Written Testimony of:

Jennie Pasquarella
Director of Immigrants' Rights and Senior Staff Attorney
ACLU of Southern California

Submitted to the
U.S. House Committee on the Judiciary
Subcommittee on Immigration and Citizenship

For a Hearing on:

The Impact of Current Immigration Policies on Service Members and Veterans, and their Families

October 29, 2019

The American Civil Liberties Union ("ACLU") thanks the U.S. House of Representatives' Committee on the Judiciary, Subcommittee on Immigration and Citizenship, for the opportunity to testify at today's hearing addressing the impact of current immigration policies on service members and veterans, and their families.

The ACLU is a nonpartisan public interest organization with four million members and supporters, and 53 affiliates nationwide—all dedicated to protecting the principles of freedom and equality set forth in the Constitution. The ACLU has a long history of defending civil liberties, including immigrants' rights.

The ACLU of Southern California ("ACLU SoCal") is an affiliate of the national ACLU. Since 2015, ACLU SoCal and the ACLU of San Diego and Imperial Counties have advocated on behalf of deported veterans in partnership with the Deported Veterans Support House and the Honorably Discharged, Dishonorably Deported Coalition. In 2016, we published a comprehensive policy report, "Discharged, then Discarded: How U.S. veterans are banished by the country they swore to protect," profiling 59 deported veterans and exploring the reasons why veterans have been deported in recent years.[1] Over the years, we have conducted legal intakes with more than 300 deported veterans and, with our pro bono partner Latham & Watkins, have represented more than a dozen of them in their legal bids to return home to the United States.

In addition to our advocacy on behalf of deported veterans, we have also worked to prevent the deportation of veterans and to challenge the Trump administration's efforts to block the naturalization of service members and the enlistment of Lawful Permanent Residents ("LPRs"). In 2018, we successfully sued to obtain citizenship for Specialist Yea Ji Sea, who joined the Army through the Military Accessions Vital to the National Interest ("MAVNI") program as a healthcare specialist and native Korean speaker. And in July 2018, together with Latham & Watkins, we sued the Department of Defense in *Kuang v. United States Dep't of Def.*, 18-cv-03698 (N.D. Cal.) to invalidate a 2017 policy that dramatically changed the enlistment process for LPRs, effectively preventing their enlistment and service.

I. Introduction

Immigrants have served in the United States military since the founding of the Republic. Going back more than 200 years, Congress began incentivizing non-citizens to join the military by rewarding them with an expedited path to citizenship. The promise of citizenship is not just an important recruitment tool, it is a moral imperative embedded in our history, values, and laws. The message has been unequivocal: *If you are willing to make the ultimate sacrifice for this country, we will give you citizenship.*

But since 1996, the United States has broken its promise of citizenship to untold numbers of people who have valiantly and honorably served our country. Instead, due to sweeping changes in immigration laws in 1996—described in detail below—and increasingly draconian immigration enforcement policies, we have shamefully turned our backs on immigrants' service and permanently banished thousands, if not tens of thousands, of veterans from the country.[2] We owe these deported veterans the opportunity to return to the country they served and call home. And it is incumbent on Congress to reform the unforgiving and punishing 1996 laws that turn a blind eye to a person's service to this country—and instead bar naturalization and mandate deportation.

The deportation of our veterans is unconscionable enough. But since 2017, the Trump administration has also sought to unwind U.S. history to not only exclude noncitizens from the ranks of our military, but also to thwart the naturalization of the men and women presently serving our country at home and abroad. These actions are not only unlawful, they are immoral.

In my statement, I will first explain the role of immigrants in our military and the history of military naturalization laws. Then I will explain why, since 1996, we have deported many veterans instead of naturalizing them during their service. And I will describe Trump administration policy changes that are deliberately designed to keep immigrants out of the military and to ensure that naturalization is not awarded to those who serve the country. I conclude with recommendations for Congress.

II. History of Immigrant Service, Military Naturalization and Enlistment

a. Immigrant Service

Since the American Revolution, immigrants have been eligible to enlist and have played a significant role in the U.S. military.[3] By 1840, half of all military recruits were immigrants.[4] During the Civil War, 20 percent of the Union Army were immigrants.[5] During World War I, 18 percent (or roughly 500,000) of the U.S. Army were immigrants.[6] And 300,000 immigrants served during World War II.[7]

Today, immigrants represent a smaller percentage of American troops,[8] but their participation nonetheless remains vital. Indeed, by many measures, noncitizens outperform their U.S. citizen counterparts in the military.[9] Noncitizen service members have higher retention rates. One study found that approximately 32 percent of citizens left the military within four years, compared to only 18 percent of noncitizens.[10] Noncitizens also tend to have higher academic qualifications and perform better than citizens on the Armed Forces Qualification Test.[11] Tellingly, 20 percent of all individuals awarded the Congressional Medal of Honor are immigrants—even though in recent years the percentage of noncitizens servicemembers has been closer to 4 percent.[12]

As one report put it, "relative to citizen recruits, noncitizen recruits generally have a stronger attachment to serving the United States, which they now consider to be 'their country,' and have a better work ethic."[13]

b. Expedited Naturalization

For over 200 years, Congress has repeatedly passed laws to incentivize immigrants to join the military by offering an expedited path to citizenship. Congress first authorized the expedited naturalization of non-citizens serving in the military during the War of 1812. The law permitted immigrants to become U.S. citizens immediately upon enlistment.[14] During the Civil War, the Union passed several laws providing an expedited path to naturalization to noncitizens who enlisted or were drafted into the Union's armed forces.[15]

Congress again provided an expedited path to naturalization for immigrants during World War I.[16] Following that war and into World War II, Congress passed at least nine bills providing an expedited path to citizenship for immigrant service members and honorably discharged veterans.[17] This trend continued even after World War II.[18]

