DISHONORABLY CHARGED: RESCUING NONCITIZEN VETERANS FROM THE "DECONSTITUTIONALIZED ZONE"

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Veterans are being deported from the United States for criminal convictions they sustained decades ago, and the federal government is failing its mission to protect them. Draconian immigration laws tied to criminal convictions, a sustained uptick in immigration enforcement, and the elimination of a longstanding statutory provision protected by the Sixth Amendment that allowed a criminal sentencing judge to make a binding recommendation against deportation for a conviction have rendered noncitizen veterans vulnerable to deportation. The Supreme Court decision Padilla v. Kentucky *revived the Sixth Amendment's role in the intersection of criminal convictions and immigration consequences, but with limited and without retroactive application. The two decades between the elimination of the judicial recommendation against deportation and* Padilla *created a constitutional vacuum around the revamped immigration consequences of criminal convictions, a "deconstitutionalized zone."*

In this Article I examine the creation of the "deconstitutionalized zone" and its unique impact on noncitizen veterans whose service in the military exposed them to an increased likelihood of (1) contact with the criminal justice system as well as (2) executive interference in their efforts to become U.S. citizens. I argue that current exercises of discretion by the executive branch to help noncitizen veterans in the "deconstitutionalized zone" are insufficient, and that the executive's proportional and adequate response is to allow its former soldiers caught in this zone to seek naturalization as if they were applying at the time of discharge from the military, that is, nunc pro tunc.

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INTRODUCTION

Liam, a Belizean baby boy, is brought to the United States at three months old. Raised by his aunts alongside his siblings and cousins, he attends elementary, middle, and high school in Chicago, Illinois. As a teenager, he becomes a lawful permanent resident (LPR) and soon after enlists in the U.S. Navy. For the first time in his life, he moves away from Chicago, his family, and his friends. During his formative young adult years, he serves with his comrades aboard a ship off the coast of Somalia during Black Hawk Down. Having been stationed in Virginia, he lays down roots, gets married, and starts a job with a cable company after an honorable discharge from the military. He wants to become a police officer but gets turned down because of his poor health. Discouraged but determined to engage in similar work, he starts a second part-time job as a security guard at a club in North Carolina. He's laid off from the cable company. After struggling with his financial, mental, and physical health and wanting to support his young daughter, he agrees to join a group he met at the club to cash fake checks around North Carolina. In 2003, he gets caught and is held in pre-trial custody for months. To get out of jail, he pleads guilty to counterfeiting an instrument. His criminal defense attorney does not advise him of his guaranteed deportation from the United States as a noncitizen for this plea. Six years later, while still on probation for the remaining restitution that he had steadily been paying off, the police learn that he is not a U.S. citizen. The Navy veteran is taken into custody, detained by Immigration and Customs Enforcement (ICE) for a year in Georgia, ordered removed by an immigration judge (IJ) for his 2003 conviction, and deported.[1]

Liam is one of an unknown number of noncitizen veterans subject to current draconian and complex[2] U.S. immigration deportation laws tied to criminal convictions who did not benefit from important Sixth Amendment protections in criminal court. From 1917 until Congress's repeal in 1990, federal law allowed federal and state criminal court judges to make Judicial Recommendations

1. Liam, whose name has been changed in this article to maintain confidentiality, is a deported veteran who was represented by the author and students participating in the Immigrant Rights Clinic at Duke University School of Law. Liam is an Irish name that means "strong-willed warrior." Alex Vance, *Liam Name Meaning*, PARENTS (Dec. 17, 2024), https://perma.cc/2W9K-QYW6.

2. This article focuses on the harshness of our immigration laws for noncitizen veterans, but it is important to note that that harshness is further animated by the laws' complexity. Federal courts, including the Supreme Court of the United States, have been candid about the complexity of our immigration laws. Padilla v. Kentucky, 559 U.S. 356, 369 (2010) (stating that "immigration law can be complex" and that "it is a legal specialty of its own"); Usubakunov v. Garland, 16 F.4th 1299, 1303 (9th Cir. 2021) (discussing the "labyrinthine nature" of immigration law); Quintero v. Garland, 998 F.3d 612, 632 (4th Cir. 2021) (recognizing U.S. immigration law for its "notorious[ly] . . . esoteric nature"); Alanis-Bustamante v. Reno, 201 F.3d 1303, 1308 (11th Cir. 2000) (finding that in immigration law "issues are seldom simple and the answers are far from clear"); Castro-O'Ryan v. INS, 821 F.2d 1415, 1419 (9th Cir. 1987) (describing immigration law as "second only to the Internal Revenue Code in complexity" even prior to the immigration laws passed from 1988 to 1996).

Against Deportation (JRAD) in the sentencing phase of a case, which would preclude the criminal conviction from serving as a basis for deportation. Prior to its repeal, multiple federal and state courts found that JRADs were subject to the Constitution's Sixth Amendment right to effective assistance of counsel. Around the same time as JRAD's demise, Congress also created and expanded the "aggravated felony," an umbrella term defined in the U.S. Code housing an extensive list of criminal conduct that would trigger deportation.[3]

With the death of JRAD, the increased tethering of immigration laws to criminal convictions, and an astronomical increase in immigration enforcement, the Supreme Court of the United States in 2010 partially revived the Sixth Amendment's role in immigration consequences of criminal convictions in *Padilla v. Kentucky* and held that criminal defense attorneys must advise their noncitizen clients of the deportation risks of a guilty plea.[4] While this decision provides noncitizens—including noncitizen military service members, the majority of whom are LPRs—with criminal defense attorneys who must advise on the risks of immigration consequences arising from a plea, this protection is not, under federal law, and for the most part, under states' laws, retroactive.[5] Therefore, someone like Liam, whose criminal proceedings and resulting conviction were in 2003, could not and cannot hold his defense attorney accountable for the absence of a JRAD request or *Padilla* advisal. This is because his plea falls between 1990 and 2010, a "deconstitutionalized zone" beyond the reach of the constitutional protections arising from JRAD and *Padilla*.

The "deconstitutionalized zone"[6] is the realm where a noncitizen, LPR veteran is convicted of a deportable crime[7] between 1990 and 2010, cannot or could

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3. 8 U.S.C. § 1101(a)(43). Aggravated felonies will be discussed in further detail in Part II.B.

4. 559 U.S. 356, 373-74 (2010).

5. As in most states, in North Carolina where Liam was convicted, the state court has held that *Padilla* does not apply retroactively and affords no relief to a person whose conviction was final before *Padilla* was decided in 2010. State v. Alshaif, 724 S.E.2d 597, 604 (N.C. Ct. App. 2012).

6. The "deconstitutionalized zone" is a term used by activists to describe the southern borderlands where individual constitutional rights, in the name of national and border security, are impinged by the "constant unabridged exercise of police authority." María Jiménez, *War in the Borderlands*, N. AM. CONG. ON LATIN AM. (Sept. 25, 2007), https://perma.cc/X9QS-D7HJ. The U.S. Court of Appeals for the Fifth Circuit, which has jurisdiction over Texas, has adopted the term in assessing the lawfulness of searches and seizures made on the basis of reasonable suspicion of smuggling along the southern border. *See, e.g.*, United States v. McDaniel, 463 F.2d 129, 133 (5th Cir. 1972) (discussing the constitutional rights of the "100-mile strip of citizenry within a 'deconstitutionalized zone'"). The concept of the "deconstitutionalized zone" as repurposed for this noncitizen veteran context will be further explored in Part III.

7. Section 237(a) of the INA identifies criminal and non-criminal-based classes of deportable noncitizens. 8 U.S.C. § 1227(a). These non-criminal classes include noncitizens who were inadmissible at the time of entry or adjustment of status (such as marriage fraud), violated their status (such as being on a student visa and failing to maintain enrollment at an eligible institution), or became a public charge within five years of entry and cannot affirmatively show that the causes of the public charge arose after entry. *id.* § 1227(a)(1)(G), (C); *id.*

not avail himself to the constitutional protections in JRAD or *Padilla* because of the date of finality of the plea, and is at risk in the era of the most fervent immigration enforcement in the history of the United States.

This "deconstitutionalized zone," where noncitizens with deportable criminal convictions between 1990 and 2010 do not benefit from JRAD or *Padilla*, is particularly punitive towards our noncitizen *veterans*. Veterans have long been at heightened risk of contact with the criminal justice system due to the intersection of age, gender, race, and mental and physical health issues such as Post-Traumatic Stress Disorder (PTSD) arising in part from their military service.[8] In addition, executive interference prevented noncitizen service members from naturalizing. Many noncitizen veterans mistakenly believed that they automatically became U.S. citizens upon enlistment, sometimes because that is what recruiters and/or military personnel told them.[9] Others may have applied to become citizens through special naturalization provisions for service members, but the military and/or the U.S. Citizenship and Immigration Services (USCIS)[10] mishandled or lost the paperwork, or the noncitizen service members missed interviews or oath ceremonies due to logistical issues such as deployments to warzones.[11]

It is foreseeable that a noncitizen veteran may find himself having contact with the criminal justice system. And for noncitizen veterans who received incorrect information about what military service meant for their immigration status from the Department of Defense (DoD) or who suffered from the administrative errors or inflexibilities of the DoD or USCIS in their naturalization applications, a criminal case with a "deconstitutionalized zone" conviction is a near guarantee of unjust deportation. This article highlights the acute plight of

§ 1227(a)(5). The classes also include a plethora of "deportable crimes," including but not limited to multiple convictions for crimes involving moral turpitude, a conviction related to high speed flight from an immigration checkpoint, failure to register as a sex offender, controlled substance offenses (including the categorization as a drug abuser or addict), certain firearm offenses, and a subclass of dozens of crimes housed under the term "aggravated felony." *id.* § 1227(a)(2)(A)(ii), (iv)-(v); *id.* § 1227(a)(2)(B)-(C); *id.* § 1227(a)(2)(A)(iii); *id.* § 1101(a)(43).

8. Part III.A.1 will further explore how noncitizen veterans, given these points of intersection, are predictively funneled into the criminal justice system.

9. BARDIS VAKILI, JENNIE PASQUARELLA & TONY MARCANO, ACLU OF. CAL., *Discharged, Then Discarded, How U.S. Veterans Are Banished by the Country They Swore to Protect* 24-25 (2016), https://perma.cc/R24B-QW9R.

10. Since 2003, USCIS has handled the adjudication of naturalization applications. Homeland Security Act of 2002, Pub. L. No. 107-296, § 451, 116 Stat. 2135, 2195 (2002) (codified as amended at 6 U.S.C. § 271). Prior to that, noncitizens applied for citizenship through the Immigration and Naturalization Service (INS). *See* Naturalization Act of 1906, Pub. L. No. 59-338, § 1, 34 Stat. 596 (1906); Organization of Executive Agencies, Exec. Order No. 6166 § 14 (June 10, 1933) (consolidating the Bureaus of Immigration and Naturalization as the INS). Since the "deconstitutionalized zone" covers a period where the INS, from 1990 to 2003, and USCIS, from 2003 to the present, conferred citizenship benefits, future reference to USCIS in the article covers the INS as well.

11. VAKILI ET AL., *supra* note 9, at 29 (recounting a noncitizen veteran's recollection of giving his naturalization application to his commanding officer in the Marines in 1994, only for the application never to appear in his immigration file and thus never be processed).

noncitizen veterans who find themselves in this "deconstitutionalized zone," sheds light on the responsibility of the executive branch for our noncitizen veterans' vulnerability to deportation, and identifies *nunc pro tunc* naturalization retroactive to the time of discharge from the military as the appropriate remedy to right the wrong.

In undertaking this analysis, this Article contributes to and connects several bodies of literature. First, it adds to emerging scholarship about immigration laws' impact on noncitizen veterans.[12] Second, it draws on a body of literature on the growing role of executive discretion in immigration law.[13] Third, it builds on existing literature regarding the Constitution's function in the intersection of criminal and immigration law.[14] This Article contributes to these various bodies of literature by examining how the confluence of current immigration laws, constitutional precedent, and executive practices that harmed noncitizen veterans creates a major problem as well as a unique discretionary solution to help them.

Part I provides a brief history of the federal government's volitional special treatment of veterans and the contributions of noncitizens in the U.S. military.

Part II recounts the creation of the "deconstitutionalized zone," including the retirement of the undervalued but constitutionally reinforced JRAD and the proliferation of "aggravated felonies" to deport LPRs. It provides an overview of

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12. *E.g.*, Ryan P. Coleman, *A Truer Concept of Service for Citizenship: Reimagining Military Naturalization*, 54 CONN. L. REV. 243 (2022); Christopher Clifton, *Naturalizing Through Military Service: Who Decides?*, 36 GEO. IMMIGR. L.J. 1061 (2022); Deenesh Sohoni & Yosselin Turcios, *Discarded Loyalty: The Deportation of Immigrant Veterans*, 24 LEWIS & CLARK L. REV. 1285 (2020); Ming H. Chen, *Citizenship Denied: Implications of the Naturalization Backlog for Noncitizens in the Military*, 97 DENV. L. REV. 669 (2020); Zachary R. New, *Ending Citizenship for Service in the Forever Wars*, 129 YALE L.J.F. 552 (2019-2020); Alejandra Martinez, *Veterans Banished: The Fight to Bring Them Home*, 19 THE SCHOLAR 321 (2017); Kevin Pimentel, *To Yick Wo, Thanks for Nothing!: Citizenship for Filipino Veterans*, 4 MICH. J. RACE & L. 459 (1999).

13. *E.g.*, David K. Hausman, *The Unexamined Law of Deportation*, 110 GEO. L.J. 973 (2022); Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661 (2015); HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 19-55 (2014); SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015); Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180 (2013); Erin B. Corcoran, *Seek Justice, Not Just Deportation: How to Improve Prosecutorial Discretion in Immigration Law*, 48 LOY. L.A. L. REV. 119 (2014); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009); Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619 (2012); David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE 167 (2012); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011); Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195 (2014).

14. *E.g.*, Juliet P. Stumpf, *Crimmigration and the Legitimacy of Immigration Law*, 65 ARIZ. L. REV. 113 (2023); Allison C. Callaghan, Comment, Padilla v. Kentucky*: A Case for Retroactivity*, 46 U.C. DAVIS L. REV. 701 (2012-2013); Kevin Ruser, Padilla v. Kentucky*: Crimmigration Law Goes Constitutional*, 13 NEB. LAW. 13 (2010).

Padilla and its role as a limited constitutional protection against the otherwise unfettered might of the deportation machine. It explores how *Padilla* serves as the outer limit to the "deconstitutionalized zone," the twenty-year period between 1990 and 2010 where no Sixth Amendment protection exists to check a conviction's impact on a noncitizen's ability to remain in the United States.

Part III explains the executive branch's role in rendering these immigration laws and policies particularly punitive for noncitizen veterans due to their increased likelihood of contact with the criminal justice system triggered by mental and physical health issues, self-medication through substance use, and correlative statistics around age, gender, and race related to military service. It demonstrates how the executive branch further tipped the scale in this calculus to the detriment of the noncitizen veteran with misinformation or the mishandling of their immigration matters, including service members' attempts to naturalize through special military provisions. It outlines how military service and naturalization eligibility requirements are remarkably similar, yet without the same immigration effect. Finally, it analyzes how noncitizen veterans handed a "deconstitutionalized zone" conviction are uniquely, unjustly, and foreseeably exposed to the risk of deportation.

Part IV proposes a solution to this injustice. It describes the discretionary authority of the executive branch to issue *nunc pro tunc*[15] relief, explains the insufficiency of the current exercise of executive discretion to help noncitizen veterans as a remedy, and identifies *nunc pro tunc* naturalization, retroactive to the time of discharge, as the executive branch's uniquely appropriate response to restore these noncitizen veterans.

I. WHO ARE OUR NONCITIZEN VETERANS?

Noncitizen veterans are part of a special class. The federal government has over centuries considered veterans as deserving of special support and recognition.[16] Of the fifteen departments of the executive branch, the Department of Veterans Affairs (VA) is the only one created to, as its mission, affirmatively care for a specific class of people.[17] It is an entity borne of the federal government's longstanding belief that it owes an "incredible debt" to veterans that "can

15. *Nunc pro tunc* is a Latin phrase that means "now for then." *Nunc pro tunc*, BLACK'S LAW DICTIONARY (11th ed. 2019). It refers to an act that retroactively applies to an earlier time. CORNELL LAW SCH., LEGAL INFO. INST., *Nunc Pro Tunc*, https://perma.cc/UE93-U66B (last updated Aug. 2023).

