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The Fight to be American: Military Naturalization and Asian Citizenship

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ABSTRACT

In 1862, Congress passed legislation granting foreigners serving in the U.S. military the right to expedited naturalization. Although driven by pragmatic concerns, "military naturalization" served as a powerful symbolic message: those willing to fight for the United States are worthy of its citizenship. At the same time, military naturalization conflicted with existing laws that limited naturalization to whites and blacks. In this Article, we analyze how courts weighed the competing ideologies of citizenship by examining court cases brought by Asian aliens seeking military naturalization between 1900 and 1952. Our research demonstrates the importance of instrumental and ideological pressures in shaping the legal understanding of U.S. citizenship, as well as the contradictions that emerged as the judiciary sought to bring coherence to conflicting legislative acts regarding naturalization. More significantly, we show how decisions made by the courts in defining the pertinent legal issues in military naturalization cases helped perpetuate racialized conceptions of citizenship.

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INTRODUCTION

In 1908, a district court in the state of Washington denied Buntaro Kumagai's application for naturalization on the basis of his racial status as Japanese.[1] In his opinion, Judge Hanford held that Congress had limited "the privilege of naturalization to white people," with the sole exception occurring in the aftermath of the Civil War, when, "in view of the peculiar situation of inhabitants of African descent, the laws were amended so as to permit the naturalization of Africans and aliens of African descent."[2] What makes Kumagai's case historically important is not that he was denied U.S. citizenship based on his racial status as "non-white" (because members of many different Asian immigrant groups had been denied citizenship on similar grounds previously),[3] but instead that he sought to naturalize based on his service in the U.S. Army.

Over forty years earlier, with passage of the Act of July 17, 1862, Congress had authorized the naturalization of "aliens" honorably discharged from U.S. military service.[4] It was under the provisions of this Act that Kumagai sought to gain citizenship. However, despite evidence provided by Kumagai that he had served honorably in the U.S. Army, the district court in Washington ruled that the racial restrictions governing naturalization in the Act of February 18, 1875, took precedence over those of military naturalization.[5] This legal conflict between military and race-based naturalization reflected a broader tension that existed, and still exists, within American society regarding U.S. citizenship. That is, the contrast between the ideological underpinnings of U.S. citizenship as universal and inclusive based on natural rights and principles of equality with U.S. policies, and practices that frequently promote racial differentiation and exclusion.[6]

Because citizenship is the dominant form of defining collective identity in modern societies, "struggles over citizenship's meanings are, in fundamental respects, struggles over competing normative visions of collective life."[7] Scholars of immigration, race, and nationality, therefore, utilize citizenship as a key concept to examine battles over community membership—i.e., who is allowed to acquire membership and which

1. *In re* Buntaro Kumagai, 163 F. 922, 924 (W.D. Wash. 1908).

2. *Id.* at 923.

3. *See generally* IAN HANEY LÓPEZ, WHITE BY LAW (1996) (providing a broad historical overview of the legal justifications used by judges to deny Asians U.S. citizenship).

4. Ch. 200, 12 Stat. 594, sec. 21. "Aliens" were legally defined as foreign-born individuals living in the United States, who had not become naturalized citizens.

5. *In re* Kumagai, 163 F. at 923-24.

6. *See* EVELYN GLENN, UNEQUAL FREEDOM: HOW RACE AND GENDER SHAPED AMERICAN CITIZENSHIP AND LABOR 1 (2002).

7. Linda Bosniak, *Citizenship, in* OXFORD HANDBOOK OF LEGAL STUDIES 184, 184 (Peter Cane & Mark Tushnet eds., 2003).

characteristics determine eligibility.[8] Some scholars further contend that public discourses about immigrants and citizenship help define "American-ness," ascribing meaning to citizenship by contrasting legitimate members of society with "aliens," "illegals," and "foreigners."[9]

In this Article, we study the relationship between race, naturalization, and citizenship by examining an important, yet generally ignored aspect of American history: the attempts of Asian aliens to gain U.S. citizenship through service in the U.S. military.[10] More specifically, we analyze court cases brought by resident Asian aliens who served in the U.S. military between 1900 and 1952 to understand how the legal system negotiated the competing ideologies of civic nationalism, represented by military naturalization, and ethno-cultural nationalism, symbolized by immigration and naturalization laws that favored aliens from Europe. In doing so, we seek to explain the role of structural and institutional factors in shaping the construction of citizenship, and how legal deliberations over the nature of citizenship influenced the evolution of national identity.

Military naturalization is particularly useful in examining the dynamics of U.S. citizenship. Central to military naturalization is a powerful symbolic message: those willing to fight and die for the United States are worthy of its citizenship. For immigrants historically considered "racially distinct," military naturalization afforded an opportunity to challenge preexisting conceptions of citizenship that equated color with country. Military naturalization also squared well with legal ideals of racial equality enshrined in the Declaration of Independence and the Fourteenth Amendment, as well as the operational exigencies of the military, which sought to meet its demands for labor.

At the same time, however, the influx of Asian aliens into the United States after the Civil War led to an increased hostility towards members of these groups and greater public support for restrictive immigration policies.[11] The growth of non-European populations also raised questions about who should be able to naturalize and to gain U.S. citizenship, and the characteristics that should determine these rights.[12] It is within this context that the judiciary, as the guardian of normative aspects of collective

8. Bosniak argues that current attempts to disallow birthright citizenship to children born in the United States to undocumented immigrant parents represent one such battle. *Id.* at 196.

9. LEO R. CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION 6 (2008); *see also* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 5-9 (2004).

10. Lucy E. Salyer, *Baptism by Fire: Race, Military Service, and U.S. Citizenship Policy, 1918-1935*, 91 JOURNAL OF AM. HISTORY, 847, 849 (2004) (noting that the research on war and citizenship has either focused on those who are already citizens (women and U.S.-born racial minorities) or foreign-born white ethnics (predominantly European immigrants), with little research on foreign-born minorities (in particular Asians)).

11. BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990, 21-27 (1993).

12. *See* HANEY LÓPEZ, *supra* note 3, at 3-4.

identity, sought to specify the meaning of naturalization and citizenship.

I. BACKGROUND

A. Constructing Citizenship: Race, Naturalization, and National Identity

Scholars studying the relationship between race and citizenship in the United States have stressed the historical conflict between two major ideologies of national membership: first, civic citizenship based on a shared set of values and beliefs; and second, ethno-cultural membership based on a common European heritage and culture.[13]

Early in American history, the concept of civic membership arose as a political rebuttal to the European feudal system, with its social hierarchies based on "differential legal and customary rights."[14] Instead, colonial leaders sought to establish a political order based on a social contract among members of free and equal status.[15] Thus, unlike Europe, America developed a belief that those who willingly contributed to the protection and the economic and political well-being of the community justly deserved an equal stake in membership.[16] This professed ideology of equality and inclusion became enshrined in the language of the Declaration of Independence, which begins with the phrase, "*We hold these truths to be self-evident, that all men are created equal . . . .*"[17]

At the same time, there existed equally strong beliefs that saw "American" national identity as rooted in Anglo-Saxon Protestant values and in the innate capacities of whites. Thus, certain racial groups, such as Native Americans and blacks, were viewed as unsuitable for the obligations and responsibilities of citizenship. Implicit was a fear that the entry of non-whites into the country posed a threat to the nature of America as a "white" nation.[18] This ideology of exclusion received legal weight early in American history when Congress passed the Act of March 26, 1790, which limited the right to naturalize to "free white persons."[19] From a legal

13. *See* Kitty Calavita, *Law, Citizenship, and the Construction of (Some) Immigrant "Others"*, 30 LAW & SOC. INQUIRY 401, 407 (2005); Evelyn Glenn, *Citizenship and Inequality: Historical and Global Perspectives*, 47 SOC. PROBLEMS 1, 3 (2000).

14. *See* Glenn, *supra* note 13, at 2.

15. *Id.*

16. JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, 127 (1978).

17. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

18. *See* ROGER M. SMITH, CIVIC IDEALS 2-3 (1997); *see also* Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 JOURNAL OF AM. HISTORY, 67, 69-71 (1999).

19. Ch. 3, 1 Stat. 103. Glenn notes that gender provided another dimension of exclusion. For women, the marriage contract superseded the social contract, and women's citizenship status depended on their husbands' status. Thus, an alien woman became a citizen if she married a U.S. citizen (unless she was racially ineligible), and a U.S.-born woman could lose her citizenship if she married an alien (until passage of the Cable Act in 1922, which permitted retention of citizenship for women as long as they did not marry aliens "ineligible for citizenship," or more specifically, as long as they didn't marry Asian aliens). *See* Glenn, *supra* note 13, at 4.

standpoint, this Act only dealt with the issue of which aliens were eligible to naturalize, and it left unanswered the question of birthright citizenship.[20] In principle, the concept of the "social contract" required that entry into citizenship be volitional and consensual, but in practice, being born in the United States was considered sufficient to garner citizenship rights for those of European descent.[21]

Contemporary race theorists stress the importance of examining not only how the legal system was used to exclude certain racial groups and how alien and immigrant groups fought for social inclusion, but also how group boundaries came to be and how boundaries were given meaning in the first place.[22] For instance, race scholars describe how the notion of "whiteness" developed in conjunction with the conquest and colonization of non-western societies by Europeans, and how the construction of non-European "others" helped Europeans justify the exploitation of their land and labor.[23]

With respect to U.S. minority groups, scholars who emphasize the ascribed and contested nature of race stress how legal decisions governing the social inclusion or exclusion of Asian Americans, Blacks, Hispanics, and Native Americans helped shape racial understandings in the United States.[24] Critically, these scholars point out the need to examine the pragmatic concerns that guided the construction of public policies concerning inclusion and exclusion, and shaped the ideologies used in their defense.[25] Thus, Kitty Calavita argues that the contradictions and inconsistencies involved in establishing racial boundaries reveal not only

20. *See* ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 23 (2001); *see also* KETTNER, *supra* note 16, at 287-88.

