

Statement of

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On

**“Honoring Veterans and Military Families: An Examination of Immigration and
Citizenship Policies for US Military Service Member, Veterans, and their Families”**

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Subcommittee on Immigration, Citizenship, and Border Safety

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Chairman Padilla, Ranking Member Cornyn, and distinguished members of the subcommittee, my name is Margaret Stock. I am honored to be here in my capacity as an expert in the field of immigration, citizenship, and national security law and to discuss the impact on military members, veterans, and their families of recent policy changes at the Department of Defense (DOD) and the Department of Homeland Security (DHS).

My Background

I am the managing attorney of the law firm Cascadia Cross Border Law Group in Anchorage, Alaska. I am also a retired Lieutenant Colonel in the Military Police Corps, U.S. Army Reserve. I previously taught at the United States Military Academy, West Point, New York, for nine years (five years on a full-time basis, four years on a part-time basis), and I have also taught on a part-time basis in the Political Science Department at the University of Alaska Anchorage. My professional affiliations include membership in the Alaska Bar Association, American Bar Association (where I served for several years as a member of the Commission on Immigration), the American Immigration Lawyers Association, the Federal Bar Association, and other civic and professional organizations. As an attorney and a graduate of the Harvard Law School, I have practiced in the area of immigration and citizenship law for more than twenty-five years. I have represented hundreds of businesses, immigrants, and citizens seeking to navigate the difficult maze of the U.S. immigration system, and I volunteer regularly to handle “pro bono” cases with the American Immigration Lawyers Association Military Assistance Program (AILA MAP). In 2009, I concluded work as a member of the Council on Foreign Relations Independent Task Force on U.S. Immigration Policy, which was headed by Jeb Bush and Thomas F. “Mac” McLarty III. Prior to my transfer to the Retired Reserve in June 2010, I worked for several years on immigration and citizenship issues relating to military service while on temporary detail to the U.S. Army Accessions Command, the Assistant Secretary of the Army for Manpower and Reserve Affairs, and the United States Special Operations Command. I am also a recipient of a 2013 Fellowship from the John D. and Catherine T. MacArthur Foundation for my work relating to immigration law and national security. Finally, I am the author of the book “Immigration Law and the Military,” now in its second edition. The opinions I am expressing today are my own.

Action is Needed to Protect Military Members, Veterans, and their Families

I am honored to be appearing before you today to discuss the immigration law problems faced by members of the U.S. military, veterans, and their families. This is not the first time that I have testified before a Congressional committee on these issues. I would have hoped that all these years later, at this hearing, I would have good news to report, but I do not. While considerable progress was made in the eight years following a 2008 House hearing on these issues, that progress has almost all been reversed since 2016. In the last five years, the Department of Defense has created new policies that prevent immigrants from joining the military, stalled their naturalization as United States citizens, and inhibited them from continuing to serve in the military. The Department of Homeland Security has similarly made it harder for immigrants to obtain the Lawful Permanent Resident (LPR) status that would allow them to serve, and harder for those currently serving and veterans to naturalize, and has been denying the naturalization applications of military members and veterans more often than it denies the applications of their civilian counterparts.

One bright spot is that a recent Department of Homeland Security, Office of the Principal Legal Advisor (OPLA) memorandum reverses several years of policies whereby Immigration and Customs Enforcement (ICE) attorneys were regularly refusing immigration benefits to family members of military members and veterans. The new “Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities”¹ directs ICE attorneys to consider “service in the U.S. military” as a factor when these attorneys exercise prosecutorial discretion in an immigration removal proceeding. That policy

¹ Available at https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf (“A favorable exercise of prosecutorial discretion (i.e., concurrence with or non-opposition to a motion for dismissal of proceedings without prejudice) generally will be appropriate if a noncitizen or immediate relative is a current or former member (honorably discharged) of the Armed Forces, including the U.S. Army, Air Force, Navy, Marine Corps, Coast Guard, and Space Force, or a member of a reserve component of the Armed Forces or National Guard, particularly if the individual may qualify for U.S. citizenship under sections 328 or 329 of the INA.”).

was only released on May 21, 2021, but early indications are that agency attorneys are following it.

Finally, it is more likely today that DHS will try to deport a military veteran than it was when I first testified on these issues more than twelve years ago. The current policies do not make our country safer; in fact, they harm military recruiting, hurt military readiness, and prevent the United States Armed Forces from utilizing the talents of the immigrants who are willing to serve. The new policies hide behind false “national security” rationales to conceal anti-immigrant motives.

Congress Must Act to Reverse Anti-Immigrant, Anti-Military Policies

To reverse immigration-related policies that harm our military members, veterans, and their family members, I recommend that Congress do the following:

1. Direct USCIS to restore the Naturalization at Basic Training Initiative, so that service members can apply for naturalization as soon as they are eligible, and their applications can be processed efficiently and cost-effectively.
2. Repeal the sunset clause (five years from the date of enactment, or October 9, 2013) on the Military Personnel Citizenship Processing Act, so that USCIS will restore the “expedited” processing of military naturalization cases required by Congress before that law expired.
3. Pass the Military Enlistment Opportunity Act, which allows recipients of Deferred Action for Childhood Arrivals (DACA) status and other legal immigrants to enlist.
4. Codify the military Parole in Place and Deferred Action programs, which prevent the deportation and separation of military families.
5. Enact legislation to prevent the deportation or removal of honorably discharged

military veterans.