16. In 1865, President Abraham Lincoln made a promise to "care for him who shall have borne the battle and for his widow, and his orphan." U.S. DEP'T OF VETERANS AFFS., *Origin of the VA Motto*, https://perma.cc/C2H6-M8QH (last updated Mar. 28, 2025). VA's mission statement has been updated to include all veterans, reading: "To fulfill President Lincoln's promise to care for those who have served in our nation's military and for their families, caregivers, and survivors." Press Release, U.S. Dep't of Veterans Affs., New VA Mission Statement Recognizes Sacred Commitment to All Veterans, Their Families, Caregivers, and Survivors (Mar. 17, 2023) [hereinafter VA Press Release], https://perma.cc/KK86-UNZJ.

17. VA Press Release, *supra* note 16.

never be fully repaid."[18] Noncitizen veterans are, in no uncertain terms, members of this group.

Our noncitizen veterans are part of a centuries-long legacy of immigrants'[19] military service to the United States. Noncitizens have served in the U.S. military[20] since the birth of this country.[21] By the middle of the nineteenth century, half of the military recruits in the United States were immigrants.[22] At the time of the Civil War, one in four members of the Union Army were immigrants.[23] Around half a million immigrants served in the U.S. Army during World War I and 300,000 immigrants served during World War II.[24] Most noncitizens who serve in the U.S. military have been required to be and continue to be required to have lawful permanent residence at the time of enlistment.[25] The Immigration and Nationality Act (INA) of 1952 defines "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws."[26] LPRs, colloquially known as "green card holders," can work in the United States "without special restrictions, own property, receive financial assistance at public colleges and universities, and join the Armed Forces. They

18. Proclamation No. 10492, 87 Fed. Reg. 67763 (Nov. 7, 2022), https://perma.cc/WES3-939U. Interestingly, President Biden's 2022 Veterans Day Proclamation starts with an ode to those with the title of "*American* veteran." *Id.* (emphasis added). While the term is likely best understood as synonymous with "veteran of the United States," it poignantly illustrates the federal government's negligence towards the non-American, i.e., noncitizen, veteran.

19. "Foreign-born" and "immigrants" refer to people living in the United States who were not born U.S. citizens. Therefore, the term encompasses naturalized citizens, LPRs, and other types of noncitizens. Jie Zong & Jeanne Batalova, *Immigrant Veterans in the United States*, MIGRATION POL'Y INST. (May 16, 2019) https://perma.cc/VT5X-3Y3P.

20. The U.S. military, for purposes of this article, includes the Army, Navy, Marine Corps, and Air Force, which all operate under the Department of Defense. This does not include the Coast Guard, which is under the Department of Homeland Security and has both military and civilian law enforcement responsibilities. *United States Coast Guard (UCSG)*, U.S. DEP'T OF HOMELAND SEC., https://perma.cc/6XWU-HZ9Z (last updated Mar. 21, 2025). This also does not include the Space Force, which was created in 2019 and did not exist at the time "deconstitutionalized zone" convictions occurred. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1601, 132 Stat. 1636, 2101 (2018).

21. Zong & Batalova, *supra* note 19.

22. *Id.*

23. Don H. Doyle, *The Civil War Was Won by Immigrant Soldiers*, ZOCALO PUB. SQUARE (June 30, 2015), https://perma.cc/J38D-V4XP**.** USCIS estimates that one in five Union Army soldiers were immigrants. *The Immigrant Army: Immigrant Service Members in World War I*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://perma.cc/L7Z5-59TY (last updated Mar. 5, 2020).

24. Wendi Maloney, *World War I: Immigrants Make a Difference on the Front Lines and at Home*, LIBR. OF CONG. BLOGS (Sept. 26, 2017), https://perma.cc/VH8T-DLXV; Kim Guise, *New Citizen Soldiers: Naturalization During World War II*, NAT'L WORLD WAR II MUSEUM (July 2, 2020), https://perma.cc/R4N9-RY52.

25. 10 U.S.C. § 504(b)(1) (2018); *Requirements to Join the U.S. Military*, USAGOV, https://perma.cc/ZZX2-K3ST (last updated Mar. 10, 2025).

26. INA § 101(a)(20), 8 U.S.C. § 1101(a)(20).

can also become U.S. citizens if they meet certain eligibility requirements."[27] Because of all these benefits, it is not uncommon for LPRs to incorrectly believe they cannot be deported or that they are equivalent to citizens.[28] While LPR status sounds like and in theory can mean a permanent life in the United States, and military service intuitively reinforces that ideal, certain criminal convictions and other designated conduct (such as falsely claiming to be a U.S. citizen) can result in the noncitizen's deportation.[29]

Currently, only U.S. citizens and LPRs can join the military.[30] There are approximately 731,000 foreign-born veterans, about 16 percent (115,000) of whom have not naturalized to become citizens.[31] Noncitizen veterans are a sizeable group, but not one that puts any pressure on the proverbial floodgates, as they make up only .0003 percent of the U.S. population and .002 percent of the immigrant population. This number, however, does not consider the number of veterans who have been deported from the United States already. As of 2021, one estimate is that approximately 94,000 noncitizen veterans have been deported from the United States since 1997.[32] Using this figure, there is roughly a similar

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27. *Lawful Permanent Residents Annual Flow Report*, U.S. DEP'T OF HOMELAND SEC., https://perma.cc/G6Q2-S4FQ (last updated Aug. 7, 2024).

28. *The Ones They Leave Behind: Deportation of Lawful Permanent Residents Harms U.S. Citizen Children*, AM. IMMIGR. COUNCIL (Apr. 26, 2010), https://perma.cc/2K84-XVRD.

29. INA § 237(a)(3)(D)(i), 8 U.S.C. § 1227(a)(3)(D)(i). *See generally* INA § 237, 8 U.S.C. § 1227.

30. 10 U.S.C. § 504(b)(1)(B) (2018). The DoD authorized a pilot program in 2008 called the Military Accessions Vital to National Interest (MAVNI) Recruitment Program which allowed noncitizens *without* LPR status with certain critical skills to be recruited to the U.S. military. Deepa Mahendru, *Military Accessions Vital to National Interest (MAVNI) Recruitment Pilot Program*, DEP'T OF DEF. (Mar. 8, 2009), https://perma.cc/H4P4-NGF9. Over 10,000 noncitizen non-LPRs enlisted between 2008 to 2016. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-416, IMMIGRATION ENFORCEMENT: ACTIONS NEEDED TO BETTER HANDLE, IDENTIFY, AND TRACK CASES INVOLVING VETERANS 7 (2019) (citing DOD data). However, the program has been suspended since 2016 and has been subject to multiple lawsuits for the mishandling of these recruits' discharge and immigration status. H.R. REP. NO. 115-1100, at 117 (2018); *see*, *e.g.*, Calixto v. U.S. Dep't of the Army, No. CV18-1551, 2021 WL 2253351 (D.D.C. June 3, 2021); Nio v. U.S. Dep't of Homeland Sec., 385 F. Supp. 3d 44 (D.D.C. 2019); Kirwa v. U.S. Dep't of Def., 285 F. Supp. 3d 257 (D.D.C. 2018).

31. Jeanne Batalova, *Immigrant Veterans in the United States*, MIGRATION POL'Y INST. (May 9, 2024), https://perma.cc/VT5X-3Y3P; THE IMMIGRANT LEARNING CTR., *How Immigrants Give Back to the U.S. as Soldiers and Veterans*, https://perma.cc/2A2N-CSC7 (last visited May 2, 2025); *see* HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., R48163, FOREIGN NATIONALS IN THE U.S. ARMED FORCES: IMMIGRATION ISSUES 4 (2024).

32. Pilar Marrero, *The U.S. Has Deported Thousands of Veterans. A New Policy Change Offers New Hope for 'Soldiers Left Behind*,*'* PBS SOCAL (Nov. 17, 2021), https://perma.cc/Q6DV-GCTU. In 2016, the American Civil Liberties Union (ACLU) identified at least 239 deported veterans in 34 countries. VAKILI ET AL., *supra* note 9, at 9. The U.S. Government Accountability Office has reported that 250 veterans were placed into removal proceedings and 92 of those veterans were removed from the country from 2013 to 2018. However, the report also noted that ICE "did not consistently follow its policies involving veterans who were placed in removal proceedings," likely resulting in an undercount. Additionally, the report only provides data covering a period of 5 years. GAO-19-416, *supra* note 30, at 16.

number of noncitizens veterans in the United States as there are deported noncitizen veterans living outside the United States.

Noncitizen service members have been labeled more loyal and committed to their service for this country than their citizen comrades. Former Chairman of the Joint Chiefs of Staff, Marine Corps General Peter Pace, testified before Congress that noncitizen service members are "extremely dependable" and "some 8 . . . to 10 percent fewer immigrants wash out of our initial training programs" than their citizen counterparts.[33] In addition, he stated that "[s]ome 10 percent or more than those who are currently citizens complete their first initial period of obligated service to the country."[34] Dropout rates for noncitizens are nearly half that of citizens when their service reaches four years.[35]

Noncitizen veterans, as part of the foreign-born veteran population, have also brought valuable diversity to the U.S. military. The foreign-born veteran population has in recent decades consistently been more diverse than the native-born veteran population.[36] The majority of foreign-born veterans today are minorities. Thirty-seven percent identify as Hispanic, twenty-eight percent as Asian/Pacific Islander, and eleven percent as Black.[37] This is in line with the reality that, regardless of citizenship, "the percentage of racial minorities in the ranks of officers and enlisted personnel has increased significantly since 1990. In 2009, more than a third of all active-duty personnel identified as minorities (36.2%), an increase from 25.4% [since the late 1980s]."[38] The diversity of the U.S. military, in part made possible by noncitizen service members, has added incredible value in language and cultural competency to the U.S. military and is reflected in our veteran population.[39]

II. THE CREATION OF THE "DECONSTITUTIONALIZED ZONE"

In the late 1980s and into the 1990s, as noncitizen service members continued to carry on their legacy of rich and loyal service to the United States, Congress unfurled an immigration universe ready to ensnare them upon discharge. As they expanded laws around immigration enforcement, Congress also eliminated a decades-old constitutionally fortified protection against deportation: the judicial recommendation against deportation in criminal sentencing. It was not

33. *Contributions of Immigrants to the United States Armed Forces: Hearing Before the S. Comm. on Armed Servs.*, 109th Cong. (2006) (statement of Peter Pace, Chairman, Joint Chiefs of Staff), https://perma.cc/3829-RKDD [hereinafter *Hearings*].

34. *Id.*

35. Catherine N. Barry, *New Americans in Our Nation's Military: A Proud Tradition and Hopeful Future*, CTR. FOR AM. PROGRESS (Nov. 8, 2013), https://perma.cc/WDP4-2HSX.

36. Zong & Batalova, *supra* note 19.

37. *Id.*

38. PEW RSCH. CTR., WAR AND SACRIFICE IN THE POST 9-11 ERA 80 (Paul Taylor et al. eds, 2011), https://perma.cc/PU38-6U9X [hereinafter 2011 PEW].

39. *See Hearings*, *supra* note 33, at 26-33 (statement of Emilio T. Gonzalez, Dir., U.S. Citizenship and Immigr. Servs.); *id.* at 13-16 (statement of Hon. David S.C. Chu, Under Secretary of Def. for Pers. and Readiness).

until 2010 that the U.S. Supreme Court intervened to bring back the Constitution in the intersection between criminal convictions and immigration consequences. That gap between the end of JRADs and the beginning of *Padilla* exists as the "deconstitutionalized zone." This Part covers the conditions that created the "deconstitutionalized zone": Congress's creation and expansion of the aggravated felony to deport noncitizens, the Sixth Amendment protections and potential that were lost with the retirement of the JRAD, and *Padilla*'s belated and limited revival of the Sixth Amendment protections.

A. The Life and Death of the Judicial Recommendation Against Deportation (JRAD) (1917-1990)

For over seven decades, a creature of statute and critical procedural protection called the JRAD existed for noncitizens in state and federal criminal proceedings. JRADs were once a valuable aspect of criminal sentencing that, prior to *Padilla*, served as the main shield in a criminal proceeding against the future civil penalty of deportation.[40] JRADs also enjoyed Sixth Amendment protections.

Created by Congress in 1917, the JRAD was referenced by the Supreme Court as "a critically important procedural protection to minimize the risk of unjust deportation."[41] State and federal prosecutors—at the time of sentencing or within thirty days thereafter—could recommend that the noncitizen not be deported based on that conviction, regardless of whether the conviction arose from a plea or a guilty verdict through a jury trial.[42] While labeled as a recommendation, it was interpreted as giving the sentencing judge "conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation."[43] However, after being on the books for over seventy years, Congress stripped JRADs from immigration law entirely in 1990.[44]

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40. The now repealed statute once read:

> "[T]he provision . . . respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply . . . if the court . . . sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act . . . ."

Immigration Act of 1917, H.R. 10384, 64th Cong. § 19, 39 Stat. 874, 889-90 (repealed 1952).

41. *Id.*; Padilla v. Kentucky, 559 U.S. 356, 361 (2010).

42. *See* H.R. 10384 § 19, 39 Stat. at 889-90.

43. *Padilla*, 559 U.S. at 362 (quoting Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986)); *see, e.g.*, Haller v. Esperdy, 397 F.2d 211, 213 (2d Cir. 1968); Velez-Lozano v. INS, 463 F.2d 1305, 1308 (D.C. Cir. 1972); United States *ex rel.* Santarelli v. Hughes, 116 F.2d 613, 616 (3d Cir. 1940).

44. Immigration Act of 1990, Pub. L. No. 101-649, § 505(a), 104 Stat. 4978, 5050 (1990). Congress took JRAD off the table for narcotics offenses in 1952, but the provision thereafter remained undisturbed until its eradication in 1990. *See* INA, Pub. L. No. 82-414, § 241(b), 66 Stat. 163, 208 (allowing for the JRAD to apply to crimes under § 241(a)(4) (crimes involving moral turpitude) with no mention of § 241(a)(11) (crimes relating to drugs)). This was further clarified in 1956, when the provision was amended to include the following: "The provisions of this subsection shall not apply in the case of any alien who is charged with

Though before *Padilla* defense attorneys were not constitutionally required to advise on the immigration consequences of a plea, in the era of JRAD, such advisals were folded into the criminal court process during plea negotiations and prior to sentencing after a conviction because of the statutorily explicit availability of the JRAD. A defense attorney would first need to find out if his client needed a JRAD—to neutralize a plea that would otherwise trigger a deportation ground—to negotiate the request with the prosecutor and then have it presented before the sentencing judge. In fact, though JRAD was an exercise of judicial discretion created and permitted by federal statute, a criminal defense attorney's failure to make or put forth an adequate request for a JRAD could and did serve as a basis for a claim of ineffective assistance of counsel under the Sixth Amendment subject to the *Strickland v. Washington*[45] analysis under multiple federal circuits[46] and state courts.

Strickland v. Washington dictates that a defendant is entitled to the Sixth Amendment right to "effective assistance of counsel."[47] Under the *Strickland* analysis, a finding that counsel's representation "fell below an objective standard of reasonableness" (performance)[48] and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (prejudice) equaled ineffective assistance of counsel in violation of the Sixth Amendment.[49] That violation could then serve as a basis for post-conviction relief. Such relief could then give way to immigration relief.[50]

After *Strickland*, the U.S. Courts of Appeals for the Second, Fifth, and Ninth Circuits all determined that JRAD was part of the criminal sentencing process subject to review, including for ineffective assistance of counsel.[51] First, in 1986, the U.S. Court of Appeals for the Second Circuit in *Janvier v. United States* found that JRADs were part of the "critical stage of the prosecution to which the Sixth Amendment safeguards are applicable."[52] The U.S. Court of Appeals for

being deportable from the United States under subsection (a)(11) of this section." Narcotic Control Act of 1956, ch. 629, sec. 301(c), § 241(b), 70 Stat. 567, 575.

45. 466 U.S. 668 (1984).

46. *Janvier*, 793 F.2d at 456; United States v. Shaibu, 957 F.2d 662 (9th Cir. 1992); United States v. Castro, 26 F.3d 557, 562 (5th Cir. 1994).

47. *Strickland*, 466 U.S. at 686.

48. *Id.* at 688.

49. *Id.* at 694.

