and Customs Enforcement (ICE) had initiated deportation proceedings against him citing his prior felony conviction.[3] In October

[1] Lawson v. U.S. Citizenship and Immigration Servs., 795 F. Supp. 2d 283, 285–86 (S.D.N.Y. 2011).

[2] *Id.* at 285, 292. Under the Immigration and Nationality Act (INA), "Any person who, while an alien or a noncitizen national of the United States, has served honorably . . . in an active-duty status in the military, air, or naval forces of the United States . . . during either World War I or during [specified time periods during which there have been military hostilities] . . . and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section." Immigration and Nationality Act, 8 U.S.C. § 1440(a) (2018).

[3] *Lawson*, 795 F. Supp. 2d at 292. Presently, a removal case begins when the U.S. Department of Homeland Security (DHS), through Immigration and Customs Enforcement (ICE), files a notice to appear, placing the individual within the jurisdiction of the immigration courts. These courts are part of the Executive Office of Immigration Review (EOIR) under the U.S. Department of Justice (DOJ), and are delegated their authority by the U.S. Attorney General. Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87

2008, an Immigration Judge ordered Lawson removed from the United States, and a year later the Board of Immigration Appeals (BIA) rejected his appeal.[4] In April of 2010, the order of removal became final when the Second Circuit dismissed his petition for review.[5] However, on December 15, 2009, after his failed appeal to the BIA, but before the order of removal became final, Lawson filed a petition for *de novo* review, arguing that the U.S. Citizenship and Immigration Services (USCIS) had improperly rejected his application for naturalization.[6]

On July 7, 2011, the U.S. District Court for the Southern District of New York heard Lawson's case. In presenting the opinion of the court, Judge Chin noted that the sole issue facing the court was "whether Lawson is and has been of 'good moral character.'"[7] In addition, Judge Chin reasoned that given Lawson's status as a non-citizen veteran, his good moral character needed to have been established "during the period beginning one year before the applications filing," and "continuing until the administration of the oath of allegiance."[8] While acknowledging that Lawson's past conduct was relevant to his case, and that the murder of his wife was a "substantial strike" against him, Judge Chin rejected the Government's claim that Lawson's felony conviction automatically disqualified him from establishing "good moral character."[9] Instead, the court accepted Lawson's argument that there were extenuating circumstances that should have been taken into account with respect to his attempt to naturalize.[10]

IND. L.J. 1571 1610–11 (2012); Craig R. Shagin, *Deporting Private Ryan: The Less than Honorable Condition of the Noncitizen in the United States Armed Forces*, 17 WIDENER L.J. 245, 249–50 (2007).

[4] *Lawson*, 795 F. Supp. 2d at 292. Rulings by an Immigration Judge (IJ) can be appealed to the BIA which is part of the EOIR. If an alien loses before the BIA, they can petition for a review of the ruling before the U.S. circuit court that has jurisdiction over the area where the immigration court which first ruled is located. Shagin, *supra* note 3, at 250.

[5] *Lawson*, 795 F. Supp. 2d at 292.

[6] *Id.* at 285, 293. Pursuant to 8 U.S.C. § 1421(c), "[a] person whose application for naturalization under this subchapter is denied, after a hearing before an immigration officer under section 1447(a) of this title, may seek review of such denial before the United States district court for the district in which such person resides . . . . Such review shall be *de novo*, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing *de novo* on the application."

[7] *Lawson*, 795 F. Supp. 2d at 285. Judge Chin also noted that while "§ 329 of the INA does not explicitly contain a 'good moral character' requirement, the statute incorporates that requirement from § 316, the general naturalization provision of the INA, 8 U.S.C. § 1427." *Id.* at 294.

[8] *Id.*; *see also* 8 C.F.R. §§ 316.10(a)(1), 329.2(d) (2020).

[9] *Lawson*, 795 F. Supp. 2d at 285, 298–99.

[10] *Id.* at 298.

First, the court noted that Lawson was a decorated Vietnam War veteran, honorably discharged in 1967 after receiving multiple commendations such as the Vietnam Service Medal, the Vietnam Campaign Medal, a Presidential Unit Citation, and the Navy Commendation Medal for valorous service on behalf of his country,[11] and that it was his thirteen months of service in Vietnam that had led to his drug and alcohol addictions and post-traumatic stress disorder (PTSD).[12] Second, the court noted that Lawson had been under the influence of alcohol and drugs the night he killed his wife,[13] and that the lack of support Lawson received in dealing with the challenges of readjustment and his mental health at the time were likely contributing factors to the killing of his wife.[14] Third, the court noted that Lawson had "paid his debt to society" and "redeemed himself" by his conduct during his incarceration and since his release.[15] Finally, the court noted that the Government had relied on problematic and legally erroneous rationales in opposing Lawson's petition to naturalize.[16] Specifically, Judge Chin noted that the USCIS decision had "erroneously invoked the aggravated felony bar, which was not applicable to Lawson's pre-1990 conviction,"[17] and that the USCIS had erroneously denied Lawson's petition based on his unlawful presence in the United States at the time of his military service, a criterion that was not disqualifying under 8 C.F.R. § 329.2(c).[18]

While Lawson's case revolved around what constituted "good moral character" and whether Lawson had demonstrated such, this Article argues that Lawson's case and other similar cases where the government has sought to deport non-citizen veterans for criminal acts reflect a broader tension within the legal system between competing perspectives and conflicting policies towards immigrants in the United States. The first perspective attempts to identify, attract, and reward immigrants deemed necessary, beneficial, or worthy of becoming Americans, and seeks to facil-

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[11] *Id.* at 287.

[12] *Id.* at 288.

[13] *Id.* at 289.

[14] *Id.* at 285, 289, 298.

[15] *Id.* at 285, 298–99. Judge Chin also rejected the Government's claim that a single DWI conviction (for which charges were dropped by the district attorney) by Lawson in 2007 spoiled "the quality of Lawson's moral character as a whole." *Id.* at 299.

[16] *Id.*

[17] *Id.* The Immigration Act of 1990 expanded the definition of "aggravated felony," which was grounds for automatic dismissal, to include acts of violence for which there was a sentence of at least five years. Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048; Theresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 634 (2003).

[18] *Lawson*, 795 F. Supp. 2d at 292–94. Judge Chin noted that military service during periods of hostility required the applicant to have either lawful permanent resident status *or* have been "physically present in the United States when enlisting." *Id.* at 292–94; 8 U.S.C. § 1440(a).

itate their social and legal incorporation into the United States; the second perspective views immigrants as a threat to national security and cohesiveness, and seeks to identify and remove those seen as dangerous to the national community. This Article uses the crime-based deportation of non-citizen veterans to explore how the legal system negotiates this tension and to explore the legal regimes around immigration.

Currently, there is no comprehensive data for the total number of U.S. Military veterans who have been deported by the United States.[19] ICE, the agency responsible for initiating removal proceedings against immigrants, does not appear to keep track of the veteran status of non-citizens who have been deported. However, the American Civil Liberties Union (ACLU) of California identified 239 veterans from 34 countries who had been deported.[20] Banished Veterans, a group formed to aid deported veterans, estimates that thousands of veterans have been deported in recent years.[21] These numbers likely underestimate the true number of deported non-citizen veterans, as they primarily capture those who have sought legal recourse for their removal.

Additionally, with the large number of foreign-born individuals currently serving in the U.S. Military, and those who have completed their military service, there will continue to be a sizable number of foreign-born veterans who are potentially vulnerable to deportation should they come into contact with the criminal justice system. As of February 2008, there were 65,000 foreign-born individuals serving on active duty in the U.S. Armed Forces (constituting about 5% of all active duty personnel)—and while about two-thirds of those serving have already been naturalized, about one-third (or a little over 20,000) remain non-citizens.[22] In 2007, there were also nearly 650,000 foreign-born veterans of the U.S. Armed Forces, many of whom remain non-citizens.[23] Hence, the study of the deportation of non-citizen military veterans is not only relevant for understanding the current plight of those who have been or are in the process of being deported, but also critical for those seeking to

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[19] Kevin Sullivan, *Deported Veterans: Banished for Committing Crimes After Serving in U.S. Military*, WASH. POST (Aug. 12, 2013), https://www.washingtonpost.com/politics/deported-veterans-banished-for-committing-crimes-after-serving-in-us-military/2013/08/12/44f81098-ffa9-11e2-9a3e-916de805f65d_story.html.

[20] Bardis Vakili, Jennie Pasquarella, & Tony Marcano, *Discharged, Then Discarded: How U.S. Veterans are Banished by the Country They Swore to Protect*, ACLU CAL. (July 2016), https://www.aclusandiego.org/wp-content/uploads/2017/06/DischargedThenDiscarded-ACLUofCA.pdf.

[21] Sullivan, *supra* note 19.

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

[23] Aaron Terrazas, *Foreign-Born Veterans of the U.S. Armed Forces*, MIGRATION POL'Y INST. IMMIGRANT FACTS (Oct. 2008), https://www.migrationpolicy.org/research/foreign-born-veterans-us-armed-forces; Jie Zong & Jeanne Batalova, *Immigrant Veterans in the United States*, MIGRATION POL'Y INST. (May 16, 2019), https://www.migrationpolicy.org/article/immigrant-veterans-united-states-2018.

prevent the continuation of policies that allow those who have risked their lives on behalf of their adopted country to be banished from their homes.

This Article argues that the present day deportation of non-citizen veterans needs to be examined within the broader context of how the United States more generally seeks to control immigration, and the types of populations it deems as acceptable (or unacceptable) for social membership and naturalization. Drawing on membership theory, this Article compares and situates historical and contemporary military naturalization policies within the more general immigration and naturalization regimes that existed at the time, to see how the legal system determines who is seen as deserving of, or excludable from, social membership.[24] Membership theory describes how individual rights and privileges are limited to those who are considered members of a social contract between the government and the people.[25] It further emphasizes how the legal system shapes which individuals and groups of people come to be seen as valid members of the social contract, and which come to be seen as unworthy, and what criteria are deemed important in making these determinations.

Historically, race has been a key determinant of who has been able to come to the United States, as well as who has been able to gain U.S. citizenship.[26] Today, while race and ethnicity no longer play an explicit role in immigration and naturalization policies, the continued willingness of the judiciary to defer to the executive and legislative branches of government on immigration issues under the "plenary power doctrine" means that constitutional protections against race-based discrimination and certain types of protections that exist in criminal proceedings are not necessarily guaranteed to non-citizens.[27] This frequently has meant that non-citizen veterans have been treated very differently by the legal system than the citizen veterans with whom they served.

This Article proceeds as follows. First, it provides a historical overview of the role of military naturalization for U.S. citizenship. Second, it examines the history of race-based immigration and naturalization laws, and their impact on claims by non-white, and in particular Asian, foreign-born veterans for citizenship based on

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[24] This application of "membership theory" draws on the work of Juliet Stumpf. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 377 (2006).

[25] *Id.*

[26] IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 155–64 (1996) (discussing the role of race in the United States in determining who could immigrate and naturalize).

[27] Stumpf, *supra* note 24, at 392–94. Under the "plenary power doctrine," the courts have viewed immigration as primarily a foreign policy issue under the purview of the administrative and legislative branches, and thus outside the scope of judicial review. *Id.*; *see also* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998).

their military service. More specifically, it examines Congressional legislation on military naturalization and race-based naturalization laws, and how federal courts ruled on the compatibility of these two legal regimes of naturalization in deciding social membership. Third, it examines the contemporary increase in linkages between immigration and naturalization laws and criminal law ("crimmigration"), and the effect of this phenomena on non-citizen veterans convicted of crimes. Fourth, it discusses the moral and legal considerations of deporting non-citizen veterans, and the solutions that have been proposed to ensure that non-citizen veterans are treated fairly given their service to the United States. Finally, this Article concludes with a discussion of the need to examine the deportation of non-citizen veterans within the broader context of existing immigration and naturalization law.

II. FIGHTING FOR CITIZENSHIP: A BRIEF HISTORY OF MILITARY NATURALIZATION

Throughout its history, the United States has relied on non-citizens to meet its military needs.[28] During the Revolutionary War, George Washington used German and Irish foreign nationals to supplement his forces, and even though Congress would technically restrict the enlistment of non-citizens upon independence, these restrictions were either ignored or suspended in times of war.[29] For example, in both the War of 1812 and the Mexican-American War, "resident aliens" from Europe were permitted to serve in the U.S. Army.[30] Similarly, during the Civil War, the Union Army regularly sought out "resident aliens" for enlistment, and even unofficially encouraged the recruitment of immigrants by offering them free passage to the United States.[31] Congressional legislation also allowed for the conscription of

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[28] NANCY GENTILE FORD, AMERICANS ALL!: FOREIGN-BORN SOLDIERS IN WORLD WAR I 45 (2001).

[29] *Id.* at 46–47. The wording of the Military Peace Establishment Act of 1802 seemed to suggest that only citizens were eligible to serve in the army. Candice Bredbenner, *A Duty to Defend? The Evolution of Aliens' Military Obligations to the United States, 1792 to 1946*, 24 J. POL'Y HIST. 224, 226 (2012).

[30] FORD, *supra* note 28, at 47–48. Ford notes that the recruitment of noncitizen immigrants (and Free Blacks) to serve in the U.S. Military during the War of 1812 was a direct result of Congressional opposition to President James Monroe's attempt to institute national conscription. *See also* Deenesh Sohoni & Amin Vafa, *The Fight to be American: Military Naturalization and Asian Citizenship*, 17 ASIAN AM. L.J. 119, 129 (2010).

[31] James B. Jacobs & Leslie Anne Hayes, *Aliens in the US Armed Forces: A Historico-Legal Analysis*, 7 ARMED FORCES & SOC'Y 187, 188–89 (1981); Robert L. Peterson & John A. Hudson, *Foreign Recruitment for Union Forces*, 7 CIV. WAR HIST. 176, 176–89 (1961); Deenesh Sohoni, *Fighting to Belong: Asian American Military Service and American Citizenship*, *in* INCLUSIONS IN THE AMERICAN MILITARY: A FORCE FOR DIVERSITY 57, 63 (David E. Rohall, Morten G. Ender, & Michael Matthews eds., 2017).

aliens during World War I,[32] World War II,[33] the Korean,[34] and the Vietnam Wars.[35] Even today, male aliens between the ages of 18 and 25 are required to register for the draft.[36]

While frequently a pragmatic solution to military demands, the use of non-citizens in the military was also based on the ideological belief that those who willingly risked injury or death on behalf of the United States demonstrated their worthiness for national membership and citizenship.[37] This relationship was first legally formalized during the Civil War, when the need to raise large numbers of troops to fight the Southern states led Congress to pass the Alien Soldiers Naturalization Act of 1862, creating "military naturalization" as an avenue to citizenship:

> That any alien, of the age of twenty-one years and upwards, who has enlisted or shall enlist in the armies of the United States . . . may be admitted to become a citizen of the United States . . . and that he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and that the court admitting such alien shall, in addition to such proof of residence and good moral character as is now provided by law, be satisfied by competent proof of such person having been honorably discharged from the service of the United States as aforesaid.[38]

Initially, this statute was seen as being limited solely to non-citizen veterans who had served in the U.S. Army.[39] However, in 1894, Congress expanded military naturalization to include non-citizen veterans who had served in the U.S. Navy and

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[32] Selective Service Act of 1917, ch. 15, § 2, 40 Stat. 76, 77–78.