As we all know, the United States is a global power and members of its military are deployed all around the world. And while our Armed Forces are engaged in many countries, with enemies who speak many languages, travel internationally, and try to harm Americans across the globe, DOD and DHS policies towards immigrants and immigrant family members detract from the military's ability to fight our enemies. Military members find that they must also fight their own government, which creates bureaucratic obstacles that impede military readiness by preventing military members and veterans from naturalizing. These bureaucratic obstacles also prevent military family members from accessing immigration benefits, prevent military family members from entering the United States altogether, and even result in the deportation of military personnel, veterans, and their family members.

Longstanding Military Naturalization Statutes Allow Rapid Naturalization

Until recently, a significant advantage of military service has been that noncitizens serving in the military traditionally have been permitted to obtain U.S. citizenship in an expedited fashion; statutes providing for such expedited citizenship date back to the Civil War era.² Expedited citizenship benefits not only noncitizens; it also benefits the U.S. military by reducing or eliminating legal problems relating to military service by noncitizens³ and allowing them to be used fully in more jobs and duty assignments.⁴

² Act of July 17, 1862, (sec. 2166, R.S., 1878) (making special naturalization benefits available to those with service in the "armies" of the United States).

³ Such legal problems can include claims by foreign countries that their citizens who serve in the U.S. military are under the jurisdiction of the foreign government for various purposes. These problems are often lessened when noncitizen service members naturalize as United States citizens, because the naturalization can sometimes work as a renunciation of the foreign citizenship. Once a noncitizen naturalizes through military service, the United States may also require that noncitizen to renounce his or her foreign citizenship as a condition of service; the United States cannot require such a renunciation when the person does not yet have U.S. citizenship.

⁴ A noncitizen serving in the U.S. military cannot normally obtain a security clearance or serve in any job that requires one, including the Army job of military linguist. *See* Executive Order No. 12968 (Aug. 2, 1995), 60 Fed.

Although most lawful permanent residents (LPRs) are required to wait three to five years before applying for U.S. citizenship, two special military-related immigration statutes provide that qualified members of the U.S. Armed Forces are permitted to apply for U.S. citizenship after one year of service (when no presidential order regarding ongoing hostilities is in effect)⁵ or immediately (when a presidential executive order regarding wartime hostilities is in effect).⁶ In return for expedited citizenship, however, military members can lose their citizenship if they subsequently fail to serve honorably for at least five years.

The two military naturalization statutes—Immigration and Nationality Act (INA) § 328, the peacetime military naturalization statute, and INA § 329, the wartime military naturalization statute—contain significant differences from naturalization statutes that apply to civilians. These differences have in the past made them attractive options for many noncitizens and have enhanced military recruiting. President George W. Bush issued a Congressionally-ratified executive order on military naturalization on July 3, 2002, retroactive to September 11, 2001, and that order remains in effect as of this date.⁷

Noncitizens filing for military naturalization must meet many of the requirements applicable to all other applicants for naturalization. They must be attached to the principles of the Constitution and well-disposed to the good order and happiness of the United States;⁸ they must be willing to bear arms on behalf of the United States;⁹ they must demonstrate knowledge of the

Reg. 40243–54 (Aug. 7, 1995) (“Where there are compelling reasons in furtherance of an agency mission, immigrant alien and foreign national employees who possess a special expertise may, in the discretion of the agency, be granted limited access to classified information only for specific programs, projects, contracts, licenses, certificates, or grants for which there is a need for access. Such individuals shall not be eligible for access to any greater level of classified information than the United States Government has determined may be releasable to the country of which the subject is currently a citizen”).

⁵ See Immigration and Nationality Act (INA) § 328, 8 USC §1439.

⁶ See INA § 329, 8 USC § 1440.

⁷ Executive Order No. 13269 (July 3, 2002), 67 Fed. Reg. 45287 (July 8, 2002).

⁸ INA § 316(a)(3); 8 USC § 1427(a)(3); 8 Code of Federal Regulations (CFR) §316.11.

⁹ INA § 337(a)(5)(A)–(C); 8 USC § 1448(a)(5)(A)–(C).

English language and U.S. history and government;¹⁰ and they are required to show good moral character.¹¹ Other requirements are either waived or modified.

As mentioned above, a significant difference between military naturalizations and civilian naturalizations is that persons naturalized through military service may face possible revocation of their U.S. citizenship based on post-naturalization misconduct or failure to serve honorably for a period or periods aggregating five years.¹²

Thanks to changes made by the National Defense Authorization Act of 2004,¹³ both military naturalization statutes also allow current service members and veterans to apply for naturalization without paying application or biometrics fees, effective October 1, 2004.¹⁴ The same law allows the overseas naturalization of currently serving military personnel, although DHS takes the position that this law only applies to active duty military members, and not to Reservists or National Guard members or veterans.¹⁵ Both statutes further provide that military naturalization applicants may be naturalized notwithstanding the pendency of removal proceedings.¹⁶ Finally, both statutes require an applicant to show good moral character,¹⁷ but the

¹⁰ INA §312(a); 8 USC §1423(a).

