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FROM A DREAM TO A REALITY CHECK: PROTECTING THE RIGHTS OF TOMORROW'S CONDITIONAL LEGAL RESIDENT ENLISTEES

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Once let the black man get upon his person the brass letter, U.S., let him get an eagle on his button, and a musket on his shoulder and bullets in his pocket, there is no power on earth that can deny that he has earned the right to citizenship.[1]

I. Introduction

A. The Case of Private Robert Gonzales

Robert is part of the 1.5 generation.[2] His parents, both undocumented aliens, crossed the border from Mexico into the United

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[1] Fredrick Douglass, Speech at National Hall (July 6, 1863).

[2] *See* Roberto G. Gonzales, *Wasted Talent and Broken Dreams: The Lost Potential of Undocumented Students*, IMMIGR. POL'Y IN FOCUS, Oct. 2007, at 2 (2007). Members of

States in 1986 when he was two years old. His father has steady work installing sheetrock and his mother works as an occasional seamstress and housekeeper.[3] Both earn a paltry hourly wage with no employee benefits.[4] The Gonzales family lives together in a one-bedroom apartment in Texas.[5]

Robert attended Texas public school from kindergarten. He is fluent in English and Spanish and is poised to graduate in the top ten percent of his class. He wants to attend college but knows his parents have little tuition money.[6] Further, because he is undocumented, he is not eligible for federal student aid.[7] Robert is steadfastly determined to help his family have a better life and is desperate for a solution. He thinks the Development, Relief, and Education for Alien Minors (DREAM) Act[8] may be able to help him become a United States citizen. The DREAM Act allows undocumented aliens like Robert to obtain conditional legal residency that can transfer to permanent legal residency if he completes

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the "1.5 Generation" are any first generation immigrant brought to United States at a young age who were largely raised in this country. They are not the first generation because they did not choose to migrate, but do not belong to second generation because they were born and spent part of their childhood outside the United States. *Id.*

3 *See* JEFFREY S. PASSELL & D'VERA COHN, PEW HISPANIC CENTER, A PORTRAIT OF ILLEGAL IMMIGRANTS IN THE UNITED STATES 15 (2009) (noting that the top five occupations for undocumented workers are in agriculture and construction.).

4 *See id.* at 16 (stating that low levels of education and low-skilled occupations lead to undocumented immigrants having lower household incomes than either other immigrants or United States born Americans); Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110, 119 (2011) (citing Gonzales, *supra* note 2, at 2) (discussing the emotional and financial struggles undocumented individuals face).

5 *See* PASSELL & COHN, *supra* note 3, at 18. More than half of unauthorized immigrants had no health insurance during all of 2007. Among their children, nearly half of those were uninsured and 25% of those who were born in the U.S. were uninsured. *Id.*

6 *See id.* at 17. A third of the children of unauthorized immigrants and a fifth of adult unauthorized immigrants live in poverty. This is nearly double the poverty rate for children of U.S.-born parents (18%) or for U.S.-born adults (10%). *Id.*

7 *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1623(a) (2006) (prohibiting illegal aliens from receiving in-state tuition rates at public institutions of higher education.).

8 Development, Relief, and Education for Alien Minors Act of 2011, S. 952, 112th Cong. (2011) [hereinafter DREAM Act of 2011]. The complete text of the DREAM Act of 2011 is located at Appendix A. The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 245D (2013), has been introduced in the Senate and includes a version of the DREAM Act but will likely not pass in the House of Representatives. Therefore, this article analyzes the DREAM Act of 2011, which limits the conditional residency to a very select class of individuals and has a higher likelihood of bipartisan support.

at least two years of work towards a bachelor's degree in six years or serves at least two years in the U.S. Armed Forces and is discharged honorably, if at all.[9]

Since college is a financial impossibility for Robert, out of a sense of patriotism for the only country he knows, a desire to learn a marketable skill, and a goal to be a productive, legal member of American society, he enlists in the U.S. Army. Soon, Robert's unit deploys in support of contingency operations in the Middle East. During his deployment, Robert proves to be a dependable, responsible young Soldier. However, upon redeployment, he has difficulty readjusting and receives a citation for driving under the influence. Further, he is involved in a drunken bar fight with several of his squad members. His symptoms are indicative of post-traumatic stress disorder (PTSD)[10] but he neither he nor his leaders recognize it as such. His Brigade Commander, who advocates a zero-tolerance policy for substance abuse, separates him from the Army with a General Discharge[11] under the provisions of Chapter 14-12(b) of Army Regulation (AR) 635-200, *Active Duty Enlisted Administrative Separations*.[12] Since Robert has been serving for fewer than six years, he does not receive the benefit of an administrative separation board.[13]