21. *See* KETTNER, *supra* note 16, at 287.

22. *See generally* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S (1994) (providing a general theoretical account of racial formation).

23. *See generally* GARY Y. OKIHIRO, COMMON GROUND: REIMAGINING AMERICAN HISTORY (2001); Ronald Takaki, *Reflections on Racial Patterns in America: An Historical Approach*, 1 ETHNICITY & PUB. POLICY, 1 (1982) (suggesting that the racial attitudes used by Europeans to defend the colonization of Asia were replicated by American settlers to justify their exploitation of the land and labor of Native Americans, Mexicans, Blacks and Asians).

24. Scholars have explicated these understandings with regard to specific racial and ethnic groups. *See, e.g.*, Neil Foley, *Straddling the Color Line: The Legal Construction of Hispanic Identity in Texas, in* NOT JUST BLACK AND WHITE 341 (Nancy Foner & George M. Fredrickson eds., 2004); GLENN, *supra* note 6; HANEY LÓPEZ, *supra* note 3; SUSAN KOSHY, SEXUAL NATURALIZATION: ASIAN AMERICANS AND MISCEGENATION (2004); OMI & WINANT, *supra* note 22; DAVID PALUMBO-LIU, ASIAN/AMERICAN: HISTORICAL CROSSINGS OF A RACIAL FRONTIER (1999); Laura E. Gomez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 CHICANO-LATINO L. REV., 9 (2005).

25. For instance, Koshy describes how in the early colonial period, when the livelihood of settlers was dependent on their relations with local Indian tribes, intermarriage between whites and Native American women was accepted and even encouraged. However, as whites gained control over Native American lands, these marriages became less and less acceptable, and were even banned in several states. *See* KOSHY, *supra* note 24, at 5-6.

the arbitrary nature of these constructions, but also "the often pragmatic and instrumental concerns driving them and shifting over time."[26]

Likewise, contemporary scholars of immigration distinguish between how immigration and naturalization laws are used to govern entry into the state and how these laws impact broader notions of national identity,[27] and they often stress how dominant ideologies are frequently manipulated to satisfy instrumental goals. For instance, Calavita illustrates the complicated relationship between immigration laws, naturalization laws, and national interests, by showing how, even as Congress sought to restrict most Chinese entry into the United States based on racial grounds with passage of the Chinese Exclusion Act of 1882,[28] Congress defended the entry of "honorable" Chinese merchants based on their superior "class" characteristics.[29]

Asians are particularly useful for examining the role of race and immigration for conceptions of citizenship and national identity because they were the first "racial" group to be specifically targeted and excluded from national membership by federal immigration laws.[30] In fact, some scholars argue that the Chinese Exclusion Act laid the groundwork for the use of racial distinctions in immigration law, and helped form definitions of "undesirable" and "excludable" immigrants.[31]

Furthermore, the restriction of Asian immigrants that began with the Chinese Exclusion Act,[32] continued with the Immigration Act of February 5, 1917,[33] and culminated in the Philippine Independence Act of 1934 (Tydings-McDuffie Act),[34] not only affected the development of Asian communities within the United States, but also ensured that the demographic composition of the United States would remain "whiter" than it might have been otherwise.[35] In addition, the linking of immigration with

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26. Kitty Calavita, *Immigration Law, Race, and Identity,* 3 ANNUAL REVIEW OF LAW & SOC. SCI., 1, 8 (2007).

27. *See* Bosniak, *supra* note 7, at 196; Calavita, *supra* note 13, 403-05.

28. Ch. 126, 22 Stat. 58

29. Kitty Calavita, *Collisions at the Intersection of Gender, Race, and Class: Enforcing the Chinese Exclusion Laws,* 40 LAW & SOC'Y REV., 249, 259 (2006).

30. *See* Calavita, *supra* note 26, at 3; HING, *supra* note 11, at 23.

31. Erika Lee, *American Gatekeeping: Race and Immigration Law in the Twentieth Century, in* NOT JUST BLACK AND WHITE, 119, 124, (Nancy Foner & George M. Fredrickson eds., 2004).

32. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (prohibiting Chinese laborers from entering the United States for a period of ten years). The Geary Act, ch. 60, 27 Stat. 25 (1892) extended the exclusion of Chinese laborers for another ten years. They were permanently barred by the Act of April 27, 1904, ch. 1630, 33 Stat. 428.

33. Ch. 29, 39 Stat. 874. This Act created the Asiatic Barred Zone, banning immigration from most parts of Asia. *Id.* at 876. China and Japan were excluded from this Act, since previous legislation had already barred their entry.

34. Ch. 84, 48 Stat. 456 (1934). The Tydings-McDuffie Act provided for Phillipine self-government and for Phillipine independence after a ten-year "transitional" period. *Id.* at 463. It also reclassified Filipinos from "nationals" allowed to live in the U.S., to aliens subject to the Immigration Act of 1917 and the Immigration Act of 1924. *Id.* at 462.

35. *See* HANEY LÓPEZ, *supra* note 3.

naturalization in the Immigration Act of May 26, 1924,[36] which barred the entry of aliens ineligible for citizenship, reinforced the notion of Asians as intrinsically foreign and perpetual outsiders.[37] Thus, the study of Asians offers an important corrective to legal research on race and citizenship that too often emphasizes the black-white paradigm and frequently ignores the naturalization of non-Europeans.[38]

B. Serving One's Country: The Military and Citizenship

Perhaps no social institution better captures the relationship between the nation-state and its citizens than the military. At the most basic level, the military represents the state's ability to create and maintain national borders, and thus the state's ability to delineate the geographic boundaries that differentiate between insiders (citizens and denizens) and outsiders (foreigners). More relevant for the current discussion, beginning with the French and American Revolutions, the ideological and normative definitions of the nation-state and citizenship became intertwined with military participation.[39] Specifically, in the United States, there arose the belief that not only was military service a duty and right of citizenship, but also that individuals who fought for the United States proved their worth for citizenship.[40] As Morris Janowitz describes:

> The legitimacy of these armed forces was based on an appeal to defend individual freedoms and achieve social and political justice. To arm the ordinary person and to declare his right to bear arms constituted a revolutionary appeal, serving the immediate requirements of raising military cadres and drawing elements from a wide variety of social strata. But this ideological and propaganda call was not only a military formula. It was a political definition which served to enlarge the concept of who were effective members of the polity. Like nationalism, it supplied a key ingredient in the expansion of the electorate.[41]

In principle, military service was supposed to be limited to those who were already citizens;[42] however, the United States has a long history of

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36. Ch. 190, § 13 43 Stat. 153.

37. *See* Natsu T. Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 O. L. REV. 261, 279 (1997); Deenesh S. Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws and the Construction of Asian Identities*, 41 LAW & SOC'Y REV. 587, 607-08 (2007).

38. *See* ANCHETA, *supra* note 20; *see also* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1267 (1993).

39. Morris Janowitz, *Military Institutions and Citizenship in Western Societies*, 2 ARMED FORCES & SOC'Y 185, 198-99 (1976).

40. *See id.* at 199-200; *see also* James B. Jacobs & Leslie A. Hayes, *Aliens in the U.S. Armed Forces: A Historico-Legal Analysis*, 7 ARMED FORCES & SOC'Y 187, 188 (1981).

41. Janowitz, *supra* note 39, at 199.

42. *See* NANCY G. FORD, AMERICANS ALL!: FOREIGN-BORN SOLDIERS IN WORLD WAR I 47 (2001).

formal and informal service by aliens in its military. During the Revolutionary War, German and Irish nationals made up a large percentage of General Washington's forces, and although Congress technically restricted the enlistment of aliens following independence, these restrictions were typically suspended in times of military crisis.[43] For example, during the War of 1812[44] and the Mexican-American War (1846-1848),[45] resident aliens from Europe were allowed to serve in the Army. Similarly, during the Civil War, the Union Army actively enlisted resident aliens to serve, and unofficially encouraged the recruitment of immigrants from Europe through the inducement of passage to the United States.[46]

While a practical solution to pressing military needs, the use of aliens in the military also was based on the belief that those willing to serve voluntarily demonstrated the necessary qualities for national membership. During the Civil War, Congress legitimized "military naturalization" as an avenue to citizenship by passing the Act of July 17, 1862, which stated:

> 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 . . . may be admitted to become a citizen of the United States . . . and that he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen.[47]

In terms of citizenship, the general purpose of naturalization is to make aliens legally "the same" as native-born Americans.[48] Typically, the naturalization process involved a waiting period of several years, during which aliens served an "'apprenticeship' to allow the individual immigrant to become firmly attached to the well-being of the Republic."[49] This ensured that individuals could demonstrate their loyalty and allegiance, key qualities necessary for constructing and maintaining national unity.[50] Military service was seen as more than adequately demonstrating these normative qualities, thus validating the shorter waiting periods permitted by military naturalization.[51]

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43. *Id.* at 47-48.

44. During the War of 1812, Congress fought President James Monroe's attempt at national conscription by doubling bounties for enlistment and extending enlistment to non-citizen immigrants and free Blacks. A compromise was achieved which allowed aliens to enlist in the Army, but prevented them from serving as officers. *See id.*

45. Jacobs & Hayes, *supra* note 40, at 188.

46. *See id.*; *see also* Robert Peterson & John Hudson, *Foreign Recruitment for Union Forces,* 7 CIVIL WAR HISTORY 176, 184-85 (1961).

