NOTES

DEPORTATION OF VETERANS: THE SILENT BATTLE FOR NATURALIZATION

Cathy Ho Hartsfield[*†]

I. INTRODUCTION

Congress' continued failure to address the immigration crisis and reform immigration laws has caused deportations from the United States to reach a record high of 396,906 deported immigrants in 2011.[1] More than half of this statistic includes deported aliens

[*] Articles Editor, *Rutgers Law Review*. J.D., Rutgers School of Law—Newark, 2012. Staff Sergeant, Judge Advocate General Corps, United States Army. I wish to thank my parents, Ki Owan and Young Sook Ho, and my husband, Jeff Hartsfield, for their endless encouragement, support, and love. I also wish to thank the Staff and Editors of the Rutgers Law Review for their diligence and assistance.

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convicted of "crimes of moral turpitude,"[2] an eighty-nine percent increase in the removal of convicted aliens since 2008,[3] and has more than doubled since George W. Bush's presidency.[4] This rising statistic is not necessarily due to an increase in criminal convictions, rather it is a reflection of the administration's attempt to show tougher deterrents against immigrants who are believed to threaten the public safety of our communities.[5]

Immigrant civil rights and privileges are radically impeded by increasingly restrictive immigration acts and bills. On April 23, 2010, Arizona enacted "the most restrictive immigration bill in the country," which requires all immigrants to carry documentation proving their resident status.[6] Other states, such as Alabama, Georgia, Indiana, South Carolina, and Utah, have since enacted similar immigration enforcement laws. Enforcement of these immigration laws sets the stage not only for racial profiling and harassment[7] but also for the mass arrest and deportation of aliens.[8]

Within this population of deported convicted aliens is a group that has fought one battle after the next to become U.S. citizens. This group consists of lawful permanent resident ("LPR") military veterans who have been deported or are facing deportation despite immigration provisions that offer naturalization in exchange for military service and allegiance to the United States.[9] There is much

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1. *ICE Announces Year-end Removal Numbers, Highlights Focus on Key Priorities Including Threats to Public Safety and National Security*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Oct. 18, 2011), http://www.ice.gov/news/releases/1110/111018washingtondc.htm.

2. *Id.*; *see* 8 U.S.C. § 1227(a)(2) (2006) (defining "crimes of moral turpitude"); *see also infra* Part II (analyzing the relationship between crimes of moral turpitude and immigration law).

3. *ICE Announces Year-end Removal Numbers*, *supra* note 1.

4. Julia Preston, *Deportations From U.S. Hit a Record High*, N.Y. TIMES, Oct. 7, 2010, at A21 (explaining that 195,772 convicted criminals were deported in 2009 in comparison to 81,000 during the final year of the Bush presidency).

5. *Id.* (quoting Homeland Security Secretary Janet Napolitano).

6. Anne E. Kornblut & Spencer S. Hsu, *Ariz. Governor Signs Tough Immigration Bill; Obama Calls it 'Misguided' Justice Dept. Will Watch Implementation, He Says,* WASH. POST, Apr. 24, 2010, at A1.

7. Under the Arizona immigration bill, Arizona police are also permitted to question those that they "'reasonably suspect' of being undocumented," which sets the stage for racial profiling and harassment. *Id.*; *see* Douglas S. Massey & Fernando Riosmena, *Undocumented Migration from Latin American in an Era of Rising U.S. Enforcement*, 630 ANNALS AM. ACAD. POL. & SOC. SCI. 294, 296-99 (2010) (analyzing the mechanism of undocumented migration to United States applying social capital theory and new economic theory of labor migration).

8. As used in this Note, an alien is defined as an individual who is neither a U.S. citizen nor a U.S. national. 8 U.S.C. § 1101(a)(3) (2006).

9. *See generally* Craig R. Shagin, *Deporting Private Ryan: The Less Than Honorable Condition of the Noncitizen in the United States Armed Forces*, 17 WIDENER

debate as to whether veterans should be provided special consideration for their military service during deportation hearings,[10] and several legal issues, as well as policy dilemmas, arise from the current deportation proceedings against veterans.[11]

This Note will uncover the inadequacy of current immigration laws and policies that affect almost 30,000 non-U.S. citizens who are fighting the longest war in our nation's history,[12] and it will provide the possible solutions to prevent the all too harsh punishment of deportation. Part II of this Note examines the history and background of naturalization provisions that are offered to military veterans. Currently, sections 328 and 329 of the Immigration and Nationality Act of 1952 ("INA") are the two provisions that provide naturalization benefits specifically to veterans.[13]

Part III explores why some veterans are not granted expedited naturalization despite sections 328 and 329. Although the United States military utilizes accelerated citizenship as a recruiting tactic, many servicemembers are not advised that they must actively seek naturalization through a complex application process and that citizenship is not automatically granted with veteran service.[14] Furthermore, military training and deployments can prevent veterans from filing the necessary paperwork and from properly communicating with immigration agencies during the naturalization process.[15]

Part IV explores the military justice system and the military

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L.J. 245, 261-69 (2007) (discussing the deportation of alien veterans who have been provided nationalization for their service); *see also* Steve Liewer, *Part Two: American Veterans Who Await Deportation*, VETERANS TODAY MILITARY & FOREIGN AFFS. J. (July 22, 2009), http://www.veteranstoday.com/2009/07/22/part-two-american-veterans-who-await-deportation/ (discussing the deportation of alien veterans who believe that military service deserves special consideration).

10. *See Row Over War Veterans Facing Deportation from the Country They Risked Their Lives to Defend*, DAILY MAIL ONLINE (Oct. 25, 2010, 9:38 AM), http://www.dailymail.co.uk/news/article-1323428/Row-war-veterans-facing-deportation-country-risked-lives-defend.html.

11. *See* Shagin, *supra* note 9, at 308-09 (discussing the dilemma presented when immigration judges do not consider the alien's U.S. military service in deportation hearings).

12. As of 2009, almost 29,000 non-U.S. citizens were currently enlisted in the military. Julia Preston, *U.S. Military Will Offer Path to Citizenship*, N.Y. TIMES, Feb. 15, 2009, at A1. June 2011 marks the 116th month since the U.S. first attacked Afghanistan on October 7, 2011 in response to the 9/11 terrorist attacks. *See* Rick Hampson, *Afghanistan: America's Longest War*, USA TODAY, May 28, 2010, at 1A.

13. 8 U.S.C. §§ 1439, 1440 (2006).

14. *See List and Stories of Veterans Facing Deportation and Deported Veterans,* BANISHED VETERANS, http://www.banishedveterans.info/donations.html (last visited May 22, 2012).

15. *See* Susan E. Timmons & Margaret D. Stock, *Immigration Issues Faced by U.S. Servicemembers: Challenges and Solutions*, 43 CLEARINGHOUSE REV. 270, 273 (2009).

courts-martial procedures that are regulated by the Uniform Code of Military Justice ("UCMJ").[16] This section will describe how courts-martial convictions can lead to servicemembers' deportation.

Part V discusses the prevalence and impact of Post-Traumatic Stress Disorder ("PTSD") on veterans and its relation to criminal activity. Veterans who suffer from PTSD have a greater propensity to self-medicate with drugs and alcohol and are prone to violent behavior due to PTSD symptoms.[17] However, immigration courts do not consider these possible causes of the veteran's criminal behavior when determining whether the veteran will be deported.[18] This section will discuss the necessity of acknowledging PTSD as an affirmative defense or, at least, as a mitigating factor in criminal cases.

Part VI, the core of this Note, analyzes the past and future of immigration reform for veterans. The Senate has introduced several legislative proposals for immigration reform, such as the Development, Relief and Education for Alien Minors ("DREAM Act") and the Lance Corporal Jose Gutierrez Act of 2008.[19] Despite these attempts to amend the INA, progress towards immigration reform has remained stagnant. This section will present reasonable amendments to the INA that would present a greater likelihood of being passed by Congress.

Part VI also looks into the future of the military criminal justice system and the effect of recent landmark Supreme Court decisions concerning immigration hearings. The Supreme Court has recognized the escalating rate of deportations after criminal convictions and recognized the need for effective assistance of counsel, as well as requested greater clarification of immigration statutes.[20] *Padilla v. Kentucky*, where the Court held that defense counsel must advise the client of immigration consequences in a criminal conviction,[21] will ultimately affect the due process

16. The UCMJ covers all active duty members of the U.S. Army, Marine Corps, Navy, Air Force, and Coast Guard, as well as retired veterans receiving military benefits. Uniform Code of Military Justice art. 2, 10 U.S.C. § 802 (2006).