Under the provisions of the DREAM Act, after the Army separates Robert and without any appellate process for the separation, Robert loses his status as a conditional legal resident. Robert is now an undocumented alien facing an immigration judge at a removal proceeding. At the proceeding, the only evidence the Government sets forth before the immigration judge is the fact that Robert failed to meet

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[9] Dream Act of 2011, *supra* note 8, § 5(a).

[10] *What Is PTSD*?, U.S. DEP'T OF VETERANS AFFAIRS (Jan. 1, 2007), http://www.ptsd.va.gov/public/pages/ what-is-ptsd.asp. There are four types of PTSD symptoms: (1) reliving the event; (2) avoiding situations that remind the patient of the event; (3) feeling numb, and; (4) feeling "keyed up" (hyperarousal). Additional problems include drinking or drug abuse, feelings of hopelessness, shame, or despair, employment problems, and relationship problems. *Id.*

[11] U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS paras. 3-5(a), 3-6(a), and 3-7(b)(1) (14 Dec. 2012) (RAR, 6 Sept. 2011) [hereinafter AR 635-200] (establishing that a Soldier's service at the time of separation may be characterized as Honorable, General, or Other Than Honorable).

[12] *Id*. para. 14-12(b) (authorizing the separation of a Soldier when the command determines that he exhibits a pattern of misconduct).

[13] *Id*. para.1-19(c)(2). A special court-martial convening authority may separate a Soldier without using the separation board procedures under paragraph 14-12(b) if the Soldier's characterization of service is more favorable than other than honorable and the soldier has fewer than six years of service. *Id.*

the conditions required to maintain his conditional residency under the DREAM Act. After more than twenty years in the United States, he is deported to Mexico. As farfetched as this scenario seems, the proposed DREAM Act and the current policies and regulations could make this scenario a common occurrence for separated members of the Armed Services.

B. The 1.5 Generation

Children of undocumented aliens born outside of the United States represent a significant number of American youth.[14] These children have lived in the country for at least five years and received much of their education in United States. They are known as the "1.5" generation, which is any first generation immigrant brought to United States at a young age who was largely raised in this country. They are not the first generation because they did not choose to migrate, but do not belong to second generation because they were born and spent part of their childhood outside the United States.[15] They are culturally American[16] and never breached the law of their own volition.[17] They are also categorically excluded from citizenship because they will never meet the requirements of being a lawful permanent resident of the United States, which is a prerequisite to naturalization.[18]

The issue of the 1.5 generation is hotly debated. Some advocate a hard-line stance on immigration—deport everyone who resides in the country illegally and build a fence on the border[19]—while others support a more measured amnesty program for illegal aliens.[20] Invariably,

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[14] Gonzales, *supra* note 2, at 1 (noting that at least 65,000 undocumented students graduate from United States high schools each year).
[15] *Id*.
[16] IMMIGR. POL'Y CENTER, THE DREAM ACT, CREATING OPPORTUNITIES FOR IMMIGRANT STUDENTS AND SUPPORTING THE U.S. ECONOMY) 1 (2011).
[17] Shachar, *supra* note 4, at 119.
[18] 8 U.S.C. § 1427(a).
[19] *See Republican Presidential Candidate Debate* (CNN television broadcast Sept. 12, 2011). During this debate, former Presidential Candidate Michele Bachmann stated, "I think that the American way is not to give taxpayer subsidized benefits to people who have broken our laws or who are here in the United States illegally. That is not the American way."
[20] *See Republican National Security Debate* (CNN television broadcast Nov. 22, 2011). During this debate, Republican Presidential Candidate Newt Gingrich indicated his support for an amnesty program for long-time illegal aliens.

politicians on either side passionately refer to the DREAM Act when discussing the subject of immigration reform.[21]

The DREAM Act is proposed legislation that would allow members of the 1.5 generation to become legal residents of the United States if they meet certain qualifications, to include: graduating from college within six years; completing two years of college in a program toward a bachelor's degree or higher within six years; or serving at least two years in the military and being discharged honorably, if at all. After the student or servicemember meets all the conditions in the DREAM Act, he can become a permanent legal resident eligible for citizenship. While this proposition seems sensible—granting conditional residency to an undocumented alien who is willing to fight and die for the United States—and is not novel to the United States, application of the DREAM Act as drafted without policy and regulatory changes would raise serious concerns about the fairness of the legislation for Soldiers enlisting under the Act.

