2000

In Service to America: Naturalization of Undocumented Alien Veterans

Darlene Goring
Louisiana State University Law Center, dgoring@lsu.edu

In Service to America: Naturalization of Undocumented Alien Veterans

Darlene C. Goring[*]

What finer test of the disposition of one who wishes to be naturalized can be conceived of than to ascertain whether he is willing to support and defend the nation in time of war?[1]

* Assistant Professor of Law, University of Kentucky College of Law. B.A., Howard University; J.D. and LL.M., Northwestern University School of Law. I would like to thank Rebecca J. Davis for her valuable research assistance. I dedicate this article to my mother Gloria Wallace Goring and my newborn daughter Morgan Alexandra Ross, two exceptionally strong African American women.

[1] Hauge v. United States, 276 F. 111, 113 (9th Cir. 1921).

INTRODUCTION

My dad proudly and honorably served this country as a soldier in the U.S. Army in World War II (WWII). This accomplishment may seem quite ordinary, but my dad was an undocumented alien[2] who came to the United States from Cuba. He assumed that Eleanor Roosevelt's efforts during WWII to equalize the status of African Americans,[3] especially military personnel, somehow played a role in establishing the immigration policy that allowed him to be naturalized as a U.S. citizen. Although he was not lawfully admitted into the United States, he easily met all of the other naturalization requirements—residency, language proficiency, a pathological hatred of all things communist, and a love for this country. There was, however, one small catch: he had to serve in the military for three years before becoming eligible for citizenship. Basically, the price of his U.S. passport was his life, or at least the genuine possibility of losing it.

My dad, however, did not know that thousands of aliens enlisted and served in every branch of the U.S. military service during the last century.[4]

---

[2] The Immigration and Nationality Act [hereinafter INA] defines an alien as "any person not a citizen or national of the United States." INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1994). The terms "illegal alien," "undocumented alien," "out-of-status alien," and "alien unlawfully present in the United States," will be used throughout the article to refer to aliens who entered the United States without "inspection and authorization by an immigration officer," or who lawfully entered as non-immigrants and remained in the U.S. after expiration of the time period authorized by their entry visa. *Id.* INA § 101(a)(13), 8 U.S.C. § 1101(a)(13)(A) (Supp. 1999); *see also* THOMAS ALEXANDER ALIENKOFF, ET AL., IMMIGRATION AND CITIZENSHIP 600 (1998). Alienkoff explored the various terms to describe such persons:

> The terms "illegal aliens," "undocumented aliens," and "unauthorized migrants" are all in common usage. Some object to "illegal aliens," noting that many persons unlawfully in the United States may ultimately qualify for legal status or obtain discretionary relief from deportation; it is also argued that the United States has tolerated and even encouraged the presence of persons deemed "illegal." But others counter that "undocumented" is a euphemism for entry and continuing presence that violates federal law; moreover, many aliens not authorized to be in the United States possess documents (although they may be fraudulent).

Id.

[3] *See generally* ALLIDA M. BLACK, CASTING HER OWN SHADOW: ELEANOR ROOSEVELT AND THE SHAPING OF POSTWAR LIBERALISM 93 (1996); MICHAEL L. LEVINE, AFRICAN AMERICANS AND CIVIL RIGHTS: FROM 1619 TO THE PRESENT 159 (1996); NANCY J. WEISS, FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR 120-35 (1983).

[4] *See generally* INS, U.S. DEP'T OF JUSTICE, 1998 STATISTICAL Y.B., *available at* www.ins.usdoj.gov/graphics/aboutins/ybpage.htm (last visited Dec. 1, 2000) [hereinafter STATISTICAL Y.B.].

Some of these individuals did so on behalf of the United States in their countries of origin, and never set foot within the geographic boundaries of the United States.[5] Others, like my father, used the country's need for military personnel to secure U.S. citizenship, a coveted prize that has been characterized by the U.S. Supreme Court as "the highest hope of civilized men."[6] Since 1862, Congress, through naturalization legislation, has provided a vehicle for over 662,759 alien veterans to become naturalized citizens.[7]

Military service and immigration proved to be an effective combination during periods of national crisis associated with world wars and other military conflicts, when the battle cry was preservation of the American way of life. During World War I (WWI) and WWII, over 143,000 legal and undocumented aliens became eligible for naturalization as a result of their wartime military service.[8] Another 33,378 who provided peacetime military service were naturalized from 1945 through 1997.[9] The naturalization policy provided much needed manpower for the war as well as an administratively efficient and cost-effective way to legalize immigrants and their families.[10]

---

[5] *See* Hmong Veteran's Naturalization Act of 2000, Pub. L. No 106-207, 114 Stat. 316 (2000) (facilitating the naturalization of aliens who served with special guerrilla units or irregular forces in Laos); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (amending the INA to change the level and preference system for admission of immigrants to the U.S., and providing administrative naturalization, which provides for the naturalization of Filipino veterans who served during WWII).

[6] Schneiderman v. United States, 320 U.S. 118, 122 (1943). In *Schneiderman*, the Supreme Court explained the significance of U.S. citizenship:

> For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men.

Id.

[7] STATISTICAL Y.B., *supra* note 4; *see also* U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, PART 1, SERIES C 162-167, 114 (1975).

[8] *See Hearing Before the Subcomm. on Immigration, Refugees, and International Law*, 101st Cong. 53 (1989) (statement of Hon. Benjamin A. Gilman, Rep., N.Y.). Representative Gilman explained the United States' history of naturalization through military service:

> In closing, I would like to point out that there is ample precedent for this method of military recruitment. During times of war, particularly during World War II, substantial numbers of foreign nationals did obtain citizenship through military enlistment. In fact, more than 143,000 members of our U.S. Armed Forces, both enlistees and draftees, obtained citizenship under the World War II provisions alone.

Id.

[9] STATISTICAL Y.B., *supra* note 4.

[10] *See* INA § 101(a)(15), 8 U.S.C. § 1101(1)(15) (Supp. 1999). It is important to note that the INA makes a distinction between an immigrant and a non-immigrant. An

Today, America faces the daunting task of controlling illegal immigration across our borders. It is estimated that over 275,000 aliens illegally immigrate to the United States annually.[11] Every border checkpoint, seaport, and geographic boundary line between the United States and Canada to the north, and Mexico, South America, and the Caribbean Islands to the south, is a potential battleground, as the U.S. Border Patrol undertakes efforts to stem the illegal flow of aliens into the country.[12] Regulation of illegal immigrants is further complicated because the Immigration and Naturalization Service (INS) has made a strategic decision that it will not pursue efforts to remove the millions of undocumented aliens currently residing in the United States.[13] With no end in sight, federal, state, and local governments bear the fiscal burden to provide emergency health care, shelter, education, and related public services for undocumented aliens.

The inherent secrecy that surrounds undocumented aliens residing in the United States makes it impossible to obtain an accurate numerical profile of this population. The INS, however, estimates that over five million undocumented aliens currently reside in the United States.[14]

---

immigrant is an alien who intends to permanently remain in the United States. A non-immigrant is an alien whose presence in the United States is temporary, and who falls within one of nineteen enumerated categories of non-immigrants defined in the act. *See id.*

[11] *See* INS, U.S. DEP'T OF JUSTICE, ILLEGAL ALIEN RESIDENT POPULATION, *at* http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm (last visited Nov. 1, 2000) [hereinafter ILLEGAL ALIEN RESIDENT POPULATION]. The Department of Justice reveals that:

> About 5.0 million undocumented immigrants were residing in the United States in October 1996, with a range of about 4.6 to 5.0 million. The population was estimated to be growing by about 275,000 each year, which is about 25,000 lower than the annual level of growth estimated by the INS in 1994.

Id.

[12] *See* Bill Hong Ing, *Border Patrol Abuse: Evaluating Complaint Procedures Available to Victims*, 9 GEO. IMMIGR. L.J. 757 (1995); Comment, *Border Violence Against Illegal Immigrants and the Need to Change the Border Patrol's Current Complaint Review Process*, 21 HOUS. J. INT'L L. 85 (1998); Thaddeus Herrick, *Another Border Shooting Disputed: Paralyzed Illegal Immigrant, 18, Is Seeking $25 Million From U.S.*, HOUS. CHRON., Mar. 8, 1999, at 1; Patrick Revere, *Border Bandits Fire on 30 Illegal Immigrants*, TUCSON CITIZEN, Feb. 24, 1999, at A1; Michael A. Pearson, Testimony Before the Subcomm. on Immigration of the Senate Judiciary Comm. Regarding Border Security Issues (Feb. 10, 2000), *available at* http://www.ins.gov/graphics/aboutins/congress/testimonies/1999/pearson.pdf (last visited Dec. 4, 2000). Pearson, the Executive Associate Commissioner for Field Operations, Immigration and Naturalization Service, testified to the success of new INS policies, including "prevention through deterrence" or "elevating the risk of apprehension to a level so high that prospective illegal entrants consider it futile to attempt to enter." *Id.*

[13] *Infra* at note 248 and accompanying text.

[14] ILLEGAL ALIEN RESIDENT POPULATION, *supra* note 11. *But see* Frank Swoboda, *Unions Reverse on Illegal Aliens; Policy Seeks Amnesty, End to Sanctions*, WASH. POST,

During 1999, the United States apprehended and immediately subjected over 176,990 undocumented aliens to removal proceedings.[15] Many others died anonymously while attempting the treacherous journey to the United States from China, Mexico, Cuba, Haiti, and other regions of South America and the Caribbean.[16] Those undocumented aliens who are lucky enough to survive the trip often receive sub-minimum wages, and suffer from poor working conditions, manual labor, fear of authorities, and few legal protections. Although undocumented aliens lead troubled lives in the United States, the INS has not significantly reduced the number of undocumented persons who surreptitiously cross the U.S. border. Frequently, the INS is unable to identify illegal aliens, and is forced to minimize its efforts to locate and deport aliens who are unlawfully present in the United States.[17] Although Congress recognizes this problem, the manpower and resources necessary to mount an effective response remain inadequate.[18]

Feb. 17, 2000, at A1 (noting that an estimated six million illegal aliens currently reside in the United States).

[15] *Houston Expels Rising Number of Illegal Immigrants*, HOUS. CHRON., Nov. 12, 1999, at 2; *Coast Guard Repatriates Intercepted Cubans, Laments Migrants' Violence* (ABC television broadcast, May 30, 2000). ABC News reported that:

> The Coast Guard released a videotape Tuesday showing Cuban immigrants swinging a machete and knives and throwing rocks, cans, and bolts from a rubber boat as guardsmen tried to intercept them. The 12 were among 51 Cubans repatriated Tuesday. All were among five groups picked up at sea by the Coast Guard last week. Coast Guard officials detailed the May 24 confrontation during a news conference calling for an end to violence by Cubans trying to reach the United States.

Id. See also U.S. BORDER PATROL, U.S. DEP'T OF JUSTICE, BORDER SAFETY INITIATIVE: MIGRANT RESCUES FOR YEAR 2000, *at* http://www.ins.usdoj.gov/graphics/lawenfor/bpatrol/rescues.pdf (last visited Nov. 11, 2000). The Department of Justice reported that "border patrol agents have rescued 1,104 migrants during the first eight months of [fiscal year] 2000 (through June 15, 2000)." *Id.*

[16] *See, e.g.*, *Chinese Stowaways Found in Seattle Died of Starvation*, AGENCE FRANCE-PRESSE, Feb. 25, 2000, *available at* 2000 WL 2740276; Joshua Hammer, *Death in the Desert Heat*, NEWSWEEK, Aug. 24, 1998, at 29; Robert L. Jamieson, Jr., *Illegal Entry Into U.S. Has a Long, Dangerous History—Using Large Containers is Just the Latest Trend*, SEATTLE POST-INTELLIGENCER, Jan. 11, 2000, at A4; James Kitfield, *A Fast Boat to Miami*, NAT'L J., Mar. 20, 1999, *available at* 1999 WL 8102276; Kim Murphy, *Smuggling of Chinese Ends in a Box of Death*, L.A. TIMES, Jan. 12, 2000, at A1; *Search is Over for Haitian Boat Survivors*, SEATTLE TIMES, Mar. 8, 1999, at A7; Karen Testa, *Bahamian Prime Minister Says U.S. Must Do More in Haiti*, ASSOC. PRESS, Nov. 26, 1999; *Three Chinese Stowaways Die in Cargo Ship Container*, ST. LOUIS POST-DISPATCH, Jan. 12, 2000, at A3.

[17] *See* Chris Poynter, *Kentucky Will Get 14 More Immigration Agents: Illegal Aliens Can Easily Find Work in States*, COURIER J. (Louisville, Ky.), Aug. 26, 1999, at A1.

[18] *See id.* Poynter discussed the creation of "quick-response teams" to track and deport illegal aliens working in the Midwest. *Id. See also INS Forming Teams to Track, Deport Aliens*, ASSOC. PRESS, Aug. 26. 1999 ("Congress has set aside $21 million this fiscal year to create 45 teams in 11 states. Each team will have two or three investigators and a couple of detention workers."); Alien Smuggling Prevention and Enforcement Act of 1999, S. 1644,

The Border Patrol, in concert with U.S. military personnel, has undertaken a number of initiatives designed to curb the illegal flow of aliens into this country.[19] The ability of U.S. immigration agencies to respond to the growing number of undocumented aliens by utilizing military personnel, however, may be significantly hampered by a continuing shortage of military personnel. During the last decade, all branches of the U.S. Armed Forces have experienced manpower shortages. This shortage of personnel could dramatically affect the United States' ability to intercept undocumented persons at the country's borders. A collaborative effort between the U.S. military and the U.S. immigration offices would serve two purposes. First, expansion of naturalization eligibility through military service would increase the pool of eligible enlistees. Second, military service would provide lawful employment and training opportunities to qualified undocumented persons. The United States could thus reap significant benefits from providing undocumented aliens with an opportunity to "earn" their way into American society through military service.[20]

106th Cong. § 2 (1999) (directing "the Attorney General to make specified increases in the number of full-time, active duty INS personnel assigned to combat alien smuggling" and "[a]uthorizes additional appropriations for such alien smuggling.").

[19] *See* Exec. Order No. 12807, 57 Fed. Reg. 23,133 (May 24, 1992). This order, executed by President George Bush, escalated the militarization of U.S. borders and seaports when it authorized the Coast Guard "to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens."). *See generally* TIMOTHY J. DUNN, THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992: LOW INTENSITY CONFLICT DOCTRINE COMES HOME (1996); *see also* Peter Andreas, *Borderless Economy, Barricaded Border*, N. AM. CONGRESS LATIN AM., Nov. 11, 1999, at 14; Josiah McC. Heyman, *Why Interdiction? Immigration Control at the United States-Mexico Border*, REGIONAL STUD., Oct. 1, 1999, at 619; David Jackson, *Congressman Says Border Slaying Investigation Being Hindered*, DALLAS MORNING NEWS, Aug. 14, 1997, at 27A ; Leonel Sanchez, *Presence of Guard on Border to Expand: Up to 200 Could Join in Support Duties*, SAN DIEGO UNION-TRIB., Jan. 27, 1996, at B1 (reporting that in 1996, National Guard troops assisted the U.S. Border patrol and U.S. Customs officers with efforts to prevent illegal entry into San Diego, California from Mexico).

Legislation that authorizes military forces to stem the flow of illegal immigrants has been annually proposed before Congress since 1997. *See, e.g.*, H.R. 628, 105th Cong. (1999) (amending U.S.C. title 10 to authorize the Secretary of Defense to assign members of the armed forces, under certain circumstances and subject to certain conditions, to assist the INS and the U.S. Customs Service in the performance of border protection functions).

Congressional interest in border militarization is evidenced by a recent report from the U.S. House-Senate conference on defense. *See* Press Release, U.S. Gov't, "Troops in Border" Language Retained in DOD Conference Report (Sept. 15, 1999) (on file with Seton Hall Law Review). The report directs the Pentagon "to prepare a plan to assign members of the armed forces to assist the INS or Customs Service in responding to a threat to national security posed by the entry into the U.S. of terrorists or drug traffickers." *Id.*

[20] Critics, however, express caution about this idea, fearing that the United States will create its own French Foreign Legion. The French Foreign Legion is composed largely of male immigrants to France who earn their French citizenship after five years of service in

Part I of this Article examines the congressional adoption of alien veteran naturalization legislation from 1878 to the present. This section includes the first comprehensive examination of the legislative history behind statutes that rewarded aliens with expedited naturalization in exchange for their service in the U.S. Armed Forces. Two legislative measures currently facilitate the naturalization of alien veterans. The provisions of section 328 of the Immigration and Nationality Act of 1952 (INA) afford alien veterans who are lawfully present in the United States the opportunity to become naturalized citizens after three years of service in the U.S. Armed Forces.[21] The applicability of INA section 328, however, is limited to aliens who are honorably discharged from peacetime military service.[22]

Alternatively, INA section 329 permits naturalization of alien veterans, including those unlawfully present in the United States, if they serve in an active-duty status for any period of time during a war or another designated military conflict.[23] Aliens naturalized under the terms of section 329 must also be honorably discharged from military service.[24] Examination of the legislative foundation of these naturalization statutes reveals that the statutes are inextricably woven into the fabric of America's military history, its immigration patterns, and its penchant for race and class discrimination.

---

the Legion. These alien soldiers are not integrated into the French military. Instead they serve as a segregated unit. DOUGLAS PORCH, THE FRENCH FOREIGN LEGION: A COMPLETE HISTORY OF THE LEGENDARY FIGHTING FORCE 631 (1991); Geraldine Brooks, *For Future Haitis, A Foreign Legion à l'Americaine*, WALL ST. J., Sept. 21, 1994, at A14 (describing the Foreign Legion as a "sophisticated citizen-making machine, in which soldiers may earn their way to a French passport through five years hard service"); *see also* Jay Cheshes, *The Legion's Last War*, P.O.V., Feb. 1998, at 78. Cheshes explained that, in the past, Legionnaires were generally perceived as ruthless mercenaries:

> Once the last refuge of criminals, heartbroken men and, ruthless mercenaries thirsty for combat, in recent years the Legion has begun to attract a different breed. They are men like Viorez, a scrawny former refrigerator repairman from Bucharest who signed away five years of his life, mostly for the money. (Legionnaires earn a Western military salary and can then qualify for a French passport when their five years service is up.) Others like him, from such cities as Warsaw, Prague and Moscow, lost low-paying government jobs when massive unemployment filled the vacuum left by the collapse of the Soviet empire. In huge numbers, they fled home for the salvation of the Foreign Legion. Today, about a third of the 8,500 men in the Legion hail from the countries of the former Soviet bloc.
> *Id.*

Id.

[21] INA § 328, 8 U.S.C. § 1439 (1994).

[22] *Id.*

[23] INA § 329, 8 U.S.C. § 1440 (Supp. 1999).

[24] *Id.*

Part II of this article explores the legislative and judicial imposition of military service on aliens residing in the United States. A necessary component of this analysis focuses on the racial and ethnic bars to naturalization that were incorporated into the body of immigration law until 1952. Notwithstanding these bars, aliens of color residing in the United States through legal *and* illegal means were used to augment U.S. military forces. Occasionally, their service came without the correlative benefit of naturalization that was available to more favored immigrant populations.

Part III recognizes that the INA permits the naturalization of alien veterans, including those unlawfully present in the United States, if they serve in an active duty status during a war or another designated military conflict. I propose, however, that this naturalization privilege should be extended to the population of aliens unlawfully present in the United States who honorably serve during peacetime for at least three years. The incorporation of an amnesty initiative into the alien veteran naturalization provisions of the INA would be specifically directed at undocumented aliens who are otherwise eligible for naturalization.

This section also examines the current social and economic conditions that undocumented aliens encounter throughout American society which necessitate an amnesty initiative of this kind. The lack of access to meaningful employment, education, health care, and related social services leave undocumented aliens vulnerable to discrimination and exploitation without adequate statutory or constitutional protections. In 1982, the U.S. Supreme Court, in *Plyler v. Doe,*[25] conferred a significant benefit upon undocumented alien children by holding that these children were entitled to free elementary and secondary public school education. I propose that an amnesty initiative that legalizes the immigration status of undocumented aliens upon their honorable discharges from peacetime military service would further the goals of *Plyler.* Aliens, upon completion of high school, would have an opportunity to obtain meaningful employment without violating immigration laws. It would also give them the tools to "lead economically productive lives to the benefit of us all."[26]

In the remainder of Part III, I discuss the beneficial aspects of an amnesty initiative designed to legalize the status of undocumented aliens who serve in the U.S. Armed Forces during times of peace. This amnesty initiative is limited in scope to a specific pool of undocumented aliens who, due to their presence in the United States, have a vested interest in preserving our national security. Additionally, an amnesty initiative that offers peacetime military service to the pool of undocumented aliens

---

[25] 457 U.S. 202 (1982).

[26] *Id.* at 221.

educated in the United States as a result of *Plyler* would address the growing manpower shortage faced by the U.S. Armed Forces. Part III concludes with a comparative discussion of the historic precedent for allowing minority group members to "earn" their place in American society through military service. Incorporated in this analysis is a discussion of the beneficial impact of military service on the gradual social and economic incorporation of African Americans into post-Civil War American society.

I conclude my analysis by arguing that the Supreme Court in *Plyler* imposed a substantial fiscal burden on state and local municipalities to provide free public elementary and secondary education to undocumented alien children. To date, the federal government has refused to reimburse these educational costs. The taxpayers deserve a return on this investment. Additionally, undocumented aliens, notwithstanding their educational qualifications, are prohibited from obtaining lawful employment in the United States. There is no question that the presence of undocumented aliens in the U.S. violates immigration laws. However, allowing generations of undocumented alien children who were educated at the expense of U.S. taxpayers to languish in an underground economy as migrant laborers, busboys, car washers, and meat processors is not a viable option.

I. HISTORIC EXAMINATION OF ALIEN VETERAN NATURALIZATION STATUTES

The power to establish uniform rules of naturalization is one of the most important powers expressly granted to Congress by Article I of the United States Constitution.[27] To further that authority, Congress adopted its first uniform rule of naturalization in 1790.[28] That Act set forth a two year residency requirement and expressly restricted the privilege of

---

[27] *See* U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish a uniform Rule of Naturalization . . . .").

[28] Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (establishing a uniform rule of naturalization); *see also In re* Knight, 171 F. 299, 301 (E.D.N.Y. 1909). In *Knight*, the court held that:

> Naturalization creates a political status which is entirely the result of legislation by Congress, and, in the case of a person not born a citizen, naturalization can be obtained only in the way in which Congress has provided that it shall be granted, and upon such a showing as Congress has determined must be set forth. It must have been within the knowledge and foresight of Congress, when legislating upon this question, that members of other races would serve in the army and navy of the United States, under certain conditions, and it must remain with Congress to determine who of this class can obtain, under the statutes, the rights of a citizen of the United States.

Id.

naturalization to "free white person[s]."[29] In 1795, Congress repealed the 1790 statute and adopted a more restrictive naturalization act in its place. The 1795 Act increased the residency requirement from two to five years, required proof of good moral character, an attachment to the principles of the Constitution, and a renunciation of titles of nobility.[30] Additionally, the racial restriction was carried forward from the 1790 Act.[31] In 1798 Congress adopted more restrictive residency requirements.[32] In accordance with the 1798 revision, an alien was not eligible for naturalization unless:

> [H]e shall have declared his intention to become a citizen of the United States, five years, at least, before his admission, and shall, at the time of his application to be admitted, declare and prove, to the satisfaction of the court having jurisdiction in the case, that he has resided within the United States fourteen years, at least, and within the state or territory where, or for which such court is at the time held, five years, at least, beside conforming to the other declarations, renunciations and proofs, by the said act required, any thing therein to the contrary notwithstanding.[33]

---

[29] Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (establishing a uniform rule of naturalization). The Act read:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common court of record, in any one 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 of affirmation prescribed by law, to support the constitution of the United States, which oath or affirmation such court shall administer; and the clerk of the court shall record such application, and the proceedings thereon; and thereupon such person shall be considered as a citizen of the United States.

Id.

[30] Act of Jan. 29, 1795, ch. 20, §§ 1-2, 1 Stat. 414-15 (establishing a uniform rule of naturalization and to repeal the act of 1790).

[31] *Id.* at 414 ("Any alien, being a free white person, may be admitted to become a citizen of the United States."); *see also In re* Buntaro Kumagai, 163 F. 922, 923 (W.D. Wash. 1908). The court in *Buntaro Kumagai* referred to congressional legislation such as the 1790 Act and held that:

> The general policy of our government in regard to the naturalization of aliens has been to limit the privilege of naturalization to white people, the only distinct departure from this general policy being soon after the close of the Civil War, when, in view of the peculiar situation of inhabitants of this country of African descent, the laws were amended so as to permit the naturalization of Africans and aliens of African descent.

Id.

[32] Act of June 18, 1798, ch. 34, § 1, 1 Stat. 566.

[33] *Id.* at 566-67.

The benchmark for modern naturalization requirements was established in 1802 when Congress repealed prior naturalization statutes and adopted a revised uniform rule of naturalization.[34] Consistent with the prior naturalization statutes, the Act of 1802 required an alien to declare his intention to become a citizen at least three years before his admission, to be a "free white person," and to renounce allegiance to any foreign authority or sovereign and all titles of nobility.[35] The Act also imposed a five year residency requirement that has been carried forward to the current naturalization requirements set forth in INA section 316(a).[36] All alien applicants were also required to swear an oath of allegiance to the U.S. Constitution.[37] During the alien's period of residency in the United States, the Act required proof that he "behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same."[38] These provisions are also codified in current naturalization provisions found in sections 316 and 332 of the INA.[39]

A. The American Civil War

Notwithstanding the racial, residency, and allegiance requirements adopted by Congress during the 1800s, the United States experienced massive growth of its immigrant population in the 19th century.[40] Coinciding with its growth, the rise of the Civil War in 1861 precipitated a need for "large bodies of troops to carry on a gigantic war."[41] In 1862,

---

[34] Act of Apr. 14, 1802, ch. 28, 2 Stat. 153 (1802) (establishing a uniform rule of naturalization and to repeal the Act of 1798); *see also* H.R. REP. NO. 1365, at 1677 (1952). In discussing the Immigration and Nationality Act of 1952, the House commented that "[t]hese early laws governing naturalization followed the general pattern of requiring formal declaration in intention, 5 years' residence, good moral character, attachment to the Constitution, and testimony of witnesses. Admission to citizenship was by Federal or designated State court procedure."