17. *Common Reactions After Trauma*, NAT'L CTR. FOR PSTD, U.S. DEP'T OF VETERAN'S AFF., http://ptsd.va.gov/public/pages/common-reactions-after-trauma.asp (last updated Dec. 20, 2011); *see* Christopher Hawthorne, *Bringing Baghdad into the Courtroom: Should Combat Trauma in Veterans be Part of the Criminal Justice Equation?*, 24 CRIM. JUST. 4, 5-8 (2009).

18. Shagin, *supra* note 9, at 307-08.

19. *Welcome to the DREAM Act Portal*, DREAM ACT PORTAL, http://dreamact.info/ (last visited May 22, 2012); Lance Corporal Jose Gutierrez Act of 2008, H.R. 6020, 110th Cong. (2008).

20. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486-87 (2010); Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2589 (2010).

21. *Padilla*, 130 S. Ct. at 1486-87.

requirements of courts-martial. Furthermore, courts will interpret ambiguous statutory language of the immigration laws in the noncitizen's favor, as the Court held in *Carachuri-Rosendo v. Holder*.[22] Lastly, this section proposes that the solution for veterans facing deportation can be found in specialized Veterans Courts, where struggling veterans are offered problem-solving treatment alternatives rather than criminal convictions, thus protecting them from deportation.[23]

II: HISTORY AND BACKGROUND OF NATURALIZATION PROVISIONS FOR VETERANS

The United States Constitution grants Congress the exclusive power "[t]o establish a uniform Rule of Naturalization."[24] The Supreme Court has defined naturalization as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen."[25] The strong presence of foreign-born soldiers in the U.S. military dates back to the American Revolution,[26] and naturalization for military members has long been provided as an incentive for enlistment.[27] Over the span of almost two-and-a-half centuries, there have been numerous modifications to the naturalization provisions for servicemembers.

The first Naturalization Act of 1790 was restricted to "free white persons" who were residents for at least two years, maintained "good character," and took an oath "to support the [C]onstitution."[28] Since the first Naturalization Act, each major American war seemed to trigger Congress to further expand naturalization privileges to military veterans.[29] In response to the urgency of the Civil War and the booming immigrant population surge, Congress adopted the Alien Soldiers Naturalization Act of 1862, which offered expedited naturalization to alien veterans.[30] The residency requirement was reduced to one year, but the Act still required proof of good moral

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22. *Carachuri-Rosendo*, 130 S. Ct. at 2589.

23. *See* Steven Berenson, *The Movement Toward Veterans Courts*, 44 CLEARINGHOUSE REV. 37, 39 (2010).

24. U.S. CONST. art I, § 8, cl. 4.

25. Boyd v. Nebraska (*ex rel.* Thayer), 143 U.S. 135, 162 (1892).

26. The U.S. Army was heavily comprised of non-nationals for the majority of the nineteenth century. Shagin, *supra* note 9, at 253.

27. *See* Darlene C. Goring, *In Service to America: Naturalization of Undocumented Alien Veterans*, 31 SETON HALL L. REV. 400, 408-30 (2000).

28. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, chap. 20, 1 Stat. 414.

29. Goring, *supra* note 27, at 408-30 (examining the historical changes of the Alien Veteran Naturalization Act from the American Civil War to the Persian Gulf War).

30. Act of July 17, 1862, ch. 200, § 21, 12 Stat. 597 (1862) (codified as Revised Stat. § 2166 (1878)).

character and an honorable discharge if not still currently serving.[31] Despite the need for troop strength, Congress continued to impose racial restrictions on veteran naturalization.[32] The Act also limited its application to alien veterans of the U.S. Army but no other branch of military service.[33] The branch restriction continued until Congress later enacted the Act of July 26, 1894, which opened naturalization privileges to the U.S. Navy and Marine Corps.[34]

In order to enlist more troops during World War I, Congress adopted the 1926 Act, which offered veterans an additional two years to obtain naturalization privileges.[35] After World War I, however, Congress again restricted the privilege by extending the requirement to show good moral character from two years to five years after the veteran's petition was filed.[36]

The next revision was the Nationality Act of 1940, which permitted alien veterans who served honorably at any time to be exempt from the five-year residency requirement if the petition was filed while the veteran was still in service or up to six months after his service, but they were still required to show good moral character and allegiance to the U.S. Constitution.[37] During World War II, Congress returned to using naturalization as a recruiting tactic by amending the 1940 Act to expedite the naturalization process and removing the racial restriction to veterans who served honorably in World War II.[38]

During the Korean War, Congress repealed the 1940 Act and enacted the Immigration and Nationality Act of 1952, which radically expanded the eligibility of naturalization for veterans.[39] Congress finally eliminated all racial prohibitions of naturalization, significantly broadening the applicable alien veteran population.[40]

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31. *Id.*

32. Goring, *supra* note 27, at 411.

33. *In re* Bailey, 2 F. Cas. 360, 360-62 (D. Or. 1872) (rejecting a U.S. Marine Corp veteran's petition for naturalization because he was not in the U.S Army).

34. Act of July 26, 1894, ch. 165, 28 Stat. 123, 124, *amended by* Act of March 15, 1948, 62 Stat. 80.

35. Act of May 26, 1926, Pub. L. No. 69-398, 44 Stat. 654, 654-55, *repealed by* Immigration and Nationality Act of 1952 (INA), Pub.L. No. 82-414, § 403, 66 Stat. 163, 280.

36. Act of May 25, 1932, Pub. L. No. 72-149, 47 Stat. 165, *amended by* Act of June 21, 1939, 53 Stat. 851; Nationality Act of 1940, § 504, 54 Stat. 1172.

37. Nationality Act of 1940, Pub. L. No. 76-853, § 307 54 Stat. 1137, 1142 (codified as amended at 8 U.S.C. § 707(a)(3) (2006)).

38. Second War Powers Act of 1942, Pub. L. No. 77-507, 56 Stat. 176, 182-83, *repealed by* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 403(a)(42), 66 Stat. 163, 280.

39. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 281 (codified as amended at 8 U.S.C. § 1101).

40. *See id.* § 201(a), 66 Stat. at 175-76 (amended 1965).

The INA also provided some relief for veteran aliens who were facing deportation through judicial recommendation against deportation ("JRAD").[41] If a court sentenced an alien for a crime of moral turpitude, JRAD gave the sentencing court the authority to make a recommendation within thirty days to the Attorney General that the alien not be deported.[42] Although referred to as a "recommendation," if the JRAD met the procedural requirements of the statute, the Attorney General was bound by the recommendation.[43] Courts have recognized that the judicial recommendation provision has been interpreted to grant "the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation" so long as proper notice was given to the immigration judge, the Immigration and Naturalization Service, and the Attorney General.[44] Thus, Congress essentially vested its deportation authority in the sentencing judge for the first time.[45]

Together, sections 328 and 329 of the INA[46] are the foundation of the current special naturalization privileges for alien veterans.[47] These two provisions of the current INA vary in regard to whether the veteran serves during peacetime or wartime.[48] Section 328 of the INA, codified at 8 U.S.C. § 1439, provides naturalization for veterans who serve honorably for at least one year, have proof of good moral character, are an LPR at the time of examination, and are still in service or have been honorably discharged no longer than six months prior to the time of application.[49] Section 239 of the INA, codified at 8 U.S.C. § 1440, provides naturalization for veterans who serve during military hostilities, provided that they show good moral character

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41. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 241(b)(2), 66 Stat. 204, 208 (codified as amended at 8 U.S.C. §§ 1251(a)(2), 1251(d)).

42. The statute reads:

> The provisions of subsection (a)(4) respecting the deportation of an alien convicted of a crime or crimes shall not apply . . . if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

Id.

43. Haller v. Esperdy, 397 F.2d 211, 213 (2d Cir. 1968); *see also* Velez-Lozano v. Immigration and Naturalization Serv., 463 F.2d 1305, 1308 (D.C. Cir. 1972).

44. *See* Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986).

45. *See id.*

46. Immigration and Nationality Act of 1952, Pub. L. No. 414, §§ 328, 329, 66 Stat. 249-50, (codified as amended at 8 U.S.C. §§ 1439-1440 (2006)).

47. 8 U.S.C. §§ 1439-1440 (2006).

