NATURALIZING THROUGH MILITARY SERVICE: WHO DECIDES?

CHRISTOPHER CLIFTON*

ABSTRACT

Congress enacted 8 U.S.C. § 1440 to provide noncitizens serving in the U.S. armed forces with an expedited path to naturalization during periods of hostility. Congress expressly required the executive to make two threshold determinations before a military member can be considered for naturalization under this statute. First, the executive must certify that an applicant has "served honorably." Second, the President must designate by executive order that the armed forces are "engaged in military operations involving armed conflict with a hostile foreign force." Since the War on Terrorism began in 2001, the military had authorized any noncitizen serving in the military to qualify for expedited naturalization by certifying their service as "honorable" after just one day in the military. However, in 2017, the Trump administration implemented new regulations that required noncitizens to serve for at least six months prior to the military certifying their service as "honorable." This policy spurred a number of legal challenges, creating a court split over the justiciability of the executive's determination of "honorable service." This court split not only renews critical questions on the scope of judicial review over matters of military affairs, but it also provides an important preview into the amount of discretion that may be afforded to the executive to determine whether the U.S. remains in "a period of armed conflict with a hostile foreign force."

TABLE OF CONTENTS

* Christopher Clifton, J.D. Candidate, 2022, Georgetown University Law Center; M.B.A., 2019, New York University Stern School of Business; B.S. Operations Research and Computer Analysis, 2013, U.S. Coast Guard Academy. The author is a Lieutenant in the U.S. Coast Guard. The views expressed herein are his own and do not necessarily represent the views of the Coast Guard, the Department of Homeland Security, or any other component of the U.S. Government.

I. INTRODUCTION

Since our nation's founding, immigrants have played a vital role in maintaining the U.S. military as one of the world's premier armed forces. More than 20 percent of union soldiers that fought in the Civil War were immigrants, and hundreds of thousands of immigrants have served during times of war in just the past century.[1] Additionally, immigrants have made some of the most meaningful contributions to our military: 22 percent of all Congressional Medal of Honor awards have been issued to immigrants.[2]

As a reward for the sacrifice made by noncitizens who serve in the military, Congress has provided a special path for naturalization during periods

1. *Immigrants Serving in the Military Have Earned Their Citizenship*, FWD.US (June 4, 2021), https://perma.cc/69F3-FPJX.
2. Collin Fox, *Restore MAVNI for Legal Aliens to Enter the Military*, 147 PROCEEDINGS 8 (2021), https://perma.cc/XEM9-7BYS.

of war, without requiring immigrants to fulfill many of the standards otherwise required. In particular, Congress has authorized any noncitizen whom the executive determines has "served honorably" during a designated period of hostility to apply for naturalization. Further, Congress has vested the executive with the authority to determine which periods of "armed conflict" may trigger such benefits.

Historically, the military has certified a member's service as "honorable" after just one day of military service. However, in 2017, the Trump administration implemented more stringent requirements prior to certifying a member's service as honorable, citing both national security concerns and the need to establish a more thorough record of service to judge a member's character. These policy changes spurred several legal challenges and resulted in a court split on the court's power to review the executive's determination of what constitutes "honorable service."

This Note examines and analyzes this court split over the justiciability of challenges to the Trump administration's policy. Part II of this Note begins by describing the historical backdrop of awarding expedited naturalization to noncitizens serving in the military. Part III then discusses how the political question doctrine has been applied to issues arising out of military activities. Part IV applies this doctrine to argue that the court split should be resolved in favor of declining to review the executive's determination of "honorable service" for the purpose of naturalization. Finally, Part V argues that despite the recent withdrawal of U.S. troops from Afghanistan and President Biden's repeated declaration that "the War is over," the Biden administration's decision to allow noncitizens to continue to naturalize through service in the "War on Terrorism" should be precluded from judicial review.

II. NATURALIZING THROUGH MILITARY SERVICE

A. *Historical Statutory Framework*

Throughout the nation's history, Congress has provided a special path to citizenship by providing less stringent requirements for noncitizens who have served honorably in the military. During the Civil War, Congress provided that any noncitizen who could submit "competent proof of . . . having been honorably discharged" from the military would be eligible for naturalization after just one year of residency in the United States,[3] instead of requiring the five-year residency requirement applicable to all other noncitizens at the time.[4]

Since World War II, Congress has prescribed more specific requirements for what constitutes "honorable service" for the purpose of naturalization.

---

3. Militia Act of 1862, § 21, 12. Stat. 597 (1862).

4. Naturalization Law of 1802, Pub. L. No. 7-28, 2 Stat. 153 (1802) (five-year requirement); *see also* Andrew M. Baxter and Alex Nowrasteh, *A Brief History of U.S. Immigration Policy from the Colonial Period to the Present Day*, CATO INST. (Aug. 3, 2021), https://perma.cc/NV6K-SMXX.

Prior to 1942, the law required a noncitizen to serve for three years in the military prior to being eligible for naturalization, until Congress enacted a separate provision that permitted noncitizens who "served honorably" in World War I or World War II to become a citizen without fulfilling the requirements of age, length of residence, or education otherwise required.[5] To fulfill the requirement of "honorable service," a noncitizen could either provide affidavits from two military members who held the rank of at least a noncommissioned officer, or the noncitizen could submit a copy of their certified service record that proved they were "a member serving honorably."[6] But military members who were "dishonorably discharged" were categorically excluded from expedited naturalization.[7]

Shortly after World War II, Congress amended this law after observing that it was too difficult to specify by statute exactly what constituted "honorable service" for the purposes of naturalization. Specifically, because the military used a number of different service characterizations that were not limited to simply an "honorable" or "dishonorable" discharge, Congress observed that it was "difficult to ascertain whether a person had actually been honorably or dishonorably discharged."[8] Consequently, Congress found that it was "preferable, therefore, to provide that a person must have been separated 'under honorable conditions' and let the executive department . . . determine whether the separation was of that type."[9] Thus, the original statutory scheme acknowledged that determining "honorable service" was a "difficult" task best left to executive discretion.

B. *Modern Statutory Framework*

In 1952, Congress reorganized the structure of immigration laws by passing the Immigration and Nationality Act (INA), which has been amended over the years but still forms the basis of U.S. immigration law today.[10] As part of the INA, Congress provided two paths to citizenship through military service. First, noncitizens who "served honorably" for at least three years in the military would be eligible for naturalization.[11] Second, those who had "served honorably" in World War I or World War II were eligible for naturalization without any time-in-service requirement or any length of residency requirement.[12] Proof of "honorable service" could only be fulfilled by providing a certified copy of the member's service record—members could

5. S. REP. NO. 989, at 7, 13–14 (1942). More than 143,000 members were naturalized under this provision. *See* H.R. REP. NO. 1129, at 2 (1968). Congress had also previously authorized noncitizens who served during World War I to receive an expedited path to naturalization. *See id.*

6. S. REP. NO. 989, at 14 (1942).

7. *Id.*

8. H.R. REP. NO. 1408, at 3 (1940).

9. *Id.*

10. Immigration and Nationality Act, Pub. L. 82-414, 66 Stat. 163 (1952).

11. *See id.* at § 328.

12. *See id.* at § 329. The applicant still had to meet all other naturalization requirements, such as a showing of good moral character and other education requirements. *See id.*

no longer prove their "honorable service" by submitting character references.[13]

Notably, World War II marked the last formal declaration of war issued by Congress.[14] During the period following World War II, the trend of ceding war powers was similarly reflected in immigration legislation.[15] For example, after World War II, Congress designated the Korean War[16] as a period qualifying for expedited naturalization.[17] Then, in 1968, Congress added the Vietnam War as a period of hostility likewise triggering expedited naturalization.[18] In the same bill, Congress delegated the executive with the authority to designate future periods of hostility, in order to "permit expeditious naturalization based on honorable service during a wartime period . . . without the need for the enactment of specific legislation."[19] Specifically, Congress provided that any period that the president designated, by executive order, as "a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force" would allow noncitizens to qualify for the "benefit" of expedited naturalization.[20] Further, Congress chose to allow any member of the military—not just those serving in combat zones—who "served honorably" to qualify for expedited naturalization.[21] This bright line standard was adopted in order to avoid the "uncertainty" of deciding "a question of fact in each case whether the serviceman has served in [a combat area]."[22] This change from the House version of the bill, which would have limited expedited naturalization to those who had physically served in a combat zone,[23] shows that Congress wished to avoid any second-guessing of who could qualify for expedited naturalization.