[33] Selective Training and Service Act of 1940, ch. 720, § 2, 54 Stat. 885, 885.

[34] Selective Service Act of 1948, ch. 625, § 3, 62 Stat. 604, 605–06.

[35] 1955 Amendments to the Universal Military Service and Training Act, ch. 250, § 101(a), 69 Stat. 223, 223–24; Shagin, *supra* note 3, at 248.

[36] Shagin. *supra* note 3, at 248; *Selective Service System*, IMMIGRANTS & DUAL NATIONALS, https://www.sss.gov/About/History-And-Records/Non-Citizens-and-Dual-Nationals (last visited Aug. 27, 2020).

[37] Morris Janowitz, *Military Institutions and Citizenship in Western Societies*, 2 ARMED FORCES & SOC'Y 185, 191–92 (1976). Even today, military service continues to be viewed as one of the most significant demonstrations of one's patriotism, right after voting. Lymari Morales, *Nearly All Americans Consider Military Service "Patriotic,"* GALLUP (July 3, 2008), https://news.gallup.com/poll/108646/nearly-all-americans-consider-military-service-patriotic.aspx; Sohoni & Vafa, *supra* note 30, at 126.

[38] Act of July 17, 1862, ch. 200, 12 Stat. 597. This dramatically shortened the normal waiting period of five years. This statute was later codified as Revised Statutes of 1878, tit. 30, § 2166. *See* Darlene Goring, *In Service to America: Naturalization of Undocumented Alien Veterans*, 1 SETON HALL L. REV. 400, 401, 411–25 (2001).

[39] Goring, *supra* note 38, at 413; *In re* Bailey, 2 F. Cas. 360, 360–62 (D. Or. 1872) (a Marine Corp veteran of English descent was denied his petition to naturalize because he had not served in the U.S. Army).

the U.S. Marine Corps.[40] The expedient nature of using military naturalization only in times of military crisis was reflected in the Act of August 1, 1894 that soon followed, which made non-citizens ineligible to serve during "time of peace."[41]

Legally, naturalization serves to make aliens "the same" as United States-born Americans.[42] Normally, the naturalization process requires a substantial waiting period of several years, during which time aliens serve an "apprenticeship" allowing them to demonstrate their loyalty and allegiance to their new homeland.[43] Military service was seen as clearly establishing these qualities, thus "validating the shorter waiting periods permitted by military naturalization."[44]

As the U.S. Military transformed from primarily a voluntary force before the Civil War, to one "based on a professional core of soldiers supplemented by conscripts" during periods of war, military naturalization also seemed to resolve problematic issues related to military labor needs and international relations.[45] During World War I, the question of whether or not to enlist aliens forced national leaders either to justify forcing aliens—who did not possess all the benefits and rights of national membership—to fight in defense of the United States, or to defend permitting "alien slackers" to take advantage of living in America while its "native sons" died.[46] Further complicating matters, the use of aliens by the U.S. Military raised diplomatic protests from other countries, which viewed the drafting of their citizens a violation of international law.[47]

With passage of the Act of May 9, 1918, which granted "any alien serving in the military during the war" the right to expedited citizenship, Congress solved both these problems.[48] By promising citizenship for service, military naturalization served the dual purpose of meeting military needs and creating new Americans. Between 1918 and 1920, nearly 50% of the over half a million individuals that received U.S. citizenship did so through military naturalization. A similar pattern, though less pronounced, can be seen during other periods of U.S. military involvement.[49]

Scholars have shown that for many "white" European immigrants, military naturalization provided not only an accelerated pathway towards citizenship, but

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[40] Act of July 26, 1894, ch. 165, 28 Stat. 124, 124.

[41] Act of August 1, 1894, ch. 179, § 2, 28 Stat. 215, 216.

[42] JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP 9 (1978).

[43] *Id.* at 243; *see also* EVELYN NAKANO GLENN, UNEQUAL FREEDOM: HOW RACE AND GENDER SHAPED AMERICAN CITIZENSHIP AND LABOR 54 (2002); Sohoni & Vafa, *supra* note 30, at 129.

[44] Sohoni & Vafa, *supra* note 30, at 126; *see* Table 1, *infra* note 268.

[45] Sohoni & Vafa, *supra* note 30, at 129.

[46] FORD, *supra* note 28, at 52–54; Sohoni & Vafa, *supra* note 30, at 129–30.

[47] FORD, *supra* note 28, at 56.

[48] Act of May 9, 1918, ch. 69, 40 Stat. 542, 542–43.

[49] Sohoni & Vafa, *supra* note 30, at 130; *see* Table 2, *infra* note 271.

also was an important factor in their "Americanization."[50] However, for immigrants that were considered racial minorities (and in particular Asian aliens), military naturalization statutes came into conflict with broader pre-existing racially restrictive immigration and naturalization laws, and put the courts in the position of resolving the contradiction between military naturalization legislation, which granted "all aliens" who had served honorably the right to naturalize, and more general naturalization laws which limited citizenship to whites and Blacks.[51]

III. RACE-BASED NATURALIZATION LAWS AND MILITARY NATURALIZATION[52]

Since the founding of the United States, large segments of its population have viewed American identity as rooted in a common European heritage and have seen racial minorities as unsuitable for the obligations and responsibilities of citizenship, who pose a threat to the nature of America as a "white" nation.[53] In fact, the very first naturalization law passed by Congress, the Naturalization Act of 1790, limited naturalization to "any alien, being a *free white person*," thus laying the foundation for a racially defined citizenship.[54] Additionally, this Act stipulated that aliens seeking citizenship demonstrate that they had resided in the United States for two years, and were "a person of *good character*."[55]

Following the Civil War, Congress amended the U.S. Constitution and passed a series of acts giving new rights to African Americans, particularly with respect to citizenship. Thus, the Civil Rights Act of 1866 specified that:

> [A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared citizens of the United States;

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[50] *See, e.g.*, FORD, *supra* note 28, at 63–64, 87; KETTNER, *supra* note 42, at 243; Jacobs & Hayes, *supra* note 31, at 200; Sohoni & Vafa, *supra* note 30, at 131.

[51] Sohoni & Vafa, *supra* note 30, at 135–36.

[52] The following section draws from and builds on the first author's previous research. *See* Sohoni & Vafa, *supra* note 30; Sohoni, *supra* note 31.

[53] Kitty Calavita, *Law, Citizenship, and the Construction of (Some) Immigrant "Others,"* 30 L. & SOC. INQUIRY 401, 407 (2005); Evelyn Glenn, *Citizenship and Inequality: Historical and Global Perspectives*, 47 SOC. PROBS. 1, 2, 11 (2000); *see also* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997).

[54] Act of March 26, 1790, ch. 3 § 1, 1 Stat. 103, 103 (repealed 1795) (emphasis added).

[55] *Id.* (emphasis added). This requirement of "good moral character" can also be found in the Naturalization Act of April 14, 1802, which required those seeking citizenship to have resided in the United States for five years, to be a free white person, and to prove to the court that during their period of residency that they had "behaved as a man of good moral character" and were "attached to the principles of the constitution of the United States . . . ." Naturalization Act of 1802, ch. 28 § 3, 2 Stat. 153, 153–54.

> and such citizens, *of every race and color*, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same rights, in every State and Territory of the United States . . . .[56]

The Fourteenth Amendment, and in particular its Equal Protection Clause, further limited the ability of states to create race-based legislation, by barring states from denying "any person within its jurisdiction the equal protection of the laws."[57] Finally in 1875, Congress passed the most progressive and comprehensive legislation up to that point with regards to race, citizenship, and legal rights. Specifically, the Civil Right Act of 1875 stated:

> [I]t is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever *nativity, race, color, or persuasion, religious or political* . . . . That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to *citizens of every race and color*, regardless of any previous condition of servitude.[58]

In principle, the Civil War Acts and Amendments appeared to remove racial status as a criterion for U.S. citizenship, and thus *theoretically* allowed other groups previously deemed "non-white" to naturalize and gain citizenship.[59] In fact, during deliberations regarding the final wording of the Naturalization Act of July 14, 1870,[60] several Congressmen attempted to remove the term "white" from naturalization laws altogether.[61] However, under pressure by representatives from western states, who feared that their rapidly growing Chinese population might seek citizenship and the rights that it afforded, Congress ended up rejecting proposals to make naturalization statutes colorblind, or to extend naturalization rights to Asian immigrants.[62] As a result, the Naturalization Act finally read: "The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity, and to persons of African descent."[63]

For the judiciary, this left the problem of reconciling the conflict between congressional Civil Rights legislation, which granted some legal protections for racial

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[56] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (emphasis added).

[57] U.S. CONST. amend. XIV, § 1.

[58] Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335, 335–36 (emphasis added).

[59] Sohoni & Vafa, *supra* note 30, at 133.

[60] Naturalization Act of July 14, 1870, ch. 254, 16 Stat. 254 (amended 1875).

[61] HANEY LÓPEZ, *supra* note 26, at 43, 63–64.

[62] Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV 1241, 1294–96 (1993); *see also* Sohoni & Vafa, *supra* note 30, at 133; Sohoni, *supra* note 31, at 60.

[63] Act of February 18, 1875, ch. 80, 18 Stat. 316, 318.

minorities, and immigration and naturalization laws, which continued to base citizenship on race. For those of Asian ancestry, the judiciary's response was to differentiate between the "rights of citizens" and the "right to become a citizen."[64] The foundations of this legal distinction first emerged when Chinese immigrants sought to challenge their deportations by arguing the incompatibility of the Chinese Exclusion Act of 1882 and existing treaties between the United States and China. In two crucial rulings, *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States*, the Supreme Court granted Congress nearly unrestricted power over immigration and naturalization through the "plenary power doctrine," holding that only the executive and legislative branches have the "sovereign power to regulate immigration" and that this power was "not subject to judicial review."[65] Thus, even though the Supreme Court would eventually rule in *United States v. Wong Kim Ark* that United States-born Asians were guaranteed birthright citizenship, and thus theoretically protected from race-based discrimination,[66] the judiciary would later uphold race-based legislation passed by Congress that served to limit Asian immigration and naturalization.[67]

During World War I, Congress passed the Immigration Act of 1917,[68] which created the Asiatic Barred Zone, thereby extending the Chinese exclusion laws to encompass all other Asians groups.[69] Eventually, in response to growing post-WWI anti-immigrant sentiment, Congress passed the Johnson-Reed Act of 1924.[70] Although its primary emphasis was to restrict immigration from southern, central, and eastern Europe through the use of the national quota system, this Act also permanently excluded all "alien[s] ineligible [for] citizenship."[71] Under the Naturalization Act of 1870 and the revisions in the Act of February 18, 1875, with the significant

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[64] Sohoni & Vafa, *supra* note 30, at 134; Sohoni, *supra* note 31, at 60–61.

[65] Chin, *supra* note 27, at 5, 12. In *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), also known as the Chinese Exclusion Case, the Supreme Court upheld a part of the Chinese Exclusion Act (1888) that Chinese "aliens" could be excluded from the United States, even though they were United States residents who possessed government issued papers assuring their return. *Id.* at 589, 609. However, in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), the Supreme Court ruled that an "alien" could be deported based strictly on their race. *Id.* at 706–07, 724.

[66] United States v. Wong Kim Ark, 169 U.S. 649, 695, 704–05 (1898) (adopting the *jus soli* rule of birthright citizenship).

[67] Sohoni & Vafa, *supra* note 30, at 134.

[68] Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874.

[69] § 3, 39 Stat. at 875–76. The zone covered most of Asia, including the islands of the Pacific. China and Japan were not included as the Chinese Exclusion Act and the Gentlemen's Agreement already restricted immigrants from these countries. *See* BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850–1990 21–27, 45, 66 (1993).

[70] Immigration (Johnson-Reed) Act of 1924, ch. 190, § 13, 43 Stat. 153, 154; HING, *supra* note 74, at 32–33.

[71] §13, 43 Stat. at 161–62.

exception of Filipinos, this came to mean all "Asians."[72] The end result of these Acts was that until racial restrictions on naturalization were finally removed by the Immigration and Nationality Act of 1952,[73] Asian immigrants could not enter the United States because they were aliens ineligible for citizenship, and were ineligible for citizenship because they were not white or Black.

Yet, even as the growth of Asian immigrant populations was leading to increased hostility towards Asian immigrants within the United States, and greater support for passage of restrictive immigration and naturalization policies against Asian groups, the United States was expanding its involvement in Asia. The forced opening of Japan in 1853, the "annexation" of the Philippines and Hawaii in 1898, and the initiation of the "Open Door" policy in China,[74] all placed new demands on the military to protect U.S. interests.[75] In order to meet its labor needs, the U.S. Military turned to the use of local labor (e.g., Asian nationals).[76] Most prominent among these Asian groups were Filipinos, who, because of the new status of the Philippines as a protectorate of the United States, were viewed as a useful source of unskilled labor.[77] Starting in 1901, Filipinos were given their own regiments in the armed services, under the U.S. Army's Philippine Department.[78] However, the use of Filipinos and other Asian aliens in the military presented an ideological and legal dilemma for the U.S. government; if these individuals showed characteristics worthy of citizenship, then denial of citizenship meant that the United States was not adhering to its ideological principles of equality, and if they were not eligible for citizenship, then their presence in the military was unwarranted.[79]

In the first cases that appeared before the federal courts, judges sought to deny that legislation permitting military naturalization was incompatible with existing race-based legislation prohibiting the naturalization of Asian aliens. Rather than question the constitutionality of race-based naturalization laws, the courts followed the precedent established by earlier Supreme Court cases that decisions regarding who could enter the country and who could naturalize were matters of "national interest" and thus strictly the domain of the legislative and administrative branches

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[72] HING, *supra* note 74, at 33. Since the Philippines were a protectorate of the United States, Filipinos were allowed to enter the United States as non-citizen nationals. *Id.*

[73] Immigration and Nationality (McCarran-Walter) Act of 1952, ch. 477, § 311, 66 Stat. 163, 239 (codified as amended at 8 U.S.C. § 1422 (1988)).

[74] GARY Y. OKIHIRO, COMMON GROUND: REIMAGINING AMERICAN HISTORY 25 (2001).

[75] Sohoni, *supra* note 31, at 62.

[76] HING, *supra* note 74, at 21–29.

[77] *Id.* at 33.