48. *Id.*

49. *Id.* § 1439.

and an honorable discharge if no longer serving.[50] Most of the conditions set forth in section 328 are removed in section 329, including LPR status, a minimum period of military service, and the physical presence or continuous residency requirement.[51] Therefore, the servicemember who falls under section 329 could potentially file a military naturalization application on the first day of basic training.[52]

Despite the various changes of the veterans naturalization act, certain aspects have not changed. The term "good moral character" has always been a requirement since the Act's inception in 1790.[53] The INA does not define good moral character but, instead, provides a non-exhaustive list of characteristics that are *not* considered good moral character.[54] These immoral characteristics include crimes of "moral turpitude" and "aggravated felonies," which subject the alien to removal pursuant to 8 U.S.C. § 1227.[55]

The statute provides that LPRs will be deported if they have been convicted of a crime of moral turpitude within five years of their entry with a resulting sentence of at least one year.[56] The statute also provides that any LPR who is convicted of more than one crime of moral turpitude is deportable, regardless of whether the alien is

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50. *Id.* § 1440.

51. *Id.*

52. *See id.* Although under this hypothetical the servicemember is eligible for naturalization, it is highly unlikely that there will be an opportunity to file an immediate application. *See infra* Part III.

53. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (1790) (repealed 1795). The first naturalization statute in 1790 required:

> [t]hat any alien, being a free white person, who shall have resided within . . . the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record, in any one of the states wherein he shall have resided for the term of one year at least, and making proof to the satisfaction of such court, *that he is a person of good character*, and taking the oath or affirmation prescribed by law, to support the constitution of the United States, which oath or affirmation such court shall administer . . . and thereupon such person shall be considered as a citizen of the United States.

Id. (emphasis added).

54. § 1227(a)(2) (2006).

55. For a current list of aggravated felonies and crimes involving moral turpitude under the INA, see Elizabeth D. Lauzon, Annotation, *What Constitutes "Aggravated Felony" for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of Immigration and Nationality Act (8 U.S.C.A. § 1227(a)(2)(A)(iii))—Crime of Violence Under 8 U.S.C.A. § 1101(a)(43)(F)*, 50 A.L.R. FED. 2d 443 (2010); Annotation, *What Constitutes "Crime Involving Moral Turpitude" Within Meaning of §§ 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 U.S.C.S. § 1182(a)(9), 1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime*, 23 A.L.R. FED. 480 (1975).

56. 8 U.S.C. § 1227(a)(2)(A)(i).

confined.[57] Considering the severity of the consequences, it seems necessary to define moral turpitude. Crimes of moral turpitude are generally classified into four categories: "crimes against the person, sex crimes, crimes against property, and crimes against the authority of government."[58] Although the term moral turpitude has a long history in immigration laws,[59] its actual definition is just as subjective as the phrase "good moral character." The Board of Immigration Appeals ("BIA") has defined moral turpitude as "conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed other persons, either individually or to society in general."[60] The BIA also requires a requisite evil intent for a crime to be considered one of moral turpitude.[61] However, the requisite evil intent is still based upon a subjective definition of immorality and, thus, can be applied to completely dissimilar crimes such as murder and adultery.[62]

There is also much debate as to what constitutes an "aggravated felony" under 8 U.S.C. § 1227.[63] The Anti-Drug Abuse Act of 1988 ("ADAA") defined an aggravated felony as murder, illegal trafficking of firearms, or illegal trafficking of controlled substances.[64] Through the years, amended immigration acts have added numerous offenses to be classified as aggravated felonies and have restricted the alien's post-trial relief, causing a higher rate of deportations from criminal convictions.[65]

The Immigration Act of 1990 was one of the most restrictive acts because it removed a judge's authority to grant post-trial relief for non-U.S. citizens in the form of JRAD.[66] Prior to the Immigration Act of 1990, if the court that convicted the alien granted JRAD, "the INS would be barred from ever using the conviction for that crime

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57. *Id.* § 1227(a)(2)(A)(ii).

58. Gregory E. Fehlings, *Deportation as a Consequence of a Court-Martial Conviction*, 7 GEO. IMMIGR. L.J. 295, 314 (1993).

59. Naturalization is not available to aliens "who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." Act of Mar. 3, 1891, Ch. 551, 26 Stat. 1084 . The Immigration Act of 1917 also provides that aliens convicted of crimes of moral turpitude will be deported. Act of Feb. 5, 1917, Pub. L. No. 301, 39 Stat. 874, 8 U.S.C.A. § 101 *et seq*.

60. Knapik v. Ashcroft, 384 F.3d 84, 89 (3d Cir. 2004).

61. *In re* Khourn, 21 I. & N. Dec. 1041, 1046 (B.I.A. 1997); *see also In re* Flores, 17 I. & N. Dec. 225, 227 (B.I.A. 1980).

62. *See generally* Annotation, *supra* note 55 (describing various approaches on how a crime classified as one of moral turpitude).

63. *See infra* Part VI.B.

64. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181 (1988).

65. *See* Shagin, *supra* note 9, at 264-65.

66. *See id.* at 269-70.

involving moral turpitude to deport the alien."[67] The Immigration Act of 1990 also defined an aggravated felony as "any crime of violence . . . for which the term of imprisonment imposed . . . is at least 5 years."[68]

Other immigration acts continued to expand the list that triggers deportation. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") added seventeen new offenses, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA") not only added new offenses but also lowered the threshold to include crimes of violence with imprisonment of just over one year.[69] Therefore under IIRAIRA, aggravated felonies, which were first defined as crimes of violence like murder, now included mayhem and disturbance of peace.[70] The list of aggravated felonies that represent immoral character is not exhaustive, and the difficulty of determining which offenses invoke removal has received recent attention from the Supreme Court.[71]

III. CHALLENGES OF EXPEDITED VETERAN NATURALIZATION

To be considered for naturalization, servicemembers must complete the citizenship application process, which consists of completing Form N-400, the Application for Naturalization Form, and they must bring the completed form to a Military Personnel Customer Service Section.[72] Servicemembers must also receive an appointment letter from United States Citizenship and Immigration Services ("USCIS"), which directs the applicant to a designated fingerprinting location.[73] Once USCIS receives all the required documents and the servicemember's background check is cleared, the

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67. Fehlings, *supra* note 58, at 297-98.

68. Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048, 8 U.S.C. §§ 1226(e)(1)-(e)(3) (2006).

69. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform & Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321, 110 Stat. 3009; *see* Shagin, *supra* note 9, at 264-65.

70. Ruiz-Morales v. Ashcroft, 361 F.3d 1219, 1222 (9th Cir. 2004) (holding that the alien's public physical altercation with another man satisfied the definition of an aggravated felony requiring deportation).

71. Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2585 (2010); *see also infra* Part VI.

72. *Naturalization Process for Military Members and Their Spouses*, UNITED STATES OF AMERICA GREEN CARD LOTTERY OFFICIAL U.S. GOVERNMENT ENTRY PROGRAM, http://www.usadiversitylottery.com/news/us-citizenship/naturalization-process-for-military-members-and-their-spouses.php (last visited May 23, 2012).

73. *Id.* The Immigration and Naturalization Service ("INS") was the predecessor to USCIS. *Our History*, U.S. DEP'T OF HOMELAND SEC. (May 25, 2011), http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e00c0b89284a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=e00c0b89284a3210VgnVCM100000b92ca60aRCRD.

servicemember is scheduled for an interview.[74] It is imperative that servicemembers attend this interview because rescheduling can take several months; if the servicemember fails to appear without notifying USCIS, the application is administratively closed.[75] If the servicemember fails to contact USCIS within one year, the application is automatically denied.[76]

The servicemember must also bring any additional requested documents to the interview or the "case may be delayed or denied."[77] In addition to taking the required English and civics test,[78] the servicemember will be questioned under oath about his or her background, supporting evidence, place and length of residence, character, and allegiance to the Constitution.[79] If the interview ends successfully, the servicemember may be granted citizenship immediately.[80] However, if the servicemember either fails the English and civics test, or if the USCIS officer requires additional documents, the servicemember will be required to schedule a second interview within two to three months.[81]

Although this may seem like a fairly straightforward application process for a civilian, there are critical issues and potential impediments that can delay the process for military servicemembers. First, it is important to recognize that the historical purpose of the veteran naturalization provision has not changed—it has always been used as a recruiting tool and continues to act as a lure for immigrants seeking citizenship.[82] Many servicemembers are told by recruiters that they can quickly gain citizenship for themselves and their family. However, they are not advised that citizenship is not granted automatically and that the servicemember must actively seek citizenship through the standard application process.[83] Second, even if servicemembers are educated about the application process, it is extremely difficult to complete the application within the required timeframe due to military training, deployments, and change of duty stations.[84] If a servicemember fails to respond to a USCIS request or

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See id.*; Preston, *supra* note 12, at A1.