47. Ch. 200, § 21, 12 Stat. 594, 597 (reducing the waiting period from the usual five years).

48. *See* KETTNER, *supra* note 16, at 9.

49. *Id.* at 243.

50. *See id.* at 10.

51. *See* Table 1.

Table 1: Selected Military Naturalization Laws: Eligibility and Service Requirements

Name of Law	Eligibility for Military Naturalization	Residency and Service Requirements
Naturalization Act of April 14, 1802[1]	Set residency requirement for naturalization at **five years**; Required a **declaration of intention** to become a U.S. citizen three years before admission	n/a
Act of July 17, 1862	"Any alien" – with service in armies of the United States (no declaration of intention required)	1 year residency
Act of July 26, 1894	"Any alien" – with service in USN or USMC[2] (with declaration of intent to become citizen)	5 years in USN 1 enlistment in USMC
Act of August 1, 1894	"Non-citizens" ineligible to serve in Army in time of peace	n/a
Act of June 30, 1914	"Any alien" who may under existing law become a citizen – with service in USN/USMC/ Naval Auxiliary Service/ Revenue-Cutter Service (no declaration of intention or proof of residence required)	4 years of service
Act of May 22, 1917	"Any aliens who may under existing law become citizens of the U.S." – with service in the Naval Reserve Force	1 year of service (wartime)
Act of May 9, 1918	"Any native-born Filipino" – with service in USN/USMC/ Naval Auxiliary Service; "Any alien or any Porto Rican" – with service in U.S. Army, National Guard, Naval Militia, USN, USMC, USCG	3 years of service

Name of Law	**Eligibility for Military Naturalization**	**Residency and Service Requirements**
Act of July 19, 1919	"Any alien" – who served in military or naval forces of the U.S. during the current war (WWI)	No residency requirement
Act of Nov. 6, 1919	"[E]very American Indian who served in the Military or Naval Establishments of the United States" during the war (WWI)	No residency requirement
Act of June 24, 1935	Amended racial restrictions and allowed any alien, previously ineligible for citizenship because of race, to naturalize if they had served honorably in WWI	No residency requirement
Nationality Act of Oct. 14, 1940	Naturalization limited to white persons, persons of African nativity or descent, and descendents of races indigenous to Western Hemisphere, *and* native-born Filipinos having served honorably in the U.S. Army, USN, USMC, or USCG	Pre-existing requirements
Immigration and Nationality Act of June 27, 1952	Sec. 328: Honorable service in the U.S. armed forces for a period of three years; Sec. 329: Provided naturalization for aliens and non-citizens who had served honorably in active-duty status in the U.S. military, air, or naval forces during WWI or WWII, whether or not at time of enlistment, he had been lawfully admitted to the U.S. for permanent residence	3 years of military service (no residency requirement) Retroactive citizenship for aliens who served in WWI or WWII
Act of Aug. 17, 1961	Restricted military service in U.S. Army and USAF in times of peace to U.S. citizens or permanent residents	n/a

Name of Law	Eligibility for Military Naturalization	Residency and Service Requirements
Act of Oct. 24, 1968	Amended the Immigration and Naturalization Act of 1952 (Sec. 329), to provide for naturalization of those who served active-duty service in the Armed Services of the U.S. during the Vietnam hostilities, and other periods of military hostilities (including Korean hostilities)	No period of residency required
Immigration Act of Nov. 29, 1990	Sec. 405. Allowed for naturalization of natives of the Philippines through certain active-duty service in WWII, including those who had served honorably in the U.S. Armed Forces, or within the Philippine Army, or the Philippine Scouts (limited applications for naturalization to 2-year period from passage of Act)	No period of residency required
National Defense Authorization Act of 2004	Sec. 1701-1705: Reduced period of active service from three years to one year; Granted posthumous citizenship to aliens, and posthumous benefits for surviving spouses, children, and parents	1 year of service

[1] Between 1790 and 1802, the residency requirement for naturalization went from two years (Act of March 26, 1790), to five years (Act of January 29, 1795), to fourteen years (Naturalization Act of June 18, 1798), before Congress settled on five years as the necessary residency requirement for naturalization (which remains the current criteria). Significant exceptions to this residency requirement have been made for non-citizen spouses and children of U.S. citizens, and for those who served in the military.

[2] Branches of the United States Military: USN (United States Navy); USMC (United States Marine Corp); USCG (United States Coast Guard).

After the Civil War, the U.S. military shifted from a primarily volunteer organization to one based on a professional core of soldiers supplemented by conscripts during periods of conflict. In this new era, military naturalization helped to resolve troublesome issues related to military labor requirements and international relations. During World War I, the question of whether or not to use aliens as combatants forced national leaders to justify either: (1) forcing aliens—who did not possess the full

benefits of national membership—to fight in defense of the United States, or (2) allowing aliens to profit from living in America, while its "native sons" died.[52] Furthermore, the use of aliens raised diplomatic protests from other countries, which considered the drafting of their countrymen a violation of international law.[53]

Congress solved both of these problems when it passed the Act of May 9, 1918,[54] which granted "any alien serving in the military during the war" the right to expedited citizenship.[55] By promising citizenship for service, military naturalization increased military rolls and created new Americans. Between 1918 and 1920, about 45 percent of the nearly five hundred fifty thousand individuals who gained U.S. citizenship did so through military naturalization. A similar pattern, though less pronounced, can be observed during other major U.S. military conflicts.[56]

Table 2: U.S. Military Naturalizations as a Percentage of Total Naturalizations: 1918-2005[1]

Years	Number of Persons Naturalized	Number of Persons Naturalized through Military	% of total Naturalizations through Military
1918-1920	546,490	244,300	44.7
1921-1925	799,790	44,383[2]	5.6
1926-1930	973,395	11,823	1.2
1931-1935	626,072	7,023[2]	1.1
1936-1940	892,392	12,868	1.4
1941-1945	1,539,972	112,531	7.3
1946-1950	447,056	37,268	8.3
1951-1955	562,779	29,838	5.3
1956-1960	627,167	11,867	1.9
1961-1965	600,468	12,304	2.1
1966-1970	519,795	23,764	4.6
1971-1975	618,554	38,882	6.3
1976-1980	846,218	28,044	3.3
1981-1985	960,693	17,134	1.8
1986-1990	1,253,572	11,183	0.9
1991-1995	1,785,186	24,631	1.4
1996-2000	3,834,706	4,314	0.1
2001-2005	2,786,548	14,956	0.5

52. *See* FORD, *supra* note 42, at 52-55.
53. *Id.* at 56.
54. Veteran's Law, ch. 69, 40 Stat. 542 (1918).
55. *See* FORD, *supra* note 42, at 63-64.
56. *See* Table 2.

[1] Data compiled from U.S. Department of Homeland Security. 2005 Yearbook of Immigration Statistics. Table 20. Data on naturalizations were first compiled by a single federal agency with the establishment of the Naturalization Service in 1906. Data on military naturalizations prior to 1918 is not available.
[2] Special provisions for military naturalizations expired or were suspended in 1925 and 1935.

Scholars note that for many European aliens, military naturalization provided an avenue for citizenship, as well as a force for their Americanization.[57] Yet, even as the military provided an opportunity for white aliens to prove their "worthiness" for citizenship, the military frequently restricted service among its own citizens.

During the Revolutionary War, blacks fought on both sides of the war. Many of them were promised, and all of them hoped, that loyalty to their respective sides would be rewarded by greater social and legal rights.[58] In the Civil War, blacks represented one-tenth of the Union Army and a quarter of the Navy.[59] Even after acquiring citizenship following the Civil War, black leaders continued to recognize the need to legitimize their membership, going as far as to suggest during World War I "that blacks could earn their citizenship rights in American society by helping to defeat the kaiser."[60] However, the use of blacks followed a clear pattern between independence and World War II:

> At first, the authorities declined to enlist them. As the shortages of manpower became apparent, they were grudgingly enrolled, largely for menial work rather than combat duty and denied positions that might give them authority over white servicemen. With the passage of time the consumption of cannon fodder would grant some the right to bleed for their country. And when the shooting was over and the number of men under arms sharply reduced, they were the first to be dismissed.[61]

Similar to blacks, the recruitment of Asian aliens for the U.S. military arose from a need for manual labor. The forced opening of Japan by Commodore Perry in 1853 began a period of growing U.S. involvement in Asia. In 1898, the United States "annexed" the Philippines and Hawaii, and in the following year began its "Open Door" policy in China.[62] The increased demands placed on the military to protect U.S. interests in Asia led the military to use local labor (i.e., Asian nationals). Filipinos, who were most prominent among these Asian groups, were viewed as a useful

57. *See, e.g.*, FORD, *supra* note 42; KETTNER, *supra* note 16; Jacobs & Hayes, *supra* note 40.

58. DAVID R. SEGAL, RECRUITING FOR UNCLE SAM 103 (1989). During the revolutionary war, approximately twenty thousand blacks served with the British, hoping to be emancipated. *Id.* In order to stem such "defections" the Continental Congress allowed black soldiers to continue to enlist. *Id.*; *see also* MARTIN BINKIN ET AL., BLACKS IN THE MILITARY 12-13 (1982).

59. SEGAL, *supra* note 58, at 103.

60. *Id.* at 106.

61. GERALD ASTOR, THE RIGHT TO FIGHT: A HISTORY OF AFRICAN AMERICANS IN THE MILITARY 14 (1998).

62. *See* Takaki, *supra* note 23, at 25-26.

source of low skilled labor because of the new status of the Philippines as a protectorate of the United States. Starting in 1901, Filipinos were given their own regiments in the armed services, under the U.S. Army's Philippine Department.[63] However, the use of Filipinos and other Asian aliens presented a conflict for the U.S. government. If these individuals showed characteristics worthy of citizenship, then denial of citizenship meant that the United States was not adhering to its ideological principles of equality. But if they were not eligible for citizenship, then their presence in the military was questionable.