C. Roadmap

This article analyzes how the DREAM Act as currently drafted, in conjunction with Department of Defense (DoD) policies and Army regulations, will cause unfair serious consequences for conditional legal resident Soldiers facing separation. In Part II, this article describes the history of the United States Government offering immigration status to certain classes of individuals who performed military service. It analyzes the historical lessons learned and how they would be helpful to Congress, DoD, and the Army. Next, Part II describes the path to citizenship for today's non-citizen United States Soldier. This article concludes Part II with the legislative history of the DREAM Act since its introduction in 2001. Part III describes international service for status

[21] *See* Lucy Madison, *Obama Pushes DREAM Act, But Says He Needs Congress to Do It*, CBS NEWS (Sep. 28, 2011), http://www.cbsnews.com/8301-503544_162-20112935-503544.html (showing video footage of President Obama's roundtable discussion with Latino journalists, in which he avows his support for the DREAM Act); *see also* Transcript of Interview by Tom Ashbrook with Mike Huckabee, NAT'L PUB. RADIO (Aug. 11, 2010), http://onpoint.wbur.org/2010/08/11/mike-huckabee-on-immigration. Former Republican Presidential Candidate Mike Huckabee said, "Is [the illegal alien] better off going to college and becoming a neurosurgeon or a banker or whatever he might become, and becoming a taxpayer, and in the process having to apply for and achieve citizenship, or should we make him pick tomatoes?"; *Republican National Security Debate*, *supra* note 20.

schemes used as a recruiting tool and analyzes their successes and failures. Specifically, Part III describes the recruitment and performance of non-citizens and foreigners in French, Russian, and Israeli defense forces.

Part IV of this article first provides a brief description of current enlisted separation procedures in the United States Army. Second, this section proposes that respite from deportation is a "heightened interest" for conditional legal residents by analyzing controlling and persuasive judicial precedent. Third, this section illustrates how deportation from the United States is a collateral effect of the separation proceeding, even though the U.S. Government provides the conditional legal resident Soldier with a fundamentally fair removal proceeding subsequent to his separation action. Fourth, this section shows how the current enlisted separation procedures are unfair for a conditional legal resident Soldier facing separation with fewer than two years in service.

In Part V, this article recommends changes to the proposed legislation, policy, and regulations. This section first discusses methods of change, proposes the best method for this situation, and describes the Army's regulatory response to the "Don't Ask, Don't Tell" (DADT) repeal as a model of change. Next, this section proposes changes to the legislation, DoD policy, and the Army's separation proceeding based on lessons learned throughout international and domestic history, the Army's response to the DADT repeal, and the mechanics of alien removal proceedings. This article also periodically revisits Private Gonzales, demonstrating how the proposed changes will protect his rights.

II. Past, Present, and Future Status for Service Laws

A. A Historical Look

The United States has a long history of offering non-citizens immigration status in exchange for military service. The successes and failures of each of these laws are helpful for Congress, the DoD, and the Army to ensure the law is effectively written to further the legitimate goals of the Government and to protect the rights of selected classes of individuals. This section discusses the lessons learned from laws that offered immigration status or citizenship to enslaved persons, Native

Americans, Filipinos, and certain Eastern European veterans of foreign and domestic wars.