With the passage of the Immigration and Nationality Act ("INA") in 1952, Congress adopted the expedited military naturalization laws we have today.[19] Section 328 applies during peacetime, allowing LPRs to naturalize after serving honorably in the military for one year (compared to three to five years for non-military LPRs).[20] Section 329 applies during wartime, allowing *any* noncitizen who serves honorably in the military to naturalize upon enlistment.[21] Both sections waive typical residence and physical presence requirements and fees associated with the naturalization process. As of today, Section 329 applies to the naturalization of any service member or veteran who has served after September 11, 2001.[22]

c. Enlistment

In 2006, Congress unified the enlistment requirements for all branches of the armed services regarding noncitizen applicants, limiting eligibility to LPRs, U.S. nationals, and persons from Micronesia, the Marshall Islands, and Palau.[23] Prior to 2006, each military branch had separate statutes or policies governing enlistment—all primarily allowed LPRs to enlist.[24] Congress's 2006 enlistment requirements left open the possibility for non-LPR foreign nationals to enlist, but only "if the Secretary of Defense determines that such enlistment is vital to the national interest."[25]

III. The Deportation of Veterans and the Broken Promise of Citizenship

Since 1996, the United States has deported thousands, if not tens of thousands, of its own veterans.[26] And every day it deports more. Just last week, Immigration and Customs Enforcement ("ICE") deported long-time resident and combat veteran **Jose Segovia Benitez** to El Salvador.[27]

These unconscionable deportations are the result of three forces working together:

(1) The punishing and unforgiving 1996 immigration laws that created lifetime bars to naturalization and mandatory deportation;

(2) The failure of the U.S. government to naturalize noncitizen service members while they are serving; and

(3) Hyper-aggressive immigration enforcement over the past decade, fueled by a criminal justice-to-deportation pipeline.

With Congressional leadership, each one of these problems can be turned into solutions to reduce and eventually end the deportation of veterans and put them back on their earned path to naturalization.

The deported veterans we interviewed for our 2016 report provide a snapshot of who deported veterans are. All the veterans we interviewed were LPRs when they joined the military. More than half served during wartime, including during the Vietnam War, Gulf War, and post-9/11.

Most were under the age of 10 when their parents brought them to the United States. Deported veterans who came to the United States as young children didn't just serve their country—everything they know and everyone they love is in the United States.

Most deported veterans are separated entirely from their families. In nearly all the cases of we documented, the parents, siblings, spouses, and children of the deported veterans were U.S. citizens or LPRs living in the United States.

a. Merciless Immigration Laws

In general, LPRs cannot be deported unless an immigration judge orders them removed, usually due to a criminal conviction(s). This is the situation of every deported veteran we have met.

Under the pre-1996 immigration laws, most of the deported veterans we interviewed would be eligible to naturalize and they would not have been subject to deportation. Even if they were deportable, immigration judges could still have considered their military service and other equities to determine whether deportation was warranted.

In 1996, Congress enacted two laws, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), that overhauled immigration law. The 1996 laws added 21 crimes to the definition of "aggravated felony,"[28] a category of deportable crimes first introduced into immigration law in 1988 and understood at that time to include only crimes of murder, drug trafficking, and trafficking in firearms.[29] The 1996 laws also dramatically lowered the threshold for many crimes to qualify as aggravated felonies—for instance, lowering the required sentence for theft offenses and crimes of violence from five years to one year.[30] So long as a person is sentenced to a year, even if they serve far less time, their crime may be considered an aggravated felony.

Today, an "aggravated felony," as it is defined in the INA, may be neither "aggravated" nor a "felony." Indeed, numerous non-violent misdemeanors are now considered "aggravated felonies" in immigration law, with the definition covering more than 30 types of offenses. Such offenses include misdemeanor theft, writing a bad check, filing a false tax return, and failing to appear in court—hardly what an average person would consider an "aggravated felony."[31] The 1996 laws also eliminated all forms of discretionary relief for people with convictions falling within the expanded "aggravated felony" definition, meaning that immigration judges were stripped of their ability to consider military service, long-term residence, and other factors in deciding whether to order deportation.[32]

Preceding the 1996 laws was the 1990 elimination of a critical feature of judicial discretion in immigration law: Judicial Recommendations Against Deportation ("JRAD").[33] From 1917 to 1990, Congress enabled sentencing judges to issue recommendations against deportation that were binding on federal immigration officials.[34] The JRAD enabled judges to consider deportation as part of the sentence imposed and to avert deportation where, based on the judge's knowledge of the crime and facts, deportation would be an unfair and disproportionate punishment for the crime.[35] With the elimination of the JRAD in 1990 and the later elimination of immigration judge discretion in 1996, deportation became mandatory for anyone with an "aggravated felony"—with no ability for an immigration judge to balance equities, even for veterans.

The 1990 law also imposed a lifetime bar to naturalization for any person with an "aggravated felony."[36] With the expansion of the definition of "aggravated felony" in 1996, the deported veterans we

interviewed were not only made subject to mandatory detention and deportation, they were also barred for life from the very benefit they were promised when they entered military service—citizenship.

There may be no better illustration of how unduly punishing today's immigration laws are for LPRs with criminal convictions considered "aggravated felonies" than the experience of veterans. Struggles with reintegration into civilian life following discharge from service are all too common for citizens and noncitizens alike. Substance abuse, mental health issues, and anger can lead to contact with the criminal justice system.

Approximately 30 percent of the veterans we interviewed for our report were deported for drug crimes considered "aggravated felonies." Although quantities involved can be very small, possession for sale can be considered an "aggravated felony." For example, **Marine Lance Cpl. Enrique Salas Garcia** was deported for a 2004 conviction for possession of a controlled substance for sale, for which he was sentenced to six months in jail.