79. *Naturalization Process for Military Members and Their Spouses*, *supra* note 72.

80. *Id.*

81. *Id.*

82. *See* Preston, *supra* note 12, at A1.

83. *See* Jan A. Ruhman, *American Combat Veterans Facing Deportation*, 39 VIETNAM VETERANS AGAINST THE WAR 32, 32 (2009).

84. *See id.*; Timmons & Stock, *supra* note 15, at 273 ("Constant deployments and changes of station often result in failure to receive USCIS notice of the need to petition for the removal of conditions.").

attend a meeting, the naturalization process is further delayed and risks critical administrative errors.[85] Third, the application process may require legal assistance that the servicemember cannot access due to the military mission and the lack of legal services provided. For example, the servicemember may be deployed to a base where there is no legal assistance through a Judge Advocate General ("JAG").[86] Even if there is a JAG attorney, legal assistance attorneys usually have little knowledge of immigration issues and cannot represent the servicemember in immigration court.[87] Due to these special military conditions, it is often difficult for servicemembers to acquire expedited citizenship as promised. Considering that approximately half of the one million servicemembers have been deployed more than once in support of Operation Iraqi Freedom and Operation Enduring Freedom,[88] it is highly probable that an alien veteran's application for naturalization will not be expedited as the recruiter promised.

IV. COURT-MARTIAL CONVICTIONS AND DEPORTATION

Military justice is procedurally and substantively regulated through the Uniform Code of Military Justice ("UCMJ").[89] The UCMJ includes its own rules of evidence, charges, sentencing, and other statutes, which are published as the *Manual for Courts-Martial* ("MCM").[90] The UCMJ applies to all active duty military members and covers civilian offenses such as robbery[91] and assault,[92] as well as military offenses such as desertion[93] and insubordinate conduct toward a noncommissioned officer.[94] Under the UCMJ, there are three levels of courts-martial: summary court-martial, special court-martial, and general court-martial.[95] The primary differences between the three courts-martial are based on the jurisdictional sentencing power and the due process protections afforded to the

85. *See* Ruhman, *supra* note 83.

86. Timmons & Stock, *supra* note 15, at 276.

87. *Id.*

88. Testimony from Randy Phelps, Ph.D., Deputy Executive Director for Professional Practice, American Psychological Ass'n, U.S. SENATE COMM. ON VETERANS' AFFAIRS (Apr. 9, 2008).

89. Steven E. Asher, Note, *Reforming the Summary Court-Martial*, 79 COLUM. L. REV. 173, 174 (1979).

90. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002) [hereinafter MCM] (containing the RULES FOR COURTS-MARTIAL).

91. *Id.* pt. IV, ¶ 47, art. 122.

92. *Id.* pt. IV, ¶ 54, art. 128.

93. *Id.* pt. IV, ¶ 9, art. 85.

94. *Id.* pt. IV, ¶ 15, art. 91.

95. RULES FOR COURTS-MARTIAL 201(f), *in* MCM, *supra* note 90.

servicemember.[96]

A. Court-Martial

Of the three courts-martial, a summary court-martial imposes the least severe punishment but also offers servicemembers the least amount of due process protections.[97] Summary courts-martial are intended for prompt adjudication of "minor offenses under a simple procedure."[98] There is only one summary court-martial officer who plays a universal impartial role and acts as the judge, jury, prosecutor, and defense counsel.[99] Furthermore, the appointed summary court-martial officer is not a JAG attorney but an officer of any branch who is simply advised of the summary court-martial procedure by the JAG attorney.[100] The servicemember does not have a right to counsel in a summary court-martial but may request representation by a military defense counsel if such counsel is reasonably available.[101] The servicemember is not afforded direct appeal to a court of military review or the Court of Military Appeals. The only available appeal is to the convening summary court-martial officer.[102] Since appeals are made to the same officer who convened the court-martial, the defendant's request to vacate or modify the findings or sentence is likely to be futile.[103]

In *Middendorf v. Henry*, the Supreme Court held that the summary courts-martial procedure does not violate the constitutional right to due process because it does not result in a criminal conviction.[104] Justice Rehnquist delivered four reasons in his opinion. First, summary courts-martial are limited to the military community.[105] Second, summary courts-martial were usually convened for military specific offenses, such as Absence Without Leave ("AWOL").[106] Third, the punishment was minimal and did not affect civilian criminal records.[107] Lastly, the summary court-martial was not an adversary hearing since the court-martial officer held a

96. *See id.*

97. "The maximum penalty which can be adjudged in a summary court-martial is confinement for 30 days, forfeiture of two-thirds pay per month for one month, and reduction to the lowest pay grade." *Id.* at 1301(d) (quoting from discussion).

98. *Id.* at 1301(b).

99. *Id.* at 1301(a); Middendorf v. Henry, 425 U.S. 25, 32-33 (1976).

100. *See* RULES FOR COURTS-MARTIAL 1301(a)-(b), *in* MCM, *supra* note 90; *Middendorf*, 425 U.S. at 32.

101. *See* RULES FOR COURTS-MARTIAL 1301(e), *in* MCM, *supra* note 90.

102. *See* Asher, *supra* note 89, at 177.

103. *See* RULES FOR COURTS-MARTIAL 1306, *in* MCM, *supra* note 90.

104. 425 U.S. at 34.

105. *Id.* at 38.

106. *See id.* at 39.

107. *See id.* at 40-41.

universal role of judge, jury, prosecutor, and defense.[108] Therefore, a conviction in a summary court-martial would not be a conviction which would subject the defendant to deportation.[109]

Special courts-martial are usually used to try more serious offenses, but the maximum punishment that can be imposed is six-months confinement, two-thirds forfeiture of pay for six months, reduction in rank to the lowest enlisted pay grade, three months of hard labor without confinement, and a bad conduct discharge.[110] The trial is much more formal than a summary court-martial: the servicemember is automatically represented by a military defense counsel and is tried by a military judge.[111] A bad conduct discharge and a conviction in a special court-martial are grounds to bar a LPR servicemember from naturalization and can lead to deportation.[112]

General courts-martial are the highest level courts-martial and are reserved for the most serious offenses.[113] General courts-martial offer the most due process protection but also carry the most severe punishments, including the death penalty.[114] The servicemember is automatically assigned a military defense counsel and is offered the same rights to counsel as a bad conduct discharge special court-martial.[115] The servicemember is also entitled to an Article 32 hearing, which is similar to a preliminary hearing in civilian jurisdictions.[116] The punishments allowed when a person is found guilty by a general court-martial include dishonorable discharge, confinement, reduction, and forfeiture of all pay and allowances, among other things.[117] The maximum punishment is limited only by section 856 of the UCMJ.[118] A conviction under a general court-martial is "indisputably a federal criminal conviction for immigration law purposes and may lead to removal."[119]

B. Deportation Proceedings after a Court-Martial Conviction

After a servicemember is convicted in a special or general court-martial for a crime of moral turpitude or an aggravated felony, the

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108. *See id.* at 40-42.

109. Fehlings, *supra* note 58, at 300.

110. RULES FOR COURTS-MARTIAL 201(f)(I)(C)(2)(B), *in* MCM, *supra* note 90.

111. *See id.*; *see also* Uniform Code of Military Justice (*UCMJ*), art. 20, 10 U.S.C. § 820 (2006).

112. Timmons & Stock, *supra* note 15, at 272.

113. RULES FOR COURTS-MARTIAL 201(f)(1), *in* MCM, *supra* note 90; UCMJ, 10 U.S.C. § 818.

114. *See* 10 U.S.C. § 818.

115. *See id.* §§ 832, 838.

116. *See id.* § 832.

117. RULES FOR COURTS-MARTIAL 1003, *in* MCM, *supra* note 90.

118. 10 U.S.C. § 856.