1. Enslaved Persons

Emancipation and eventual citizenship through military service in North America is a concept that predates the birth of the United States. During the Revolutionary War, Lord Dunmore, the Royal Governor of Virginia and a loyalist to the British, proclaimed freedom to all the slaves who would repair to his standard and bear arms for the King of England.[22] In response, the Continental Congress promptly prohibited the employment of slaves in the Army, calling such employment "inconsistent with the principles that are to be supported."[23] However, nearly every state had passed a law freeing all slaves who would enlist in the Army and fight against the British.[24]

The number of slaves who enlisted was a testament to their hope for emancipation.[25] Unfortunately, at the close of the war, a large number of slaves who served in the Army with the promise of freedom were promptly re-enslaved.[26] This practice was so common in the loyalist state of Virginia that the state passed a law directing the emancipation of certain slaves who served as Soldiers.[27] Of the half million slaves in the

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[22] JOS. T. WILSON, EMANCIPATION: ITS COURSE AND PROGRESS, FROM 1481 B.C. TO A.D. 1875, WITH A REVIEW OF PRESIDENT LINCOLN'S PROCLAMATIONS, THE XIII AMENDMENT, AND THE PROGRESS OF THE FREED PEOPLE SINCE EMANCIPATION; WITH A HISTORY OF THE EMANCIPATION MONUMENT 38 (1882).

[23] *Id.* at 39.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] An Act Directing the Emancipation of Certain Slaves who have Served as Soldiers in this State, and for the Emancipation of the Slave Aberdeen, Assembly of Virginia (1783).

> [D]uring the course of the war, many persons in the State had caused their slaves to enlist in certain regiments or corps raised within the same . . . and whereas it appears just and reasonable that all persons enlisted as aforesaid, who have faithfully served agreeable to the terms of their enlistment, and have thereby of course contributed towards the establishment of American liberty and independence, should enjoy the blessings of freedom as a reward for their toils and labors . . . .

Id.

colonies at the outbreak of the Revolutionary War, about one-fifth of the slaves became free.[28]

After the Colonial government's treatment of enslaved persons during the Revolutionary War, the United States had an opportunity to draft its own status-for-service laws. Nearly a century later during the Civil War, the Union Government emancipated enslaved men who fought against the Confederacy in the form of enemy property confiscation.[29] Statesmen believed slaves employed to aid the rebellion should be confiscated and dealt with as contraband of war.[30] Further, the Union leaders understood their obligation that in a time of war if certain people are oppressed by the enemy (the Confederacy), and the enemy is conquered, the victorious party cannot return the oppressed people back into bondage.[31] In "An Act to Confiscate Property Used for Insurrectionary Purposes," otherwise known as the First Confiscation Act, a slave owner would forfeit his claim to any slave whom he required or permitted to work or be employed upon any "fort, navy yard, dock, armory, ship, entrenchment, or in any military or naval service whatsoever, against the Government and lawful authority of the United States;"[32] in other words, the slaves who were forced to support the Confederate military effort. On July 17, 1862, the Second Confiscation Act[33] gave freedom to every black man enrolled, drafted, or volunteering into the military service of the United States.[34] The result of the First and Second Confiscation Acts was to free hundreds of thousands of slaves, to include over 200,000 in the Army and Navy during the rebellion.[35]

2. Native Americans

The United States first offered immigration status to enslaved men in exchange for their military service, soon followed by Native Americans. In the early 1800s, the United States government realized the intense

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[28] WILSON, *supra* note 22, at 41.
[29] Confiscation Act of 1861, ch. 60, 12 Stat. 319 (1861).
[30] WILSON, *supra* note 22, at 48.
[31] *Id.* at 49.
[32] *Id.*
[33] An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes, ch. 195, 12 Stat. 589–92 (1862).
[34] WILSON, *supra* note 22, at 60.
[35] *Id*.

demand for the vast expanses of Native American land and sought treaties with the Native Americans.[36] To entice the Native Americans to sign the treaties and cede their land, the United States Government often promised them citizenship.[37] During the early 19th century, few Native Americans were willing to abandon their homelands in exchange for United States citizenship, forcing the United States to take more aggressive measures in the form of the Indian Removal Act.[38] Unfortunately, the Native Americans tribes that signed the treaties and ceded their homelands found their citizenship unequal to other citizens, with federal courts ruling that the 14th and 15th Amendments did not apply to them.[39]

Later in the 19th century, the government passed the Dawes Act, which allowed citizenship for Native Americans who surrendered their land.[40] However, the Dawes Act required eligible Native Americans to

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[36] *See* Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830–1965*, 5 NEV. L.J. 126, 127 (2004–2005).

[37] *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (1994); Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native American: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 111(1999) (discussing the incentives of "citizenship" for Native Americans").

[38] Rollings, *supra* note 36, at 130 (noting that President Jackson passed the Indian Removal Act under intense pressure from Congress).