Others were deported because their convictions were considered "aggravated felonies" as "crimes of violence" because the 1996 amendments lowered the threshold sentences from five years to one year. For example, **Army Spc. Jorge Salcedo** was ordered deported for a 2004 conviction for assault on a public safety officer for having spit at a Connecticut police officer, for which he was sentenced to one year. **Navy Petty Officer 3rd Class Frank De La Cruz** was deported for a 1996 conviction for driving while intoxicated, for which he served no time and was placed under community supervision for five years. (In 2004, the Supreme Court clarified that a DWI is not a crime of violence and thus not an aggravated felony.[37])

Still others were deported because their theft, fraud, or perjury crimes were considered "aggravated felonies" because the 1996 amendments lowered the threshold sentences from five years to one year. For example, **Army Spc. Fabian Rebolledo** was deported for a 2007 conviction of check fraud in California and sentenced to 16 months, of which he served eight. (His conviction is now a misdemeanor in California.)

But while citizen veterans convicted of "aggravated felony" crimes may serve sentences and go home, for noncitizen veterans with "aggravated felony" convictions, serving their sentence in criminal custody is only part of the punishment they suffer. They can be arrested and detained by ICE in immigration prison with no right to release on bond pending the resolution of their removal case.[38] Then, if an immigration judge concludes their crime is an "aggravated felony," the law *requires* the immigration judge to order deportation, providing no opportunity for a judge to consider military service or longtime residence or for an individual to apply for discretionary forms of relief from deportation.[39]

With only a few exceptions, all of the deported veterans we interviewed for our report were jailed in ICE detention facilities prior to their deportation—some of them were detained for years while they fought their cases. This incarceration can only logically be understood one way: as additional punishment for the crime committed. To make matters worse, incarceration in immigration jails—often located in remote areas—makes access to immigration counsel much more difficult. Indeed, of the veterans we interviewed, only 27 percent had the assistance of immigration lawyers during their removal proceedings.

But the worst punishment of all is the lifetime of banishment that the law requires on account of a person's criminal conviction. For the veterans we interviewed, deportation is experienced as an ongoing life

sentence for the crime committed—an excessive penalty that does not fit the crime—because to them home is in the United States.

b. Failure to Naturalize in the Service

U.S. veterans would not be deported had the government delivered its promise of citizenship to them when they were serving in the military. Over the years, noncitizen service members have encountered numerous obstacles to naturalizing while in the service—mainly, misinformation and administrative hurdles.

Many deported veterans we interviewed never applied for naturalization during their service because they were led to believe that their service automatically made them citizens. In fact, many had been told just that by their recruiters or their military chain of command, so they thought they did not need to bother with applying.

Misinformation in the military also led veterans to believe that when Presidents Bill Clinton and George W. Bush signed their executive orders respectively declaring Operations Desert Storm and Enduring Freedom (the period after Sept. 11, 2001) periods of hostility for purposes of naturalization under INA § 329, that these executive orders automatically made them citizens, without the need for an application.

Many other veterans *did* apply for naturalization, only to have the government lose, misplace, or fail to file their applications. In some cases, deployments prevented them from following through with their applications because, prior to 2004, naturalization fingerprinting, interviews, and ceremonies could only be performed inside the United States. In other cases, because of the transient nature of training and deployment, notices from the former Immigration and Naturalization Services ("INS") or the current U.S. Citizenship and Immigration Services ("USCIS") to complete various steps of the naturalization process never reached them. No caseworkers or immigration liaisons were assigned to their cases.

Between 2003 and 2017, Congress and USCIS took some important steps to improve naturalization access for service members. But most of those gains—which significantly increased naturalization rates of noncitizen service members—have been eviscerated by the Trump administration.

c. Hyper-aggressive Immigration Enforcement

The federal government's aggressive focus on immigration enforcement—rather than addressing legalization or other priorities—has contributed to the growing swell of banished veterans in the last decade. The increased reliance on state and local law enforcement to assist with federal immigration enforcement through ICE's Secure Communities program is primarily responsible for the explosive numbers of deportations over the last decade. Beginning in 2008, the Secure Communities program began to link ICE to information about every person arrested and booked into criminal custody anywhere in the country, enabling ICE to screen and arrest record numbers of people for removal purposes.

While it pursued record numbers of deportations, ICE ignored 2004 agency policies that instructed its officers to inquire about military service and required the most senior ICE official in the relevant field office to approve initiating deportation proceedings against a veteran.[40] The 2004 policies instruct senior ICE

officials to consider the veteran's overall criminal history, evidence of rehabilitation, family and financial ties to the United States, employment history, health, and community service, as well as military service, assignment to a war zone, number of years in service, and decorations awarded.[41] To authorize removal proceedings, the policy requires ICE senior officials to complete a memo and include it in the veteran's A-File.[42]

Despite the 2004 policies—which remain in place—ICE officers do not consistently ask whether an individual is a veteran before initiating removal proceedings. In our review of the immigration files of dozens of veterans, we have not once encountered a memo by an ICE official, let alone a senior one, assessing whether to proceed with removal despite a person's military service. In the Government Accountability Office's ("GAO") June 2019 investigation of ICE's handling of veteran cases, it found that ICE Homeland Security Investigation ("HSI") officials did not follow the policies *at all* because they did not know about them.[43] There is no better proof of ICE's failure to exercise discretion than in the cases of veterans fighting removal charges today.

The experiences of deported veterans reflect two sets of U.S. laws and values at odds with one another. On the one hand, we honor those who serve our military with citizenship. As a society, we also understand the trauma and struggles that service members and veterans endure and we look to rehabilitative solutions. But on the other hand, our immigration laws are unduly punitive, providing no grace from deportation, not even for veterans whose criminal convictions often are attributable to their experiences in the military, including Post-Traumatic Stress Disorder ("PTSD").