[35] Act of April 14, 1802, ch. 28, 2 Stat. 153.

[36] *Id.* Similar provisions are currently codified at INA § 316(a), 8 U.S.C. § 1427 (Supp. 1999).

[37] *Id.*

[38] *Id.*

[39] INA § 316, 8 U.S.C. § 1427 (Supp. 1999); INA § 332, 8 U.S.C. § 1443 (1994).

[40] VERNON M. BRIGGS, JR., MASS IMMIGRATION AND THE NATIONAL INTEREST 53-69 (1996); KITTY CALAVITA, U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR: 1820-1924, at 19-38 (1984); LOUIS DE SIPIO & RODOLFO O. LAGARZA, MAKING AMERICANS, REMAKING AMERICA: IMMIGRATION AND IMMIGRATION POLICY 15-59 (1998).

[41] *In re* Bailey, 2 F. Cas. 360, 362 (D. Or. 1872). In *Bailey*, the district court explained reason behind government advocacy of alien enlistments:

> And first, the act was passed early in the progress of the late civil war, which in the main was a conflict upon land. It offered the boon or privilege of American citizenship to any person who would honorably serve in the armies of the United States, upon only one year's residence in the country, and

Congress encouraged increased alien immigration to meet this need through the adoption of the Alien Soldiers Naturalization Act.[42] This Act was the first in a series of statutes to offer expedited naturalization to aliens who agreed to defend the Union in its war against the Southern states. The Alien Soldiers Naturalization Act was codified as section 2166 of the Revised Statutes of 1878 (Rev. Stat. § 2166). This statute provided:

> That any alien, of the age of twenty-one years and upwards, who has enlisted or shall enlist in the armies of the United States, either the regular or the volunteer forces, and has been or shall be hereafter honorably discharged, may be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become a citizen of the United States, and that he shall not be required to prove a more than one year's residence within the United States previous to his application to become such citizen; and that the court admitting such alien shall, in addition to such proof of residence and good moral character as is now provided by law, be satisfied by competent proof of such person having been honorably discharged from the service of the United States as aforesaid.[43]

Revised Statute § 2166 was not unlimited in scope. Although the residency requirement for qualified aliens was reduced from five years to one year, Congress imposed limits on the types of racial groups that could avail themselves of this expedited form of naturalization. From the adoption of the Alien Veteran Naturalization Act in 1862 until 1952, Congress restricted a variety of racial and ethnic groups from becoming naturalized, notwithstanding their eligibility. As further discussed in Section III.B., alien veterans were not exempt from these racial bars to naturalization.[44]

The branches of military service eligible for this privilege were also restricted by Revised Statute § 2166. In the case of *In re Bailey*,[45] the court

---

> otherwise upon terms more favorable than it was offered to others. The object of the provision is apparent. The government was endeavoring to raise large bodies of troops to carry on a gigantic war upon land, and this was a means to aid in accomplishing that end–to induce aliens to enlist in the armies of the United States.

Id.

[42] *See* Act of July 17, 1862, ch. 254, § 21, 12 Stat. 597 (defining the pay and emoluments of certain officers of the Army). *C.f.* United States v. Convento, 336 F.2d 954, 955 (D.C. Cir. 1964) ("Easing naturalization requirements for those who have served our country in wartime is a congressional policy of long standing. It is not simply a matter of reward; it is also a recognition that no further demonstration of attachment to this country and its ideals is necessary.").

[43] Act of July 17, 1862, ch. 254, § 21, 12 Stat. 597.

[44] *See, e.g.*, Act of July 14, 1870, § 7, 16 Stat. 256.

[45] 2 F. Cas. 360 (1872); *see also In re* Byrne, 26 F.2d 750 (1928) (dismissing an Irish national's petition for naturalization because he served in the U.S. Navy not the U.S. Army).

noted that Revised Statute § 2166 explicitly applied to alien veterans of the U.S. Army. In *Bailey*, a Marine Corps veteran of English descent petitioned for naturalization pursuant to the provisions of Revised Statute § 2166.[46] The District Court of Oregon determined that the phrase "armies of the United States" was intended by Congress to exclusively refer to members of the U.S. Army.[47] Furthermore, the court noted that:

> The term army or armies has never been used by congress, so far as I am advised, so as to include the navy or marines, and there is nothing in the act of 1862, or the circumstances which led to its passage, to warrant the conclusion that it was used therein in any other than its long established and ordinary sense—the land force, as distinguished from the navy and marines.[48]

Because of this distinction, the court denied Bailey naturalization. Two decades after *Bailey*, Congress adopted the Act of July 26, 1894.[49] This Act addressed the problem in *Bailey* by expanding the alien naturalization privileges established in Revised Statute § 2166. The Act applied the privilege to "any alien who has enlisted or may enlist in the United States Navy or Marine Corps."[50] When the 1894 Act was adopted, the enlistment period for Navy and Marine service was five years.[51] In accordance with these enlistment requirements, the Act of 1894 required alien veterans to serve "five consecutive years in the United States Navy or one enlistment in the United States Marine Corps."[52]

The Navy, in 1819, and the Marine Corps, in 1901, reduced their enlistment periods to four years.[53] Congress responded to this reduction by adopting subsequent alien veterans naturalization legislation to govern

---

[46] *See Bailey*, 2 F. Cas. at 360.

[47] *Id.* at 362. The court specifically held that:

> No alien has a right to become an American citizen, except upon such terms and conditions as congress, in legislating for the common weal, may prescribe. The act under consideration entitles persons who may honorably serve in the armies of the United States, to this high privilege, and the court is not authorized to enlarge it, by construction, so as to include a class of persons, who do not appear to be within its spirit or letter.

Id.

[48] *Id.*

[49] Act of July 26, 1894, ch. 165, 28 Stat. 124 (making appropriations for the Navy for the fiscal year ending June 1895).

[50] *Id.*

[51] *See* Act of Mar. 2, 1837, ch. 21, 5 Stat. 153 ("[I]t shall be lawful to enlist other persons for the navy, to serve for a period not exceeding five years, unless sooner discharged by the direction of the President of the United States."); Act of Mar. 3, 1809, ch. 33, 2 Stat. 544 (authorizing an augmentation of the Marine Corps).

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

[53] *See* Act of Mar. 3, 1899, ch. 413, § 16, 30 Stat. 1008; Naval Appropriation Act of 1901, 31 Stat. 1132.

aliens who registered after the adoption of the new Naval and Marine enlistment statutes. The Act of June 30, 1914 provided that:

> [A veteran] who has served or may hereafter serve for one enlistment of not less than four years in the United States Navy or Marine Corps, and who has received therefrom an honorable discharge or an ordinary discharge with recommendation for re-enlistment. . .shall be admitted to become a citizen of the United States upon his petition without any previous declaration of his intention to become such, and without proof of residence on shore . . . .[54]

With the adoption of the Act of 1914, there were three ways that an alien veteran could become naturalized based upon his military service: through service in the Army; after honorably completing a five year enlistment in the Navy or Marines; or after an honorable discharge from four years of service in the Navy or Marines. Although the Act of July 26, 1894 and the Act of June 30, 1914 extended the privilege of naturalization to alien veterans of the Navy and Marines, these acts did not apply to the same pool of veterans. The 1914 Act only applied to veterans who were current and future alien enlistees in the Navy and Marines, while the Act of 1894 applied to Naval and Marine veterans who previously served under the prior five-year enlistment provisions. The District Court for the District of Minnesota noted in the case of *In re Schrape*[55] that the congressional purpose underlying the 1914 Act was to

> [I]nclude only persons who were then in the service of the government defined by this act, or who could re-enlist and obtain the benefits enjoyed by enlisted citizens, and it was not the intention to include persons who were not in the government service, or whose time for re-enlistment, and to secure such benefits, had expired.[56]

---

[54] Naval Appropriations Act, Pub. L. No. 121, ch. 130, 38 Stat. 395 (1914).

[55] 217 F. 142 (D. Wash. 1914); *see also In re* Sterbuck, 224 F. 1013 (D. Minn. 1914) (granting citizenship to petitioner who demonstrated proper residence subsequent to his discharge from the U.S. Navy).

[56] *Schrape*, 217 F. at 145. The court in *Schrape* also noted that:

> The act of June 30, 1914, is not amendatory of a former act, and having no repealing clause, and repeals by implication not being favored, and nothing appearing upon the face of the act showing such intent, it must be held supplementary to the other acts, and the legislative statement in this act must be taken with the other statements to determine the congressional intent solely expressed.

Id. at 144.

B. The First World War

The onset of WWI substantially increased the need for additional manpower to support the American military campaign in Europe.[57] To address the shortage of available inductees, Congress required that all males residing in the United States, including aliens, register for military service.[58] As a result, over 2,820,000 men were admitted into the military.[59] In 1918, Congress amended section four of the Uniform Naturalization Act of 1906 to reward aliens who served in the military during WWI.[60] Unlike aliens applying for citizenship under the standard naturalization requirements found in section four of the 1906 Act, the new provision of section four provided that WWI alien veterans were not required to submit a "preliminary declaration of intention" or "proof of the required five years" residence in the United States.[61]

The Act of June 29, 1906, as amended in 1918, accomplished several goals. In addition to providing an expedited naturalization method for aliens serving during WWI, the 1906 Act, as amended, also expanded the

---

[57] *See* Act of May 18, 1917, ch. 15, Pub. L. No. 121, 40 Stat. 76 (authorizing the President to temporarily increase the U.S. military). The Act defined the presidential powers:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in view of the existing emergency, which demands the raising of troops in addition to those now available, the President be, and he is hereby, authorized . . . Immediately to raise, organize, officer, and equip all or such number of increments of the Regular Army provided by the national defense Act approved June third, Nineteen Hundred and Sixteen, or such parts thereof as he may deem necessary; to raise all organizations of the Regular Army, including those added by such increments, to the maximum enlisted strength authorized by law.

Id. See also THOMAS G. FROTHINGHAM, THE AMERICAN REINFORCEMENT IN THE WORLD WAR 43-50 (1927); GEN. PEYTON C. MARCH, UNITED STATES ARMY, THE NATION AT WAR 231-42 (1932); JOHN BACH MCMASTER, THE UNITED STATES IN THE WORLD WAR (1918-1920), at 32-51 (1920).

[58] Act of May 18, 1917, ch. 15.

[59] U.S. Dep't of Congress, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, PART 2, SERIES Y 865, *at* 1140 (1975).

[60] Act of June 29, 1906, Pub. L. No. 338, ch. 3592, § 4, 34 Stat. 596 (establishing an Immigration and Naturalization bureau, and providing a uniform rule for the naturalization of aliens throughout the United States), *amended by* Act of May 9, 1918, Pub. L. No. 144, ch. 69, 40 Stat. 542.

[61] *Id.* The Act states:

> Any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States.

Id.

scope of the naturalization privilege to include Filipino Naval or Marine veterans and Puerto Rican veterans of any branch of the military who had honorably served for three years.[62] The next year Congress expanded the naturalization provisions for WWI alien veterans by extending the expedited naturalization privilege granted by the 1906 Act "for the period of one year after all of the American troops are returned to the United States."[63]

To make the naturalization privilege available to alien veterans who failed to become citizens during WWI, Congress adopted the 1926 Act. The 1926 Act provided veterans with two additional years to take advantage of the expedited naturalization privileges.[64] The 1926 Act extended naturalization privileges to alien veterans of WWI,[65] and defined

---

[62] *Id.* The 1918 Amendment also provided an expedited means for other alien veterans:

> Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment; or any alien, or any Porto [sic] Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States . . . or in the United States Navy or Marine Corps, or in the United States Coast Guard . . . may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence in the United States.

Id. Moreover, the Act of November 6, 1919, Pub. L. No. 75, ch. 95, 41 Stat. 350, offered naturalization to Native Americans who served during World War I, explaining:

> That every American Indian who served in the Military or Naval Establishments of the United States during the war against the Imperial German Government, and who has received or who shall hereafter receive an honorable discharge, if not now a citizen and if he so desires, shall, on proof of such discharge and after proper identification before a court of competent jurisdiction, and without other examination except as prescribed by said court, be granted full citizenship . . . .

Id.

[63] Act of June 19, 1919, Pub. L. No. 21, ch. 24, 41 Stat. 222 (making appropriations for various civil expenses of the government for the fiscal year ending June 30, 1920 and amending Act of June 29, 1906, 34 Stat. 596 and Act of May 19, 1918, 40 Stat. 542). The amended act read:

> Any person of foreign birth who served in the military or naval forces of the United States during the present war, after final examination and acceptance by the said military or naval authorities, and shall have been honorably discharged after such acceptance and service . . . shall not be required to pay any fee therefor; and this provision shall continue for the period of one year after all of the American troops are returned to The United States.

Id.

[64] Act of May 26, 1926, Pub. L. No. 293, ch. 398, 44 Stat. 654 (extending naturalization privileges to alien veterans of World War I).

[65] *Id.*

alien veterans as men who served between April 5, 1917 and November 12, 1918.[66] Veterans who met these criteria were eligible for naturalization "upon the same terms, conditions, and exemptions which would have been accorded to such alien if he had petitioned before the armistice of the World War."[67] Congress intended this provision to benefit alien veterans who were honorably discharged from military and naval forces.

The 1926 Act recognized that in 1917 Congress adopted provisions for excluding certain classes of aliens from admission into the United States.[68] The Act exempted alien veterans from most of the exclusionary provisions of the 1917 Act, with the exception of several enumerated categories. Under the 1926 Act, alien veterans were inadmissible if they were:

> (1) Persons afflicted with a loathsome or dangerous contagious disease, except tuberculosis;
>
> (2) Polygamists;
>
> (3) Prostitutes, procurers, or other like immoral persons;
>
> (4) Contract laborers;
>
> (5) Persons previously deported;
>
> (6) Persons convicted of a crime.[69]

Congress omitted one additional, important exclusion to admission: the racial bars to naturalization that were initially adopted in 1870 remained in force. The provisions of the Act of March 4, 1929 extended the

---

[66] *Id.* Specifically, under the Act:

> [T]he term "alien veteran" means an individual, a member of the military or naval forces of the United States at any time after April 5, 1917, and before November 12, 1918, who is now an alien not ineligible to citizenship; but does not include (1) any individual at any time during such period or thereafter separated from such forces under other than honorable conditions, (2) any conscientious objector who performed no military duty whatever or refused to wear the uniform, or (3) any alien at any time during such period or thereafter discharged from the military or naval forces on account of his alienage.

Id.

[67] *Id.*

[68] *See* Act of Feb. 5, 1917, Pub. L. No. 301, ch. 29, § 3, 39 Stat. 874 (regulating the immigration of aliens to, and the residence of aliens in, the United States).

[69] Act of May 26, 1926, Pub. L. No. 294, ch. 398, 44 Stat. 654-55. These alien veterans were considered:

> "[N]onquota immigrant[s]" which meant that they were not subject to the numerical quota limitations set forth in the Immigration Act of 1924. This classification as a nonquota immigrant insured that the alien veteran, upon satisfaction of the requirements for admissibility and proof of eligibility for an immigrant visa, would not be required to wait before an immigration visa was issued.

Id. (alterations in original).

naturalization privilege for WWI alien veterans for an additional two-year period following its enactment.[70]

During the post-World War I era, Congress imposed stricter naturalization requirements on alien veterans of WWI. These requirements ensured that alien veterans who were not previously naturalized during or immediately after the war were sufficiently connected to the United States. Although these alien veterans could be naturalized "upon the same terms, conditions, and exemptions which would have been accorded to such alien if he had petitioned before the armistice of the World War," the Act of May 25, 1932 reinstated the residency and morality requirements that had not been imposed on alien veterans since 1862.[71] According to the provisions of the 1932 Act, alien veterans of WWI could be naturalized within two years of the adoption of the Act if they satisfied a number of requirements, including submission of proof "that immediately preceding the date of his petition he has resided continuously within the United States for at least two years, in pursuance of a legal admission for permanent residence, and that during all such period he has behaved as a person of good moral character."[72]

Congress extended the naturalization provisions specifically applicable to alien veterans of WWI until 1940. Subsequent alien naturalization statutes, however, imposed heightened morality requirements on alien veterans. Prior acts required an alien veteran to prove that he "behaved as a person of good moral character" for a period of two years preceding his naturalization petition.[73] The extension provisions required the alien veteran to satisfy the morality requirement for "the five years immediately preceding the filing of his petition."[74] Under these provisions,

---

[70] Act of Mar. 4, 1929, Pub. L. No. 1011, ch. 683, 45 Stat. 1546 (relating to declarations of intention and naturalization proceedings). In relevant part, the Act states:

> An alien veteran as defined in sec. 1 of the Act of May 26, 1926 . . . shall, if residing in the United States, Be entitled, at any time within two years after the enactment of this Act, to naturalization upon the same terms, conditions, and exemptions which would have been accorded to such alien if he had petitioned before the armistice of the World War, except that such alien shall be required to appear and file his petition in person and to take the prescribed oath of allegiance in open court.

Id.

[71] Act of May 25, 1932, Pub. L. No. 149, ch. 203, 47 Stat. 165 (amending the naturalization laws).

[72] *Id.* Note that this Act also amended the seventh subdivision of section four of the Naturalization Act of June 29, 1906, by excluding service in the militia as an eligible branch of military service for the purposes of obtaining naturalization. The act held that the seventh subdivision is amended by striking out "the National Guard or Naval Militia of any State, Territory, or the District of Columbia, or the state militia in Federal service." *Id.*

[73] *Id.*

[74] Act of June 21, 1939, Pub. L. No. 146, ch. 234, 53 Stat. 851 (extending the

over 320,397 alien veterans became naturalized U.S. citizens during the WWI era and the period thereafter until 1940.[75]

C. *The Second World War*

Congress adopted the Nationality Act of 1940 after extensive revisions to the immigration and naturalization statutes.[76] The Nationality Act consolidated into a uniform compilation numerous immigration and nationality statutes, including the alien veteran naturalization provisions. Importantly, the 1940 Act re-codified the racial and ethnic bars to naturalization that originated with the Naturalization Act of 1870. Section 303 of the 1940 Act limited citizenship "only to white persons, persons of African nativity or descent, and descendants of races indigenous to the western Hemisphere."[77] Notwithstanding the racial restrictions of section 303, section 324 of the 1940 Act entitled all persons to naturalization including Filipinos, who were currently enlisted for three years in the U.S. Army, Navy, Marine Corps, or Coast Guard, or if they were honorably discharged from one of these branches.[78]

All alien veterans "who honorably served at any time" could be naturalized under the 1940 Act, regardless of their dates of service.[79] Although this group of alien veterans was required to comply in all other respects with the 1940 Act, unlike other aliens they were not required to submit a declaration of intention, certificate of arrival, or prove residence within the jurisdiction of the state court.[80] These alien veterans were exempt from the standard five year residency requirement. Section 324(a) provided that this group of alien veterans was eligible for naturalization "without having resided, continuously immediately preceding the date of filing such person's petition, in the United States for at least five years and in the State in which the petition for naturalization is filed for at least six months, if such petition is filed while the petitioner is still in the service or within six months after the termination of such service."[81]

---

naturalization privilege to May 25, 1940), *repealed by* Act of Oct. 14, 1940, ch. 5, § 504, 54 Stat. 1172; Act of August 23, 1937, Pub. L. No. 338, ch. 735, 50 Stat. 743 (extending the naturalization privilege to May 25, 1938); Act of June 24, 1935, Pub. L. No. 160, ch. 203, 49 Stat. 395 (extending time for the naturalization of alien veterans of World War I to May 25, 1937).

[75] STATISTICAL Y.B., *supra* note 4, at Table 44.

[76] Nationality Act of 1940, Pub. L. No. 853, ch. 876, 54 Stat. 1137.

[77] *Id.* § 303, 54 Stat. 1140.

[78] *Id.* § 324(a), 54 Stat. 1149.

[79] *Id.*

[80] *Id.* § 324(b), 54 Stat. 1149.

[81] *Id.*

The 1940 Act differentiated between alien veterans who served continuously in the military for a three-year period, and those who did not serve continuously for the requisite time period, or who failed to file their petition within six years after termination of military service.[82] Alien veterans who fell within the latter category were required to submit proof of compliance with naturalization requirements in section 309 of the 1940 Act, which were similar to those imposed on other immigrants.[83] In cases where a petitioner's service was not continuous, it was necessary to verify several requirements, including:

> [P]etitioner's residence in the United States and State, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing said petition between the periods of petitioner's service in the United States Army, Navy, Marine Corps, or Coast Guard.[84]

When the United States entered WWII, its armed forces lacked the number of military personnel necessary to secure victory. Congressional reaction to this dilemma mirrored its reaction during WWI. Responding to the need for soldiers, in 1942, Congress amended the 1940 Act. The amendment provided expedited naturalization for alien veterans serving

---

[82] Nationality Act of 1940, Pub. L. No. 853, ch. 876, § 324(c), 54 Stat. 1137.

[83] *See id.* Under § 324, immigrants were required to comply with several requirements:

> In case such petitioner's service was not continuous, petitioner's residence in the United States and State, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing said petition between the periods of petitioner's service in the United States Army, Navy, Marine Corps, or Coast Guard, shall be verified in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing thereon by witnesses, citizens of the United States, in the manner as required by section 309. Such verification and proof shall also be made as to any period between the termination of petitioner's service and the filing of the petition for naturalization.

Id. See also id. § 309(a), 54 Stat. 1143. Section 309 requires that:

> As to each period and place of residence in the state in which the petitioner resides at the time of filing the petition, during the entire period of at least six months immediately preceding the date of filing the petition, there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each has personally known the petitioner to have been a resident at such place for such period, and that the petitioner is and during all such period has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

Id.

[84] *Id.* § 324(c), 54 Stat. 1149.

during WWII. Thus, aliens who were willing to demonstrate their allegiance to the United States by becoming naturalized citizens increased the available manpower to fight the war. In fact, Congress needed so desperately to increase the number of enlisted personnel in the Armed Forces that in 1942 it added Title III, sections 701 through 705, to the Nationality Act of 1940. By doing so, it provided a statutory framework to almost immediately naturalize aliens serving in WWII.[85]

Section 701 of Title III of the 1940 Act, as amended, provided that any alien enlistee who honorably served in the military or naval forces during WWII was eligible for naturalization regardless of age, satisfaction of residency requirements, English language proficiency, or literacy requirements.[86] An alien veteran of WWII was, however, required to be "lawfully admitted to the United States, including its Territories and possessions"[87] at the time of enlistment or induction, and was required to

---

[85] *See* Second War Powers Act of 1942, Pub. L. No. 507, ch. 199, § 701, 56 Stat. 182 (naturalizing persons serving in the armed forces during World War II). The Second War Powers Act was amended in 1945 to establish that alien veterans of WWII were required to file a naturalization petition prior to December 31, 1946. *See* Act to Amend the Second War Powers Act, 1942, ch. 590, § 202, 59 Stat. 658. The amendment read:

> (c) Title III of the Nationality Act of 1940, as amended by title X of the Second War Powers Act, 1942 (relating to naturalization of persons serving in the armed forces of the United States during the present war), is amended as follows:
> (1) Section 701 of such title is amended by striking out "and (3) the petition shall be filed not later than one year after the termination of the effective period of those titles of the Second War Powers Act, 1942, for which the effective period is specified in the last title thereof" and inserting in lieu thereof "and (3) the petition shall be filed not later than December 31, 1946."
> (2) Such title is amended by adding at the end thereof the following new section:
> . . . No person shall be naturalized under the provisions of this title unless such person has served in
> the military or naval forces of the United States prior to the date of enactment of this section.

Id.

[86] Second War Powers Act § 701. Although pursuant to section 701 the alien was required to be "lawfully admitted to the United States," the following requirements were waived:

> (1) no declaration of intention and no period of residence within the United States or any State shall be required; (2) the petition for naturalization my be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; and (4) no fee shall be charged or collected for making, filing, or docketing the petition for naturalization, or for the final hearing thereon.

Id.

[87] *Id.*; *see also* Act of Dec. 22, 1944, Pub. L. No. 530, ch. 662, 58 Stat. 886. In the Act of Dec. 22, 1944, Congress amended section 701 by allowing certain alien veterans who

submit affidavits from two credible United States citizens that he was known as "a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."[88] Racial restrictions to naturalization found in section 303 of the 1940 Act did not apply to those aliens who qualified under section 701.[89]

It is important to note that the legislative paradigm of section 701 is consistent with past congressional willingness to exempt alien veterans from standard naturalization requirements during times of declared war or other military conflicts. Apparently, the comprehensive scope of these exemptions was a byproduct of the urgent need for military personnel

---

were illegally present in the United States, and who had served outside of the continental United States, to become eligible for expedited naturalization. Section 701 was amended as follows:

> By striking out "who, having been lawfully admitted to the United States, including its Territories and possessions, shall have been at the time of his enlistment or induction a resident thereof" and inserting in lieu thereof the following: "Who shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943 being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served."

Id. See also In re Wong Sie Lim, 71 F. Supp. 84, 87 (N.D. Cal. 1947). In *Wong Sie Lim*, the court held that:

> Consequently, an alien serving in the armed forces who illegally entered the United States and was not therefore a lawful resident at the time of his induction or enlistment in the armed forces, cannot have the benefits of this section of the law, unless he performed military services outside of the continental limits of the United States. To hold otherwise . . . would be to judicially legislate.

Id.

[88] Second War Powers Act § 701.