50. *See In re* Rodriguez-Ruiz, 22 I&N Dec. 1378, 1380 (B.I.A 2000). It is important to note that not all vacaturs of convictions give way to immigration relief. A vacatur based solely on "rehabilitation or immigration hardships" does not eliminate a conviction for purposes of seeking immigration relief. *In re* Pickering, 23 I&N Dec. 621, 624 (B.I.A. 2003), *rev'd on other grounds*, 465 F.3d 263 (6th Cir. 2006). This further illuminates the federal government's intent to do away with judicial discretion and authority in the realm of immigration consequences tied to criminal convictions.

51. *Janvier*, 793 F.2d at 455; *Shaibu*, 957 F.2d at 664; *Castro*, 26 F.3d at 561-62.

52. *Janvier*, 793 F.2d at 455. Lyonel Janvier, an LPR from Haiti, was convicted after a jury trial of possessing counterfeit currency and smuggling that currency into the United States. *Id.* at 450. Facing deportation, he moved the U.S. District Court for the Northern District of New York to vacate his sentence. *Id.* Janvier alleged that his defense counsel failed (1)

the Ninth Circuit, in *United States v. Shaibu*, relied on *Janvier* to similarly find that JRAD is part of the sentencing process and a final appealable decision.[53] In *United States v. Castro*, the U.S. Court of Appeals for the Fifth Circuit agreed with the Second Circuit's decision in *Janvier* and found that JRAD is part of the criminal sentencing process subject to the Sixth Amendment guarantee of effective assistance of counsel.[54]

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to request a JRAD and (2) to advise him that he would be deportable because of these convictions unless the sentencing judge made a JRAD no later than thirty days after sentencing therefore depriving him of his Sixth Amendment right to effective assistance of counsel. *See id.* at 451. The district court, denying his motion, found that JRAD existed "independent of any sentence imposed upon a criminal defendant," taking it outside of the purview of the Sixth Amendment right to effective assistance of counsel in a critical stage of a criminal proceeding. *See id.* The district court further found that the Sixth Amendment did not attach because JRAD is related to deportation proceedings, which is civil in nature. *Id.* Reversing the district court's decision, the U.S. Court of Appeals for the Second Circuit unanimously agreed with the defendant and deemed JRAD as "part of the [critical] sentencing stage of the criminal prosecution rather than part of the ensuing [civil] deportation proceedings," and subject to the Sixth Amendment. *Id.* at 452, 455. The case was remanded for the district court to carry out the *Strickland* analysis to decide whether to exercise its authority to vacate the sentence and judgment due to ineffective assistance of counsel. *Id.* at 456.

53. *Shaibu*, 957 F.2d at 664. In this case, following a guilty plea in January of 1990 in district court for conspiracy to commit a number of fraud-related offenses, the two petitioners, Shafii Shaibu (from Nigeria) and Edward Omiunu (from Nigeria or Ghana—the court could not definitively identify Mr. Omiunu's country of origin), submitted timely motions for a JRAD, which were denied by the sentencing judge. *Id.* at 662-63. These denials were subsequently appealed to the Ninth Circuit, where the court held that the denial of a JRAD motion is reviewable as an integral part of the sentence. *Id.* at 664. In doing so, the court "adopt[ed] the reasoning and analysis of the Second Circuit [in *Janvier*] as to the nexus between a JRAD and the sentencing process." *Id.* Because Shaibu and Omiunu's counsel made timely requests for JRADs, the issue of the Sixth Amendment right to effective assistance of counsel around JRADs was not squarely before the circuit court in this instance. However, following the court's reasoning for appellate review of a JRAD and its reliance on *Janvier*, counsel's failure to request one would likely have invoked a *Strickland* inquiry.

54. *Castro*, 26 F.3d at 561-62. Petitioner Marvin Castro, a native of Honduras, filed a writ of *coram nobis* in district court and claimed that he was deprived of effective assistance of counsel because of his defense counsel's failure to advise him of the availability of and to pursue a JRAD at sentencing. *Id.* at 558-59. In 1984, Castro pled guilty to conspiracy to transport stolen cars across state lines. *Id.* at 558. Unlike the district court in *Janvier*, the U.S. District Court for the Southern District of Texas held that Castro's claim for ineffective assistance of counsel procedurally failed the cause and prejudice standard and failed on the merits regardless because Castro could never show prejudice by proving that he would have received a JRAD had one been requested. *Id.* at 559. Looking to *Janvier*, the Fifth Circuit reversed the district court's decision and carried out a light *Strickland* analysis based on the record. *Id.* at 561-62. The court determined that "Castro may well be able to make a similar showing of inadequacy of counsel and prejudice" as considered under *Janvier* and *Strickland* and remanded the case to the district court to carry out a *Strickland* analysis. *Id.* at 561-63. See, however, the U.S. Court of Appeals for the First Circuit finding otherwise. United States v. Bodre, 948 F.2d 28, 35 (1st Cir. 1991), *cert. denied*, 503 U.S. 941 (1992) (finding that the substantive effect of a JRAD is on the civil immigration case, not the criminal sentence imposed). The wrinkle in *Bodre* is that the case was not about ineffective assistance of counsel or whether JRADs were subject to appellate review. It was about timing. The appellant, an LPR from the Dominican Republic, put forth a motion for a JRAD on November 26, 1990. *Id.* at 30. Three days later, while the motion was still pending, the elimination of JRAD by

State courts have also found Sixth Amendment violations for deficiencies around JRADs at sentencing. In 1985, the Oregon Supreme Court in *Lyons v. Pearce* found that the noncitizen from Jamaica received ineffective assistance of counsel because his defense attorney failed to request a JRAD on his behalf.[55] In 1987, the Supreme Court in Queens County in New York in *People v. Hyun Chul Nho* vacated a sentence of a noncitizen man due to ineffective assistance of counsel because the counsel failed to notify the INS of the JRAD, which resulted in removal proceedings.[56] In 1989, an appeals court in California in *People v. Barocio* found that defense counsel provided ineffective assistance because he failed to advise the defendant about the availability of JRADs.[57] In *People v. Ping Cheung*, a case involving a 1983 conviction from New York, the judge reviewed a motion to set aside a criminal sentence in which the presiding judge was quoted promising that he would make a JRAD as part of the plea agreement but then failed to do so.[58] The failure to carry out that promise resulted in a vacatur of the sentence 17 years later.[59]

As useful and effective as they were, JRADs were seldom used in courts because noncitizens didn't really need them when they existed.[60] Prior to the 1990s, crime-based deportations of noncitizens were incredibly low.[61] In 1990, around 30,000 individuals were removed from the United States when the total population was 250.1 million. Compare that with 360,000 removals in 2019 with a total population of 328.2 million. The U.S. population grew by 31.2 percent while the number of individuals deported in a year jumped 1100 percent.[62] The

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Congress went into effect. *Id.* The sentencing judge admitted that he would have granted a JRAD if not for the repeal. *Id.* at 30-31. Therefore, the issue was whether the repeal of the JRAD statute could go back in time three days to eliminate what would have been a guaranteed JRAD. The court held that because JRAD's effect was on a civil proceeding, the loss of that effect was civil and not subject to the constitutional prohibition of *ex post facto* laws. *Id.* at 35. The key difference is that *Bodre* was not about ineffective assistance of counsel around an avenue that was statutorily provided for. It regarded the constitutionality of the effect of JRAD's elimination by Congress, while *Janvier*, *Shaibu*, and *Castro* addressed the constitutionality of how JRAD functioned when it was still statutorily available to a defendant. A successful claim for ineffective assistance of counsel due to counsel's failure to request a JRAD would restore the defendant's ability to request the JRAD, not guarantee the effect of it. *Bodre*'s characterization of JRAD as part of a civil proceeding created a circuit split (though one can argue it is comparing apples and oranges) with *Janvier*, but the Supreme Court declined to take up the case. While the Supreme Court typically does not provide a reason as to why it declines to grant certiorari on a particular case, it is worth noting that by the time the case reached the Supreme Court in 1992, Congress had already created the new "aggravated felony" and JRAD had been off the books for over a year.

55. 694 P.2d 969, 978 (Or. 1985).

56. 523 N.Y.S.2d 368, 368-69 (N.Y. Sup. Ct. 1987).

57. 264 Cal. Rptr. 573, 580 (Cal. Ct. App. 1989).

58. 718 N.Y.S.2d 578, 579, 581-82 (N.Y. Sup. Ct. 2000).

59. *Id.* at 583.

60. Jason A. Cade, *Return of the JRAD*, 90 N.Y.U. L. REV. ONLINE 36, 38 n.12 (2015), https://perma.cc/SK8M-VT4P.

61. Philip L. Torrey, *The Erosion of Judicial Discretion in Crime-Based Removal Proceedings*, IMMIGR. BRIEFINGS, Feb. 2014, at 1, 6.

62. *Table 39: Aliens Removed or Returned: Fiscal Years 1892 to 2019*, U.S. DEP'T OF

deportation numbers were very low prior to the 1990s in part because the "aggravated felony" was not invented until 1988 and even then, only included murder and the trafficking of firearms or drugs.[63] The main trigger for deportation prior to the aggravated felony was a (a) conviction for (b) a crime involving moral turpitude (CIMT) (c) within five years after entry and (d) a sentence or serving of a prison term of one year or longer. All the cases related to ineffective assistance of counsel regarding JRADs were for deportation cases triggered by this one CIMT ground.

Another reason for the growth in deportations is that advances in technology have greatly facilitated immigration enforcement efforts. JRADs existed mostly at a time when comprehensive systems to identify noncitizens with criminal convictions did not exist. The internet was not invented until 1983 and it was not until 1989 that Congress provided the initial funding for the INS to develop an automated fingerprint identification system to identify and track noncitizens.[64] Five years later, Congress granted the INS an additional nearly $30 million to run this fingerprint identification system.[65] And in 1996, through the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), Congress mandated the operation of a "criminal [noncitizen] identification system" to "be used to assist Federal, State, and local law enforcement agencies in identifying and locating [noncitizens] who may be subject to deportation by reason of their conviction of aggravated felonies."[66] DHS now has the Enforcement Integrated Database (EID), which is a "shared common database repository for several DHS law enforcement and homeland security applications."[67] Programs for information sharing between ICE and local, state, and federal law enforcement entities have grown tremendously as well.[68] Now, with a noncitizen's alien number and country of birth, anyone on the internet can check where a noncitizen in ICE custody is presently detained.[69]

HOMELAND SEC., https://perma.cc/ZBK5-M8FS (last updated Dec. 13, 2022).

63. Immigration Act of 1990, Pub. L. No. 101-649, § 101(a)(43), 104 Stat. 4978 (1990); 8 U.S.C. § 1101(a)(43) (1988).

64. UNIV. SYS. OF GA., *A Brief History of the Internet*, ONLINE LIBRARY LEARNING CTR., https://perma.cc/FPS2-8F8A (last visited Aug. 9, 2023); U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., REPORT NO. I-2002-003, STATUS OF IDENT/IAFIS INTEGRATION (2001), https://perma.cc/HN32-M8TS.

65. U.S. DEP'T OF JUST., *supra* note 64.

66. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 432, 110 Stat. 1273, 1273-74 (1996).

67. U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT UPDATE FOR THE ENFORCEMENT INTEGRATED DATABASE (EID) ENFORCE ALIEN REMOVAL MODULE (EARM 3.0) DHS/ICE-PIA-015(B), at 2 (2011), https://perma.cc/9KL2-WD4V.

68. *See Law Enforcement Information Sharing Initiative*, U.S. IMMIGR. & CUSTOMS ENF'T, https://perma.cc/WA7C-EYT5; *287(g) - Memorandums of Agreement/Understanding (Old)*, U.S. IMMIGR. & CUSTOMS ENF'T, https://perma.cc/MM8S-Q38A (last updated Mar. 7, 2025) (listing all the memoranda of existing enforcement agreements between local law enforcement and ICE in twenty-six states).

69. *See Online Detainee Locator System*, U.S. IMMIGR. & CUSTOMS ENF'T, https://perma.cc/32BB-8JRH (last visited May 25, 2025).

Additionally, JRADs were infrequently used by sentencing judges, who were reluctant to get involved in immigration matters by issuing JRADs.[70] However, as we saw in the above-mentioned federal and state court decisions, procedural issues around JRADs then gave way to possible Sixth Amendment claims in the future. Finally, the law that pushed aggravated felonies into existence was enacted on November 18, 1988, and JRADs were eliminated on November 29, 1990. Therefore, JRADs and aggravated felonies coexisted for less than two years. Arguably, then, noncitizens had the most explicit protections against crime-based deportations when they needed them least.

Nonetheless, noncitizens entering criminal proceedings after the elimination of JRADs no longer had the built-in deportation risk assessment and binding recommendation at sentencing as well as the possibility of pursuing post-conviction relief for ineffective assistance of counsel after the fact. Interestingly, though unsurprisingly, noncitizens' pursuit of post-conviction relief through deficiencies around JRADs has occurred around, during, or soon after the passage of our current immigration laws and the uptick in immigration enforcement. The questions around whether JRAD were part of the sentencing process and subject to review made their way up to the Second Circuit in 1986, the Ninth Circuit in 1992, and the Fifth Circuit in 1994. The state cases all involve convictions that occurred between 1983 and 1990 with review happening in the late 1980s into the 2000s. The 2000 *Ping Cheung* decision in New York concerned a 1983 criminal case with a defective JRAD.[71] *Nho* out of New York was regarding a plea from 1985, with the ineffective assistance case decided in 1987.[72] *Lyons* was decided in Oregon in 1985, and the *Barcio* decision from California in 1989.[73]

The continued existence of JRADs would have been a gamechanger for noncitizens facing deportation based on aggravated felony convictions. From 1988 until their elimination in 1990, JRADs covered aggravated felonies, too.[74] During that narrow window, the U.S. District Court for the Eastern District of Michigan found that the drug trafficking aggravated felony could benefit from a JRAD and issued one for a noncitizen who pled guilty to the importation of cocaine.[75] When the noncitizen thereafter was charged with deportability based on a separate, non-criminal ground and the INS sought to mandatorily detain him based on his drug trafficking aggravated felony conviction, the U.S. Court of Appeals for the Sixth Circuit held that because of the JRAD, the INS could not mandatorily detain him based on that conviction.[76] Not only did the JRAD shield

70. Torrey, *supra* note 61, at 6.

71. *See* People v. Ping Cheung, 718 N.Y.S.2d 578 (N.Y. Sup. Ct. 2000).

72. People v. Hyun Chul Nho, 523 N.Y.S.2d 368 (N.Y. Sup. Ct. 1987).

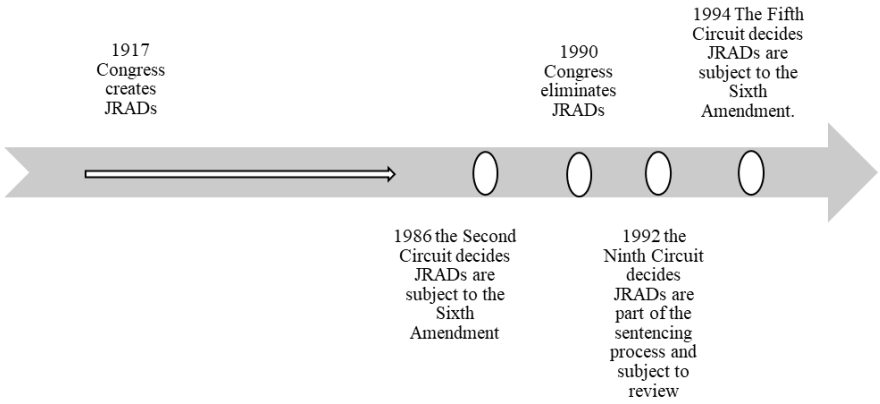
73. Lyons v. Pearce, 694 P.2d 969 (Or. 1985); People v. Barocio, 264 Cal. Rptr. 573 (Cal. Ct. App. 1989).

74. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7344, 102 Stat. 4181, 4470-71 (Nov. 18, 1988).

75. United States v. Probert, 737 F. Supp. 1010, 1010-11 (E.D. Mich. 1989), *aff'd*, 902 F.2d 35 (6th Cir.1990).

76. Probert v. INS, 954 F.2d 1253, 1255 (6th Cir. 1992).

noncitizens from deportation based on an aggravated felony conviction, it also foreclosed mandatory detention during removal proceedings based on a non-criminal ground. One can only imagine the value JRADs would bring to noncitizens' immigration cases if it continued to exist to cover current deportability grounds, including aggravated felonies, today.