For veterans unable to naturalize in the service due to administrative hurdles or misinformation, far too many instead have been unfairly caught in the crosshairs of deportation.

IV. The Trump Administration's Efforts to Block Naturalization of Service Members and Veterans and to Rid the Military of Immigrants

The Trump administration has adopted a series of policies and practices deliberately designed to thwart the more than 200 years of Congressional directives to expedite the naturalization of service members and to encourage noncitizens to enlist in the military. It has taken calculated steps to curtail the enlistment of LPRs altogether, thereby slowly eliminating the time-honored role immigrants have played in the U.S. armed forces.[44] And it has adopted policies that—in plain contravention of INA § 329—make it impossible for service members to naturalize expeditiously, eviscerating important programs adopted over recent years to improve naturalization services for current service members. Finally, rather than facilitate an expedited and sensible process for deported veterans who are nonetheless eligible to naturalize, USCIS under Trump has delayed adjudication for years and erected roadblocks.

These policy changes have resulted in a dramatic decline in military naturalization. In the first quarter of FY 2018 (the first quarter in which numerous policy changes impacting service member naturalization came into effect), military naturalization applications filed dropped by more than 65 percent (1,069) from the previous fourth quarter of FY 2017 (3,132).[45] Overall, applications dropped more than 70 percent FY 2018 (3,233) compared to FY 2017 (10,979).[46] As application rates declined, USCIS denials of service member naturalization applications significantly increased, from 7 percent denied in the fourth quarter of FY2017 to 18 percent denied in the first quarter of FY 2018 (and from 7 percent denied overall in

FY 2017 to 20 percent denied overall in FY 2018).[47] Troublingly, these rates of denials outstrip those for civilian naturalization applications (11 percent in the first quarter of FY 2018, as well as overall for FY 2018).[48]

a. Service Member Naturalization

The Trump administration has stymied the ability of LPRs currently serving in the military to naturalize in several fundamental ways. First, the Department of Defense ("DoD") has adopted policies that intentionally thwart the ability of any service member to expeditiously naturalize under INA § 329. Second, USCIS has rolled back critical services that had facilitated the ability of service members to naturalize while on active duty and had largely addressed prior challenges to naturalizing noncitizen service members.

1. *Department of Defense 2017 Policy Changes: Form N-426*

For a current service member to naturalize while in the service, the DoD must first certify that the person's service has been "honorable" on USCIS's Form N-426. With this certification, a service member may then apply to naturalize under INA § 329. Before 2017, a service member could obtain this certification from a commanding officer or local service record holder after a single day of service.[49] The certification involved a cursory records check to determine if the service member was serving in an active-duty status or in the Selected Reserves, had valid dates of service, and had no information in his or her service record indicating non-honorable service.[50]

On October 13, 2017, the DoD introduced policy changes erecting new substantive and procedural hurdles to impede service members' ability to expeditiously naturalize, as provided under INA § 329.[51] The DoD now requires LPR service members to complete an enhanced background screening process before the DoD will certify their honorable service on Form N-426. This background screening is completely unrelated to the question of whether a person's service has been "honorable," which is all the statute requires—indeed, no background checks have ever been required to certify a person's honorable service. The DoD has projected that completion of this new screening requirement is likely to exceed one year.[52]

Once a person completes the enhanced background check, the new DoD policy provides that the Form N-426 may *only* be signed by the Secretary of the applicable branch. Alternatively, the Secretary of each branch may also delegate this authority "to a commissioned officer serving in the pay grade of 0-6 or higher."[53] The policy sets out no process for LPR service members to request the certification from the relevant Secretary.[54] Overall, there is a total lack of clarity and consistency and significant confusion within each of the branches as to how to process an N-426 and who may sign it. By contrast, before 2017, LPR service members could obtain N-426 certifications at basic training, which could be easily signed by a commanding officer or a local service record holder.

The DoD's N-426 policy is deliberately designed to impede the ability of service members to expeditiously naturalize, as INA § 329 requires. And it goes a step further. The DoD's 2017 policy also states that service members may not obtain a Form N-426 until they have served in active-duty status for 180 consecutive days or one year for enlistees in the Selected Reserves.[55] This not only violates the statute, but

flies in the face of Congress's intent for more than 200 years that wartime service members should be able to naturalize upon enlistment.

2. *USCIS Naturalization Services for Service Members*

In August 2009, USCIS established the Naturalization at Basic Training Initiative with the Army to enable noncitizen enlistees to complete the naturalization process during basic training. According to USCIS, "under this initiative, USCIS conducts all naturalization processing including the capture of biometrics, the naturalization interview and administration of the Oath of Allegiance on the military installation."[56] Viewed as a success, by 2013 USCIS had expanded the initiative to all branches of the military.[57]

The Naturalization at Basic Training Initiative was an important answer to the problem of deported veterans because it ensured that new noncitizen enlistees would not leave the military without being naturalized. But under President Trump, USCIS has now ended the program and shuttered its naturalization centers at basic training locations, citing the DoD's October 2017 policy changes which made it impossible to start, let alone finish, the naturalization process in the first few months of service.[58]

Additional changes were made during the wars in Iraq and Afghanistan that improved the ability of service members to naturalize, particularly while deployed overseas. For example, the National Defense Authorization Act ("NDAA") for Fiscal Year 2004 authorized overseas military naturalization ceremonies.[59] Prior to this, service members could only naturalize while physically in the United States, preventing deployed service members from naturalizing.[60] Between Fiscal Years 2005 and 2018, USCIS naturalized 11,483 service members in overseas ceremonies.[61]

USCIS, however, has now announced that it will only provide naturalization services to service members in just four "hubs" one week each quarter at the following locations: Camp Humphreys, South Korea; U.S. Army Garrison Stuttgart, Germany; Naval Support Activity Naples, Italy; and Commander Fleet Activities Yokosuka, Japan.[62] These limitations will undoubtedly impede access to naturalization for deployed service members.

b. <u>Roadblocks for Deported Veterans to Naturalize</u>

The Trump administration is also making it procedurally impossible for deported veterans eligible to naturalize under INA § 329 to do so. An honorably discharged wartime veteran can be eligible to naturalize under Section 329, despite having been deported, because Section 329 waives not only the general naturalization requirements of physical presence and continuous residence in the United States, but it waives the requirement that a person be an LPR to naturalize. So long as a veteran does not have a conviction considered an "aggravated felony," which serves as a lifetime bar to naturalization, they can be eligible to naturalize.