[89] *See id.*; *see also In re* Delgado, 57 F. Supp. 460, 462 (N.D. Cal. 1944). In *Delgado*, the district court interpreted section 701:

> It was clearly the intent of Congress in adopting Sec. 701 to follow the historic course of granting the boon of citizenship to loyal aliens engaging to help defend this country. The House Committee reporting H.R. 1710 (which became Sec. 701) said: "It is a matter of historic record that the Government of the United States, as an encouragement to loyal aliens engaged in the defense of this country through service in the armed forces, has in past years, relieved them from some of the burdensome requirements of the general naturalization laws." And again in the same report, it is stated: "This proposed legislation proceeds upon the principle that non-citizens who are ready and willing to sacrifice their lives in the maintenance of this democratic government are deserving of the high gift of United States citizenship when vouched for by responsible witnesses as loyal and of good character and shown by government records as serving honorably."

Id. (citations omitted).

during WWII.[90] More importantly, however, these exemptions indicate that the value of aliens to the American government was connected not to their ability to enhance our society, but to their ability to defend it.

D. Korea, Vietnam, and Other Military Conflicts

Following the end of WWII, Congress abandoned the provisions of section 701 in favor of a more comprehensive statutory framework for alien veterans who honorably served in WWI or WWII.[91] The Act of June 1, 1948 amended the Nationality Act of 1940 by adding section 324A to provide uniform naturalization procedures for alien veterans of both world wars.[92] With several minor exceptions, the naturalization requirements of section 324A of the 1948 Act closely track the provisions of sections 324 and 701 of the 1940 Act, as amended. Alien veterans applying for citizenship pursuant to section 324A(a) were required to have "served

---

[90] *See Wong Sie Lim*, 71 F. Supp. at 87. The *Wong Sie Lim* court evaluated the motives behind the Nationality Act of 1940:

> Furthermore, it must be kept in mind that the amendments to the Nationality Act of 1940 were in furtherance of the war effort. The traditional naturalization requirements were lessened only as to those in the armed forces only to the specific extent prescribed by the Congress, after long and thorough discussion and consideration.

Id.

[91] Act of June 1, 1948, Pub. L. No. 567, ch. 360, 62 Stat. 282 (amending the Nationality Act of 1940). World War II was defined as the "period beginning September 1, 1939, and ending December 31, 1946." *Id.* This act amended the Nationality Act of 1940, by stating that:

> [A]ny person not a citizen who has served honorably in a active-duty status in the military or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section . . . .

Id.

[92] *See In re* Watson, 502 F. Supp. 145, 147 (D.D.C. 1980). In *Watson*, the district court provided the historical background of this amendment:

> Congress first enacted this language in 1948, as an amendment to the Nationality Act of 1940 . . . . The purpose of the amendment was to "make it possible for aliens who have served, or are serving honorably, in the armed forces of the United States during World War I or World War II, to acquire United States citizenship through naturalization without the necessity of going through the regular detailed process required of non-service people." The 1948 Amendment permanently eased requirements facing alien veterans and active duty personnel who had not taken advantage of such naturalization opportunities under statutes that had expired. Congress reenacted the language as § 329(a) of the Immigration and Naturalization Act of 1952 . . . and permanently extended its coverage to Korean War era personnel in 1961 . . . and to Vietnam era personnel in 1968 . . . .

Id. (citations omitted).

honorably in an active-duty status in the military or naval forces.'"[93] Unlike Section 701 of the 1940 Act, the English proficiency and literacy requirements were not waived. Notably, however, Congress disregarded the racial prohibition to naturalization found in section 303.[94] Additionally, section 324A of the 1948 Act was not restricted to aliens who lawfully entered the United States. Section 324A provided for naturalization if:

> (1) at the time of enlistment or induction such person shall have been in the United States or an outlying possession (including the Panama Canal Zone, but excluding the Philippine Islands), or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence.[95]

In 1952, Congress repealed the Nationality Act of 1940, as amended, including sections 324, 324A, and 701 relating to the naturalization of alien veterans.[96] Sections 328[97] and 329[98] of the Immigration and Nationality

---

[93] Act of June 1, 1948, ch. 360, 62 Stat. 282.

[94] *Id.* The Act of June 1, 1948 amended the Nationality Act of 1940 to include a new section, known as section 324A, which allowed veterans to be naturalized notwithstanding the racial restrictions formerly imposed by the 1940 Act, ch. 3, § 303, 54 Stat. 1137.

[95] *Id.*

[96] Act of June 27, 1952, § 403(a)(42), 66 Stat. 280 (revising laws relating to immigration, naturalization and nationality) [hereinafter 1952 Act]; *see* Lodge Act, 64 Stat. 316 (1950) (regarding the enlistment of aliens in the Army), *amended by* Act of June 19, 1951, § 21, 65 Stat. 89, *amended by* Act of June 27, 1952, 66 Stat. 276; Act of July 24, 1957, Pub. L. No. 85-116, 71 Stat. 311 (1957) (repealed 1981) (instructing that an alien, "after completion of five or more years of military service, if honorably discharged therefrom, be deemed to have been lawfully admitted to the United States for permanent residence within the meaning of such § 324(a)."); *see also* Garcia v. INS, 783 F.2d 953, 954 (9th Cir. 1986). In *Garcia*, the Ninth Circuit held that:

> The purpose of the Lodge Act was to overcome obstacles to the enlistment of noncitizens in the United States Army in 1950. The Act was entitled "An Act to provide for the enlistment of aliens in the regular army." The first three sections of the Act as it was originally enacted authorized the Secretary of the Army to enlist up to 2500 aliens in the regular army for periods of at least five years. In 1952, Congress amended the Act, adding the provision at issue in this case. That amendment deemed those servicemen enlisted pursuant to the Lodge Act admitted for permanent residence in the United States.

Id.; *see also* Petition of Leuthold, 116 F. Supp. 777, 779-80 (D.N.J. 1953) (citing to House and Senate reports discussing the Lodge Act).

[97] Act of June 27, 1952, § 328, 66 Stat. 249; *see also* H.R. REP. NO. 1365, at 1737 (1952) (discussing the INA act of 1952). The report explains the bill:

> The bill provides that aliens who serve in the Armed Forces for 3 years and who receive honorable discharges may be naturalized without having to wait for another 2 years of residence in the United States. This provision in section 328 of this bill carries forward substantially the provisions of existing law in section 324 of the Nationality Act of 1940.

Id.

[98] Act of June 27, 1952, § 329, 66 Stat. 250 (revising immigration laws to include naturalization through active-duty service in the armed forces during WWI or WWII); *see*

Act of 1952 replaced these provisions. The Act of 1952 dramatically enlarged the class of persons eligible for naturalization through military service.[99] These provisions were codified as 8 U.S.C. §§ 1439 and 1440, and they serve as the foundation for the currently enacted statutes.[100]

---

also H.R. REP. NO. 1365, at 1737 (1952), which explains the 1952 Act:

> Section 329 of the bill also carries forward the provisions of the Nationality Act of 1940 relating to naturalization of those who served honorably in an active-duty status during World War I or World War II. In such cases if the induction or enlistment took place in the United States, the Canal Zone, or in an outlying possession, lawful admission for permanent residence is waived, and no period of residence or specified period of physical presence within the United States or any State is required.

Id.

[99] *See* H.R. REP. NO. 1365, at 1677 (1952). The report discusses the importance of the 1952 act noting:

> While the naturalization and nationality laws of the United States have been reexamined more recently (1937 through 1940) our present basic immigration laws consist of two acts enacted in 1917 and 1924, respectively. The act of February 5, 1917, is still regarded as the basic qualitative law and the act of May 26, 1924, as the basic quantitative law. However, a complicated superstructure of amendments, substitutes, and repeals has been added through the years to these two basic statutes. Many obsolete laws, reminiscent of their day, remain on the statute books. Inequities, gaps, loopholes, and lax practices have become apparent through the years. In the field of our naturalization and nationality laws, very important codification work was done in 1940. However, since then, not less than 31 amendments to the Nationality Act of 1940 have been enacted, some for the purpose of clarification and others designed to meet the spirit and the requirements of the ever-changing times. Legislation such as this, legislation which will affect the fate of millions of human beings in this country and abroad, has to be approached with foresight and caution. It requires painstaking study, as well as careful weighing of equities, human rights, and continuous consideration of the social, economic, and security interests of the people of the United States.

Id.

[100] *See* 8 U.S.C. § 1439 (1994). Section 1439 provides:

> A person who has served honorably at any time in the armed forces of the United States for a period or periods aggregating three years, and, who, if separated from such service, was never separated except under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing such person's application, in the United States for at least five years, and in the State or district of the Service in the United States in which the application for naturalization is filed for at least three months, and without having been physically present in the United States for any specified period, if such application is filed while the applicant is still in the service or within six months after the termination of such service.

Id. See also 8 U.S.C. § 1440 (Supp. 1999). Section 1440 describes the parameters for expedited legal residency:

> Any person who, while an alien or a non-citizen national of the United States, has served honorably in an active-duty status in the military, air, or naval forces of the United States during either World War I or during a

1. Section 329 of the INA: Naturalization through war-time military service

Immigration and Naturalization Act section 329 was specifically adopted to expedite the naturalization of alien veterans who served during declared wars. Alien veterans who honorably served in an active-duty status "during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946 could be naturalized."[101] The new 1952 Act outlawed racial prohibitions to naturalization, significantly distinguishing it from previous alien veteran naturalization provisions. Section 311 of the 1952 Act provides, in pertinent part, that "[t]he right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married."[102] For the first time in U.S. history, Congress eliminated racial prohibitions from the eligibility requirements of the naturalization statutes.

The 1952 Act incorporated some standard eligibility requirements into its naturalization paradigm. For example, the 1952 Act required an alien veteran to demonstrate English language proficiency, literacy, "knowledge

---

> period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25, 1950, and ending July 1, 1955, or during a period beginning February 28, 1961, and ending on a date designated by the President by Executive order as of the date of termination of the Vietnam hostilities, or thereafter during any other period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment, reenlistment, extension of enlistment, or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, or on board a public vessel owned or operated by the United States for noncommercial service, whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence.

Id. *See also* 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, 32 C.F.R. § 94.4(a)-(b) (1997).

[101] Act of June 27, 1952, § 329(a), 66 Stat. 250. Under this Act, for the first time in the history of alien military naturalization, alien veterans of the U.S. Air Force were afforded the same naturalization privileges as members of military or naval forces of the United States. *See id.* The 1952 Act stated that "[a]ny person who, while an alien or a non-citizen national of the United States, has served honorably in an active-duty status in the military, air, or naval forces of the United States" would be eligible for naturalization. *Id.* The provisions of the National Security Act of 1947 established the Air Force as a separate branch of the United States military. *See* National Security Act of 1947, § 208(a), 61 Stat. 503. Prior to 1947, the Department of the Army administered what was then referred to as the Army Air Forces. *See id.*

[102] Act of June 27, 1952, § 311, 66 Stat. 280.

and understanding of the fundamentals of the history, and the principles and form of government of the United States,"[103] and to be "a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."[104] In accordance with prior military naturalization statutes, INA section 329 did not require a period of residency within the United States as a condition for naturalization.[105] Additionally, aliens could be naturalized pursuant to this provision even if they were not legally residing in the United States. INA section 329(a) provided that such alien veterans could be naturalized "whether or not [they have] been lawfully admitted to the United States for permanent residence" if the aliens were in the "United States, the Canal Zone, American Samoa, or Swains Island" at the time of induction or enlistment.[106] This language represents a departure from the naturalization requirements set forth in INA section 318, which provide that "except as otherwise provided in this subchapter, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence."[107]

Alien veterans who honorably served during the Korean Conflict were not, however, permitted to take advantage of the war-time exemption from establishing lawful residency in the United States. In 1953, Congress

---

[103] *Id.* § 312(1)-(2), 66 Stat. 239-40.

[104] *Id.* § 316(a), 66 Stat 242-43.

[105] *Id.* § 329(b)(2), 66 Stat. 250 (stating "no period of residence or specified period of physical presence within the United States or any State shall be required").

[106] *Id.* § 329(a), 66 Stat. 250. *See also* Tak Shan Fong v. United States, 359 U.S. 102, 103-04 (1959). In *Tak Shan Fong*, the Supreme Court held that:

> Congress has shown varying degrees of liberality in granting special naturalization rights to aliens serving in our armed forces at various times. For example, the Immigration and Nationality Act of 1952 allows such rights to those having served honorably in World War I or during the period September 1, 1939, to December 31, 1946, if at the time of their induction or enlistment they simply were physically present in the United States or certain named outlying territories. On the other hand, that Act's general provision allowing aliens with three years' armed service at any time to be naturalized free of certain residence requirements provides no exemption from the requirement that they had been "lawfully admitted to the United States for permanent residence."

Id.

[107] Act of June 27, 1952, § 318, 66 Stat. 244. This provision is currently found in section 318 of the INA, which provides:

> Except as otherwise provided in this subchapter, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this chapter. The burden of proof shall be upon such person to show that he entered the United States lawfully, and the time, place, and manner of such entry into the United States.

INA § 318, (codified at 8 U.S.C § 1428 (1994)).

adopted expedited naturalization provisions specifically aimed at alien veterans actively serving in the Armed Forces of the United States during the period "after June 24, 1950, and not later than July 1, 1955."[108] These alien veterans of the Korean Conflict were eligible for naturalization only if they were lawfully present in the United States.[109] Justice Brennan, in *Tak Shan Fong v. United States*, noted that Congress specifically considered granting more liberal naturalization requirements to this class of aliens, and rejected that proposal. In *Tak Shan Fong*, the Supreme Court explained the distinction between the statutory framework for aliens serving during the Korean Conflict and prior world wars, and concluded:

> As distinguished from its policy toward World War I and II service, Congress was not prepared to allow special naturalization rights to aliens serving at the time of Korea simply if they entered the service while physically, for any length of time and lawfully or unlawfully, within the United States. Nor was it prepared to make one year's residence alone the condition; it also imposed the requirement of lawful admittance. It would not be a meaningful requirement to attribute to Congress if it could have been satisfied by a lawful entry, followed by departure, before and unconnected with the commencement of the year's presence.[110]

The Korean veterans naturalization provisions expired in 1955 and were not revived. Instead, the provisions of INA section 329(a) were amended by section eight of the Act of September 26, 1961 to include alien veterans of the Korean Conflict.[111] As amended, the naturalization privileges of INA section 329(a) became available to alien veterans who served in the air, military or naval forces between "June 25, 1950, and ending July 1, 1955."[112] These aliens were eligible for naturalization pursuant to the same terms and conditions provided by INA section 329.[113]

---

[108] Act of June 1953, Pub. L. No. 86, ch. 162, 67 Stat. 108 (providing naturalization for persons who served in the armed forces after June 24, 1950).

[109] *Id.* The 1953 Act states that:

> [A]ny person, not a citizen, who after June 24, 1950, and not later than July 1, 1955, has actively served or actively serves, honorably, in the Armed Forces of the United States for a period or periods totaling not less than ninety days and who (1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, may be naturalized on petition filed not later than December 31, 1955, upon compliance with all the requirements of the Immigration and Nationality Act.

Id.

[110] *Tak Shan Fong*, 359 U.S. at 104-05.

[111] Act of Sept. 26, 1961, 75 Stat. 650-57.

[112] *Id.*

[113] *See* H.R. 7209, 87th Cong. (1961). The bill's legislative history explained that:

2. Section 328 of the INA: Naturalization through peace-time military service

Immigration and Naturalization Act section 329 is distinctly different from section 328. The requirement in INA section 329 that alien veterans serve in active-duty status during WWI, WWII, or the Korean Conflict differentiates INA section 329 from its sister statute section 328.[114] Section 328 affords the naturalization privilege to those alien veterans who honorably served in the armed forces, but did not serve during any declared war or conflict.[115] Section 328 is modeled after and virtually identical to the naturalization privilege established in section 324 of the 1940 Act for this class of alien veterans. The eligibility requirements for alien veterans covered by INA section 328, however, differ in several significant ways from those imposed on war veterans under section 329. First, alien veterans may qualify for this naturalization privilege if they served in the United States Armed Forces "at any time."[116] Second, unlike section 329, where no specific period of service is required, section 328 requires aliens to serve in the U.S. Armed Forces for a "period or periods aggregating

---

> The present provisions of section 329 of the Immigration and Nationality Act provide special naturalization benefits of persons who served honorably on active duty with Armed Forces in World War I or World War II. Expeditious naturalization is accorded those veterans since no specific period of residence or physical presence is required. The same policy considerations which warranted the grant of naturalization privileges to veterans of World War I or II are equally applicable to veterans of the Korean conflict . . . .

Id.

[114] In *United States v. Rosner*, the First Circuit explained that time served in reserve units may be considered when alien veterans apply for expedited naturalization under section 328, unlike section 329, which expressly requires "active duty" in the armed forces to trigger the applicability of the statute:

> It seems likely that Congress, if it had meant the words "served honorably" in Sec. 328 to require such service to be in an active duty status, would have inserted that requirement specifically in Sec. 328 as it has done in Sec. 329 . . . . By its omission of any reference to active service, there is a strong inference that Congress meant the type of military service required under Sec. 328 to be somewhat different than that required by Sec. 329 and 8 U.S.C.A. § 1440(a).

249 F.2d 49, 51 (1st Cir. 1957).

[115] Act of June 27, 1952 § 328, 66 Stat. 249; *see also* Nationality Regulations: Special Classes of Persons who may be Naturalized: Persons with Three Years' Service in Armed Forces of the United States, 8 C.F.R. § 328.1(1) (1991); 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, 32 C.F.R. § 94.3(b); Naturalizing Aliens who Served in the Armed Forces of the United States, 65 Fed. Reg. 17413 ("Armed Forces of the United States' denotes collectively, all components of the Army, Navy, Air Force, Marine Corps, and Coast Guard.").

[116] Act of June 27, 1952, § 328, 66 Stat. 249.

three years."[117] As a result, the standard five-year residency requirement is reduced by two years for this class of alien veterans. Most importantly, under section 328, alien veterans must be lawfully present in the United States to qualify for this naturalization privilege.[118] This requirement effectively bars undocumented alien veterans from becoming naturalized notwithstanding their honorable military service.

During the forty-eight years since Congress adopted sections 328 and 329 of the INA, there have been several minor revisions to the statutes. In 1968, Congress revised section 329(a) to extend naturalization eligibility to alien veterans serving during the Vietnam conflict and combat activities engaged in thereafter by the United States.[119] Section 329, as amended, provides that the relevant eligibility period shall include WWI, WWII, the Korean Conflict, and any:

> [P]eriod beginning February 28, 1961, and ending on a date designated by the President by Executive order as of the date of termination of the Vietnam hostilities, or thereafter during any other period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force.[120]

During this two-year period, 1,043 alien veterans were naturalized as a result of their wartime military service during WWI, WWII, Vietnam, and the Gulf War.[121]

Several executive orders were issued following the amendment to INA section 329. In 1978, President Carter issued Executive Order No. 12081, which indicated that alien veterans who honorably served in an active-duty status during the Vietnam Conflict, which "[began] on February 28, 1961," were eligible for expedited naturalization, but they must have served before the conflict "terminated on October 15, 1978."[122]

---

[117] *Id.*

[118] *See* Act of June 27, 1952, § 328(d), 66 Stat. 249. Section 328(d) provides that an alien must comply with the requirements of INA § 316(a), which identifies lawful permanent residence as a requirement for naturalization. *Id.* at § 316(a), 66 Stat. 242.

[119] Act of Oct. 24, 1968, Pub L. No. 90-633, 82 Stat. 1343 (1968) (amending the INA to provide for the naturalization of persons who served in active-duty service in the U.S. Armed Forces during the Vietnam hostilities, or during other periods of military hostility).

[120] *Id.*

[121] STATISTICAL Y.B., *supra* note 4. Another 2,347 were naturalized as a result of their peacetime military service. *Id.*

[122] Exec. Order No. 12,081, 43 Fed. Reg. 42,237 (Sept. 18, 1978) (terminating expeditious naturalization based on military service). President Carter instructed:

> By the authority vested in me as President of the United States of America by Section 329 of the Immigration and Nationality Act, as amended by Sections 1 and 2 of the Act of October 24, and by the authority of Section 3 of that Act of October 24, 1968 it is hereby ordered that the statutory period of Vietnam hostilities which began on February 28, 1961, shall be deemed to

During this period, 31,569 alien veterans became naturalized citizens as a result of their wartime military service during WWI, WWII, and Vietnam.[123] President Clinton issued Executive Order No. 12939 in 1994. The Order established that Persian Gulf war veterans who served between August 2, 1990 and April 11, 1991 were eligible for naturalization.[124]

An undercurrent of governmental opportunism runs throughout the evolution of the alien veterans' naturalization legislation. During peacetime, the naturalization requirements imposed by Congress on aliens, especially those unlawfully present in the United States, were substantially more stringent than those imposed during periods of war. The wartime naturalization provisions were seemingly motivated by the urgent need for military personnel, and not the constitutional mandate of Article I, which directs Congress to establish uniform rules of naturalization.

II. CONGRESSIONAL BYPASSES

During the last century, Congress routinely conscripted aliens who were both legally *and* illegally present in the United States. Notwithstanding their service to America, the privilege of naturalization was not always offered to these alien veterans. This section explores the legislative and judicial imposition of military service on aliens residing in the United States. A necessary component of this analysis focuses on the

---

> have terminated on October 15, 1978, for the purpose of ending the period in which active-duty service in the Armed Forces qualifies for certain exemptions from the usual requirements for naturalization, including length of residence and fees.

Id. (citations omitted).

[123] STATISTICAL Y.B., *supra* note 4. Another 13,725 were naturalized during this period of time as a result of their peacetime military service. *Id.*

[124] Exec. Order No. 12,939, 59 Fed. Reg. 61,231 (Nov. 22, 1994) (expediting naturalization of aliens and non-citizen nationals who served in active-duty status during the Persian Gulf conflict). President Clinton commanded:

> By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 1440 of title 8, United States Code, and in order to provide expedited naturalization for aliens and non-citizen nationals who served in an active-duty status in the Armed Forces of the United States during the period of the Persian Gulf Conflict, it is hereby ordered as follows: For the purpose of determining qualification for the exception from the usual requirements for naturalization, the period of Persian Gulf Conflict military operations in which the Armed Forces of the United States were engaged in armed conflict with a hostile force commenced on August 2, 1990, and terminated on April 11, 1991. Those persons serving honorably in active-duty status in the Armed Forces of the United States during this period are eligible for naturalization in accordance with the statutory exception to the naturalization requirements, as provided in section 1440(b) of title 8, United States Code.

Id.

racial and ethnic bars to naturalization that were incorporated into the body of immigration law until 1952. Although no longer codified, racial and ethnic discrimination remain major obstacles to the broadening of the naturalization privilege to a larger group of aliens.

A. Enlistment Requirements

The realization that aliens have served in every branch of the U.S. Armed Forces since 1862 runs counterintuitive to our basic notion that only citizens risk their lives to defend their country. What is even more striking is that the congressional power to "raise and support Armies," and to "provide and maintain a Navy,"[125] has been interpreted by courts to include the authority to conscript aliens into compulsory military service.[126] In 1945, the Second Circuit in *United States v. Lamothe* held that "[t]he grant of power in the Constitution to raise and support armed forces is in terms broad enough to include the compulsory service of aliens."[127] In *Leonhard v. Eley*, the Tenth Circuit analogized Congress's power to conscript aliens to the public service requirements imposed on citizens as members of a common social and political structure:

> Aliens residing in the United States, so long as they are permitted by the government to remain therein, are entitled generally, with respect to the rights of person and property and to their civil and criminal responsibility, to the safeguards of the Constitution and to the protection of our laws. However, they may exercise only such political rights as are conferred upon them by law. Their duties and obligations, so long as they reside in the United States, do not differ materially from those of native-born or naturalized citizens. Equally with such citizens, for the rights and privileges they enjoy, they owe allegiance to our country, obedience to our laws, except those immediately relating to citizenship, contribution to the support of our governments, state and national; and in war, they share equally with our citizens the calamities which befall our country; and their services may be required for its defense and their lives may be periled for maintaining its rights and vindicating its honor.[128]

---

[125] U.S. CONST. art. I, § 8, cl. 13.

[126] *See, e.g.*, United States v. Rumsa, 122 F.2d 927, 936 (7th Cir.), *cert. denied*, 348 U.S. 838 (1954). The court in *Rumsa* held that: "[t]he grant of power to Congress to raise and support armies is certainly sufficient to authorize the adoption of the present policy to conscript aliens." *Id.*

[127] United States v. Lamothe, 152 F.2d 340, 342 (2d Cir. 1945).

[128] Leonhard v. Eley, 151 F.2d 409, 410 (10th Cir. 1945).

Although the United States eliminated compulsory military service in 1973,[129] most men, including aliens residing in the United States, are not free from all military obligations. Section 453 of the Military Selective Service Act (MSSA) requires:

> [E]very male citizen of the United States, and every other male person residing in the United States . . . to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.[130]

Additionally, all males who are required to register under section 453 of the MSSA may be inducted into military service.[131] Although non-immigrants are not required to register, the MSSA expressly provides that "aliens admitted for permanent residence in the United States shall not be so exempted."[132] Dating back to the Selective Training and Service Act of

---

[129] Military Selective Service Act of 1967, as amended, Pub. L. No. 92-129, 85 Stat. 353 (1971) (codified as amended at 50 U.S.C. § 467(c) (1994)) ("Notwithstanding any other provisions of this title, no person shall be inducted for training and service in the Armed Forces after July 1, 1973 . . . .").

[130] *Id.* § 101, 85 Stat. 345 (codified as amended at 50 U.S.C. app. § 453(a) (1994)).

[131] *See id.* (stating that persons who are required to register "shall be liable for training and service in the Armed Forces of the United States"); *see also* Lionel Van Deerlin, *Washington Resurrects a Bad Idea*, SAN DIEGO UNION-TRIB., Sept. 1, 1999, at B7 ("Congress may be asked to meet current shortages in Army, Navy, and even Air Force enlistments by turning again to a recruiting system [conscription] abandoned in shambles more than 25 years ago.").

[132] *See* 50 U.S.C. app. § 456 (1994). The statute delineates deferments and exemptions:

> [P]ersons in other categories to be specified by the President who are not citizens of the United States, shall not be required to be registered under section 3 . . . and shall be relieved from liability for training and service under section 4 . . . except that aliens admitted for permanent residence in the United States shall not be so exempted.