B. The "Aggravated Felony" (1988-Present)

So, what is this "aggravated felony,"—the ship passing in the night bidding farewell to ship JRAD? Four main laws passed between 1988 and 1996 around the "aggravated felony" have propelled immigration law to where it is today: (1) the 1988 Anti-Drug Abuse Act; (2) the Immigration Act of 1990; (3) the infamous 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA); and (4) the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA).[77]

In 1988, through the passage of the Anti-Drug Abuse Act, Congress created a new category of crimes called the "aggravated felony" that subjects noncitizens to deportation.[78] An "aggravated felony" conviction renders a noncitizen deportable.[79] The term "aggravated felony" does not have a set definition.[80] An

77. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7341, 102 Stat. 4181, 4469 (1988) (codified as amended at 8 U.S.C. § 1101); Immigration Act of 1990, Pub. L. No. 101-649, §§ 501, 505, 104 Stat. 4978, 5048, 5050 (1990) (codified as amended at 8 U.S.C. § 1101); Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 321, 110 Stat. 3009, 627-28 (1996) (codified as amended at 8 U.S.C. § 1101(a)(43)); Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, §§ 432, 439-40, 110 Stat. 1214, 1273, 1276-77 (1996) (codified as amended at 8 U.S.C. § 1252c).

78. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342-43, 102 Stat. 4181, 4469-70 (1988) (codified as amended at 8 U.S.C. § 1101(a)(43)).

79. INA § 237(a)(2)(A)(iii) (8 U.S.C. § 1227(a)(2)(A)(iii) ("Any [noncitizen] who is convicted of an aggravated felony at any time after admission is deportable.").

80. Under current immigration law, the statute reads, "The term 'aggravated felony'

aggravated felony is an aggravated felony when Congress decides that a type of crime or a variation of a type of crime is one.[81] The first set of offenses that Congress designated as aggravated felonies in 1988 was murder, drug trafficking, and firearms trafficking.[82] An aggravated felony does not need to be a crime involving aggravating factors. Nor does it need to be a felony under federal or state law at all. In theory, Congress could add Broken Windows policing[83] offenses such as urinating in public or drawing graffiti to its list of "aggravated felonies" and render noncitizens deportable and LPRs permanently ineligible for citizenship for such offenses. The law also required that an "aggravated felon" be mandatorily detained during their immigration proceedings.[84] That way, once an IJ ordered a noncitizen removed, the noncitizen would already have been languishing in immigration custody and then swiftly put on the plane out of the country.

In 1990 and 1994, Congress designated additional crimes as "aggravated felonies," including money laundering and tax evasion.[85] In 1996, through the AEDPA and IIRIRA, Congress added twenty-one additional types of crimes as "aggravated felonies."[86] Congress has not made any additions or subtractions to the list of "aggravated felonies" since 1996. Current "aggravated felonies" include convictions for failures to appear,[87] an offense relating to counterfeiting for which the term of imprisonment is at least a year,[88] and obstruction of justice

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means—" and then lists all the offenses that Congress has decided are "aggravated felonies." 8 U.S.C. § 1101(a)(43).

81. *See id.*

82. *Id.*

83. Broken Windows Policing is a theory that was first described in the 1982 article *Broken Windows* which alleges that visible disorder generates and sustains more serious crime. George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC MONTHLY (Mar. 1, 1982), https://perma.cc/K3N5-ZW8B; *see also What Works in Policing?*, CTR. FOR EVIDENCE-BASED CRIME POL'Y, https://perma.cc/6LEL-VSS4 (last visited Apr. 17, 2024). The popularity of the theory led many police departments, most prominently the New York Police Department (NYPD), to increase patrolling and enforcement of low-level crimes like vandalism, prostitution, and public intoxication. *See, e.g.*, William J. Bratton, *Broken Windows and Quality-of-Life Policing in New York City*, N.Y.C. POLICE DEP'T (2015), https://perma.cc/ME5X-8TXU; *see also* Sarah Childress, *The Problem with "Broken Windows" Policing*, PBS (June 28, 2016), https://perma.cc/7X6R-FU5S (providing information about Broken Windows policing in Newark, New Jersey); *Albuquerque Police Department's Safe Streets Program*, DEP'T OF TRANSP. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (Apr. 3, 2015), https://perma.cc/Y4CW-VD5G (describing the Safe Streets Program inspired by Broken Windows policing theory in Albuquerque, New Mexico).

84. INA § 236(c), 8 U.S.C. § 1226(c) (1988).

85. 8 U.S.C. § 1101(a)(43) (1991); *id.* § 1101(a)(43)(A)-(Q) (1995).

86. *Id.* § 1101(a)(43)(A)-(U) (1997).

87. *Id.* § 1101(a)(43)(Q).

88. *Id.* § 1101(a)(43)(R). "Term of imprisonment" includes suspended sentences where the defendant does not serve any jailtime. *Id.* § 1101(a)(48)(B) (explaining that "term of imprisonment" includes "the period of incarceration of confinement ordered by a court of law regardless of any suspension of the imposition or execution of all or part of the sentence"); *In re* Esposito, 21 I. & N. Dec. 1 (B.I.A. 1995).

for which the term of imprisonment is at least one year.[89] The types of offenses that require a specific sentence to be an "aggravated felony" can produce jarring results. For example, while a theft offense *alone* is not categorically an aggravated felony, the iteration of a theft offense for which the term of imprisonment is at least one year, even if it is a suspended sentence with no actual jail time, *is* an aggravated felony.[90] More alarmingly, the aggravated felony deportation ground applies retroactively to convictions that occurred before the crime was labeled an "aggravated felony."[91] Currently, there are more than thirty types of crimes that are identified as "aggravated felonies" under the INA.[92]

In the vast immigration landscape, aggravated felonies don't work alone in mobilizing past criminal convictions for deportation. "Crimes involving moral turpitude" (CIMT) grounds of deportability are still on the books and can render a noncitizen deportable.[93] Controlled substance offenses, including marijuana offenses, also render a noncitizen deportable.[94] This is not to distract from the additional significant impacts that an aggravated felony has beyond rendering an LPR deportable in removal proceedings. As previously stated, a noncitizen with an alleged aggravated felony conviction is subject to mandatory immigration detention during the course of his proceedings.[95] Furthermore, an aggravated felony

89. 8 U.S.C. § 1101(a)(43)(S).

90. INA § 101(a)(43)(G) (codified as amended at 8 U.S.C. § 1101(a)(43)(G); INA § 101(a)(48)(B) (codified as amended at 8 U.S.C. § 1101(a)(48)(B)). Say person *A* stole a slice of pizza, was convicted of theft, and sentenced to physically be in prison for 364 days. Say person *B* also stole a slice and was convicted of theft with a suspended sentence of 365 days (no jail time). Person *B* is an aggravated felon who is subject to deportation, but Person *A* is not.

91. INS v. St. Cyr, 533 U.S. 289, 318–19, n.43 (2001) (stating that the aggravated felony definition itself clearly provides that it applies retroactively).

92. 8 U.S.C. § 1101(a)(43) (2023).

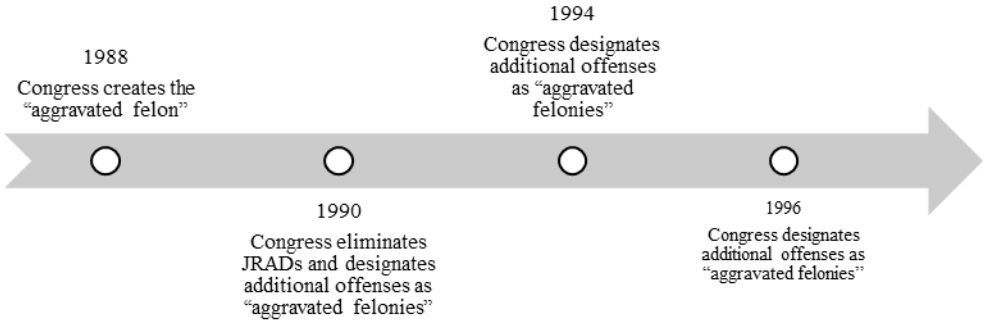
93. 8 U.S.C. § 1227(a)(2)(A)(i)-(ii) (2023); *id.* § 1251(a)(4) (1982). The phrase "crime involving moral turpitude" is a term of art created by Congress. Like aggravated felonies, there is no statutory definition for a CIMT, but unlike the aggravated felony, a CIMT is based on an analysis of the penal provision, and not a list of designated offenses created by Congress. The Board of Immigration Appeals (BIA), the highest administrative body housed under the Department of Justice tasked with interpreting and applying immigration laws, has defined CIMT as a "nebulous concept" and refers to "conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." 8 C.F.R. § 1001.3(d); *In re* Danesh, 19 I. & N. Dec. 669, 670 (B.I.A. 1988); *see In re* Perez-Contreras, 20 I. & N. Dec. 615, 618 (B.I.A. 1992); *In re* Flores, 17 I. & N. Dec. 225 (B.I.A 1980). There has been and continues to be a great deal of litigation around what offenses constitute CIMTs. See, for example, this chart covering nearly fifty BIA and circuit court cases regarding CIMTs for *only* assault-related offenses as of March 2021. CLINIC, *Board of Immigration Appeals and Circuit Court Case Law Chart: Assault-Related CIMTs*, https://perma.cc/FCC5-NYTB (last updated Mar. 19, 2021). Notwithstanding this, the Supreme Court held in 1951 that the Term CIMT, at least for fraud offenses, was not void for vagueness. Jordan v. De George, 341 U.S. 223 (1951).

94. 8 U.S.C. § 1227(a)(2)(B).

95. *Id.* § 1226(c)(1)(B).

conviction is a permanent bar to citizenship.[96] It can make a noncitizen permanently ineligible to receive any kind of status in the United States, including asylum.[97] It renders a noncitizen permanently barred from reentry to the United States following his departure and carries enhanced criminal penalties if he is thereafter criminally prosecuted for reentering the United States.[98]

The passage of IIRIRA, which went into effect on April 1, 1997, has been identified as creating "the most sweeping immigration law changes in the history of the United States."[99] The Supreme Court has acknowledged that these changes to immigration law "have dramatically raised the stakes of a noncitizen's criminal conviction."[100] The data supports this statement: Since the passage of IIRIRA, between 1997 and 2018, over 6.7 million noncitizens were removed from the United States.[101]



C. U.S. Veteran Jose Padilla's Partial Sealing of the "Deconstitutionalized zone"

Twenty years after the demise of the JRAD, the Supreme Court of the United States stepped in to check the crime-based deportation machine. In the landmark case *Padilla v. Kentucky*, the Supreme Court held that under the Sixth Amendment to the U.S. Constitution, criminal defense "counsel must inform her client whether his plea carries a risk of deportation."[102] Petitioner Jose Padilla was an

96. 8 C.F.R § 316.10(b)(1)(ii).

97. INA § 208(b)(2)(B)(i) (codified as amended at 8 U.S.C. § 1158(b)(2)(B)(i)).

98. INA § 212(a)(9)(ii) (codified as amended at 8 U.S.C. § 1182(a)(9)(ii)); *id.* § 276(b)(2) (codified as amended at 8 U.S.C. § 1326(b)(2)).

99. HUMAN RIGHTS WATCH, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy* (July 16, 2007), https://perma.cc/AN4K-VACL; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

100. Padilla v. Kentucky, 559 U.S. 356, 364 (2010).

101. DEP'T OF HOMELAND SEC., *supra* note 62. Prior to the passage of IIRIRA, between 1975 and 1996, fewer than 687,000 noncitizens were removed. *Id.*

102. 559 U.S. at 356.

LPR from Honduras who had arrived to the United States in the 1960s and had resided here for over forty years by the time this case reached the highest court.[103] Mr. Padilla was a veteran who had "served this Nation with honor as a member of the U.S. Armed Forces during the Vietnam War."[104] Mr. Padilla had been arrested in 2001, four years after IIRIRA went into effect, for transporting a large amount of marijuana in the state of Kentucky.[105] He pled guilty to the transportation of marijuana in the state of Kentucky in 2002.[106] When Mr. Padilla pled guilty to the drug charges in Kentucky, his criminal defense attorney did not advise him that the plea made his deportation virtually mandatory and that he did not have to worry about deportation because he had been in the country for a long time.[107] Soon after the plea, Mr. Padilla was served with an immigration detainer for deportation proceedings.[108]

In its analysis, the majority acknowledged the existence of the protection of JRADs before its demise in 1990, which previously had the power to bind the executive branch from being able to use the conviction at issue as a basis for deportation and the increasingly unforgiving and voracious immigration laws around deportation enacted between 1990 and 1996.[109] Against this backdrop of "dramatically raised . . . stakes," the Court conducted its analysis of whether failure to advise on immigration consequences in taking a plea constituted ineffective assistance of counsel.[110]

The Court found that "reasonable professional assistance" includes an advisal on the risk of deportation that a plea carries.[111] *Padilla* did not include discussion of prejudice, but the Court later decided in 2017 that, to establish prejudice, a petitioner need only prove that there is a reasonable probability he would have rejected the plea and proceeded to trial if he had known about the deportation risk.[112] Since *Padilla*, criminal defense bar associations, public defender offices, and immigration nonprofit organizations across the country have created positions and resources to assist criminal defense attorneys in adhering to this important constitutional requirement.[113] Noncitizens have also been able to

103. *Id.* at 359.

104. *Id.* In the opening paragraph of this decision, Justice Stevens provides information about Mr. Padilla that informs the legal analysis: his alienage, immigration status, and deportation-triggering plea. Conspicuously, the only additional biographical detail that the Court felt compelled to include, but which does not inform the analysis, is his military service.

105. Brief for Petitioner at 8, *Padilla*, 559 U.S. 356 (No. 08-651).

106. *Id.* at 9.

107. *Padilla*, 559 U.S. at 359.

108. Petition for Writ of Certiorari at 2-3, *Padilla*, 559 U.S. 356 (No. 08-651).

109. *Padilla*, 559 U.S. at 360 ("While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.").

110. *Id.* at 364.

111. *Id.* at 365, 369.

112. Lee v. United States, 137 S. Ct. 1958 (2017).

113. *Criminal-Immigration Resources*, CAIR COALITION, https://perma.cc/C2DZ-

pursue post-conviction relief through ineffective assistance of counsel claims, giving way to possible immigration relief and benefits.[114]

While this decision has protected countless noncitizens in federal and state criminal cases across all fifty states since 2010, the decision is not retroactive.[115] In 2013, the Supreme Court clarified in *Chaidez v. United States* that federal "defendants whose convictions became final prior to *Padilla* . . . cannot benefit from its holding."[116] *Chaidez* does not bind the states on retroactivity in their state criminal proceedings, but only a handful of states, including Massachusetts and New Mexico, have affirmatively decided for retroactive application of *Padilla* in state criminal cases.[117] Most state courts have decided against the retroactive application of *Padilla* in their criminal proceedings.[118]

Furthermore, *Padilla* does not do the direct work JRADs could do in securing a shield from deportation. *Padilla* is a judicially confirmed mandate on criminal defense attorneys to protect the rights of noncitizen defendants with regards to immigration consequences of pleas, but unlike its predecessor JRAD, it is by design limited to convictions arising from plea agreements. And unlike JRADs, it is not a way to get a judicial shield from deportation, but a notice to at minimum obtain informed consent for a plea and at maximum to help avoid a deportation-triggering plea. JRADs thus provided greater statutory, procedural, and constitutional protections.

Post-JRAD and pre-*Padilla*, convictions by noncitizen defendants do not have constitutional protections vis-à-vis immigration consequences, and these

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EH5V (last visited May 25, 2025) (providing resources, including individual case consultations, regarding immigration consequences of pleas in Virginia); *Immigration*, MARYLAND OFFICE OF THE PUBLIC DEFENDER, https://perma.cc/5XSK-2J9D (last visited Aug. 12, 2023) (noting the establishment of the Immigration Division in 2012 after *Padilla* and referencing in-house immigrant experts); *PD's Immigration Unit*, LAW OFFICES OF LOS ANGELES COUNTY PUBLIC DEFENDER, https://perma.cc/SGT5-V87Y (last visited Aug. 9, 2024) (stating that the office provides *Padilla* advisements); *Assistant Public Defender, Immigration Specialist*, ZIPRECRUITER, https://perma.cc/P558-PJKK (last visited May 25, 2024) (a job posting for a *Padilla* advising attorney with the Houston Public Defender's Office).

114. Zemene v. Clarke, 768 S.E.2d 684 (Va. 2015); State v. Nkiam, 778 S.E.2d 863 (N.C. Ct. App. 2015). California has even codified the *Padilla* decision in its penal code. Cal. Pen. Code § 1016.2.