Most deported veterans, as described above, were deported for "aggravated felony" convictions. However, what constitutes an "aggravated felony" is constantly shifting and changing as courts interpret the definition. So, some veterans have become eligible to naturalize based on clarification from the courts that their conviction was not in fact an "aggravated felony." Others become eligible because of post-conviction relief, such as executive pardons that can waive the immigration effect of certain convictions.

I am aware of a handful of deported veteran naturalization applications currently pending before USCIS for prolonged periods, including two whom I represent myself. Despite their eligibility to naturalize, USCIS has erected roadblock after roadblock to the ability of these individuals to pursue their statutory entitlement to citizenship.

First, the agency has subjected these applications to unreasonable delays in processing. For example, **Frank De La Cruz** filed his application for naturalization more than three years ago. To date, USCIS has made no effort to process his application, failing even to schedule an interview.

Second, once the agency finally schedules the interview, it refuses to conduct it at a location where the individual can travel. Instead, it schedules the interviews inside the United States, despite knowing that these individuals are inadmissible because of their prior removal orders and/or criminal histories. A simple solution in many cases would be for USCIS to schedule interviews at the nearest port of entry, as USCIS did in Hector Barajas' case. Instead, it takes the position that the veteran must exhaust every possible means to seek permission to return to the United States—including through costly, time consuming, and generally futile visitor visa requests with the Department of State and parole applications with DHS—before they will consider providing an interview at a port of entry. Congress explicitly provided that fees would be waived for military naturalization—yet by refusing to make accommodations at the outset to conduct interviews in a location accessible to deported veterans, USCIS has transformed what is meant to be an expeditious and free process, into a time consuming and expensive process.

For example, deported veteran **Erasmo Apodaca** applied for naturalization nearly three years ago. More than two years after he applied, in April 2019, USCIS finally issued an interview notice, scheduling him for an interview in San Diego. At USCIS's direction, Mr. Apodaca applied for a visa to enter the U.S. to attend the interview but was denied. He applied for humanitarian parole with Customs and Border Protection ("CBP") and ICE, and was rejected. He applied for an I-212 waiver for permission to reapply for admission into the U.S. after removal from USCIS, and reapplied for parole from ICE. Through all of this, he has spent $1500 on filing fees.

In fact, today was supposed to be Mr. Apodaca's naturalization interview at USCIS offices in San Diego. But USCIS canceled the interview last week, citing the pending applications, and thus far has not rescheduled it, even though two days later ICE granted his parole request. This all could have been averted if a USCIS officer simply drove the 22 miles from downtown San Diego to the San Ysidro Port of Entry to conduct Mr. Apodaca's interview.

Rather than facilitating a reasonable process to make these individuals the citizens they should have become years ago, USCIS has instead prolonged and impeded deported veterans' bids to naturalize.

V. Conclusion

Throughout our history, the United States has encouraged the participation of noncitizens in our military and has benefited immeasurably from their sacrifices. For their commitment and service, we have provided an expedited path to naturalization. In recent history, however, the United States has failed to deliver its promise of expedited citizenship due to administrative hurdles and misinformation, leaving

veterans without citizenship and vulnerable to a post-1996 unforgiving deportation regime. The banishment of our veterans is immoral and must end. But, as the Trump administration works to block military naturalization, veteran deportations will only increase, unless Congress acts. I urge Congress to adopt legislation—with some recommendations from the ACLU to follow—to correct these injustices and to honor the contributions of our service members and veterans.

Recommendations for Congress

Congress should enact legislation to:

- Address the 1996 laws to redefine so-called "aggravated felonies" and restore the ability of immigration judges to consider equities—such as military service—of a person's case.

- Amend INA §329 to clarify that honorable service in the U.S. armed forces during a period of hostility satisfies the "good moral character" requirement for naturalization. Doing so would ensure that honorably discharged veterans do not become permanently barred from naturalization if convicted of an aggravated felony.

- Enable honorably discharged deported veterans to apply to return to the United States as LPRs, waiving grounds of inadmissibility and permanent bars to admission. Such legislation would reunite veterans with their families.

- Amend the INA to restore Judicial Recommendations Against Deportation (JRAD) in state and federal criminal sentencing. Deportation of LPR veterans is a consequence of the criminal process, as the Supreme Court has recognized.[63] Criminal court judges should be able to determine whether deportation is an appropriate punishment for a crime.

- Require the DoD to certify honorable service on the N-426 form within five days for active duty service and three weeks for the reserved force. If a service member's service has been other than honorable, require the DoD to provide the member notice that a certification will not be granted, and for what reason, within the same timeframe. Clarify that refusal to certify honorable service may not be based on anything other than a person's service record, such as the completion of background checks.

- Clarify that applications filed under INA § 329 may be filed after one day of active duty service.

- Require USCIS to process military naturalization applications within four months of their receipt, subject to exceptional circumstance delays. Because Congress has directed that regular naturalization should take six months from the date of filing to the date of adjudication,[64] four months seems like a fair benchmark to prioritize and expedite military naturalization applications.

- Require DHS and DoD to provide naturalization services during basic training and on military installations, codifying the now-disbanded USCIS Naturalization at Basic Training Initiative and ensuring the continuing existence of such assistance at basic training and military installations into the future.