In "Baptism by Fire: Race, Military Service, and U.S. Citizenship Policy," Lucy Salyer provides a detailed examination of how Asian aliens who had served in World War I successfully used their service record to contest racial restrictions on citizenship.[64] Salyer argues that the post-World War I success of Asian servicemen in securing citizenship "reveals how racialist definitions of citizenship . . . could be dislodged when other ideals of citizenship—in particular, the warrior ideal—better served strategic and ideological needs."[65]

Yet, while the United States has had major periods of liberalization and democratization, these typically have occurred due to external pressures and often have been followed by the retrenchment of discriminatory policies towards minorities.[66] In fact, American resistance to egalitarian ideals has been so great that significant gains have only occurred during periods where Americans have "fought great wars against opponents hostile to such ideals," and where circumstances made "pursuit of egalitarian liberal republican principles politically advantageous."[67] However, gains made during these periods "have often created the conditions for the resurgence of inegalitarian ideologies and institutions."[68]

C. The Role of the Legal System

While U.S. immigration and naturalization policy is influenced by the labor needs of the U.S. economy, the military, the political interests of the

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63. The Philippine Scouts, as they were known, were given the suffix (PS) to distinguish them from other regiments. Filipinos accounted for over ten percent of enlisted men serving in the Philippines. *See generally* James Woolard, The Development of America's Colonial Army (1975) (unpublished Ph.D. Dissertation, Ohio State University (on file with Library of Congress) (providing a detailed history of the incorporation of Filipinos into the U.S. Army in the Philippines).

64. Salyer, *supra* note 10.

65. *Id.* at 849.

66. *See* SMITH, *supra* note 18, at 5.

67. *Id.* at 16. (identifying America's battles against the British monarchy, the Southern slavocracy, and the totalitarian regimes of Hitler and Stalin in World War II and the Cold War years, as leading respectively to the creation of state and national democratic republics, the freeing of slaves, and the end of Jim Crow).

68. *Id.* at 5. For instance, the post Civil War period when blacks gained citizenship and the right of franchise, was soon followed by the development of Jim Crow, leading to the formal exclusion of most blacks from voting from 1905 thru 1965. *Id.* at 371.

majority, and the public opinion regarding the nature of citizenship, these factors have evolved and changed over time, and have frequently conflicted with one another. Furthermore, the complexity of the legal system generated tensions between the legislative branch, which was more responsive to the needs of special interests and public sentiment, and the judiciary, which had greater autonomy and an internal pressure to maintain consistent legal norms. Thus, while the legislature responded to the needs of its diverse constituencies by generating vague and often conflicting policies regarding naturalization and citizenship requirements, the judiciary sought to define the underlying principles that would bring coherence to these policies.

For instance, after the Civil War, Congress amended the U.S. Constitution and passed a series of acts in order to provide blacks both citizenship and equal protection under the law as citizens. Thus, the Civil Rights Act of April 9, 1866, stipulated that:

> [A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared citizens of the United States, and such citizens, of every race and color, without regard to slavery or involuntary servitude . . . shall have the same right, in every State and Territory of the United States . . . as is enjoyed by white citizens . . . .[69]

Two years later, the Fourteenth Amendment further clarified eligibility requirements for citizenship, and the rights that citizens enjoyed:

> All persons born or naturalized in the United States . . . are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[70]

In theory, the Civil War acts and amendments appeared to remove racial status as a criterion for U.S. citizenship. During debates regarding the wording of the Naturalization Act of July 14, 1870, a few Congressmen led by Senator Sumner of Massachusetts, sought to strike down the term "white" from naturalization laws altogether.[71] However, faced with concerns by representatives from Western states that the growing Chinese population would seek citizenship rights, Congress ultimately rejected proposals either to make naturalization statutes colorblind or to extend

69. Ch 31, 14 Stat. 27.
70. Civil Rights Act of 1875, ch. 114, 18, Stat. 335, 336.
71. *In re* Ah Yup, 1 Cas. 223 (C.C.D. Cal. 1878).

naturalization rights to Asian immigrants.[72] Consequently, the Act of February 18, 1875, ultimately stated: "The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity, and to persons of African descent."[73]

In the courts' efforts to reconcile conflicts in congressional legislation regarding the rights of Asians to seek citizenship, the judiciary sought to distinguish between the U.S. born and aliens, and between the "rights of citizens" and the "right to become citizens." Specifically, the courts distinguished between the role of race in limiting the rights of U.S. citizens, and the role of race for determining access to U.S. citizenship. Furthermore, and perhaps more importantly, the courts granted Congress nearly unrestricted power over immigration and naturalization through the "plenary power doctrine."[74] In *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States*, the Supreme Court laid the foundation for the doctrine that "Congress had the sovereign power to regulate immigration, and that this power was beyond judicial review."[75] Thus, while the Supreme Court would eventually rule in *United States v. Wong Kim Ark*[76] that U.S.-born Asians were guaranteed birthright (*jus soli*) citizenship, they also came to rule that foreign-born Asians were ineligible to naturalize because they were not white.[77]

This Article argues that this distinction between the "rights of citizens" versus the "right to become a citizen" is crucial to understanding how the courts sought to resolve the ideological tensions inherent in military naturalization cases. While our research supports the claims of many contemporary race theorists with respect to the link between pragmatic pressures and passage of more inclusive legislation governing citizenship, this Article argues that how the judiciary interpreted and gave meaning to this legislation is just as important for understanding the history of racial progress.

This Article expands on Salyer's work in two important ways.[78] First, this Article broadens the historical period to include both World War I and

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72. *See* ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE 79-80 (1999); *see also* Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes,* 36 WM. & MARY L. REV. 1, 12-13 (1994).

73. Ch. 80, 18 Stat. 316, 316-21.

74. *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration,* 46 UCLA L. REV. 1, 5 (1998).

75. *Id.* at *12.* In *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), also known as the Chinese Exclusion Case, the Supreme Court upheld a part of the Chinese Exclusion Act (1888) that Chinese could be excluded from the U.S., even though they were U.S. residents who possessed government issued papers assuring their return; while in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), the Supreme Court ruled that an "alien" could be deported based solely on his race.

76. 169 U.S. 649 (1898).

77. *See* Ozawa v. United States, 260 U.S. 189, 198 (1922); United States v. Bhagat Singh Thind, 261 U.S. 204, 215 (1923).

78. *See* Salyer, *supra* note 10.

World War II and the periods that immediately preceded and followed these wars. This broader period allows us to demonstrate that, while periods of military crisis created conditions favorable for Asians to challenge dominant racial ideologies of U.S. citizenship, this did not necessarily lead to fundamental changes of more universal ideals of citizenship. Second, whereas Salyer emphasizes the administrative role of the Bureau of Naturalization in implementing legislative dictates and court decisions with respect to the military naturalization of Asian aliens, this Article instead focuses on the role of the judiciary in reconciling conflicting legislative acts. In particular, we examine how federal courts chose to define the pertinent legal issues in military naturalizations cases and how their decisions helped perpetuate racialized conceptions of citizenship.

II. DATA AND FINDINGS

In this Article, we examine how the legal system negotiated the conflicting ideologies of military and race-based citizenship. We do so by examining all federal court cases brought by Asians seeking to naturalize between 1900 and 1952 in which there is any reference to military service and naturalization.[79] Descriptions of the court cases were compiled using the Lexis-Nexis electronic database service. In sum, fifteen cases[80] were brought before federal courts during this period.[81] These cases were analyzed to understand how the courts sought to resolve apparent contradictions between congressional legislation governing immigration and naturalization more generally and congressional legislation regarding military naturalization. In addition, we examined how the courts justified the differential treatment of various Asian groups with respect to military naturalization.

The legal question of the right of Asian aliens to seek military naturalization appeared to place into direct conflict the respective ideologies of civic and ethno-cultural membership. Specifically, Asian military naturalization cases put courts in the position of resolving the contradiction between military naturalization legislation, which granted "all aliens" who had served in the military the right to naturalize, and more

79. Passage of the Immigration and Nationality of Act of June 27, 1952, ch. 2, 66 Stat. 163, 182-88, also known as the McCarran-Walter Act, formally eliminated race as a bar to immigration.

80. Toyota v. United States, 268 U.S. 402 (1925); De La Ysla v. United States, 77 F.2d 988 (9th Cir. 1935); United States v. Javier, 22 F.2d 879 (D.C. Cir. 1927); Bessho v. United States, 178 F. 245 (4th Cir. 1910); United States v. Toyota, 290 F. 971 (D. Mass. 1923); *In re* Charr, 273 F. 207 (W.D. Mo. 1921); *In re* Song, 271 F. 23 (S.D. Cal. 1921); *In re* Para, 269 F. 643 (S.D.N.Y. 1919); *In re* Bautista, 245 F. 765 (N.D. Cal. 1917); *In re* Rallos, 241 F. 686 (E.D.N.Y. 1917); *In re* Mallari, 239 F. 416 (D. Mass. 1916); *In re* Lampitoe, 232 F. 382 (S.D.N.Y. 1916); *In re* Alverto, 198 F. 688 (E.D. Pa. 1912); *In re* Knight, 171 F. 299 (E.D.N.Y. 1909); *In re* Kumagai, 163 F. 922 (W.D. Wash. 1908).

81. Salyer reports that despite the general judicial sentiment that ran against allowing Asian soldiers to naturalize, the Bureau of Naturalization recorded 218 Japanese alien soldiers who were allowed to naturalize by administrative decision in twenty different courts immediately after WWI (mainly in Hawaii). Salyer, *supra* note 10, at 861 n.37

general naturalization laws that limited naturalization to whites and blacks.