Since the Vietnam War, a sitting president has only twice designated a period as qualifying as an "armed conflict with a hostile foreign force": the

---

13. *See id.* at §§ 328–29.

14. *Declarations of War by Congress*, U.S. SENATE, https://perma.cc/VS5Z-RDXF (last visited Apr. 15, 2022).

15. *See, e.g.*, S. REP. NO. 1291, at 3–4 (1968).

16. President Truman entered the Korean War without a declaration of war, marking one of the most significant steps a president had taken without congressional authorization and setting a precedent for later presidents to follow. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1056, 1060–61 (2008).

17. See H.R. REP. NO. 1129, at 2 (1968). Initially, only lawful permanent residents were eligible for expedited naturalization, and they were also required to serve in the military for at least ninety days. *See id.* However, several years after the Korean War, Congress extended the benefits of expedited naturalization to any Korean War veteran. H.R. REP. NO. 1086, at 4 (1961). In total, 31,000 noncitizens received citizenship through service in the Korean War. H.R. REP. NO. 1129, at 2 (1968).

18. H.R. REP. NO. 1968, at 2 (1968) (Conf. Rep.).

19. S. REP. NO. 1292, at 5 (1968) (emphasis added); *see also* Act of Oct. 24, 1968, Pub. L. No. 90-633, 82 Stat. 1343 (codified as amended at 8 U.S.C. § 1440).

20. Act of Oct. 24, 1968, Pub. L. No. 90-633, 82 Stat. 1343 (codified as amended at 8 U.S.C. § 1440); S. REP. NO. 1292, at 5 (1968).

21. H.R. REP. NO. 1968, at 2 (1968) (Conf. Rep.).

22. *Id.* Additionally, providing the benefit of expedited naturalization to all service members was intended to comport to the legislation applicable to previous wars and to "reward" the sacrifice all members who were required to be ready to deploy at any given time. *See id.*

23. *Id.*

Persian Gulf War from 1990 to 1991, and the War on Terrorism since 2001.[24] The same statutory scheme described above largely remains in place today, with three noteworthy exceptions.[25] First, to be eligible for expedited naturalization during times of peace, a noncitizen in the military must now only serve for one year, rather than three years.[26] Second, noncitizens in the reserve, in addition to active duty personnel, may now qualify for expedited naturalization during designated periods of armed conflict.[27] Third, in 2019, following various challenges to the Department of Defense (DoD)'s implementation of the wartime statute under the Trump administration, Congress directed the DoD to publish regulations on how it would certify a member's service as honorable, including the level of official that could certify a member's record and how quickly that request must be processed.[28]

III. JUSTICIABILITY OF MILITARY AFFAIRS

Prior to discussing the challenges to the Trump administration's policy of determining "honorable service," it is important to first examine the doctrine of justiciability as applied to military affairs. In general, a court will not review matters that it deems are better left to the discretion of Congress or the president as politically accountable branches.[29] This broad aspect of justiciability is known as the "political question doctrine." In *Baker v. Carr*, the Supreme Court explained that a political question may arise when there is:

> [A] textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branched of government . . . [30]

The Supreme Court has applied this doctrine when deciding whether to review a case arising out of military activities.[31] In particular, courts are often hesitant to review matters arising out of military affairs due to the constitutional authority of the president as the "Commander in Chief of the Army

---

24. *See* MARGARET MIKYUNG LEE & RUTH ELLEN WASEM, CONG. RSCH. SERV., RL31884, EXPEDITED CITIZENSHIP THROUGH MILITARY SERVICE: POLICY AND ISSUES 5 (2003).

25. Though outside the scope of this Note, another interesting feature of this statutory scheme is that a noncitizen-member of the military who dies in the line of duty may be awarded posthumous citizenship, providing a number of benefits for the noncitizen's family. *See* 8 U.S.C. § 1440-1.

26. *See* 8 U.S.C. § 1439.

27. *See* 8 U.S.C. § 1440. Further, both the peacetime and wartime naturalization provisions provide that any member who receives citizenship under those statutes, but is then separated under other than honorable conditions within five years may have their citizenship revoked. 8 U.S.C. §§ 1439(f); 1440(c).

28. H.R. REP. NO. 116-333, at 161 (2019) (Conf. Rep.).

29. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962).

30. *Id.* at 217.

31. *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1, 10–11 (1973).

and Navy"[32] and the constitutional authority of Congress to "raise and support Armies," "provide and maintain a Navy," and "make Rules for the Government and Regulation of the land and naval Forces."[33] However, deference to executive actions in military affairs is not absolute.

This section focuses on the three areas of justiciability that are implicated under the military naturalization statute. First, the section explains the scope of review applied when the military is alleged to have acted outside its statutory authority. Second, the section describes the relevance of the military as a "specialized society," and how courts may offer it more deference than provided to some other executive agencies. Finally, the section examines the scope of judicial review over Administrative Procedure Act (APA) claims in military affairs.

A. *Scope of Statutory Authority*

One of the foundational cases establishing the reviewability of administrative decisions within the military is *Reaves v. Ainsworth*.[34] *Reaves* stands for the proposition that courts may review military actions for compliance with statutory authority, but they may not dictate how to implement such authority. In *Reaves*, an Army officer claimed he was denied due process when he could not confront or cross-examine witnesses at his physical disability board.[35] The Supreme Court held that when determining an officer's suitability for service, the decision of the military "acting within the scope of its lawful powers cannot be reviewed or set aside by the courts."[36] The Court found that the purpose of the relevant statute authorizing the military to promote and discharge members was to "secure efficiency in those who are to be active in service." Therefore, the statute gave the executive broad authority to evaluate officers' fitness for service, and the Court lacked the power to review such a determination, reasoning that intruding in that matter could affect the efficient administration of the Army.[37]

---

32. U.S. CONST. art 2, § 2, cl. 1.

33. U.S. CONST. art 1, § 8, cl. 12–14.

34. Reaves v. Ainsworth, 219 U.S. 296 (1911). *See also* Colonel Darrell L. Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1, 14 (1975).

35. *Reaves*, 219 U.S. at 302.

36. *Id.* at 304.

37. *Id.* at 305–06. The Court further held that "The courts are not the only instrumentalities of government. They cannot command or regulate the Army. To be promoted or to be retired may be the right of an officer . . . but greater even than that is the welfare of the country . . . through the efficiency of the Army." *Id.* at 306. *See also* French v. Weeks, 259 U.S. 326 (1922) (declining to review officers' involuntary separation when the military acted under its statutory authority); Creary v. Weeks, 259 U.S. 336 (1922) (same); Denby v. Berry, 263 U.S. 29 (1923) (finding that the military acted within its statutory authority to discharge a naval officer); Patterson v. Lamb, 329 U.S. 539 (1947) (same). Although these cases on their face would seem to allow Congress to circumvent procedural due process requirements in the military context, the Supreme Court has since made clear that a military member's procedural due process claim may be reviewed. *See, e.g.*, Weiss v. United States, 510 U.S. 163 (1994); Burns v. Wilson, 346 U.S. 137, 144 (1953).