- Provide that military naturalization interviews and oath ceremonies may take place overseas at U.S. embassies or consulates and U.S. military installations for both veterans and service members.

- Require USCIS to make biometric, interview, and oath ceremony accommodations at ports of entry, U.S. embassies or consulates, or U.S. military installations for deported veterans with naturalization applications who are statutorily barred from reentering the United States.

- Mandate that ICE to ask every person whether they are a U.S. service member or veteran before initiating removal proceedings and to statistically track that information. Require ICE to report to Congress on a semi-annual basis the number of service members and veterans for whom ICE has initiated removal proceedings, detained, and/or deported. Such reporting should include information about the person's branch of service; whether the person served during a period of hostility as defined under INA § 329 and by Executive Order; whether the person served honorably and/or was separated under honorable conditions; the basis for which removal was sought; and, if the basis for removal was a criminal conviction, what the underlying criminal conviction was.

[1] ACLU of California, *Discharged, Then Discarded: How U.S. veterans are banished by the country they swore to protect*, July 2016, https://www.aclusocal.org/en/publications/discharged-then-discarded

[2] This is the ACLU's own estimate based on its more than 300 interviews with deported veterans, the size of the noncitizen veteran population and its knowledge of immigration enforcement trends over the last decade. There are no statistics on the true numbers of veterans the United States has deported. ICE does not track whether the individuals it deports are veterans, making such statistics impossible to come by. See ACLU of CA, *Discharged, Then Discarded*, *supra* note 1, at 39; Government Accountability Office, *Immigration Enforcement: Actions Needed to Better Handle, Identify, and Track Cases Involving Veterans*, GAO-19-416, June 2019, at 13 ("ICE has not developed a policy to identify and document all military veterans it encounters").

[3] *See* Muzaffar Chishti, et al, *Noncitizens in the U.S. Military: Navigating National Security Concerns and Recruitment Needs*, MIGRATION POLICY INSTITUTE, May 2019, https://www.migrationpolicy.org/research/noncitizens-us-military-national-security-concerns-recruitment-needs; Jie Zong & Jeanne Batalova, *Immigrant Veterans in the United States*, MIGRATION POLICY INSTITUTE, May 16, 2019, https://www.migrationpolicy.org/article/immigrant-veterans-united-states.

[4] *See* Jeanne Batalova, *Immigrants in the U.S. Armed Forces*, MIGRATION POLICY INSTITUTE, 2008, https://www.migrationpolicy.org/article/immigrants-us-armed-forces.

[5] *See id.*

[6] USCIS, *The Immigrant Army: Immigrant Service Members in World War I*, https://www.uscis.gov/history-and-genealogy/our-history/immigrant-army-immigrant-service-members-world-war-i; *see* National Immigration Forum, *For Love of Country: New Americans Serving in our Armed Forces*, 2017, at 8, http://immigrationforum.org/wp-content/uploads/2017/11/FOR-THE-LOVE-OF-COUNTRY-DIGITAL.pdf.

[7] *See* Immigration and Naturalization Service, U.S. Dep't of Justice, *Foreign-Born in the United States during World War II, with Special Reference to the Alien*, 6 MONTHLY REVIEW 43, 48 (1948), https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/WWII/INSMRev1948.10.pdf.

[8] Between 1999 and 2008, noncitizens represented 4 percent of all new enlistments. David Gregory, et al., *Non-Citizens in the Enlisted U.S. Military*, CENTER FOR NAVAL ANALYSES, Nov. 2011, at 5, https://timemilitary.files.wordpress.com/2012/04/non-citizens-in-the-enlisted-us-militaryd0025768-a2.pdf. Approximately 530,000 (or 3 percent) of today's veterans are foreign-born. Zong, *Immigrant Veterans*, *supra* note 3. Mexico and the Philippines are the top two countries of birth for today's immigrant veterans and each represent 17 percent of all foreign-born veterans. *Id.* Other top countries of birth include Germany (5 percent), Colombia (4 percent), and the United Kingdom (4 percent). *Id.*

[9] Marine Corps Gen. Peter Pace, *Contributions of Immigrants to the United States Armed Forces: Hearing Before the S. Comm. on Armed Services*, 109th Cong. (2006), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-109shrg35222/html/CHRG-109shrg35222.htm (Marine Corps Gen. Peter Pace, the former Chairman of the Joint Chiefs of Staff, testifying before Congress, stated that noncitizen service members "are extremely dependable. . . some eight, nine, or ten percent fewer immigrants wash out of our initial training programs than do those who are currently citizens. Some ten percent or more than those who are currently citizens complete their first initial period of obligated service to the country.").

[10] Gregory, *Non-Citizens in the Enlisted U.S. Military*, *supra* note 8, at 26. *See also* Catherine N. Barry, *New Americans in Our Nation's Military: A Proud Tradition and Hopeful Future*, CENTER FOR AMERICAN PROGRESS, Nov. 8, 2013, *available at* https://www.americanprogress.org/issues/immigration/ report/2013/11/08/79116/new-americans-in-our-nations-military/

[11] *See* Chishti, *Noncitizens in the U.S. Military*, *supra* note 3, at 11.

[12] Barry, *New Americans in Our Nation's Military, supra* note 10; Gregory, *Non-Citizens in the Enlisted U.S. Military*, *supra* note 8 (providing percentage of noncitizens serving in the military).

[13] *Id.*

[14] *See* An Act Supplementary to the Acts Heretofore Passed on the Subject of a Uniform Rule of Naturalization, 3 Stat. 53 (1813), http://www.loc.gov/law/help/statutes-at-large/13th-congress/c13.pdf.