119. Timmons & Stock, *supra* note 15, at 272.

servicemember's criminal history data is reported to the Criminal Justice Information Services ("CJIS") Division of the Federal Bureau of Investigation ("FBI") by the servicemember's respective branch's law enforcement agency.[120] The criminal history data includes the servicemember's biographical data, fingerprints, and the entire court-martial report: the referral of charges, Article 32 investigation, any UCMJ nonjudicial proceedings, and the final results of the court-martial.[121] In addition to the criminal history data, the military law enforcement agency will also submit the convicted servicemember's "Suspect Fingerprint Card" to the CJIS.[122]

Once the CJIS Division of the FBI receives the complete report, the data are entered into the FBI database that contains a full record of every individual in the United States who was ever "arrested, charged, convicted, or paroled . . . [for] a felony or serious misdemeanor."[123] However, the FBI's database is not directly linked to the USCIS; so, the servicemember's court-martial conviction can be reported to immigration authorities in several other ways.[124]

If the convicted LPR servicemember is a soldier in the U.S. Army, his or her criminal history data must be forwarded to the U.S. Immigration and Customs Enforcement ("ICE").[125] The Army confinement facility will then coordinate with ICE in his or her deportation proceedings, pursuant to Army regulations.[126] However, the same procedure is not required in other branches, namely, the Navy and the Marine Corps, meaning a servicemember in one of those branches may not have his or her criminal history data sent to ICE.[127] Regardless of whether the servicemember's conviction is directly sent to ICE, the information is likely to reach U.S. immigration authorities in a number of other ways. If the LPR servicemember ever gets arrested and confined in prison by civilian police authorities, the prison may be required to alert U.S. immigration authorities that they are holding a noncitizen inmate.[128] The LPR servicemember is also likely to be asked in a variety of situations whether he or she has a criminal conviction.[129] An

120. Richard D. Belliss, *Consequences of a Court-Martial Conviction for United States Service Members who are not United States Citizens*, 51 NAVAL L. REV. 53, 64-65 (2005).

121. *Id.* at 64.

122. *Id.* at 64-65.

123. *Id.* at 65.

124. *Id.*

125. *Id.* at 66.

126. *Id.*

127. *Id.* at 66-67.

128. *Id.* at 67.

129. The LPR servicemember will be asked whether he has a criminal conviction if he applies for citizenship or a new permanent resident card, if he leaves the country,

affirmative answer could trigger a call to ICE and lead to an arrest and detention in a deportation holding facility.[130]

V. PTSD AND THE LPR VETERAN

The damaging effects of combat extend beyond the physical ailments that are visibly recognizable. Symptoms of post-combat trauma such as nightmares, aggression, and anxiety have been recognized since the beginning of combat.[131] In 1980, the American Psychological Association ("APA") recognized PTSD as a psychiatric disorder.[132] The APA described PTSD as a series of symptoms that occur in response to a "traumatic event that is generally outside the range of usual human experience."[133] Traumatic events can include personal experience of "actual or threatened death or serious injury . . . or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a . . . close associate."[134] Trauma-induced symptoms include recurrent nightmares, aggression, depression, anxiety, hyperalertness, diminished responsiveness, and exaggeratedly startled responses.[135] Research has shown that persons suffering from PTSD may experience flashbacks and tend to feel threatened or mistrust even when not warranted.[136] There is a high prevalence of PTSD in the criminal population.[137] Criminals are more likely to "self-medicate with drugs and alcohol," seek out the same adrenaline rush similar to what was experienced in combat, and respond with violent behavior to perceived threats.[138]

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or if he gets stopped at a random Customs and Border Protection vehicle checkpoint. *Id.* at 67-68.

130. *Id.* at 67-68, 73.

131. Christopher Hawthorne, *Bringing Baghdad into the Courtroom: Should Combat Trauma in Veterans be Part of the Criminal Justice Equation?*, 24 CRIM. JUST. 4, 6 (2009) (discussing the historical recording of unusual behavior in early soldiers after they returned from combat operations).

132. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 308.30, at 236 (3d ed. 1980).

133. *Id.*

134. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 309.81, 465 (4th ed. 2000).

135. *Id.*

136. *Criminal Behavior and PTSD: An Analysis*, NAT'L CTR. FOR PTSD, http://www.ptsd.va.gov/professional/pages/criminal-behavior-ptsd.asp (last visited May 23, 2012).

137. *Id.*

138. Claudia Baker & Cessie Alfonso, *PTSD and Criminal Behavior: A National Center for PTSD Fact Sheet*, TRAUMATIC STRESS TREATMENT CTR., http://www.traumatic-stress-treatment.com/artptsdandcriminalbehavior.html (last visited May 23, 2012).

The soaring prevalence of veterans who suffer from PTSD is alarming. Studies show that one out of every five veterans who have served in Iraq and Afghanistan suffer from PTSD or major depression.[139] Nearly 20% of those who have been deployed in the past six years, the equivalent of 300,000 soldiers, suffer from PTSD or major depression.[140] The suicide rate of Army soldiers has more than doubled since 2001, reaching a record high and surpassing the suicide rate of civilians "for the first time since the Vietnam War."[141] Despite these escalating rates of PTSD, only 23-40% of veterans exhibiting PTSD symptoms sought treatment.[142]

Considering these statistics and the character of PTSD symptoms, it is no surprise that criminal convictions of veterans are also increasing.[143] Although PTSD has been used as a criminal defense for veterans since Vietnam,[144] it has been reemerging in recent years since the Iraqi and Afghanistan conflict.[145] U.S. Army veteran Sargent Binkly, who was charged with armed robbery of a pharmacy, pled a PTSD defense during the insanity phase of trial and was found not guilty by a California court.[146] In Oregon, Army National Guard soldier Jessie Bratcher, who was charged with murder, also pled a PTSD insanity defense and was found not guilty.[147] Courts have also recognized PTSD as a self-defense. Matthew Sepi, a U.S. Army veteran who served in Iraq, was

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139. *One in Five Iraq and Afghanistan Veterans Suffer from PTSD or Major Depression*, RAND CORP. (Apr. 17, 2008), http://www.rand.org/news/press/2008/04/17.html.

140. *Id.*

141. Lizette Alvarez, *Suicides of Soldiers Reach High of Nearly 3 Decades, and Army Vows to Bolster Protection*, N.Y. TIMES, Jan. 30, 2009, at A19. (arguing fifteen-month combat deployments and PTSD may contribute to the growing suicide rates).

142. Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems and Barriers to Care*, 351 NEW ENG. J. MED. 13, 16 (2004).

143. Veterans who suffer from PTSD "committed 13.3 violent acts in the prior year, compared to 3.54 acts for [v]eterans without PTSD." *Criminal Behavior and PTSD: An Analysis*, NAT'L CTR. FOR PTSD (June 6, 2010), http://www.ptsd.va.gov/professional/pages/criminal-behavior-ptsd.asp; *see also* Deborah Sontag & Lizette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, N.Y. TIMES, Jan. 13, 2008, at A1 (discussing the increase in recent veterans who are charged and convicted of murders).

144. *See generally* Michael J. Davidson, *Post-Traumatic Stress Disorder: A Controverial Defense for Veterans of a Controversial War*, 29 WM. AND MARY L. REV. 415 (1988) (discussing the use of PTSD as an insanity defense for Vietnam veterans).

145. *See generally* Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder*, 85 IND. L.J. 87 (2010).

146. *Veteran with PTSD Acquitted in Robbery Case*, THE ASSOCIATED PRESS, Jan. 13, 2009.

147. Martha Deller, *Veteran's Lawyers Seek to Use Post-Traumatic Stress Disorder as a Defense in Capital Murder Trial*, STAR TELEGRAM (Apr. 21, 2010).

approached by two gang members who allegedly raised a gun at him. Sepi pulled his AK-47 rifle and killed one and wounded the other. The veteran pled a PTSD-related self-defense and was given probation for concealing a dangerous weapon.[148]

Many LPR servicemembers who are facing deportation are convicted of crimes that are a result of their PTSD symptoms and combat experience.[149] Although some critics have raised concerns of a potential for false PTSD pleas, only 0.3% of defendants that raised the insanity defense were diagnosed with PTSD, and the plea was no more likely to succeed than any other insanity plea.[150] If PTSD can be recognized by the courts as an affirmative defense as it was for these soldiers, it may prevent LPR servicemembers from facing deportation, a consequence that can be just as severe as life sentence of confinement. Instead of banishing LPR veterans who sacrificed their mental health by serving the United States, courts should require them to receive specialized mental health treatment to treat their PTSD and provide them the opportunity to overcome their disorder.