¹¹ INA §§316(a)(3), 319(a)(1); 8 USC §§1427(a)(3), 1430(a)(1); 8 CFR §§316.2(a)(7), 316.10, and 329.2(d).

¹² INA §§328(f), 329(c); 8 USC §§1439(f), 1440(c).

¹³ National Defense Authorization Act for Fiscal Year 2004 (NDAA 2004), Pub. L. No. 108-136, 117 Stat. 1392 (2003).

¹⁴ NDAA 2004, sec. 1701(b).

¹⁵ NDAA 2004, sec. 1701(d); *see also* American Forces Press Service, “Troops Earn U.S. Citizenship in Iraq” (Mar. 4, 2009), available at www.defenselink.mil/news/newsarticle.aspx?id=53336 (describing how more than 250 American military members were sworn in as U.S. citizens in Baghdad, Iraq, during the 13th U.S. naturalization ceremony conducted overseas since U.S. Citizenship and Immigration Services (USCIS) began overseas military naturalization ceremonies). USCIS takes the position that overseas naturalization is not available unless the person is a currently serving active duty member of the U.S. military. Veterans and Reserve or National Guard members must therefore naturalize inside the United States, even if they claim eligibility for naturalization under INA §328 or §329.

¹⁶ INA § 328(a)(2), 8 USC § 1439(a)(2) (“notwithstanding section 318 insofar as it relates to deportability, such applicant may be naturalized immediately if the applicant be then actually in the Armed Forces of the United States, and if prior to the filing of the application, the applicant shall have appeared before and been examined by a representative of the Service”); INA § 329(b)(1), 8 USC § 1440(b)(1) (“he may be naturalized regardless of age, and notwithstanding the provisions of section 318 as they relate to deportability and the provisions of section 331”).

¹⁷ INA § 328 has previously been interpreted by USCIS to allow a presumption of good moral character if the person has served honorably as documented in military records by an honorable discharge; this presumption, however, can

period of good moral character has been reduced to one year for most applicants.¹⁸

Another notable difference between INA § 328 and 329 is that INA § 328 does not require any specific type of service, while INA § 329 requires service in active-duty status or in the Selected Reserve of the Ready Reserve.

On October 13, 2017, the DOD made two key policy changes to the naturalization process for military service members. First, DOD ordered that noncitizens enlisting in the military must now complete new DOD background screening requirements, and receive a favorable background screening (Military Service Suitability Determination (MSSD) and National Security Determination (NSD)), before attending basic training. Before October 13, 2017, eligible noncitizens who enlisted in the military were allowed to start their basic training as long as their background screening had been initiated. This new DOD screening process can take years; some Army enlistees who enlisted for active duty in 2016 are still waiting, five years later, for their NSD. DOD has no deadline for completing these background screenings.

USCIS and other DHS agencies continue to create policies that only complicate the military naturalization process. The most recent example of this phenomenon is the May 28th, 2021 USCIS Policy Memo, which clarifies that all DOD background checks –which can take years to complete –must be completed prior to USCIS interviewing an applicant. USCIS has also established a track record of not allowing servicemembers to naturalize under Section 328 of the

be overcome by contrary evidence. *See Yuen Jung v. Barber*, 184 F.2d 491 (9th Cir. 1950) (rejecting argument that honorable discharge is conclusive evidence of good moral character that prevents Immigration authorities from inquiring further).

¹⁸ The one-year good moral character requirement under INA § 329 is not statutory, but rests on a regulation and an agency interpretation that has been upheld by the courts. See 8 CFR § 329.2(e) and *Lopez v. Henley*, 416 F.3d 455, 457–58 (5th Cir. 2005) (upholding agency requirement that a person seeking citizenship through military service must establish good moral character); *Nolan v. Holmes*, 334 F.3d 189 (2d Cir. 2003) (although nothing in INA §329 requires a showing of good moral character, *Chevron* deference will be applied to uphold regulation requiring one year of good moral character). *Accord, Castiglia v. INS*, 108 F.3d 1101, 1102 (9th Cir. 1997); *Cacho v. Ashcroft*, 403 F. Supp. 2d 991, 994 (D. Hawaii 2004).

Immigration and Nationality Act, which applies to servicemembers who have served honorably for at least one year during peacetime, unless they also qualify under INA § 329.

The effect of these policies has been that noncitizens who join the military may be stuck in an extended background check process that prevents them from attending basic training, deploying overseas, and applying for citizenship for extremely lengthy periods of time.

Because of these changes, and contrary to the purposes of the military naturalization statutes, it is often now faster for LPRs seeking citizenship to remain civilians when applying for naturalization. Enlistment in the Armed Forces may now delay an application for years, rather than speeding up the naturalization process. In sum, currently it may be advisable for a potential naturalization applicant who is nearing five years of permanent resident status (three if married to a U.S. citizen) to apply for citizenship as a civilian before enlisting in the military, because it may take less time to finish the civilian N-400 process than the supposedly “expedited” military naturalization process.

In addition to USCIS’ track record concerning qualifying service for naturalization, the service has also established a precedent of holding military applicants to an unreasonably higher standard than civilians in their naturalizations. We have seen military naturalization cases denied because the military members has old, paid traffic citations; this is rarely a basis for denying a civilian naturalization application. We have also seen denials of naturalization where a Reservist accepted work outside of the military, such as driving for companies like Uber and Lyft. These denials can be appealed; however, the process is expensive and time-consuming, and further delays naturalization.