Id. *See also* United States v. Rumsa, 122 F.2d 927, 932 (7th Cir. 1954). In *Rumsa*, the Seventh Circuit held that:

> There can be no question but that the Universal Military Training and Service Act as amended authorized the selection and induction of aliens who had been admitted to the United States for permanent residence. Section 454(a) of 50 U.S.C.A. Appendix, § 4(a) of the Universal Military Training and Service Act, as amended June 19, 1951, expressly provided: "Except as otherwise provided in this title . . . every male alien admitted for permanent residence . . . shall be liable for training and service in the Armed Forces of the United States . . . ." And Section 456 of 50 U.S.C.A. Appendix, which gave to the President broad powers to exempt various classes of aliens, expressly provided: "except that aliens admitted for permanent residence in the United States shall not be so exempted."

Id.; *Ex parte* Larrucea, 249 F. 981, 985 (S.D. Cal. 1917). The court in *Larrucea* interpreted the MSSA and noted the act provides "in express terms that the draft shall be based upon liability to military service of all male citizens and all male persons not alien enemies who have *declared* their intention to become citizens," and thus concluded that "none shall be exempt from service, unless exempt or excused "'as in the act provided.'" *Id.*

1940, the phrase "every other male person residing in the United States" has been broadly interpreted by Congress and the courts.[133] Notwithstanding the express language of section 453 of the MSSA, the phrase does not require every male residing in the U.S. to register for military service. It is broad enough, however, to include a wide category of men.

In 1950, the United States Supreme Court, in *McGrath v. Kristensen*,[134] held that the precise scope of this privilege was not subject to judicial interpretation, but instead must be defined by "administrative regulation."[135] When Congress defined the parameters of this language, it has never specifically excluded undocumented aliens residing in the United States from registration or the draft. In fact, the former Universal Military Training and Service Act of 1951 addressed this issue. Section four of the 1951 Act provided:

> Except as otherwise provided in this title, every male citizen of the United States and every male alien admitted for permanent residence . . . shall be liable for training and service in the Armed Forces of the United States . . . . [A]ny male alien . . . who has remained in the United States in a status other than that of a permanent resident for a period exceeding one year (other than an alien exempted from registration under this title and regulations prescribed thereunder) shall be liable for training and service in the Armed Forces of the United States.[136]

This language was deleted from subsequent revisions to the selective service statutes.[137]

---

[133] Selective Training and Service Act of 1940, Pub. L. No. 783, ch. 720, 54 Stat. 885, *amended by* Act of Nov. 13, 1942, Pub. L. No. 772, ch. 638, § 3, 56 Stat. 1019 (modifying age restrictions), *amended by* Selective Service Act of 1948, Pub. L. No. 759, 62 Stat. 604 (eliminating and replacing various sections of previous acts).

[134] 340 U.S. 162 (1950).

[135] *Id.* at 172-73. The Court held:

> The phrase of § 3(a), "every other male person residing in the United States," when used as it is, in juxtaposition with "every male citizen," falls short of saying that every person in the United States is subject to military service. But the Act did not define who was a "male person residing in the United States, liable for training and service . . . . Such preciseness was left for administrative regulation."

Id.

[136] Act of June 19, 1951, Pub. L. No. 51, ch. 144, § 1(a), 65 Stat. 76 (renaming the Selective Service Act of 1948 the "Universal Military Training and Service Act").

[137] Selective Service Act of 1948, 62 Stat. 604, *amended by* Act of June 19, 1951, Pub. L. No. 51, 65 Stat. 76, *amended in relevant part by* Act of June 30, 1967, Pub. L. No. 90-40, § 1(a), 81 Stat. 100 (renaming the act the "Military Selective Service Act of 1967"), *amended in relevant part by* Act of Sept. 28, 1971, Pub. L. No. 92-129, § 101(1)(a) 85 Stat. 348 (renaming the act the "Military Selective Service Act").

Congress, however, does not have the authority to compel aliens into military service. An alien may seek deferment from military service, but such a request carries with it an exceptional price.[138] Any alien seeking such an exemption is thereafter barred from becoming a naturalized U.S. citizen.[139] This permanent bar to citizenship is applicable to undocumented as well as permanent resident aliens.[140] The severity of this penalty, when

---

[138] *See, e.g.*, *In re* Thanner, 253 F. Supp. 283, 286 (D. Col. 1996). In *Thanner*, the district court stated:

> Section 315 is a clear example of a law enacted pursuant to this Congressional authority. Congress, undoubtedly persuaded by the necessity of good relations with various foreign nations, grants to nationals of those nations residing in this country immunity from compulsory service in the military forces of the United States. But this benefit is not without its price and that price is the permanent ineligibility of such aliens for citizenship. Such is the manifest policy of the Congress, those who consider this to be a harsh or unfair bargain must seek their redress from Congress and not the Federal Courts; it is our duty to enforce that policy—not to override it.

Id.

[139] INA § 315, 8 U.S.C. § 1426 (1994). The debarment provision states:

> Notwithstanding the provisions of this Act but subject to subsection (c) of this section, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

Id.

[140] *See, e.g.*, *In re* Watson, 502 F. Supp. 145, 147 (D.D.C. 1980). The *Watson* court described the disqualification of exempt permanent residents from citizenship:

> The language "separated from the service on account of alienage" was evidently added to deal with a special situation created by the draft laws in force at the time. Under the statute as it stood in World War II, aliens within the United States were subject to the draft unless they declared their intention not to seek United States citizenship. This declaration permanently barred them from seeking naturalization. Under some circumstances, aliens already in the United States armed forces could petition for discharge on account of alienage. Discharge on these grounds permanently disqualified petitioning alien from United States citizenship.

Id. (citations omitted); *see also* Ceballos v. Shaugnessy, 352 U.S. 599, 604-05 (1957). In *Ceballos*, the Supreme Court interpreted the provisions of the Selective Training and Service Act of 1940, Pub. L. No. 783, ch. 720, §3(a), 54 Stat. 885 (as amended, 54 Stat. 885, 55 Stat. 845, 56 Stat. 1019). This version of the Act applied to the debarment provision to permanent resident aliens for filing the exemption application. The Court held that the "neutral alien in this country during the war was at liberty to refuse to bear arms to help us win the struggle, but the price he paid for his unwillingness was permanent debarment from United States citizenship." *Id.*; *see also* Astrup v. INS, 402 U.S. 509 (1971) (holding that temporary release from military service does not permanently prevent an alien from seeking naturalization); Petition for Naturalization of Serano, 651 F.2d 178 (3d Cir. 1981) (holding that alien who requested exemption from military service was not eligible for naturalization); Aklin v. United States, 340 F.2d 746 (2d Cir. 1965) (holding that alien who deliberately accepted exemption from military service was ineligible for naturalization); *In re* Rego, 289 F.2d 174 (3d Cir. 1961) (holding that a Spanish national who was exempted

weighed against the alternative of military service, raises the service obligation to a *de facto* compulsory one. The debarment provision was initially found in the selective service statute.[141] However, in 1952, section 315 was added to the INA to classify an alien who refused to serve as "ineligible to become a citizen of the United States."[142]

A historic review of military enlistment statutes and regulations also demonstrates the extent of alien integration into U.S. military forces. In 1894, Congress adopted an Act to regulate enlistments in the Army of the United States.[143] This statute only imposed substantial enlistment restrictions on aliens in military service "in time of peace."[144] As a threshold matter, any individual "who is not a citizen of the United States"

---

from military service under a treaty between the United States and Spain, in which both countries reciprocally excused nationals of the other from military service, was ineligible for naturalization); Gilligan v. Barton, 265 F.2d 904 (8th Cir. 1959) (holding that an individual who voluntarily applied for a military exemption was ineligible for naturalization); *In re* Coronado, 224 F.2d 556 (2d Cir. 1955) (affirming district court decision that held petitioner ineligible for naturalization because he voluntarily requested exemption from military service); *In re* Thanner, 253 F. Supp. 283 (D. Colo. 1996) (holding that individual who requested exemption from military service was ineligible for naturalization); *In re* Naturalization of Krummenacher, 202 F. Supp. 781 (N.D. Cal. 1962). In *Krummenacher*, the court explained the term "permanent resident alien":

> The term "permanent resident alien" or PRA, as it is commonly defined, referred to an alien who was "lawfully admitted for permanent residence." As defined by § 101 of the INA, an alien lawfully admitted for permanent residence is a person who has "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, such status not having changed."

Id. (citations omitted).

[141] Selective Training and Service Act of 1940, § 3(a), 54 Stat. 885, *amended by* Selective Service Act of 1948, 62 Stat. 605 (codified as amended at 50 U.S.C. app. § 454(a)).

[142] INA § 315, 8 U.S.C. 1426 (1994). The INA defines "ineligible to citizenship" as:

> [A]n individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940 . . . or under any section of this title, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

INA § 101(a)(19), 8 U.S.C. § 1101(a)(19) (1994); *see also* Persons Ineligible to Citizenship: Exemption From Military Service, 8 C.F.R. § 315 (2000) (providing exemption for military service and persons ineligible for citizenship). Regulation 315.2 states that:

> [A]ny alien who has requested, applied for, and obtained an exemption from military service on the ground that he or she is an alien shall be ineligible for approval of his or her application for naturalization as a citizen of the United States.

Id.

[143] Act of Aug. 1, 1894, ch. 179, § 2, 28 Stat. 216 (regulating U.S. Army enlistments).

[144] *Id.*

was not permitted to enlist in peacetime military service.[145] Exceptions were made for an alien who previously "made legal declaration of his intention to become a citizen of the United States."[146] Yet, in emergent times of war or military conflict, all aliens regardless of their immigration status were eligible for enlistment into the Army. Unlike the Army, the Navy and the Marines had liberal enlistment policies that applied equally in times of peace or war. The Act of March 3, 1865, as amended, only excluded from enlistment eligibility in the Navy and the Marines minors under the age of fourteen, insane or intoxicated persons, and deserters.[147]

In 1956 Congress repealed the 1894 Act, and in its place promulgated Title 10, the uniform compilation of the regulations pertaining to the various branches of military service. Incorporated within this statute are provisions that set forth the qualifications for enlistment into the Army, Navy, and Air Force. The statutes governing enlistment into the Army and Air Force specifically limit eligibility to aliens who were citizens or who had "made a legal declaration of intention to become, a citizen of the United States."[148] Consistent with the provisions established in 1865 governing enlistment in the Navy and Marines, the 1956 enlistment provisions omitted any requirement of citizenship or declaration of intent to become a citizen in the requirements for enlistment. The only prohibitions to enlistment in the Navy or Marines related to age, desertion, and incapacity.[149]

---

[145] *Id.*

[146] *Id.*; *see also* Act of June 14, 1920, Pub. L. No. 281, ch. 286, 41 Stat. 1077. The Act of June 14, 1920 made an exception for non-English speaking persons, who were previously precluded from enlisting. *Id.*

[147] Act of Mar. 3, 1865, § 21, 13 Stat. 490, *amended by* Act of Feb. 23, 1881, ch. 73, § 2, 21 Stat. 338.

[148] Act of Aug. 10, 1956, ch. 333, § 3253(c), 70A Stat. 178 (revising, codifying, and enacting into law Title 10 of the United States Code, entitled "Armed Forces"). The Act of August 10 stated that "In time of peace, no person may be accepted for original enlistment in the Army unless he is, or has made a legal declaration of intention to become, a citizen of the United States." *Id.*; *see also* Act of Aug. 10, 1956, ch. 833, 70A Stat. 503(c) ("In time of peace, no person may be accepted for original enlistment in the Air Force unless he is, or has made a legal declaration of intention to become, a citizen of the United States.").

[149] Act of Aug. 10, 1956, ch. 537, § 5532, 70A Stat. 318. The Act prohibited certain classes of people from enlisting in the U.S. Navy including (1) males under 14 years of age; (2) females under 18 years of age; (3) the "insane"; (4) intoxicated applicants; and (5) persons who have "deserted in time of war from any of the armed forces, unless, in time of war, his enlistment is permitted by such authority as the Secretary of the Navy designates." *Id.* This provision was repealed by the Act of Jan. 2, 1968, Pub. L. No. 90-235, 81 Stat. 756. In its place, is an enlistment provision with broad applicability to all branches of the armed forces. *See* Act of Jan. 2, 1968, at § 504, 81 Stat. 754 ("No person who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force.").

Current military enlistment policies also reflect a willingness to waive citizenship restrictions during national emergencies. During periods of military conflict, only persons who are "insane, intoxicated, or a deserter from an armed force, or who ha[ve] been convicted of a felony," are prohibited from serving in the Armed Forces.[150] Notwithstanding the foregoing, aliens drafted during periods of war are not required to serve. However, there remains a penalty: Section 315(a) of the INA provides that an alien who receives an exemption from military service based on alienage, "shall be permanently ineligible to become a citizen of the United States."[151] During times of peace, however, Congress continues to require citizenship or lawful permanent residence status before an alien may be permitted to enlist in either the Army[152] or the Air Force.[153] This distinction clearly evidences congressional opportunism when evaluating the fitness of aliens for military service during times of war.

In 1968, Congress repealed the enlistment provisions for the Navy and Marines as set forth in Title 10 of the U.S. Code.[154] In its place, Congress granted the Secretary of the Navy the authority "to conduct, all affairs of the Department of the Navy, including . . . recruiting." [155] Although there is no express statutory prohibition restricting the enlistment of aliens into the Navy, the Navy's administrative regulations favor U.S. citizens or permanent resident aliens.[156] The Navy's internal enlistment criteria

---

[150] *Id.*

[151] INA § 315(a), 8 U.S.C. § 1426(a) (1994); *see also* Persons Ineligible to Citizenship: Exemption From Military Service, 8 C.F.R. § 315.2(a) (2000) ("[A]ny alien who has requested, applied for, and obtained an exemption from military service on the ground that he or she is an alien shall be ineligible for approval of his or her application for naturalization as a citizen of the United States.").

[152] 10 U.S.C. § 3253 (1994) ("In time of peace, no person may be accepted for original enlistment in the Army unless he is a citizen of the United States or has been lawfully admitted to the United States for permanent residence under the applicable provisions of the Immigration and Nationality Act."); *see also* Basic Qualifications for Enlistment, 32 C.F.R. § 571.2(b) (2000). The regulations details the enlistment requirements requiring an applicant to be a United States citizen, an "alien who has been lawfully admitted to the United States as a permanent resident," or a "National of the United States (Citizen of Puerto Rico, Guam, American Samoa or the Virgin Islands." *Id.*

[153] 10 U.S.C. § 3253 (1994) ("In time of peace, no person may be accepted for original enlistment in the Air Force unless he is a citizen of the United States or has been lawfully admitted to the United States for permanent residence under the applicable provisions of the Immigration and Nationality Act.").

[154] Act of Jan. 2, 1968, Pub. L. 90-235, § 2(a)(3),(b), 81 Stat. 756.

[155] 10 U.S.C. § 5013 (Supp. 1999).

[156] United States Navy, *Joining the U.S. Navy By Non-U.S. Citizens*, *at* http://www.chinfo.navy.mil/navpalib/questions/foreign.html (last visited Nov. 6, 2000). The Navy explains its enlistment requirements:

> Enlistment into the U.S. Navy, or any branch of the U.S. military, by citizens of countries other than the United States is limited to those foreign nationals who are legally residing in the United States and possess an Immigration and

provide that "U.S. citizenship is . . . the preferred status for enlistment to create a legally binding obligation from the service member based on the premise that these individuals are more capable of fulfilling their contractual military service obligation."[157] This administrative regulation represents a departure from the Navy's historic willingness to induct interested personnel regardless of their citizenship status.

B. Racial Restrictions on Naturalization

During times of war or other periods of military conflict, Congress has willingly conscripted aliens of various races and ethnicity. During these times, however, Congress continued to adopt racially exclusionary naturalization restrictions that denied many alien veterans the benefit of naturalization in exchange for their military service. As early as 1863, the need for emergent manpower forced Congress to include blacks and aliens within the parameters of the first conscription statute.[158] Such inclusion

---

> Naturalization Service Alien Registration Card (INS Form I-151/551—commonly known as a "Green Card"). Applicants must be between 17 and 35; meet the mental, moral, and physical standards for enlistment; and must speak, read and write English fluently.

Id.

[157] 2 DEP'T OF THE NAVY, MARINES CORPS MILITARY PERSONNEL PROCUREMENT MANUAL § 3221.1 (1997). The *Manual* specifically states that "[a]lthough there is no policy or statute restricting the enlistment of aliens into the regular component," applicants to the Marine Corps "must be a United States citizen," or "[a]n alien who has . . . entered the United States on a permanent residence visa or has an Alien Registration Receipt Card," as well as establishing a "bona fide residence," and "a home of record in the United States." *Id.* Only U.S. Citizens, U.S. non-citizen nationals, and aliens lawfully admitted for permanent residence are eligible for enlistment in the U.S. Navy or Naval Reserve. *Id.* § 3222.2. Citizens of the Marshall Islands, the Federated States of Micronesia, Guam, Puerto Rico, the U.S. Virgin Islands, and American Samoa are considered U.S. citizens for enlistment purposes. *Id.* § 3222.1(a)(1).

[158] *See* Conscription Act of Mar. 3, 1863, ch. 75, § 1, 7 Stat. 731. The Conscription Act stated:

> [A]ll able-bodied male citizens of the United States, and persons of foreign birth who shall have declared on oath their intention to become citizens under and in pursuance of the laws thereof, between the ages of twenty and forty-five years, except as hereinafter excepted, are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States when called out by the President for that purpose.

Id.; *see also* JACK FRANKLIN LEACH, CONSCRIPTION IN THE UNITED STATES: HISTORICAL BACKGROUND 398 (1952) ("All able-bodied Negroes between twenty and forty-five years were declared to be part of the national forces and liable for the draft. Whenever a slave of a loyal master was drafted, the slave became a freedman, and the master was to be paid a bounty of $100."); Leach described the United States' history of excluding black soldiers from the military:

> [Horace] Greeley pointed out that so long as the Union armies were kept up to their desirable strength by volunteering, and white men answered all calls promptly, negroes and mulattoes were not accepted as soldiers. They were, however, always extensively used by the navy and were given the same pay

was even more dramatic because blacks were still enslaved, and as a result, their extra-constitutional status was analogous to that of aliens residing in the United States.

From the late 1880s until 1952, courts routinely held that the words "any alien" set forth in the first line of section 2166 of the Revised Statutes of 1878 meant "any alien of the restricted class"[159] as defined by section 2169 of the Revised Statutes. Through a drafting error in 1870, when promulgating section 2169, Congress inadvertently limited the class of persons eligible for naturalization to aliens of "African nativity and to persons of African descent."[160] The initial drafting of section 2169 was clearly an error since congressional intent prior to 1870 had always been to limit persons eligible for naturalization to "free white persons."[161] In 1875

> as white men. Colored men were never allowed to serve in regiments or other organizations which were preponderantly white. Greeley noted that negroes had been accepted in white regiments throughout the Revolutionary War. During the Civil War, he pointed out, when the draft became unavoidable in some localities, the barriers of caste began to give way and finally the law provided no exemption from military service because of color.

Id. (citing 2 HORACE GREELEY, THE AMERICAN CONFLICT 518-19, 528 (1881); Wray R. Johnson, *Black American Radicalism and the First World War: The Secret Files of the Military Intelligence Division*, ARMED FORCES & SOC'Y, Oct. 1, 1999, at 27 ("At the outbreak of the Civil War President Abraham Lincoln was initially reluctant to enlist blacks, but enthusiastically endorsed the practice after Congress explicitly authorized him to 'employ as many persons of African descent as he may deem necessary and proper.'").

[159] *In re* Geronimo Para, 269 F. 643, 644 (S.D.N.Y. 1919).

[160] Act of July 14, 1870, § 7, 16 Stat. 256.

[161] *See, e.g.*, *In re* Halladjian, 174 F. 834 (D. Mass. 1909) (admitting four Armenians as citizens upon finding that they were "white"). In *Halladjian,* the court conducted an exhaustive exploration of the term "white" and concluded that:

> Armenians have always been reckoned as Caucasians and white persons; that the outlook of their civilization has been toward Europe. We find, further, that the word "white" has generally been used in the federal and in the state statutes, in the publications of the United States, in its classification of its inhabitants, to include all persons not otherwise classified; that Armenians, as well as Syrians and Turks, have been freely naturalized in this court until now, although the statutes in this respect have stood substantially unchanged since the First Congress; that the word "white," as used in the statutes, publications, and classification above referred to, though its meaning has been narrowed so as to exclude Chinese and Japanese in some instances, yet still includes Armenians.

Id. at 845; *see also* H.R. REP. NO. 1365, at 1677 (1952). The report states:

> The first act providing procedure for naturalization of aliens became law in the First Congress on March 26, 1790. This act provided for naturalization of "any alien, being a free white person" who otherwise met the requirements of the act. Periodically thereafter the following acts were enacted, each providing for naturalization of alien white persons: Act of January 29, 1795, Third Congress (1 Stat. 414); Act of April 14, 1802, Seventh Congress (2 Stat. 153); Act of March 26, 1804, Eighth Congress (2 Stat. 292); act of May 26, 1824, Eighteenth Congress (4 Stat. 69); Act of May 24, 1829, Twentieth Congress (4 Stat. 310). The Forty-first Congress

Congress adopted an act to correct errors and to supply omissions in the statutes, which amended section 2169 to explicitly include "free white persons" within the class eligible for naturalization.[162]

Although the United States permitted aliens to serve in various branches of the military, that service did not make all aliens eligible for the privilege of naturalization provided in section 2166 of the Revised Statues of 1878. In *In re Buntaro Kumagai*, one of the first cases to address this issue, a Japanese alien filed an application for naturalization based upon his military service in the Army under section 2166.[163] The District Court for the Western District of Washington indicated that there was no "objection to his admission to citizenship on personal grounds."[164] The court focused on his eligibility for naturalization in light of Revised Statute § 2169, which limited citizenship obtained through naturalization to free white people and persons of African descent. The court denied the application for citizenship, holding that Congress' explicit adoption of Revised Statute § 2169 specifically excluded members of the Japanese race from becoming citizens.[165]

In 1882, Congress explicitly denied aliens of Chinese ancestry the privilege of obtaining citizenship through naturalization. In the case of *In re Knight*, an alien of Chinese, Japanese, and English ancestry who served honorably in the Navy was denied citizenship because of his race.[166] The alien filed his application for citizenship in accordance with the requirements of the Act of July 26, 1894, which expanded the scope of Revised Statute § 2166 to make alien veterans of the Navy eligible for naturalization.[167] The district court noted that although he satisfied the other requirements for naturalization, the statutory exclusion of Chinese from naturalization under the provisions of the Act of May 6, 1882 made

---

> enacted the act of July 14, 1870, providing that: "the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."

Id.

[162] Act of Feb. 18, 1875, ch. 80, 18 Stat. 318 (correcting errors and supplying omissions in the Revised Statutes of the United States). Revised Statute § 2169 was amended to add the phrase "being free white persons, and to aliens" after the word aliens in the first line.

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

[164] *Id.* at 923.

[165] *See id.* at 924 ("The use of the words 'white persons' clearly indicates the intention of Congress to maintain a line of demarcation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country.").

Id.

[166] *In re* Knight, 171 F. 299, 301 (E.D.N.Y. 1909).

[167] *Id.* at 300; *see also* Act of July 26, 1894, ch. 165, 28 Stat. 124 (making appropriations for the Naval Service for the fiscal year ending June 30, 1895).

Knight ineligible for naturalization.[168] The Act of May 6, 1882 provided that "hereinafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."[169] In its opinion, the court reiterated the judiciary's position that naturalization is a privilege, not a right, explaining that:

> Naturalization creates a political status which is entirely the result of legislation by Congress, and, in the case of a person not born a citizen, naturalization can be obtained only in the way in which Congress has provided that it shall be granted . . . . It must have been within the knowledge and foresight of Congress, when legislating upon this question, that members of other races would serve in the army and navy of the United States, under certain conditions, and it must remain with Congress to determine who of this class can obtain, under the statutes, the rights of a citizen of the United States.[170]

Although the statutes providing for naturalization through military service were expanded in 1894 to include service in other branches of the military such as the Navy and Marines, racial restrictions under Revised Statute § 2169 and the 1882 Act remained in place.[171] These racial restrictions were eased in 1906 when Congress passed the seventh subdivision of section four of the Act of June 29, 1906,[172] as amended by the Act of May 9, 1918.[173] Pursuant to these statutes, aliens born in the

---

[168] Act of May 6, 1882, ch. 126, § 14, 22 Stat. 61 (executing certain treaty stipulations regarding Chinese persons).

[169] *Id.*; *see also* Fong Yue Ting v. United States, 149 U.S. 698, 716 (1893). In *Fong Yue Ting*, Justice Gray explained that: "Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws." *Id.*

[170] *Knight*, 171 F. at 301.

[171] *See, e.g.*, Takao Ozawa v. United States, 260 U.S. 178, 192-93 (1922). In *Takao Ozawa*, The Supreme Court noted the racial restrictions to naturalization:

> In all of the naturalization acts from 1790 to 1906 the privilege of naturalization was confined to white persons (with the addition in 1870) of those of African nativity and descent), although the exact wording of the various statutes was not always the same. If Congress in 1906 desired to alter a rule so well and so long established it may be assumed that its purpose would have been definitely disclosed and its legislation to that end put in unmistakable terms.

Id.; *see also* Bessho v. United States, 178 F. 245 (4th Cir. 1910) (holding that petition filed by Japanese naval veteran was denied pursuant to the provisions of § 2169).

[172] Act of June 29, 1906, Pub. L. No. 328, ch. 3592, 34 Stat. 596 (establishing a Bureau of Immigration and Naturalization).