Years later, in 1953, the Supreme Court reaffirmed its deference to the military's handling of personnel matters in *Orloff v. Willoughby*.[38] In *Orloff*, a doctor inducted into the Army under the Doctors' Draft Act refused to answer questions about his affiliation with the Communist Party. As a result, the Army refused to commission the doctor as an officer, instead retaining him as an enlisted member and assigning him to limited medical duties.[39] The Court held that it was "obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief," and it declined to review whether the military abused its discretion in withholding the doctor's commission.[40] Further, because the Doctors' Draft Act simply required that the doctor be assigned to medical duties, the executive was entitled to use discretion on what those duties entailed, even if it significantly curtailed those duties.[41] Thus, the Court declined to review the executive's decision when acting within the scope of the statute, again seeking to avoid any interference into the efficient operation of the military.[42]

In the same period, the Court held that a service member's claim was justiciable in a similar case involving a military personnel decision. In *Harmon v. Brucker*, an officer alleged that the military had unlawfully issued him a less than honorable discharge based on misconduct prior to his military service.[43] Interestingly, the Government conceded that this decision was outside the scope of its statutory authority, but it insisted that its actions were still nonjusticiable. The Court rejected this argument, holding that "judicial relief is available to the one who has been injured by an act of a government official which is in excess of his express or implied powers."[44] The Court examined the language of the relevant statute, holding that because the statute only authorized the Army to discharge members based on "all available records of the Army," the Court was qualified to interpret the operative word "records," and held that the term was limited to records of military service.[45]

---

38. Orloff v. Willoughby, 345 U.S. 83 (1953).
39. *Id.* at 90–92.
40. *Id.* at 90.
41. *Id.* at 92–93. Specifically, the military prohibited the doctor from administering drugs to senior officers, fearing that his "loyalty" to the Communist Party meant that he may try to obtain confidential information from his patients when "under hypnosis," although there was no evidence to justify such a suspicion. *See id.*
42. The Court went on to famously hold that "[J]udges are not given the task of running the Army . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Id.* at 93–94.
43. Harmon v. Brucker, 355 U.S. 579, 581 (1958)
44. *Id.* at 581–82.
45. Courts have also not hesitated to review the constitutionality of military statutes, even statutes involving administrative matters. *See, e.g.*, Frontiero v. United States, 411 U.S. 677 (1973) (declaring a military statute that awarded benefits to female spouses, but not male spouses, unconstitutional). However, because the military naturalization statute itself has not been challenged as unconstitutional, discussing this justification for judicial review is outside the scope of this Note.

B. *The Military as a "Specialized Society"*

Courts generally avoid intruding into the domain of other branches of government in any context, and they are in particular skeptical of inserting judgment over areas that require the expertise of an executive agency.[46] This theory is especially applicable to the military. For example, in *Parker v. Levy*, an officer was charged with a violation of several articles of the Uniform Code of Military Justice (UCMJ) for making statements against the Vietnam War, and he challenged these articles as unconstitutionally vague.[47] Although the Court reviewed this challenge to the constitutionality of the statute as justiciable, it also reaffirmed its past cases where it declined judicial review in other instances, noting that:

> [t]his Court has long recognized that the military is, by necessity, a specialized society separate from civilian society . . . [t]he differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.'[48]

The concept of the military as a specialized society resurfaced when the Court decided *Gilligan v. Morgan*.[49] There, the plaintiffs alleged that the National Guard used excessive force against Vietnam War protestors and asked the Court to mandate remedial training standards. The Court dismissed the case as a political question, ruling that it would be inappropriate to "require a judicial evaluation of a wide range of possibly dissimilar procedures and policies," even "in the unlikely event that [a judge] possessed the requisite technical competence to do so."[50] Further, mandating certain types of training would require the court to continually oversee the National Guard's training. The Court reasoned that "[i]t is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system; the [Court of Appeals] failed to give appropriate weight to this separation of powers."[51] Thus, *Gilligan* demonstrates that courts lack the power to dictate the everyday affairs of the military, as such control has been entrusted to the politically accountable branches.

---

46. *See, e.g.*, State v. Mandel, 914 F.2d 1215 (9th Cir. 1990) (declining to review a decision by the secretary of the interior to place an item on the commodity control list).
47. Parker v. Levy, 417 U.S. 733, 736–38 (1974).
48. *Parker*, 417 U.S. at 743 (quoting Toth v. Quarles, 350 U.S. 11 (1955)); Peck, *supra* note 34, at 54.
49. *Gilligan*, 413 U.S. at 1.
50. *Id.* at 8.
51. *Id.* at 10.

C. *The APA*

The APA is a federal statute that governs the procedures and practices of administrative law,[52] including military administrative functions.[53] Section 701 of the APA establishes that alleged violations of its provisions are not subject to judicial review when the "agency action is committed to agency discretion by law,"[54] which applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[55] The APA's standard of review may be considered separately from other doctrines of justiciability. For example, in *Webster v. Doe*, the Court held that the Central Intelligence Agency's (CIA) decision to terminate an employee for being gay was not reviewable under the APA as a decision committed to agency discretion by law when the National Security Act allowed for the CIA Director to terminate an employee whenever he "deemed" it necessary.[56] However, the Court ruled that it could consider the member's constitutional claim, which offered a clear legal standard for the Court to apply.[57] In dissent, Justice Scalia argued that the Court was barred from reviewing the constitutional claim because the executive action had traditionally been committed to agency discretion, as the decision was based on the interests of national security.[58] The view that a court must also consider whether the nature of an executive action has historically been shielded from judicial review has since been adopted, at least in part, by the Supreme Court.[59]

Lower courts have shown a willingness to review a military decision or regulation under the APA. For example, in *Kreis v. Secretary of the Air Force*, the D.C. Circuit held that whether an officer was entitled to promotion was a nonjusticiable military personnel decision, as it would require the court to examine his service record and compare his performance to other officers.[60] However, the judiciary could require the military to explain its reasoning for denying the promotion because such a reasoned decision was required under the APA.[61] The court explained that this determination would not direct how the military should promote its members, but would rather require

---

52. Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C ch. 5).

53. *See* 5 U.S.C. § 701(b) (defining the APA as inapplicable to the military only in the context of court-martials, military commissions, military authority exercised in the field during war, and other military "functions"); *see also* Thomas R. Folk, *The Administrative Procedure Act and the Military Departments*, 108 MIL. L. REV. 135, 141– 43 (1985) (explaining the scope of "military authority" and other "functions").

54. 5 U.S.C. § 701.

55. Citizens to Preserver Overton Park v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752 (1945)); *see also* Heckler v. Chaney, 470 U.S. 821 (1985) (holding that an APA claim is not subject to judicial review when "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion").

56. Webster v. Doe, 486 U.S. 592, 592–93 (1988).

57. *Webster*, 486 U.S. at 604–05.

58. *See Webster*, 486 U.S. at 607–10 (Scalia, J., dissenting).

59. *See* Lincoln v. Vigil, 508 U.S. 182, 191 (1993); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905–06, 1908 (2020).

60. Kreis v. Sec. of Air Force, 866 F.2d 1508, 1512 (D.C. Cir. 1989).

61. *Id.*

the military to exercise its discretion in a reasoned manner.[62] The court distinguished *Webster v. Doe* by explaining that the National Security Act allowed the CIA to consider *any* factor for termination, whereas here, the statute at issue provided the executive with the discretion to adjust a military record "when [the Secretary] considers it necessary to correct an error or injustice." Thus, the court could consider whether the military based its decision on an "error" or "injustice," though such a decision was entitled to extreme deference.[63] Accordingly, when adjudicating APA claims, lower courts have been generally willing to review the basis of the military's underlying decision when the statute provides a sufficient standard of review.[64]

IV. JUSTICIABILITY OF DETERMINING "HONORABLE SERVICE"

This section applies the framework described in Part III to analyze the limits of judicial review over the executive's characterization of a noncitizen's military service as "honorable." The section begins by briefly explaining the legal framework for how a noncitizen may join the military. Then, the section describes the Trump administration's policy for how a noncitizen's service could be certified as "honorable," the resulting legal challenges to the policy, and the court split regarding the justiciability of these challenges. Finally, the section argues that the Trump administration's policy of characterizing a member's service for the purpose of naturalization should be precluded from judicial review.