[78] Henry B. Hazard, *Administrative Naturalization Abroad of Members of the Armed Forces of the United States*, 46 AM. J. INT'L L. 259, 262 (1952). The Philippine Scouts, as they were known, were given the suffix "PS" to distinguish them from other regiments. Filipinos accounted for over 10% of enlisted men serving in the Philippines. Sohoni & Vafa, *supra* note 30, at 132.

[79] *Id.*

of government.[80] But, through their interpretations of legislative intent, the judiciary helped establish and reinforce the primacy of race over patriotism as the basis of social membership.

For example, in 1908, a District Court in Washington ruled that Buntaro Kumagai, a Japanese alien who had served honorably in the U.S. Army, was ineligible for citizenship.[81] In presenting the court's opinion, Judge Hanford reasoned that the Constitution clearly delineated the roles of Congress and the courts with respect to naturalization,[82] and thus distinguished between those born in the United States, who had the right to citizenship "without distinction as to race or color,"[83] and aliens, who could only claim the privilege of becoming citizens under the provisions of laws enacted by Congress.[84] Thus, rather than addressing the question of whether military naturalization laws proved a challenge to the ideology of race-based citizenship, Judge Hanford shifted the legal issue to whether Congress had intended military naturalization to provide an exception to laws limiting naturalization to whites and Blacks.[85] In presenting the court's ruling, Judge Hanford held that because both the Act of July 17, 1862, which had authorized military naturalization, and the Act of February 18, 1875, which limited naturalization to whites and Blacks, had been incorporated into succeeding immigration and naturalization laws, Congress must have intended military naturalization to give way to the broader framework of race-based naturalization.[86]

This case was soon followed by two additional cases, *In re Knight* and *Bessho v. United States*, where a District Court in New York and the Court of Appeals for the Fourth Circuit respectively reached very similar decisions regarding the military naturalization of foreign-born Asians.[87] In the first case, Knight, whose father was English, and whose mother was half-Chinese and half-Japanese, argued that his service in the U.S. Navy entitled him to naturalize under the Act of July 26, 1894, which specified that "any alien" who had served in the United States Navy "shall be admitted to become a citizen of the United States . . . ."[88] Citing the precedent established in *In re Buntaro Kumagai*, the court ruled that race-based naturalization laws

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[80] *Id.* While not directly citing the Supreme Court cases that had established Congress's "plenary power" on immigration and naturalization, the courts clearly referenced the idea that rules governing naturalization were strictly the domain of Congress. Sohoni, *supra* note 31, at 66.

[81] *In re* Buntaro Kumagai, 163 F. 922, 922–23 (W.D. Wash. 1908).

[82] *Id.* at 923.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 923–24.

[86] *Id.*; Sohoni, *supra* note 31, at 67.

[87] *In re* Knight, 171 F. 299, 299–300 (E.D.N.Y. 1909); Bessho v. United States, 178 F. 245, 245–48 (4th Cir. 1910).

[88] Act of July 26, 1894, ch. 165, 28 Stat. 123, 124; *In re Knight*, 171 F. at 300.

took precedence over military naturalization.[89] In justifying the court's opinion, Judge Chatfield determined that Congress must have known that members of other races would serve in the U.S. Army and Navy, and thus by *not* specifying which racial groups were eligible for military naturalization, Congress had meant to limit military naturalization to white and Blacks, the only groups allowed to naturalize based on the more general immigration and naturalization laws.[90] Likewise, in *In re Bessho*, the court ruled against a Japanese petitioner who had served in the U.S. Navy, arguing that because Congress failed to specifically repeal section 2169 of the Revised Statutes limiting naturalization to whites and Blacks,[91] it must have intended race to take precedence in questions of citizenship.[92]

The net result of these cases was that despite Congressional legislation that appeared to grant U.S. citizenship to "any alien" who served in the military, and the willingness of the U.S. Military to allow them to serve, Asian aliens who had fought on behalf of the United States were denied its citizenship.[93] However, in making this determination, the judiciary ignored the equally plausible legal interpretation that Congress had intended to limit citizenship to whites and Blacks *except* in the unique case of military service. In fact, under the "plain meaning rule," the courts theoretically could and should have accepted the Congressional wording "any alien" in military naturalization laws, to mean any alien, unless further specified by Congress. Thus, these rulings "served to reinforce the dominance of ethno-cultural views of U.S. citizenship, as well as the right of Congress to make and use immigration and naturalization laws to maintain the demographic and ideological dominance of whites."[94]

However, these legal justifications for preventing Asian American veterans from acquiring citizenship soon came under pressure due to the unique legal situation of Filipinos and the Philippines.[95] Particularly crucial for judicial proceedings was the legal status of Filipinos as "non-aliens/non-citizens" owing allegiance to the United States, and military demand for foreign labor in Asia.[96] Under the Treaty of Paris (1898), which ended the Spanish-American War, the United States gained

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[89] *Id.*

[90] *Id.* at 300–01. Judge Chatfield also discussed what percentage of "Mongolian" blood would disqualify someone from being classified as "white." Drawing on an earlier federal case, *In re* Camille, 6 F. 256 (D. Or. 1880), Judge Chatfield argued that Knight could not be considered white, as "[a] person, one-half white and one-half of some other race, belongs to neither of those races, but is literally a half-breed." *In re Knight*, 171 F. at 301; Sohoni, *supra* note 31, at 66–67.

[91] Act of February 18, 1875, ch. 80, 18 Stat. 316, 318; Bessho v. United States, 178 F. 245, 247–48 (4th Cir. 1910).

[92] *Bessho*, 178 F. at 246; Sohoni, *supra* note 31, at 66.

[93] Sohoni & Vafa, *supra* note 31, at 145–46.

[94] *See* Sohoni, *supra* note 30, at 67.

[95] *See id.*

[96] *Id.*

control of the Philippines from Spain.[97] When Filipino rebels shifted their struggle for independence to fighting the United States,[98] the U.S. government responded by establishing the Philippine Scouts, units of Filipino enlisted men led by U.S. Army officers, to help quell the rebellion.[99] The United States's eventual victory forced Filipino leaders to accept U.S. sovereignty, and the new territorial government formed under U.S. stewardship.[100] In the years leading up to World War I, the U.S. Navy began recruiting Filipinos to fill its most menial positions (such as stewards and messmen), and to meet its growing manpower needs.[101]

When Filipinos first attempted to use their military service to claim U.S. citizenship, the federal courts used the same legal reasoning that they had used against the naturalization of foreign-born Chinese and Japanese Americans.[102] For example, in 1912, the District Court of the Eastern District of Pennsylvania denied Eugenio Alverto, a Philippine citizen, who at the time had been serving in the U.S. Navy for seven years, his petition to become an U.S. citizen.[103] Citing the precedent established in the three previously described cases, Judge Thompson argued that "however commendable" Alverto's naval service, Congress had only intended to extend naturalization by service to those "who were of the white or African races."[104] Judge Thompson further noted that given the Philippines' status as a protectorate of the United States, Filipinos were technically not "aliens," and thus not even eligible to naturalize.[105]

With the start of World War I, Congress passed the Act of June 30, 1914, granting citizenship to aliens who served for four years in the U.S. Navy or Marine Corps.[106] As with previous military naturalization legislation, Congress failed to

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[97] Treaty of Peace, Spain-U.S., art. 3, Dec. 10, 1898, 30 Stat. 1754, 1754–55.

[98] Golden Gate National Recreation Area, *Spanish-American War and the Philippine-American War, 1898-1902*, U.S. NAT'L PARK SERV. (February 28, 2015), https://www.nps.gov/goga/learn/historyculture/spanish-american-war.htm#.

[99] Michael A. Cabotaje, *Equity Denied: Historical and Legal Analyses in Support of the Extension of U.S. Veterans' Benefits to Filipino World War II Veterans*, 6 ASIAN L.J. 67, 70–74 (1999).

[100] *Id.* at 72. Congress would incorporate the Philippine Scouts into the regular U.S. Army regiments in WWII. Act of February 2, 1901, ch. 192, § 36, 31 Stat. 748, 757.

[101] Lucy E. Salyer, *Baptism by Fire: Race, Military Service, and U.S. Citizenship Policy, 1918–1935*, 91 J. AM. HIST. 847, 854 (2004); *see also* DAVID R. SEGAL, RECRUITING FOR UNCLE SAM 103, 106 (1989). Between 1903 and 1914, the number of Filipinos serving in the U.S. Navy grew from nine individuals to about 6,000. YEN LE ESPIRITU, HOME BOUND: FILIPINO AMERICAN LIVES ACROSS CULTURES, COMMUNITIES, AND COUNTRIES 15 (1995).

[102] Sohoni & Vafa, *supra* note 30, at 139.

[103] *In re* Alverto, 198 F. 688, 688–89 (E.D. Pa. 1912).

[104] *Id.* at 690–91.

[105] *Id.* at 690.

[106] Naval Service Appropriations Act, ch. 130, 38 Stat. 392 (1914).

specify racial eligibility or restrictions. However, Congress did add that military naturalization was restricted to aliens who were eligible for citizenship "under existing law."[107] In 1916, the District Court of Massachusetts used the Philippines' unique legal status to support the right of Filipinos living in the United States to seek citizenship. In *In re Mallari* (1916), Judge Morton concluded that since the Act of June 29, 1906 authorized admission to citizenship for "all persons not citizens who owe permanent allegiance to the United States," that Francisco Mallari should be eligible to naturalize as a resident of the Philippines.[108]

A year later, however, two federal courts reached conflicting decisions regarding the military naturalization of Filipinos.[109] In *In re Rallos* (1917), the District Court of the Eastern District of New York denied citizenship to Penaro Rallos, who was half-Spanish and half-Filipino and had served in the U.S. Navy.[110] Judge Chatfield reasoned that because Filipinos were not legally aliens, they were unable to naturalize.[111] He further reasoned that granting Filipinos military naturalization would nullify the purpose of broader immigration and naturalization laws which existed to maintain race-based naturalization.[112] Yet, that same year, in *In re Bautista* (1916), the District Court of Northern California granted Engracio Bautista, a Filipino, his petition for citizenship, determining that because section 30 of the Naturalization Act of June 29, 1906 authorized "the admission to citizenship of *all persons not citizens who owed permanent allegiance* to the United States," Congress must have intended to allow Filipinos and Puerto Ricans the opportunity to naturalize.[113] However, in *Mallari*, Judge Morrow reasoned that this did not mean all Filipinos were eligible for citizenship, and instead meant only those with the "necessary qualifications which, for Bautista, was his naval service.[114] Furthermore, Judge Morrow concluded that it did not make sense to deny Bautista citizenship, since this "would defeat the purpose of the act to encourage enlistment."[115]

During World War I, in response to the U.S. Navy's growing personnel demands in Asia, Congress passed the Alien and Naturalization Act of May 9, 1918,[116] which for the first time stipulated that "Filipinos" and "Porto Ricans" who served

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[107] *Id.*

[108] *In re* Mallari, 239 F. 416, 416–18 (D. Mass. 1916). Ironically, the court ruled that Mallari was ineligible for citizenship for procedural reasons, as he had used the Act of July 26, 1894 relating to military naturalization, rather than the Act of June 29, 1906 which used the term "owe permanent allegiance." *Id.*; *see* Sohoni & Vafa, *supra* note 30, at 140.

[109] Sohoni & Vafa, *supra* note 30, at 140–41.

[110] *In re* Rallos, 241 F. 686, 686 (E.D.N.Y. 1917).

[111] *Id.* at 687.

[112] *Id.*

[113] *In re* Bautista, 245 F. 765, 765–66 (N.D. Cal. 1917) (emphasis added).

[114] *Id.* at 773.

[115] *Id.* at 774.

[116] Alien and Naturalization Act, ch. 69, 40 Stat. 542 (1918).

in the U.S. Military were eligible to naturalize.[117] However, the Act also stated that "any alien" who had enlisted or planned to enlist in the U.S. Army, Navy, Marine Corps, or Coast Guard, was eligible to naturalize, while simultaneously stating that the Act should not be seen as repealing or enlarging section 2169 of the Revised Statutes, thus leaving the status of members of other Asian groups unresolved. To further complicate matters, the following year, Congress passed the Act of June 19, 1919, making "[a]ny person of foreign birth" eligible for naturalization if they served in the U.S. Military during World War I.[118] The vagueness of this legislation led some federal and state court judges to grant citizenship to non-Filipino Asian servicemen.[119] Yet, it is important to note that these were primarily administrative decisions made at the height of war-time patriotism, and did not substantively or symbolically challenge the primacy of race-based citizenship.[120]

With the end World War I, the judiciary was again confronted with making sense of the conflicting legislative messages regarding military and race-based naturalization.[121] For example, in the case of *In re Geronimo Para* (1919), the District Court for the Southern District of New York denied citizenship to two aliens, one of South American Indian ancestry and one of Japanese ancestry, despite their service in the U.S. Navy during WWI.[122] In supporting its opinion, the court argued that "any alien" in the Act of May 9, 1918, was limited to whites and Blacks, *and* to Filipinos and Puerto Ricans, who had been spelled out in the language of the legislation.[123] The joint cases of *In re En Sk Song* and *In re Mascarenas*, decided in 1921, would further clarify this legal distinction between Filipinos/Puerto Ricans and other Asian groups.[124] Specifically, the District Court for the Southern District of California ruled that even though both Song (a Korean) and Mascarenas (a Filipino) had engaged in military service for the United States, only Mascarenas was eligible for citizenship under the Act of May 9, 1918.[125] At the same time, Judge Bledsoe noted that these legislative acts lacked the "uniformity" expected of naturalization law, and the problematic nature of denying citizenship to someone who had "bared his breast to the bayonet of the enemy."[126]

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[117] *Id.* at 542.

[118] Act of July 19, 1919, ch. 24, 41 Stat. 163, 222.

[119] Salyer, *supra* note 101, at 862; Angela M. Banks, *Precarious Citizenship: Asian Immigrant Naturalization 1918 to 1925*, 37 L. & INEQ. 149, 179–80 (2019).

[120] Sohoni & Vafa, *supra* note 30, at 143.

[121] *Id.*

[122] *In re* Geronimo Para, 269 F. 643, 643–44, 647 (S.D.N.Y. 1919).

[123] *Id.* at 646–47.

[124] *In re* En Sk Song, 271 F. 23, 23, 26 (S.D. Cal. 1921).

[125] *Id.* at 26–27.

[126] *Id.* at 25–26.