A. Chinese and Japanese Military Naturalization Cases

In the first cases to come before the federal courts, judges sought to deny that legislation allowing the military naturalization of aliens presented a challenge to existing race-based policies denying Asian aliens the right to naturalize. Critically, the courts skirted the issue regarding the constitutionality of race-based naturalization laws by drawing on the distinction between citizens and aliens. The courts appeared to follow the precedent established in earlier Supreme Court cases,[82] that decisions regarding who should be allowed to enter the country and who could become a citizen were matters of "national interest" and thus strictly the purview of Congress.[83]

For instance, in the case of *In re Buntaro Kumagai*, the District Court in Washington ruled that as a Japanese alien, Buntaro Kumagai was ineligible for naturalization despite serving honorably in the U.S. Army.[84] In presenting the opinion of the court, Judge Hanford emphasized the distinction between those born in the United States, who had the *right* to citizenship "without distinction to race or color," and aliens, who could only claim the *privilege* of becoming citizens under the provisions of laws enacted by Congress.[85] He further held that the Constitution clearly delineated the roles of Congress and the courts with respect to naturalization:

> By our Constitution the power to provide for the naturalization of aliens is vested in Congress, the courts have no power to admit aliens to citizenship, otherwise than in accordance with the laws which Congress has enacted.[86]

By invoking the plenary power doctrine, Judge Hanford shifted the legal question from whether military naturalization laws provided a potential challenge to the ideology of race-based citizenship to whether legislation allowing military naturalization presented an *exception* to existing laws that limited naturalization to whites and blacks. Judge Hanford held that because both the Act of July 17, 1862 which authorized military naturalization, and the Act of February 18, 1875, which limited

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82. *E.g.*, Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. United States, 130 U.S. 581 (1889).

83. *See* PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP 19-22 (1998) (arguing that this legal order, which he calls "Classical Immigration Law," allowed immigration law to be "insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system").

84. *In re* Buntaro Kumagai, 163 F. at 924.

85. *Id.* at 923.

86. *Id.*

naturalization to whites and blacks, had been incorporated into existing relevant immigration and naturalization law,[87] Congress had clearly intended the latter to provide "a rule of construction applicable to [existing relevant immigration and naturalization law]."[88] In other words, the District Court in Washington ruled that military naturalization had to give way to the broader framework of race-based naturalization that had been established in, for example, *In re Ah Yup* and *In re Saito*, which prohibited Asian aliens from naturalizing because they were not white.[89]

This ruling reinforced the idea that naturalization laws served as an important tool in maintaining the demographic and ideological dominance of "whiteness" for U.S. citizenship and national identity. As Judge Hanford noted in the conclusion of his opinion: "[t]he use of the words 'white persons' clearly indicates the intention of Congress to maintain a line of demarkation (sic) between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country."[90]

A year later, in *In re Knight*,[91] the District Court in New York reached a similar conclusion concerning military naturalization. Knight, whose father was English and whose mother was half-Chinese and half-Japanese, had served in the U.S. Navy, and even received a medal in the battle of Manila Bay (1898).[92] Knight argued that his Navy service entitled him to naturalization under the Act of July 26, 1894, which specified that:

> Any alien of the age of twenty-one years and upward who has enlisted or may enlist in the United States Navy or Marine Corps, and has served or may hereafter serve five consecutive years in the United States Navy or one enlistment in the United States Marine Corps, and has been or may hereafter be honorably discharged, shall be admitted to become a citizen of the United States . . . .[93]

While acknowledging Knight's intelligence and good character, Judge Chatfield argued that the provisions of the Act of May 6, 1882 (The Chinese Exclusion Act) and section 2169 of the Revised Statutes of 1901 forbade the naturalization of persons of the "Mongolian race."[94] Citing the

87. *Id.*

88. *Id.* at 924.

89. In the case of *In re Ah Yup*, 1 F. Cas. 223, 225 (C.C.D. Cal. 1878) (No. 104), the Circuit Court in California ruled that since Congress had limited naturalization to "free white persons" and "persons of African descent" in the Act of February 18, 1875, Chinese, as "Mongolians," were ineligible to become U.S. citizens. Similarly, in *In re Saito*, 62 F. 126, 127 (D. Mass. 1894), the Circuit Court of Massachusetts ruled that since Congress had refused to eliminate the word "white" from the Act of February 18, 1875 it was clear that they had intended to exclude "Asiatics" from citizenship.

90. *In re* Kumagai, 163 F. at 924.

91. *In re* Knight, 171 F. 299 (E.D.N.Y. 1909).

92. *Id.* at 300.

93. Ch.165, 28 Stat. 123, 124; *In re* Knight, 171 F. at 300.

94. *In re* Knight, 171 F. at 300-01 (citing the precedent established in *In re Camille*, 6 Fed. 256

precedent established in *In re Buntaro Kumagai*, the Court found that this held true "even with honorable service in the army or navy."[95] In addition, Judge Chatfield argued that Congress must have known that members of other races would serve in the U.S. Army and Navy.[96] Therefore, by *not specifying* which racial groups were eligible for military naturalization, Congress had meant to limit military naturalization to whites and blacks, the only two racial groups allowed under more general naturalization acts to become citizens.[97]

A year later in *Bessho v. United States*, a Japanese petitioner who had served in the Navy sought to challenge this judicial interpretation of "congressional intent" before the Court of Appeals for the Fourth Circuit.[98] Bessho's counsel argued that because the congressional legislation that granted military naturalization had followed that which limited naturalization to whites and blacks, Congress had intended racial restrictions to yield to the broader civic-based citizenship available to "any alien" who served.[99] In denying Bessho's request, Judge Goff admitted that on its own merit the Act of July 26, 1894 would allow "any alien" who served in the military to be admitted as a citizen.[100] However, he stated that one could not read this Act in isolation from other legislation, and argued instead that the Act of June 29, 1906, which had led to the establishment of the Bureau of Immigration and Naturalization, better revealed congressional intent.[101] He argued that because the Act of 1906 repealed many other statutes in order to create "a uniform rule for the naturalization of aliens," the fact that it did not specifically repeal section 2169 of the Revised Statutes meant that Congress must have intended race still to matter in questions of citizenship, even though section 2166 was retained.[102] The court thus reiterated the underlying dominance of race-based citizenship.

In each of these three cases, the courts interpreted congressional legislation granting naturalization for military service as constrained by, rather than co-existing with, laws restricting naturalization to whites and blacks. Significantly, the courts appeared to take for granted the right of Congress to regulate the naturalization of aliens without judicial oversight.[103] Thus, the courts created a situation whereby Congress could

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(D. Or. 1880) and ultimately holding that Knight's mixed racial status did not permit him to be classified as a "white person").

95. *Id.* at 300.

96. *Id.* at 301.

97. *Id.*

98. 178 F. 245 (4th Cir. 1910). Bessho had unsuccessfully filed a petition to naturalize at the District Court of the United States for the Eastern District of Virginia. *Id.* at 245.

99. *Id.*

100. *Id.*

101. *Id.* at 247.

102. *Id.*

103. While the courts did not cite the Supreme Court cases that had established the "plenary power

use race to restrict foreign-born Asians from seeking citizenship outside the purview of the courts, even where race-based laws that limited the rights of U.S.-born Asians were technically considered unconstitutional and thus open to judicial review.[104] Furthermore, in doing so, the courts defined the legal question as one of establishing consistency in congressional legislation governing naturalization, rather than one of establishing consistency over the racial requirements for citizenship. However, by explicitly recognizing the bravery and good character of Asian aliens, yet denying them the right to naturalize, the courts reaffirmed that race trumped civic duty as the key characteristic of American national identity.

B. Filipino Military Naturalization Cases

When Filipino nationals first tried to naturalize based upon their military service, federal courts used the same arguments that courts had previously applied to Chinese and Japanese nationals. For instance, in *In re Alverto* (1912),[105] Judge Thompson, presenting the opinion of the District Court in Pennsylvania, cited the precedent established in the three prior cases to limit the scope of the naturalization laws:

> It is apparent, therefore, that, however commendable the service of the applicant in the navy, the provisions of law in relation to naturalization of persons in the army and navy were intended by Congress to grant to those serving in the army and navy, who were of the white or African races, exemption from the necessity of a previous declaration of intention . . . but were not intended to extend the benefit of naturalization laws to those not coming within the racial qualifications.[106]

Furthermore, the court ruled that because the Philippines and Puerto Rico were protectorates of the United States, its citizens were technically not aliens, a prerequisite for naturalization.[107]

During the years leading up to World War I, the growing U.S. military presence in the Philippines and the need to protect American interests in Asia had led to the active recruitment of Filipinos by the U.S. Navy to staff its more menial positions such as stewards and messmen.[108] From 1903 to the start of the war in 1914, the number of Filipinos serving in the U.S.

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doctrine" in these three cases, in the first two cases, the courts clearly state that naturalization is strictly under the domain of Congress.

104. *See* SCHUCK, *supra* note 83, at 28. Judicial review would theoretically be available under the due process and equal protection clauses of the Fifth and Fourteenth Amendments. *See* U.S. CONST. amend. V, cl. 3; amend. XIV, § 1, cls. 3-4.

105. 198 F. 688 (E.D. Pa. 1912).

106. *Id.* at 690. Reiterating the position held in previous cases, the court stated that naturalization created a "political status which is entirely the result of legislation by Congress . . . ." *Id.* at 691.

107. *Id.* at 690; *see also In re* Lampitoe, 232 F. 382 (S.D. N.Y. 1916) ("The case falls exactly within [*In re Alverto*] and needs no other consideration.").