Further, there are few reliable resources readily available to assist military members and veterans with naturalization. The military has no established system for tracking individuals and

their cases, and the responsibility is left largely up to the military members themselves. The Veterans Administration does not assist veterans with applying. Many who want to apply for citizenship are slipping through the cracks because they are simply ill-informed about the process, and unable to obtain accurate information about the process.

Military Members Can No Longer Easily File for Naturalization

The key to naturalization through military service is that the military service must have been “honorable,” as determined by the branch of the U.S. Armed Forces in which the person served or is serving. If the person is still serving at the time that the naturalization application is filed, then the character of the person’s service is determined by the statements on the Form N-426, which must be filed with the N-400 application package. A representative of the military branch is supposed to complete Form N-426 and certify the person’s service as honorable or otherwise.¹⁹ Recently, however, the Department of Defense has severely restricted the rules whereby this form can be certified. DOD now requires an officer in the grade of O-6 (colonel or Navy captain) to certify the form. Enlisted soldiers attempting to apply for naturalization report that they have grave difficulty finding an officer of this grade who is willing and able to sign their form. DOD has also elected to disregard the statutory mandate that military members may seek naturalization immediately upon entering active duty or Selected Reserve service; by internal executive memo, DOD has mandated that military members may only get the form signed once they have completed at least six months of active duty, one year of Reserve service, or one day in a combat zone. This DOD directive almost entirely eliminates the distinction between the two military naturalization statutes, and is unlawful and unconstitutional; it has been

¹⁹ The certification was previously made by any military official who has access to the individual’s military personnel file; military personnel files are now maintained online, so military personnel officials need not have a “paper file” to certify the form.

enjoined by a Federal Court, but confusion persists among military members about their eligibility to file because DOD has made little effort to publicize the Court decision.

A May 28th, 2021 USCIS policy memo also states that Certifications of Military or Naval Service, Form N-426, will expire if it is not submitted within six months of certification. The N-426 certification process is now lengthy and frustrating for those familiar with the process, and even more so for those who are neophytes. The forms must be preliminarily completed by the applicant with personal identity information, enlistment details, and dates of service. Then the form must be sent to a “certifying official,” who must complete the remainder of the form. Many times, the certifying officer does not complete the form appropriately, and the process must begin again.

Military Members Face Obstacles When Trying to Naturalize

In the past, one key difference between military and civilian naturalization applications was that military naturalization applications could typically be filed much earlier than civilian naturalization applications. By law, a military member who is applying for naturalization under INA § 329 (naturalization through U.S. military service during a designated period of hostilities) need not be an LPR and may file the Application for Naturalization (Form N-400)²⁰ after having completed one day of honorable service on active duty or in the Selected Reserve of the Ready Reserve.

In the past, INA § 329 naturalization applications could be submitted for enlisted persons during basic training, but the previous Administration terminated the popular Naturalization at Basic Training Initiative in January 2018.

Naturalization at Basic Training was the most cost-effective and efficient method for

²⁰ The Form N-400, Application for Naturalization, is available at www.uscis.gov/files/form/n-400.pdf.

naturalizing military members, because the application could be processed by onsite USCIS offices, and applicants were all but guaranteed a decision before their first deployment. Although the practice of naturalizing military servicemembers dates back to at least the Civil War, the policy of naturalizing service members at basic training dates back to World War I. This policy benefits the military by allowing the newly naturalized servicemembers to be deployed worldwide, to be eligible for security clearances, and to fill any military job for which they are qualified. By law, members of the military who apply for naturalization under INA § 328 (naturalization with one year or more of U.S. military service) may file the N-400 as soon as they have LPR status and have completed one year of honorable military service of any type—but USCIS refuses to accept the application unless the application is accompanied by a Form N-426, which they cannot obtain unless they have served on active duty or in the Selected Reserve. USCIS has not developed any alternative form or method to allow applications under INA § 328, and as result, these applications are quite rare today.

Members of the military must complete the biometrics requirements that apply to any naturalization applicant. By law, military personnel also used to be able to elect to sign a form authorizing the release of their enlistment fingerprints to the Department of Homeland Security (DHS), so they do not have to report to a USCIS Application Support Center (ASC) for biometrics. Unfortunately, in recent years, USCIS has refused to accept this form and demands that military members report to an ASC for fingerprinting. USCIS no longer sends mobile fingerprinting teams to military basic training sites, however, and many military members cannot easily get their fingerprints taken at USCIS ASCs because such ASCs are often located many hours' drive from the nearest military base. Service members stationed overseas may have their fingerprints taken manually at U.S. military installations or U.S. embassies and consulates using

the FD-258 fingerprint card but are often told to report to an ASC in the United States before their application can be processed.

When Military Members Do File for Naturalization, USCIS Stalls Them

Under the Military Personnel Citizenship Processing Act, enacted on October 9, 2008, USCIS was required to process military-related citizenship applications within six months of filing, or provide the service member with an explanation of why the case had not been processed.²¹ However, the provision of the law setting the deadline contained a five-year sunset clause and is no longer in effect. While the law was in effect, USCIS processed military-related naturalization applications very quickly; absent some unusual circumstances, cases inside the United States were typically processed in one or two months after filing.²² Today, however, USCIS takes the position that there is no deadline for processing military cases, and they are often taking years to process.