115. Even though *Padilla* is an important and helpful protection for noncitizen defendants, there are still many incidents of lawyers failing to inform their clients about immigration consequences to their plea. This includes deported noncitizen veterans, who have also indicated that their defense attorneys did not tell them that their pleas might carry immigration consequences. Vakili et. al., *supra* note 9, at 37.

116. Chaidez v. United States, 568 U.S. 342 (2013). The majority in *Chaidez* stated that under Teague v. Lane, 489 U.S. 288 (1989), *Padilla* announced a new rule imposing a new obligation on defense attorneys and that a conviction that was final prior to that imposition may not benefit from the decision in a habeas or similar proceeding. *Id.* at 347.

117. *See* Commonwealth v. Clarke, 949 N.E.2d 892 (Mass. 2011); Commonwealth v. Sylvain, 995 N.E.2d 760 (Mass. 2013); Ramirez v. State, 333 P.3d 240 (N.M. 2014).

118. *See* State v. Alshaif, 724 S.E.2d 597 (N.C. Ct. App. 2012); State v. Garcia, 834 N.W.2d 821 (S.D. 2013); Miller v. State, 77 A.3d 1030 (Md. 2013); People v. Baret, 16 N.E.3d 1216 (N.Y. 2014).

noncitizens have been dropped into the "deconstitutionalized zone." For purposes of this article, the "deconstitutionalized zone" is not a place, but a zone defined by time and conditions that similarly exists outside of the reach of the Constitution's Sixth Amendment to the detriment of the noncitizen veteran.

This "deconstitutionalized zone" opened its portal at the death of JRAD and would have ballooned indefinitely if not for *Padilla*. But it is not exclusively temporal. It has multiple conditions, and it is a closed universe. The "deconstitutionalized zone" only applies to noncitizens. It covers convictions by noncitizens that took place between 1990 and 2010 that trigger deportation grounds but do not have the benefit of JRADs or *Padilla*. Even though IIRIRA went into effect in 1997, the label of the "aggravated felony" is retroactive, so a type of offense that was not identified as an aggravated felony until 1997 can still be a ground for deportability for a conviction that occurred before 1997.[119] And since ICE can initiate removal proceedings against noncitizens for past convictions at any time with no statute of limitations, the removal proceedings based on those 1990 to 2010 convictions could have occurred in that window of time, may be occurring right now, or may be initiated tomorrow. The main condition of the "deconstitutionalized zone" is that regardless of when immigration enforcement decides to pursue the deportation of a noncitizen under post-1996 immigration law, the deportation-triggering convictions is outside the reach of JRAD and *Padilla* but within the chokehold of our present INA.

III. SETTING THE NONCITIZEN VETERAN UP FOR DEPORTATION IN THE "DECONSTITUTIONALIZED ZONE"

The executive branch has played a significant role in setting the noncitizen veteran up for deportation in the "deconstitutionalized zone." This Part explains how military service—employment with the executive branch—foreseeably increased the likelihood of veterans having contact with the criminal justice system. It goes further to explain that interference from the executive branch prevented many noncitizen veterans from being able to naturalize and exposed them to the "deconstitutionalized zone." Exposure to the criminal justice system and interference by the executive branch have set noncitizen veterans up for deportation in this zone.

119. *In re* Lettman, 22 I. & N. Dec. 365 (B.I.A. 1998); Lopez–Amaro v. INS, 25 F.3d 986 (11th Cir. 1994) (following *Lettman*); *see also* Lewis v. INS, 194 F.3d 539, 545-46 (4th Cir. 1999); Bell v. Reno, 218 F.3d 86 (2d Cir. 2000) (finding that the amended definition of "aggravated felony" only applies in proceedings initiated after March 1, 1991). In removal proceedings arising in the U.S. Courts of Appeals for the Seventh and Ninth Circuits, however, an "aggravated felony" conviction is grounds for removal only if the conviction occurred after November 19, 1988. Zivkovic v. Holder, 724 F.3d 894, 911 (7th Cir. 2013); Ledezma-Galicia v. Holder, 636 F.3d 1059, 1080 (9th Cir. 2010).

A. Veterans' Increased Likelihood of Contact with the Criminal Justice System

When IIRIRA and AEDPA went into effect in 1997, there were over half a million foreign-born veterans in the United States.[120] It is unknown how many of those foreign-born veterans were LPRs. It is also unknown exactly how many noncitizen veterans have been deported since the dawn, rise, and expansion of aggravated felonies and how many noncitizen veterans are deportable today. What we do know is that before facing the many challenges of military service and reentry to civilian life, veterans were likely teenagers with near squeaky-clean criminal records who had been determined to have good moral character at the time of enlistment.[121] Upon discharge, notwithstanding the values of loyalty, duty, respect, selfless service, honor, integrity, and personal courage instilled in them during their service, that changed.[122] In 1998, there were nearly a quarter of a million veterans in U.S. prisons and jails, accounting for 12 percent of all inmates.[123] The majority of those veterans were honorably discharged from the military.[124] In 2021, nearly 200,000 veterans were serving time in state or federal prison.[125] Veterans are more likely than civilians to be arrested, and the Veterans Justice Commission has been working to figure out why and recommend changes.[126] According to its preliminary report, one in three veterans self-report having been arrested at least once compared to one in five for civilians.[127] Almost eight percent of those currently incarcerated in state prisons are veterans.[128] Data on service members from the year IIRIRA went into effect, when convictions taken at that time could not benefit from JRADs or *Padilla*, and the present day show that noncitizen veterans' increased likelihood of contact with the criminal justice system and subsequent risk of deportation were and continue to be foreseeable.[129]

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120. Zong & Batalova, *supra* note 19.

121. Around the time IIRIRA went into effect, an applicant to the U.S. military had to meet "rigorous moral character standards." Potential new recruits were questioned on their criminal history at the initial screening, another interview, and, for some, a computerized records search. U.S. DEP'T OF DEF., POPULATION REPRESENTATION IN THE MILITARY SERVICES 2-4 (1998).

122. *The Army Values*, U.S. ARMY, https://perma.cc/7W4W-QWSE (last visited Mar. 20, 2025).

123. Christopher J. Mumola, *Veterans in Prison or Jail*, U.S. DEP'T OF JUST. (Jan. 2000), https://perma.cc/FVJ8-9EAN.

124. *Id.*

125. *Commission to Study Why So Many Veterans End up in Jail, Prison*, NAT'L CRIM. JUST. ASS'N (Aug. 23, 2022), https://perma.cc/6PCA-PBQT. The Bureau of Justice Statistics estimated that approximately 107,000 veterans were serving time in state or federal prison in 2016. LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, *Survey of Prison Inmates, 2016: Veterans in Prison*, U.S. DEP'T OF JUST. (2021), https://perma.cc/6YTK-AP47.

126. COUNCIL ON CRIM. JUST., FROM SERVICE THROUGH REENTRY: A PRELIMINARY ASSESSMENT OF VETERANS IN THE CRIMINAL JUSTICE SYSTEM (2022), https://perma.cc/6B2U-QYY3.

127. *Id.*

128. *Id.*

129. As a basic premise, regardless of immigration or military service, contact with the

The Gender, Age, and Race Makeup of Service Members Predict a Higher Likelihood of Veterans to Eventually Enter the Criminal Justice System.

At the time someone successfully enlists to be a part of the U.S. military, he is statistically ensured to be part of a cohort that is at a higher chance of contact with the criminal justice system in the future. For one, the gender, age, and racial makeup of those entering military service all point to an increased and foreseeable likelihood of a future veteran's contact with the criminal justice system.

Gender: Most veterans, regardless of immigration status, have been men. While women are a growing share of the military and the veteran population, in Fiscal Year 1997, men made up 88 percent of service members.[130] Over 95 percent of veterans were men in Fiscal Year 1997.[131] It is well established that men are statistically more likely to be arrested for a crime than women are by a large margin.[132] In 1997, males made up 78 percent of the over 15.3 million arrests in the country.[133] It has been projected that as of September 30, 2023, 82 percent of veterans will be men.[134] As expected, an overwhelmingly majority of veterans, around 98 percent, currently serving time in state or federal prison, are male.[135]

Age: Most new recruits who have entered military service have been the youngest of adults. Most individuals enlisting in the U.S. military, citizen or not, in recent decades have done so at the age range of 18 to 24.[136] Currently, the average length of service is 6.7 years.[137] Therefore, the age range of individuals who are discharged from the military is 23 to 31. In Fiscal Year 1997, approximately 88 percent of new recruits were 18- to 24-year-olds.[138] The Army and

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criminal justice system by any person in the United States is also predictable. Interfacing with the criminal justice system in the United States is commonplace. Between 70-100 million individuals, or as many as one in three Americans, have a criminal record. Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR FOR JUST. (Nov. 17, 2015), https://perma.cc/V8KY-84PQ.

130. U.S. DEP'T OF DEF., *supra* note 121, at 2-12.

131. DEP'T OF VETERANS AFFS., THE ANNUAL REPORT OF THE SECRETARY OF VETERANS AFFAIRS—FY 1997 1 (1998). It is predicted that by 2050, nearly twenty percent of the military will be women.

132. In 1997, there were around 268 million persons in the United States. *Statistical Abstract of the United States: 1998*, U.S. CENSUS BUREAU 1 (Sept. 25, 1998), https://perma.cc/YG8A-9QE8. Around forty-nine percent were male but men made up seventy-eight percent of all the arrests nationally. *See id.* at 14; FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT, CIUS 1997, at 222 (1998), https://perma.cc/6377-6J4L.

133. *See* FED. BUREAU OF INVESTIGATION, *supra* note 132.

134. *National Center for Veterans Analysis & Statistics*, DEP'T OF VETERANS AFFS., https://perma.cc/K4WP-58MR (last updated Sept. 7, 2022).

135. Maruschak et al., *supra* note 125, at 4.

136. *Population Representation in the Military Services: Fiscal Year 2017 Summary Report Appendix B*, OFFICE OF THE UNDER SEC'Y FOR PERS. AND READINESS (2017), https://perma.cc/P3ZV-GRTJ.

137. 2011 PEW, *supra* note 38, at 79.

138. *Population Representation in the Military Services Fiscal Year 1997*, *Table B-1*, U.S. DEPT' OF DEF., https://perma.cc/3JZH-56HY (last visited May 2, 2025).

Navy at that time accepted applicants up to age 35, while the Air Force had the ceiling at 27 years old and the Marine Corps at 29.[139] Forty-four percent of the Marine Corps recruits during the 1997 fiscal year were 17- and 18-year-old teenagers.[140] In Fiscal Year 1997, the average length of service for active service members was 7.4 years.[141] Therefore, at around the time that IIRIRA became law, the average service member would separate from service between the ages of 25 and 32. The Department of Veterans Affairs estimated that over two million of its veteran population would be between the ages of 20 and 34 as of July 1, 1997.[142] This timing of separation from service being between a service member's mid-twenties to mid-thirties is statistically detrimental to veterans. In 1997 when IIRIRA went into effect, and presently, adults between the ages of 25 and 34 experienced the greatest percentage of arrests nationally.[143] This range overlaps almost exactly with the age at time of discharge for veterans. In 1996, adults between the age of 18 and 24 also collectively had a sizable percentage of twenty-six percent of total arrests nationally.[144] However, given that most new recruits at that time were in that age range of 18 to 24 when they first entered the military, service members between those ages would have been removed from the general population and shielded from contact with the criminal justice system by the strict and regimented lifestyle of the military. Every new recruit would have gone through basic training that lasted anywhere from eight to thirteen weeks.[145] They were told what to wear, what and when to eat, when to sleep, and what values to espouse.[146] But after many years of service and upon discharge, they left the service needing to adapt to civilian life with less structure and at an age where they faced an increased likelihood of coming into contact with the criminal justice system.[147]

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139. DEP'T OF DEF., *supra* note 121, at 2-8.

140. *Id.*

141. 2011 PEW, *supra* note 38, at 79.

142. DEP'T OF VETERANS AFFS., *supra* note 131, at 56.

143. By 1996, individuals between the ages of 25 and 34 made up more than twenty-seven percent of total arrests in the United States. Compare this with 7.4% for ages 40 to 44 and 1.1% for ages 55 to 59. FED. BUREAU OF INVESTIGATION, *Crime in the U.S.*, tbl.38 (1997), https://perma.cc/R4KB-5JAV.

144. *Id.*

145. SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., UNDERSTANDING THE MILITARY: THE INSTITUTION, THE CULTURE, AND THE PEOPLE 10 (2010), https://perma.cc/R8BF-L7QD.

146. *Id.*

147. MITRE Corp., *Military-to-Civilian Readiness: The Past, Present, and Future of the Transition Process*, 2 (2019), https://perma.cc/RF34-66F8 (noting that "some veterans miss the strict structure of military life" and "struggle with the lack of structure that permeates other civilians' lives."). Congress has recognized the difficulties of servicemembers' transition from military to civilian life by requiring, since 2011, that all separating servicemembers participate in the Transition Assistance Program (TAP) to receive counseling, employment assistance, information on federal veteran benefits, and other supports. VOW to Hire Heroes Act, Pub. L. No. 112-56, tit. II, 125 Stat. 711, 713-733. Between 2023 and 2024, the GAO made no fewer than eleven recommendations to the Department of Defense and three to the VA to improve their support for the transitioning population. U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-

Race and Diversity: Race also plays a role in predicting an increased chance of a veteran having contact with the criminal justice system. As a basic premise, the United States over-polices its population. Police arrest someone every three seconds in the United States.[148] One in three people in this country will experience arrest by age 23.[149] This is largely because law enforcement over-polices communities of color, particularly Black individuals. Today, one in two young Black men will be arrested by age 23.[150] In the United States, Black people are five times more likely to be arrested than White people.[151] This does not bode well for veterans. Minorities in recent decades have consistently been overrepresented in the U.S. military. For example, regardless of citizenship, minorities made up around 35 percent of the enlisted U.S. military in Fiscal Year 1997.[152] In Fiscal Year 1997, Black service members made up nearly 30 percent of the U.S. Army, which is the largest branch of the U.S. military, and 20 percent of all new recruits across all branches, while only making up 14 percent of the total U.S. population.[153] Nearly 47 percent of current active-duty service members identify as persons of color or biracial compared to forty percent of the general public.[154] As previously noted, seventy-seven percent of foreign born veterans are minorities.[155] The largest share of foreign-born veterans, at fifteen percent, are from Mexico and eleven percent are from the Philippines.[156] Being more diverse in race than the civilian population, the veteran population, and particularly the foreign born population, were and are at increased odds of contact with the criminal justice system upon discharge from the military and reentry into civilian life.

Veterans Face Mental and Physical Challenges to Adjustment to Civilian

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107752, DOD AND VA TRANSITION PROGRAMS: RECOMMENDATIONS FOR IMPROVING MENTAL HEALTH SUPPORT, Preface (2024). For example, the GAO found that the DoD's inTransition program, which is intended to facilitate connections between separating servicemembers and mental health services, was failing to connect with over seventy percent of eligible service members in 2022. U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106189, DOD AND VA HEALTH CARE: ACTIONS NEEDED TO BETTER FACILITATE ACCESS TO MENTAL HEALTH SERVICES DURING MILITARY TO CIVILIAN TRANSITIONS 16 (2024). The GAO recommended expanded outreach efforts to help connect transitioning service members with mental health services. *Id.* at 18.

148. Rebecca Neusteter & Megan O'Toole, *Every Three Seconds: Unlocking Police Data on Arrests*, VERA INST. OF JUST. (Jan. 2019), https://perma.cc/3295-TQJU.

149. Logan Schmidt, Micah Haskell-Hoehl & Hayne Yoon, *Data-Backed Outrage: Police Violence by the Numbers*, VERA INST. OF JUST. (Jul. 7, 2020), https://perma.cc/F4CB-M7ND.

150. *Id.*

151. Anagha Srikanth, *Black People 5 Times More Likely to be Arrested Than Whites, According to New Analysis*, THE HILL (Jun. 11, 2020), **https://perma.cc/R6DU-YWA2**.

152. DEP'T OF DEF., *supra* note 121, at 2-8.

153. *Id.* at 2-11.

154. *Id.*

155. Zong & Batalova, *supra* note 19.

156. Batalova, *supra* note 31.

Life upon Discharge.