At the very least, courts should consider the veteran's prior service and PTSD diagnosis as a mitigating factor during the sentencing stage of trial. Several states have already created sentencing-mitigation laws for veterans who suffer from PTSD.[151] These veterans can then be sent to treatment facilities, or a federal facility, and receive the PTSD therapy they desperately need.[152] Most importantly, if courts consider PTSD as a mitigating factor and

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148. Hawthorne, *supra* note 17, at 5.

149. Shagin, *supra* note 9, at 303-10. Rohan Coombs, a Jamaican-born U.S. Marine Corps veteran who fought in Iraq, "was court-martialed for possession of cocaine and marijuana with the intent to distribute, and was given 18 months of confinement and a dishonorable discharge," and he was again arrested by civilian authorities for attempting to sell marijuana. Juliana Barbassa, *Immigrant Veterans Face Deportation Despite Military Service If They Run Afoul of U.S. Law*, ASSOCIATED PRESS (Oct. 25, 2010). The LPR veteran says that he felt "depressed and anxious" after the war, and he got involved in drugs because he had no other outlet. *Id.* Dardar Paye, a U.S. Army veteran who served in Kosovo and Kuwait, is facing deportation for weapons offenses and a drug possession charge. Rohan Mascarenhas, *A Soldier Scorned Immigrant Daydar Paye Served in the U.S. Military, then Ran Afront of the Law*, STAR-LEDGER, Nov. 3, 2010, at 17. Veterans are commonly convicted for drug violations, violent behavior, and weapons charges. *Id.* For more veteran deportation stories, see *List and Stories of Veterans Facing Deportation & Deported Veterans*, BANISHED VETERANS, http://banishedveterans.intuitwebsites.com/donations.html (last visited May 23, 2012).

150. Paul S. Appelbaum et al., *Use of Posttraumatic Stress Disorder to Support an Insanity Defense*, 150 AM. J. PSYCHIATRY 299, 231 (1993).

151. California and Minnesota have created sentencing-mitigation laws for Operation Iraqi Freedom and Operation Enduring Freedom veterans, and Minnesota courts may involve the Department of Veterans Affairs to help determine "sentencing and treatment recommendations." Hawthorne, *supra* note 17, at 12-13.

152. *Id.*

reduce the serviceman's sentence to less than one year, LPR veterans can avoid deportation since they would no longer fall under the IIRAIRA requirement of deportation for aliens sentenced to over one year imprisonment.[153] Courts should not wait for legislative action to create sentencing-mitigation laws. The statistics prove that PTSD is an illness that is becoming increasingly pervasive. Courts have the ability to provide immediate assistance to these veterans by recognizing PTSD as an affirmative defense or a mitigating factor and requiring these veterans to seek help, instead of subjecting them to deportation.

VI. THE PAST AND FUTURE OF IMMIGRATION REFORM FOR ALIEN VETERANS

A. Lance Corporal Jose Gutierrez Act of 2008

Lance Corporal Jose Gutierrez was a U.S. Marine Corps veteran who was killed while serving in Operation Iraqi Freedom in 2003. Gutierrez entered the United States illegally but was able to obtain a green card by falsely stating he was a minor.[154] Gutierrez joined the military to fight for the country that took him in and to obtain his citizenship; he was granted citizenship posthumously.[155] In 2008, the Lance Corporal Jose Gutierrez Act was proposed to amend the INA so that servicemembers and their families would be protected from removal.[156] The last action date was October 3, 2008, when the House

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153. Illegal Immigration Reform & Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 236(c)(1)(C), 231-44, 110 Stat. 3009–546 *et seq.* (1996).

154. Rebecca Leung, *The Death of Lance Cpl. Gutierrez*, CBS NEWS.COM (Feb. 11, 2009 8:43 PM), http://www.cbsnews.com/stories/2003/04/23/60II/main550779.shtml.

155. *Id.*

156. Lance Corporal Jose Gutierrez Act of 2008, H.R. 6020, 110th Cong. (2008). The proposed bill would:

> make eligible for naturalization under Section 329 anyone who served in the armed forces honorably in support of contingency operations; extend the period for applying for military naturalization from six months to one year following the completion of eligible service; codify the factors to be considered in initiating removal proceedings against active-duty military personnel or veterans; restore discretion to immigration judges to grant relief for active-duty military personnel, veterans, and their family members who are in removal proceedings; exempt from specified grounds of inadmissibility or deportation an alien who is a member or veteran of the armed forces or an immediate family member of the military member or veteran; authorize the secretary of homeland security to waive certain grounds of admissibility and removability for military family members; exempt from numerical immigrant visa limitations aliens who are eligible for a family-sponsored immigrant visa and are either a spouse or child of an alien serving in the armed forces; direct the secretary of homeland security to adjust to permanent resident status an alien who is a parent, spouse, child, or minor sibling of an armed forces eligible member who has served honorably during the specified period of hostilities; and waive certain grounds of

Committee on the Judiciary voted favorably and passed it onto the full House.[157]

However, the likelihood that the bill will be passed is slim, especially considering the Senate block of the DREAM Act, which contained similar provisions to the Lance Corporal Jose Gutierrez Act.[158] The most critical aspect of both of these acts is that its proposed benefits are showered too extensively.[159] The Lance Corporal Jose Gutierrez Act provides benefits to not only undocumented immigrants who enlist in the military but also the family members of these noncitizen servicemembers.[160] If the legislature and the courts cannot even agree on whether LPR servicemembers should be given special consideration,[161] Congress is certainly not prepared to extend those benefits to undocumented immigrants and their families. The focus of the servicemember's protection should be on the actual servicemember and not family members. It is argued that the assurance of knowing "spouses, children, and other family members are safe and well is critical to servicemembers' mission readiness, focus, and effectiveness in protecting the United States."[162] Much like the reaction to the DREAM Act, however, a complete overhaul of INA is unlikely to satisfy the critics who believe such benefits are too widespread and provide amnesty for undocumented immigrants.[163] Thus, a bill that targets only veteran naturalization and immigration benefits is much more likely to avoid the fear of "chain migration" when families are included.[164]

B. The Effects of Recent Landmark Supreme Court Cases on LPR Veterans

In *Padilla v. Kentucky*, the Supreme Court held that defense

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inadmissibility for the purposes of adjustment and allow for posthumous benefits in certain circumstances.

Timmons & Stock, *supra* note 15, at 274-75.

157. H.R. REP. NO. 110-912 (2008).

158. Catalina Camina, *Senate Blocks DREAM Act*, USA TODAY (Dec. 18, 2010), http://content.usatoday.com/communities/onpolitics/post/2010/12/senate-dream-act-/1; *see generally* DREAM Act, S. 1291, 107th Cong. (2001). The DREAM Act contained similar provisions to the Lance Corporal Jose Gutierrez Act in that it would grant U.S. citizenship to undocumented immigrants who enlisted in the military or attended two years of college. Camina, *supra*.

159. *See, e.g.*, H.R. REP. NO. 110-912, at 33 (2008) (dissenting views) (discussing DREAM Act's overreach in providing benefits that extend beyond "facilitate[ing] the naturalization of noncitizens serving in the Armed Forces").

160. H.R. 6020 § 7.

161. *See supra* Part V.

162. Timmons & Stock, *supra* note 15, at 273.

163. H.R. REP. NO. 110-912, at 33-35 (2008).

164. *Id.*

counsel is required to advise the client of the immigration consequences in a criminal conviction.[165] Jose Padilla, a Honduran citizen, was a LPR for over forty years and served in the Vietnam War. He was charged with transporting marijuana, and he pled guilty pursuant to his counsel's assurance that he "did not have to worry about immigration status since he had been in the country so long."[166] Due to his defense attorney's advice, Padilla's guilty plea and conviction of the drug charges "made his deportation virtually mandatory."[167] Padilla alleged that, but for his defense attorney's recommendation, he would not have pled guilty.[168] The Supreme Court of Kentucky denied Padilla's "ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters."[169]

On appeal, the United States Supreme Court held that due to the severity of deportation, the immigration consequence is integral, and not collateral, to a criminal proceeding.[170] In addition, the Court agreed with Padilla and held that the defense counsel has a duty to explain possible immigration consequences.[171] The Court applied the two-part test that was first established in *Strickland v. Washington*[172] to determine whether the defense attorney's assistance fell below the standard required under the defendant's Sixth Amendment right to counsel in criminal proceedings.[173] The first part of the test is to determine whether the assistance "fell below an objective standard of reasonableness."[174] The second part of the test is whether the attorney's ineffective advice caused a reasonable probability of another result.[175] Padilla's attorney's advice failed the first prong because the immigration statutes clearly state that a felony drug trafficking conviction would lead to his client's

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165. 130 S. Ct. 1473, 1486-87 (2010).