[173] Act of May 9, 1918, ch. 69, 40 Stat. 542. In this Act Congress eased the naturalization requirements by including several previously excluded nationalities:

> Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three

Philippines who honorably served in the Navy or Marine Corps, and Puerto Ricans who honorably served in United States military were eligible for naturalization. As late as 1919, however, "Indians, Malays, or Mongolians" were ineligible to be naturalized.[174] The district court in *In re Geronimo Para*[175] noted that although the statutes were amended in 1906 and 1918 respectively, these amendments specifically left the racial restrictions intact, stating:

> The Naturalization Act of June 29, 1906, repealed sections 2165, 2168, and 2173 of the Revised Statutes, while it retained section 2169, defining the classes of aliens which may be naturalized . . . . If the words "any alien" are to be taken literally, not only would a meaning be given wholly contrary to existing judicial interpretation, but all the

---

> years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment; or any alien, or any Porto [sic] Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, either the Regular or the Volunteer Forces, or the National Army, the National Guard or Naval Militia of any State, Territory, or the District of Columbia, or the State militia in Federal service, or in the United States Navy or Marine Corps, or in the United States Coast Guard, or who served for three years on board of merchant or fishing vessels of the United States of more twenty tons burden, and while still in the service on a reenlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve after honorable service, may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence . . . .

Id. In *Petition of Easurk Emsen Charr*, the district court explained the purpose of the 1918 Act "was to reward those aliens who had entered the military or naval service of the United States, . . . by admitting them to citizenship without many of the slow processes, formalities, and strictness of proofs which were rigidly provided and enforced under the law affecting naturalization as it existed then, and as it exists now." 273 F. 207, 210-11 (W.D. Mo. 1921).

Prior to the 1918 Act, Filipino veterans were routinely denied citizenship. *See, e.g.*, *In re* Alverto, 198 F. 688, 691 (E.D. Pa. 1912) (holding that Philippine naval veteran was not eligible for citizenship through naturalization under Revised Statute § 2169). *But see In re* Bautista, 245 F. 765, 769 (D.C. Cal. 1917) (granting Filipino veteran citizenship under Act of June 30, 1914). The *Bautista* court held that Congress intended to amend the provisions of section 2169 to "admit to citizenship the Filipino otherwise qualified for citizenship, notwithstanding he is not an alien of the white race nor an alien of African nativity or descent." *Id.*

[174] *See, e.g.*, *In re* Geronimo Para, 269 F. 643 (S.D.N.Y. 1919).

[175] *See id.* at 646-47 (1919); *see also Emsen Charr*, 273 F. at 212-13 (refusing Korean army veteran citizenship through naturalization based on his military pursuant to the racial restrictions set for in section 2169 of the Revised Statutes); Petition of Dong Chong, 287 F. 546 (W.D. Wash. 1923) (denying alien of Chinese ancestry the privilege of naturalization pursuant to section 2169).

> definitions of section 2169 would be rendered meaningless, and even Chinese who had served in the army could be naturalized, in spite of the express language to the contrary.[176]

After the end of World War I, Congress adopted another naturalization statute to expedite the naturalization of aliens who served in the United States military. This adoption raised the question of whether the racial restrictions contained in Revised Statute § 2169 were valid. Congress answered this question when it passed the Act of July 19, 1919,[177] which stated that "any person of foreign birth" who was honorably discharged after service in the military during WWI, was eligible for naturalization pursuant to the Seventh Subdivision of Section Four of the Act of June 29, 1906. Two district courts, in *United States v. Hidemitsu Toyota*[178] and in *In re Charr*,[179] held that the racial restrictions of Revised Statute § 2169 made certain classes of alien veterans ineligible for naturalization.

On appeal to the United States Supreme Court, the Court in *Toyota,* defined the class of aliens eligible for naturalization under Seventh Subdivision of Section Four of the Act of June 29, 1906,[180] as amended by the Act of May 9, 1918,[181] as well as under the Act of July 19, 1919.[182] The Court noted that all the statutes used the language "any alien," or "any person of foreign birth" to define the class of alien veterans eligible for naturalization.[183] The Supreme Court concluded, however, that if read

---

[176] *Geronimo Para*, 269 F. at 646-47; *see also* Act of May 9, 1918, ch. 9, 40 Stat. 542. The Act of May 9, 1918 amended the U.S. naturalization laws, and provided in pertinent part, that:

> All acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed; but nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh sub-division of this act and under the limitation therein defined . . . .

Id.; *see also In re* Leichtag 211 F. 681, 682 (W.D. Pa. 1914) (holding that the 1906 Act did not repeal section 2166 of the Revised Statutes). The court in *Leichtag* explained that "[a]lthough the general act of 1906 expressly repealed various provisions of existing law, it made no mention of section 2166, which specially regulated the admission of honorably discharged soldiers. Congress must have intended that the admission of this class of aliens should continue to be regulated by section 2166." *Id.*

[177] Act of June 19, 1919, Pub. L. No. 21, ch. 24, 41 Stat. 222 (making appropriations for government expenses for the fiscal year ending June 20, 1920, and amending the Act of June 29, 1906, 34 Stat. 596, and Act of May 9, 1918, 40 Stat. 542).

[178] 290 F. 971 (D. Mass. 1923).

[179] 273 F. 207 (W.D. Mo. 1921).

[180] Act of June 29, 1906, Pub. L. No. 338, ch. 3592, 34 Stat. 596 (establishing the Bureau of Immigration and Naturalization).

[181] *See* Act of May 9, 1918, ch. 69, 40 Stat. 542.

[182] *See* Act of June 19, 1919, ch. 24, 41 Stat. 222.

[183] Toyota v. United States, 268 U.S. 402, 410 (1925).

literally, this phrase would negate the significance of section 2169 of the Revised Statutes.[184] According to the Court, section 2169 incorporated distinctions based on color and race into the naturalization statutes.[185] As Justice Butler concluded in *Toyota*, "[t]here is nothing to show an intention to eliminate from the definition of eligibility in Revised Statute § 2169 the distinction based on color or race."[186] Absent any evidence that Congress intended to expand R.S. § 2169 to include other racial or ethnic groups, the Court refused to permit the naturalization of any alien veteran whose racial classification did not explicitly fall within the eligible categories set forth in the existing naturalization statutes: white persons, persons of African nativity, Filipinos, or Puerto Ricans.[187]

The ethnic and racial restrictions that made aliens of WWI who fell outside of the aforementioned classes ineligible for naturalization were ultimately lifted by Congress in 1935. In accordance with the Act of June 24, 1935,[188] racial restrictions were lifted for aliens veterans of WWI. The Act provided that:

> [N]otwithstanding the racial limitations contained within section 2169 of the Revised Statutes of the United States . . . any alien veteran of the World War heretofore ineligible to citizenship because not a free white person or of African nativity or of African descent may be naturalized under this Act . . .[189]

---

[184] *Id.* ("And if the phrase 'any alien' in the seventh subdivision is read literally, the qualifying words 'being free white persons' and 'of African nativity' in section 2169 are without significance.").

[185] *See id.* at 409-10. The Supreme Court interpreted the racial restrictions:

> There is nothing to show an intention to eliminate from the definition of eligibility in section 2169 the distinction based on color or race. Nor is there anything to indicate that, if the seventh subdivision stood alone, the words "any alien" should be taken to mean more than did the same words when used in the Acts of 1862 and 1894. But section 2 of the Act of 1918 . . . provides that nothing in the act shall repeal or in any way enlarge section 2169 "except as specified in the seventh subdivision of this act and under the limitation therein defined." This implies some enlargement of section 2169 in respect to color and race; but it also indicates a purpose not to eliminate all distinction based on color and race so long continued in the naturalization laws.

Id.

[186] *Id.*

[187] *See id.* at 412 (noting that "in view of the policy of Congress to limit the naturalization of aliens to white persons and to those of African nativity or descent the implied enlargement of section 2169 should be taken at the minimum").

[188] Act of June 24, 1935, Pub. L. No. 162, ch. 290, 49 Stat. 397 (authorizing the naturalization of certain World War veterans).

[189] *Id.*

The purpose underlying this dramatic shift in Congressional regard for aliens was to "reward military or naval service by citizenship"[190] to individuals who were previously excluded from such benefits. In the case of *In re Ayson*, the district court concluded that "Congress was not thinking of extending this grace only to Chinese, Japanese, or Hinduese [sic] otherwise incapable of citizenship, but rather of extending to any one not a citizen, of whatever color or race, the nation's gratitude for service rendered in the country's defense."[191]

Congress' decision to extend the naturalization privilege to all aliens regardless of race or ethnicity was short lived. Congress adopted the Nationality Act of 1940 to revise and consolidate naturalization provisions into a uniform compilation. In this Act, Congress expressly provided that eligibility for citizenship would be determined by race and ethnicity. Section 303 of the Nationality Act of 1940 limited citizenship to "white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere."[192] Notwithstanding this limitation, the 1940 Act exempted Filipino veterans of the "United States Army, Navy, Marine Corps, or Coast Guard" from this draconian restriction.[193]

Congress lifted the racial and ethnic restrictions on eligibility for naturalization in 1952.[194] Section 311 of the Immigration and Nationality

---

[190] *In re* Ayson, 14 F. Supp. 488, 489 (N.D. Ill. 1936).

[191] *Id.* at 489-90.

[192] Nationality Act of 1940, ch. 3, § 303, 54 Stat. 1140 (revising and codifying the nationality laws of the United States into a comprehensive nationality code) [hereinafter Nationality Act].

[193] *Id.*

[194] *See* H.R. REP. NO. 1365, at 1679 (1952). Congress enumerated which people would be eligible for naturalization:

> One of the significant provisions of H.R. 5678 is the elimination of race as a bar to naturalization and immigration. The removal of racial bars in our immigration and nationality statutes has been a piecemeal proposition and the result is that some races designed by the ethnologists as "yellow" or "brown" remain barred while other people of similar races have been granted eligibility to immigrate and to obtain citizenship. This bill would make all persons, regardless of race, eligible for naturalization, and would set up minimum quotas for aliens now barred for racial reasons. Thus, persons of Japanese, Korean, Indonesian, etc., ancestry could be admitted and naturalized as any other qualified alien. No doubt this will have a favorable effect on our international relations, particularly in the Far East.

Id.; *see also* H.R. REP. NO. 1365, at 1735 (1952). Congress defined the groups who were granted naturalization, and those people who were traditionally denied naturalization:

> Since 1871 there has been a gradual extension of the privilege of naturalization to persons of various races. In that year naturalization was extended "to aliens of African nativity and to persons of African descent." In 1940, races indigenous to North and South America were made eligible to citizenship. The act of December 17, 1943, took the Chinese out of the

Act of 1952 provided that "the right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married."[195] It is impossible to logically reconcile the congressional intent underlying the nearly one hundred years of deprivation of the privilege of naturalization from alien veterans who fought in defense of their adopted country. This clearly-discriminatory means of restricting citizenship to favored classes of immigrants is analogous to the many barriers that prohibited undocumented alien veterans from becoming naturalized as a result of their peacetime military service. In both cases, aliens who proved their allegiance to the United States through their military service earned the right to become naturalized citizens but were denied solely on the basis of their country of origin.

III. NATURALIZATION OF ALIEN VETERANS UNLAWFULLY PRESENT IN THE UNITED STATES

A. Amnesty Initiative

The statutory scheme of section 329 of the INA permits naturalization of alien veterans, even those unlawfully present in the United States, if they serve in an active-duty status during a war or other designated military conflict.[196] An amnesty initiative that extends this naturalization privilege to aliens unlawfully present in the United States would require the incorporation of a lawful residency exemption into INA section 328 for alien veterans who "served honorably at any time in the armed forces of the United States."[197] This residency exemption would require proof of continued presence in the United States for a specified time period to be

---

> category of racially ineligibles, made the Chinese quota available to Chinese, wherever born, and included the Chinese in the enumerated list of those eligible to naturalization. The act of July 2, 1946, extended the privilege of immigration and naturalization to persons indigenous to India and the Philippine Islands. On August 1, 1950, Guamanian aliens were made eligible to citizenship. There remain at the present time, therefore, only the Japanese, the Koreans, the Burmese, the Indonesians, the Maoris, the Polynesians, the Samoans, etc., who are racially ineligible to become citizens of the United States. Of these people, the Japanese compose by far the largest class numerically. There are residing in the United States and in Hawaii approximately 88,000 aliens who because of race are not eligible to become naturalized. Of this group, approximately 85,000 are Japanese.

Id.

[195] Act of June 27, 1952, § 311, 66 Stat. 239.

[196] Section 328(d) of the INA provides that an alien must comply with the requirements of section 316(a), which identifies lawful permanent residence as a requirement for naturalization. INA § 328(d), 8 U.S.C. § 1439(d) (1994); INA § 316(a), 8 U.S.C. § 1427(a) (Supp. 1999).

[197] INA § 328(a), 8 U.S.C. § 1439(a) (1994).

determined by the INS, and verification of graduation from an American high school, or completion of a high school equivalency program.

The most challenging aspect of this amnesty initiative is the waiver of lawful presence in the United States. The statutory framework that governs the naturalization of alien veterans considers an alien's method of arrival into the United States as a factor in determining eligibility for naturalization. Section 318(a) prohibits naturalization of any alien who was not lawfully admitted into the United States for permanent residence.[198] To qualify for naturalization under section 328 in times of peace, aliens must demonstrate that they are lawful permanent residents of the United States.[199] Indeed, the Ninth Circuit, in *Sing Chow v. United States*,[200] held that under section 328, a mandatory prerequisite for naturalization eligibility is compliance with section 318.[201] Thus, alien veterans who are unlawfully present in the United States, notwithstanding satisfaction of the other naturalization requirements, may not take advantage of the expedited naturalization privilege of section 328.

The language of section 329 of the INA represents a clear departure from this fundamental tenet of the naturalization framework. The requirement that an alien veteran be a lawful resident of the United States

---

[198] INA § 318, 8 U.S.C. § 1429 (Supp. 1999), which provides that:

> Except as otherwise provided in this subchapter, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this chapter. The burden of proof shall be upon such person to show that he entered the United States lawfully, and the time, place, and manner of such entry into the United States.

Id.; *see also* INA § 316, 8 U.S.C. § 1427 (Supp. 1999) ("No person . . . shall be naturalized unless such applicant . . . immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years . . . .").

[199] INA § 329(a), 8 U.S.C. § 1440(a) (Supp. 1999).

[200] 327 F.2d 340 (9th Cir. 1964).

[201] *See id.* at 341 (citing dicta from *United States v. Tak Shan Fong*, 359 U.S. 102, 104 (1959)). In *Tak Shan Fong*, the Supreme Court expressly stated that section 1439 "provides no exemption from the requirement that they have been 'lawfully admitted to the United States for permanent residence.'" *Tak Shan Fong*, 359 U.S. at 104; *see also In re* Wieg, 30 F.2d 418, 420 (S.D. Tex. 1929). The *Wieg* court explained:

> In these cases . . . it was suggested that there was no such interdependence between the naturalization laws and the immigration laws as to deprive an alien of citizenship, because he has entered the country in violation of the immigration laws, if he has complied strictly with those governing naturalization; whereas, in later decisions, especially since the force and effect of the statute making a certificate of arrival a prerequisite of naturalization has been made clear . . . the trend of decisions has been the opposite, and is now practically uniform that an illegal entry cannot be made the basis for citizenship.

Id. (citations omitted).

does not apply to veterans who served in an active duty capacity during times of war in accordance under section 329.[202] Any alien, even one who is unlawfully present in the United States, may become naturalized "if at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, whether or not he has been lawfully admitted to the United States for permanent residence."[203]

The phrase in section 329 pertaining to the enlistment of undocumented aliens "in the United States" requires further analysis.[204] Prior to 1996, undocumented aliens who were physically present within the United States were deemed to have affected "entry." The pre-1996 version of INA section 101(a)(13) defined entry as "any coming of an alien into the

---

[202] *See In re* Garcia, 240 F. Supp. 458, 459-60 (D.D.C. 1965). The court in *Garcia* stated that:

> In comparing these provisions, it is significant at the outset that Congress expressly declared its intention in Section 1440 as to the applicability of the lawful admission for permanent residence requirement. Thus, the absence of a similar express declaration in Section 1439 suggests a Congressional intent that the general provision in Section 1429 should apply to Section 1439. Furthermore, the substance of the war-time provision, Section 1440, insofar as it eliminates the lawful admission for permanent residence requirement for one who enlists or is inducted while in the country and gives expediting naturalization treatment to one who is lawfully admitted for permanent residence, subsequent to enlistment or induction, supports the position urged by the respondent and adopted by the Court. Section 1440 permits an alien who serves the country's defense in war time to have an advantage, in terms of naturalization, not a disadvantage over one who has served in peace time. The interpretation sought by the petitioner would result in an anomalous situation. An alien who served in time of war who had not enlisted or been inducted in this country would be required to be lawfully admitted for permanent residence in order to be naturalized, while one who served in peace time could be naturalized without being so lawfully admitted. It would have been extraordinary for Congress to have intended this result.

Id.

[203] INA § 329(a)(1), 8 U.S.C. § 1440(a)(1) (Supp. 1999). For cases applying these sections, see United States v. Convento, 336 F.2d 954, 955 (D.C. Cir. 1964); Villarin v. United States, 307 F.2d 774, 775 (9th Cir. 1962) (holding that alien who served in active-duty status qualified for naturalization under § 1440); *In re* Alon, 342 F. Supp. 596, 599 (E.D. La. 1972) (holding that an extension of enlistment qualified under § 1440). *Accord In re* Roque, 339 F. Supp. 339, 340 (S.D. Miss. 1971); *In re* Gabriel, 319 F. Supp. 1312, 1314 (D.P.R. 1970); *In re* Fechalin Ladrido, 307 F. Supp. 799, 801 (D.R.I. 1969); Petition of Martinez, 202 F. Supp. 153, 155 (N.D. Ill. 1962) ("The absence of a lawful admission for permanent residence is no disqualification under § 329(a) as amended (8 U.S.C.A. § 1440) since persons inducted in the United States are exempt from such requirement."); *see also In re* Torres, 240 F. Supp. 1021, 1023 (D. Ariz. 1965) (holding that reenlistment qualified under § 1440); *In re* Zamora, 232 F. Supp. 1017, 1018 (S.D. Cal. 1964).

[204] *See, e.g.*, *In re* Lum Sum Git, 161 F. Supp. 821, 822 (E.D.N.Y. 1958) ("It is evident that the petitioner's enlistment in China does not place him in the status contemplated [by § 1440]. The Court, therefore, has no alternative but to hold, although reluctantly, that he is ineligible for citizenship under the terms of the statute.").

U.S. from a foreign port or place or from an outlying possession, whether voluntarily or otherwise . . . ."[205] Undocumented aliens who entered the United States were subject to deportation proceedings in accordance with former INA section 242.[206] Although their presence was unauthorized, aliens who entered the United States under the pre-1996 statute were deemed to reside within the United States.

The adoption of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 revised section 101(a)(13) to eliminate the concept of "entry" from the immigration framework, and replaced it with a paradigm that distinguishes among aliens based on whether they were lawfully admitted into the United States or illegally entered the country.[207] In the current version, which reflects the 1996 amendments, section 101(a)(13) uses the term "admission," which is defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[208] An alien who has not been lawfully admitted is subject to removal proceedings in accordance with INA section 240, notwithstanding his length of residence in the United States.[209] Although physically present within the United States, aliens who are not admitted into the country are not considered U.S. residents.[210]

The 1996 revisions were not, however, incorporated into section 329 of the INA. An alien is "in the United States" under section 329 if he is physically present in the United States, the Canal Zone, American Samoa, or Swains Island at the time of enlistment into the Armed Forces, notwithstanding the language of section 101(a)(13). In *Petition for Naturalization of Martinez*,[211] the Court held that "neither an entry nor admission in any category is a prerequisite under section 329(a) . . . . It is enough that he was in this country when inducted."[212] In *Martinez*, an alien

---

[205] INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (Supp. 1999).

[206] INA § 242, 8 U.S.C. § 1252 (1994). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-5475-615 (1996) (revising provisions relating to removal proceedings); *see also* INA § 240, 8 U.S.C. § 1229a (Supp. 1999) (currently governs removal proceedings).

[207] *See* Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. at 3009-575.

[208] INA § 101(a)(13), 8 U.S.C. § 1101(a)(13)(A) (Supp. 1999).

[209] INA § 240, 8 U.S.C. § 1229a (Supp. 1994). For a general discussion of post-1996 changes to the provisions governing removal procedures, see Maureen O'Sullivan, *The Cancellation of Deportation and Exclusion Jurisprudence: What Can We Expect From Removal Proceedings?*, SD61 ALI-ABA 253 (May 6, 1999).

[210] *See* INA § 235(a)(1), 8 U.S.C. § 1225(a)(1) (Supp. 1999) ("An Alien present in the United States who has not been admitted or who arrives in the United States . . . shall be deemed for purposes of this Act an applicant for admission.").

[211] 202 F. Supp. 153 (N.D. Ill. 1962).

[212] *Id.* at 155.

veteran sought naturalization although he was inducted in the Army while paroled into the United States.[213] The Court noted that the legislative history of the alien veteran naturalization statutes indicates that "a lawful entry or admission under the Immigration Laws was not contemplated and that the requirement [of section 329] was satisfied by mere physical presence in the United States."[214]

The extent of Congress' willingness to reward the sacrifice of aliens who served on behalf of U.S. military forces during times of war is clearly evidenced in its willingness to extend the naturalization privilege to a class of people who have been targeted by immigration laws for the most severe treatment when captured in the United States and deported by the INS.[215] This privilege, however, should be extended to the estimated 28,000[216] aliens serving in the U.S. Armed Forces regardless of their immigration status, and to the untold number of undocumented aliens who may want to enlist in peacetime military service. Such a statutory revision would certainly avoid the anomalous situation faced in 1994 by Danny Lightfoot, an undocumented Marine sergeant whose peacetime enlistment in 1983 was achieved through the use of a fraudulent birth certificate.[217] After ten years of distinguished service in the Marines, this Bahamian citizen was not eligible for naturalization under INA section 328 because he served during peacetime, and because he was not lawfully present in the United

---

[213] *Id.* at 154-55 (citation omitted).

[214] *Id.* at 155.

[215] *See* INA § 212(a), 8 U.S.C. § 1182 (a)(1)(A) (Supp. 1999) (listing classes of aliens ineligible for visas or admissibility).

[216] Staff Sgt. Kathleen T. Rhem, *Immigration Service, DoD Join to Speed Citizenship Process*, DEFENSELINK, Mar. 27, 2000, *available at* http://www.defenselink.mil/news/Mar2000 (last visited Nov. 6, 2000) (citing Department of Defense officials as estimating approximately 28,000 resident aliens in the United States military); *see also* Donna Leinwand, *INS Streamlines Citizenship Applications Process for Immigrants in Military*, GANNETT NEWS SERV., July 26, 1999. Gannett News Service reported:

> Non-citizens make up less than 5 percent of military recruits each year, but the number is rising. In 1995, 5,267 non-citizens joined the active duty military—about 3.1 percent, according to Department of Defense records. In 1998, 8,171 non-citizens enlisted—about 4.6 percent of recruits, the records show.

Id; *see also* Ed Offley, *Military Careers at Risk: INS Backlog Delays Applications for Citizenship*, ARIZ. REPUBLIC, July 6, 1999, at B4 ("Although still a relatively small number overall, immigrant enlistments in the U.S. military have steadily risen from 5,267—3.1 percent—of all first-term enlistments in 1995, to 8,171 recruits—4.6 percent overall—last year . . . ."); Gary Warner, *27,500 U.S. Troops Serve Under Flag Foreign to Them*, ORANGE COUNTY REG. (Cal.), Jan. 8, 1990, at A1 (describing alien soldiers as a "small but vital part of the U.S. fighting force . . . made up of people from every corner of the world").

[217] Patrick J. McDonnell, *Mission Accomplished: Illegal Immigrant Who has Been a U.S. Marine for 11 Years Gets His Green Card in an Emotional Ceremony*, L.A. TIMES, Dec. 17, 1994, at B1.

States.[218] Additionally, he was not eligible under section 329 because he had not served during any periods of war or designated conflict.

It was only through the "support of the Marine Corps, U.S. Rep. Jerry Lewis (R-Redlands) and Carl Shusterman, a prominent Los Angeles immigration attorney," that Lightfoot became a lawful permanent resident.[219] Despite Danny Lightfoot's success, the thousands of alien veterans who do not have attorneys and politicians to advocate on their behalf face a troubling future upon discharge from the military. They will be forced to either live in the shadows of American society, unable to seek lawful employment or take advantage of the benefits offered to military veterans, or return to their country of origin, where they may have no familial or other ties. This outcome is certainly inconsistent with the congressional intent to reward those aliens who provide a valuable contribution to the security of their adopted country.

B. Reasons Underlying the Amnesty Initiative

Never has the need to address the problems faced by aliens unlawfully present in the United States been greater. Statutory barriers in the form of numerical quotas and long visa waiting periods restrict the number of aliens who can lawfully immigrate to the United States.[220] An alien who wishes

---

[218] *Id.*

[219] *Id.*

[220] *See* INA § 201, 8 U.S.C. § 1151 (Supp. 1999). INA section 201 provides several procedural options for a potential immigrant. An alien who is the child, spouse, or parent of a U.S. citizen may qualify as an immediate relative. *See* INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). The INA confers preferential status on this group of immigrants and exempts them from the world-wide numerical visa limitations imposed on most aliens seeking to immigrate. *See* INA § 201(b), 8 U.S.C. § 1151(b). As a result immediate relatives, upon application for a visa, and proof of admission eligibility under INA § 212, 8 U.S.C. § 1182 (Supp. 1999), may immigrate with few procedural or administrative difficulties. In 1998, 345,960 aliens immigrated to the United States in this way. *See* INS, U.S. DEP'T OF JUSTICE, ANNUAL REPORT: LEGAL IMMIGRATION, FISCAL YEAR 1998, *available at* http:www.ins.usdoj.gov/graphics/aboutins/statistics/index.htm (last visited Aug. 1, 2000).