Former Marine and current deported veterans advocate Mr. James Smith of Black Deported Veterans of America recounted that when he was in training, new Marines recruits were made to shout together, morning, day, and night, the following chant: "Those who kill for pleasure are sadists. Those who kill for money are mercenaries. Those who kill for both are Marines."[157] While in the military, service members are trained to fight and kill.[158] However, upon separation from service, service members are expected to seamlessly adjust back to civilian life. The VA makes efforts to assist its veterans to adjust to civilian life,[159] but veterans are still struggling. A 2019 survey found that nearly half of the veterans reported feeling "inadequately prepared for the transition to civilian life."[160] Upon separation from service, veterans deal with difficulties in finding civilian employment and securing housing. As of January 2024, over 32,000 veterans were experiencing homelessness.[161] They encounter challenges to their mental and physical health and access to care.[162] "[S]tudies show that service-related trauma exposure, combined with increased incidence of mental health and substance use disorders, elevates veterans' risk of [criminal] justice system involvement."[163]

Nearly one third of veterans develop Post-Traumatic Stress Disorder (PTSD).[164] PTSD is a "psychiatric disorder that may occur in people who have experienced or witnessed a traumatic event, series of events or set of circumstances."[165] The veteran "may experience this as emotionally or physically harmful or life-threatening and may affect mental, physical, social, and/or spiritual

157. Teleconference Interview with James Smith, Advocate, Black Deported Veterans of America (Mar. 15, 2023).

158. *Id.*

159. For example, the VA has the Transition Assistance Program (TAP) provide "resources for emotional, employment and financial stability and [create] a support network that can provide a smooth transition for a [v]eteran and their family." Outreach, Transition and Economic Development, U.S. DEP'T OF VETERAN AFFS., https://perma.cc/8SFN-UWUZ (last visited Dec. 29, 2024).

160. Kim Parker et al.,*The American Veteran Experience and the Post-9/11 Generation*, 17-18, PEW RSCH. CTR. (Sept. 10, 2019) [hereinafter 2019 Pew], https://perma.cc/YK39-TD8Z.

161. Tanya de Sousa & Meghan Henry, *2024 Annual Homelessness Assessment Report (AHAR) to Congress*, U.S. DEP'T OF HOUS. AND URB. DEV. (2024) at 49, https://perma.cc/4GCE-AYL8 (identifying issues with long wait times and lack of quality control and oversight over contractors providing health care to veterans).

162. U.S. Gov't Accountability Off., *A Veterans' Program Meant to Help Increase Access to Health Care May Struggle to Do So*, WATCHBLOG (Aug. 29, 2024), https://perma.cc/5G43-RL5D.

163. Council on Criminal Justice, *supra* note 126, at 3.

164. Anna Kline et al., *Effects of Repeated Deployment to Iraq and Afghanistan on the Health of New Jersey Army National Guard Troops: Implications for Military Readiness*, 100 AM. J. PUB. HEALTH 276, 276 (2010), https://perma.cc/RKK6-M9RM.

165. *What is Posttraumatic Stress Disorder (PTSD)*?, AM. PSYCHIATRIC ASSOC., https://perma.cc/2PYD-TTRA (last visited May 9, 2025).

well-being. Examples include . . . serious accidents, terrorist acts, war/combat, rape/sexual assault, historical trauma, . . . and bullying."[166] Many of the sources of PTSD align with experiences by veterans because the diagnosis itself was developed in 1980 in part through the study of veterans.[167] By the nature of their work, veterans were at a heightened risk of serious accidents while in service. "Combat deployment is strongly associated with the development of [PTSD] and traumatic brain injury [TBI]."[168] Of the 2.7 million service members that the United States sent to fight in Vietnam, including Petitioner Padilla, 700,000 of them (25 percent) required some form of psychological treatment.[169] After the Vietnam War, when JRAD was being undone, the United States deployed 694,550 service members to the Gulf for Desert Shield/Desert Storm from 1990 to 1991.[170] The American Psychological Association (APA) also identifies terrorist acts as a source of PTSD. Four years after IIRIRA was enacted, the September 11 attack occurred, and since then, two out of three service members post-9/11 have been deployed overseas to fight in the Global War on Terror and more than half of them have been deployed more than once.[171] As the name implies, many of these service members will have been exposed to terrorism. So, these individuals did not only see combat but also may have witnessed terrorist acts to increase the likelihood of having PTSD.

The risk of PTSD goes up not just with combat and the conditions that come with that, but also through factors like age and race. "Veterans who served in the military since September 11, 2001," who "are younger and more racially diverse than the general public and [] have seen more combat deployments—and redeployments—than any previous cohort of service members" are at heightened risk of PTSD.[172] This is exacerbated by the fact that minorities are significantly less likely to receive treatment for PTSD symptoms than white individuals.[173] Rape

166. *Id.*

167. Morgan Godvin, *How Veterans Created PTSD*, JSTOR DAILY (Nov. 9, 2021), https://perma.cc/Q9QS-947G. The diagnosis of PTSD was influenced by "a number of social movements," including "[v]eteran . . . advocacy groups." Matthew J. Friedman, *History of PTSD in Veterans: Civil War to* DSM-5, NAT'L CTR. FOR PTSD, https://perma.cc/F8ZP-FZRP (last updated May 9, 2024). Since the 9/11 attacks, there has been an explosion of research around the mental health effects, including PTSD, of mass violence. Mark Moran and Katie O'Connor, *9/11 Attacks Changed Understanding of Trauma, Elevated Disaster Psychiatry*, PSYCHIATRY ONLINE (Aug. 17, 2021) (stating that more research has been conducted on the mental health effects of the 9/11 attacks, including PTSD, than any other act of mass violence in American history).

168. Council on Criminal Justice, *supra* note 126, at 4.

169. *Id.*

170. *America's Wars*, DEP'T OF VETERANS AFFS. (Nov. 2023), https://perma.cc/2FYF-QJKH.

171. *Id.*; *see* 2019 Pew, *supra* note 160.

172. Council on Criminal Justice, *supra* note 126, at 3-4.

173. A. L. Roberts, S. E. Gilman, J. Breslau, N. Breslau & K. C. Koenen, *Race/Ethnic Differences in Exposure to Traumatic Events, Development of Post-Traumatic Stress Disorder, and Treatment-Seeking for Post-Traumatic Stress Disorder in the United States*, 41 PSYCH. MED. 71, 72 (2011).

and sexual assault, also sources of PTSD, have come to the forefront as a major issue in the military.[174] Data from 2010 show that there were an estimated 26,000 victims of unwanted sexual contact in the military.[175] After such contact, 81% of males and 67% of females didn't report the incident, severely limiting the opportunities for accountability and healing from the trauma.[176] Hazing and bullying, another source of PTSD, in the military have also been a huge problem.[177] A study by the Government Accountability Office (GAO) on hazing in the military from Fiscal Years 2017 to 2020 found that the DoD severely underestimated the number of hazing incidents by tens of thousands.[178] All in all, the military is the home ground and ideal space for PTSD to rear its agonizing head.

Military veterans also struggle with physical injuries like Traumatic Brain Injury (TBI) arising from their service. TBI is "a disruption in the normal function of the brain that can be caused by a blow, bump or jolt to the head, the head suddenly and violently hitting an object or when an object pierces the skull and enters brain tissue."[179] TBI can cause a variety of mental health issues, including mood disorders, anxiety, and PTSD.[180] Symptoms also include increased confusion, restlessness, impulsivity, aggression, and agitation, which facilitate behavior that go awry of the law.[181] Symptoms arising from PTSD and TBI symptoms "fuel substance misuse."[182] In 1996, over 25 percent of veterans who were being treated in VA medical facilities were being treated for primary or secondary substance abuse.[183] Currently, more than one in ten veterans have been diagnosed with substance abuse disorder (SUD).[184] Veterans also self-medicate or overmedicate for physical ailments arising from their time in the military, and substance abuse and contact with the criminal justice system are closely linked.

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174. *Sexual Violence in the Military*, VAWNET, https://perma.cc/33YB-C3UZ (last visited Aug. 12, 2023).

175. *Id.*

176. *Id.*

177. Exposure to hazing and bullying in the U.S. Army has been found to be significantly associated with mental health disorders like PTSD. Laura Campbell-Sills, et al., *Exposure to Bullying or Hazing During Deployment and Mental Health Outcomes Among US Army Soldiers*, 6 JAMA NETWORK OPEN 1 (2023), https://perma.cc/L7B4-RJXB.

178. U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104066, MILITARY HAZING: DOD SHOULD ADDRESS DATA REPORTING DEFICIENCIES, TRAINING LIMITATIONS, AND PERSONNEL SHORTFALLS (Dec. 15, 2021), https://perma.cc/U8BC-NK2G.

179. Nitin Agarwal, Rut Thakkar & Khoi Than, *Traumatic Brain Injury*, AM. ASS'N OF NEUROLOGICAL SURGEONS (Mar. 27, 2024), https://perma.cc/LR72-4DRC.

180. Jonathon Howlett, Lindsay Nelson & Murray Stein, *Mental Health Consequences of Traumatic Brain Injury*, 91 BIOLOGICAL PSYCHIATRY 413, 414 (2022).

181. Marvin M. Brooke et al., *Agitation and Restlessness After Closed Head Injury: A Prospective Study of 100 Consecutive Admissions*, 73 ARCHIVES OF PHYSICAL MED. REHAB. 320, 323 (1992).

182. Chuck Hagel & Leon Panetta, *America's Post-9/11 Veterans are Struggling and Need our Help*, THE HILL (Mar. 27, 2023), https://perma.cc/R38F-9WJQ.

183. U.S. DEP'T OF VETERANS AFFS., FISCAL YEAR 1996 REPORT 13 (1996).

184. *Substance Use and Military Life DrugFacts*, NAT'L INST. ON DRUG ABUSE, https://perma.cc/35FQ-NBGV (last updated Oct. 2019).

Eighty-five percent of the U.S. prison population have abused drugs or alcohol.[185] PTSD, TBI, and substance abuse "are associated with crime and justice involvement for veterans."[186] The close relationship between PTSD and interaction with the criminal justice system is not breaking news. In 1990, the year JRAD ended and the Gulf War began, Representative George Brown testified before the House Judiciary Committee that PTSD associated with their military service was "the root of the problems," and that these experiences were "at least a part" of what led veterans into prison.[187] In 2000, the Vietnam Veterans of America stated that it "believe[d] that past trauma is a complicating factor in the lives of many veterans incarcerated."[188] Still today, veterans suffer from their experiences in the military and are more likely than civilians to enter the criminal justice system.[189]

Age at time of discharge, gender, race, PTSD and other mental health issues, TBI and other physical health problems, and substance abuse problems—predictive factors and outcomes common to veterans—compound each other to angle the veteran into the criminal justice system. For the *noncitizen* veteran, that contact could then predictably serve as a trigger for deportation. [190]

B. Why Didn't They Just Naturalize?

One may wonder why the noncitizen veteran did not naturalize through his military service as soon as possible to avoid the future possibility of deportation for criminal convictions. After all, there are special and more lenient requirements for naturalization by statute for service members. It is a valid thought, and one not lost on the noncitizen veterans who enlisted. For noncitizen service members, the bureaucracy-rife route to naturalization may have been top of mind during their military service. However, government misinformation and mishandling of their files impeded noncitizen service members' road to naturalization.

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185. *Criminal Justice DrugFacts*, NAT'L INST. ON DRUG ABUSE, https://perma.cc/J3H6-52SR (last updated June 2020).

186. *Id.*

187. *Incarcerated Veterans Rehabilitation and Readjustment Act of 1989: Hearing on H.R. 3453 Before the Subcomm. on Cts., Intellectual Prop. & the Admin. of Just. of the H. Comm. on the Judiciary*, 101st Cong. 29 (1990) (statement of Rep. George E. Brown, Jr.).

188. Kweilin T. Lucas et al., *Military Veteran Involvement with the Criminal Justice System: A Systematic Review*, 66 AGGRESSION AND VIOLENT BEHAV. (2022).

189. Council on Criminal Justice, *supra* note 126, at 3.

190. Would time in prison help noncitizen veterans get treatment and rehabilitate? No. Since 1999, a federal rule has prohibited incarcerated veterans from receiving care from the Veterans Administration. 38 C.F.R. § 17.38(c)(5); *From Confinement to Community: Supporting Successful Veteran Reentry and Employment*, COUNCIL ON CRIM. JUST. (2024), https://perma.cc/QB7H-QNGX; Evan R. Seamone, *Healing on the Inside: A History of Healthcare for Incarcerated Veterans*, COUNCIL ON CRIM. JUST. (July 2024), https://perma.cc/XZ7V-CBNB. Notably, this stripping of a seven-decade-old benefit to veterans occurred at the time JRADs were eliminated and draconian immigration laws were put into effect.

Congress Provided Two Special Statutory Avenues for the Naturalization of Service Members.

Noncitizen service members benefit from special military naturalization laws. There are two provisions: one for peacetime and another for wartime.[191] During peacetime, LPR service members can naturalize after serving honorably in the military for one year. During wartime, noncitizens who serve honorably can naturalize upon enlistment after one day of active service. The two most recent designated periods of hostilities are the following: (1) the Persian Gulf Conflict from August 2, 1990, to April 11, 1991, and (2) the War on Terror from September 11, 2001, to the present time.

While military naturalization statutes allow noncitizen service members to fast-track naturalization after being an LPR for a year or upon enlistment, individuals who have been LPRs for five years (or three years if the green card was obtained through marriage) or more at the time of enlistment are already eligible for naturalization, regardless of military service. This reinforces the reality that veterans were permanent residents prior to and independent of their military service. That is not to say that civilian naturalization is a simple process. The requirements are as follows: (1) be at least eighteen years old when you apply; (2) demonstrate that you have been continuously present in the United States as a lawful permanent resident for at least five years; (3) demonstrate that you have been physically present in the United States for at least half of the time in the past five years; (4) pass a test for reading, writing, and speaking English; (5) pass a civics exam; (6) demonstrate good moral character; (7) pledge allegiance to the United States; and, if you are a male between the ages of 18 and 26, (8) register for Selective Service to demonstrate your willingness to serve in the U.S. military.[192] The Form N-400 Application for Naturalization is fourteen pages long and the filing fee is over $700.00.[193] After the submission of the application, applicants will be scheduled for a fingerprint appointment at a USCIS Application Support Center. After that, the applicant will likely wait several months to get an interview.[194] If the applicant passes the interview and exams, he will be scheduled for an oath ceremony, which can occur a month or later after the interview. After the oath ceremony, he will be given a naturalization certificate and be a U.S. citizen.

A noncitizen service member applying for naturalization through INA § 328 or § 329 needs to submit the Form N-400 Application for Naturalization, but the

191. 8 U.S.C. §§ 1439-1440 (2000).

192. 8 C.F.R. § 316.2.

193. U.S. CITIZENSHIP & IMMIGR. SERVS., FORM N-400 APPLICATION FOR NATURALIZATION (2024), https://perma.cc/QY3A-HDM8; *N-400 Application for Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://perma.cc/38FA-VMMH (last updated Nov. 13, 2024) (indicating that the paper filing fee is $760 and the online filing fee is $710).

194. *Check Case Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://perma.cc/B546-62HJ (last visited May 26, 2025). As of May 26, 2025, the majority of field offices are completing N-400 cases within seven to nine months, the average wait time being eight months. *Id.*

application will be free of charge.[195] In 1990, the N-400 was a four-page document.[196] The number of pages have continued to grow over the years and the current N-400 is a fourteen-page document that asks for a plethora of information.[197] Under INA § 328, a noncitizen must be 18 years or older, have served honorably at any time in the U.S. armed forces for a total of at least a year, submit proof of military service, be an LPR, meet certain residence and physical presence requirements, be able to read, write, and speak English, pass the civics exam, and demonstrate good moral character for at least five years before the filing of your N-400.[198] Prior to 2003, the required length of service was for 3 years, not 1, and service members still had to pay the filing fee.[199] So for 13 years of the 20 years covered by the "deconstitutionalized zone" service members needed to pay for their naturalization applications and could not apply until they were halfway into their time of service. Service members who serve in periods of hostility must submit proof of honorable service, be an LPR, demonstrate English proficiency and civics knowledge, and demonstrate good moral character for at least a year prior to the filing of the application.[200] The main benefit is that continuous residence and physical presence requirements are waived.[201] Since 2001, noncitizen service members have been able to naturalize after 1 day of service through INA § 329. Importantly, though, there is a 10-year gap in hostilities between the Gulf War ending in 1991 and the Global War on Terror starting in 2001. Those whose service occurred exclusively between 1991 and 2001, which makes up the first half of the "deconstitutionalized zone," would not be able to benefit from INA § 329. Nor would veterans who served between 1978 and 1990, as the Vietnam War ended in 1975 and the Gulf War did not begin until 1990.[202]

The Federal Government Prevented Many Noncitizen Veterans from Naturalizing

While these two avenues have existed in their current iteration since 2003, the problem of noncitizen veterans at risk of deportation points to the reality that many noncitizen veterans did not in fact naturalize during their service. A failure to naturalize because of the noncitizen's own lack of initiative or want is one

195. 8 U.S.C. § 1439(b)(4); *id.* § 1440-1(b)(4).