108. *Cf.* SEGAL, *supra* note 58, at 106.

Navy grew from nine individuals to six thousand.[109] The increasing numbers of Filipinos serving in the U.S. Navy brought additional pressure on the legal system to adjudicate the distinction between military and race-based naturalization.

At the start of World War I, Congress passed the Act of June 30, 1914, which granted citizenship for aliens who had served for four years in the U.S. Navy or Marine Corps and had received an honorable discharge.[110] As with previous legislation granting military naturalization, Congress did not specify racial eligibility or restrictions. However, Congress did specify that only aliens who could become citizens "under existing law" were eligible for military naturalization.[111] In the following years, various courts would rule on whether non-U.S.-born Asians, and in particular Filipinos, had the right to gain citizenship through military service. Particularly critical in judicial deliberations regarding Filipinos was their legal status as "non-alien/non-citizens" and the perceived need of the military to attract foreign military labor.

In 1916, in *In re Mallari*, the District Court of Massachusetts took the unusual position of using the unique legal status of the Philippines to support the right of Filipinos to seek citizenship.[112] Rather than arguing that Filipinos were technically not aliens and thus ineligible to naturalize, Judge Morton found that section 30 of the Act of June 29, 1906 authorized the admission of citizenship to "all persons not citizens who owe permanent allegiance to the United States . . . ."[113] Thus, the court declared that Mallari would be eligible to naturalize based on his status as a resident of the Philippines.[114] To support this position, which ran counter to *In re Alverto*, Judge Morton argued for the need to examine congressional debates to understand "congressional intent."[115] Judge Morton held that the *Congressional Record* clearly revealed that the Senate intended to give those from Puerto Rico and the Philippines, which were under U.S. jurisdiction, the right to seek U.S. citizenship if they were residing in the United States.[116] But ironically, the court ruled that Mallari was ultimately ineligible to naturalize for procedural reasons—Mallari had sought to use the Act of July 26, 1894 relating to military naturalization, which pre-dated the Act of June 29, 1906.[117]

A year later, however, the District Court of the Eastern District of New York in *In re Rallos* argued that the reasoning of the District Court in

109. YEN LE ESPIRITU, FILIPINO AMERICAN LIVES 15 (1995).
110. Ch. 130, 38 Stat. 392.
111. *Id.* at 395.
112. *See* 239 F. 416 (D. Mass., 1916).
113. *Id.* at 417.
114. *Id.* at 418.
115. *Id.* at 417.
116. *Id.* (internal citations omitted).
117. *Id.* at 418.

Massachusetts was flawed.[118] In denying Rallos, a half-Spanish, half-Filipino who had served in the Navy the right to naturalize, Judge Chatfield, citing *In re Alverto*, held that because Filipinos were not legally aliens they were ineligible for naturalization.[119] Further, Judge Chatfield found that to allow a Filipino to naturalize based on military service would defeat the purpose of existing immigration and naturalization laws, which limited naturalization to whites.[120]

However, in that same year, in *In re Bautista*, the District Court of Northern California argued that section 30 of the Naturalization Act of June 29, 1906, which authorized "the admission to citizenship of all persons not citizens *who owed permanent allegiance to the United States*"[121] clearly demonstrated that Congress intended to give Filipinos and Puerto Ricans the opportunity to naturalize, based on an analysis of legislative debates transcribed in the *Congressional Record*.[122] However, in presenting the opinion of the court, Judge Morrow argued that unlike the District Court of Massachusetts' ruling in *In re Mallari*, this did not mean that all natural-born inhabitants of the Philippine Islands were eligible for citizenship, but instead only those who had other necessary qualifications.[123] In granting Bautista citizenship, the District Court in California ruled that under the Act of June 30, 1914, naval service constituted such a qualification.[124] Furthermore, Judge Morrow argued that even if there were conflicting reasons to question the citizenship rights of Filipinos on racial grounds, it was evident that not allowing the petitioner to gain citizenship "would defeat the purpose of the act to encourage enlistment in the services."[125]

An important point to note in these cases is that despite their differing interpretations of congressional intent regarding Filipinos, none of the courts questioned the constitutionality of racial bars to naturalization, but instead the courts examined whether Congress had provided a legal avenue for Filipinos to gain U.S. citizenship *despite* not being white. Specifically, the courts focused on whether the status of the Philippines as a U.S. protectorate made its residents eligible for the right to naturalize, and whether this right was available to all Filipinos or limited to those who had served the (military) needs of the United States.

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118. *See In re* Rallos, 241 F. 686, 687 (E.D.N.Y. 1917).

119. *Id.* at 686-87.

120. *Id.*

121. *In re* Bautista, 245 F. 765, 771. (N.D. Cal. 1917) (emphasis added).

122. *Id.* at 767-68. The court further justified this manner of assessing "congressional intent" by citing the Supreme Court's decision in the *Tap Line Cases*, 234 U.S. 1 (1914), which "declared that debates in Congress may be resorted to for the purpose of ascertaining the situation which prompted the legislation." *Id.* at 768.

123. *Id.* at 769.

124. Ch. 130, 38 Stat. 392, 395.

125. *In re Bautista* 245 F. at 772.

C. The Act of May 9, 1918 and Asian Military Naturalization

During World War I, in response to the Navy's growing wartime personnel demands,[126] Congress passed the Act of May 9, 1918, and specified that "Filipinos" and "Porto Ricans" [127] who had served in the U.S. military were eligible to naturalize.[128] In addition, this Act reiterated that "any alien" who had enlisted or planned to enlist in the U.S. Army, Navy, Marine Corps, and Coast Guard, or served on board any vessel of the U.S. Government, was eligible to seek naturalization. The Act of May 9, 1918 also included a final section that stated, "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 under the seventh subdivision of this Act . . . ."[129] Congress passed the Act of July 19, 1919 a year later, reiterating that "[a]ny person of foreign birth" who served in the military or naval forces of the United States during World War I was eligible for citizenship.[130]

With the Act of May 9, 1918, Congress made clear that Filipinos who had served in the military were eligible for citizenship; however, its continued use of the term "any alien" was ambiguous as to the eligibility of other Asian groups for military naturalization. An examination of the *Congressional Record* reveals that even some Congressmen found the use of "any alien" in the bill problematic. For instance, Congressman Moore of Pennsylvania asked whether the term "may not apply to Japanese or Chinese who may be engaged somewhere in the Navy or the Army?"[131] The Chairman of the House Committee on Immigration and Naturalization, John Burnett, responded that the provision stating "nothing in this Act shall repeal or in any way enlarge section 2169 of the Revised Statutes" made other "Asiatics" ineligible to naturalize.[132] Yet, to further confuse matters, a military appropriation bill that Congress passed only a year later included a provision for the military naturalization of aliens without any such racial restrictions.[133]

As Salyer notes, the vagueness of congressional legislation led some

126. The *Congressional Record* reveals that Congress was responding to a direct appeal from the Navy to allow Filipinos and Puerto Ricans who had served to naturalize. *See* 56 CONG. REC. 6,0000 (1918).

127. Although the Jones-Shafroth Act of 1917 previously granted U.S. citizenship to citizens of Puerto Rico, the wording suggested that they had to be permanent residents or become permanent residents of Puerto Rico within six months of the Act. Ch. 145, 39 Stat. 953. The Act of May 9, 1918, clarified the citizenship status of those Puerto Ricans who were residing in the United Sates and had gone into military service directly. Congressional Record, H.R. 3132. Vol. 56, pt. 6, pg. 6000, May 3, 1918.

128. Ch. 69, 40 Stat. 542.

129. *Id.* 547.

130. Ch. 24, 41 Stat. 222.

131. H.R. 3132. Vol. 56, pt. 6, pg. 6000, May 3, 1918.

132. *Id.*

133. Act of July 19, 1919, ch. 24, 41 Stat. 222.

federal and state court judges, most notably Judge Vaughan in Hawaii, to grant citizenship to Asian servicemen.[134] However, these decisions remained purely administrative decisions and were primarily limited to Hawaii. Rather than contest the legality of these naturalizations at the peak of wartime patriotism and military needs, the Bureau of Naturalization decided to allow Asian soldiers who had been naturalized during the "current war" to keep their newly acquired citizenship.[135]

This pragmatic avoidance of the inherent contradictions between military and race-based naturalization was short-lived. Soon the judiciary again confronted the issue of whether non-white (and non-black) aliens who had served in the military were eligible for citizenship. For instance, two aliens of South American Indian and Japanese ancestry sought citizenship based on their service in the naval forces during World War I.[136] Here, the District Court for the Southern District of New York interpreted the term "any alien" in the Act of May 9, 1918 as limited to free white persons and persons of African ancestry, *and* to native-born Filipinos and Puerto Ricans, who were exceptions to existing racial restrictions because of language in congressional legislation.[137] In defending the decision of the court to interpret the term "any alien" in such a manner, Judge Hand further noted that "[i]f 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 definitions of section 2169 would be rendered meaningless, and even Chinese who served in the army could be naturalized, in spite of the express language to the contrary."[138]

The joint cases of *In re En Sk Song* and *In re Mascaranas* further capture this legal distinction between Filipinos, Puerto Ricans, and members of other Asians groups.[139] In these cases, the District Court for the Southern District of California ruled that while both Song (a Korean) and Mascaranas (a Filipino) had served with honor during World War I, only Mascaranas was eligible for citizenship. In presenting the opinion of the court, Judge Bledsoe followed the same logic as the District Court in *In re Rallos*[140] and argued that the Act of May 9, 1918 only extended the right of

134. *See* Salyer, *supra* note 10, at 857. Judge Vaughan, impressed by the patriotism shown by Asians, was moved to write "We had drafted them into our service and they had thought enough of us to be willing to serve, to risk their lives in our service. Was Congress unwilling to grant citizenship to those among them found to possess the qualifications required of others? I hope it is not improper to say that I do not believe Congress was so illiberal." *Id.*

135. *See* Salyer, *supra* note 10, at 859. There were divisions within the Bureau of Naturalization regarding Judge Vaughan. Originally, Commissioner Campbell wanted to prepare "bills of cancellation" for Asians who had successfully naturalized. *Id.* However, Deputy Commissioner Crist convinced him to let the courts decide who was racially eligible for citizenship. *Id.*

136. *In re* Para, 269 F. 643 (S.D.N.Y. 1919).