166. *Id.* at 1478.

167. *Id.*

168. *Id.*

169. *Id.* at 1481.

170. *Id.* at 1481-82.

171. *Id.* at 1486-87.

172. 466 U.S. 668, 687, 693-700 (1984).

173.The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI (emphasis added).

174. *Strickland*, 466 U.S. at 688.

175. *See id.* at 687.

automatic deportation.[176] Therefore, the Court did not even apply the second prong of the *Strickland* test.[177]

The Court's reasoning in *Padilla* shows that courts recognize the limited alternatives that noncitizens have due to the increasingly stringent immigration laws.[178] Moreover, the Court emphasized the severity of deportation in the criminal process, even though it is not a criminal sanction.[179] After *Padilla*, criminal defense attorneys are subject to a heightened standard of professional responsibility in that they have a clear duty to advise their clients on immigration consequences with no distinction between whether the immigration consequence is collateral or direct. Prosecutors should also be aware of the defendant's possible deportation consequences during the plea-bargaining process since it may allow both parties to better satisfy their interests.[180] *Padilla* suggests that:

> [D]efense counsel should (1) be sufficiently familiar with immigration law to be able to render correct advice on the immigration consequences of various criminal charges; (2) consult with an immigration attorney when provided with a plea offer from which immigration consequences are, or may be, unclear; or (3) advise the client that a plea may have immigration consequences and refer the client to an immigration attorney for direct consultation about the immigration consequences of the plea.[181]

The Supreme Court further clarified this area of immigration law in its holding in *Carachuri-Rosendo v. Holder*.[182] Jose Carachuri-Rosendo was born in Mexico but came to the United States when he was five, becoming an LPR.[183] Carachuri-Rosendo was convicted in Texas for two drug possession charges: the first charge was in 2004 for possession of less than two ounces of marijuana (a Class B misdemeanor), and the second charge was in 2005 for one tablet of anti-anxiety medication without a prescription.[184] The prosecutor did not pursue felony charges for the second charge, and instead, Carachuri-Rosendo was charged with a

176. *Padilla*, 130 S. Ct. at 1483.

177. *Id.* at 1483-84.

178. *Id.* at 1478-80 (discussing the dramatic change in immigration law over the past ninety years, including the addition of narcotic related offenses as crimes of moral turpitude and the abolition of JRAD).

179. *Id.* at 1481.

180. *Id.* at 1486.

181. Mathew Millen & Phoebe P. Liu, *Supreme Court Sends a Message to Criminal Defense Attorneys Whose Clients Are Not Citizens: Do Not Ignore the Defendant's Immigration Status*, 57 FED. LAW. 20, 21 (2010).

182. 130 S. Ct. 2577 (2010).

183. *Id.* at 2583.

184. *Id.*

Class A misdemeanor.[185] However, the federal government initiated removal proceedings for possession of a controlled substance: marijuana.[186] The immigration judge found that Carachuri-Rosendo was in possession of a controlled substance but also held that his second possession conviction was an aggravated felony, which barred him from cancellation of removal.[187] The BIA upheld the denial for cancellation of removal, but the board ruled that it would not consider a second misdemeanor conviction an aggravated felony unless there was a finding that the defendant was a recidivist.[188]

As discussed in Part II, INA added several low-level offenses to the aggravated felony list that can lead to deportation or bar to naturalization, including possession of a controlled substance.[189] However, the offenses are still classified as *felonies* and Carachuri-Rosendo's crimes were both misdemeanors under Texas and federal law.[190] In opposition, the government argued that the federal law has a recidivist condition and that his second charge qualified as a felony.[191]

The Court held that Carachuri-Rosendo's two misdemeanors were not "aggravated felonies" and, therefore, did not bar him from obtaining a cancellation of removal.[192] The Court first examined the intent of the prosecutor and found that the prosecutor chose not to pursue Carchuri-Rosendo's second misdeameanor as a recidivist felony.[193] Second, the Court pointed out that there was actually no conviction because Carachuri-Rosendo was only charged with misdemeanors.[194] Following the government's "hypothetical approach" that it *could have* charged Carachuri-Rosendo with a felony would go against the statutory language and meaning.[195] Third, if the immigration court retrospectively treated his misdemeanor as a felony, it would fail to give "mandatory notice and process requirements, which have great practical significance with respect to the conviction itself and are integral to the structure and design of federal drug laws."[196] Fourth, the Court highlighted that both of Carachuri-Rosendo's charges were misdemeanors with

185. *Id.*

186. *Id.* at 2580; *see* 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

187. *Carachuri-Rosendo*, 130 S. Ct. at 2583.

188. *In re* Carachuri-Rosendo, 24 I. & N. Dec. 382, 391, 394 (B.I.A. 2007) (holding that the defendant was a recidivist by his own admission).

189. *See* § 1227(a)(2)(B)(i).

190. *Carachuri-Rosendo*, 130 S. Ct. at 2583.

191. *Id.* at 2586.

192. *Id.* at 2586-90.

193. *Id.* at 2587.

194. *Id.* at 2586-87.

195. *Id.* at 2588, 2590-91 (Scalia, J., concurring in judgment).

196. *Id.* at 2579 (majority opinion).

sentences of less than a year and that there is not a single case in which a prosecutor has pursued felony charges for such offenses.[197]

Carachuri-Rosendo provides clarification and guidelines to the ambiguous context of "aggravated felonies" in INA cases. The Court recognized the complexity of state convictions cross-referenced with federal convictions under the INA[198] and held that the courts should first determine whether the drug offense is a felony under the federal Controlled Substance Act and only then look to see whether there was a felony conviction.[199] *Carachuri-Rosendo* reminds the courts to look at the original meaning of "aggravated felony" as a crime of violence, prior to the INA's supplement of nonviolent crimes. This is especially pertinent to LPR veteran cases because an exceedingly large population of veterans suffer from PTSD and self-medicate with drugs and alcohol, leading to misdemeanor offenses that could potentially be tried as recidivist felonies. *Carachuri-Rosendo* encourages courts to evaluate what the true meaning of an "aggravated felony" is prior to subjecting an LPR to removal. This can conceivably be the catalyst to curbing the influx of removal proceedings involving LPR veterans who do not commit violent crimes but simply suffer from PTSD.

C. Solving the Problem Through Veterans Courts

Over the past two decades, there has been a growing movement towards "problem-solving" or "specialty" courts that specifically deal with "domestic violence, homelessness, and most frequently drug addiction and mental illness."[200] Thousands of veterans struggle with these exact issues when they return from deployments with PTSD.[201] Veterans Courts have been emerging as problem-solving courts that deal with "the cycle of incarceration-release-recidivism" when violators are punished for their crimes but not treated for the mental illnesses that are the root of their criminal behavior.[202]

The first Veterans Court was established in Alaska in 2004 by two judges who were veterans themselves and were recognizing the escalating number of veterans appearing in their courts.[203] The program was structured so that once the veteran defendant was

197. *Id.* at 2589.

198. *Id.* at 2581 (referring to the "maze of statutory cross-references").

199. *Id.* at 2589-90.

200. Steven Berenson, *The Movement Toward Veterans Courts*, 44 CLEARINGHOUSE REV. 37, 40 (2010).

201. *Id.* at 37-38 (discussing "invisible wounds" that correlate with family conflicts, anger issues, and drug abuse).

202. *Id.* at 40.

203. Michael Daly Hawkins, *Coming Home: Accomodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 565 (2010).

arraigned, the defendant could submit an application for participation in the Veterans Court.[204] Most Veterans Courts do not allow veterans who are charged with violent crimes. If the defendant is approved, the judge refers the defendant to a Veterans Service Representative ("VSR"), a fellow veteran whose role is similar to that of a caseworker.[205] In order to build a trusting relationship with the defendant, it is crucial that the VSR can identify with the veteran defendant, and some Veterans Courts go as far as to require the VSR to serve in or near the same combat zones.[206] The VSR works as a counselor, develops a treatment plan, and refers the defendant to alcohol, drug dependency, or mental health treatment centers if necessary.[207] The veteran defendant is also required to regularly appear in court with fellow participants and the judge, similar to group therapy sessions.[208] If the defendant successfully completes the program, the judge may reduce or even dismiss the charges.[209] If the defendant fails to complete the program, the defendant is usually sentenced to the remainder of the uncompleted term.[210]

More than forty Veterans Courts in almost twenty-two states have followed this intensive treatment model and have seen great success in reducing recidivism rates.[211] Veterans Courts have been highly effective because every professional that is involved, from the judges to the attorneys and VSRs, is specially trained to understand and create a program that targets veterans' social problems.[212] Standard probation programs are ineffective because they do not address the "unique needs based on the trauma of combat[]" and do not treat PTSD, the "source of the deviant behavior."[213]

Veterans Courts would be particularly beneficial for LPR veterans since it would provide them the opportunity to reduce or

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204. *See id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 565-66.