The INA also provides additional preference categories for aliens seeking to immigrate who do not qualify as immediate relatives. *See* INA § 201(a), 8 U.S.C. § 1151(a) (1994). There are, however, numerical limits imposed on these categories that substantially restrict the number of immigration visas allocated annually to qualified immigrants. Depending on the country of origin, such limited allocations result in lengthy waiting periods before immigration visas become available. The numerical visa limitations found in INA § 201(a) apply to three visa preference categories: family-sponsored immigrants, employment-based immigrants, and diversity immigrants. The maximum annual allocation of visas for these categories is 491,900, world-wide family sponsored preference limit is 226,000; world-wide employment-based preference limit is at least 140,000, and the world-wide limit for diversity preference limit is 55,000. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, VISA BULLETIN: IMMIGRATION NUMBERS FOR NOV. 2000, *available at* http://travel.state.gov/visa bulletin.html (last visited Nov. 6, 2000).

to legally immigrate to the U.S. and become a naturalized citizen follows an arduous path.[221] There are administrative, procedural, and substantive barriers relating to admission and naturalization that must be overcome, unless he or she is a member of a preferred class of aliens.[222] Although not

---

In an emergency, an alien may immigrate to the United States as a refugee under INA § 207, 8 U.S.C. § 1157 (Supp. 1999), or as a person seeking asylum under INA § 208, 8 U.S.C. § 1158 (Supp. 1999). These immigrant categories do not have pre-established statutory numerical limits. Determinations regarding the number of refugees annually admitted into the U.S. are within the exclusive purview of the President. INA § 207(b), 8 U.S.C. § 1157(b) (1994).

[221] *See generally* DANIEL LEVY, NATIONAL IMMIGRATION PROJECT, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK (2000) (providing a comprehensive discussion of naturalization procedures).

[222] *See, e.g.*, INA § 212(a), 8 U.S.C. § 1182 (Supp. 1999). Aliens who are eligible for visas through the above-referenced means must also overcome the additional hurdle of satisfying admissibility requirements to obtain visa and eventual admission into the United States as immigrants. *Id.* Aliens may be deemed inadmissible for a number of reasons including poor health, criminal convictions, and related criminal activity, national security threats, terrorist activity, and indigence. INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A) (Supp. 1999). Although an admissible alien may possess a visa, the alien must also be admitted into the U.S. at a designated port of entry "after inspection and authorization by an immigration officer." 8 U.S.C. § 1225(a)(3) (1994). Successful completion of these threshold requirements affords the alien status as "lawfully admitted for permanent residence" ("PRA"). This status is evidenced by an alien registration receipt card or "Green card." 8 U.S.C. § 1304(d) (1994). Although a PRA is not entitled to all of the benefits associated with citizenship such as voting, or eligibility for certain government types of government employment, the PRA status confers on the alien the permanent right to lawfully remain in the U.S. and to obtain lawful employment. An alien must qualify for this status before applying for naturalization. *See* INA § 316(a), 8 U.S.C. § 1427(a) (Supp. 1999); *see also* LEVY, *supra* note 221, at 244.

The naturalization requirements set forth in the INA are as burdensome as the requirements for initial admission into the United States. *See* INA § 312, 8 U.S.C. § 1423 (Supp. 1999); INA § 316, 8 U.S.C. § 1427 (Supp. 1999); INA § 334, 8 U.S.C. § 1445 (1994). A permanent resident alien must establish: (1) "An understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language" (INA § 312(a), 8 U.S.C. § 1423); (2) "A knowledge and understanding of the fundamentals of the history, and the principles and form of government, of the United States." (*Id.*); (3) Continuous residence "after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application has been physically present therein for periods totaling at least half of that time." (INA § 316(a), 8 U.S.C. § 1427); (4) "good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States" during the five years in which the alien was lawfully present in the United States. (*Id.*),. Finally, alien applicants must be at least eighteen years of age (*see* INA § 334, 8 U.S.C. 1445(f)). *See also* INA § 204, 8 U.S.C. § 1154 (Supp. 1999) (describing procedure for granting immigrant status); INA § 213A, 8 U.S.C. § 1183(a) (Supp. 1994) (granting admission of alien by virtue of sponsor's affidavit and bond); INA § 221, 8 U.S.C. § 1201 (Supp. 1999) (issuing of visas); INA § 222, 8 U.S.C. § 1202 (Supp. 1999) (describing application for visas).

insurmountable, these barriers prove difficult for many aliens to overcome. As a result, many choose the path of least resistance, and surreptitiously cross U.S. borders.

It is estimated that more than 275,000 aliens illegally immigrate to the United States annually.[223] Many aliens enter the United States without authorization because they hope to achieve a better way of life; to escape poverty, political, social, or religious repression; or to seek family reunification.[224] Upon arrival, many find that the streets of America are not paved with golden opportunities. On the contrary, life for undocumented aliens is characterized by deprivation, exploitation, and uncertainty. In *Plyler v. Doe*, the Supreme Court recognized the problems associated with the continuing presence of undocumented aliens in the United States. Justice Brennan noted that "[t]his situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents."[225]

Immigration laws prohibit undocumented aliens from lawfully seeking employment,[226] or from receiving most government benefits,[227]

---

[223] ILLEGAL ALIEN RESIDENT POPULATION, *supra* note 11.

[224] *See* ILLEGAL IMMIGRATION: OPPOSING VIEWPOINTS 86-87 (Charles P. Cozic ed., 1997). The book debates the cause of illegal immigration:

> What causes illegal immigration? People move in search of freedom, family and work. The causes of uncontrolled migration involve economic disparities, underdevelopment, political upheavals, oppression, population pressures, and environmental destruction. On a personal level, most people migrate by choice. They want to provide for their family, to seek freedom and opportunity, to reunite with family members and to give their children a brighter future. Others leave out of necessity. They leave to escape the knock on the door in the middle of the night, to flee the bombs and bullets of civil war, to get out from under the grinding boot of oppression and tyranny.

Id. See also JOHN ISBISTER, IMMIGRATION DEBATE: REMAKING AMERICA 92-120 (1996).

[225] 457 U.S. 202, 218-19 (1982).

[226] *See* INA § 274A, 8 U.S.C. § 1324a (Supp. 1999).

[227] *See* Immigration Reform and Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 8 U.S.C. 1601 (Supp. IV 1998) [hereinafter PRWOR Act]; *see also* Shvartsman v. Apfel, 138 F.3d 1196, 1198 (7th Cir. 1998) (holding that in light of the PRWOR Act, which made U.S. citizenship an eligibility requirement for receipt of food stamps, permanent resident aliens did not have a property interest protected by the Due Process Clause in the "Food Stamp recertification procedure to establish their continuing eligibility for benefits"); Abreu v. Callahan, 971 F. Supp. 799, 820 (S.D.N.Y. 1997) (holding that the denial of Supplemental Security Income to permanent residents as a result of the PRWOR Act of 1996, which made citizenship an eligibility requirement for the receipt of social security income, did not violate equal protection guarantees). As the *Abreu* court explained:

> Given the enormous immigration pressure the United States has experienced and the tremendous increase in the numbers and proportions of aliens receiving SSI benefits, Congress certainly was entitled to conclude that there

including any post-secondary education benefit.[228] Esteban Morales, an undocumented alien, when discussing the rules that govern his existence, expressed sentiments that are far removed from the idyllic picture of the American dream:

> The rules for surviving in [this] world are simple: Don't question your employer, either about payment or work practices. Don't ask for workers compensation. If you drive, drive carefully. Don't call the police. Steer clear of hospital emergency rooms. If the Immigration and Naturalization Service shows up at your workplace, run. Trade only in cash. And don't, under any circumstances, drink in public.[229]

The desire of this group of people to attain U.S. citizenship cannot be overemphasized.[230] Undocumented aliens, although physically present

---

> has been a relationship between the availability of benefits to lawful residents aliens and the flow of immigrants to our shores.

Id.; *see also* Rodriguez v. United States, 169 F.3d 1342, 1353 (11th Cir. 1999) (holding that "there are rational bases for Congress' decision to extend benefits only to [a] specified category of aliens," and that "the fact that an Act of Congress treats aliens differently from citizens does not imply that such disparate treatment is 'invidious.'"); City of Chicago v. Shalala, No. 97 C-4884 1998 WL 164889, at *12 (N.D. Ill. 1998) (holding that "there appears to be a logical connection between . . . restricting aliens' access to welfare programs and . . . fostering self-reliance and easing the burden on the welfare system."); Kiev v. Glickman, 991 F. Supp. 1090, 1100 (D. Minn. 1998) (holding that the Welfare Reform Act does not violate the Equal Protection Clause, though it distinguishes between aliens and citizens).

[228] INA § 505, 8 U.S.C. § 1623 (Supp. 1999); *see also* United States General Accounting Office, *Report to Congressional Requesters: Illegal Aliens—National Net Cost Estimates Vary Widely*, July 25, 1995, *available at* 1995 WL 505387. The General Accounting Office concluded that "Illegal aliens are not eligible for most federal benefit programs, including Supplemental Security Income, Aid to Families With Dependent Children (AFDC), Food Stamps, unemployment compensation, financial assistance for higher education, and the Job Training Partnership Act." *Id.* The report noted, however, that aliens "may participate in . . . Head Start, the Special Supplemental Food Program for Women, Infants, and Children (WIC), and the school lunch program." *Id.* Moreover, aliens remain "eligible for emergency medical services, including childbirth services, under Medicaid if they meet the program's conditions of eligibility." *Id.*

[229] Jerd Smith, *Working in the Shadows: Illegal Aliens a Fact of Life in Colorado's Economy*, DENV. ROCKY MTN. NEWS, Apr. 18, 1999, at 1G.

[230] *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 581-84 (1952). In *Harisiades*, the government petitioned to deport three aliens because of their communist affiliations. *See id.* The Supreme Court explained the vulnerability of such individuals, noting that "the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen . . . . The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose." *Id.* at 586-87. In a footnote, the Court explained the rights afforded to aliens, including the right "to invoke the writ of habeas corpus to protect . . personal liberty," "the protections of the Fifth and Sixth Amendments" in criminal prosecutions, and "unless he is an enemy alien, his property cannot be taken without just compensation." *Id.* at n.9 (citations omitted). The Court, however, detailed the restrictions to which aliens are subjected:

> He cannot stand for election to many public offices. For instance, Art. I, § 2, cl. 2, § 3, cl. 3, of the Constitution respectively require that candidates for

within U.S. borders, are not lawfully present in the United States. They have not been inspected and authorized for admission by an immigration officer as required by sections 101(a)(13)(A)[231] and 235 (a)(3).[232] As a result, immigration laws treat them as if they were outside of the physical boundaries of the United States. Justice Brewer noted this distinction between legal status and physical presence in his dissenting opinion in *Fong Yue Ting v. United States*.[233] The Justice argued that "[t]he constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions."[234] Due to their extra-constitutional status, undocumented aliens have few meaningful rights or privileges.[235] They are, however,

---

> election to the House of Representatives and Senate be citizens. The states, to whom is entrusted the authority to set qualifications of voters, for most purposes require citizenship as a condition precedent to the voting franchise. The alien's right to travel temporarily outside the United States is subject to restrictions not applicable to citizens. If he is arrested on a charge of entering the country illegally, the burden is his to prove "his right to enter or remain" -no presumptions accrue in his favor by his presence here.

Id. at n.10 (citations omitted); *see also* DANIEL LEVY, *supra* note 221, at 3-4. Levy explains the benefits of U.S. citizenship:

> Citizenship in the United States provides certain rights and privileges not available to aliens. These benefits include the right to vote, the right to hold public office, and eligibility for unlimited types of employment. Citizens are able to confer immigration benefits upon their family members more easily and quickly than permanent resident aliens. Most importantly, perhaps, is the fact that naturalized citizens have not yet been subject to the rapid erosion of rights that lawful permanent residents have seen in the last Congress. As an example, even though the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 restricted the eligibility of lawful permanent residents to public benefits, it did not affect naturalized citizens. At the most basic level, citizens are not subject to removal from the country (be it deportation or inadmissibility).

Id.

[231] INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (Supp. 1999).

[232] INA § 235(a)(3), 8 U.S.C. § 1225(a)(3) (Supp. 1999).

[233] 149 U.S. 698, 738 (1893) (Brewer, J., dissenting).

[234] *Id.* at 738.

[235] *See generally* Steven Greenhouse, *Illegal Aliens Will be Extended Right to Sue U.S. Employers*, COM. APPEAL (Memphis, Tenn.), Oct. 28, 1999, at A4. Recently, illegal aliens have afforded increased protections against employment discrimination and exploitation: "The EEOC said Tuesday that illegal immigrants who are dismissed or discriminated against because of their race, sex, age or religion should enjoy the same remedies as legal workers—back pay, punitive damages and even reinstatement, although reinstatement would require employees to obtain legal work papers." *Id.*; *see also* Press Release, U.S. Equal Employment Opportunity Commission, EEOC Issues Guidance on Remedies for Undocumented Workers Under Laws Prohibiting Employment Discrimination, Oct. 26, 1999, *available at* http://www.eeoc.gov/press/10-26-99.html (last visited Nov. 7, 2000). The EEOC states that alien workers "are entitled to the same remedies as any other workers," including back pay, reinstatement for unlawful termination, relief for discrimination in the hiring process, and "other appropriate injunctive relief, damages and

afforded some Constitutional protections. For example, in *Yick Wo v. Hopkins*,[236] the Supreme Court held that the rights set forth in the Fourteenth Amendment are equally afforded to every person residing in the United States, notwithstanding their immigration status.[237] The Supreme Court has also extended to undocumented persons the Fifth, Sixth, and Fourteenth Amendments' due process guarantees, as well as the equal protection guarantees of the Fourteenth Amendment.[238] Notwithstanding these rights, the Supreme Court in *Mathews v. Diaz*[239] noted that there are a number of rights and privileges afforded only to citizens:

> The Constitution protects the privileges and immunities only of citizens . . . and the right to vote only of citizens. It requires that Representatives have been citizens for seven years . . . and Senators citizens for nine . . . and that the President be a "natural born Citizen."

---

attorneys' fees . . . ." *Id.*

The EEOC guidance policy defines an undocumented worker as "one who is not a citizen or national of the United States and is neither . . . lawfully admitted for permanent residence in the United States, nor . . . authorized by law to work." U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS, at n.2, *at* http://www.eeoc.gov/docs/undoc.html (last visited Nov. 7, 2000). The policy grants aliens protection under the following employment discrimination statutes: "Title VII of the Civil Rights act of 1964, the Americans with Disabilities Act (ADA), section 501 of the Rehabilitation Act, the Age Discrimination in Employment Act (ADEA), and the Equal Pay Act (EPA)." *Id.*

[236] 118 U.S. 356, 369 (1886).

[237] *See id.* at 369. The Court held the commands of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws." *Id.*

[238] *See, e.g.*, Wong Wing v. United States, 163 U.S. 228, 238 (1896). In *Wong Wing*, the Supreme Court followed the reasoning of *Yick Wo*, and explained the extension of Due Process guarantees to aliens:

> Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.

Id. Eighty years later, the Supreme Court reinforced the notion of Due Process for all residents of the United States in *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). In *Mathews*, the Court held that:

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law . . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.

Id.

[239] *Id.* at 78, n.12.

> A multitude of federal statutes distinguish between citizens and aliens. The whole of Title 8 of the United States Code, regulating aliens and nationality, is founded on the legitimacy of distinguishing between citizens and aliens. A variety of other federal statutes provide for disparate treatment of aliens and citizens. These include prohibitions and restrictions upon Government employment of aliens . . . upon private employment of aliens . . . and upon investments and businesses of aliens . . . statutes excluding aliens from benefits available to citizens . . . and from protections extended to citizens . . . and statutes imposing added burdens upon aliens . . . .[240]

In 1981, the Supreme Court decision in *Plyler v. Doe*[241] conferred a significant constitutional benefit on children of undocumented aliens. The Supreme Court acknowledged that the scope of the Equal Protection Clause of the Fourteenth Amendment prohibits the denial of a free public primary and secondary education to children of undocumented aliens.[242] Although the Court concluded that undocumented aliens are not subject to heightened constitutional protection, the Court stated that it was:

> [R]eluctant to impute to Congress the intention to withhold from these children, for so long as they are present in this country through no fault of their own, access to a basic education. In other contexts, undocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens. But in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the present legislative record, we perceive no national policy that supports the State in denying these children an elementary education.[243]

In accordance with *Plyler*, children of undocumented aliens are entitled to a free public education from kindergarten through high school. Schools spend millions of tax dollars to educate these students with no hope of ever seeing a return on that investment.[244] Despite this investment,

---

[240] *Id.*

[241] 457 U.S. 202 (1982).

[242] *Id.* at 219-20.

[243] *Id.* at 226.

[244] *See* Susan C. Morse & Frank S. Ludovina, *Responding to Undocumented Children in the Schools*, ERIC DIG., Sept. 1999, *available at* http://aelvis.ael.org/eric/digests/edorc991.htm (last visited Nov. 7, 2000). Morse and Ludovina comment:

> The actual cost of schooling undocumented children is . . . unclear. Because of the ways schools are funded, state and federal aid tend to keep pace with enrollment increases. Hence, local taxpayers are not likely to suffer an increased tax burden from the mandate to serve undocumented children. In fact, studies suggest that taxes withheld from the pay of undocumented workers (who seldom file for refunds) provide a *net gain* to local, state, and federal governments. One study found that undocumented immigrants used

undocumented high school graduates cannot obtain legal employment after graduation, attend college as a resident of any state, or qualify for public scholarships or financial aid.[245] The question then becomes, "what will society do with the ever growing number of educated, second generation undocumented aliens?"[246]

There certainly will not be a wholesale effort to deport the estimated six million undocumented aliens currently residing in the United States. The current INS enforcement strategy is not to identify and deport undocumented aliens residing in the United States. Instead, the agency channels its resources into deportation of alien criminals and organized smugglers of undocumented aliens.[247] As discussed in Section III.C.1.,

---

> public services at a lower rate than other U.S. residents (Simon, 1997). Like filing for tax refunds, accessing public services (including schooling) is potentially dangerous for undocumented residents.

Id.

[245] *See* Higher Education Assistance Act, 20 U.S.C. § 1091(a)(5) (Supp. 1999). The Act requires that to be eligible:

> [T]o receive any grant, loan, or work assistance . . . a student must . . . be a citizen or national of the United States, a permanent resident of the United States, able to provide evidence from the Immigration and Naturalization Service that he or she is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident.

Id. Cf. Illinois Educational Opportunity Consortium, 110 ILL. COMP. STAT. 930/7(a) (1993) ("An individual is eligible for an award under the provision of this Act when the Consortium Board finds: that the individual is a resident of this State and a citizen or lawful permanent resident alien of the United States."); New Mexico Legislative Endowment Scholarship, N.M. STAT. ANN. § 21-21J-4 (1978) ("A legislative endowment scholarship may be awarded to any individual who: is a citizen of the United States or has a permanent resident visa"); N.Y. EDUC. LAW § 661(3) (1985) (holding that to receive "all general awards, academic performance awards, and student loans," an applicant must show that he is "a citizen of the United States, or . . . an alien lawfully admitted for permanent residence in the United States . . . ."). Texas requires legal residency to qualify for lower in-state tuition. TEX. EDUC. CODE. ANN. § 54.057(a) (1996).

[246] Jim Dyer, The Dreams of Rigo Nunez: Defying the Odds and Fighting a Stereotype, a Young Teen Left Home to Carve Out a Better Life, ATLANTA J. & CONST., Jan. 24, 1999, at C1; Frank Trejo, Immigrant Ready to Hit Books at SMU Thanks to Donation, DALLAS MORNING NEWS, Aug. 16, 1999, at 13A (reporting on the problems that gifted, but undocumented, students face); Frank Trejo, *Hard Lesson: Undocumented-Immigrant Status May Keep Gifted Irving Student from Attending College*, DALLAS MORNING NEWS, Jan. 27, 1999, at 1A (noting that colleges increasingly include questions concerning residency on applications, with admissions officials stating that "financial aid, especially federally funded assistance, probably would not be available for an undocumented immigrant").

[247] Dan Stein, *U.S. Illegals Policy Leaves State Bereft*, ARIZ. REPUBLIC, May 10, 1999, at B7; *see also* Dena Bunis, *INS Will Focus on Curbing Entries/Immigration*, ORANGE COUNTY REG. (Cal.), Mar. 6, 1999, at A21; Michael Hedges, *Deporting Illegals No Longer Priority in New INS Policy Some in Congress Attack*, ARIZ. REPUBLIC, Mar. 6, 1999, at A4; *INS Shifts Away From Pursuing Illegals*, NEWS & OBSERVER (Raleigh N.C.), Mar. 6, 1999, at A1. William Brangin reported on the INS' new plan:

> The strategy document, which has been distributed to INS field offices but has not been publicly released, says the agency's goal in interior enforcement

legalization of their immigration status through amnesty legislation is another option under consideration. If we are to follow the mandate of the Supreme Court in *Plyler*, however, these second-generation undocumented aliens are entitled to more than a menial, low paying job at the local car wash.

The Supreme Court, in *Plyler*, addressed three justifications for its decision that apply with equal force to the extension of the naturalization privilege to alien veterans notwithstanding their immigration status. First, the Supreme Court was concerned that withholding public education would foster the creation of a "permanent caste of undocumented aliens."[248] Second, the Court in *Plyler* refused to punish children for their parents' decision to illegally relocate to the United States in violation of U.S. immigration laws. Justice Brennan noted that the Texas statute denying free public education to undocumented alien children "imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control."[249] Finally, the Court was eager to give these children an opportunity to "lead economically productive lives to the benefit of us all."[250]

As the obligation to educate undocumented children continues to

---

> is to "reduce the size and annual growth of the illegal resident population." The INS has used new powers under a 1996 immigration law to step up deportations in recent years, removing a record 169,000-plus people in fiscal 1998. But the increased expulsions are not keeping pace with estimated 275,000 illegal immigrants who permanently settle in the United States every year, much less putting a dent in the core illegal population. The top priority, the document says, is to identify and remove "criminal aliens," many of whom "are released before their legal status is ascertained or before the INS can be called" to pick them up. The agency estimates that about 221,000 foreign-born criminals are in federal, state or local jails—two-thirds of them illegal immigrants. As many as 142,000 others are on parole or probation but are subject to removal under the immigration law. An additional 161,000 are "abscondees" who disappeared after receiving deportation orders. The next interior enforcement priority is dismantling networks that smuggle illegal aliens, an underground industry that makes as much as $8 billion a year worldwide. These networks have grown increasingly sophisticated, often recruiting and transporting illegal workers to job sites with the knowledge and participation of employers, the document says.

William Brangin, *INS Shifts "Interior" Strategy to Target Criminal Aliens: Critics Say Plan to Curtail Work-Site Raids Will Hurt Immigration Compliance*, WASH. POST, Mar. 15, 1999, at A3.

[248] *Plyler v. Doe*, 457 U.S. at 218-19. The Court also noted that: "[s]heer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial 'shadow population' of illegal migrants—numbering in the millions—within our borders." *Id.*

[249] *Id.* at 220.

[250] *Id.* at 221.

increase, the costs associated with providing elementary and secondary education to these children places a correlative fiscal burden on state and local budgets.[251] Conservative estimates suggest that the seven states that bear the primary burden of educating undocumented children incur annual costs in excess of $3.1 billion.[252] Several states have unsuccessfully sought reimbursement for these educational costs through legislative and judicial means.[253] Congressional and judicial reluctance to address this issue by compensating state and local governments for these educational expenses

---

[251] *See* United States General Accounting Office, *Report to Congressional Requesters: Illegal Aliens—National Net Cost Estimates Vary Widely*, July 25, 1995, *available at* 1995 WL 505387. In 1995 the GAO commissioned a study on the costs of illegal immigration. *Id.* The study estimated that annual expenditures totaling $3.9 billion were used to underwrite costs for "primary and secondary education, school lunch, Food Stamps, and English as a Second Language, English for Speakers of Other Languages, and bilingual education" for citizen children of undocumented aliens. *Id.* The report discussed the results of a study conducted by Donald Huddle, Emeritus Professor of Economics at Rice University, and concluded that Huddle failed to offer estimates for undocumented children. *Id.* The GAO noted that:

> The limited availability of data on illegal aliens is likely to remain a persistent problem because persons residing in the country illegally have an incentive to keep their status hidden from government officials. Yet as researchers explore new possibilities for overcoming some of the obstacles to collecting data on this population, some progress may be achieved. Given the data gaps in so many areas, any effort to collect better data should focus on those data that would have the greatest impact in improving the estimates of net costs. Thus, emphasis could be placed on obtaining data on illegal aliens' use of those public benefits associated with the largest cost items or their payment of those taxes associated with the largest revenue items. For example, elementary and secondary education is estimated to be the single largest program cost; thus, researchers could focus on obtaining data on the number of illegal alien schoolchildren. However, researchers may confront legal barriers in attempting to collect these data.

Id.

[252] *See, e.g.*, REBECCA L. CLARK, ET AL., URBAN INSTITUTE PROGRAM FOR RESEARCH ON IMMIGRATION POLICY, STUDY OF FISCAL IMPACTS OF UNDOCUMENTED ALIENS: SELECTED ESTIMATES FOR SEVEN STATES 11 (1994). This study examined "the cost of providing public primary and secondary education to undocumented aliens in academic year 1993-94 for seven states: California, New York, Texas, Florida, Illinois, New Jersey, and Arizona." *Id.* at 61. The study estimates that 85% of all undocumented aliens are concentrated in these seven states. *Id.*

[253] *See* Illegal Alien Educational Impact Aid Act of 1999, H.R. 2849, 106th Cong. (1999) (authorizing appropriations to reimburse states for costs of educating certain illegal alien students); Equity in Public Education Act of 1996, H.R. 4304, 104th Cong. (1996) (authorizing appropriations to reimburse states for costs of educating certain illegal alien students); Illegal Alien Educational Impact Aid Act of 1996, H.R. 4062, 104th Cong. (1996) (authorizing appropriations to reimburse States for costs of educating certain illegal alien students). *See also* California v. United States, 104 F.3d 1086, 1095 (9th Cir. 1997); Texas v. United States, 106 F.3d 661 (5th Cir. 1997); Arizona v. United States, 104 F.3d 1095, 1096 (9th Cir. 1997); New Jersey v. United States, 91 F.3d 463, 470 (3d Cir. 1996); Padavan v. United States, 82 F.3d 23, 30 (2d Cir. 1996); Chiles v. United States, 874 F. Supp. 1334, 1344 (S.D. Fla. 1994).

suggests that an alternative method of reimbursement must be implemented.