137. *Id.* at 643-44.

138. *Id.* at 646-47.

139. *See, e.g., In re* En Sk Song, 271 F. 23 (S.D. Cal. 1921).

140. *See* 241 F. 686, 687 (E.D.N.Y. 1917).

military naturalization to Filipinos and Puerto Ricans.[141] At the same time, however, Judge Bledsoe noted that these legislative acts lacked the "uniformity expected and to be sought in the naturalization law,"[142] and hinted at the ideological conflict inherent in denying citizenship to someone "who may have bared his breast to the bayonet of the enemy . . . ."[143] Nonetheless, rather than seeing resolution of this legal conflict as under the purview of the judiciary, Judge Bledsoe argued that the question of which class of persons was eligible for admission into the United States was strictly the domain of the legislature.

That same year, a Korean applicant sought to gain citizenship based on his military service.[144] A key point of deliberation in this case was whether the Act of July 19, 1919, which referred to the right of "[a]ny person of foreign birth" who had served in the military to gain military naturalization,[145] took precedence over pre-existing legislation that seem to imply that only aliens "under existing law" (specifically section 2169 of the Revised Statutes) were eligible for citizenship. In this case, the District Court in Missouri ruled that because the *Congressional Record* revealed that the Act of July 19, 1919 had been attached as a rider to an appropriation bill, and therefore had not undergone any scrutiny or debate, it could not be assumed to relax the provisions of the Act of May 9, 1918.[146] The court therefore ruled that only Filipinos and Puerto Ricans were allowed to naturalize under the conditions of the Act of May 9, 1918.[147]

Between the end of World War I and 1925, federal and state courts repeatedly and consistently interpreted congressional intent in this manner,[148] culminating in the Supreme Court decision in *Toyota v. United States* in 1925.[149] In this case, the Supreme Court upheld the District Court of Massachusetts's decision to vacate an order allowing for the naturalization of a Japanese alien based on his military service, noting that the term "any alien" in pre-existing military naturalization legislation referred only to aliens of the white or black races and thus did not repeal the race or color criteria for naturalization.[150] To defend this interpretation, the Supreme Court cited *Ozawa v. United States*, precedent that made

141. *In re* En Sk Song, 271 F. at 26.

142. *Id.* at 26.

143. *Id.* at 25.

144. *In re* Charr, 273 F. 207, 209 (W.D. Mo. 1921).

145. Ch. 24, 41 Stat. 222.

146. *Petition of* Charr, 273 F. at 214.

147. *Id.* at 214.

148. *See, e.g., Sato v. Hall*, 191 Cal. 510, 518-20 (Cal., 1923) (holding that the Act of May 9, 1918 and the act of July 19, 1919 only create an exemption for Filipinos and Puerto Ricans from section 2180 of the Revised Statutes).

149. 268 U.S. 402 (1925).

150. *See* Toyota v. United States, 268 U.S. 402 (1925) (agreeing with the lower court's decision in United States v. Toyota, 290 F. 971 (D. Mass. 1923)).

Japanese aliens ineligible for citizenship based on racial grounds.[151] Furthermore, the Court argued that the Act of May 9, 1918, did not change racial criteria for citizenship because it only made an exception for the naturalization of Filipinos and Puerto Ricans who had *served in the military*.[152] In fact, the Supreme Court stressed that the decision to allow Filipinos to naturalize in no way challenged the long history of "national policy to maintain the distinction of color and race" since Filipinos were only allowed to naturalize because of their special status as non-aliens, and even then, only with military service.[153]

Two later court cases where Filipinos sought to naturalize emphasized this latter point.[154] In both cases, the courts, citing Supreme Court precedent in *Toyota v. United States*, held that while individual Filipinos could become eligible for citizenship through completion of military service, Filipinos as a group were still subject to racial bars on naturalization.[155]

In choosing to allow only Filipinos among Asian groups to naturalize based on their military service, the courts interpreted congressional legislation in a manner that minimized contradictions with existing race-based naturalization laws and with precedent established in previous cases regarding Asians' right to naturalize. At the same time, however, by limiting military naturalization to Filipinos, the courts failed to use the potential of military naturalization to support a more pluralistic conception of citizenship based on attachment to country. Furthermore, even for Filipino servicemen, military service became less about proving their loyalty and more about demonstrating their difference from other members of their ethnic group.

In 1935, Congress finally appeared to have reached a compromise on the issue of race with respect to naturalization. As Salyer details, Asian veterans were able to garner the support of the traditionally nativist American Legion in pressuring Congress to allow their naturalization.[156] In the Act of June 24, 1935, Congress stipulated that "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" was eligible to

151. *Id.* at 408 (citing Ozawa v. United States, 260 U.S. 189, 198 (1922)). *But see* HANEY LÓPEZ, *supra* note 3 (noting that the Supreme Court had relied on the "scientific" distinctions of ethnologists to equate "white" with "Caucasian," and had thus denied Ozawa citizenship).

152. *See* Toyota v. United States, 268 U.S. at 412.

153. *Id.*

154. *See* De La Ysla v. United States, 77 F.2d 988 (9th Cir. 1935); United States v. Javier, 22 F.2d 879 (D.C. Cir. 1927).

155. *See* De La Ysla v. United States, 77 F.2d at 989; United States v. Javier, 22 F.2d at 880. *See also* DeCano v. State, 110 P.2d 627, 632 (Wash. 1941) (holding that since DeCano had not shown that his "ultimate naturalization is feasible by applying for enlistment and procuring his induction into the Navy, Marine Corps, Naval Auxiliary service of the Coast Guard of the United States," he was ineligible to apply for citizenship).

156. *See* Salyer, *supra* note 10, at 866.

naturalize if they had served honorably between April 6, 1917, and November 11, 1918.[157] While it did not remove race as a general criterion for the naturalization of Asians, this Act appeared to suggest that individual Asian aliens ineligible to naturalize could prove themselves worthy of citizenship through patriotic service in the U.S. military. However, five years later, in the Nationality Act of October 14, 1940, Congress stipulated that only white persons, persons of African nativity or descent, and descendents of races indigenous to the Western Hemisphere could naturalize, the sole exception being Filipinos who had honorably served in the U.S. Army, Navy, Marine Corps, or Coast Guard; thus, military naturalization was again blocked off as a pathway to citizenship for members of other Asian groups.[158]

During and immediately after World War II, Congress gradually began to dismantle the racial restrictions that prevented Asians from naturalizing. On December 17, 1943, Congress passed "The Chinese Repealer," which overturned the Chinese Exclusion Acts and permitted Chinese aliens to naturalize.[159] Three years later, Congress passed legislation making Filipinos and Asian Indians racially eligible for citizenship.[160] Finally, with passage of the Immigration and Nationality Act of 1952, Congress made all races eligible for citizenship thereby eliminating race as a bar to immigration.[161] It is important to note, however, that the driving force behind repeal of these exclusionary practices against Asian aliens within the United States had more to do with differentiating U.S. racial ideology from that of our wartime enemies.[162] Rather than dealing with the rights of Asian aliens within the United States, these actions symbolically rewarded the Asian nations who had been our allies during the war, and responded to the needs of post-World War II Cold War international politics.[163]

III. DISCUSSION

The preceding analysis reveals the role of the legal system in

157. Nye-Lea Act, ch. 290, 49 Stat. 397 (1935).

158. *See* Nationality Act of 1940, ch. 876, 54 Stat. 1137.

159. Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

160. The Filipino and Indian Naturalization Act, ch. 534, 60 Stat. 416. Ironically, in the same year that Congress removed the racial bars that had precluded Filipinos who had not served in the military from the right to seek citizenship, it also passed the Rescission Acts of 1946, 60 Stat. 14 (1946) and 60 Stat. 223 (1946), which took away veterans benefits for those who did not serve directly under the U.S. military (i.e., the Filipino Army, recognized guerilla groups, and members of the New Philippine Scouts), even though veterans in these groups had been placed under U.S. command. Among the benefits denied to these veterans was the right to military naturalization. *See* Michael A. Cabotaje, *Equity Denied: Historical and Legal Analyses in Support of the Extension of U.S. Veterans' Benefits to Filipino World War II Veterans*, 6 ASIAN L.J. 67, 77-79 (1998).

161. McCarran-Walter Act, ch. 2, 66 Stat. 163 (1952).

162. See HING, *supra* note 11, at 36.

163. *See id.* at 36-41.

maintaining a race-based conception of citizenship. It also demonstrates the resilience of racial ideologies despite strong instrumental pressures towards the inclusion of minorities. At the same time, our research shows that the process by which instrumental pressures are translated into legal decisions is rarely straightforward, and is strongly dependent on the priorities of and the interplay between the legislative and the judicial branches of the legal system.