[39] *See* MacKay v. Campbell, 16 F. Cas. 161 (D. Or. 1871) (finding that a mixed-race Chinook man of "seven-sixteenth white and nine-sixteenth Indian" blood could not vote even though he assimilated and lived as a white man for several years); United States v. Osborn, 2 F. 58 (D. Or. 1880) (finding that assimilation did not allow a Native American to become a citizen of the United States); Elk v. Wilkins, 112 U.S. 94 (1884) (finding that since Native Americans were not taxed, they were not citizens; thus, the 15th Amendment did not apply and the appellant could not vote).

[40] General Allotment Act, ch. 119, § 6, 24 Stat. 388 (1887) [hereinafter General Allotment Act] (codified at 25 U.S.C. §§ 331–333 (1887)) (repealed 2000). Commonly known as the Dawes Act, this law stated:

> [E]very Indian born within the territorial limits of the United States to whom allotments have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of a civilized life, if hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens . . . .

Id.; Rollings, *supra* note 36, at 127.

have "voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein" and to have "adopted the habits of civilized life."[41] To this point, Native American citizenship was conditional on both the surrender of land and assimilation into "white" culture.

The next legislation concerning citizenship for Native Americans was directly linked to military service and did not have the qualifications of allotment or assimilation. During World War I, thousands of Native American citizens and non-citizens volunteered to fight in Europe for freedom and democracy.[42] After the war, the United States Government offered Native Americans citizenship in exchange for their military service through the 1919 American Indian Citizenship Act.[43] The Act did not grant automatic citizenship to American Indian veterans who received an honorable discharge; however, it authorized those American Indian veterans who wanted to become U.S. citizens to apply for and be granted citizenship.[44] Unfortunately, few Native Americans actually followed through on the process for a variety of reasons, to include an unwillingness to abandon their culture or to undergo the competence determination required by the Government prior to naturalization, a lack of knowledge about the law, or an inability to complete the application process.[45] However, it was another step towards citizenship and an

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[41] General Allotment Act, *supra* note 40, § 6 (stating that Native Americans must assimilate into white culture in order to be eligible for citizenship).
[42] Rollings, *supra* note 36, at 134.
[43] An Act Granting Citizenship to Certain Indians, ch. 19, 41 Stat. 350, (1919) [hereinafter Act of 1919]; *see* Rollings, *supra* note 36, at 134 ("Ironically, they were fighting for freedoms they did not have at home.").
[44] Act of 1919, *supra* note 43.

> Be it enacted . . . [t]hat every American Indian who served in the Military or Naval establishments of the United States during the war against the Imperial Government, and who has received or who shall hereafter receive an honorable discharge, if not now a citizen and if he so desires, shall, on proof of such discharge and after proper identification before a court of competent jurisdiction, and without other examination except as prescribed by said court, be granted full citizenship with all the privileges pertaining thereto, without in any manner impairing or otherwise affecting the property rights, individual or tribal, of any such Indian or his interest in tribal or other Indian property.

Id.
[45] Porter, *supra* note 37, at 127.

acknowledgment of the Native American contribution toward the war effort.[46]

Native American military veterans who did not apply or receive citizenship under the provisions of the 1919 act waited five more years to automatically become citizens. In 1924, Congress passed the second Indian Citizenship Act and granted U.S. citizenship to all Native Americans born in the United States, regardless of their military service or lack thereof.[47] However, this victory was still bittersweet for Native Americans who found themselves without the constitutional civil rights guaranteed to other American citizens.[48]

3. Filipinos

After enacting laws conferring citizenship on enslaved person and Native American veterans, the U.S. Government was becoming more experienced in enlisting non-citizens to augment its military ranks. However, during World War II, the United States promised (without legislation) Filipino troops citizenship and full Veteran's benefits in exchange for their service.[49] Following the war, the Government granted full immigration status and Veteran's benefits to Regular Philippine Scouts while limiting eligibility among other veterans.[50]

Ultimately, the U.S. Government failed to provide any other Filipino veteran with immigration status and Veteran's benefits. As a result, 40 years later legislators introduced the Filipino Veteran's Fairness Act.[51]

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[46] *Id.* (citing LAURENCE HAUPTMAN, CONGRESS AND THE AMERICAN INDIAN: EXILED IN THE LAND OF THE FREE 323 (Oren Lyons & John Mohawk eds., 1991)) (stating that even though Congress authorized Native American veterans to become citizens upon judicial application, few Indians refused to turn their backs on their heritage or go through the "demeaning" process of being declared competent for citizenship, which was a qualification of the law).