A. *Joining the Military as a Noncitizen*

Congress has authorized two ways for a noncitizen to join the military. First, any noncitizen who has been admitted into the United States as a lawful permanent resident (LPR) may enlist in the military.[65] Second, the military may choose to enlist certain noncitizens who are not LPRs if they have been deemed to possess a "critical skill or expertise" that is "vital to the national interest."[66] The Bush administration was the first administration to utilize this latter statutory authority in 2008 by allowing non-LPRs, including DACA recipients and recent international graduates of U.S. universities, to enlist in the military. Specifically, under the Bush administration, the DoD established the "MAVNI" program, short for "Military Accessions Vital to the National

62. *Id.*

63. *See also* Nation v. Dalton, 107 F. Supp. 2d 37 (D.D.C. 2000) (finding that a claim challenging a records-correction decision is justiciable). *Cf.* Flower v. United States, 407 U.S. 197, 199 (1972) (holding that a military installation's regulation violated the First Amendment).

64. Additionally, courts may review an allegation that the military failed to follow its own procedures. However, a regulation that is purposed to promote the efficient administration of the military, rather than protect the rights of military members, is not typically subject to review. *See, e.g.*, Watson v. United States, 113 Fed. Cl. 615 (2013); Brass v. United States, 120 Fed. Cl. 157 (2015); Cortright v. Resor, 447 F.2d 245, 251 (2d Cir. 1971).

65. 10 U.S.C. § 504(b)(1).

66. 10 U.S.C. § 504(b)(2).

Interest," which designated healthcare professionals and those with "special language and cultural backgrounds" as having "critical skills" that were "vital to the national interest."[67] However, in 2016, citing security risks, the Obama administration suspended this program, and it also implemented enhanced security screening measures for those who had already enlisted but had not yet attended basic training.[68]

B. *Legal Challenges and Court Split*

After the start of the War on Terrorism in 2001, the military certified a noncitizen's service as "honorable" after just one day of military service.[69] However, in October 2017, the Trump administration implemented new regulations (hereinafter October 2017 Policy) concerning how it would certify a member's service as honorable. Under this October 2017 Policy, any noncitizen who enlisted as an active-duty member after October 2017 would be required to fulfill three requirements before their service could be certified as honorable: (1) complete basic training; (2) serve at least six months of active duty service;[70] and (3) pass additional security screening measures.[71] Reserve members were required to complete one year of service.[72]

Additionally, any noncitizen who had enlisted prior to this policy change was exempted from the time-in-service requirement, but in order to receive a certification of "honorable service," they had to fulfill a separate set of arguably less stringent requirements: they could not be the subject of a pending disciplinary action, they had to pass additional security screening measures, and they must have served for some period of time that permitted an "informed determination that the member has served honorably."[73]

The October 2017 Policy spurred a number of legal challenges over the executive's authority to set preconditions for "honorable service." These challenges, which primarily centered on the six-month minimum time-in-service requirement, resulted in courts reaching different conclusions on the

---

67. *Military Accessions Vital to National Interest (MAVNI) Recruitment Pilot Program*, U.S. DEP'T OF DEFENSE (2016), https://perma.cc/72HJ-2LZQ. Fifty languages were designated as eligible. *See id.*

68. Dave Phillips, *The Army Stopped Expelling Immigrant Recruits. But an Email Suggests It's Still Trying*, N.Y. TIMES, (Sept. 19, 2018), https://perma.cc/FGJ3-YJ56.

69. *See* 32 C.F.R. § 94.4 (2021); DEP'T OF DEFENSE, DoDI 5500.14, NATURALIZATION OF ALIENS SERVING IN THE ARMED FORCES OF THE UNITED STATES AND OF ALIEN SPOUSES AND/OR ALIEN ADOPTED CHILDREN OF MILITARY AND CIVILIAN PERSONNEL ORDERED OVERSEAS (2006). Since 2002, more than 148,000 noncitizens have been naturalized through military service. *Military Naturalization Statistics*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://perma.cc/REM4-5MNP (last visited Apr. 13, 2022).

70. Memorandum for Secretaries of the Military Departments and Coast Guard, Certification of Honorable Service for the Purposes of Naturalization (Oct. 13, 2017) [hereinafter Oct. 2017 Policy]. Reserve members were required to complete one year of service toward retirement. *Id.*

71. In *Kuang v. U.S. Department of Defense*, the Ninth Circuit declined to review challenges to the requirement to complete additional screening measures because "military decisions about national security and personnel are inherently sensitive and generally reserved to military discretion, subject to the control of the political branches." *See* Kuang v. U.S. Dep't of Def., 778 Fed. Appx. 418, 421 (9th Cir. 2019), *cert. denied sub nom.* 141 S. Ct. 2565 (2021).

72. Oct. 2017 Policy, *supra* note 70.

73. *Id.* at 2.

justiciability of the claims. Specifically, courts disagreed over whether the executive's characterization of a noncitizen's service as "honorable" was intended to be a ministerial task in the context of a broader immigration statute, or whether Congress intended to vest the executive with discretion to characterize a member's service for the purpose of naturalization.

1. *D.C. District Court: Kirwa v. DoD (2017)*

The first challenge involved the set of regulations applicable to those who enlisted *before* the October 2017 Policy was announced. After the Obama administration implemented additional screening protocols for non-LPRs who joined as part of the MAVNI program, non-LPR military members began to experience significant delays before they could report to basic training.[74] Thus, when the Trump administration made these background checks a precondition for satisfying honorable service, this class of non-LPRs was left waiting to qualify for citizenship while their background investigations were pending. In *Kirwa v. U.S. Department of Defense*, the class sued to enjoin the military from refusing to certify their service, arguing that requiring a background check as a precondition for honorable service was arbitrary and capricious, an unlawful retroactive policy, and an unlawfully withheld agency action under the APA.[75]

Prior to considering these APA claims, Judge Ellen Huvelle of the D.C. District Court first found that the claims were subject to judicial review. Judge Huvelle reasoned that because the military naturalization statute is framed in the past tense as encompassing anyone who "has served honorably," it requires the DoD to certify a noncitizen who has *any* record of past service, regardless of the length of that service.[76] She explained that withholding a certification of honorable service was really a determination of suitability for *future* service, which was inapplicable for the purposes of naturalization.[77] Further, any future concerns over a member's suitability for service could be addressed under the statute's separate provision that permitted citizenship to be revoked due to later misconduct.[78] Accordingly, because any length of service provided a basis for the military to certify a member's service for the purpose of naturalization, doing so was a ministerial task that was subject to judicial review.[79] On the merits, Judge Huvelle found that the DoD policy likely violated the APA, and she ordered the DoD to certify any

74. *See* Phillips, *supra* note 68.
75. Kirwa v. U.S. Dep't of Def., 285 F. Supp. 3d 21 (D.D.C. 2017).
76. *See id.* at 35–36.
77. *See id.* at 36.
78. *Id.* at 36. Specifically, citizenship attained through military service can be revoked due to later misconduct for a period of up to five years. See 8 U.S.C. § 1440.
79. *Kirwa*, 285 F. Supp. 3d at 37.

pending requests as honorable within two days if a member had no disciplinary concerns.[80]

2. *District Court of Nevada: Kotab v. U.S. Dep't of Air Force (2019)*

Nearly two years after Kirwa, in *Kotab v. U.S. Dep't of Air Force*, a plaintiff challenged the minimum time-in-service and background investigation requirements applicable to those who enlisted *after* the October 2017 Policy went into effect, asserting Fifth Amendment and APA claims. Unlike the D.C. District Court in *Kirwa*, however, Judge Kent Dawson of the District Court of Nevada held that these challenges were nonjusticiable.[81]

First, Judge Dawson followed Ninth Circuit precedent in applying the *Mindes* test,[82] finding that ruling on the executive's conditions for honorable service would insert the judiciary into matters that depend on military judgment and expertise, and that such a ruling would require the court to ignore the national security concerns cited by the October 2017 Policy.[83] Second, Judge Dawson found that even apart from the *Mindes* test, the plaintiff's claims were not reviewable under the APA. Specifically, because the statute was silent on the meaning of "honorable" service, it intended to confer discretion to the executive when implementing this military term of art.[84] In other words, the October 2017 Policy did not exceed the scope of the statute's authority. And unlike Judge Huvelle in *Kirwa*, Judge Dawson interpreted the statute's language as imposing no requirement on *when* the DoD must certify a member's service, explaining that Congress' use of past tense suggested that such a determination can be made some time after the member's enlistment.[85] Finally, Judge Dawson held that the statute's legislative history signaled Congress' intent to leave the term "honorable service" to the military's discretion.[86] Thus, the court dismissed the plaintiff's claims.