From the end of WWI through the end of WWII, the federal courts continued to interpret congressional intent in this manner, highlighted by the Supreme Court decision in *Toyota v. United States* where the Court, responding to a question certified by the Circuit Court of Appeals for the First Circuit relating to the District Court of Massachusetts's decision to vacate an order allowing a Japanese alien to naturalize based on his military service, held that Japanese aliens were not entitled to naturalization.[127] Specifically, the Supreme Court ruled that the Act of May 9, 1918 did not conflict with the long history of "national policy to maintain the distinction of color and race," because Congress had only intended to make an exception for Filipinos and Puerto Ricans who had *served in the military*.[128] However, in trying to reconcile the inconsistencies between military naturalization and broader race-based immigration and naturalization policies, the courts created new contradictions. By providing an exception for Filipino naturalization, the courts created problematic understandings of both military and race-based naturalization. Specifically, if Filipinos could demonstrate their patriotism and worth to become citizens through military service, why couldn't veterans of other Asian ancestry groups do the same? And if Filipino veterans were worthy of citizenship, then why not Filipinos who had not served?[129]

Despite the Act of June 24, 1935, which allowed Asian-American WWI veterans previously ineligible for citizenship to naturalize, and thus seemingly ended the distinction between Filipino and other Asian veterans, as well as between Asian veterans and white non-citizen veterans, it was not until near the end of WWII that Congress finally began to fully dismantle the racial restrictions that prevented Asians from citizenship.[130] In fact, only five years after passage of the Act of 1935, Congress passed the Nationality Act of 1940, which reaffirmed racial and ethnic bars to citizenship, while continuing to provide loopholes for the military to meet its demands through the recruitment of Asian American non-citizens:

> The right to become a naturalized citizen under the provisions of this Act shall extend only to white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere: Provided, That nothing in this section shall prevent the naturalization of native-born Filipinos having the honorable service in the United States Army, Navy, Marine

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[127] Toyota v. United States, 268 U.S. 402, 407, 412 (1925); *see* Sohoni & Vafa, *supra* note 30, at 143–44.

[128] *Id.* at 409, 411–12. Later circuit court cases, *United States v. Javier*, 22 F.2d 879 (D.C. Cir. 1927) and *Roque Espiritu De La Ysla v. United States*, 77 F.2d 988 (9th Cir. 1935), further clarified that Filipinos seeking to naturalize had to do so based on their military service.

[129] Sohoni & Vafa, *supra* note 30, at 147–48; *Javier*, 22 F.2d at 879; *Roque Espiritu De La Ysla*, 77 F.2d at 988.

[130] Act of June 24, 1935, ch. 288, 49 Stat. 395. As detailed in Salyer, *supra* note 101, at 868, 871–73, Asian veterans of WWI were able to win the support of the traditionally nativist American Legion to pressure Congress to allow for their naturalization.

> Corps, or Coast Guard as specified in section 324, nor of former citizens of the United States who are otherwise eligible to naturalization under the provisions of section 317.[131]

Finally, on December 17, 1943, Congress began the process of ending race-based immigration and naturalization laws by overturning the Chinese Exclusion Acts and allowing Chinese aliens to naturalize.[132] Three years later, Congress passed legislation making Filipinos and Asian Indians eligible for citizenship.[133] This process culminated with the passage of the Immigration and Nationality Act (INA) of 1952, whereby Congress made all races eligible for citizenship, thereby also eliminating race as a bar to immigration.[134] In addition, section 329 of the INA served to expedite the naturalization of non-citizen veterans who had served during "declared wars," including a provision that they could do so regardless if they had been "lawfully admitted to the United States for permanent residence."[135] Nonetheless, it is important to note that the primary motivation behind the repeal of these race-based discriminatory policies was less about improving the status of Asian aliens within the United States and more about symbolically rewarding our war-time Asian allies and responding to Cold War politics.[136]

The end of legally sanctioned race and ethnic based immigration and naturalization laws appeared to usher in a new era of access to U.S. citizenship for racial and ethnic minorities. However, as this Article argues, the contemporary convergence of immigration and criminal law, in what has been variously described as the "criminalization of immigration law"[137] or the "crimmigration crisis,"[138] has relied heavily on racialized anti-immigrant hostility to garner public and political support. This,

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[131] Nationality Act of 1940, Pub. L. No. 853. § 303, 54 Stat. 1137, 1140; *see* Goring, *supra* note 38, at 419, 445; *see* Sohoni & Vafa, *supra* note 30, at 128.

[132] Chinese Exclusion Repeal Act, ch. 344, 57 Stat. 600 (1943).

[133] Filipino and Indian Naturalization Act, ch. 534, § 303, 60 Stat. 416, 416 (1945). Ironically, in the same year that Congress removed the racial bars that had prevented Filipinos who had not served in the military from naturalizing, it also passed the Rescission Acts of 1946, 60 Stat. 14 and Second Supplemental Surplus Appropriation Rescission Act, ch. 271, 60 Stat. 221, 223 (1946) taking away veterans benefits for those who had not served directly under the U.S. Military (e.g., the Filipino Army, recognized guerilla groups, and members of the New Philippine Scouts). Among the benefits denied to these veterans was the right to military naturalization. Cabotaje, *supra* note 99, at 68–69, 77–79.

[134] Immigration and Nationality (McCarran-Walter) Act of 1952, ch. 477, § 311, 66 Stat. 163, 239 (codified as amended at 8 U.S.C. § 1422 (1988)); Sohoni & Vafa, *supra* note 30, at 128.

[135] *Id.*; Goring, *supra* note 38, at 425.

[136] HING, *supra* note 69, at 32–33; Sohoni & Vafa, *supra* note 30, at 146.

[137] Miller, *supra* note 17, at 617; Teresa A. Miller, *Blurring the Boundaries between Immigration and Crime Control after September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83 (2005).

[138] Stumpf, *supra* note 24, at 377.

in turn, has had direct and indirect consequences for non-citizen veterans who have been convicted or even accused of criminal acts.

IV. "CRIMMIGRATION" AND THE DEPORTATION OF NON-CITIZEN VETERANS

Criminals have long been barred entry into the United States through its immigration and naturalization laws.[139] For instance, one of the first immigration laws that specifically prohibited the entry of "undesirable" immigrants, the Page Act of 1875, included the categories of women engaged in prostitution (targeting Asian women), and those considered non-political convicts in their own country, stating:

> [I]t shall be unlawful for aliens of the following classes to immigrate into the United States, namely, persons who are undergoing a sentence for conviction in their own country of felonious crimes other than political or growing out of or the result of such political offenses, or whose sentence has been remitted on condition of their emigration, and women "imported for the purposes of prostitution."[140]

Similarly, the Immigration Act of 1882, which established the federal immigration bureaucracy, also prevented the entry of "any *convict*, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge."[141] With respect to non-citizen veterans, the Act of May 26, 1926 was the first to make explicit that alien veterans with criminal records were ineligible to naturalize.[142] Specifically, even as this Act extended the period for non-citizen veterans who had fought in WWI to seek expedited naturalization, it also incorporated provisions from the Act of February 5, 1917, which made persons previously deported, or persons convicted of a crime ineligible for entry, thus making non-citizen veterans previously convicted of crimes inadmissible for naturalization.[143]

Until relatively recently, immigration and naturalization law and criminal law were seen as distinct bodies of law: Immigration and naturalization law primarily concerned who could enter the country and gain citizenship, whereas criminal law focused on protecting individuals and society from harm and punishing (or rehabilitating) those engaged in wrongdoing.[144] At the same time, inherent in each of these bodies of law, are "systems of inclusion and exclusion" which serve to distinguish

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[139] Stumpf, *supra* note 24, at 380.

[140] Page Act of March 3, 1875, ch. 141, §5, 18 Stat. 477, 477. The Page Act also forbade the entry of forced ("cooly") labor from Asia. *Id.*

[141] Immigration Fund Act, ch. 376, §2, 22 Stat. 214, 214 (1882) (emphasis added).

[142] Act of May 26, 1926, ch. 398, 44 stat. 654, 654–55.

[143] *Id.* at 655; Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875–76; *see* Goring, *supra* note 38, at 416.

[144] Stumpf, *supra* note 24, at 379, 382; Miller, *supra* note 17, at 613.

between "innocent versus guilty, admitted versus excluded, [and] 'legal' versus 'illegal.'"[145] This similarity has allowed policy makers to shift from simply preventing immigrants with a *prior* criminal history from entering the country to increasingly deporting non-citizens for violations of immigration law, which were previously considered civil violations (such as unlawful entry) and for a growing number of crimes which have now become grounds for deportation.[146]

A. The Origins and Growth of the "Crimmigration" Regime

Between the early-1960s and the mid-1980s, immigration laws were far less stringent than today. A strong U.S. economy, relatively low immigration levels, and generally favorable public attitudes towards immigrants combined to limit support for restrictive legislation against immigrants.[147] As a result, within the criminal justice system, "the grounds for deportation of criminal and illegal aliens were narrower, the use of detention was less frequent, avenues for relief from detention were much broader, judicial review of deportation orders was broader, and far fewer immigration violations were criminally punishable."[148] However, beginning in the early 1980s, a slowing U.S. economy and growing unemployment rates, combined with an increase in legal and illegal immigration, led to greater public apprehension about immigration.[149] This apprehension was further fueled by the fact that immigration was becoming increasingly dominated by flows from Asia and Latin America, with corresponding changes in the racial and ethnic composition of the United States.[150] The result was that public sentiment began to shift from generally supportive of immigration, and somewhat tolerant of illegal immigration, to fearful that the United States was being overrun by immigrants and losing "control of its borders."[151]

In *The New Jim Crow*, Michelle Alexander describes how the criminal justice system, under an ideology of "colorblindness," has systematically incarcerated predominantly young, Black males through its harsh sentencing in the "War on

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[145] Stumpf, *supra* note 24, at 380.

[146] *Id.* at 381–83. Stumpf notes historically, those who entered the country without authorization were rarely punished, and those who committed crimes after entering the United States were rarely deported. *See also* Miller, *supra* note 17, at 614–15, 619.

[147] For a more detailed account, *see* Miller, *supra* note 17, at 622.

[148] *Id.* at 622. Specifically, non-citizens with criminal records were subject to deportation for a limited set of crimes related to moral turpitude, drug trafficking, and automatic weapons offenses. Miller also notes that detainees could seek relief based on a variety of personal considerations, including military service. *Id.* at 622–23.

[149] *Id.* at 625.

[150] Charles Hirschman & Douglas S. Massey, *Places and Peoples: The New American Mosaic*, *in* NEW FACES IN NEW PLACES 1–2 (Douglas S. Massey ed., 2008).

[151] Miller, *supra* note 17, at 625–26.

Drugs."[152] Similarly, it can be argued that the increased criminalization and deportation of immigrants, and in particular Latin American immigrants, has in large part been a result of the success of the political right in pushing forth a "Latino Threat" narrative linking immigration, and in particular Latin American immigration, with crime.[153] Thus, despite an extensive and growing body of social science research showing that immigrants are less likely to engage in crime than United States-born citizens,[154] that areas with growing immigrant populations for the most part have seen either no increase or decreases in crime rates,[155] and that these findings also hold true more specifically for Latin American immigrants,[156] public opinion surveys still show that a large number of Americans believe immigration, and in particular, illegal immigration, is likely to lead to higher levels of crime.[157] It is within this context that Congress began implementing a series of legislative acts to protect the United States against "criminal" and, after September 11, 2001, "terrorist" threats. Key characteristics of this legislation included expanding the definition of what constituted a deportable offense, enhancing the government's ability to apprehend and detain criminal aliens, limiting the right of those identified as criminal aliens to seek relief from detention and deportation, and limiting judicial review of these cases.[158]

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[152] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 103 (2012).

[153] *See* LEO R CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION 23–25 (2d ed. 2013); Jorge M. Chavez & Doris M. Provine, *Race and the Response of State Legislatures to Unauthorized Immigrants*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 2–3 (2009); Deenesh Sohoni & Tracy W.P. Sohoni, *Perceptions of Immigrant Criminality: Crime and Social Boundaries*, 55 SOCIOLOGICAL Q. 49, 59–60 (2014).

[154] Ramiro Martinez, Jr. & Matthew T. Lee, *On Immigration and Crime*, *in* 1 CRIMINAL JUSTICE 2000, THE NATURE OF CRIME: CONTINUITY AND CHANGE 499 (Gary LaFree et al. eds., 2000); Scott. A. Desmond & Charis E. Kubrin, *The Power of Place: Immigrant Communities and Adolescent Violence*, 50 SOCIOLOGICAL Q. 581, 599 (2009).

[155] Graham C. Ousey & Charis E. Kubrin, *Exploring the Connection between Immigration and Violent Crime Rates in U.S. Cities, 1980-2000*, 56 SOC. PROBS. 447, 461–64 (2009); Tim Wadsworth, *Is Immigration Responsible for the Crime Drop? An Assessment of the Influence of Immigration on Changes in Violent Crime between 1990 and 2000*, 91 SOC. SCI. Q. 531, 546 (2009).

[156] Matthew T. Lee, Ramiro Martinez, Jr. & Richard Rosenfeld, *Does Immigration Increase Homicide? Negative Evidence from Three Border Cities*, 42 SOC. Q. 559, 570 (2001); Holly Ventura Miller, *Correlates of Delinquency and Victimization in a Sample of Hispanic Youth*, 22 INT'L CRIM. JUST. REV. 153, 162 (2012).

[157] Casey T. Harris & Jeff Gruenewald, *News Media Trends in the Framing of Immigration and Crime, 1990–2013*, 67 SOC. PROBS. 452, 465–67 (2020); Andrew Kohut et al., *America's Immigration Quandary*, PEW RES. CTR., https://www.pewresearch.org/wp-content/uploads/sites/4/legacy-pdf/274.pdf (last visited Aug. 27, 2020); *Immigration*, POLLINGREPORT.COM, http://www.pollingreport.com/immigration.htm (last visited Jan. 6, 2010).

[158] Miller, *supra* note 17, at 632–37.

The first major legislation during this period was the Immigration Reform and Control Act (IRCA) of 1986, which sought to both legalize the status of certain long-term undocumented immigrants—as long as they could show they had not committed crimes—and create a stronger system to prevent and control illegal immigration.[159] In terms of policing, among the IRCA's major provisions were increased funding for immigration law enforcement and stronger employer sanctions against companies using illegal immigrants.[160] This Act was followed by the Anti-Drug Abuse Act (ADAA) of 1988, which, while ostensibly a part of the "War on Drugs," also "created a new category of crimes—aggravated felonies," for which criminal aliens could be deported.[161] It is under this category of crime that the types of offenses that trigger deportation began to increase.[162]

During the 1990s, the expansion of what constituted a "serious crime" would occur under both Republican and Democratic administrations. In 1990, under President H.W. Bush, the Immigration Act of 1990 expanded aggravated felonies to include any act of violence for which the sentence was at least five years.[163] Four years later during the Clinton administration, the Immigration and Nationality Technical Corrections Act of 1994 further enlarged the definition of aggravated felonies to include theft, burglary, fraud, and other offences that had not previously been treated as deportable offences.[164] The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[165] further expanded the scope of what crimes were considered aggravated felonies under existing definitions (e.g., passport and document fraud, bribery, forgery, and counterfeiting), and added new offences to be considered aggravated felonies (e.g., skipping bail for which a sentence of two or more years had been imposed).[166] The Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) made additional offenses aggravated felonies, in-

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[159] Immigration Reform and Control Act of 1968, Pub. L. 99-603, 100 Stat. 3445, 3445.