During periods of armed conflict, Congress frequently approved measures that appeared to give alien servicemen—including Asians—expedited naturalization, but these measures were often repealed after the need for surplus manpower ended.[164] In addition, these legislative acts were typically vague and often inconsistent, and they stood in contrast to more general immigration and naturalization laws that limited the entry of Asians into the United States, leaving "congressional intent" open to interpretation. Military service, therefore, became a potent way for Asian aliens to demonstrate their allegiance to a country that otherwise sought to exclude them. However, despite the opportunity provided by military naturalization to establish egalitarian, civic-based definitions of citizenship, the judiciary interpreted congressional legislation in ways that restricted the ability of Asian aliens to naturalize through military service, thus reinforcing racialized conceptions of citizenship.

The passage of congressional legislation allowing for the military naturalization of Filipinos highlights the arbitrary nature of both civic-based and race-based naturalization.[165] By singling out Filipinos over other Asian ethnics, Congress sought to meet the growing wartime demands of the military, while still remaining receptive to public opinion that was increasingly hostile towards immigration in general, and Asian immigration in particular. Rather than interpreting legislation granting "any alien" serving in the military the right to naturalize as applying to all Asians, which would have risked having military naturalization conflict with legislation governing naturalization more generally (i.e., the Immigration Act of 1917),[166] the courts ended up restricting military naturalization to Filipinos.

By seeking to keep naturalization laws consistent, however, the courts made it nearly impossible to develop a coherent ideology of citizenship. By preventing Asian aliens from naturalizing even as U.S.-born Asians were given *jus soli* citizenship, the courts limited the ability of the category of race to serve as a defining characteristic of citizenship; by permitting Filipinos (and foreign-born whites) the right to seek military naturalization while denying this right to other Asian servicemen, the courts weakened

164. Henry Hazard, *Administrative Naturalization Abroad of Members of the Armed Forces of the United States*, 46 AM. J. INT'L L. 259, 260-63 (1952).

165. Act of May 9, 1918, ch. 69, 40 Stat. 542.

166. Ch. 29, 39 Stat. 874.

the potency of civic duty to serve as a representative ideal of citizenship. Furthermore, by allowing only those Filipinos who had served in the military the right to naturalize, the courts created a paradoxical situation where Filipinos as *individuals* could demonstrate their worthiness for citizenship through fighting, while other members of their ethnic group remained unacceptable for American society.

From the point of view of resolving the debate between the competing ideologies of race-based versus civic-based citizenship, the courts' responses to the Asian military naturalization cases appear arbitrary, contradictory, and racially biased. Yet, the judiciary remained remarkably consistent from the perspective of defining authority over aliens. As legal scholars note, since the Supreme Court established the plenary power doctrine in *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States*, the federal courts have repeatedly deferred to Congress with respect to who is allowed entry into the United States and under what conditions.[167]

Why the judiciary chose to abdicate this responsibility even as it imposed constitutional boundaries on other federal powers is less clear.[168] More to the point, it is unclear why the "egalitarian potential" of the due process and equal protection clauses in the Fourteenth Amendment were left unexamined in military naturalization cases.[169] Such an omission essentially limited the courts to interpreting and enforcing legislative statutes.[170]

Peter Schuck contends that early immigration law developed in conjunction with America's emergence as a world power in the late 1800s; a key expression of the nation's sovereignty and power was its right to admit or exclude foreigners as it saw fit.[171] Therefore, even as the courts began to protect citizenship rights for racial minorities born in the United States, they gave Congress the liberty to enact legislation that often discriminated against Asian aliens. Our analysis further suggests that this distinction between the rights of citizens versus the right to become a citizen allowed the courts to support and justify race-based naturalization policies against Asians (as part of international affairs) without having to confront the implications of these decisions on racial meanings in the domestic sphere. Thus, the tendency of Congress to respond to instrumental pressures in passing naturalization legislation—such as military needs or the racial prejudices of its constituency—was not curbed by judicial restraints concerning their constitutionality.

These judicial decisions also had a significant impact on the evolution

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167. *See* Chin, *supra* note 74, at 12-16; *see also* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 862-63 (1989).

168. *See* Aleinikoff, *supra* note 167, at 862.

169. U.S. CONST. amend. XIV.

170. See SCHUCK, *supra* note 83, at 28.

171. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. J. REV. 1, 6-7 (1984).

of American national identity. The courts' underlying assumption that maintaining the racial composition of the country was a matter of "national interest" helped reinforce the idea that race was a constitutive element of national identity.[172] Furthermore, the courts' position that Asians' military service, by itself, did not grant them the right to seek citizenship made clear that race, rather than a more general concept of citizenship, remained a potent symbolic reference for defining American identity deep into the twentieth century.

While legislation such as the McCarran-Walter Act of 1952[173] and the Immigration and Nationality Act Amendments of 1965[174] brought an official end to race-based immigration and naturalization laws, passage of these acts was less a victory for the principle of civic-based citizenship than the growing unacceptability of race-based principles of citizenship for the international arena. Yet, even though the courts have placed judicial constraints on the more blatant forms of racial and ethnic discrimination, they still have not completely renounced the principles established in *Chae Chan Ping* and *Fong Yue Ting*, which allowed Congress to determine and define national interest in immigration and naturalization policies.[175]

Therefore, even though race-based naturalization policies have been abolished, it would be a mistake to assume that there have been no further attempts to exclude broad categories of immigrants, especially in times of economic contraction and social uncertainty. While ascriptive racial markers were used previously to deny citizenship to certain immigrant groups, today there has been a transition to secondary characteristics. For instance, emphasis on the "illegality" of Mexican immigrants through increased security at the U.S.-Mexico border, and greater domestic regulation of access to housing, jobs, and social services, has helped to categorize them as a threat to the U.S.—a threat with racial overtones. As Nicholas De Genova notes, the stigmatization of undocumented Mexicans, combined with selective border enforcement, has played a large part in the racialization of Mexicans and other Latinos within the U.S. regardless of their legal status or citizenship.[176]

Moreover, the relationship between military naturalization, race, and other ascriptive characteristics continues to be relevant in understanding the nature of citizenship. In 2003, Congress passed the National Defense Authorization Act for Fiscal Year 2004.[177] This act was designed to

172. *See In re* Kumagai, 163 F. 922, 922 (W.D. Wash. 1908); Toyota v. United States, 268 U.S. 402, 412 (1925).

173. Ch. 2, 66 Stat. 163.

174. 79 Stat. 911.

175. See Chin, *supra* note 74, at 16-22; *Chae Chan Ping*, 130 U.S. 581 (1889); *Fong Yue Ting*,, 149 U.S. 698 (1893).

176. Nicholas P. De Genova, *Migrant "Illegality" and Deportability in Everyday Life*, 31 ANN. REV. ANTHROPOLOGY 419, 432-34 (2002).

177. Pub. L. 108-136. §§ 1701-1705, 117 Stat. 1403.

recognize the service of the foreign-born currently serving in the Armed Forces and Reserves, which equal roughly five percent of those on active duty.[178] Among the sections of this congressional act were listed new rules regarding the military naturalization of non-citizens serving in the U.S. armed forces. Specifically, this act gave aliens the right to apply for citizenship after only one year of active service compared to three years previously (and five years for non-military petitioners), granted posthumous citizenship for non-citizens who died in combat, and allowed the immediate family of non-citizens who had died in service the right to apply for citizenship.[179] In the past decade, both the House and the Senate have attempted unsuccessfully to pass the Development, Relief and Education for Alien Minors Act (the DREAM Act),[180] which would have provided undocumented alien minors with the possibility of gaining legal status by serving in the armed forces or by attending college.

These modifications, and attempted modifications, to U.S. naturalization policies continue the long-standing practice of expedited naturalization for those willing to serve in the U.S. armed services, particularly in times of military conflict. These types of policies have become particularly vital for the U.S. military, whose growing manpower demands, which are not being met by the U.S.-born, have led to increased reliance on those born abroad. At the same time, recent policies, aimed at certain minority groups to make it more difficult for their members to enter the United States legally or at all, have increased the attractiveness of U.S. military service as a pathway to citizenship.

Attempts like the DREAM Act—which would allow "high quality" undocumented immigrants to gain citizenship through military service[181]—are likely to raise new legal issues regarding naturalization and citizenship that the judiciary will need to address. Given the history of the judicial deference to Congress with respect to immigration and naturalization laws,[182] and its continued failure to repudiate the "plenary power doctrine,"[183] it is quite possible that the courts will continue to permit Congress to pass racially and ethnically discriminatory legislation, such as allowing Congress to craft a version of the DREAM Act that does not permit undocumented immigrants from Middle Eastern countries the same

178. *See* Laura Barker & Jeanne Batalova, *The Foreign Born in the Armed Services*, MIGRATION POLICY INSTITUTE, Jan. 2007. http://www.migrationinformation.org/Usfocus/display.cfm?ID=572.

179. Pub. L. 108-136, §§ 1701, 1703, 1704.

180. *See, e.g.*, S. 1545, 108th Cong. (2003); S. 2075, 109th Cong. (2005); S. 774, 110th Cong. (2007); H.R. 1684, 108th Cong. (2003); H.R. 5131, 109th Cong. (2006); H.R. 1275, 110th Cong. (2007).

181. Qualifying for the DREAM Act requires the equivalent of having a GED and "good moral character." *See* Bryan Bender, *Immigration Bill Offers a Military Path to US Dream*, BOSTON GLOBE, July 16, 2007, available at http://www.boston.com/news/nation/articles/2007/06/16/immigration_bill_offers_a_military_path_to_us_dream.

182. *See* SCHUCK, *supra* note 83, at 28; Aleinikoff, *supra* note 167, at 862-71.

183. *See* Chin, *supra* note 74, at 12-16.

access to military naturalization as other undocumented immigrants due to post-9/11 security concerns. Therefore, efforts to observe how the legal system handles various definitions of inclusion and exclusion remain as relevant today as it was for the period analyzed in this Article.