---

80. *Id.* at 21; Samma v. U.S. Dept. of Def., 486 F. Supp. 3d 240, 256 (D.D.C. 2020) (summarizing *Kirwa*). Specifically, the court held that requiring a background check prior to an honorable certification could not be justified based on national security concerns, since certification "is not related to" security screening. *Kirwa*, 285 F. Supp. 3d at 38-40. The policy was also held to have unlawful retroactive effects because it was substantially inconsistent with its prior policy of certifying members after just one day of service. *Id.* at 41.

81. Kotab v. U.S. Dept. of Air Force, No. 2:18-cv-3031-KJD-CWH, 2019 WL 4677020, at *6 (D. Nev. Sept. 25, 2019).

82. *See* Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). *See infra* Part IV.C.2 for a more thorough discussion and critique of the *Mindes* test. In applying the test, courts balance four factors: (1) the nature and strength of the plaintiff's challenge; (2) the potential injury to the plaintiff; (3) the type and degree of interference with the military function; and (4) the extent to which the exercise of military expertise or discretion is involved, such as in matters involving promotions or orders. *Mindes*, 453 F.2d at 201–02.

83. *Kotab*, 2019 WL 4677020, at *6; *see infra* Part IV.C.2 below for an analysis of the *Mindes* test.

84. *Id.* at *9.

85. *Id.*

86. *Id.*

3. *D.C. District Court: Samma v. DoD (2020)*

Shortly after *Kotab*, in *Samma v. Department of Defense*, a class of plaintiffs representing all noncitizens in the military awaiting an honorable service certification brought suit against the DoD in the D.C. District Court. Similar to the plaintiff in *Kotab*, these plaintiffs alleged that the six-month time-in-service requirement for active duty personnel and the one-year time-in-service requirement for reserve personnel violated the APA.[87] Relying on her previous ruling in *Kirwa*, Judge Ellen Huvelle held that the plaintiff's claims were subject to review. First, Judge Huvelle held that characterizing a member's service for the purpose of naturalization was not a matter traditionally committed to agency discretion because such an act was distinct from characterizing a member's service for the purpose of discharge.[88] She reasoned that determining "honorable service" for the purpose of naturalization did not require military expertise or affect military operations, but rather only required the DoD to adhere to an immigration statute.[89]

Second, Judge Huvelle held that the statute provided a meaningful standard to review the October 2017 Policy. She reasoned that characterizing a noncitizen's service as honorable was distinct from setting preconditions—such as background checks and minimum time-in-service requirements—for *when* that determination would be made.[90] Specifically, because the statute was an immigration statute that U.S. Citizenship and Immigration Services (USCIS), not the DoD, had the role of administering, the statute's failure to define "honorable service" indicated that certifying a member's service as honorable did not confer the executive with discretion to interpret that term.[91] In other words, because DoD's role was limited to certifying an enlistee's honorable service for the purpose of notifying USCIS,[92] the DoD's determination of past "honorable service" could be reviewed based on the statutory requirement to provide such a certification.[93] To support this theory, Judge Huvelle argued that legislative history suggested that the purpose of the statute was to award naturalization after *any* period of service.[94] Thus, she

87. *Samma*, 486 F. Supp. 3d at 260. This claim brought on behalf of all noncitizens serving in the military was separate from the claim considered in *Kirwa* that addressed only non-LPRs.

88. *Id*. at 262

89. *Id*.

90. *Id*. at 263.

91. *Id*. at 275.

92. *See* U.S. CITIZENSHIP AND IMMIGR. SERV., N-426, Request for Certification of Military or Naval Service (2021), https://perma.cc/Q8T3-Z9MR. The military certifies a noncitizen's service as "honorable" or "less than honorable" using USCIS Form N-426. *See id*. To complete the form, the official must essentially check yes or no without any standards or guidance from USCIS. The certifying official must also include any derogatory information from the member's record and their characterization of service at discharge, if applicable. *See id*. The applicant then provides the completed form to USCIS as part of their application for naturalization, and the DoD has no further input in the naturalization process.

93. *Samma*, 486 F. Supp. 3d at 275.

94. *Id*. at 277–80. Judge Huvelle also briefly distinguished the District Court of Nevada's ruling in *Kotab* by characterizing it as a case that declined to review *when* the DoD should allow a member to attend basic training, but not *whether* the DoD should certify a noncitizens' service as honorable. *Id*. at 264.

granted the plaintiffs' motion for summary judgment and vacated the minimum time-in-service requirements.[95] The Trump administration filed an appeal, although as of August 2021 the Biden administration has since held the appeal in abeyance.[96]

C. *Resolving the Court Split*

The cases above show that the D.C. District Court and the District Court of Nevada disagree over the extent of discretion that the military naturalization statute, 8 U.S.C. § 1440, confers to the executive. While the District Court for Nevada found that the word "determine" confers the executive with broad discretion to characterize a member's service, the D.C. District Court found that any discretion was limited to the ministerial task of certifying a noncitizen's service for the sole purpose of naturalization. Additionally, while the District Court for Nevada applied the *Mindes* test and found the issues to be non-justiciable, the D.C. District Court rejected this test in favor of traditional standards of justiciability.

This section first argues that 8 U.S.C. § 1440 confers the executive with broad discretion to "determine" honorable service, shielding the Trump administration's policy from judicial review under the APA. This section then argues that although the *Mindes* test is an inappropriate way to analyze the justiciability of issues arising out of military affairs, the policy should still be precluded from judicial review when analyzed under traditional standards of justiciability.

1. *"Determining" What Constitutes Honorable Service Under the APA*

8 U.S.C. § 1440 states that during periods of war, the executive "shall determine" whether a noncitizen has "served honorably . . . and whether separation from such service was under honorable conditions."[97] The word "shall" unambiguously indicates the executive cannot indefinitely withhold certification of a noncitizen's service; Congress has made such a certification mandatory. However, the word "determine" indicates that the executive has some discretion when deciding how to classify a member's service. Similarly, in *Webster v. Doe*, because Congress delegated the executive with authority to terminate CIA employees as it "deemed" necessary, such a decision was committed to agency discretion by law under the APA.[98]

Like the word "deem" in *Webster*, the executive's authority to "determine" honorable service is committed to agency discretion by law. To "determine" means "to fix conclusively or authoritatively," or "to settle or decide by

95. *Id.* at 280.
96. *See* Status Report, Samma v. U.S. Dept. of Def., 486 F. Supp. 3d 240, 260 (D.D.C. 2020 Aug. 30, 2021) (No. 20-5320).
97. 8 U.S.C. § 1440.
98. *See supra* note 56 and accompanying text.

choice of alternatives or possibilities,"[99] while the word "deem" means "to come to think or judge" or "to have an opinion."[100] Based on these definitions, the word "deem" may seem to confer broader authority to form an opinion, while the word "determine" may seem to confer discretion to form a decision based on a set of certain factors that would be judicially reviewable. However, the statute here is silent on any factors that the executive must consider when "determining" what constitutes honorable service, suggesting that Congress left determining what factors should be considered—such as time-in-service and security screening requirements—to executive discretion.