[160] *Id.*; Miller, *supra* note 17, at 630–31. Unlike later legislation, it was employers rather than illegal immigrants who were meant to bear the brunt of punishment, under the belief that employer sanctions would reduce the incentive for immigrants to come to the United States.

[161] Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181, 4469–73; Miller, *supra* note 17, at 633. Most drug and weapons crimes, which previously were considered crimes of "moral turpitude" were now reclassified as "aggravated felonies." *Id.*

[162] Miller, *supra* note 17, at 633–44.

[163] Immigration Act of 1990, Pub. L. 101-649, §§ 511(a), 602(a)2, 104 Stat. 4978, 5052; Stumpf, *supra* note 24, at 383.

[164] Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, § 222, 108 Stat. 4305, 4320–22; Miller, *supra* note 17, at 634.

[165] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 1101, 110 Stat. 1214, 1274. The AEDPA was in large part passed in response to the World Trade Center bombing of 1993 and the 1995 Oklahoma City bombing.

[166] Miller, *supra* note 17, at 634–35.

cluding marrying to evade immigration laws, voting in federal elections, and obtaining employment or work benefits by falsely claiming citizenship.[167] Critically, the IIRIRA also created a mandatory detention provision, applicable to virtually all criminal aliens subject to deportation, regardless of personal characteristics such as family or community ties, or the presence of dependent children.[168] Furthermore, the AEDPA and IIRIRA made it more difficult for non-citizens facing deportation to seek judicial relief from detention.[169] In 2000, "Congress also made the commission of an aggravated felony at any time in an alien's past a permanent bar to a finding of good moral character for purposes of obtaining citizenship."[170]

Finally, the attacks of September 11, 2001 led to the further merging of criminal law and immigration law. Immediately after the attacks, Congress passed, and President George W. Bush signed, the Patriot Act of 2001[171] which allowed for the detainment and deportation of non-citizens for terrorist tendencies.[172] Perhaps most emblematic of this change was passage of the Department of Homeland Security Act,[173] which led to the bureaucratic shift and reorganization of immigration control, from under the responsibility of the Immigration and Naturalization Service (INS) in the Department of Justice, to three new components within the newly created U.S. Department of Homeland Security (DHS).[174]

The net result of this new "crimmigration" regime has been to increase the number of immigrants who are being detained and deported. During the 1960s, the total number of immigrants deported by the United States was slightly over 1.4

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[167] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 611, 110 Stat. 3009, 572, 712–13.

[168] Miller, *supra* note 17, at 635–37.

[169] *Id.* at 637. Specifically, "if an immigration judge determines that the alien is detainable," they are prevented from inquiring into grounds that might exist to release on bond. Shagin, *supra* note 3, at 270 specifically notes that section 304(b) of the IIRIRA repealed section 212(c) of the INA, which had permitted "an immigration judge [to] waive deportation based on a series of factors that weighed alien's ties to the United States, including service in the military."

[170] 8 U.S.C. § 1101(f)(8) (2000); Shagin, *supra* note 3, at 267.

[171] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

[172] *Id.* at § 236A, 115 Stat. 272, 351; Miller, *supra* note 17, at 643.

[173] Department of Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135; 6 U.S.C. §§ 251–52, 271 (2002).

[174] *Id.* at 116 Stat. 2192–93, 2205. U.S. Customs and Border Protection (CBP), U.S. Immigration and Custom Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS). *See Our History*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/about-us/our-history (last visited Dec. 20, 2020).

million, for an average of 140,000 annually.[175] During the 1970s, the number of immigrants deported jumped to nearly 7.5 million, further increasing to slightly over 10 million in the 1980s, and up to 14.5 million in the 1990s, before a slight dip to slightly over 12 million in the first decade of the 2000s.[176] Historically, the two other time periods that have seen comparable increases in deportations were in the late 1920s and early 1930s under President Hoover,[177] and during the 1950s under President Eisenhower,[178] when each of these administrations sought to target Hispanic immigrants.[179]

More critical to this Article is the change in the number of *removals* over time. In detailing deportations, the Department of Homeland Security (and previously the INS) distinguishes between *removals*, which require a formal court order, and *returns*, which consist of the "voluntary" return of an immigrant and do not require a formal court order.[180] Typically, returns were used with apprehensions at the border, and removals for "deportation or exclusion" of longer-term residents.[181] When we look at these numbers we find that removals ranged between 100,000 and 300,000 from the first decade of the twentieth century, all the way through the 1980s.[182] But starting in the 1990s, removals jumped to triple that of any previous decade, with a total of 950,000.[183] By the first decade of the 2000s that number

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[175] *Aliens Removed or Returned: Fiscal Years 1892 to 2017*, U.S. DEP'T OF HOMELAND SECURITY, https://www.dhs.gov/immigration-statistics/yearbook/2017/table39 (last visited Dec. 20, 2020).

[176] *Id.*

[177] During the Great Depression, President Hoover announced a national plan to keep "American jobs for real Americans," that led to the deportation of nearly 1 million Mexican ancestry individuals. Diane Bernard, *The Time a President Deported 1 Million Mexican Americans for Supposedly Stealing U.S. Jobs*, WASH. POST (Aug. 13, 2018, 4:00 AM), https://www.washingtonpost.com/news/retropolis/wp/2018/08/13/the-time-a-president-deported-1-million-mexican-americans-for-stealing-u-s-jobs/?noredirect=on.

[178] The derogatorily named Operation Wetback, also referred to as "repatriation," was a campaign under the Eisenhower administration to remove undocumented Mexicans from the United States. Over 1 million individuals with Mexican ancestry were deported to Mexico, including many U.S. citizens. Erin Blakemore, *The Largest Mass Deportation in American History*, HIST. (June 18, 2019), https://www.history.com/news/operation-wetback-eisenhower-1954-deportation.

[179] *See* Table 3, *infra*, for deportation statistics.

[180] U.S. DEPARTMENT OF HOMELAND SECURITY, *supra* note 175, at 6.

[181] Dara Lind, *Removals vs Returns: How to Think About Obama's Deportation Record*, VOX (April 11, 2014, 11:17 AM), https://www.vox.com/2014/4/11/5602272/removals-returns-and-deportations-a-very-short-history-of-immigration.

[182] U.S. DEP'T OF HOMELAND SECURITY, *supra* note 175, at 2–5.

[183] *Id.* at 2.

nearly tripled again to 2.8 million, and the current decade is on pace to reach over 3.5 million.[184]

B. Judicial Discretion and the Removal of Non-Citizen Veterans

The changes in deportation policies under the new "crimmigration" regime has also impacted non-citizen veterans accused of criminal behavior. This is reflected in how federal courts have ruled on this group of individuals over time. From 1965 through the mid-1980s, the courts for the most part used their discretion to protect non-citizen veterans from deportation.[185] Illustrative of this is the case *Pignatello v. Attorney General of the U.S.* in which the U.S. Court of Appeals for the Second Circuit halted deportation proceedings initiated against Leonard Pignatello, an Italian native, and WWII Army veteran, despite his convictions on two felony charges (an armed robbery in 1936, and breaking into a U.S. Post Office with intent to commit larceny in 1953).[186] In explaining its decision, the Court of Appeals argued that while it was unclear whether or not Pignatello had actually completed the naturalization process, "the special circumstances of this case, where the individual had valiantly risked his life for this country, lawfully entered the country, and has lived here for more than fifty years," justified an evidentiary *de novo* hearing, and transferred the case back to the U.S. District Court for the Eastern District of New York.[187] Furthermore, the Court of Appeals recommended that even if the District Court determined that Pignatello had not been naturalized, that the Board of Immigrant Appeals should allow him to apply for discretionary relief.[188]

In fact, during this period, the courts seemed to have given precedence to military service even over other characteristics that may have normally prevented the showing of good moral character. For instance, in *In re Petition for Naturalization of Brodie*, the U.S. District Court for the District of Oregon ruled that although Brodie, a native New Zealander and a Vietnam veteran, should have been denied

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[184] *Id.* at 1–2.

[185] *See infra* Table 4. This period begins with the end of the race-based quota system (with passage of the Immigration and Naturalization Act of 1965) and continues through the beginning of the new Crimmigration Era. It is important to note that previously in *Tak Shan Fong v. United States*, 359 U.S. 102, 106–07 (1959), the Supreme Court had upheld an order by a U.S. Court of Appeals (which had reversed the order of the district court), that Tak Shan Fong, a native of China, was not entitled to naturalization under 8 U.S.C. § 1440 (1964), because he had not been lawfully admitted at the time of his service. This result ensued partly due to Congressional legislation, of which the stated requirements for those serving during periods of hostilities was their physical presence and lawful admittance, and ushered in the new era of "crimmigration." Naturalization of Persons Serving in the Armed Forces, Pub. L. No. 83-86, § 411, 67 Stat. 108, 108–09 (1953).

[186] Pignatello v. Att'y Gen. of the U.S., 350 F.2d 719, 721–22 (2d Cir. 1965).

[187] *Id.* at 724, 726.

[188] *Id.* at 724; Shagin, *supra* note 3, at 278.

entry to the United States as a homosexual, the good moral character showing required for citizenship based on wartime military service was not the same as the moral character standard needed to enter the United States.[189]

From the late 1980s to 2000, coinciding with the expansion of the "crimmigration" regime, there has been weakening judicial support for non-citizen veterans who commit crimes. For example, in *Mason v. Brooks*, the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the U.S. District Court of the Western District of Washington (Seattle) to deny Gregory Mason, a Canadian citizen and Vietnam veteran, entry into the United States for naturalization under 8 U.S.C. § 1440(b).[190] In this case, the district court had prevented Mason, who had been honorably discharged after his service in the U.S. Marine Corps (from April 1969 to October 1970), entry into the United States after his deportation to Canada for two drug convictions.[191] Specifically, the Ninth Circuit ruled that the district court had not erred in supporting the broad discretionary power of the attorney general to refuse Mason's petition for temporary admission into the United States.[192]

Two cases with seemingly contrasting outcomes further highlight the impact of the new legislation and the judiciary's lack of support for non-citizen veterans. In *Santamaria-Ames v. Immigration and Naturalization Service*, the U.S. Court of Appeals for the Ninth Circuit held that the district court had erred in not granting Santamaria-Ames, a native of Peru and a Vietnam War veteran, the opportunity to establish his good moral character, and remanded the case to the district court.[193] However, even this decision by the court of appeals to support Santamaria-Ames' *opportunity* to naturalize should be tempered by the fact that the court made clear that their decision did not imply support for his naturalization. Rather, the court of appeals argued that while Santamaria-Ames' military service during a period of hostility granted him the opportunity to naturalize, his lengthy criminal record of possession of heroin, felony hit and run, multiple other misdemeanor vehicle code violations and drug violations created a "formidable task" in proving his good moral character.[194] In fact, only a year later in *Castiglia v. Immigration and Naturalization*

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[189] *In re Brodie*, 394 F. Supp. 1208, 1210–11 (D. Or. 1975); Shagin, *supra* note 3 at 278–79.

[190] *See* Mason v. Brooks, 862 F.2d 190, 191, 195 (9th Cir. 1988).

[191] *Id.* at 192. A year after his discharge from the U.S. Marine Corps, Mason was convicted of possession of marijuana with intent to distribute (a charge which was later expunged); however, two years later in 1973, after a conviction on a misdemeanor count of possession of marijuana, he was deported to Canada by the INS. In 1983, Mason sought to enter the United States to meet the need of physical presence to apply for naturalization. *Id.* at 191.

[192] *Id.* at 195.

[193] *See S*antamaria-Ames v. INS, 104 F.3d 1127, 1129, 1132–33 (9th Cir. 1996).

[194] *Id.* at 1132. Specifically, the Ninth Circuit Court of Appeals rejected both the government's position that Santamaria-Ames' conduct before his military service was sufficient to reject his petition and Santamaria-Ames' contention that his honorable service in the army was

Service, the Ninth Circuit argued that notwithstanding their previous decision in *Santamaria-Ames*, where criminal history alone was considered insufficient to prove lack of good moral character, Castiglia's conviction of second degree murder, an aggravated felony under section 1101(f), constituted a permanent bar to a showing of good moral character.[195]

By the turn of the millennium, and under new Congressional legislation, non-citizen veterans facing criminal convictions for the most part lost even the opportunity to prove their good character and contest their deportations. For instance, in *Nolan v. Holmes*, the U.S. Court of Appeals for the Second Circuit upheld the decision of the district court to deny Nolan's attempt to terminate his deportation proceedings and apply for naturalization based on his service in the U.S. Army during the Vietnam War.[196] Specifically, the Second Circuit affirmed the district court's decision that the BIA had properly denied Nolan's appeal, despite his honorable discharge in 1965, because his guilty plea in 1996 to federal narcotic offenses ("aggravated felonies" under section 1101(a) of the INA) made him deportable for failing to meet the good-moral-character requirement of INA section 329.[197] This legal understanding, that felony charges automatically disqualified non-citizen veterans from proving "good moral character," is also seen in the cases of *Lopez v. Henley*[198] and *O'Sullivan v. U.S. Customs and Immigration Service*.[199]

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sufficient in establishing his good moral character. Instead the Court argued that Santamaria-Ames needed to demonstrate "exemplary conduct" from the beginning of the one-year regulatory period (when he sought to naturalize) to the present.

[195] *See* Castiglia v. Immigration & Naturalization Serv., 108 F.3d 1101, 1103–04 (9th Cir. 1996). Specifically, the Ninth Circuit Court of Appeals argued that under the portion of the Immigration and Naturalization Act codified by 8 U.S.C. § 1101, which had replaced "convicted of the crime of murder" with "convicted of an aggravated felony," that a "conviction of murder at any time continues to be considered a bar to good moral character." *Id.* at 1103; Shagin, *supra* note 3, at 280.

[196] *See* Nolan v. Holmes, 334 F.3d 189, 193 (2nd Cir. 2003).

[197] *Id.* at 203. Nolan enlisted in the U.S. Army in 1962, and served three years during the Vietnam conflict, before being honorable discharged in 1965. He reenlisted and served a second tour of duty, before being discharged in 1973 "under conditions other than honorable." *Id.* at 191, 203; Shagin, *supra* note 3, at 281–86.

[198] In *Lopez v. Henley*, 416 F.3d 455, 456 (5th Cir. 2005), the Fifth Circuit affirmed the decision of the U.S. District Court for the Western District of Texas that Lopez's "criminal conviction for drug possession rendered him unable to demonstrate the requisite good moral character" necessary to naturalize, and thus refused his appeal of his order for deportation.