[47] An Act to Authorize the Secretary of the Interior to Issue Certificates of Citizenship to Indians, ch. 233, 43 Stat. 253 (1924) (declaring all Native Americans to be citizens of the United States).

[48] *See* Rollings, *supra* note 36, at 127 (describing how Native Americans were not allowed to vote in city, county, state, or federal elections, testify in courts, serve on juries, attend public schools, or even purchase beer).

[49] THOMAS LUM & LARRY A. NIKSCH, CONG. RESEARCH SERV., RL 33233, THE REPUBLIC OF THE PHILIPPINES: BACKGROUND AND U.S. RELATIONS 20–21 (2007).

[50] *Id.* at 21.

[51] Filipino Veterans Equity Act of 1993, S. 120, 103d Cong. § 2 (1993). The purpose of this bill was to grant special immigrant status to immediate relatives of Filipino veterans

The Act would "exempt children of certain Filipino World War II veterans from numerical limitations on immigrant visas."[52] Unfortunately for the veterans and their families, the bill never progressed past the committee phase for sixteen years until President Obama signed it into law as a part of the American Recovery and Reinvestment Act of 2009.[53]

4. The Lodge-Philbin Act

The Lodge-Philbin Act was a relatively unknown prescriptive law that the United States used to recruit and enlist highly specialized individuals using the promise of immigration status and subsequent naturalization. During the Cold War, the Government saw an opportunity to recruit and enlist qualified non-resident individuals and drafted proactive legislation to this end. The Lodge-Philbin Act of 1950 initially permitted up to 2,500 non-resident aliens, later expanded to 12,500 non-resident aliens, to enlist in the Armed Services.[54] The official purpose of the Lodge Act was to overcome obstacles to the enlistment of non-citizens in the U.S. Army in 1950.[55] Specifically, the Lodge-Philbin Act targeted certain aliens who had enlisted outside the United States and therefore had not been admitted to the United States as lawful permanent residents.[56] Unofficially, the purpose of the Lodge-Philbin Act was to recruit Eastern European enlistees to form special operation infiltration units in the Soviet Bloc.[57]

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of World War II, and for other purposes. The bill proposed to amend a section of the Immigration and Naturalization Act in order to permit this special status.

[52] *See* LUM & NIKSCH, *supra* note 49, at 21; SIDATH VIRANGA ET AL., CONG. RESEARCH SERV., RL 33876, OVERVIEW OF FILIPINO VETERANS' BENEFITS (2009).

[53] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

[54] Lodge Act, ch. 443, 64 Stat. 316 (1950) (codified as amended at Immigration and Nationality Act of 1952, 8 U.S.C. § 1440 (1952) (commonly known as the Lodge-Philbin Act).

[55] Garcia v. U.S. Immigration & Naturalization Serv., 783 F.2d 953, 954 (9th Cir. 1986) (stating the purpose of the Lodge-Philbin Act and describing eligibility through the original and amended Act).

[56] *See generally* MARGARET MIKYUNG LEE & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL 31884, EXPEDITED CITIZENSHIP THROUGH MILITARY SERVICE: POLICY AND ISSUES (2003) (discussing the Lodge-Philbin Act in the context of the history of the United States offering citizenship to select enlistees in exchange for their military service).

[57] *See generally* Eric T. Olson, *U.S. Special Operations: Context and Capabilities in Irregular Warfare*, 56 JOINT FORCES Q. 68 (2010) (discussing the Military Accessions

The requirements for a servicemember to be eligible for legal residency under the Lodge-Philbin Act were similar to that of the DREAM Act. The Lodge-Philbin Act authorized naturalization of an alien who enlisted or reenlisted overseas under the terms of the Act, subsequently entered the United States or a qualifying territory pursuant to military orders, and was honorably discharged after at least five years of service.[58] Should the veteran meet these qualifications, the Government considered him lawfully admitted to the United States for permanent residence for the purposes of naturalization.[59] The Lodge-Philbin Act was an effective recruiting tool that produced over 2,000 Eastern Europeans enlistees before the program expired in 1959.[60]

5. Lessons Learned

The collective history of certain enslaved men, Native Americans, Filipinos, and Eastern European veterans of foreign and domestic wars provides the United States with three key lessons that Congress and the DoD should consider when codifying and implementing, respectively, the DREAM Act.