[15] *See* An Act to Define the Pay and Emoluments of Certain Officers of the Army, and for Other Purposes, U.S. Statutes at Large 12 (1862): 594, www.loc.gov/law/help/statutes-at-large/13th-congress/c13.pdf; An Act for Enrolling and Calling Out the National Forces, and for Other Purposes, 12 Stat. 731 (1863), www.loc.gov/law/help/statutes-at-large/37th-congress/session-3/c37s3ch75.pdf.

[16] *See* An Act to Amend the Naturalization Laws and to Repeal Certain Sections of the Revised Statutes of the United States and Other Laws Relating to Naturalization, Pub. L. No. 65-144, 40 Stat. 542 (1918), http://www.loc.gov/law/help/statutes-at-large/65th-congress/session-2/c65s2ch69.pdf.

[17] *See* An Act to Amend the Naturalization Laws and to Repeal Certain Sections of the Revised Statutes of the United States and Other Laws Relating to Naturalization, and for Other Purposes, ch. 69, § 1, 40 Stat. 542 (1918), https://www.loc.gov/law/help/statutes-at-large/65th-congress/session-2/c65s2ch69.pdf; An Act to Admit to the United States, and to Extend Naturalization Privileges to, Alien Veterans of the World War, Pub. L. No. 69-294, 44 Stat. 654 (1926), http://www.loc.gov/law/help/statutes-at-large/69th-congress/session-1/c69s1ch398.pdf; An Act to Supplement the Naturalization Laws, and for Other Purposes, Pub. L. No. 70-962, 45 Stat. 1512 (1929), http://www.loc.gov/law/help/statutes-at-large/70th-congress/session-2/c70s2ch536.pdf; An Act to Further Amend the Naturalization Laws, and for Other Purposes, Pub. L. No. 72-149, 47 Stat. 165 (1932), http://www.loc.gov/law/help/statutes-at-large/72nd-congress/session-1/c72s1ch203.pdf; An Act to Extend Further Time for Naturalization to Alien Veterans of the World War Under the Act Approved May 25, 1932 (47 Stat. 165), to Extend the Same Privileges to Certain Veterans of Countries Allied With the United States During the World War, and for Other Purposes, Pub. L. No. 74-160, 49 Stat. 395 (1935), http://www.loc.gov/law/help/statutes-at-large/74th-congress/session-1/c74s1ch288.pdf; An Act to Authorize the Naturalization of Certain Resident Alien World War Veterans, Pub. L. No. 74-162, 49 Stat. 397 (1935), http://www.loc.gov/law/help/statutes-at-large/74th-congress/session-1/c74s1ch290.pdf; An Act to Extend Further Time for Naturalization to Alien Veterans of the World War Under the Act Approved May 25, 1932 (47 Stat. 165), the Extend the Same Privileges to Certain Veterans of Countries Allied With the United States During the World War, and for Other Purposes, Pub. L. 75-338, 50 Stat. 743 (1937); http://www.loc.gov/law/help/statutes-at-large/75th-congress/session-1/c75s1ch735.pdf; An Act to Extend Further Time for Naturalization to Alien Veterans of the World War Under the Act Approved May 25, 1932 (47 Stat. 165), to Extend the Same Privileges to Certain Veterans of Countries Allied With the United States During the World War, and for Other Purposes, Pub. L. 76-146, 53 Stat. 851 (1939), http://www.loc.gov/law/help/statutes-at-large/76th-congress/session-1/c76s1ch234.pdf; Second War Powers Act, Title X, Pub. L. No. 77-507, 56 Stat. 182 (1942), https://www.loc.gov/law/help/statutes-at-large/77th-congress/session-2/c77s2ch199.pdf.

[18] *See, e.g.*, An Act Relating to the Naturalization of Persons Not Citizens Who Serve Honorably in the Military or Naval Forces during the Present War, Pub. L. No. 78-531, 58 Stat. 886 (1944), http://www.loc.gov/law/help/statutes-at-large/78th-congress/session-2/c78s2ch662.pdf; An Act to Amend the Second War Powers Act, 1942, as Amended, Pub. L. No. 79-270, 59 Stat. 658 (1945), http://www.loc.gov/law/help/statutes-at-large/79th-congress/session-1/c79s1ch590.pdf; An Act to Amend the Nationality Act of 1940, Pub. L. 80-567, 62 Stat. 281 (1948), http://www.loc.gov/law/help/statutes-at-large/80th-congress/session-2/c80s2ch360.pdf.

[19] Immigration and Nationality Act, Pub. L. 414 (1952), https://www.govinfo.gov/content/pkg/STATUTE-66/pdf/STATUTE-66-Pg163.pdf

[20] 8 U.S.C. § 1439.

[21] 8 U.S.C. § 1440.

[22] President George W. Bush designated September 11, 2001 as the start date of a period of hostility for purposes of naturalization under INA § 329, but provided no end date. Ex. Ord. No. 13269, July 3, 2002, 67 F.R. 45287. Rather, he stated "For the purpose of determining qualification for the exception from the usual requirements for naturalization, I designate as a period in which the Armed Forces of the United States were engaged in armed conflict with a hostile foreign force the period beginning on September 11, 2001. Such period will be deemed to terminate on a date designated by future Executive Order." *Id.*

[23] 10 U.S.C. § 504(b)(1); *see* Margaret D. Stock, *Essential to the Fight: Immigrants in the Military Eight Years after 9/11*, AMERICAN IMMIGRATION COUNCIL, Nov. 2009, at 6, available at https://www.americanimmigrationcouncil.org/sites/default/files/research/Immigrants_in_the_Military_-_Stock_110909_0.pdf

[24] *Id.*

[25] 10 U.S.C. § 504(b)(2).

[26] *See supra* note 2.

[27] Roxana Kopetman, *U.S. Marine Combat Veteran, Long-Time Long Beach Resident, Deported to El Salvador*, OC REGISTRAR, Oct. 23, 2019; Derrick Bryson Taylor, *Marine Veteran is Deported to El Salvador*, NY TIMES, Oct. 25, 2019.