[199] In *O'Sullivan v. U.S. Customs & Immigration Serv.*, 453 F.3d 809, 817 (7th Cir. 2006), O'Sullivan argued that "since wartime veterans [were] exempt from the residency requirements," they were also exempt from the "good moral character requirement . . . located in the residency subsection." Citing the cases of *Santamaria-Ames*, 104 F.3d at 1130, and *Lopez*, 416 F.3d at 455, the Seventh Circuit ruled that wartime veterans needed to show good moral character, and thus despite O'Sullivan's honorable service during the Vietnam War, his "aggravated felony" of

As the judiciary increasingly held that aggravated felony charges automatically disqualified non-citizens from showing the good moral character necessary for citizenship, some petitioners instead sought to argue that they were not deportable since they were already U.S. citizens based on their military service. For example, in *Reyes-Alcaraz v. Ashcroft*, Reyes-Alcaraz, a native of Mexico who had served in the U.S. Army from 1972 to 1974, and a further four years in the Army Reserve until his honorable discharge in 1978, sought to stay his deportation for aggravated assault on the basis of his military service.[200] While the Ninth Circuit noted that, given his aggravated felony charge under 8 U.S.C. § 1252(a)(2)(c), they did not have jurisdiction to consider the merits of Reyes-Alcaraz's petition, they recognized jurisdiction to examine Reyes-Alcaraz's claim that his written oath of allegiance to enlist in the U.S. Army constituted proof of his allegiance to the United States.[201] In denying a stay to Reyes-Alcaraz's removal order, the court of appeals ruled that a "military oath does not demonstrate that the signer 'owes permanent allegiance to the United States,'" but rather "allegiance (as well as obedience to the superior officers and the Commander in Chief) for the duration of military service."[202]

Similarly, in *Theagene v. Gonzales*, Theagene, a native of Haiti and an honorably discharged veteran of U.S. Navy who "participated in combat operations during the first Gulf War," sought a review of the Board of Immigration Appeals' final order of removal for his conviction of first degree residential burglary in California, the Ninth Circuit limited its determination to Theagene's claim of nationality.[203] In denying Theagene's claim, the court held that consistent with its ruling in *Reyes-Alcaraz v. Ashcroft*, "service in the armed forces of the United States, along with the taking of the standard military oath, does not alter an alien's status to that of a 'national' within the meaning of the Immigration and Nationality Act."[204]

Nonetheless, there have been a few rare cases where the judiciary has seemingly challenged the ability of the government to deport non-citizen veterans. However, in each of these cases, rather than disputing the right of the government to deport non-citizen veterans, the judiciary has shown an unwillingness to permit the government an unlimited time frame for administrative action. For instance, in *Lawson*, the case that began this Article, one of the main arguments made by the district court in support of Lawson was that the new congressional legislation, which made

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distributing cocaine precluded him from demonstrating good moral character under relevant statutes.

[200] Reyes-Alcaraz v. Ashcroft, 363 F.3d 937, 938–39 (9th Cir. 2004). Reyes-Alcaraz had been convicted of felony driving under the influence (in violation of California Vehicle Code § 23152(a)) in 1995 and of the felony offense of exhibiting a deadly weapon to a police officer with the intent to resist arrest (in violation of California Penal Code § 417.8) in 1996. *Id.*

[201] *Id.* at 940.

[202] *Id.* (citing 8 U.S.C. § 1101(a)(22) (emphasis omitted)).

[203] Theagene v. Gonzales, 411 F.3d 1107, 1109–12 (9th Cir. 2005).

[204] *Id.* at 1112–13.

aggravated felonies automatically disqualifying in showing good moral character, could not be applied retroactively to Lawson's pre-1990 conviction when these bars did not exist.[205]

Similarly in *Gordon v. Johnson*, the judiciary also ruled against the use of unrestricted time-frames but with respect to mandatory detention rather than for showing good moral character.[206] The specifics of this case were that the plaintiff, Richard Gordon, a native of Jamaica who had served in active duty in the U.S. Army before being honorably discharged in 1999, had pleaded guilty in state court in 2008 for possession of narcotics with intent to sell for cocaine that was found in his home.[207] He received a seven-year suspended sentence, and three years of probation which he successfully completed.[208] In June of 2013, Gordon was stopped by ICE agents, and based on his 2008 criminal conviction, detained under the mandatory provisions of 8 U.S.C. § 1226(c) "without the opportunity for an individualized bond hearing."[209] In supporting Gordon's petition for a writ of habeas corpus, the district court ruled that while the government had the power to detain individuals pending removal, they did not have an unlimited period of time to decide whether to detain a person.[210] Nonetheless, the court pointed out that its ruling was not meant to prohibit the government's ability to deport Gordon, but instead, only to "circumscrib[e] the executive's power to detain a person without a hearing."[211]

In summarizing the impact of the contemporary "crimmigration" regime for non-citizen veterans accused of criminal behavior, this Article highlights two key and interrelated points: first, over the past three decades Congress has passed legislation that has greatly expanded the definition of what types of criminal behavior constitute deportable offenses; and second, Congress has increasingly restricted judicial review of these cases, thus limiting the ability of the courts to consider non-citizen veterans' military service as a mitigating factor in contesting their deporta-

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[205] *Lawson*, *supra* note 1, at 296. However, it is unclear whether this ruling established any lasting precedent, given congressional legislation in 2000, which retroactively made any aggravated felony in an alien's past a permanent bar to establishing the good moral character necessary for naturalization. 8 U.S.C. § 1101(f)(8).

[206] Gordon v. Johnson, 991 F. Supp. 2d 258, 269 (2013).

[207] *Id.* at 262.

[208] *Id.*

[209] *Id.*

[210] *Id.* at 269.

[211] *Id.* at 268–70 (emphasis omitted). Specifically, the court argued that the ruling did not serve to strip the power of the executive branch to deport an individual ("the essence of the 'Loss of Authority Cases'"), but instead to limit their authority with regard to detention without a hearing. In fact, the court argued that given Congress's desire to eliminate discretion through this statute, it would make no sense to allow some people to return to their communities (i.e., Gordon when first charged) while not allowing others to do so. *Id.*

tion. While there are clear distinctions between the race-based immigration and naturalization laws of the past and the contemporary "crimmigration" regime, in many ways the impact for non-citizen veterans, and specifically minority veterans, has been quite similar. In both periods, the attempts of non-citizen veterans to use military naturalization legislation to seek citizenship has been restricted by the judicial interpretation of this legislation, and the broader naturalization and citizenship laws existing at the time. Thus, in the same way that many non-citizen Asian American veterans found race trumping patriotism in determining their ability to gain citizenship and social membership, today many non-citizen veterans find their "criminality" outweighing their military service in their attempts to seek naturalization and avoid deportation.

Furthermore, as has been argued in this Article, even though race is no longer an explicit part of contemporary immigration and naturalization laws, racialized attitudes continue to impact what type of legislation is enacted, and which groups bear the burden of its effects. Specifically, there is a growing body of literature that suggests that public support for restrictive immigration and naturalization laws, as well as punitive sentencing of criminals, is more responsive to the growth in population of those seen as "out-groups," rather than empirical evidence of whether the threat is real.[212] Furthermore, given that nearly 80% of all foreign-born individuals serving in the military are either from Asia or Latin America,[213] the majority of those being deported or who are likely to be deported, are likely to be members of these groups. Thus, attempts to address the deportation of non-citizen veterans must also address the broader environment faced more generally by all immigrants.

V. THE POLITICS OF PATRIOTISM: FAILING TO SUPPORT OUR NON-CITIZEN VETERANS

Advocates of non-citizen veterans who have been deported or face deportation have criticized the U.S. government for failing to support those who have served loyally on behalf of their adopted country. Three of the dominant critiques of current policy are: (1) bureaucratic failures by the government in providing assistance to non-citizen veterans throughout the naturalization process have made non-citizen veterans unnecessarily vulnerable to deportation; (2) current policy fails to account for veteran status or to distinguish between serious and non-serious crimes in determining deportation; and (3) it fails to acknowledge that it may be the very military

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[212] Graham C. Ousey & James D. Unnever, *Racial-Ethnic Threat, Out-Group Intolerance, and Support for Punishing Criminals: A Cross-National Study*, 50 CRIMINOLOGY 565, 572–73 (2012); Chavez & Provine, *supra* note 153, at 6–9.

[213] Laura Barker & Jeanne Batalova, *The Foreign Born in the Armed Services*, MIGRATION POL'Y INST. (Jan. 15, 2007), https://www.migrationpolicy.org/article/foreign-born-armed-services.

service provided by non-citizen veterans that caused their criminal actions. In addition, some legal scholars have raised legal issues regarding how military service on behalf of the United States may leave deported veterans vulnerable to national laws in other countries. Below, we discuss each of these points before turning to attempts to address these issues and examining their likelihood of success.

A. The Military and Bureaucratic Barriers to Citizenship

The first major critique of United States deportation policies is based on the contrast between the government's willingness to enlist non-citizens into the military, and its failure to ease the bureaucratic hurdles to citizenship for those who enlist. The active recruitment of non-citizens by the U.S. Military suggests a contract—with the promise of citizenship—for honorable service rendered. In fact, many non-citizen service members assumed that they would, or had, automatically become citizens after they finished their military service, or incorrectly thought they had completed all the necessary steps for naturalization.[214]

However, the formal process by which non-citizen veterans become U.S. citizens requires a complicated series of administrative steps. First, prospective citizens must complete and submit the Application for Naturalization Form to a Military Personnel Customer Service Section,[215] after which they must set up an appointment with the U.S. Citizenship and Immigration Service ("USCIS") to get fingerprinted.[216] After a background check by the USCIS, applicants are scheduled for an interview, where they take a required English and civics test, and then are questioned under oath about their background, supporting evidence, and their allegiance to the Constitution.[217] If the applicant is found eligible for naturalization, they are given a date where they can take the Oath of Allegiance and become a U.S. citizen. However, the ACLU found that many deported veterans mistakenly assumed their Oath of Enlistment, which also includes the promise to "support and defend the Constitution of the United States," had actually served as their Oath of Allegiance for the

[214] Vakili, Pasquarelle, & Marcano, *supra* note 20, at 24.

[215] Cathy Ho Hartsfield, Note, *Deportation of Veterans: The Silent Battle for Naturalization*, 64 RUTGERS L. REV. 835, 844 (2012); Form N-400, *Naturalization Through Military Service*, U.S. CITIZEN & IMMIGRATION SERV., https://www.uscis.gov/military/naturalization-through-military-service (last visited Aug. 30, 2020).

[216] Hartsfield, *supra* note 215, at 844.

[217] *Id.* at 845.

naturalization process.[218] Furthermore, several interviewees also reported being misinformed by recruiters that joining the military automatically meant citizenship.[219]

Even those who try to follow the necessary steps often find administrative barriers to completing the naturalization process. For instance, many of those interviewed by the ACLU complained that the Federal Government had lost, misplaced, or failed to file their applications in time, preventing them from completing their applications or making them think that they had already received citizenship.[220] This was further compounded by the fact that "because of the transient nature of training and deployment," many failed to receive important notices from the USCIS.[221] For non-citizen veterans, the consequence of not being able to attend, or missing interviews, ranged from long delays in rescheduling to having their application automatically denied.[222] In addition, until 2004, those deployed abroad had to wait until they were physically present in the United States to take part in the naturalization ceremonies necessary for their swearing in.[223]

The net impact of these bureaucratic failings by the military to provide information and administrative support to help non-citizen veterans with the naturalization process is that many non-citizen veterans fail to complete the process necessary to gain citizenship. Thus, many non-citizen veterans lack the legal protections to which they would have been entitled if they run afoul of the law. Specifically, non-citizen veterans who commit crimes end up not only facing prison time, but also the additional threat of deportation upon completion of their prison term.[224]

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[218] Vakili, Pasquarelle, & Marcano, *supra* note 20, at 24. Both oaths have similar wording regarding the promise to "support and defend the Constitution of the United States . . . against all enemies, foreign and domestic." Furthermore, the oath of naturalization even has a clause that the declarant must be willing to "bear arms on behalf of the United States when required by the law . . . ." See the oath of enlistment at *Oaths of Enlistment and Oaths of Office*, U.S. ARMY CTR. OF MIL. HIST., https://history.army.mil/html/faq/oaths.html (last visited Dec. 20, 2020), and the oath of naturalization at *Naturalization Oath of Allegiance to the United States of America*, U.S. CITIZENSHIP & IMMIGR. SERV., https://www.uscis.gov/us-citizenship/naturalization-test/naturalization-oath-allegiance-united-states-america (last visited Dec. 20, 2020).

[219] Vakili, Pasquarelle, & Marcano, *supra* note 20, at 26.

[220] *Id.* at 28.

[221] *Id.*

[222] Hartsfield, *supra* note 215, at 845.

[223] Vakili, Pasquarelle, & Marcano, *supra* note 20, at 30. In November of 2003, President George W. Bush signed the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1391, allowing overseas naturalization ceremonies.

[224] *Id.*; Hartsfield, *supra* note 215, at 849–50; Vakili, Pasquarelle, & Marcano, *supra* note 20, at 41.

B. Serious Versus Non-Serious Crimes

As previously discussed in Section IV of this Article, today an increasing number of crimes have become grounds for deportation. In particular, the ADAA of 1988 created a new category of offenses—"aggravated felonies"—that made someone deportable.[225] This last category was meant to represent the most serious types of crimes, such as murder, rape, and racketeering.[226] However, as part of its "War Against Drugs," Congress also made all drug trafficking offenses aggravated felonies, whether large amounts of hard drugs are involved or minor amounts of marijuana.[227] In addition, many other less serious offenses such as theft and assault have also become aggravated felonies if they lead to a sentence of imprisonment for at least one year. Furthermore, judges no longer have the discretion to take into account military service for "relief from removal" if a non-citizen has been convicted of an aggravated felony.[228]

Many supporters of "tough on crime" policies argue that engaging in criminal activities should have repercussions. However, this ignores the fact that non-citizen veterans already face punishment for their crimes, just as would any citizen. But in addition, they face the further punishment of deportation.[229] Furthermore, many of the crimes that today count as being deportable offenses are relatively minor such as shoplifting, the possession and use of pot, or fighting.[230] Essentially, crimes for which U.S. citizens often get probation or a suspended sentence, but for which non-citizens can lead to deportation, even when prosecutors choose not to proceed with the case or even if the sentence is suspended.[231] Finally, many of the crimes that non-citizen veterans engage in are drug offences that are linked to their military service—a point discussed in the next Section.

C. Military Service, Mental Health, and Criminality

The third major critique of United States' deportation of non-citizen veterans is that the very service non-citizen veterans provided for their country may have

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[225] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Craig R. Shagin, *Deporting our Troops*, 60 FED. LAW. 46, 48 (2013). This was in addition to the previously existing categories of "crimes involving moral turpitude," "crimes relating to 'controlled substances,'" and "crimes of domestic violence." *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.* at 48, 50.

[229] *Id.* at 50.

[230] *Id.* at 48–49.