Sixty-Five Percent Drop in Military Naturalizations After DOD Memo

On May 3, 2018, Tara Copp, the Pentagon Bureau Chief for the Military Times, broke the story that there had been a dramatic drop in the numbers of service members applying for naturalization and being naturalized after DOD issued a new policy memo that took aim at

²¹ INA § 328(g) stated:

“Not later than 6 months after receiving an application for naturalization filed by a current member of the Armed Forces under subsection (a), section 329(a), or section 329A, by the spouse of such member under section 319(b), or by a surviving spouse or child under section 319(d), United States Citizenship and Immigration Services shall—

- (1) process and adjudicate the application, including completing all required background checks to the satisfaction of the Secretary of Homeland Security; or
- (2) provide the applicant with—
 - (A) an explanation for its inability to meet the processing and adjudication deadline under this subsection; and
 - (B) an estimate of the date by which the application will be processed and adjudicated.”

For more information, see USCIS Letter, W. Janssen, “Notification of Processing Delay - Form N-400” (May 16, 2011).

²² See, e.g., USCIS Press Release, “USCIS Naturalizes First Soldier in Military Pilot Recruiting Program,” (July 27, 2009), available at www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=cc095341bf982210VgnVCM100000082ca60aRCR_D&vgnnextcha=nel=a2dd6d26d17df110VgnVCM1000004718190aRCRD (reporting a processing time of one month).

expedited military naturalization.²³ As reported in the story,

The number of service members applying for and earning U.S. citizenship through military service has dropped 65 percent since Defense Secretary Jim Mattis directed additional background checks for non-citizen troops, Military Times has found. In October 2017, Mattis directed policy changes . . . that added additional reviews of non-citizen service members and extended time in service before they could receive necessary paperwork to pursue naturalization. In the first set of data available since the new policy, the number of applicants dropped from 3,132 in the last quarter of fiscal year 2017 to 1,069 in the first quarter of fiscal year 2018, the most recent data available. The number of service members approved to become naturalized U.S. citizens dropped from 2,123 in the last quarter of fiscal year 2017, which ended Sept. 30, to 755 in the first quarter of fiscal year 2018, which ended Dec. 31, according to the U.S. Citizenship and Immigration Services, or USCIS, agency, which tracks the data.

Later reports showed similar declines, including a National Immigration Forum report, titled “Naturalizations in the Military: A Recent Decline.” The latter report showed a fifty-seven percent decline in the first half of Fiscal Year 2018 compared to the same period in Fiscal Year 2017. The report further showed that 18.52% of military naturalization applications were denied.²⁴ A follow-on story by reporter Tara Copp explained that immigrants serving in the military were more likely to be denied citizenship than civilians:

According to the most recent USCIS data available, the agency denied 16.6% of military applications for citizenship, compared to an 11.2% civilian denial rate in the first quarter of fiscal year 2019, a period that covers October to December 2018.

The fiscal year 2019 data is the eighth quarterly report of military naturalization rates since Trump took office. In six of the last eight reports, civilians had a higher rate of approval for citizenship than military applicants did, reversing the previous trend.²⁵

²³ Tara Copp, “Naturalizations Drop 65 Percent For Service Members Seeking Citizenship After Mattis Memo,” Military Times, May 3, 2018.

²⁴ “Naturalizations in the Military: A Recent Decline,” National Immigration Forum, September 17, 2018.

²⁵ Tara Copp, “Immigrant Service Members Are Now Denied US Citizenship At a Higher Rate Than Civilians,” McClatchy News, May 15, 2019.

The Government Ignores Agency Policy and Seeks Regularly to Deport Veterans

Because military naturalization offers a unique avenue of relief to potentially removable foreign nationals, Immigration and Customs Enforcement (ICE) has in the past sometimes exercised its discretion favorably when determining whether to place a military member or veteran into removal proceedings or to reinstate a removal order against a noncitizen with prior military service. In a 2004 internal memorandum, an ICE official stated that “ICE should not initiate removal proceedings against aliens who are eligible for naturalization under sections 328 or 329 of the INA, notwithstanding an order of removal.”²⁶ The same memorandum also explained that an honorable discharge “by no means serves to bar an alien from being placed in removal proceedings,” but that several factors should be taken into account when deciding whether to do so.²⁷ In a June 17, 2011, memorandum to all ICE officials, then ICE Director John Morton also reiterated that ICE employees should exercise prosecutorial discretion using all relevant factors, one of which is “whether the person, or the person’s immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat.”²⁸ Mr. Morton further stated that being a veteran or member of the U.S. Armed Forces is a positive factor that “should prompt particular care and consideration.”²⁹ These past internal directives are not consistently followed by ICE personnel: A recent Government Accountability Office (GAO) report, “Immigration Enforcement: Actions Needed to Better Handle, Identify, and Track Cases Involving Veterans,” June 2019, found that:

U.S. Immigration and Customs Enforcement (ICE) has developed policies for handling cases of noncitizen veterans who may be subject to removal from the United States, but does not consistently adhere to those policies, and does not consistently identify and track

²⁶ ICE Memorandum, M. Forman, “Issuance of Notices to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service” (June 21, 2004).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

such veterans. When ICE agents and officers learn they have encountered a potentially removable veteran, ICE policies require them to take additional steps to proceed with the case. GAO found that ICE did not consistently follow its policies involving veterans who were placed in removal proceedings from fiscal years 2013 through 2018. Consistent implementation of its policies would help ICE better ensure that veterans receive appropriate levels of review before they are placed in removal proceedings. Additionally, ICE has not developed a policy to identify and document all military veterans it encounters during interviews, and in cases when agents and officers do learn they have encountered a veteran, ICE does not maintain complete electronic data. Therefore, ICE does not have reasonable assurance that it is consistently implementing its policies for handling veterans' cases.