First, the concept of the U.S. Government offering some sort of immigration status—whether citizenship or residency status—in exchange for a non-citizen's military service is neither new nor revolutionary.[61] As shown through the experiences of certain selected classes of individuals during the past two centuries, if codified, the DREAM Act would simply exist as another mechanism for the United

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Vital to the National Interest program as compared to the Lodge Act, which provided highly qualified enlistees to Special Operation forces during the Cold War); *The DREAM Act: Hearing before the S. Comm. on the Judiciary, Subcomm. on Immigr., Refugees, and Border Security*, 112th Cong. (2011) (statement of The Honorable Clifford L. Stanley, Under Secretary of Defense (Personnel and Readiness)) (discussing the distinguished history of non-citizens serving in the United States Armed Forces); *10th SFG(A) History*, U.S. SPECIAL OPERATIONS COMMAND, http://www.soc.mil/usasfc/10thSFGA/10thSFG%20History.html (last visited Oct. 8, 2012) In 1951 Congress passed the Lodge-Philbin Act, which provided for the recruiting of foreign nationals, predominantly Eastern Europeans, into the United States military. *Id.*

[58] *Garcia*, 783 F.2d at 954.

[59] *Id.*

[60] CHARLES K. DAGLEISH, A NEW "LODGE ACT" FOR THE US ARMY—A STRATEGIC TOOL FOR THE GLOBAL WAR ON TERRORISM 9 (2005) (stating that between June 30, 1959 and the end of the Lodge Act program, 1969 foreign-born Soldiers enlisted).

[61] *See supra* Part II.A.1.–4.

States to broaden its base of potential enlistees. Historically, the United States has often relied on non-citizens to augment its military ranks, with varying degrees of success for each program.[62]

This fact leads to the second lesson learned, which is that the legislation must be effectively written at the outset to further the Government's interests while protecting the rights of the enlistee. The experiences of enslaved and Native American veterans illustrate how the Government can very easily draft legislation that furthers the legitimate goals of the Government while paying little regard to individual rights of selected classes.[63] Further, as shown by the experiences of Filipino veterans, once the law is codified, it could take decades of remediation for the Government to successfully address the inequities it created.[64]

Similarly, the third lesson is that the Government enjoyed the most success with proactive laws that targeted recruitment of certain selected classes, as compared to reactionary laws intended to compensate a selected class for its service. The Lodge-Philbin Act is a model example of how the Government achieved this balance with a proactive law (albeit on a smaller scale than the DREAM Act).[65] The law benefited the enlistee because it allowed him to understand the requirements for time in service and discharge prior to his departure from the Armed Services.[66] Further, the law was beneficial for the Government because it allowed the Government to recruit the highly-specialized enlistee it was seeking.[67] The DREAM Act has been in the legislative process for eleven years, which is ample time to identify the correct balance between an individual enlistee's rights and the goals of the Government.[68]

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[62] *Id.*
[63] *See supra* notes 36–48 and accompanying text (discussing the history of the Government offering Native American citizenship in exchange for their military service).
[64] *See supra* notes 49–53 and accompanying text (describing the retroactive laws allowing immigration status for certain Filipino veterans of WWII).
[65] *See* Garcia v. U.S. Immigration & Naturalization Serv., 783 F.2d 953, 954 (9th Cir. 1986) (illustrating the small number of potential enlistees under the Lodge-Philbin Act).
[66] *See id.* (stating the qualifications that the enlistee complete five or more years of service and be honorably discharged from the Armed Services).
[67] *See* Olson, *supra* note 57 (asserting that the intent of the Lodge-Philbin Act was to recruit Eastern European enlistees to augment Special Operations units).
[68] *See infra* Part II.C (outlining the history of the DREAM Act).