[231] Kevin Sullivan, *Deported Veterans Banished for Crimes After Serving in U.S. Military*, WASH. POST. (Aug. 12, 2013), https://www.washingtonpost.com/politics/deported-veterans-banished-for-committing-crimes-after-serving-in-us-military/2013/08/12/44f81098-ffa9-11e2-9a3e-916de805f65d_story.html.

directly contributed to their criminality. One of the growing concerns facing the U.S. Military is the increasing prevalence of mental health issues among all its members, including depression, post-traumatic stress disorder (PTSD), substance abuse, and suicide. In fact, a 2014 study published in *JAMA Psychiatry* reported that nearly a quarter of active duty members showed signs of mental illness and that the rates of PTSD were 15 times higher for those in the military compared to civilians.[232] As mental illness has become more prevalent among service members, criminal convictions of veterans (both citizen and non-citizen) have also grown, frequently for "crimes that are a result of their PTSD symptoms and combat experience."[233] In fact, many non-citizen veterans facing deportation for drug possession reported using drugs to self-medicate for their depression and PTSD.[234] This in large part helps explain why the percentage of denials of military naturalization applications on the grounds of failing to show good moral character are over double the percentage of denials of civilian naturalization applications for lacking good moral character, as their convictions foreclose a showing of good moral character.[235]

In 1980, the American Psychological Association recognized PTSD as a psychiatric disorder.[236] Research shows that those suffering PTSD may feel threatened, and may respond to perceived threats with violence.[237] However, while citizen veterans can ask the court to consider PTSD as a mitigating factor for criminal conduct, non-citizen veterans are not afforded this same opportunity.[238] Furthermore, once deported, non-citizen veterans often report not receiving any mental health treatment let alone specialized treatment for service-related conditions.[239] Critics of the United States' deportation policies towards non-citizen veterans thus contend that rather than living up to its moral obligation to take care of its service members, the

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[232] Michael Schoenbaum et al., *Predictors of Suicide and Accidental Death in the Army Study to Assess Risk and Resilience in Servicemembers (Army STARRS): Results from the Army Study to Assess Risk and Resilience in Servicemembers*, 71 JAMA PSYCHIATRY 493, 493–503 (2014); *see* The National Alliance on Medical Illness, *Veterans and Active Duty*, https://www.nami.org/find-support/veterans-and-active-duty (last visited Aug. 30, 2020).

[233] Hartsfield, *supra* note 215, at 852.

[234] *Id.* at 838.

[235] Joanna S. Kao, *Good Enough to Fight for the U.S. but Missing the Mark for Citizenship*, AL JAZEERA AM. (May 8, 2015, 5:00 AM), http://america.aljazeera.com/multimedia/2015/5/good-enough-to-be-soldier-but-not-citizen.html. Using USCIS figures, Kao found that between 2003 and 2014, even though those seeking military naturalization and those seeking civilian naturalization had relatively similar rates in attaining citizenship (92% and 88% respectively), and that among those denied naturalization, failure to show good moral character was over twice as high for service members compared to civilians (36% to 15% respectively). *Id.*

[236] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 247–50 (Janet B.W. Williams ed., 3d ed. 1987); Hartsfield, *supra* note 215, at 850.

[237] *Id.*

[238] *Id.* at 852.

[239] Vakili, Pasquarelle, & Marcano, *supra* note 20, at 45.

United States is choosing to deport those who "sacrificed their mental health" on behalf of their country.[240]

D. Legal Issues Related to Military Service and National Allegiance

An additional critique raised by legal scholars regarding the deportation of non-citizen veterans concerns the legal issues raised by such deportations. Specifically, non-citizen veterans may face legal sanctions due to their service in the U.S. Military based on the law of other nations and international law. For example, U.S. citizens who serve in the militaries of other countries are liable for criminal sanctions in the United States.[241] Yet by deporting non-citizen veterans, the United States is allowing these individuals to become vulnerable to similar laws in other countries.[242] Thus, despite the fact that individuals may have served honorably, current U.S. immigration policy allows non-citizen veterans to potentially be deported to countries that may view their participation in the U.S. Military as criminal, without any of the safeguards that come with U.S. citizenship.[243]

Furthermore, there are international treaties that are legally problematic for deported non-citizen veterans. For instance, the Rome Statute of the International Criminal Court (ICC) makes certain war actions (e.g., genocide, crimes against humanity, war crimes, and the crime of aggression) prosecutable under international law.[244] But, because the United States is no longer a signatory to the ICC, its citizens are generally not subject to ICC jurisdiction.[245] However, as noted by legal scholars,

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[240] Hartsfield, *supra* note 215, at 852.

[241] 18 U.S.C § 958 (2000); Shagin, *supra* note 3, at 311.

[242] *Id.* at 311–13. Shagin points out that non-citizen veterans who may have fought against terrorist groups in their country of origin could theoretically be returned to these countries and then face revenge and punishment if that terrorist group ever came into power. *Id.*

[243] The full extent of the potential consequences of serving in the U.S. Military as a non-citizen can be seen with the recent shutting down of the Military Accessions Vital to the National Interest (MAVNI) program in 2017. The MAVNI program promised expedited naturalization to over 10,000 immigrants who possessed specialized medical or language skills. After the U.S. Army accidently released the names of those on the list, hundreds of recruits, particularly from China and Russia, have become vulnerable to prison or death if they are returned to their countries of origin. For example, collusion with a foreign government is punishable with ten years to life in prison in China, and those who are considered in breach of national security can face the death penalty. Alex Horton, *Hundreds of Immigrant Recruits Risk 'Death Sentence' After Army Bungles Data, Lawmaker Says*, WASH. POST (Mar. 7, 2019, 9:03 AM), https://www.washingtonpost.com/national-security/2019/03/06/hundreds-immigrant-recruits-risk-death-sentence-after-army-bungles-sensitive-data/?utm_term=.6ae6451b3333.

[244] Shagin, *supra* note 3, at 313–14.

[245] *Id.* at 314.

this protection does not apply to those deported by the United States, making them prosecutable for actions engaged in while under the service of the U.S. Military.[246]

E. Policy Recommendations

Advocates for non-citizen veterans have suggested several policies—some bureaucratic, some legal—to ensure that these veterans are treated fairly given their service to the United States. The main bureaucratic suggestion has been that the military should offer more legal support to non-citizen service members to navigate the naturalization process. Specifically, the military should make it clear to immigrant service members that military service does not bestow automatic citizenship, and then help immigrant service members navigate the process of naturalization. There have been some efforts to facilitate the naturalization process, such as changes in the U.S. citizenship law in 2004 that allowed the USCIS to conduct naturalization interviews and ceremonies at military bases abroad.[247] However, even these efforts have been tenuous, as in September of 2019, the USCIS announced that it was cutting the number of places overseas where non-citizen service members and their families could naturalize from 23 to 4, again making it harder for foreign-born service members serving overseas to naturalize.[248]

In terms of more permanent legal changes, some have argued that non-citizen service members should be treated the same as non-citizen nationals.[249] Others have pointed to the need for greater judicial discretion to take into account military service as a mitigating factor, particularly when non-citizen veterans are dealing with mental issues related to their service.[250] However, any major changes in the legal treatment of non-citizen veterans would require the support of Congress.[251]

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[246] *Id.*

[247] Batalova, *supra* note 22.

[248] Richard Sisk, *The Naturalization Process Just Got Harder for Noncitizen Troops Stationed Overseas*, MILITARY.COM (Sept. 20, 2019), https://www.military.com/daily-news/2019/09/30/naturalization-process-just-got-harder-noncitizen-troops-stationed-overseas.html.

[249] Shagin, *supra* note 225, at 49–50, argues that military service by non-citizens could be viewed as showing permanent allegiance, and thus deserving of the status and protections of non-citizen nationals (including protection against deportation). However, he also notes that given the Ninth Circuit ruling in *Reyes-Alcaraz v. Ashcroft* that military service did not constitute permanent allegiance, that this is unlikely to be solved by the judiciary. *Id.*

[250] Hartsfield, *supra* note 215, at 852–53. For instance, Hartsfield argues that if the courts see "PTSD as a mitigating factor and reduce sentences to less than one year," it could prevent non-citizen veterans from being deported. *Id.*

[251] Shagin, *supra* note 3, at 252–53. Shagin argues that due to "the deference given by [the] court of appeals to the decisions of the BIA," protecting non-citizen veterans from deportation will require Congress to step in and amend the INA to provide non-citizen servicemen (and women) the equivalent status of noncitizen national. *Id.*

Yet, this assumes that the deportation of non-citizen veterans is a congressional priority. As this Article has shown, despite the frequent lip service given to military patriotism as a demonstration of loyalty to the nation, the legislative branch has treated, and the judicial branch has interpreted, military naturalization as secondary to the broader immigration and naturalization laws of the time. Despite the fact there is little evidence that anti-immigrant legislation and policies is effective in reducing crime,[252] current "tough on crime" immigration policies continue to be symbolically and politically important.[253] Thus, even though naturalization through military service makes up less than 2% of all naturalization,[254] leniency towards non-citizen service members and veterans may be seen as challenging the broader "crimmigration" regime. For example, Congress may fear that if it again were to allow greater discretion to judges with respect to military service as a mitigating factor in deportation, the judiciary could potentially seek to extend this discretion beyond cases of non-citizen veterans.

VI. CONCLUSION: A HISTORY OF BROKEN PROMISES—RACE, PATRIOTISM, CITIZENSHIP, AND THE LAW

The United States has a long history of promising greater legal rights to non-citizens for serving in its Armed Forces during periods of conflict, yet failing to live up to these obligations once the need for their military service is over. This failure has been particularly pronounced for non-citizens viewed as racial or ethnic minorities. For instance, during the Revolutionary War, slaves were promised emancipation and citizenship if they enlisted in the Continental Army to fight against the British; however, once the war ended, many of these African-American veterans were promptly re-enslaved.[255]

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[252] For instance, researchers have shown that there is little to be gained in crime control by enacting harsh, restrictive policies against immigrants or by punishing sanctuary jurisdictions. For example, Miles and Adams found that the Secure Communities, Criminal Alien Program, which incorporates local officers in policing immigration, has had no noticeable effect on reducing crime, Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937, 964 (2014), while Kubrin and Bartos found that in California, the establishment of sanctuary status did not lead to increased crime, Charis E. Kubrin & Bradley Bartos, *Sanctuary Status and Crime in California: What's the Connection?*, 13 JUST. EVALUATION J. (forthcoming 2020).

[253] Jize Jiang & Edna Erez, *Immigrants as Symbolic Assailants: Crimmigration and its Discontents*, 28 INT'L CRIM. JUST. REV. 5, 16–17 (2018).

[254] *See* Table 2, *infra* note 271.

[255] Major Alison F. Atkins, *From a Dream to a Reality Check: Protecting the Rights of Tomorrow's Conditional Legal Resident Enlistees*, 216 MIL. L. REV. 1, 7 (2013)

Similarly, during World War I, many Native Americans—both citizens and non-citizens—fought in Europe on behalf of the United States.[256] After the war, Congress passed the American Indian Citizenship Act, granting citizenship to Native Americans who had served in the U.S. Armed Forces:

> Be it enacted . . . [t]hat every American Indian who served in the Military or Naval Establishments of the United States during the war against the Imperial German Government, and who has received or who shall hereafter receive an honorable discharge, if not now a citizen and if he so desires, shall, on proof of such discharge and after proper identification before a court of competent jurisdiction, and without other examination except as prescribed by said court, be granted full citizenship with all the privileges pertaining thereto, without in any manner impairing or otherwise affecting the property rights, individual or tribal, of any such Indian or his interest in tribal or other Indian property.[257]

However, because the Act did not automatically bestow citizenship upon non-citizen Native American veterans, but instead only allowed them to apply to naturalize, few eligible Native American veterans actually applied for citizenship.[258]

Likewise, as described in Section III of this Article, many foreign-born Asian Americans enlisted, and were willingly accepted into various branches of the U.S. Military, only to have the courts rule that congressional legislation granting "all aliens" the right to naturalize based on military service did not supersede broader race-based citizenship requirements. One prominent example of the U.S. government's attempts to meet the instrumental needs of its military but failing to live up to its obligations after these demands were met, is the case of the recruitment of Filipino soldiers during WWII. In 1941, President Franklin Roosevelt issued an Executive Order calling for non-citizens to join the Armed Forces.[259] After the Japanese attack on Pearl Harbor, Congress ratified this call with the Second War Powers Act of 1942,[260] promising citizenship for all non-citizens who served in active duty in the

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[256] *Id.* at 10. The Dawes Act of 1887, ch. 119, § 6, 24 Stat. 388, 388–90, granted citizenship to Native Americans who surrendered their traditional lands, as long as they maintained a residence "separate and apart from any tribe of Indians" and "adopted the habits of a civilized life . . . ."

[257] Citizenship for Native Americans Who Served in World War I, ch. 95, 41 Stat. 350, 350 (1919).

[258] Atkins, *supra* note 255, at 10. This was in part due to a lack of knowledge about the Act and in part due to the competence determination required by the U.S. government prior to naturalization. Eventually, all Native Americans would be granted citizenship under the Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253.

[259] Exec. Order No. 8,802, 6 Fed. Reg. 3,109 (June 25, 1941), *rev'd by* Exec. Order No. 9,664, 10 Fed. Reg. 15,301 (Dec. 18, 1945).

[260] Second War Powers Act, 1942, ch. 199, 56 Stat. 176, 182.

U.S. Armed Forces.[261] With passage of this Act, "tens of thousands of Filipino men accepted the offer of expedited U.S. citizenship in exchange for enlisting in the U.S. Armed Forces."[262] However, once WWII ended, Congress passed the Rescission Acts of 1946, repealing promised benefits for the majority of Filipinos who had served with the U.S. Armed Forces.[263] Specifically, only Filipinos who had served directly under the U.S. Armed Forces (Old Philippine Scouts) were considered part of the U.S. Army for veterans' benefits and naturalization. Meanwhile, Filipinos who had served under the Philippine Army in recognized guerilla units and in the New Philippine Scouts, despite being called into service by formal acts of Congress and under Executive Order, became ineligible for active duty status and thus for the rights that accrued to this status.[264]

Today, the U.S. government is again failing its non-citizen veterans. The hundreds or thousands of non-citizen veterans who have been deported represent another broken promise. Membership theory argues that the constitutional rights provided to various groups are dependent on the legal system's view of who belongs.[265] Historically, racial and ethnic minorities were denied U.S. citizenship and social membership overtly through its immigration and naturalization policies. Today, while it is true that race and ethnicity are no longer supposed to influence access to citizenship, the contemporary merging of immigration and criminal law has disproportionately allowed members of certain groups to be removed from social membership for certain acts. Specifically, race and ethnicity have played a strong role in justifying the harsher treatment of immigrants who commit certain crimes and in determining who is likely to be deported. The racialization of criminality has been further inflamed preceding the election of Donald Trump in 2016, spurred in part by his claims that Mexico is "sending people that have lots of problems" to the United States, including drug runners, rapists, and other criminals,[266] as well as by

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[261] Second War Powers Act, 1942 §§ 701, 182; HENRY C. DETHLOFF & GERALD SHENK, CITIZEN AND SOLDIER: A SOURCEBOOK ON MILITARY SERVICE AND NATIONAL DEFENSE FROM COLONIAL AMERICA TO THE PRESENT 112 (2011).