196. U.S. DEP'T OF JUST. IMMIGR. & NATURALIZATION SERVS., FORM N-400 APPLICATION TO FILE PETITION FOR NATURALIZATION (May 12, 1988).

197. USCIS, *supra* note 193.

198. 8 U.S.C. § 1439.

199. National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, § 1701, 117 Stat. 1392, 1691 (2003).

200. 8 U.S.C. § 1440-1.

201. *Id*. § 1440-1(b)(2).

202. While the Vietnam War ended in 1975, the period of eligibility for expedited naturalization through military service was terminated three years later by executive order in 1978. Termination of Expeditious Naturalization Based On Military Service, Exec. Order No. 12081 (Sept. 18, 1978).

thing. The other things, things outside the noncitizen's will or power that can hinder naturalization, are cause for concern. It has been shown that the federal government, regardless of intent, confused noncitizen veterans about their immigration status and did not help them naturalize through the military naturalization provisions.[203] Multiple noncitizen veterans remember recruiters telling them that they automatically became citizens upon enlistment or upon taking the oath of enlistment.[204] Odds are that the veteran was a teenager at the time he heard that, the recruiter was an older adult, and that the teenager believed what the adult recruiter told him.[205] That noncitizen veterans could mistake enlistment or the taking of the oath of enlistment to be confirmation of citizenship is no surprise. The civilian requirements for naturalization and the requirements to enlist greatly overlap. A civilian applicant for naturalization and a noncitizen applicant for enlistment must: (1) be at least 18 years old, (2) be an LPR, (3) be proficient in English, (4) pass knowledge exams, (5) demonstrate good moral character, and (6) swear allegiance to this country.[206] In a period of no hostilities, civilian naturalization and military enlistment both require physical presence and continuous residence.[207] Furthermore, a civilian applicant for naturalization who is male between the ages of 18 and 26 must register for Selective Service. As previously stated, the majority of applicants to the military are between the ages of 18 and 24 and male and, historically, the U.S. military has limited the qualifying ages of enlistment to between 17 and 35.

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203. *Oversight of Immigrant Military Members and Veterans: Hearing Before the S. Comm. on the Judiciary*, 117th Cong., 9-10 (2022) [hereinafter, *Rogers 2022 Hearing*] (statement of Debra Rogers, Director, Immgr. Mil. Members & Veterans Intiative, Dep't of Homeland Sec.), available at https://perma.cc/PH8S-QUCD; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-105021, MILITARY NATURALIZATIONS: FEDERAL AGENCIES ASSIST WITH NATURALIZATIONS, BUT ADDITIONAL MONITORING AND ASSESSMENT ARE NEEDED 45 (2022).

204. Many of the fifty-nine deported veterans interviewed by the ACLU of Southern California in 2016 "said they never applied for naturalization because they thought their military service automatically made them U.S. citizens." Some thought that their oath of enlistment triggered citizenship, while others were misinformed by recruiters. Vakili et al., *supra* note 9, at 24. Specialist Clayton Gordon recalled, "[M]y recruiter told me that by being in the military I would automatically become a citizen." *Id.* at 26. The more *Padilla*-friendly approach would have been to frontload expectations in this relationship with an advisal that as noncitizens, they faced an increased likelihood of contact with the criminal justice system, and therefore a tangible risk of being deported after putting their lives on the line for this country.

205. *Id.* at 7, 19. A recruiter's power over a young recruit cannot be overstated. In 2005, Gunnery Sergeant Huber A. Lucas, a Marine Corps. recruiter, was convicted for providing counterfeit documents to noncitizens in order for them to fraudulently enter the military. Douglas Gillison, *The Few, the Proud, the Guilty: Marines Recruiter Convicted of Providing Fake Documents to Enlist Illegal Aliens*, VILLAGE VOICE (Oct. 11, 2005), https://perma.cc/66FB-TJPL.

206. 8 U.S.C. § 1427; 8 C.F.R. § 316.

207. *Compare* 8 U.S.C. § 1439, *with id.* § 1427.

Side-by-side comparison of eligibility requirements for civilian naturalization and military enlistment

Requirements for Naturalization as a Civilian	*Requirements to Join the Military*
Be at least 18 years old (can derive citizenship if parent becomes a U.S. citizen before he turns 18)	Be at least 18 years old (can be 17 with parental permission)
Be an LPR	Be an LPR
Read, write, and speak English	Read, write, and speak English
Pass the U.S. civics exam	Pass the Armed Services Vocational Aptitude Battery
Demonstrate good moral character	Demonstrate good moral character
Oath of Naturalization	Oath of Enlistment
Register for Selective Service if male between the ages of 18-26	Required to be between ages 18 to 35, and likely recruited between the ages of 18 and 26

Furthermore, the oath of enlistment and the oath of naturalization's language contain the same key elements and some nearly identical language. The civilian naturalization applicant and applicant to join the military must (1) swear (2) allegiance to the country, (3) support and defend the Constitution, (4) bear arms, and (5) seal that oath with a request for help from a higher power.

Common Elements	*Oath of Enlistment*	*Oath of Naturalization*
Swear	I, __, do solemnly swear (or affirm)	I hereby declare, on oath,
Heeding to executive authority	that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice	that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen;
Supporting and defending the Constitution	**that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same**;	**that I will support and defend the Constitution** and laws **of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same**;

Bearing arms	**Enlistment means that the individual will bear arms on behalf of the United States freely and without reservation.*	that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion;
Calling to God	So help me God.[208]	so help me God.[209]

Confusion aside, other noncitizen veterans still took proactive steps to apply for naturalization in the military, only to later discover that the "necessary paperwork didn't reach them . . . because the government lost their applications" or the DoD never filed them.[210] Other logistical issues foreseeable and common to military service, such as deployments to fight in wars and changes in station, served to impede the processing of these applications.[211] These confusions would be further compounded by the fact that official military forms would sometimes reflect that the noncitizen was a citizen when he was not.[212] Furthermore, prior to 2004, fingerprinting, interviews, and ceremonies for naturalization could occur only in the United States, even for veterans.[213] This calculus also does not take into consideration that successfully going through the naturalization application process through military provisions does not guarantee citizenship. Military naturalization applications regularly get denied. In Fiscal Year 2010, nearly 6 percent of military naturalization applications were denied.[214] In Fiscal Year

208. Act of May 5, 1950, ch. 169, § 8, 64 Stat. 146, as amended by Pub. L. No. 87-751, § 501, 76 Stat. 748 (1962) (codified as amended at 10 U.S.C. § 502).

209. 8 C.F.R. § 337.1.

210. Vakili et al., *supra* note 9, at 20.

211. *Id.*

212. The author has one example from a former client's record on file.

213. Effective October 1, 2004, the military naturalization process became available overseas for military personnel. U.S. DEP'T OF DEF., DIRECTIVE 5500.14: NATURALIZATION OF ALIENS SERVING IN THE ARMED FORCES OF THE UNITED STATES AND OF ALIEN SPOUSES AND/OR ALIEN ADOPTED CHILDREN OF MILITARY AND CIVILIAN PERSONNEL ORDERED OVERSEAS (2006), https://perma.cc/FYT4-7SQU.

214. *Field Offices Form N-400 Applications for Naturalization Receipts, Completions and Pending Fiscal Years: 2010 through 2012*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 31, 2012), https://perma.cc/JN2K-CV22.

2019, over 20 percent of military naturalization applications were denied.[215] These denials increased in part due to the consequences of restricted access such as the shutting down of naturalization offices at some basic training locations and restrictions on who in the military could sign critical immigration forms for naturalization.[216] Immigration attorneys pointed to the whiplash caused by sudden shifts in military immigration policies and the anti-immigrant stance of the administration during that time as contributing to the military naturalization denials.[217]

The military naturalization application process has also been subject to the whims of political interference. History shows us as much. Back when the Philippines was a U.S. territory and during World War II, Congress amended the Nationality Act of 1940 to render all noncitizens who served honorably in the U.S. military immediately eligible for naturalization.[218] During World War II, over 250,000 Filipino troops fought under U.S. command.[219] Though the American Vice Consul in Manila was given the authority to naturalize Filipinos, that authority was revoked within two months by the INS Commissioner.[220] Scholars expressed that this revocation was a "political move [by the United States] to gain a stronger foothold in the Philippines."[221] Congress then moved to declare that Filipino veterans from World War II would not "be deemed to have been active . . . for the purposes of any law of the United States conferring rights, privilege, or benefits," including citizenship.[222]

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215. *Number of Form N-400, Application for Naturalization by Category of Naturalization, Case Status, and USCIS Field Office Location: October 1 – December 31, 2018*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://perma.cc/2ZZT-7MTD (last visited May. 9, 2025) (227 of 648 applications denied); *Number of Form N-400, Application for Naturalization by Category of Naturalization, Case Status, and USCIS Field Office Location: January 1 – March 31, 2019 (Fiscal Year 2019, Quarter 2)*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://perma.cc/C5K3-2FZP (last visited May. 9, 2025) (205 of 734 applications denied); *Form N-400, Application for Naturalization, by Category ofNaturalization Case Status, and USCIS Field Office Location: April 1 – June 30, 2019*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://perma.cc/4XUJ-TT8J (last visited May. 9, 2025) (220 of 875 applications denied); *Number of Form N-400, Application for Naturalization by Category of Naturalization, Case Status, and USCIS Field Office Location: July 1 – September 30, 2019*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://perma.cc/474N-94TB (last visited May. 9, 2025) (175 of 1249 applications denied).

216. *See* Tara Copp McClatchy, *Immigrant Soldiers Now Denied U.S. Citizenship at Higher Rate than Civilians*, HERALD NEWS (May 18, 2019), https://perma.cc/X7MJ-NRNN.

217. *See id.*

218. Nationality Act of 1940, Pub. L. No. 76-853, §§ 323-25, 54 Stat. 1137, 1149-50 (1940).

219. Kimmy Yam, *Filipinos Who Fought for the U.S. in WWII Never Saw Benefits. A New Bill Seeks to Change That*, NBC NEWS (Oct. 31, 2023), https://perma.cc/3X9F-KTDK.

220. Terry Ann Walsh, *Military Service: Both a Path and a Bar to Naturalization*, 8 GEO. IMMIGR. L.J. 449, 459 (1994). Prior to the revocation, 4,000 Filipino veterans naturalized under the Nationality Act of 1940. *In re* Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931, 936 (N.D. Cal. 1975).

221. Walsh, *supra* note 220, at 459.

222. Second Supplemental Surplus Appropriation Rescission Act of 1946, Pub. L. No. 79-301, 60 Stat. 6, 14 (1946) (codified at 38 U.S.C. § 107(a) (1994)).

This interference continues. In 2017, the DoD under President Trump made service members go through more onerous background checks and wait longer to be able to obtain the certificate from the DoD required to apply for expedited naturalization under INA 240 (notwithstanding the fact that through serving during the Global War on Terror, they would qualify to naturalize after one day of active service).[223] This hostility towards noncitizen service members resulted in the filing of far fewer military naturalization applications, a 78 percent drop between Fiscal Years 2017 and 2018, after the policy was created.[224] As a result of this policy, in Fiscal Year 2019, service members were more likely to get their applications denied than their civilian counterparts.[225] So, while yes, there are special expedited avenues for the naturalization of noncitizen veterans, n practice—the government has created many hurdles for them to take advantage of this benefit and it is clear that it continues to have the capability to create additional hurdles and confusion. For many noncitizen veterans, military naturalization was and remains out of reach. The government can change that.

IV. THE APPROPRIATE REMEDY: *NUNC PRO TUNC* NATURALIZATION

Federal and state court decisions around JRADs endowed constitutional rights tied to deportation arising from criminal convictions, but their repeal created the fiction that immigration consequences arising from criminal convictions have no constitutional precedent. Two decades later, without the statutory basis of JRADs, *Padilla* in part resurrected those rights in the form of advisals for plea agreements. But in that gap of time, the aggravated felony grew to adulthood and reached back to old transgressions while JRADs could no longer reach forward, and the government militarized and invested heavily in the expansion of immigration enforcement.

Service members marched on. In that time period of the "deconstitutionalized zone," service members were deployed to fight in the Gulf War and the

223. *See Memorandum for Secretaries of the Military Departments Commandant of the Coast Guard*, OFFICE OF THE UNDER SEC'Y. OF DEF. (Oct. 13, 2017), https://perma.cc/22HV-GRTW; *DoD Announces Policy Changes to Lawful Permanent Residents and the Military Accessions Vital to the National Interest (MAVNI) Pilot Program*, U.S. DEP'T OF DEF. (Oct. 13, 2017), https://perma.cc/6XUG-HTGT.

224. *Military Naturalizations: Federal Agencies Assist with Naturalizations, but Additional Monitoring and Assessment Are Needed*, U.S. GOV'T ACCOUNTABILITY OFF. (Sept. 14, 2022), https://perma.cc/T7VM-QS28.

225. The U.S. District Court for the District of Columbia enjoined the 2017 DoD policy in August of 2020. Samma v. Dep't of Def., 486 F. Supp. 3d 240, 280 (D.D.C. 2020). The incoming Biden administration rescinded the policy, but the DoD did not comply with the court order. Plaintiffs' Motion to Enforce Court Order, *Samma*, 486 F. Supp. 3d (No. 20-cv-01104); *see* Letter from ACLU to Joseph R. Biden, Jr., President (June 28, 2022), https://perma.cc/SS6G-Q89V (expressing concern about the DoD's continued practices frustrating the expedited naturalization process for noncitizen veterans). In 2025, the second Trump administration attempted to defend the already-rescinded policy on appeal, and the U.S. Court of Appeals for the District of Columbia held that, given the rescission of the policy, the case was moot. Samma v. Dep't of Def., 136 F.4th 1108, 1114 (D.C. Cir. 2025).

Global War on Terror. Maybe one noncitizen service member applied for naturalization, but then was flown out to fight in Kuwait and could not complete the process. Maybe another noncitizen service member never applied for citizenship and jumped off a plane into battle believing himself to already be a citizen, not realizing that he has closer to being a citizen dead than alive.[226] Upon their return, still a young adult but weary from battle and dealing with PTSD and other ailments, many veterans were caught in the criminal justice system. Noncitizen veterans, though, then found that the criminal justice system's exit was just another entrance to the "deconstitutionalized zone," a world doling out a second punishment: exile.

In a larger context, this "deconstitutionalized zone" affects all noncitizens, not just veterans. But with veterans in focus, this zone eviscerates a finite and diminishing population of people who were willing to give up their youth and lives in defense of our country. It pays no heed to the unique, common, and predictable characteristics and struggles of the veteran population and fails to provide any sort of reprieve. One can see how the unforgiving and inhumane nature of our current deportation system against a more "deserving" subset has thrived in the Constitution's absence. But are the Constitution and the courts that uphold it responsible for the current plight of the veterans in the "deconstitutionalized zone"? No. The federal executive branch is responsible, and they can exercise their discretion meaningfully to allow noncitizen veterans with "deconstitutionalized zone" convictions to pursue *nunc pro tunc* naturalization. This Part outlines the executive branch's discretionary authority in immigration, identifies the shortcomings of their recent efforts to exercise discretion to help noncitizen veterans, describes the existing judicial and agency case law around *nunc pro tunc* in the immigration context, and argues that *nunc pro tunc* naturalization is available as the appropriate and equitable discretionary remedy to help restore noncitizen veterans.

A. The Executive Branch's Discretionary Authority and its Current Exercise of Discretion is a Band-Aid Over a Bullet Hole

The executive branch's broad authority to exercise its discretion in deciding whether to pursue enforcement in the immigration context is well-established. Recently, in *United States v. Texas*, the U.S. Supreme Court reiterated executive immigration agencies' discretionary authority in immigration enforcement.[227]

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226. A noncitizen service member who served in a time of hostility and dies as a result of an injury sustained or disease acquired during or aggravated by that service is eligible for posthumous naturalization. 8 U.S.C. § 1440-1; 8 C.F.R. § 392.2. Additionally, noncitizen veterans who are deported for aggravated felonies are permanently barred from returning to the United States. However, they retain the right to be buried with a military funeral in the United States upon death. 38 U.S.C. § 2402; 10 U.S.C. §§ 1491, 985(a).