The legislative history of the statute supports the contention that Congress intended for the executive to have broad discretion when "determining" honorable service. When the word "determine" was first incorporated in 1940, Congress explicitly stated that "determining" if a noncitizen had been "honorably" discharged was a "difficult" task.[101] Congress found that it was "preferable, therefore, to provide that a person must have been separated 'under honorable conditions' and *let the executive department* . . . determine whether the separation was of that type."[102] If Congress deemed itself incapable of deciding what factors to use to "determine" what qualifies as honorable service, it is unlikely that it intended for the judiciary to have the power to negate the executive's determination of these factors. Thus, the word "determine" is sufficiently broad to make an honorable service certification a matter committed to agency discretion by law.

Additionally, the statute's silence on any factors that must be considered distinguishes this case from prior military decisions that were found to be justiciable. For example, in *Harmon v. Brucker*, discussed *supra*, the Court found that because the statute at issue authorized the Army to discharge members based "all available records of the Army," the Court was qualified to interpret the operative word "records," holding that the term was limited to records of military service.[103] Similarly, in *Kreis v. Secretary of the Air Force*, discussed *supra*, the statute at issue provided the executive with the discretion to adjust a military record "when [the Secretary] considers it necessary to correct an error or remove an injustice," allowing the court to consider whether the military based its decision on an "error" or "injustice."[104] However, here, the only operative word included in the statute is "honorable service," which is a military term of art that Congress expressly declined to

---

99. *Determine*, MERRIAM-WEBSTER DICTIONARY (2021), https://perma.cc/AJN8-DEBH (last visited Apr. 11, 2022).

100. *Deem*, MERRIAM-WEBSTER DICTIONARY (2021); *see also Deem*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "deem" to mean "[t]o consider, think, or judge").

101. H.R. REP. NO. 1408, at 3 (1940).

102. *Id.* (emphasis added). Although the issue here is certifying a noncitizen who is still serving in the military, rather than certifying a noncitizen who has already been discharged, it is unlikely that the statute would refer to two different types of "honorable" service characterizations without expressly distinguishing the meaning of "honorable" in these two contexts.

103. Harmon v. Brucker, 355 U.S. 579, 582 (1958).

104. Kreis v. Sec'y of Air Force, 866 F.2d 1508, 1513 (D.C. Cir. 1989).

define. Based on the long tradition of declining to review such applications of a military term of art,[105] the executive's determination that a member must serve six months before receiving an honorable service determination is a factor that should not be subject to judicial review.

2. *The Impact and Validity of the* Mindes *Test*

Another key difference between the Nevada District Court and the D.C. District Court is that the former applied the *Mindes* test. This section argues that while the *Mindes* test is not an appropriate model to determine the justiciability of military affairs, the Trump administration's October 2017 Policy should nevertheless be precluded from judicial review under traditional standards of justiciability.

The *Mindes* test was first developed by the Fifth Circuit in 1971 in an attempt to form a more consistent and reasoned approach to determining the justiciability of issues arising out of military activities.[106] The test begins with two threshold determinations: An internal military affair is only justiciable if (a) the underlying claim is an alleged deprivation of a constitutional right, a statutory violation, or violation of the military's own regulations, and (b) if all intra-service measures have been exhausted. If both preliminary determinations are met, the court then balances four factors: (1) the nature and strength of the plaintiff's challenge, where non-tenuous constitutional claims weigh more heavily towards judicial review than claims with only a statutory or regulatory base; (2) the potential injury to the plaintiff; (3) the type and degree of interference with the military function; and (4) the extent to which the exercise of military expertise or discretion is involved, such as in matters involving promotions or orders.[107]

The *Mindes* test has been adopted by seven circuits, although it is relied upon to varying degrees.[108] The test has been expressly rejected, however, by the Third, Seventh, and D.C. Circuits, which apply traditional standards of justiciability to service members' claims.[109] These circuits have each criticized the *Mindes* test as "erroneously intertwin[ing] the concept of justiciability with the standards to be applied to the merits of [the] case."[110]

Kotab v. Dep't of Air Force, discussed *supra*,[111] demonstrates how the *Mindes* test applies to the six-month minimum time-in-service requirement.

---

105. *See generally supra* Part III.A–C.
106. *Mindes*, 453 F.2d at 197.
107. *Id.* at 201–02.
108. The test has been used at some point by each of the First, Fourth, Fifth Eight, Ninth, Tenth, and Eleventh Circuits. *See* E. Roy Hawkens, *The Exhaustion Component of the Mindes Justiciability Test Is Not Laid to Rest by Darby v. Cisneros*, 166 MIL. L. REV. 67, 71 (2000).
109. *Id.* The Seventh Circuit may also consider "whether the military seeks to achieve legitimate ends by means designed to accommodate the individual right at stake to an appropriate degree." Knutson v. Wisconsin Air Nat. Guard, 995 F.2d 765, 768 (7th Cir. 1993).
110. *See* Kreis v. Sec. of Air Force, 866 F.2d 1508, 1512 (D.C. Cir. 1989); Dillard v. Brown, 652 F.2d 316, 323 (3rd Cir.1981); *Knutson*, 995 F.2d at 768.
111. *See supra* note 81 and accompanying text.

In *Kotab*, a noncitizen seeking to enlist in the Air Force challenged the minimum time-in-service requirement as depriving him of his constitutional and statutory right to obtain "immediate naturalization."[112] The Nevada District Court applied the *Mindes* test to hold that these challenges were non-justiciable. The court reasoned that the first *Mindes* factor weighed against review because the plaintiff's claims were "weak" on the merits. Second, because the plaintiff was likely to suffer little injury from the delay of the "derivative benefit" of expedited naturalization, the second factor weighed against review.[113] The third factor also weighed against review because determining when a member's service should be certified as honorable would constitute significant interference into the military's function, as it would require the military to certify service with an incomplete record and prior to obtaining information on potential security risks. Finally, the fourth factor weighed against review because military expertise was required in adjudicating this information to determine whether a noncitizen had served "honorably."[114] Thus, the court declined to review the plaintiff's claim.

Although this Note asserts that the *Kotab* court reached the correct outcome in finding the plaintiff's claim to be nonjusticiable, the *Mindes* test itself is difficult to reconcile with traditional standards of justiciability because it inexplicably considers the merits of the underlying claim. In particular, the first *Mindes* factor considers the strength of the underlying claim, and the second factor considers any potential injury to the plaintiff.[115] Though the political question doctrine in application may also force the court to recognize the merits of a claim, such as when considering if there are "judicially discoverable and manageable standards" for the court to apply,[116] the ultimate justiciability determination does not necessarily depend on the strength of the claim or the possible injury to the plaintiff. For example, in *Rucho v. Common Cause*, in concluding that there were no judicially manageable standards to determine whether partisan gerrymandering had gone "too far," the Supreme Court recognized the merits of the underlying claim, acknowledging that declining to review the case could result in a serious constitutional violation.[117] However, unlike the *Mindes* test, the strength of the claim and likely injury to the plaintiff in *Rucho* did not provide a path to

112. *See* Kotab v. U.S. Dept. of Air Force, No. 18-cv-2031-KJD-CWH, 2019 WL 4677020, at *4, *6 (D. Nev. Sept. 25, 2019).

113. *Id.* at *5–*6.

114. *See id.* at *6.

115. Though *Mindes* itself provides no support for why the merits should impact the justiciability of the claim, it implies that reviewing a large number of tenuous issues could unnecessarily intrude into military affairs. *See Mindes*, 453 F.2d at 201 (citing Cortright v. Resor, 447 F.2d 245, 255 (2d Cir. 1971), which held that a large number of frivolous claims would cause excessive interference into military affairs). However, this issue could be adequately addressed under traditional standards of jurisprudence. *See infra* notes 117–21 and accompanying text.