For veterans of the U.S. military, ICE is not the only immigration agency that fails to consider their service. USCIS' chronic misinterpretation of the law also excludes veterans from the benefits they have a right to. Specifically, USCIS incorrectly interprets 8 USC § 1143a, which appears to allow veterans to naturalize overseas, but which USCIS has chosen to interpret narrowly. Additionally, a May 28, 2021 policy memorandum from USCIS makes it more difficult for veterans to apply for naturalization, and more difficult for them to return to the U.S. for the required interviews, fingerprinting, and oath ceremonies.

Basic Training Naturalization Ended in January 2018

In mid-2009, USCIS started a highly successful program whereby noncitizen military recruits were able to file their naturalization applications when they reported to basic training, and those applications were adjudicated so that the soldiers graduated from basic training and became U.S. citizens at the same time.³⁰ Although USCIS is still advertising the existence of this program during films shown in USCIS offices nationwide,³¹ the previous Administration

³⁰ USCIS News Release, "52 Soldiers Become U.S. Citizens at Army Basic Training," May 6, 2010, *available at*: <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=ead760657dd68210VgnVCM100000082ca60aRCRD&vgnnextchannel=a2dd6d26d17df110VgnVCM1000004718190aRCRD>. See also Congressional Letter Exchange Between Z. Lofgren, M. Thornberry, *et al.* (July 9, 2010) and DHS Secretary J. Napolitano (Aug. 30, 2010).

³¹ The author was in the USCIS waiting room at 26 Federal Plaza in New York City on October 24, 2019 with several Army soldiers who were waiting for naturalization interviews. The television on the wall was playing a USCIS film that showed clips of Army soldiers naturalizing at basic training and stated that military naturalizations would be processed during such training. The soldiers in the room were all aghast because they were aware that they were being interviewed in New York City that day because basic training naturalization had been eliminated. Some

terminated this program in early 2018. The demise of this program has created havoc. As a result of USCIS eliminating the Naturalization at Basic Training Initiative, currently serving U.S. military members now encounter many difficulties filing their military naturalization applications. They report being told that they are not allowed to file for citizenship until they are discharged; being told that their application cannot be filed until they report to their first permanent duty station; and being told that their military unit will process the application locally when in fact it must be mailed to a USCIS Service Center in Chicago or filed electronically on the USCIS website.

The most significant issue is to obtain certification of the N-426 certificate of honorable service. Military members now experience significant difficulties when trying to get this form certified. Under new DOD policies, only an officer in the rank of O-6 can certify that a person is serving honorably for purposes of naturalization, and this requirement has caused significant delays and obstacles for servicemembers. To give just one example, in the State of Alaska, in one Army Reserve unit, there is no officer in the rank of O-6 in the entire state, so that an individual seeking to get the form signed must reach out through his or her chain of command to an officer in a different state many thousands of miles away. A form that previously could be signed and certified in a matter of hours cannot be obtained now without weeks or even months of bureaucratic wrangling.

In the National Defense Authorization Act for Fiscal Year 2018, Congress enacted a law requiring DOD to provide information on naturalization through military service to servicemembers. However, DOD has to date apparently done nothing public to comply with this law.

It is worth recounting the story of Sergeant Kendell Frederick of Maryland to recall why

of the soldiers present had waited several years for their N-400s to be processed.

restoring basic training naturalization is so important. Sergeant Frederick had immigrated to the United States from Trinidad in 1999 when he was 15 years old, and joined the Army after high school. He tried repeatedly to apply for naturalization but did not get naturalized at basic training because there was no such program at the time he enlisted. He deployed to Iraq as a noncitizen and continued to try to naturalize. Tragically, Sergeant Frederick was killed in Iraq in October 2005 when his vehicle was struck by a roadside bomb. He was only in the convoy at the time because he had to go to another base in Iraq to have his fingerprints taken for the USCIS naturalization background check required of all naturalization applicants. Sergeant Frederick was literally killed trying to get his citizenship. If the Basic Training Naturalization Initiative had existed in 2001, Sergeant Frederick would no doubt be alive today.³²

Untrained Adjudicators Wrongly Deny Military Applications

Previously, when the Naturalization at Basic Training Initiative was operating, USCIS had specially trained teams of adjudicators who were responsible for military naturalization applications. Now that the program has been eliminated, random, untrained USCIS officers, many of whom are unfamiliar with the special military statutes, are responsible for adjudicating military N-400 applications. USCIS has failed to supervise these officers to ensure that they follow the USCIS Policy Manual, DHS regulations, and the law. For example, in Houston, Texas on Tuesday, October 22, 2019, Immigration Officer Darren Howard refused to approve a naturalization application for an Army Reservist who resides in Canada because Officer Howard believes that a person must reside in the United States in order to naturalize.³³ USCIS refuses to process the naturalization applications of Reservists who live outside the United States, although

³² In the aftermath of his death, Congress enacted the Kendell Frederick Citizenship Assistance Act, which was intended to streamline the process for military naturalization. Unfortunately, USCIS has not been complying with the Act's directive to expedite the processing on military naturalization applications.