A rational response to Justice Brennan's concerns in *Plyler* is to provide undocumented aliens with access to the training opportunities available to military personnel, and to use military services as means of legalizing their immigration status. Currently, INA section 274A prohibits undocumented aliens, even if educated, from obtaining legal employment.[254] In the absence of comparable avenues for social and economic advancement within the private sector, military service is their only viable option. Without it, the "permanent caste" that Justice Brennan sought to eliminate in *Plyler* will most assuredly become even more entrenched in our society.

C. Beneficial Aspects of Naturalizing Undocumented Alien Veterans

The impetus for an amnesty initiative designed to legalize the status of undocumented aliens present in the United States is three-fold. First, this amnesty initiative is limited to a specific pool of aliens that would otherwise be eligible for naturalization but for their unlawful presence in the United States.[255] Second, unlike past amnesty initiatives, naturalization of alien veterans would have a positive and tangible impact on American society. The elimination of compulsory military service in 1973 caused a shortage of military personnel available for induction in every branch of the U.S. Armed Forces. This growing shortage could be eased by offering naturalization to undocumented aliens who provide peacetime military service. Finally, there is historic precedent for allowing minority group members to "earn" their place in American society through military service.

1. Limited Scope of Amnesty Initiative

In addition to the grant of amnesty for alien veterans that served during the World Wars, Congress has adopted legislation to legalize the status of undocumented aliens on several occasions. In 1950 Congress granted amnesty to aliens with longstanding ties to the United States. Section 249 of the Immigration and Nationality Act of 1952 provided that an alien who entered the United States prior to July 1, 1924, and who otherwise satisfied the requirements of that provision "shall be deemed to have been lawfully admitted to the United States for permanent residence

---

[254] INA § 274A, 8 U.S.C. § 1324a (Supp. 1999).

[255] *See* INA § 318, 8 U.S.C. § 1429 (Supp. 1999) ("Except as otherwise provided in this title, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this chapter.").

as of the date of his entry prior to July 1, 1924."[256] More than thirty years later, Congress adopted the Immigration Reform and Control Act of 1986 to legalize the immigration status of eligible undocumented aliens who could prove continuous residence in the United States prior to January 1, 1982.[257] In addition to satisfying residency requirements, undocumented aliens were required to establish admissibility in accordance with section 245A(a)(4).[258] Much to the dismay of critics, more than 2.5 million aliens

---

[256] Act of June 27, 1952, ch. 5, § 249(a), 66 Stat. 163. The Act provides discretion to the attorney general to admit an alien for permanent residency if the alien has: (1) "entered the United States prior to July 1, 1924"; (2) resided in the United States continuously since arrival; (3) demonstrated "good moral character"; (4) not been, and is not subject to deportation; and (5) is not otherwise ineligible for citizenship. *Id.*

[257] Act of November 6, 1986, 8 U.S.C. 1255a (Supp. 1999) (describing legalization of status). Under this Act, an alien was entitled to adjust his status to "that of an alien lawfully admitted for temporary residence." *Id.* To qualify for this adjustment of status, the alien was required to "establish that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under this subsection." *Id.* The alien was also required to establish that he had been "continuously physically present in the United States since the date of the enactment of this section [November 6, 1988]." *Id.*; *see also* Lisa A. Falkenthal, Comment, *The Adequacy of Review for Aliens Denied Legalization Under the Immigration Reform and Control Act of 1986: A Due Process Analysis*, 26 CAL. W. L. REV. 149 (1990). Moreover, in a 1986 report, the House of Representatives discussed the legalization provision:

> The United States has a large undocumented alien population living and working within its borders. Many of these people have been here for a number of years and have become a part of their communities. Many have strong family ties here which include U.S. citizens and lawful residents. They have built social networks in this country. They have contributed to the United States in myriad ways, including providing their talents, labor, and tax dollars. However, because of their undocumented status, these people live in fear, afraid to seek help when their rights are violated, when they are victimized by criminals, employers or landlords or when they become ill. Continuing to ignore this situation is harmful to both the United States and the aliens themselves. However, the alternative of intensifying interior enforcement or attempting mass deportations would be both costly, ineffective, and inconsistent with our immigrant heritage. The Committee believes that the solution lies in legalizing the status of aliens who have been present in the United States for several years, recognizing that past failures to enforce the immigration laws have allowed them to enter and to settle here. This step would enable INS to target its enforcement efforts on new flows of undocumented aliens and, in conjunction with the proposed employer sanctions programs, help stem the flow of undocumented people to the United States. It would allow qualified aliens to contribute openly to society and it would help to prevent the exploitation of this vulnerable population in the work place. The Committee strongly believes that a one-time legalization program is a necessary part of an effective enforcement program and that a generous program is an essential part of any immigration reform legislation.

H.R. REP. NO. 99-381, at 49 (1986).

[258] INA § 245A(a)(4), 8 U.S.C. § 1255a(a)(4) (1994). The statute required an alien applicants to demonstrate that "he has not been convicted of any felony or of three or more

were legalized as a result of this legislation.[259]

During the last decade, Congress considered several amendments to the INA to provide mechanisms for undocumented aliens to become naturalized citizens.[260] In 1999, a bill to legitimize the status of agricultural

---

misdemeanors committed in the United States," that "he has not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion," and that he "is registered or registering under the Military Selective Service Act," if required. *Id.*

[259] *See Record Number of Immigrants Get Permanent Residency*, ASSOC. PRESS, May 14, 1992, *available at* 1992 WL 5297813. The Associated Press reported that:

> The 1986 Immigration Reform and Control Act provided amnesty to illegal aliens living in the United States at the time a chance to apply for permanent residency. So far 2.5 million illegal aliens have received permanent residency and an additional 300,000 will be eligible to apply for the status, the INS said.

Id.; INS, U.S. DEP'T OF JUSTICE, REPORT ON IMMIGRATION TO THE UNITED STATES IN FISCAL YEAR 1995 n.1, *at* http://www.ins.usdoj.gov/graphics/aboutins/statistics (last visited Dec. 1, 2000). The Department of Justice commented that "the IRCA allowed for the one-time admission of certain resident illegal aliens beginning in 1989" and that 2,680,257 aliens were admitted under the IRCA provisions by the end of 1995. *Id.* The Census Bureau reported the number of immigrants admitted from 1990 to 1997 totaled nearly 922,100. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1999 10. *See also* STATISTICAL Y.B., *supra* note 4, at table 4.

The INS reported the number of immigrants admitted by type and selected class of admission, for fiscal years 1991-1998. *Id.* Specifically, the number of immigrants admitted as residents and special agricultural workers as a result of the Immigration Reform and Control Act of 1986 legalization adjustments was: 1,123,162 (1991); 163,342 (1992); 24,278 (1993); 6,022 (1994); 4,267 (1995); 4,635 (1996); 2,548 (1997); 955 (1998). *Id.*; *INS Enforcement Strategy: Hearing Before the House of Representatives Subcomm. on Immigration, and Claims Comm. on the Judiciary*, 105th Cong. (1999), *available at* 1999 WL 458296 (testimony of Thomas P. Hammond, former INS supervisory special agent). Mr. Hammond testified that:

> During 1986, in an effort to control illegal immigration, Congress passed amnesty programs that legalized over 3 million illegal aliens. It is safe to say that many of the illegal aliens who were subsequently granted amnesty through those programs were actually not even in the United States at the time the amnesty laws were passed. Many illegal aliens entered subsequently to take advantage of, and to fraudulently take part in the very liberal amnesty "open season" filing period that lasted for over a year. The 1986 amnesty programs were full of fraud. The INS did not have the will or the way to investigate the over 3 million amnesty applications that were filed and therefore almost all were "rubber stamped" through . . . . It is my opinion that the 1986 amnesty programs, and such legalization paths as the Section 245(i) adjustment of status program, served to greatly encourage the over 5 million illegal aliens now in the United States to come to this country.

Id.

[260] *See* Farmworker Adjustment Act of 1999, S. 1815, 106th Cong. (1999) (providing for the adjustment of status of certain aliens who previously performed agricultural work in the United States to that of aliens who are lawfully admitted to the United States to perform that work); *see also* Agricultural Job Opportunity Benefits and Security Act of 2000, H.R. 4056, 106th Cong. (2000) (establishing a system of registries of temporary agricultural workers to provide for a sufficient supply of such workers and to amend the Immigration and

workers was sponsored by Senators Gordon H. Smith and Jim Bunning "Smith-Bunning agricultural amnesty legislation").[261] This bill would grant amnesty to aliens who are otherwise admissible pursuant to the provisions of INA section 212,[262] except for their unlawful presence in the United States. Eligible aliens would be required to establish that they performed agricultural work for 150 days within the United States prior to October 27, 1999.[263] Satisfaction of this provision would make the alien eligible for temporary nonimmigrant status under INA section 101(a)(15).[264] The temporary resident status would be valid for seven years, within which period the alien can not be present in the United States for more than 300 days in any calendar year.[265] The Smith-Bunning agricultural amnesty legislation provided that the alien may adjust his status to that of a permanent resident if within a five-year period he performs a minimum of 180 days agricultural work within each calendar year.[266]

With the encouragement of the Clinton administration, a number of legislators have proposed "mini-amnesty" programs that would extend the application of the 1986 amnesty program for more than 500,000 undocumented aliens.[267] One example of proposed amnesty legislation would grant permanent residence status to undocumented aliens who can establish that they were present in the United States before 1986.[268]

Nationality Act to streamline procedures for the admission and extension of stay of nonimmigrant agricultural workers) [hereinafter, Agricultural Job Opportunity Benefits and Security Act of 2000].

[261] *See* Agricultural Job Opportunity Benefits and Security Act of 2000, H.R. 4056, 106th Cong. (2000).

[262] *See id.*; *see also* INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(I) (Supp. 2000).

[263] *See* Agricultural Job Opportunity Benefits and Security Act of 2000, § 101(a)(2)(A), H.R. 4056, 106th Cong. (2000).

[264] *See id.* § 101(a)(1).

[265] *Id.* § 101(a)(2)(A).

[266] *Id.* § 101(b)(A)-(B).

[267] Esther Schrader, *U.S. Proposes to Offer 500,000 Legal Residency*, L.A. TIMES, Apr. 12, 2000, at A1. Schrader reported that:

> The proposal is an attempt by the administration to resolve class-action lawsuits filed on behalf of an estimated 350,000 immigrants who claim that they were wrongly discouraged from applying for the 1986 amnesty program because of short-term absences from the United States. It also would apply to an estimated 150,000 immigrants who are not plaintiffs in the suits.

Id.

[268] Legal Amnesty Restoration Act of 2000, H.R. 4172, 106th Cong. (2000) (amending section 249 of the Immigration and Nationality Act to permit the Attorney General to create a record of lawful admission for permanent residence for certain aliens who entered the United States prior to 1986). Support for amnesty legislation is broad based. *See generally* Steven Greenhouse, *Coalition Urges Easing of Immigration Laws*, N.Y. TIMES, May 16, 2000, at A16; Bart Jansen, *Amnesty For Illegals Sought in Bill*, ASSOC. PRESS, May 17, 2000, *available at* 2000 WL 20909404; *see also Gore, Administration Propose Amnesty*

Another bill would create a "rolling registry date"[269] by amending the registry date in the 1986 amnesty program from 1972 to 1986.[270] Thereafter, on an annual basis from 2002 through 2006, the registry date would be extended to 1991.[271]

Amnesty legislation for undocumented workers with more far-reaching implications than those proposed for undocumented aliens with established connections to the U.S., or undocumented agricultural workers is gaining momentum among groups with divergent interests. In addition to the agricultural and service industries,[272] the AFL-CIO has adopted a policy that encourages the INS to implement:

> [A] new amnesty program, allowing undocumented immigrants to regularize their status, and an inexpensive and expedited citizenship process to allow immigrants to become citizens as quickly as possible.[273]

The position adopted by the AFL-CIO on the amnesty issue is in direct response to its view that the INS' immigration policy does not consider the historic contributions made by immigrant populations to the U.S. economy. The AFL-CIO asserts that an amnesty program is also

---

Program Via Registry Date Amendment, INTERPRETER RELEASES (West), May 1, 2000, at 571-72. The Interpreter Releases reported that H.R. 4172 "could benefit as many as 500,000 undocumented aliens," and "would affect about eight percent of the estimated six million undocumented aliens currently in the U.S., many of whom reside in California." *Id.*

[269] *Second Amnesty Proposal Via Registry Date Shift Introduced*, INTERPRETER RELEASES (West), May 8, 2000, at 598 (discussing a Senate proposal that would "permit individuals who have lived continuously in the U.S. since 1986 and who are deemed to be of good moral character to apply for permanent residence").

[270] S. 2407, 106th Cong. (2000) (amending the Immigration and Nationality Act with respect to the record of admission for permanent residence in the case of certain aliens); *see also Second Amnesty Proposal*, *supra* note 269, at 598. The *Interpreter Releases* wrote:

> In introducing the bill on the Senate floor, Sen. Reid said that the measure attempted to address "the terrible mistake made by the Congress in 1996 . . . [when it] nullified legitimate claims based upon substantial evidence that the Immigration and Naturalization Service had bypassed Congressional intent in denying benefits to certain undocumented persons who have come to be known as the 'late amnesty' class of immigrants." He called § 377 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (which stripped the federal courts of jurisdiction to adjudicate legalization claims against the INS) a provision that "has caused significant hardships, and denied due process and fundamental fairness, for hundreds of thousands of hard-working immigrants."

Id.

[271] S. 2407, 106th Cong (2000).

[272] *See* Dena Bunis & Elizabeth Aguilera, *A New Amnesty Effort is Brewing Immigration*, ORANGE COUNTY REG. (Cal.), Apr. 9, 2000, at A1; Minerva Canto, *Coalition Will Push for Amnesty Immigration*, ORANGE COUNTY REG., Apr. 25, 2000, at A1.

[273] *Defending the Right of Immigrant Workers and the Right to Organize*, Res. 34, AFL-CIO, (2000), *available at* http://www.aflcio.org/convention99/res3_34.htm (last visited Nov. 8, 2000) [hereinafter AFL-CIO resolution].

necessary because the current INS policies do not "protect workplace rights and freedoms and hold employers accountable for exploitation of immigrant workers."[274] AFL-CIO Executive Vice President, Linda Chavez-Thompson, argues that "[t]he current system of immigration enforcement in the U.S. is broken. If we are to have an immigration system that works, it must be orderly, responsible, and fair."[275]

Unlike the sweeping grants of amnesty adopted by Congress in the past, amnesty initiatives that target alien veterans are limited in scope and beneficial to U.S. military interests. In 1989, Representative Benjamin A. Gilman sponsored the most comprehensive legislation addressing the issue of peacetime alien veteran naturalization. The bill would have permitted

---

[274] *Id.* *See also* Nancy Cleeland, *AFL-CIO Calls for Amnesty for Illegal U.S. Workers' Jobs*, L.A. TIMES, Feb. 17, 2000, at A1; Steven Greenhouse, *Labor Urges Amnesty for Illegal Immigrants*, N.Y. TIMES, Feb. 17, 2000, at A26; Elizabeth Llorente, *Sweatshop Conditions Stir Call to Give Aliens Amnesty: Newark Conference Told of Abuses, Threats Against Illegal Immigrants*, RECORD (New Jersey), Feb. 17, 2000, at A4; Steve Quinn, *2,000 March for Immigration Amnesty: Hispanic Groups Unite to Show Support for Federal Bills to Grant Workers Residency*, DALLAS MORNING NEWS, May 1, 2000, at 16A; John Rather, *"Hidden" Workers Nurse Hope of Amnesty,* N.Y. TIMES, Feb. 27, 2000, at 14-1. *But see* Steve DiMeglio, *Critics of New Immigrant Amnesty Drive Say Last One Didn't Work*, GANNETT NEWS SERV., Mar. 24, 2000. DiMeglio wrote:

> The 1986 act initially cut the number of illegal immigrants entering the United States, but the numbers quickly began rising. A report on the 1986 act by the National Council of La Raza, a Hispanic advocacy group in Washington, estimated that nearly 5 million people were illegally living in the United States in 1990, up from an estimated 3 million in 1980. And given their new legal status, the immigrants flooded out of the very jobs that were supposed to benefit from the law, especially in agriculture, construction and the hotel industry. Previously, the workers had been concerned that seeking better-paying work would expose them to scrutiny that would end up in their deportation. With that fear gone, most of them moved on to financially better—and less grueling—jobs.

Id. Earlier in the article, DiMeglio noted that, "While 3.1 million illegal immigrants obtained legal status—nearly double the anticipated number—studies since then show that many thousands of people entered the country surreptitiously to take advantage of the program, some of them armed with falsified documents." *Id.*

[275] *See* AFL-CIO resolution, *supra* note 273; Louis Uchitelle, *I.N.S. is Looking the Other Way as Illegal Immigrants Fill Jobs*, N.Y. TIMES, Mar. 9, 2000, at A1. Uchitelle commented on the decreasing number of raids on illegal immigrants:

> Such raids have all but stopped around the country over the last year. In a booming economy running short of labor, hundreds of thousands of illegal immigrants are increasingly tolerated in the nation's workplaces. The Immigration and Naturalization Service has made crossing the border harder than ever, stepping up patrols and prosecuting companies that smuggle in aliens or blatantly recruit them. But once inside the country, illegal immigrants are now largely left alone. Even when these people are discovered, arrests for the purpose of deportation are much less frequent; such arrests dropped to about 8,600 last year from 22,000 just two years earlier, the I.N.S. reports.

Id.

the annual enlistment and eventual naturalization of 17,000 aliens.[276] The class of aliens eligible for enlistment in the Armed Forces pursuant to this bill were those who were illegally present in the United States, and those outside of the United States who applied for enlistment through diplomatic channels.[277] One of the underlying purposes of this legislation was to "provide a constructive method on an on-going basis for certain foreign nationals and 'out-of-status' aliens to obtain U.S. citizenship in a meaningful and productive way which meets our national security goals."[278]

To qualify for the expedited naturalization, an eligible alien veteran would also have been required to declare his intention to become naturalized, be admissible as an immigrant, be free from criminal convictions, and establish that he had "not assisted in the persecution of any person or persons on account of race, religion, nationality, or membership in a particular social group."[279] Once these preliminary qualifications were established, the alien veteran would be entitled to temporary resident status. This conditional status would be adjusted to that of a permanent resident upon completion of three years of honorable service in the Armed Forces or state militia.[280] The underlying purpose of this legislation was to address the growing concern over the continuing manpower shortage facing all branches of the Armed Forces. Although this bill languished in committee, the military manpower shortage that it sought to redress has become even more critical. The time has come to revisit this issue.

---

[276] *See* H.R. 1306, 101st Cong. (1989) (authorizing the original enlistment of certain aliens in the Armed Forces of the United States and state militias to provide temporary and permanent resident status to such enlisted members) [hereinafter H.R. 1306].

[277] *See id.* The statute states that:

> (b)(1) Aliens who may enlist in the armed forces in the manner described in subsection (a) are the following classes of aliens:
> (A) Aliens not already admitted to the United States for permanent residence who are foreign nationals present in any State, territory, or possession of the United States, whether or not in the United States on a valid, unexpired visa.
> (B) Aliens not already admitted to the United States for permanent residence who are abroad but who apply for enlistment through the United States diplomatic mission to a country or to any other appropriate United States military or diplomatic personnel designated for such purpose by the Secretary concerned.

Id.

[278] *Hearing Before the Subcomm. on Immigration, Refugees, and International Law*, 101st Cong. 52 (1989) (statement of Rep. Benjamin A. Gilman (N.Y.)).

[279] H.R. 1306, *supra* note 276.

[280] *See id.* § 2(b).

2. Military Personnel Shortage

The Army, along with other branches of the U.S. Armed Forces, initiated enthusiastic recruiting campaigns following the end of the draft in 1973.[281] In 1981, the U.S. Army adopted the phrase "Be all that you can be" as its recruiting slogan.[282] This slogan has become a rallying cry for help as every branch of the U.S. Armed Forces has experienced increasing difficulty in meeting congressionally imposed annual enlistment goals, and retaining experienced enlisted military personnel. Section 691 of Title 10 requires the Armed Forces to annually maintain a roster of 1,384,806 active-duty soldiers.[283] With the exception of the Marines, every branch of the Armed Forces has had difficulty satisfying this active duty personnel requirement.[284] The year 2000 recruitment goals were 68,000 for the

---

[281] The draft was ended by the 1971 amendment to the War and National Defense Military Selective Service Act of 1948, ch. 625, 62 Stat. 604 (1948).

[282] *See* George Lazarus, *Burnett, Ewald Last Survivors in Army Ads War*, CHI. TRIB., Apr. 28, 2000, at 3. It is interesting to note that the Army recently changed its primary recruiting slogan to "An Army of One" in an attempt to reach a generation it feels respects individuality more than discipline. Thomas W. Evans, *The Wrong Campaign: Army's Latest Ad is Poor Recruiter*, ADVERTISING AGE, Jan. 29, 2001, at 28, *available at* 2001 WL 5298366. Critics have not been kind. *Id.*

[283] 10 U.S.C. § 691(b) (Supp. 1999), *amended by* National Defense Authorization Act of 2000, § 402(a)(1)-(3), Pub. L. No. 106-65, 113 Stat. 512 (1999) (authorizing appropriations for the fiscal year 2000). The act states that:

> Unless otherwise provided by law, the number of members of the armed forces (other than the Coast Guard) on active duty at the end of any fiscal year shall be not less than the following:
> (1) For the Army, 480,000.
> (2) For the Navy, 371,781.
> (3) For the Marine Corps, 172,148.
> (4) For the Air Force, 360,877

Id.

[284] *See* Andrea Stone, *Air Force Misses Its Recruiting Aim, Army, Marines, Navy Meet or Exceed Quarter's Goals*, USA TODAY, Jan. 14, 2000, at 5A ("[The Air Force] missed its last quarterly goal by 15% . . . . The service had a goal of 7,563 recruits for the Oct.1-Dec. 31 quarter. It ended fiscal 1999, which ended Sept. 30, short 1,700 recruits."); *Army to Recruit High School Dropouts, It Will Also Use College-Stipend Experiment to Try to Boost Enlistment*, STAR-TRIB. (Minn.-St. Paul), Feb. 4, 2000, at 4A ("In fiscal 1999, the Army fell 8.5 percent short of its goal to enlist 74,500 of [Americans of recruiting age]."); Barbara B. Buchholz, *May the Armed Forces Be With You, Uncle Sam Still Wants You—And He's Got the Incentives to Prove It*, CHI. TRIB., Oct. 3, 1999, at 1; *Challenges in Recruiting and Retention*, OFFICER, Apr. 1, 1999, at 61; Greg Jaffe, *The Price of Power; Empty Net: Military Recruiters Face a Tough Sell in Job-Rich U.S.*, WALL ST. J., Sept. 23, 1999, at A1. Jaffe reported:

> For the first time since 1979, both the Air Force and the Army can't find enough people to fill the ranks. The Navy came up 7,000 recruits short of its target last year of about 55,000, so it decided to accept a large number of recruits who didn't graduate from high school to meet this year's goals. Only the Marines, the smallest of the forces, is meeting its relatively modest goals without much trouble. Overall, the Department of Defense is 7% behind its

Army, 40,000 for the Air Force, 40,900 for the Navy, and 12,700 for the Marines.[285] Through the implementation of enlistment incentives, including signing bonuses,[286] new recruiting personnel and methods,[287]

> recruitment goals this fiscal year—the largest shortfall in years—leaving it more than 9,000 recruits short and struggling to fulfill its missions with fewer and in some cases less-qualified troops.

Id.; James H. Anderson, *Why, Oh Why, Does Uncle Sam Have a Recruiting Problem?* SAN DIEGO UNION & TRIB., Aug. 29, 1999, at G4; *Army Offers Special Recruit Bonus: Deadline to get $6,000 is Thursday as Services Struggle to Fill Ranks*, CHI. TRIB., Sept. 28, 1999, at 13 (noting the Navy expects to meet recruiting goals "but only after accepting more personnel who failed to finish high school and stepping up recruitment and bonus programs"); Steven Lee Myers, *Military Has a Hard Time Finding a Few Good Recruits*, COM APPEAL (Memphis, Tenn.), Sept. 27, 1999, at A1. Meyers described the recruitment crisis:

> When the fiscal year ends on Thursday, the Army will fall short of its recruiting goal for the second year in a row, signing up nearly 7,000 fewer enlistees than the 74,500 it needs to maintain its force at current levels. It is the worst shortfall since 1979, when the Army was recruiting twice as many recruits as it does now. The Air Force, too, is expected to miss its target of 33,800 by between 1,500 and 1,800 people, despite having paid for commercial television advertising this past year for the first time in its history. The Navy, which fell 12,000 recruits short last year, may just squeak by, but only after lowering its goal from last year and accepting thousands of recruits who never made it through high school but earned only general equivalency diplomas.

Id.

[285] *See Sustaining the All-Volunteer Force: Hearing Before the Comm. on Armed Services Military Personnel, and Subcomm. on Military Recruiting and Retention* 106th Cong. (2000) (prepared statement of Hon. Rudy DeLeon); Paul Leavitt, *Army Expects to Meet Recruiting Goal*, USA TODAY, July 19, 2000, at 8A. Leavitt discussed military recruitment goals noting the Army "has added hundreds of recruiters to help woo enlistees. It has also developed programs that would let recruits pursue college degrees while serving, and help them gain priority for jobs with large corporations after leaving the armed forces." *Id.*

[286] *See* Dave Moniz, *Military Branches to Reach Recruitment Goals*, USA TODAY, July 31, 2000, at 10A ("[E]nlistment bonuses increased dramatically in one year, from $59 million in 1998 to $105 million last year."); *see also Army Offers Special Recruit Bonus: Deadline to Get $6,000 is Thursday as Services Struggle to Fill Ranks*, CHI. TRIB., Sept. 28, 1999, at 13 ("The Army is offering $6,000 to anyone who joins up by Thursday, on top of other bonuses and scholarships, as the U.S. military ends its most difficult recruiting year since the post-Vietnam 1970s."); Steven Komarow, *Army Offers $20,000 to Sign Up*, USA TODAY, Nov. 19, 1999, at 1A. Komarow detailed the bonuses:

> The new inducements include a near doubling of the signing bonus, from $12,000 to $20,000, for certain recruits . . . . Another perk: Previously, recruits had to choose between a signing bonus and college assistance. Now for the first time since the early 1980s, bonuses and tuition benefits can be combined, bringing the maximum to $85,000 for a college student with loans to repay.