227. 143 S. Ct. 1964, 1971 (2023). This discretionary authority was recently reaffirmed by the U.S. Supreme Court when it granted an emergency request by the Trump administration to allow it to move forward in terminating Temporary Protected Status (TPS) protection to hundreds of thousands of Venezuelan immigrants. Miscellaneous Order, Noem v. Nat'l

The Supreme Court stated that under Article II of the Constitution, the executive branch "possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'"[228] The Court also stated that the "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."[229] Given that current immigration laws "squeez[e] consideration of humanitarian or fairness concerns almost completely out of the adjudicative stages of deportation of criminal proceedings . . . considerations of equity enter the deportation system . . . primarily through the discretionary decisions of enforcement actors."[230] The executive branch is therefore critical in exercising discretion, and their current efforts to help noncitizen veterans are not enough.

The executive branch has made progress in recent years in trying to support noncitizen service members to naturalize while in the military, assist them in accessing their benefits, including medical care, and to review cases of deported veterans to allow them back to the United States temporarily and long-term on discretion.[231] On July 21, 2021, the Secretaries of the DHS and the VA announced a:

> "new joint initiative, the Immigrant Military Members and Veterans Initiative (IMMVI), [which] . . . was formed to support the Nation's noncitizen service members, and their immediate family members, and directed DHS and the VA to identify and prioritize the return of current and former U.S. military members, and their immediate family members, who were removed from the United

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Temp. Protected Status All., 605 U.S. __ (No. 24A1059), https://perma.cc/B5BJ-5JD3; *see* Termination of the October 3, 2023 Designation of Venezuela for Temporary Protected Status, 90 Fed. Reg. 9040 (Feb. 5, 2025). TPS is a discretionary designation by the executive branch which grants noncitizens from designated countries the right to temporarily live and work in the United States. 8 U.S.C § 1254a; 8 C.F.R. § 244.2.

228. *Id.* (quoting TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021)).

229. *Id.* at 679 (quoting United States v. Nixon, 418 U.S. 683, 693 (1974)).

230. Cade, *supra* note 13, at 664.

231. There were policies developed around the handling of cases involving potentially removable veterans in the past two decades. A June 2004 ICE memorandum provided authority to a special agent to approve issuances of a Notice to Appear (NTA) to initiate proceedings to deport a noncitizen veteran. Memorandum from Marcy M. Forman, Acting Director of ICE Investigations, to ICE agents, 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). A similar authority was provided to ICE Field Office Directors later that year. Memorandum from Victor Cerda, Acting Director of ICE Detention and Removal Operations, to all field office directors, 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). In November 2015, ICE's Director issued a policy that established procedures for investigating the possible citizenship of a noncitizen on ICE's radar and identified prior military service as one possible indicator of citizenship. *ICE Directive 16001.2: Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE*, U.S. IMMIGR. & CUSTOMS ENF'T (Nov. 10, 2015). However, a review of ICE files conducted by the GAO indicate that ICE does not consistently follow these policies. *Immigration Enforcement: Actions Needed To Better Handle, Identify, and Track Cases Involving Veterans*, U.S. GOV'T ACCOUNTABILITY OFF. (June 2019), https://perma.cc/MC73-JBLV.

States, to ensure they receive the benefits to which they may be entitled."[232]

Soon thereafter, ICE also issued a new directive that directed the Enforcement and Removal Operations (ERO) unit to consider U.S. military service when making discretionary determinations with regard to enforcement actions against noncitizens.[233]

While IMMVI has exercised its discretion to reportedly allow over a hundred and thirty deported noncitizen veterans to return to the United States, the return is on humanitarian parole, which is temporary and does not provide for permanent relief.[234] Advocates have seen humanitarian parole grants for four months to a year. If the noncitizen veteran wants to extend his parole, he must then apply for re-parole and, if granted, will also likely only be granted for several months to a year. If denied re-parole, the noncitizen veteran will need to leave the country again, losing direct access to often critical medical care and resulting in separation from family. Some noncitizen veterans, like Liam, have been able to have ICE Office of the Principal Legal Advisor (OPLA) exercise its discretion to get their removal cases reopened and dismissed. Others have been able to return to become U.S. citizens through naturalization. But discretionary dismissals are often without prejudice, allowing ICE, in theory, to rearrest the individual and reinitiate removal proceedings based on the same conviction. And for someone like Liam, who cannot benefit from *Padilla*, the immigration consequence of that conviction is presently undone, but its resurrection is ever looming. Furthermore, IMMVI does not have a say in the exercise of prosecutorial discretion by ICE for permanent relief in the immigration courts.[235]

IMMVI is a valuable initiative that provides piecemeal reprieve to veterans who deserve permanent support from the country they served. While IMMVI

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232. *DHS, VA Announce Initiative to Support Noncitizen Service Members, Veterans, and Immediate Family Members*, U.S. DEP'T OF HOMELAND SEC. (July 2, 2021), https://perma.cc/7D4G-N93P.

233. *ICE Directive 10039.2: Consideration of U.S. Military Service When Making Discretionary Determinations with Regard to Enforcement Actions Against Noncitizens*, U.S. IMMIGR. & CUSTOMS ENF'T (May 23, 2022), https://perma.cc/PXX2-RS8Z.

234. E-mail from Jennie Pasquarella, Director, Seattle Clemency Project, to author (Dec. 6, 2024) (on file with author).

235. To make matters worse and more complicated, each local OPLA office has the final say in the exercise of prosecutorial discretion, and some have declined to join in a motion to reopen proceedings so that the noncitizen veteran could have the proceedings dismissed or apply for some form of relief. This is because some OPLA offices have taken the position that because the noncitizen veteran departed the United States due to a removal order, the immigration court does not have jurisdiction to entertain a joint motion to reopen and so OPLA cannot join such a motion. 8 C.F.R. § 1003.23(b)(1) (motions filed with the IJ); *id.* § 1003.2(d) (motions filed with the BIA). OPLA offices that have done so are within jurisdictions in which the federal circuit in which they are housed have decided that the CFR precludes *sua sponte* (regulatory) reopening once a noncitizen departs the United States under a removal order. *In re* Armendarez-Mendez, 24 I. & N. Dec. 646 (B.I.A. 2008); Zhang v. Holder, 617 F.3d 650 (2d Cir. 2010). Nonetheless, the majority of circuits, the First, Third, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits, have all held that the departure bar in the C.F.R. conflicts with the INA, which explicitly allows for motions to reopen with no mention of a bar due to a departure.

continues to connect noncitizen veterans to necessary medical care, benefits, parole, and possibly a light thumb on the scale for permanent immigration relief, that noncitizens in the "deconstitutionalized zone" did not have JRAD to avoid deportation and cannot enlist *Padilla* to permanently undo the immigration consequence of a criminal conviction remains a problem. The solution is for the executive branch to exercise its discretion and allow noncitizen veterans to apply for naturalization retroactively to the date of discharge from the military.

B. *Nunc Pro Tunc* Naturalization

The executive branch, through a collaboration between the Department of Justice, Department of Homeland Security, Department of Defense, and the Department of Veterans Affairs, must meaningfully and proportionately exercise its discretion to allow noncitizen veterans with "deconstitutionalized zone" convictions to apply for *nunc pro tunc* naturalization dating back to their date of discharge. *Nunc pro tunc* is a Latin phrase which means "now for then."[236] A doctrine typically requested in the court context, *nunc pro tunc* refers to "an action taken by a court that applies retroactively to correct an earlier ruling."[237] However, *nunc pro tunc* is not limited to the judicial context and has been exercised by executive immigration agencies.

While there is no provision in immigration law that expressly authorizes *nunc pro tunc* relief, there has long been an administrative practice of granting *nunc pro tunc* relief in immigration court.[238] Furthermore, *nunc pro tunc* relief

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236. *Nunc pro tunc*, BLACK'S LAW DICTIONARY (11th ed. 2019).

237. CORNELL LAW SCH., LEGAL INFO. INST., *Nunc Pro Tunc*, https://perma.cc/CYD6-VGNM (last updated Aug. 2023).

238. *In re* Garcia-Linares, 21 I. & N. Dec. 254, 257 (B.I.A. 1996). In *In re Garcia-Linares*, the respondent appealed an IJ's denial of "*nunc pro tunc* permission to reapply for admission to cure [a noncitizen's] failure to obtain such permission prior to reentry after deportation." *Id.* The respondent in this instance was from Mexico with an approved visa petition as the spouse of a U.S. citizen. *Id.* at 255. He failed to regularize his status to that of an LPR for several years and was subsequently ordered deported. *Id.* When he went back to Mexico, he obtained an immigrant visa and returned to the United States as an LPR. *Id.* However, he never applied for advance permission to reenter after his deportation, which was required due to his prior removal order. *Id.* Several years later, he was convicted of a drug offense and was placed into removal proceedings for being convicted of a controlled substance offense and an aggravated felony. *Id.* at 256. He was additionally charged with inadmissibility because he had not received advance permission to reenter after being ordered removed and did not possess a valid entry document. *Id.* The respondent had hoped he could obtain *nunc pro tunc* relief on the admission piece so that he could then seek a waiver for the conviction-related removability grounds. The BIA first noted that while "there is no provision in the immigration laws that expressly authorizes *nunc pro tunc*" relief, "there had long been an administrative practice of granting such relief." *Id.* at 257. However, the BIA denied this respondent's request, as *nunc pro tunc* relief could only be granted if it would resolve all grounds of deportability or inadmissibility in one fell swoop. *Id.* at 258. In this instance, *nunc pro tunc* relief would only serve to render him admitted and therefore eligible to apply for a waiver for his drug conviction. *Id.* This case serves to demonstrate that *nunc pro tunc* can be exercised by the executive branch. The BIA's requirement of the *nunc pro tunc* relief in the immigration court setting having to resolve all removability issues has no bearing in USCIS's affirmative exercise of adjudicating

has also been a part of USCIS's practice in conferring benefits to noncitizens. USCIS can approve late filed requests to change or extend nonimmigrant status.[239] *Nunc pro tunc* is also available in the affirmative asylum context with USCIS. USCIS allows asylum applicants who were at one point but are for whatever reason no longer able to derive asylum status from a principal asylum applicant to later file and be granted asylum in his or her own right and the grant may be dated as of the date of the original principal's asylum grant.[240] *Nunc pro tunc*, therefore, is a regular part of USCIS practice that can extend to the naturalization of noncitizen veterans.

Nunc pro tunc naturalization cases have been litigated in federal court, but the case law is limited and not particularly relevant to the executive branch's discretionary power to grant it. Federal courts that denied *nunc pro tunc* naturalization claims have done so because, by statute, noncitizens who have removal orders or are currently in removal proceedings cannot naturalize.[241] Therefore, the courts could not entertain equitable relief against the statutory bar.[242] In essence, these federal court cases speak to the court's inability to dole out equitable *nunc pro tunc* relief in contravention of statute. But none of these decisions prevent DHS from exercising its authority to reopen and dismiss proceedings and open the option for *nunc pro tunc* naturalization for veterans administratively.[243]

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naturalization applications.

239. *USCIS Updates Guidance on Untimely Filed Extension of Stay and Change of Status Requests*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 24, 2024), https://perma.cc/DF5H-WY63.

240. *Chapter 2 – Eligibility Requirements*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://perma.cc/7QEV-8DA7 (last updated Mar. 6, 2025). Certain family members can be derivative beneficiaries of a principal asylum applicant. If the principal is granted asylum, that grant extends to the derivative applicant. Asylees and their derivatives can adjust to the status of LPR after one year. However, certain changes can render the derivative no longer eligible to adjust to the status of an LPR based on the asylum status. This includes divorce from the principal asylee, marriage, the naturalization of the asylee, or the termination of the principal's status as an asylee.

241. 8 U.S.C. § 1429.

242. In the Third Circuit, an LPR from the Dominican Republic applied for naturalization and passed the exam in 1998. Duran-Pichardo v. Att'y Gen., 695 F.3d 282, 283 (3d Cir. 2012). However, he never took the oath of allegiance and was therefore not naturalized. *Id.* The error was by the government, as INS lost his file and never sent him a notice to take the oath even after he reached out to the agency multiple times. *Id.* In 2008, he was convicted of an aggravated felony. *Id*. Therefore, he was placed into removal proceedings. *Id.* The court found that because the statute forecloses naturalization for someone who was in proceedings, the court could not supersede that with equitable relief. *Id.* at 288. In 2015, the Third Circuit doubled down on their decision in *Duran-Pichardo*. In that case, Wilfredo Gonzalez-Lora, an LPR from the Dominican Republic with a final removal order, appealed the district court's denial of his request for a *nunc pro tunc* naturalization. Gonzalez-Lora v. U.S. Dep't of Just., 629 F. App'x. 182, 183 (3d Cir. 2015). He applied for naturalization in 1992 but failed to provide proof of registration for selective service. *Id.* The INS therefore dismissed his application. *Id.* He was convicted of a drug trafficking aggravated felony in 1998, which led to an order of removal. *Id.* Because of his aggravated felony, he was rendered permanently unable to demonstrate good moral character for naturalization. *Id.* at 184. Because of the outstanding removal order, the court found that they could not entertain *nunc pro tunc* naturalization. *Id.*

243. *Doyle Memorandum: Frequently Asked Questions and Additional Instructions*,

In fact, the ICE's online guidance on its exercise of prosecutorial discretion includes the avenue of the reopening and dismissal of proceedings.[244] Upon dismissal, the noncitizen veteran can be restored to the status of LPR and apply for nunc pro tunc naturalization.

Nunc pro tunc naturalization at the time of discharge is the proportional and appropriate response because at that point, noncitizen service members had already proved up so many of the overlapping requirements for civilian naturalization. Noncitizen veterans with "deconstitutionalized zone" convictions entered the military as LPRs and were certainly over the age of 18 at time of discharge. They took an oath to defend the Constitution, passed a comprehensive set of exams covering English and civics, and statistically likely served for over 5 years. Their time in the service lends a finding of continuous residence and physical presence for those 5+ years as well as good moral character. Serving the executive branch of the U.S. government had exposed noncitizen veterans to confusion about their immigration status, mental and physical anguish, an increased likelihood of contact with the criminal justice system, and possible deportation triggered by "deconstitutionalized zone" convictions without constitutional safeguards. *Nunc pro tunc* naturalization, as if the noncitizen applied at time of discharge, would make executive discretion meaningful for these noncitizen veterans.

CONCLUSION

Before they joined the Armed Forces, most noncitizen veterans enjoyed lawful permanent residence. By opting to serve their country, they were put at heightened risk of being banished from it. Noncitizen veterans abandoned in the "deconstitutionalized zone" are in urgent need of rescue. The clock continues to tick, and our noncitizen veterans, as they battle to survive as civilians, will continue to age and eventually pass away.[245] Congress is not moving to alleviate the effects of the existing immigration laws for anyone, including noncitizen veterans. The courts have by and large declined to have the Sixth Amendment right to effective assistance of counsel cover the "deconstitutionalized zone." But it is the executive branch, the Department of Defense that sent these veterans to war, the Department of Veterans Affairs tasked with serving them upon return, and

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U.S. IMMIGR. & CUSTOMS ENF'T, https://perma.cc/R6B6-DXJ2 (last updated Sept. 12, 2023).

244. *In re Garcia*'s requirement of a global disposition would not apply here, since the *nunc pro tunc* exercise will occur after the resolution of the removal proceedings before a different agency.

245. The life expectancy of veterans is shorter than compared to the U.S. civilian population. Dan Brillman, *Addressing Veterans' Unmet Needs Can Improve Life Expectancy*, STARS & STRIPES (Sept. 27, 2023), https://perma.cc/6U8Y-43UW (stating that "[v]eterans' average age at death is 67, almost a decade younger than the national average of 76.4 years old."). Additionally, an alarming number of veterans commit suicide. In 2020, nearly seventeen veterans commited suicide per day. *National Veteran Suicide Prevention Annual Report*, U.S. DEP'T OF VETERANS AFFS. (Sept. 2022). Veteran suicides rates double the rate of civilian suicides. *Id.* at 10.

the Department of Homeland Security armed with the discretionary power to grant relief to our noncitizen veterans with "deconstitutionalized zone" convictions, that bears the responsibility to grant relief. Before it's too late, the federal executive branch can do right by our veterans and neutralize the effects of "deconstitutionalized zone" convictions by opening the way for *nunc pro tunc* naturalization.