³³ Officer Howard is correct that *civilian* naturalization applicants must reside in the United States, but this requirement does not apply to *military* naturalization applicants.

the law allows them to do so; accordingly, this Reservist had to fly from Canada to Texas to appear for his naturalization interview. The Reservist had to obtain a special visa from the U.S. Department of State in order to enter the United States to appear at his naturalization interview. Officer Howard incorrectly advised this Soldier that military members are required to reside in the United States in order to naturalize. Officer Howard had unfortunately not been trained to read his own agency policy manual, which explains clearly that the Immigration & Nationality Act does not impose any such requirement on military members,³⁴ and in 8 USC § 1443a,³⁵ Congress specifically stated that military members can naturalize overseas (although DHS takes the position that only active duty service members, not Reservists, are allowed to do so).

Demise of MAVNI Program, But Hundreds Remain in Limbo

DOD has also made it much more difficult for noncitizens to join the military in the first place. While the Bush Administration had previously authorized lawful immigrants who did not yet have green cards to enlist through the Military Accessions Vital to the National Interest (MAVNI) program, and the Obama Administration had allowed some DACA (Deferred Action for Childhood Arrivals) recipients to enlist through MAVNI, the previous Administration ended the MAVNI program. Today, only United States nationals, green card holders, and some Pacific Islanders are permitted to enlist. This change has hurt the military's ability to attract talented immigrants and reduced the percentage of immigrants serving. While immigrants make up about

³⁴ See USCIS Policy Manual, Chapter 3, Section A, *available at* <https://www.uscis.gov/policy-manual/volume-12-part-i-chapter-3>: "An applicant who files on the basis of military service during hostilities is exempt from the general naturalization requirements of continuous residence and physical presence."

³⁵ See 8 USC § 1443a. Naturalization proceedings overseas for members of the Armed Forces and their spouses and children:

Notwithstanding any other provision of law, the Secretary of Homeland Security, the Secretary of State, and the Secretary of Defense shall ensure that any applications, interviews, filings, oaths, ceremonies, or other proceedings under title III of the Immigration and Nationality Act (8 U.S.C. 1401 et seq.) relating to naturalization of members of the Armed Forces, and persons made eligible for naturalization by section 319(e) or 322(d) of such Act [8 U.S.C. 1430(e), 1433(d)], are available through United States embassies, consulates, and as practicable, United States military installations overseas.

13.5% of the United States population, they are less than four percent of the military at this time. Military recruiters report to me that they are meeting recruiting quotas by enlisting less prepared native-born Americans. In some cases, the Armed Forces simply cannot find enough qualified candidates among the native-born population, so the billets go unfilled.³⁶

The MAVNI program ended three years ago, and there have been no MAVNI enlistments since October 2016. DOD has also made efforts to unlawfully discharge MAVNI soldiers, including many who have been waiting for more than five years to clear new DOD “background checks.” As of today, hundreds of MAVNI soldiers remained in immigration limbo, with many falling out of status during the wait and facing the risk of deportation, including to countries that would persecute them for having joined the U.S. military.

Military Parole in Place and Deferred Action Programs Threatened

The previous Administration internally floated proposals to end the popular military “Parole in Place” and “Deferred Action” programs that began under the Bush Administration and were formalized under the Obama Administration. These longstanding programs have prevented military members, veterans, and their family members from being deported. They have also allowed family members to adjust status in the United States, rather than enduring lengthy waits for immigrant visas overseas. The previous Administration apparently intended to end or curtail these programs in July 2019, but a public outcry has delayed implementation of the plan to end them. Congress has indicated its support for these programs, but codification of these programs would ensure that a future executive branch cannot dismantle them.

DHS Policies Harm Family Members of Military Personnel

Family members of military servicemembers and veterans are also eligible for some

³⁶ Jackson Barnett & Ann Klein, “As Economy Roars, Army Falls Thousands Short of Recruiting Goals,” New York Times, September 21, 2018.

immigration benefits, however the current processes often preclude their successful approval. One such example is in the Parole in Place (PIP) program, designed to provide temporary status for the immediate non-citizen family members of U.S. citizen servicemembers. Currently, USCIS does generally well in processing PIP applications, however USCIS Field Offices tend not to grant parole if the family member is in removal proceedings or has a removal order, although those applicants arguably have the greatest need for parole. Additionally, the agency responsible for the program seems to be in question; USCIS believes that it is ICE's responsibility to grant PIP to persons who are in removal proceedings. ICE states that the USCIS military PIP memorandum only applies to USCIS, not ICE. Further exacerbating these problems is the fact that there is no formal process for military members, family members, or veterans to request service-related Parole in Place from ICE.

Similar issues occur with Deferred Action programs for military members and their families. There is again no formal process and USCIS often refuses to adjudicate requests, or delays them beyond reason, and family members of Reservists are excluded from the benefit.