116. *See Baker*, 369 U.S. at 217.

117. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2501, 2507–08 (2019); *id.* at 2512 (Kagan, J., dissenting) ("[T]he majority concedes . . . that gerrymandering is incompatible with democratic principles.").

judicial review.[118] While some critics of the political question doctrine have argued that such consideration of the merits suggests that the Court should simply offer deference when ruling on the merits, rather than finding the claim to be nonjusticiable,[119] the *Mindes* test goes even further in confusing judicial deference with abdication by allowing the strength and consequence of a claim to affect justiciability.

Although the first two *Mindes* factors are not grounded in doctrine, the third and fourth factors appropriately reflect well-accepted principles of justiciability. However, because these principles already exist independent of the *Mindes* test, it is both superfluous and erroneous to include these principles in a balancing test, rather than applying each individual principle where appropriate. In fact, the same holding reached by the *Kotab* court under the *Mindes* test—that the minimum time-in-service requirement is not subject to judicial review—can be reached by applying the principles of justiciability represented by the third and fourth *Mindes* factors.

To begin, the third *Mindes* factor, which considers the type and degree of interference with military function, can be traced to *Orloff v. Willoughby*, where the Supreme Court declined to review certain issues that would interfere in military affairs.[120] In *Orloff*, because the relevant statute only required that the plaintiff be assigned to medical duties, the Court was unwilling to review how the military determined the particular assignment within the medical field, since dictating particular assignments would interfere with military affairs.[121] Similarly, with respect to military naturalization, generally mandating how the military makes honorable service determinations would be an impermissible intrusion into military affairs because the statute only requires that an honorable service determination be made. In particular, the six-month time-in-service requirement does not deprive noncitizens of liberty or property under the Due Process Clause, a matter that could more persuasively justify some intrusion into military affairs. Rather, the Trump administration's policy simply requires noncitizens to wait six months before having their service certified as "honorable." This policy is an appropriate exercise of the discretion conferred by Congress to the executive. Nevertheless, challengers of the policy have asked courts to direct the executive to confer this "benefit"[122] of expedited naturalization to noncitizens immediately upon joining the military.[123] Such a mandate would force the executive to provide a

118. *See Rucho*, 139 S. Ct. at 2501, 2507–08 (acknowledging the potential injury but still finding the issue to be a political question).

119. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 145 (6 ed. 2019).

120. *See Orloff*, 345 U.S. at 91–95; *Mindes*, 453 F.2d at 199.

121. *See Orloff*, 345 U.S. at 84, 88, 91–95.

122. Congress consistently referred to expedited naturalization as a "benefit" for honorable service, rather than a vested right. *See supra* note 22 and accompanying text.

123. Such a determination resulted in a court order directing the military to certify as "honorable" all noncitizens' serving through the MAVNI program, after at least one day of service, if they have applied for citizenship and they had no record of discipline. *See supra* note 80 and accompanying text.

certification based on a blank record of service, impermissibly intruding into military affairs.

The D.C. District Court reasoned that the judiciary could require the executive to certify a member's service after just one day in the military because certifying a noncitizen's past service as honorable has no effect on military operations. The court stated that certifying one's service as honorable for the purpose of naturalization has no effect on the member's status in the military, since citizenship can later be revoked if the member commits certain misconduct.[124] However, this argument ignores the purpose of the statute, which is to provide a noncitizen with expedited naturalization as a "reward" for "honorable service" during a period of war.[125] In other words, noncitizens are only eligible to receive this "reward" once they have been found to have "served honorably." Even if citizenship can later be revoked, certification still represents a fundamental military determination that Congress required the executive to make. Thus, even if certification has no apparent direct impact on military operations, ordering the military to certify noncitizens' service as honorable still interferes with military affairs by directing the military on how to make this fundamental determination.

Finally, the principle underlying the fourth *Mindes* factor supports finding that the minimum time-in-service requirement is not subject to judicial review. The fourth *Mindes* factor is the extent to which the exercise of military expertise or discretion is involved. This factor is based on the principle that courts should not venture into areas that require military expertise,[126] or similarly, where there are no judicially manageable standards.[127] Here, certification depends on the determination of a noncitizen's service as "honorable." As noted above, Congress expressly indicated that "honorable service" was a military term of art that was preferable to "let the executive department . . . determine whether the separation was of that type."[128] Forcing the executive to determine whether a noncitizen has served honorably based on a blank service record and no security screening information substitutes the court's judgment that certification can be made with such little information, when the military asserts that more information is required. Such a determination is outside the qualifications of the court.

Therefore, the same conclusion reached under *Mindes* test can likewise be reached under traditional standards of justiciability: that the minimum time-in-service requirements are not subject to judicial review. The *Mindes* test is

---

124. *See* 8 U.S.C. § 1440(c).

125. S. REP. NO. 1292 at 2–4 (1968).

126. *See* Reaves v. Ainsworth, 219 U.S. 296, 305-06 (1911); *Mindes*, 453 F.2d at 199; *Gilligan*, 413 U.S. at 10–12.

127. *See, e.g.*, *Baker*, 369 U.S. at 217; Coleman v. Miller, 307 U.S. 433 (1939).

128. *See supra* note 8. Further, following the D.C. District Court's rulings in *Kirwa* and *Samma*, Congress directed the military to designate what level official may certify a noncitizens' service as honorable. H.R. REP. NO. 116-333, at 161 (2019) (Conf. Rep.). This provision, enacted subsequent to the D.C. court's rulings, affirms that Congress intended for some level of military judgment to be used in an honorable service determination.

not only a superfluous tool, but it also risks employing traditional concepts of justiciability outside of their appropriate context by incorporating these concepts into a balancing test. Courts should instead apply these principles as appropriate in each individual case when assessing the justiciability of issues arising out of military affairs.

3. *The Limits of Non-Justiciability*

Although the Trump administration's policy does not exceed the executive's discretion under 8 U.S.C. § 1440, it is worth examining when such an exercise of discretion would be reviewable. In particular, if the executive were to delay certification beyond one year, such a policy would be subject to judicial review. As described above, 8 U.S.C. § 1440 awards "expedited" naturalization to those serving during designated periods of armed conflict. Similarly, 8 U.S.C. § 1439 allows noncitizens to apply for naturalization during times of *peace* after one year of honorable service. In the House Report accompanying the current version of these statutes, Congress made clear that together, the "rewards embodied" in these two statutes have provided "expeditious naturalization" throughout America's history. And, more particularly:

> [e]xemptions granted [to] wartime servicemen and veterans have been more liberal than those given for service rendered during peacetime . . . These distinctions between naturalization benefits accorded [to] wartime veterans and benefits available to those who served during times of peace have always been a part of the act.[129]

Thus, the statute envisions expedited naturalization to be a "benefit" or "reward" that a noncitizen earns from their military service, and that the reward should be greater for members willing to offer personal sacrifice during times of war.

Considering this legislative history, it seems clear that Congress intended for members who serve during a period of war to be eligible for naturalization prior to those who serve in times of peace. Implicit in this intent is that the one year of service required in times of peace would provide a sufficient period for the military to judge a member's service. Otherwise, there would be no benefit afforded to the noncitizen who served during a period of war. Accordingly, an executive policy that effectively nullifies the benefit awarded for wartime service may not be within the scope of the statute and would be subject to judicial review. The Trump administration's policy, however, states that an active-duty member's service will be certified after just six months of service, which still provides a six-month advantage to those who serve in times of war over those who serve during times of peace. Similarly, the policy requires members of the reserve to serve for at least one

129. S. REP. NO. 1292 at 2–4 (1968).

year, even during periods of war. Because reserve members may not be called to active duty at all during that period, and neither statute defines what constitutes a "period of service," the executive's decision to withhold the benefit of expedited naturalization to reserve members for one year is within its discretion.