[262] DETHLOFF & SHENK, *supra* note 261, at 112.

[263] Second Supplemental Surplus Appropriation Rescission Act, 1946, Pub. L. No. 79-391, 60 Stat. 221, 223–24.

[264] For a more detailed history, see Cabotaje, *supra* note 99, at 76–79.

[265] Stumpf, *supra* note 24, at 397.

[266] Trump's comment regarding Mexican immigrants came on June 16, 2015, when he announced his intention to seek the Republican nomination for President. Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015, 12:00 AM), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/.

similar rhetoric used to defend his call of a national emergency in 2019 to access funding to build his wall.[267]

The unintended consequence of the "crimmigration" regime in the United States is that non-citizen veterans are increasingly being deported for criminal acts that are often a direct result of their military service. Current proposals to force the military to better help non-citizen service members navigate the bureaucratic hurdles necessary to naturalize and gain citizenship during and immediately after enlistment, while valuable and necessary, still do not address the underlying causes of these problems. More significant changes, such as congressional legislation protecting non-citizen veterans from deportation or permitting greater judicial discretion to take into account military service in deportation hearings, seem unlikely given the extensive history of Congress treating military naturalization as strictly secondary to the ideologies governing broader immigration and naturalization laws. Thus, similar to the past, when Asian American non-citizen service members found race trumping patriotism in determining access to citizenship, today many non-citizen veterans find "criminality" outweighing military service in legal determinations regarding social membership. Therefore, any real remedy seeking to protect non-citizen veterans needs to examine the continued racialized and discriminatory underpinnings of contemporary U.S. immigration policy.

[267] Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 5, 2019), https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html?searchResultPosition=1.

APPENDIX

Table 1: Selected Military Naturalization Laws—Eligibility and Service Requirements[268]

Name of Law	Eligibility for Military Naturalization	Residency and Service Requirements
Naturalization Act of April 14, 1802[269]	Set residency requirement for naturalization at five years and required a declaration of intention to become a U.S. citizen three years before admission	N/A
Act of July 17, 1862	"Any alien" with service in armies of the United States (no declaration of intention required).	1 year of residency
Act of July 26, 1894	"Any alien" with service in U.S. Navy or U.S. Marine Corp[270] (with declaration of intent to become citizen).	5 years in USN 1 enlistment in USMC
Act of August 1, 1894	"Non-citizens" ineligible to serve in Army in time of peace.	N/A
Act of June 30, 1914	"Any alien" who may under existing law become a citizen with service in U.S. Navy, U.S. Marine Corp, Naval Auxiliary Service, or Revenue-Cutter Service (no declaration of intention or proof of residence required).	4 years of service

[268] Adapted from Table 1 in Sohoni & Vafa, *supra* note 30, at 127–29.

[269] Sohoni & Vafa, *supra* note 29, at 129. Between 1790 and 1802, the residency requirement for naturalization went from two years (Act of March 26, 1790), to five years (Act of January 29, 1795), to fourteen years (Naturalization Act of June 18, 1798), before Congress settled on five years as the necessary residency requirement for naturalization (which remains the current criteria). Significant exceptions to this residency requirement have been made for non-citizen spouses and children of U.S. citizens, and for those who served in the military.

[270] Branches of the United States Military: USN (United States Navy); USMC (United States Marine Corps); USCG (United States Coast Guard).

Act of May 22, 1917	"Any aliens who may under existing law become citizens of the United States" with service in the Naval Reserve Force.	1 year of service (wartime)
Act of May 9, 1918	"Any native-born Filipino" with service in U.S. Navy, U.S. Marine Corp, Naval Auxiliary Service. "Any alien or any Porto Rican" with service in U.S. Army, National Guard, Naval Militia, USN, USMC, USCG.	3 years of service
Act of July 19, 1919	"Any alien" who served in military or naval forces of the United States during WWI.	No residency requirement
Act of May 26, 1926	"[E]very American Indian who served in the Military or Naval Establishments of the United States" during WWI.	No residency requirement
Act of June 24, 1935	Amended racial restrictions and allowed any alien, previously ineligible for citizenship because of race, to naturalize if they had served honorably in WWI.	No residency requirement
Nationality Act of October 14, 1940	Naturalization limited to white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere, *and* native-born Filipinos having served honorably in the U.S. Army, U.S.N., U.S.M.C., or U.S.C.G.	Pre-existing requirements
Act of June 30, 1950	(§ 3) Amended the Act of August 1, 1894 to allow the enlistment of aliens during peacetime (for a three-year period lasting until June 30, 1953). (§ 4) Allowed for naturalization of aliens after five or more years of service if honorably discharged.	Five years of military service in peacetime

Immigration and Nationality Act of June 27, 1952	(§ 328) Honorable service in the U.S. Armed Forces for a period of three years. (§ 329) Provided naturalization for aliens and non-citizens who had served honorably in active-duty status in the U.S. Military, Air, or Naval Forces during WWI or WWII whether or not lawfully admitted to the United States for permanent residence at time of enlistment.	Three years of military service during peacetime (no residency requirement) -Immediate naturalization during "active hostilities" -Retroactive citizenship for aliens who served in WWI or WWII
Act of August 17, 1961	Restricted military service in U.S. Army and U.S. Air Force in times of peace to U.S. citizens or permanent residents.	N/A
Act of October 24, 1968	Amended the Immigration and Naturalization Act of 1952 (§ 329) to provide for naturalization of those who served active-duty service in the Armed Services of the U.S. during the Vietnam and Korean hostilities, and other periods of military hostilities designated by executive order by the President.	No period of residency required
Immigration Act of November 29, 1990	(§ 405) Allowed for naturalization of natives of the Philippines through certain active-duty service in WWII, including those who had served honorably in the U.S. Armed Forces, or within the Philippine Army, or the Philippine Scouts. (Limited applications for naturalization to two year period from passage of Act).	No period of residency required

National Defense Authorization Act of 2004	(§§ 1701–1705) Reduced period of active service from three years to one year. Granted posthumous citizenship to aliens, and posthumous benefits for surviving spouses, children, and parents.	1 year of service
The Military Accessions Vital to the National Interest (MAVNI) Program (2008)	While federal law requires U.S. citizenship or lawful permanent residency (LPR) for enlistment in the U.S. Armed Forces, the MAVNI Program allows individuals who do not meet those requirements to enlist if the appropriate Service Secretary "determines that such enlistment is vital to the national interest" (10 U.S.C. § 504(b)(2)). Applicants at the time of enlistment have to be either asylees, refugees, holders of Temporary Protected Status (TPS), beneficiaries of the Deferred Action for Childhood Arrivals (DACA) policy, or in any one of a range of nonimmigrant categories. Does not admit unauthorized aliens who were not lawfully present in the United States.	Same as previous requirements

Table 2: U.S. Military Naturalizations as a Percentage of Total Naturalizations: 1918–2015[271]

Years	Number of Persons Naturalized	Number of Persons Naturalized through Military	Percent of Total Naturalizations through Military
1918–1920	546,490	244,300	44.7
1921–1925	799,790	44,383[272]	5.6
1926–1930	973,395	11,823	1.2
1931–1935	626,072	7,023[273]	1.1
1936–1940	892,392	12,868	1.4
1941–1945	1,539,972	112,531	7.3
1946–1950	447,056	37,268	8.3
1951–1955	562,779	29,838	5.3
1956–1960	627,167	11,867	1.9
1961–1965	600,468	12,304	2.1
1966–1970	519,795	23,764	4.6
1971–1975	618,554	38,882	6.3
1976–1980	846,218	28,044	3.3
1981–1985	960,693	17,134	1.8

[271] Adapted from Table 2, Sohoni & Vafa, *supra* note 30, at 130. Data compiled from U.S. Department of Homeland Security. U.S. DEP'T OF HOMELAND SECURITY, *supra* note 175. Data on military naturalizations prior to 1918 is not available.

[272] Special provisions for military naturalizations expired or were suspended in 1925 and 1935.

[273] *Id.*

1986–1990	1,253,572	11,183	0.9
1991–1995	1,785,186	24,631	1.4
1996–2000	3,834,706	4,314	0.1
2001–2005	2,786,548	14,956	0.5
2006–2010	3,773,233	30,631	0.8
2011–2015	3,615,231	46,106	1.3

Table 3: Aliens Removed or Returned: 1900–2017[274]

Decade	Removals[275]	Returns[276]	Total
1900–1910	119,769	N/A	119,769
1911–1920	206,021	N/A	206,021
1921–1930	281,464	72,233	353,697
1931–1940	185,303	93,330	278,633
1941–1950	141,112	1,470,925	1,612,037
1951–1960	150,472	3,883,660	4,034,132
1961–1970	101,205	1,334,528	1,435,733
1971–1980	240,217	7,246,812	7,487,029

[274] Data compiled by authors from U.S. DEP'T OF HOMELAND SECURITY, *supra* note 175, at 1–5. N/A denotes data that was not available.

[275] *Id.* at 6. "Removals are the compulsory and confirmed movement of an inadmissible or deportable alien out of the United States" based on a court order. *Id.*

[276] *Id.* "Returns are the confirmed movement of an inadmissible or deportable alien out of the United States" without a court order of removal. *Id.*

1981–1990	232,830	9,961,912	10,194,742
1991–2000	946,506	13,588,193	14,534,699
2001–2010	2,774,766	9,370,692	12,145,458
2011–2017*	2,599,594	1,232,918	3,832,512

Table 4: Selected Court Cases—Deportation of Military Veterans[277]

Date	Case	Decision
March 23, 1959	*Tak Shan Fong v. United States*, 359 U.S. 102 (1959)	Supreme Court affirmed the order of the appellate court and held that although petitioner had served for the required length of time, petitioner was not entitled to naturalization because he had entered the United States unlawfully prior to his military service.
August 3, 1965	*Pignatello v. Att'y Gen. of the U.S.*, 350 F.2d 719 (2d Cir. 1965)	The U.S. Court of Appeals for the Second Circuit argued that Pignatello had reasonably assumed that he had been naturalized (based on discharge papers listing him as a U.S. citizen), plus his "distinguished military service and the fact that he had lawfully entered the United States in 1919 and lived here ever since" warranted discretionary relief.

[277] Cases were in part drawn from Shagin, *supra* note 3, and supplemented by authors' own search of relevant cases.

May 15, 1975	*In re Brodie*, 394 F. Supp. 1208 (D. Or. 1975)	The district court argued that because Brodie was a "homosexual," he should have been denied admission to the United States, but it concluded that the good moral character required for entry into the United States was not the same as the good moral character required for citizenship (evidenced by his honorable discharge).
November 29, 1988	*Mason v. Brooks*, 862 F.2d 190 (9th Cir. 1988)	The U.S. Court of Appeals for the Ninth Circuit: - Rejected the request of appellant, a Canadian citizen and Vietnam veteran who was outside country due to criminal conviction, to reenter the United States to seek discretionary relief. - Affirmed the grant of summary judgment, holding that appellant, a statutorily excludible alien, had not shown any circumstance under which his admission into the United States was authorized.
December 31, 1996	*Santamaria-Ames v. INS*, 104 F.3d 1127 (9th Cir. 1996)	The U.S. Court of Appeals for the Ninth Circuit remanded case to district court determining that while Santamaria-Ames's past criminal record (e.g., battery, assault, drug possession, burglary, etc.) made it difficult to prove his good moral character, he could not be denied his opportunity to provide evidence of his good moral character.

March 7, 1997	*Castiglia v. INS*, 108 F.3d 1101 (9th Cir. 1997)	The U.S. Court of Appeals for the Ninth Circuit ruled that a murder *conviction* bars showing of good moral character and naturalization (based on congressional amendment of INA 8 U.S.C. § 1101(f) barring anyone who had committed an aggravated felony from naturalization). - *Contra Santa Maria-Ames*.
July 2, 2003	*Nolan v. Holmes*, 334 F.3d 189 (2d Cir. 2003)	The U.S. Court of Appeals for the Second Circuit affirmed the district court's dismissal of Nolan's petition for a writ of habeas corpus for refusing to terminate his deportation hearings in order to apply for naturalization based on prior service in the U.S. Armed Forces. The district court had upheld BIA's decision that Nolan had not shown good moral character (due to drug related "aggravated felonies"), and rejected Nolan's claim that INA § 329 does not require a showing of good moral character.
April 8, 2004	*Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937 (9th Cir. 2004)	The U.S. Court of Appeals for the Ninth Circuit rejected petition for review of final order of removal: - BIA had affirmed the Immigration Judge's decision that Reyes-Alcaraz was removable for having committed an aggravated felony (exhibiting a deadly weapon to police in order to resist arrest). - Rejected Reyes-Alcaraz's claim that military oath demonstrated "permanent allegiance." Argued instead that 8 U.S.C. §§ 1439 and 1440 stated that those who met service requirements "may be naturalized."

June 15, 2005	*Theagene v. Gonzales*, 411 F.3d 1107 (9th Cir. 2005)	The U.S. Court of Appeals for the Ninth Circuit rejected petition for review of final order of removal by BIA. - Held that the court had jurisdiction to review petitioner's claim of nationality. - The dissent argued that Theagene could have avoided removal order despite aggravated felony by establishing that he was not an alien. However, his military service was not sufficient to prove nationality.
July 12, 2005	*Lopez v. Henley*, 416 F.3d 455 (5th Cir. 2005)	The U.S. Court of Appeals for the Fifth Circuit concluded that Appellant Lopez was properly deported (affirming the decision by the U.S. District Court for the Western District of Texas) because his criminal conviction for drug possession rendered him unable to demonstrate requisite good moral character. - The court of appeals noted the ambiguity of the Immigration and Nationality Act regarding honorable service in the U.S. Armed Forces during wartime (under § 329) (referencing *Nolan*).
July 6, 2006	*O'Sullivan v. U.S. Customs and Immigration Serv.*, 453 F.3d 809 (7th Cir. 2006)	The U.S. Court of Appeals for the Seventh Circuit denied O'Sullivan's petition for naturalization on grounds of distributing cocaine, an aggravated felony under relevant immigration statutes. The court dismissed O'Sullivan's claim that he did not need to show good moral character in order to naturalize.

July 7, 2011	*Lawson v. U.S. Citizenship and Immigration Serv.*, 795 F. Supp. 2d 283 (S.D.N.Y. 2011)	U.S. District Court for the Southern District of New York granted Lawson's petition for review and ordered USCIS to grant alien's petition for naturalization.
December 31, 2013	*Gordon v. Johnson*, 991 F. Supp. 2d 258 (D. Mass. 2013)	U.S. District Court for the District of Massachusetts allowed plaintiff's writ of habeas corpus for "consideration of the possibility of his release" from mandatory detention. The court denied plaintiff's motion to dismiss.