Id.

[287] *See, e.g.*, Dave Moniz, *Companies Give Army New Ammunition for Recruiting*, USA TODAY, June 5, 2000, at 1A (discussing the Army's "Partnership for Youth Success," a new program "in which dozens of U.S. companies and non-profit groups have agreed to offer

internet recruiting,[288] and advertising,[289] every branch of the Armed Forces met their recruitment goals in the year 2000.[290] These recruitment goals, however, had not been reached by every branch of the Armed Forces since 1998.[291]

---

preferential hiring to Army soldiers who serve two to four years, then join the job market"). *Id.*

[288] *See, e.g.*, Pauline Jelinek, *Pentagon: Recruitment is Climbing*, ASSOC. PRESS, Aug. 1, 2000 ("The services also have added recruiters and are using the Internet more aggressively. 'The majority of our leads are coming off of the Web page,' said Air Force recruiting spokesman Master Sgt. Tom Clements. 'It's our most productive method of getting leads' for recruiters to pursue."). All of the branches of the American military now offer a web site for internet recruiting: U.S. Marine Corps at http://www.usmc.mil (last visited Nov. 8, 2000); U.S. Air Force at http://www.af.mil (last visited Nov. 8, 2000); U.S. Army at http://www.army.mil (last visited Nov. 8, 2000); U.S. Navy at http://www.navy.mil (last visited Nov. 8, 2000); U.S. Coast Guard at http://www.uscg.mil (last visited Nov. 8, 2000).

[289] *See* Bucholz, *supra* note 284; Jaffe, *supra* note 284; *Air Force Joins Recruiting Game: Drops in Enlistees Prompts TV Ads*, COM. APPEAL (Memphis. Tenn.), Feb. 16, 1999, at A4. The Commercial Appeal noted that the Air Force planned to spend $17 million on television advertising during the National Collegiate Athletic Association's basketball tournament. *Id.* The Air Force "also plans to spend $37 million to begin a new network advertising campaign . . . intended to increase the enlisted ranks," and "enhance . . . the Air Force's image." *Id.*

[290] Dave Moniz, *Army Expects to Meet Recruiting Goal*, *supra* note 286; *U.S. Air Force, Air Force Exceeds 2000 Recruiting Goal*, AIR FORCE NEWS, July 28, 2000, *at* http://www.af.mil/news/Jul2000/n20000728_001131.html. The Air Force's web site commented on its recruiting situation:

> Last year, the Air Force missed its recruiting goal for the first time in 20 years. An increase in the number of recruiters, targeted enlistment bonuses in hard-to-fill areas and months, and a first-ever television advertising campaign contributed to this year's success. In addition to increasing its overall manning, the Air Force deployed 100 recruiters from headquarters and staff positions for 90 days, recalled 170 former recruiters to serve 120 days on temporary duty status and deferred assignments for nearly 100 recruiters. This boosted its number of "on the street" recruiters from fewer than 900 last fall to approximately 1,300 current recruiters.

Id.

[291] U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN AND RANKING MINORITY MEMBER, SUBCOMM. ON PERSONNEL, COMM. ON ARMED SERVICES: MILITARY PERSONNEL—SERVICES NEED TO ASSESS EFFORTS TO MEET RECRUITING GOALS AND CUT ATTRITION, June 23, 2000, *available at* 2000 WL 1207435 [hereinafter GAO REPORT ON RECRUITING AND ATTRITION]. The GAO recorded testimony of Norman J. Rabkin, the director of national security, before the Senate Subcommittee of Personnel. Rabkin detailed the Armed Forces' attainment of recruitment goals:

> Until fiscal year 1998, the services had been successful in meeting their recruiting goals for the all-volunteer force of enlistees. In fiscal year 1998, the Navy and the Army were the first services to miss their annual recruiting goals for active-duty enlisted personnel. That year, the Navy achieved 88 percent of its goal, and the Army 99 percent. The following year, the Army made only 92 percent of its goal and the Air Force made 95 percent of its objective. For some Members of Congress, the fact that the services were missing their recruiting goals indicated a recruiting crisis. Added to the services' recent struggles to meet recruiting goals is the fact that, historically,

Although the Armed Forces reached its recruitment goals during the fiscal year 2000, this accomplishment was not achieved without a significant price tag. Over $250 million was spent by the Armed Forces on advertising.[292] The Army alone "spent $113 million on advertising, up from $34 million in 1993."[293] Additional resources were allocated for pay increases to retain current enlisted personnel, as well as signing bonuses to attract new enlistees.[294] This price tag also includes variables that cannot be measured in dollars alone. Every branch of the Armed Forces has reduced enlistment standards and training requirements to retain as many soldiers as possible, notwithstanding their qualifications.[295]

---

about one-third of their enlistees do not complete their first terms of service.

Id.

[292] *See* Dale Eisman, *Military Will Redirect its Advertising Dollars, Recruiting Efforts Too Broad*, VIRGINIAN-PILOT & LEDGER-STAR (Norfolk, Va.), July 10, 2000, at A1 ("The armed services spend more than $250 million per year on recruiting advertising. The outlays have more than doubled in recent years as the services have struggled to compete for workers in a nearly full-employment civilian economy."); Greg Jaffe, *Uncle Sam Wants Who? New Report Calls Military's Ads Off Target*, WALL ST. J., July 6, 2000, at B1 ("The Navy and the Air Force are now seeking bids for their advertising contracts, together valued at about $650 million over the next five years.").

[293] Dave Moniz, *Military Branches to Reach Recruitment Goals*, USA TODAY, July 31, 2000, at 10A.

[294] *See* GAO REPORT ON RECRUITING AND ATTRITION, *supra* note 291. The GAO specified the bonuses offered by the Armed Forces:

> The Army has . . . offered an array of enlistment bonuses to qualified personnel and increased the maximum amount offered from $12,000 to $20,000. Enlistment bonus expenditures increased substantially in just the past year, from $59.7 million in fiscal year 1998 to $105.2 million in fiscal year 1999 . . . . In October 1998, the Air Force expanded its enlistment bonus program to target persons willing to commit to six—rather than four—year contracts in critical and highly technical skills, such as combat controllers, para-rescue personnel, linguists, and security forces. The Air Force believed that offering such bonuses (1) positioned it for better return on its recruiting and training investment, (2) provided another tool to attract youth into the Air Force, and (3) would result in improved retention over time and ultimately in a reduction of future requirements for new recruits without prior military service. Enlistees in approximately 100 occupations are eligible for bonuses ranging from $2,000 to $12,000. Combat controllers and para-rescue personnel are eligible for the maximum bonus of $12,000.

Id.

[295] *See* Dave Moniz, *This Isn't Your Father's Boot Camp Anymore*, USA TODAY, July 19, 2000, at 1A. Moniz wrote about how dramatically boot camp has changed, commenting that in the past:

> Many never got past the Army's fearsome gatekeepers. They washed out and returned to civilian life after a brief and sometimes painful introduction to boot camp. But today . . . virtually anyone who makes the effort can get through 8-12 weeks of basic training. The Army has designed a raft of programs to help woebegone trainees graduate, from remedial military drills to special courses for those with marginal English language skills. There are courses for recruits who arrive too flabby and need a gentler training pace,

Many exigent factors have contributed to the shortage of available young men and women willing to enlist in the military, including low unemployment, antipathy toward military structures, and high compensation levels for civilian jobs. Thus, the fact remains that resources expended by the Armed Forces are failing to produce the manpower necessary to sustain and enhance our military forces.[296] Granting amnesty to undocumented young men and women who are otherwise qualified for military service would augment the military recruitment methods being currently implemented.[297] It would be a cost-effective means of increasing

---

> and courses to calm the fears of trainees who try to quit the Army in the first week. Because of that newfound ethos, the Army's largest basic training site has experienced an unprecedented drop in recruit failure. As recently as December 1998, 23% of Fort Jackson recruits flunked out of basic training. By the end of this year, the recruit failure rate here is expected to be 10% or lower. The sudden drop is part of a military-wide trend playing out at rifle ranges and recruit barracks across the country. Commanders at Marine, Navy and Air Force basic training sites say that they, too, are graduating recruits who in years past would have been discharged without a second thought. Some critics, however, question whether the four services, which put about 200,000 recruits through boot camp each year, are sacrificing quality as they struggle to attract and keep young men and women in a wickedly competitive job market.

Id. The Army also unveiled new recruitment programs allowing high school dropouts to earn a diploma, attend two years of college before beginning duty, and providing financial assistance for tuition loans. *Army to Recruit High School Dropouts, It Will Also Use College-Stipend Experiment to Try to Boost Enlistment*, STAR-TRIB. (St. Paul, Minn.), Feb. 4, 2000, at 4A; Greg Jaffe, *The Price of Power; Empty Net: Military Recruiters Face a Tough Sell in Job-rich U.S.*, WALL ST. J., Sept. 23, 1999, at A1 (noting that the military is decreasing its academic requirements to meet quotas); Steven Lee Meyers, *Military has a Hard Time Finding a Few Good Recruits*, COM. APPEAL (Memphis, Tenn.), Sept. 27, 1999, at A1; *More Recruits Will Enter Navy Without Diplomas*, ORLANDO SENTINEL, Jan. 16, 1999, at A17.

[296] *See* GAO REPORT ON RECRUITING AND ATTRITION, *supra* note 291. The GAO outlined the troubles that face the Armed Forces:

> Despite years of research on how best to recruit into the military, the Army, the Navy, and the Air Force are unsure of what recruiting strategies will work best in today's environment. Their concerns are that private sector competition, the economy, the attitudes and skills of youth, and the views of their parents toward the military have so changed over time that old ways of doing things may no longer be applicable. DOD and the services cannot yet determine whether they are taking the appropriate steps to increase the number of young people they enlist without reducing the chances that these persons will perform acceptably and complete their enlistment tours.

Id.

[297] *See* James H. Anderson, *Why, Oh Why, Does Uncle Sam Have a Recruiting Problem?* SAN DIEGO UNION & TRIB., Aug. 29, 1999, at G4. The recruiting problem has caused some people to revisit the issue of compulsory draft. *See id.* For a number of ideas including short enlistment, reinstatement of draft, and increased pay, see Dave Moniz, *Some Novel Ideas to Fill Military Ranks: Military's Worst Manpower Slide in 20 Years Prompts a Rethinking of Options—From Higher Pay to Reviving the Draft*, CHRISTIAN SCI. MONITOR, Aug. 10, 1999, at 3; *Recruit Disabled: Gerry Braun, Hunter Sees Military Potential in*

the pool of eligible recruits with people already present in the U.S., who are invested in our way of life. Additionally, offering military and other educational training to the children of undocumented aliens educated at American taxpayer expense (in accordance with the Supreme Court's mandate in *Plyler*) would give Americans a reciprocal return on their educational investment. If the United States can utilize undocumented aliens present in the country during times of war or other military conflict, then enlisting young alien men and women who are otherwise qualified for peacetime military service would certainly satisfy similar goals.

3. Historic Importance of Military Service for Disenfranchised Groups

The post-Civil War assimilation of African-Americans into mainstream American culture is the historic antecedent for the situation currently faced by undocumented aliens, many of whom are people of color. Both groups were physically present in the United States, but remained outside of many protections afforded by the Constitution, and were denied access to avenues of employment, education, and social advancement.[298] Unlike undocumented aliens, the immigration status of African-Americans was legitimized with the passage of the Fourteenth Amendment, as well as other statutes and judicial decisions. These hard fought rights were the result of a number of factors, including recognition of the sacrifices made by African-Americans during every military conflict since the Civil War.[299] Given similar opportunities to contribute to

---

Disabled. He Believes They Could Serve in High-Tech Posts, SAN DIEGO UNION & TRIB., Feb. 20, 1999, at A1.

[298] *See* KITTY CALAVITA, U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR: 1820-1924 at 19 (1984). Calavita wrote:

> European immigration to the United States in the mid-nineteenth century had much in common with that other movement of workers, the importation of African slaves. As one historian of the American South put it, "The African experience was only a special case in the general immigration experience" The one fundamental difference is that in slavery a whole person is bought, while immigrants generally sold only their labor (although some did sell themselves in peonage). While the parallel should not be overdrawn, both slavery and immigration resulted from the demand for "the human power to fuel the new systems of production," and both rested on the principle of one man's appropriation of another for the fruits of his labor. By definition and in essence, it was a system of class rule in which some people lived off the labor of others. The fact that in one case a person was bought, and in another only the person's labor power, was primarily a function of the different economic systems into which they were inserted.

Id.

[299] *See* MICHAEL L. LEVINE, AFRICAN AMERICANS AND CIVIL RIGHTS: FROM 1619 TO THE PRESENT 88 (1996) ("Black troops played a greater role in the Civil War than in the American Revolution, and their performance was enough to modify the anti-black views of

American society through military service, undocumented aliens could also earn their place in this country. During periods of war or military conflict, aliens, regardless of race or ethnic origin, were afforded opportunities to serve in the military, even if such service was on a segregated basis.[300] Notwithstanding the inequalities inflicted upon these veterans by the military and in their civilian lives, many were eager to serve.[301] The

---

some whites. After the war, their valiant service for the Union became a strong argument in behalf of equal rights for blacks.").

[300] Although persons of color were permitted to enlist in the military, it was not until President Harry Truman issued Executive Order 9981 that the military forces were desegregated. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948). Section one of Executive Order 9981 provided that "there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin." *Id.* In 1998, on the fiftieth anniversary of the desegregation of the military, President William J. Clinton issued Proclamation 7108 in which he acknowledged the military contributions of soldiers from a variety of diverse backgrounds and origins. Pres. Proclamation No. 7108, 63 Fed. Reg. 38 (July 13, 1998). President Clinton recognized that "[h]undreds of thousands of our fellow citizens from many different ethnic and racial backgrounds served and sacrificed in [WWII]." *Id.*; *see generally* A. RUSSELL BUCHANAN, BLACK AMERICANS IN WORLD WAR II (1977); JACK D. FONER, BLACKS IN THE MILITARY IN AMERICAN HISTORY: A NEW PERSPECTIVE (1974); GILBERT WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE 124 (1984).

[301] *See* Wray R. Johnson, *Black American Radicalism and the First World War: The Secret Files of the Military Intelligence Division*, ARMED FORCES & SOC'Y, Oct. 10, 1999, at 27. Johnson discusses the connection between participation in the military and the social status of African Americans during World War I:

> [C]onfusion and vacillation over the continued role of blacks in the armed forces persisted until well into the twentieth century. Nevertheless, blacks generally viewed the Army as an opportunity to demonstrate merit and, perhaps, effect some measure of social change. Black military men were held in high esteem in the black community, and their deeds and sacrifices were viewed as a key to improving the condition of the entire race. For many blacks, the battle streamers on black regimental guidons were symbols of equal citizenship-in a nation holding fast to black disenfranchisement and Jim Crow laws.

Id.; NEIL A. WYNN, THE AFRO-AMERICAN AND THE SECOND WORLD WAR 101-02 (1975). Wynn wrote:

> Perhaps in response to attitudes such as these, black spokesmen argued that involvement in all avenues of the war effort was imperative to the black struggle for civil rights. It was both means and end. Not only did Afro-Americans "see in war an opportunity to prove their patriotism and thus lay the nation under obligation to them," the war also provided the chance to demonstrate that they were in fact first-class citizens. The situation was aptly summed up by Lester Granger of the National Urban League when he said that "the quest of the Negro for full partnership in the war is an expression of his desire to assume full citizenship responsibilities." From the very beginning, the duties and the privileges attached to citizenship were thus linked together and demands for participation in the war effort were coupled with specific demands relating to civil rights.
>
> . . . .
>
> Along with this desire to fight for equal rights was the feeling that participation in the war effort would be rewarded; in fact the two ideas were

resulting benefit in the form of equalization of rights and privileges was elusive until after African-American participation in the Vietnam hostilities.[302] The perception within the African-American community was that a direct correlation existed between the attainment of rights and the obligation to serve in the "White Man's War."[303] During the Civil War,

---

inextricably interwoven. George Rouzeau, one of the *Courier's* war correspondents, urged black soldiers to "insist on combat duty" and asked, "is it not true that only those who spill their blood are in a position to demand rights?" A black soldier, in a letter to the *Baltimore Afro-American*, said that black soldiers "fight because of the opportunities it will make possible for them after the war." The mutual obligations of the citizen and the state were also spelled out. For a man to enter the forces, risk life and limb, was "just and reasonable" if the nation was "fighting for the purpose of providing a better life for the people who compose the citizenry." Forty-six percent of the blacks polled in the New York survey felt that they would be treated better once the war was won; of that number, 14 per cent expected better treatment because of their war effort, while another 10 per cent thought it would be due to black initiatives in demanding rights.

Id.

[302] *See* JAMES E. WESTHEIDER, FIGHTING ON TWO FRONTS: AFRICAN AMERICANS AND THE VIETNAM WAR 8-9 (1997). Westheider described the fleeting promise of equal rights:

African Americans often welcomed their assignment to Vietnam in the early days of the war. Historically, the black community had viewed wartime military service as a chance for social and economic advancement, as well as an opportunity to erase the myth that whites were superior fighting men to blacks. Frederick Douglass, writing one hundred years before American involvement in Vietnam, stated, "Let the black man get upon his person the brass letters U.S. Let him get an eagle on his button and a musket on his shoulder, and there is no power on earth which can deny that he has earned the right to citizenship in the United States." Though African Americans had served in all of America's wars prior to Vietnam, with few exceptions they had done so in segregated units and usually were relegated to performing only menial labors. Their chance to earn equal citizenship was generally denied them. Vietnam would be different. It was the first war in which the armed forces were totally integrated, and the first in which African Americans ostensibly had the same opportunities as whites.

. . . .

Many observers commented favorably on this new and expanded role for blacks . . . . Daniel P. Moynihan noted that "the single most important psychological event in race-relations in the nineteen-sixties was the appearance of Negro fighting men on the TV screens of the nation," adding that "acquiring a reputation for military valor is of the oldest known routes to social equity."

Id.

[303] *See* Wray R. Johnson, *supra* note 301. Johnson further developed Neil Wynn's description of the African-American reaction to service in the armed forces:

As Neil Wynn writes in *From Progressivism to Prosperity: World War I and American Society*, "If the theory that military participation brings rewards and recognition for minority groups had any validity, then black Americans would have been free and equal long before the twentieth century dawned." Thus, on the eve of American participation in the First World War, blacks themselves had ambivalent feelings about any role in yet another "White

abolitionist Frederick Douglass encouraged the government to permit blacks to take an active role in support of the Union. Douglass wrote:

> Let the black man get upon his person the brass letters U.S. Let him get an eagle on his button and a musket on his shoulder, and there is no power on earth which can deny that he has earned the right to citizenship in the United States.[304]

Douglass also encouraged African-Americans to take an active role in the Civil War "to fulfil any and every obligation which the relation of citizenship imposes."[305] He noted that African Americans deserved the same right to fight on behalf of the Union Army that had been afforded to alien soldiers:

> Man's War." Activist and labor leader A. Philip Randolph and other black socialists believed that black involvement in the war would not bring about significant change. Indeed, Randolph argued that "black soldiers should not fight and die for the American ideals of liberty, freedom, and democracy while black Americans were being denied those rights and opportunities at home." W.E.B. Du Bois, the most prominent black public figure of the time, wrote of unrest and bitterness regarding a wartime role for blacks, and Joel Spingarn, the white chairman of the National Association for the Advancement of Colored People (NAACP), warned that the continued "alienation, or worse, of eleven million people would be a serious menace to the successful prosecution of the war."

Id.

[304] WESTHEIDER, *supra* note 302; B. Kevin Bennett, *The Jacksonville Mutiny*, 134 MIL. L. REV. 157, 158 (1991). The author wrote:

> As a result of the large-scale operations and resultant massive casualties, the Civil War created a manpower crisis that, in turn, led to the enlistment of large numbers of blacks into the federal military and naval services. Prior to the Civil War, free blacks served in a limited capacity in the American Revolution and the War of 1812. Unfortunately, their participation was limited by the relatively small numbers of free blacks and by the prejudices of society. The Civil War, however, was the first real opportunity for blacks to join organized military units and to vindicate the freedom and status of their race.

Id.

[305] FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 528-529 (Philip. S. Foner ed., 1999). Foner described Douglass' recruiting efforts:

> His recruiting tour convinced Douglass that many Negroes did not fully understand why they should join the Union army. To meet this problem, he wrote an article in his journal listing and discussing nine reasons why the Negro should enlist . . . . You are however, not only a man, but an American citizen, so declared by the highest legal advisor of the Government, and you have hitherto expressed in various ways, not only your willingness but your earnest desire to fulfil any and every obligation which the relation of citizenship imposes. Indeed, you have hitherto felt wronged and slighted, because while white men of all other nations have been freely enrolled to serve the country, you a native born citizen have been coldly denied the honor of aiding in defense of the land of your birth. The injustice thus done you is now repented of by the Government.

Id.

> Indeed, you have hitherto felt wronged and slighted, because while white men of all other nations have been freely enrolled to serve the country, you a native born citizen have been coldly denied the honor of aiding in defense of the land of your birth. The injustice thus done you is now repented of by the Government.[306]

Participation by African-Americans in the war, however, did not lead to a reciprocal exchange of service for equal rights.[307] Notwithstanding their military contributions during the Civil War, WWI and WWII, African-Americans were not afforded equal rights until passage of Civil Rights legislation during the 1960s. Undocumented aliens currently residing in the U.S. would not face a similar outcome. Expansion of alien veteran naturalization statutes to include undocumented aliens who serve during times of peace would result in the tangible benefit of citizenship and all the rights associated with it as an inducement to enlist.

---

[306] *Id.* at 529.

[307] *See* THE MILITARY AND AMERICAN SOCIETY 178-79 (Stephen E. Ambrose & James A. Barber, Jr. eds., 1972). Ambrose and Barber present the expectations black Americans had when joining the war effort, and the results their service produced:

> Yet many black Americans pinned their hopes for a better future on the Army. William E.B. DuBois, editor of *The Crisis*, official organizer of the National Association for the Advancement of Colored People, who later joined the Communist Party and who hardly was an Uncle Tom, was one of these. In an editorial during World War I, DuBois wrote, "*The Crisis* says, *first* your Country, *then* your Rights!" His justification was historical. "Five thousand Negroes fought in the Revolution; the result was the emancipation of the slaves in the North and the abolition of the African slave trade. At least three thousand Negro soldiers and sailors fought in the War of 1812; the result was the enfranchisement of the Negro in many northern States and the beginning of a strong movement for general emancipation. Two hundred thousand Negroes enlisted in the Civil War, and the result was the emancipation of four million slaves, and the enfranchisement of the black man. Some ten thousand Negroes fought in the Spanish-American War, and in the twenty years ensuing since that war, despite many setbacks, we have doubled or quadrupled our accumulated wealth." If the black man would fight to defeat the Kaiser, DuBois argued, he could later present a bill for payment due to a grateful white America, a bill that the nation would in all conscience be obligated to pay.
>
> ....
>
> Dubois was unquestionably presenting the views of the vast majority of America's blacks. His history may have been poor–what gains black Americans had made were not directly linked to service in war, and the gains were hardly as great as he indicated—but the sentiment was authentic. Blacks did take tremendous pride in the historical record as members of the Army. They knew what white America had managed to forget—that no matter how circumscribed their troops had been, no matter how limited the role that had been allowed to play, in fact black soldiers had made a significant contribution to victory in all American wars.

Id.

CONCLUSION

I conclude this article where I began it—with my Dad, an undocumented alien who was given the opportunity to serve in the U.S. Army during WWII. He legalized his immigration status by becoming a naturalized citizen, lived in this country for over fifty years, contributed his labor and taxes to the U.S. economy, and raised a family that continues his legacy. The undocumented young men and women who in the coming years will be the recipients of free primary and secondary education, in accordance with *Plyler*, deserve the same opportunity. In 1994, the annual cost of educating undocumented aliens was in excess of $3.1 billion. Since that time, these expenditures most assuredly have increased as the number of undocumented aliens residing in the United States continues to rise. Educational expenses for undocumented aliens are primarily borne by state and local governments with only minimal hope of reimbursement from the federal government. These escalating costs, coupled with the prohibition against private sector employment of undocumented aliens, makes the public utilization of these qualified aliens through peacetime military service a viable way to address this problem. Through peacetime military service, undocumented aliens will have access to advanced skills and technical training opportunities that are currently foreclosed.

Simultaneously, American taxpayers will realize a return on the billions of dollars spent to educate undocumented aliens. The development of a naturalization paradigm that allows full participation of both lawfully admitted and undocumented aliens in section 328 would be an acknowledgment by Congress of the military contribution that aliens have made to the United States since the Civil War. If undocumented aliens are worthy of expedited naturalization during times of war, then they must also be worthy of similar privileges when there is an urgent peacetime need to alleviate the manpower shortage currently faced by the U.S. Armed Forces. In both situations, the contributions of undocumented aliens bolster the ability of the U.S. Armed Forces to protect all residents of the United States, regardless of their immigration status.

Without a mechanism for the thousands of undocumented aliens residing in the United States to legally work and participate in the economic structure of our society, a caste system reminiscent of the African slaves during the 1880s will surely develop. Admittedly, the amnesty initiative proposed in this article offers minimal guidance about eliminating the problem of illegal immigration and border control in the United States. It does provide, however, an opportunity for a specific pool of qualified undocumented aliens to "earn" their place in American society. Under the current legislative scheme, this opportunity, absent another war or designated military conflict, will always be foreclosed to them.