V. JUSTICIABILITY OF DESIGNATING PERIODS OF "ARMED CONFLICT"

8 U.S.C. § 1440 also provides the president with the authority to designate by executive order "a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force" to allow noncitizens serving in the military to be eligible for expedited naturalization. Since 2001, the War on Terrorism has been designated as a period of "armed conflict" pursuant to this statute.[130] However, on August 30, 2021, the United States completed its withdrawal from Afghanistan. Following this withdrawal, President Biden publicly announced that "the war in Afghanistan is now over."[131] Nevertheless, the executive order establishing the war on terror as a period of armed conflict remains in effect, and the Biden administration has offered no indication that it intends to suspend the order. This section argues that although continuing to allow members to naturalize under 8 U.S.C. § 1440 would likely contravene Congress' intent, such a decision should not be subject to judicial review.

Continuing to allow future members of the military to naturalize as part of the war on terror is likely outside the intended scope of 8 U.S.C. § 1440. Congress originally delegated the president with broad authority to designate periods of "armed conflict" in order to avoid "the need for the enactment of specific legislation."[132] Further, Congress chose to allow all noncitizens in the military to be eligible, and not just those who physically served in a combat zone, due to the fact that "a serviceman's availability for assignment to a combat zone [in times of war] is ever present" and such members "are no less deserving of such special naturalization privileges."[133] President Biden has publicly announced that continuing combat operations in Afghanistan has "no clear purpose," and he has made clear that there is no intention of soon returning.[134]

Although the United States continuously maintains a military presence in other hostile areas of the world to combat terrorist organizations, based on

---

130. Exec. Order. No. 13,269 (2002).

131. Jackie Kucinich, *Biden to U.S.: The War is Over, You are Welcome*, DAILY BEAST (Sept. 1, 2021), https://perma.cc/YX5W-GBU5.

132. S. REP. NO. 1292, at 5 (1968).

133. H.R. REP. NO. 1968 at 2 (1968) (Conf. Rep.); *see also* S. REP. NO. 1292 (1968) ("This treatment places the emphasis properly on the period of the time of the military service by the alien in times of war or undeclared military hostilities with due recognition of the dangers and risks inherent in such service wherever it might be *because of the ever-present possibility of reassignment to the war zones of operation*.") (emphasis added).

134. Kucinich, *supra* note 131.

historical precedent, this presence would not be sufficient to trigger expedited naturalization under 8 U.S.C. § 1440. For example, prior military actions in Somalia, Bosnia, Kosovo, Haiti, and Panama have not been designated as periods of hostilities, despite U.S. forces facing hostile conditions.[135] Similarly, prior to 2001, the only period of "armed conflict" that a president had successfully designated under this statute was the Persian Gulf War from 1990 to 1991.[136] Congress likewise narrowly confined the time periods of past wars to when combat operations started and ended, and the war on terror has been the longest running period of conflict under this statute in the nation's history.[137] Relying on continued military presence in hostile areas of foreign countries would also seem to render inoperative the more limited expedited naturalization benefit offered during times of peace.

The executive's first attempted use of this statutory authority to designate a period of armed conflict also suggests that the current state of the War on Terror could be found outside the scope of 8 U.S.C. § 1440. In 1987, President Reagan issued an executive order authorizing expedited naturalization for service members who were physically present in Grenada during the 1983 Grenada Campaign, which lasted just nine days.[138] In *Matter of Reyes*, the Ninth Circuit invalidated this executive order as exceeding the scope of executive authority, holding that the order exceeded Congress' intention that such authorizations could only be limited by time periods, and not geographic locations.[139] More relevant here, however, is that the court also considered whether the order could be valid if it had authorized expedited naturalization for all members of the armed forces, regardless of their geographic location.[140] After recognizing that all previous periods of armed conflict designated by Congress had lasted at least five years, the court held that because "there was little chance that any service personnel not originally sent to Grenada would be sent there during those nine days," the executive order would be in excess of the executive's authority.[141]

The Ninth Circuit's decision in *Reyes* and any potential judicial review of the current executive order regarding the War on Terror is outside the courts' power to review. Determining the possibility of a member's deployment is a matter that requires military expertise and judgment. For example, in *Reyes*,

---

135. LEE & WASEM, *supra* note 24.

136. *Id.*

137. For example, the qualifying period for World War I was only from 1917 to 1918; the qualifying period for World War II was from 1939 to 1946; and the qualifying period for the Korean War was from 1950 to 1955. *See id.*

138. *See* Matter of Reyes, 910 F.2d 611, 611–12 (9th Cir. 1990).

139. *Id.* at 613–14.

140. The plaintiff in the case was a noncitizen serving in the military during the Grenada campaign, but he was not physically present in the designated geographic areas. The plaintiff sought to have the provision limiting naturalization to those physically present in Grenada invalidated, so that the order would be applicable to all noncitizen service members. *See id.* at 612–14.

141. *Id.* at 614. *But see* United States v. Convento, 336 F.2d 954, 955 (D.C. Cir. 1964) (construing 8 U.S.C. § 1440 more liberally in acknowledging that the statute "is also a recognition that no further demonstration of attachment to this country and its ideals is necessary [to obtain citizenship]").

although the court looked back in time to find that the Grenada campaign lasted just nine days, there is no way that the court was in a position to determine whether a military member at the time was subject to "the ever-present possibility of reassignment to the war zones."[142] Such a determination would require a consideration of threat assessments, strategic priorities, and perhaps factors unknown even to the military. As the Supreme Court ruled in *Gilligan v. Morgan*, such a determination would "require a judicial evaluation of a wide range of possibly dissimilar procedures and policies," which judges lack the technical competence to implement.[143] Here, the United States has withdrawn all troops from Afghanistan, and without any ongoing military presence in Afghanistan, the likelihood of a service member being deployed to a combat area may seem low. Still, courts are not equipped to insert themselves into the executive's position to hold that military members are not currently at risk of deployment.

Additionally, Congress was under no obligation to provide the executive with the authority to make this determination, but it did so expressly in order to avoid having to enact legislation.[144] "A President's power, if any, to issue [an executive] order must stem either from an act of Congress or from the Constitution itself."[145] In enacting 8 U.S.C. § 1440, Congress vested the executive with broad authority when it chose to continue its practice of ceding war powers, even in the context of naturalization. Despite the reasonable concern over such broad authority being vested in the executive, it is not the court's role to repair the balance of power between the two politically accountable branches. Further, one of the primary reasons Congress limited the executive to designating periods of "armed conflict" by periods of time, rather than by geographic location, was to prevent the court from engaging in any fact-finding on who might qualify for expedited naturalization.[146] Thus, if the Biden administration determines that the United States remains in a period of "armed conflict with a hostile foreign force," courts have no power to second-guess such a determination. Doing so would be even more upsetting to the separation of powers than any well-intentioned repair that courts may be seeking to achieve.

VI. CONCLUSION

Congress has vested the executive with broad authority to determine when a noncitizen is entitled to expedited naturalization during times of war. Various administrations may choose to utilize this authority in different ways, whether it be in response to national security threats or due to a more stringent standard of determining "honorable service." Whatever the executive's

142. S. REP. NO. 1292 at 13 (1968).
143. *Gilligan*, 413 U.S. at 8; *see also supra* text accompanying notes 49–51.
144. *See supra* note 19 and accompanying text.
145. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).
146. *See supra* note 22 and accompanying text.

reasoning may be, such an exercise of discretion is not subject to judicial review when made pursuant to the broad authority delegated by Congress. Similarly, only the executive is in the position to determine whether military members are at risk of deployment to a hostile war zone. Congress vested the authority to make this determination with the executive, not the courts. Even if the president appears to be unreasonably stretching this authority to authorize expedited naturalizations during times of peace, the proper recourse is through the political process, not through the judiciary inserting its judgment into areas traditionally left to executive discretion.