[28] *See* Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by U.S. Deportation Policy*, July 16, 2007, at 18.

[29] American Immigration Council, *Aggravated Felonies: An Overview*, Dec. 2016, http://www.immigrationpolicy.org/sites/default/files/research/aggravated_felonies.pdf

[30] *See* HRW, *Forced Apart*, *supra* note 28, at 19.

[31] AIC, *Aggravated Felonies*, *supra* note 29. *See* 8 U.S.C. § 1101(a)(43) (definition of aggravated felony); 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony grounds of removal).
[32] *See* AIC, *Aggravated Felonies*, *supra* note 29; IIRIRA, Pub. L. No. 104-208, § 348, 110 Stat. 3009-628 (2005).
[33] *Padilla v. Kentucky*, 559 U.S. 356, 361-62 (2010).
[34] *Id.*
[35] *Id.*
[36] 8 C.F.R. § 316.10(b)(ii) (an aggravated felony committed on or after November 29, 1990 is defined as permanent bar to "good moral character" needed for naturalization). *See* 8 U.S.C. §1101(f)(8) (aggravated felony is lifetime bar to "good moral character").
[37] *Leocal v. Ashcroft*, 543 U.S. 1 (2004).
[38] 8 U.S.C. § 1226(c).
[39] 8 U.S.C. § 1227(a)(2).
[40] ICE, Acting Director of Investigations Marcy 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*, Jun. 21, 2004; ICE, Acting Director of Detention and Removal Operations Victor Cerda, *Issuance of Notices to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service*, Sept. 3, 2004.
[41] GAO, *Immigration Enforcement*, *supra* note 2, at 10.
[42] *Id.* at 11.
[43] *Id.* at 12.
[44] *See generally Kuang v. United States Dep't of Def.*, 340 F.Supp.3d 873 (N.D. Cal. 2018), *vacated and remanded* 778 F. App'x 418 (9th Cir. 2019) (class action challenging DoD policy requiring LPR service members clear enhanced background checks before they can begin basic training).
[45] This data was obtained from the quarterly data sets related to naturalization applications published by USCIS. *See* USCIS, Immigration and Citizenship Data, N-400 Quarterly Reports, https://www.uscis.gov/tools/reports-studies/immigration-forms-data?topic_id=All&field_native_doc_issue_date_value%5Bvalue%5D%5Bmonth%5D=&field_native_doc_issue_date_value_1%5Bvalue%5D%5Byear%5D=&combined=n-400&items_per_page=10&page=1. These data sets separate civilian and military naturalizations and provide the numbers of applications received, approved, denied and pending for each category.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *See Kirwa v. United States Dep't of Def.*, 285 F.Supp.3d 21, 27-28 (D.D.C. Oct. 25, 2017) (describing DoD past practice in issuing Form N-426).
[50] *See id*. at 27-29, 37-38.
[51] *See* DoD, *Memorandum from Office of the Under Secretary of Defense to Secretaries of the Military Departments, Commandant of the Coast Guard, Certification of Honorable Service for Members of the Selected Reserve of the Ready Reserve and Members of the Active Components of the Military or Naval Forces for Purposes of Naturalization*, Oct. 13, 2017, https://www.aila.org/infonet/dod-memo-on-certification-of-honorable-service.
[52] *See Kuang*, 340 F.Supp.3d at 920.
[53] *See* DoD, Memorandum, *supra* note 51, at 3.
[54] The Secretary of the Navy has delegated this authority to the Chief of Naval Operations and the Commandant of the Marine Corps (who may further delegate this authority to commissioned officers serving in the 0-6 pay grade or higher). *Memorandum from the Secretary of the Navy to Chief of Naval Operations, Commandant of the Marine Corps, Honorable Service Certification Authority for Members of the Selected Reserve of the Ready Reserve and Active Duty Members of the Naval Forces for Purposes of Naturalization*, Jan. 18, 2018, https://www.jag.navy.mil/organization/documents/SECNAV_Memo_18_Jan_18.pdf. It is unclear whether the Secretaries of the other services have made similar delegations.
[55] LPR service members may also, in the alternative, serve one day "in a location designated as a combat zone, a qualified hazardous duty area, or an area where service in the area has been designated to be in direct support of a combat zone, and which also qualifies the member for hostile fire or imminent danger pay. Memo from Office of the Under Secretary of Defense, *Certification of Honorable Service*, *supra* note 51, at 3.
[56] USCIS., *Naturalization Through Military Service: Fact Sheet* (2015), https://www.uscis.gov/news/fact-sheets/naturalization-through-military-service-fact-sheet.
[57] *Id.*
[58] Vera Bergengruen, *The US Army Promised Immigrants a Fast Track for Citizenship. That Fast Track is Gone*, BUZZFEED NEWS, Mar. 5, 2018, https://www.buzzfeednews.com/article/verabergengruen/more-bad-news-for-immigrant-military-recruits-who-were.
[59] Nat'l Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108–136, 117 Stat 1392; USCIS, *Press Release: First U.S. Military Naturalizations in Europe and the Middle East*, Oct. 6, 2004, https://www.uscis.gov/sites/default/files/files/pressrelease/AfghanNatz_10_60_04.pdf.
[60] *Id.*
[61] USCIS, *Military Naturalization Statistics*, https://www.uscis.gov/military/military-naturalization-statistics.
[62] *See* Haley Britzky, *USCIS is reducing when and where naturalization services are available to US troops around the world*, TASK & PURPOSE, Sept. 30, 2019, https://taskandpurpose.com/uscis-military-naturalization-services-overseas.
[63] *See Padilla*, 559 U.S. at 364 ("deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes").
[64] 8 U.S.C. §1571(b) ("It is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial date of filing of the application").