209. *Id.* at 566.

210. *Id.*

211. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Michigan, Minnesota, Missouri, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Texas, Washington, and Wisconsin all have established Veterans Courts. *See id.* at 566-67; *Justice for Vets: The Nat'l Clearinghouse for Veterans Treatment Courts*, NAT'L ASSOC. OF DRUG COURT PROF'L, http://bit.ly/bK67tT (last visited Jan. 31, 2012). Out "of more than 100 veterans who participated in the Buffalo program, only 2 were returned to the traditional criminal court system." *See* Berensen, *supra* note 23, at 39.

212. Craig Logsdon & Michelle Keogh, *Special Feature: Homeland Justice for Veterans: Why Veterans Need Their Own Court: Uncommon Criminals*, 47 ARIZ. ATTORNEY 14, 20 (2010).

213. *Id.*

dismiss their sentence and avoid deportation. Although Veterans Courts are usually limited to "misdemeanor or felony nonviolent crimes,"[214] hundreds of veterans who have been arrested on drug- or alcohol-related crimes would be able to participate in these programs and recover from their traumatic combat experiences. The United States should take responsibility in caring for these veterans who have sacrificed their well-being for this nation. It would be deplorable to deport LPR veterans who have become socially, mentally, and physically broken from fighting for the United States.

Veterans Courts also return a measure of discretionary relief to judges since they can no longer recommend against deportation after the abolition of JRAD. The JRAD procedure was commonly used by judges who convicted LPR defendants in violation of narcotics offenses.[215] Similarly, Veterans Courts often hear cases involving drug offenses of veterans suffering from PTSD. Veterans Courts would allow judges to provide rehabilitation for these veterans and present another chance for veterans who would otherwise be deported for a crime of moral turpitude or aggravated felony in immigration court.

Despite the success rates proven by low recidivism rates, Veterans Courts have received criticism as offering a "special treatment" from the courts.[216] The American Civil Liberties Union ("ACLU") has opposed Veterans Courts, arguing that veterans are provided "an automatic free pass based on military status to certain criminal-defense rights that others don't have."[217] Other concerns are that Veterans Courts exclude nonveterans who suffer from PTSD but are not eligible for special provisions through these problem-solving courts.[218] Critics also say that Veterans Courts perpetuate the stereotype that veterans are returning "war-crazy."[219] Lastly, Veterans Courts have been criticized for being more costly than traditional courts.[220]

In response to these criticisms, Veterans Courts are not "get-out-of-jail cards" that are abused by defendants. Veterans Courts are highly intensive treatment programs for the duration of approximately eighteen months in which veterans are required to attend regular meetings with the judges and attorneys, attend

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214. *See* Berenson, *supra* note 23, at 39.

215. Padilla v. Kentucky, 130 S. Ct. 1473, 1479-80 (2010); *see also* United States v. O'Rourke, 213 F.2d 759, 762 (8th Cir. 1954) (allowing JRAD to prevent deportation of an individual convicted of a narcotics offense).

216. Dahlia Lithwick, *A Separate Peace; Why Veterans Deserve Special Courts*, NEWSWEEK, Feb. 22, 2010, at 20.

217. *Id.* (quoting Lee Rowland of the ACLU of Nevada).

218. *Id.*

219. Berenson, *supra* note 23, at 41.

220. *Id.* at 40.

therapy sessions with psychiatrists, and meet with fellow participants.[221] In addition, veteran defendants are subject to unannounced home visits, drug and alcohol testing, and random searches by probation officers.[222] If the veteran fails to meet these requirements, the veteran can be demoted to an earlier stage of the program, subjected to increased drug and alcohol testing and court appearances, dismissed from the program, or incarcerated and prosecuted on the original charges.[223] The intensive treatment and probation program is hardly a free pass. It is designed to treat the underlying PTSD issues instead of subjecting the defendant to further traumatic stressors in prison.

Although some may disparage Veterans Courts for perpetuating a stereotype of troubled veterans, it would be a greater disaster to turn a blind eye and deny the psychiatric and social problems with which returning veterans are coping. In *Porter v. McCollum*, Mr. Porter was a Korean War veteran who was subjected to psychological traumas on the battlefield.[224] Mr. Porter exhibited several symptoms of PTSD for decades but did not receive any treatment.[225] One day, he suddenly murdered his ex-wife and her boyfriend.[226] Veterans Courts are designed to address the issues necessary to prevent violent crimes such as this. Perhaps if Mr. Porter entered into a Veterans Court treatment program upon receiving his first misdemeanors from his violent outbursts, he may have been able to overcome his PTSD and learn how to cope with his traumatic combat experience.

Finally, although Veterans Courts have higher start-up costs, they are cost-efficient due to significant reduction in recidivism and crime rates.[227] Research results have shown that drug courts that utilize similar problem-solving programs as Veterans Courts spend an average of $4,333 per client but save an average per client of $4,705 for taxpayers and $4,395 for potential future victims.[228] Another study in California found that compared to the $3,597 average client cost for special courts, there is an average annual

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221. Melissa Pratt, *New Courts on the Block: Specialized Criminal Courts for Veterans in the United States*, 15 APPEAL L. CURRENT L. & L. REFORM 39, 55-56 (2010) (discussing the strict regimen of the Veterans Court program).

222. *Id.*

223. *Id.* at 55.

224. Porter v. McCollum, 130 S. Ct. 447, 455 (2009).

225. The defendant developed a severe drinking problem, engaged in violent outbursts, and experienced horrible nightmares. *Id.* at 450-51.

226. *Id.* at 448.

227. C. West Huddleston, III et al., *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem-Solving Court Programs in the United States*, NATIONAL DRUG COURT INSTITUTE, May 2008, at i, 1-2.

228. *Id.* at 6.

savings of $24,000.[229] Problem-solving courts, such as Veterans Courts, should be viewed as a long-term solution, and thus, the long-term cost-efficient benefits are well worth the initial investment.

VII. CONCLUSION: WHERE DO WE GO FROM HERE?

There are almost 30,000 non-U.S. citizens in our military, fighting for a country that promises them citizenship and a home in exchange for their allegiance.[230] Despite optimistic offers of expedited citizenship by military recruiters, many veterans do not get the opportunity to apply because they are not informed of the application procedure, have no access to legal assistance to guide them through the process, or simply cannot find the time due to constant deployments.[231] Moreover, the continued deployments are causing veterans to suffer from PTSD, leading to criminal convictions that either bar them from naturalization or require their deportation.[232]

Courts are beginning to take a more affirmative role amidst the stalling legislative actions for immigration reform. They are realizing the severe consequences of banning a veteran from a country he or she fought for and are finding other ways to assist veterans despite legislative barriers.[233] After *Padilla v. Kentucky*, courts are finding that a servicemember's counsel has a duty to inform the defendant of immigration consequences no matter how slight the offense.[234] Furthermore, in *Carachuri-Rosendo v. Holder*, the Supreme Court prevented a flood of new deportation proceedings by restricting the definition of "aggravated felony" under immigration law.[235] These landmark Supreme Court cases reiterate the LPR veteran's due process rights and recognize that deportation can shatter lives even though it is not considered a punishment.[236] It is also promising to see the growth of specialized Veterans Courts across the country, supporting the rehabilitation of veterans upon their return to the civilian world and offering them a second chance. As our veterans continue to fight the longest American war, we must assist our LPR veterans so they do not have to fight another battle at home.

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229. *See* Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 371 (2009).

230. Preston, *supra* note 12.

231. *See supra* Part III.

232. *See supra* Part V.

233. *See supra* Part VI.B; Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

234. *Padilla*, 130 S. Ct. at 1486.

235. *Id.* at 2577, 2586.

236. *See supra* Part VI.B.