Special Immigrant Visa Delays Break Promises Made to Allies

It is important to mention yet another broken promise made to noncitizens who have put their lives on the line for America. After 9/11, Congress created three different programs that applied to Iraqi and Afghan nationals who worked with the U.S. Armed Forces or the U.S. Department of State (DOS) in Iraq or Afghanistan. These programs have allowed certain Iraqis and Afghans to obtain special immigrant visas (SIVs) that allow them to enter the United States as LPRs or adjust status to LPR while legally present in the United States. These three different programs have been extended and changed repeatedly by Congress. But many of the interpreters and other Iraqi or Afghan workers who have tried to get these Special Immigrant visas have

struggled to get them, and many of them have family members who remain in danger in Iraq or Afghanistan while they await “background checks” that drag out for years. The latest “travel ban” has also affected them. The number of individuals granted Special Immigrant Visas to come to the United States in recent years has dropped dramatically. Rebecca Giblan, a reporter for Public Radio International (PRI), publicized the dilemma in a September 19, 2019 article:³⁷

[Muhammad] Kamran, a former interpreter for the United States Army, fled with his family from his native Afghanistan due to threats from both the Taliban and villagers. The threats were related to his work with the US. The family now lives illegally and in constant fear of being discovered and sent back to Afghanistan, where Kamran believes they would face near-certain death. Sometimes he has to sleep in the desert to avoid police raids, bribes and beatings.

Kamran became a translator for the US military when he was 18 because he wanted to do something good for Afghanistan, he said. He spent a decade with American troops, living and working directly alongside them. But now, he is one of the thousands of interpreters who have been left behind and are in danger because of their service to the US.

“Ten years I spent with the US Army,” he said during a phone interview. “I went with them on a lot of patrols, a lot of missions, a lot of fights, and I spent the night and days in the mountains with them, in small holes with them, in the bases, everywhere, in the villages, in cold weather and hot weather. But I was working with them as a brother and they were calling me brother. I was ... an important part of their mission.”

Legislation passed in 2008 was supposed to provide a pathway to safety for translators and interpreters who serve alongside American forces in Iraq and Afghanistan by granting them Special Immigrant Visas (SIVs) to the US after their service. But due to security review slowdowns, President Donald Trump’s travel ban, and the demise of the Iraqi SIV program, hundreds of thousands of translators are left behind in dangerous—and even deadly—situations.

The story went on to report that the U.S. Department of State reported to Congress in 2019 that only 1,649 Afghan SIVs were issued in 2018, which represents a 60% decrease from the 4,120 visas issued the prior year. Government agencies, as is typical, claim that “national

³⁷ See Rebecca Giblan, *The US Promised Thousands of Foreign Military Interpreters Special Immigrant Visas, But Now They Are Trapped and In Danger*, <https://www.pri.org/stories/2019-09-19/us-promised-thousands-foreign-interpreters-special-immigrant-visas-now-they-re>

security” requires them to process the cases very slowly, rather than complying with the statutory nine month deadline. Many recipients of initial visa approvals also report that the new “security reviews” sometimes results in inexplicable reversals of their initial approval, and attempts to appeal go nowhere.

The same individuals who are eligible for SIVs can, as an alternative, try to seek admission through the US Refugee program—but that, too, has been severely reduced.

When the United States Government breaks the promises that it made to these individuals who put their lives on the line for the United States and previously passed rigorous security checks, American foreign policy and the lives of American military members are put at risk. As Representative Steve Stivers (R-Ohio) said, “What kind of message does that send next time that we go somewhere and ask people to help us if they realize that people who helped us last time, we turned our back on them and didn’t help them?”

Asylum Denied To Servicemembers and Veterans

Some service members are also eligible for asylum in the United States. Yet USCIS routinely places “holds” on certain military asylum cases, flagging them for issues that do not generally affect the asylum applications of civilians. There is little effective communication from USCIS in these situations, and military asylum seekers are left without protection in the country they honorably serve. Additionally, USCIS generally applies a “one year rule” to refer military members to Immigration Court for removal proceedings, which has caused many currently serving members of the military to be placed into removal proceedings.

Harm to National Security from Anti-Immigrant Policy Changes

One of the grievances in the Declaration of Independence, against King George, was that he “has endeavoured to prevent the population of these States; for that purpose obstructing the

Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither . . .” The Founders knew that immigrants were a powerful asset to the United States, and particularly to the United States military, which could not have won the American Revolution without the contributions of the immigrant soldiers in the Continental Army.

Today it is no different: America cannot fight its wars without the contributions of immigrants. The recent DOD and DHS policy changes have harmed national security by reducing recruitment of immigrants, preventing those who join the military from reporting to training and otherwise performing their duties, halting their overseas deployments, and requiring them to leave the service early because they cannot be promoted or reenlist. Key commands like Special Operations Command can’t employ them in important jobs because they don’t have citizenship. Their family members cannot get visas or green cards because the military members cannot naturalize. Military members, veterans, and their family members find themselves to be trapped in limbo, with no immigration status, unable to travel, obtain driver’s licenses, or even rent an apartment. Many face deportation, in some cases to countries where they will be tortured or killed. American citizens in the military are also harmed when their family members cannot obtain any immigration status and potentially face deportation. Congress must act, through legislation and oversight, if we truly want to honor the service of the noncitizens who have sworn the oath of enlistment and put their lives on the line for our Nation.