B. The Future for Today's Non-Citizen Soldier

The path to citizenship is much less complicated for non-citizen members of the U.S. Armed Forces who are lawful residents of the United States. The current laws allow eligible non-citizen servicemembers to receive expedited and overseas naturalization processing under special provisions of the United States Code.[69] However, under the current laws, a non-citizen must lawfully reside in the United States to be eligible to enlist in any branch of the Armed Services.[70] Thus, no avenue currently exists for an undocumented alien to enlist in the Armed Services and obtain citizenship through the established process. Accordingly, this prohibition may change if Congress passes the DREAM Act.[71]

The 2011 version of the DREAM Act provides an avenue for the 1.5 generation to become lawful permanent residents of the United States, eligible for citizenship after meeting all the normal requirements for naturalization. The purpose is to create a special immigration rule for qualified long-term undocumented alien residents of the United States who entered the country as children.[72] Specifically, the alien must have been physically present in the United States for at least five consecutive years prior to applying for conditional status.[73] The applicant must have been no more than fifteen-years old when he entered the country with a history of good moral character from that date.[74] Additionally, the applicant must be no older than thirty-two years at the time the Act is enacted and must be admitted to an institution of higher learning or possess a high school diploma or general equivalency development certificate.[75] If the applicant meets the qualifications, the Department of Homeland Security (DHS) will grant him conditional legal residency status, which legitimizes his status in the United States and permits the

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[69] 8 U.S.C. § 1427 (2011). An alien who has served honorably during a time of hostilities as declared by the President and is discharged honorably if at all may be naturalized according to this provision of the law. For combat veterans, this section specifically waives some requirements for non-servicemember applicants, to include the age limit and minimum time the applicant resided in the United States. *Id.*

[70] *See* 10 U.S.C. § 504 (2006) (stating that an applicant is only eligible for enlistment if (among other requirements) he or she is lawfully in the United States.).

[71] The DREAM Act of 2011 is currently referred to the Committee on the Judiciary, Subcommittee on Immigration, Refugees and Border Security.

[72] DREAM Act of 2011, *supra* note 8, § 3.

[73] *Id.* § 3(b)(1)(A).

[74] *Id.* § 3(b)(1)(B)–(C).

[75] *Id.* § 3(b)(1)(E)–(F).

applicant to enter the Armed Services or enroll in a college or university.[76]

The requirements for the conditional legal resident are continuous throughout the applicant's pendency. The applicant must maintain a history of good moral character and may not abandon his residence in the United States for the duration of his conditional status.[77] Additionally, he must complete two years in good standing toward a bachelor's degree within six years, or serve in the Armed Services for at least two years, and be discharged honorably, if at all.[78] If the applicant meets all these requirements, his conditional status will be removed and he will become a permanent legal resident of the United States.[79]

Should the applicant cease to meet any of the original requirements, he will return to the immigration status he had immediately prior to receiving conditional status. More specifically, the applicant will become an undocumented alien again, subject to deportation.[80] The former DREAM Act Soldier or student may be subject to a removal proceeding, where an Immigration Judge determines whether the former applicant should be deported. At the hearing, the burden of proof is on the alien to prove he is "clearly and beyond doubt" entitled to be admitted and by "clear and convincing evidence" and that he is lawfully present in the United States pursuant to a prior admission.[81] However, the burden of proof is on the service, if alien has been admitted to the United States, to prove the alien is deportable based on "reasonable, substantial, and probative evidence."[82] Accordingly, in the case of a DREAM Act applicant who loses his conditional status and reverts to his illegal status, the burden is on the applicant to prove his admissibility in accordance with the law.

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[76] *Id.* § 4.
[77] *Id.* § 4(c)(1).
[78] *Id.* § 4(c)(1).
[79] *Id.* § 5.
[80] *Id.* § 4 ("The Secretary shall terminate the conditional permanent resident status of an alien, if the Secretary determines that the alien . . . was discharged from the Uniformed Serves and did not receive an honorable discharge."). The plain reading of this language suggests that the government would revoke the conditional residency of a DREAM Act Soldier who receives a General (Under Honorable Conditions) discharge.
[81] 8 U.S.C. § 1427 (2011).
[82] *Id.*

C. The DREAM Act

The DREAM Act legislation has been pending in Congress for more than a decade. Senator Orrin Hatch (R–Utah) first introduced the DREAM Act on August 1, 2001, with eighteen cosponsors.[83] A departure from today's legislation, the bill initially did not include a military service provision.[84] It was placed on the senate legislative calendar on June 20, 2002, and subsequently reintroduced in the108th,[85] 109th,[86] and 110th[87] Congresses. Senator Arlin Spector (R–Pa.) also placed the text of the bill in the Comprehensive Immigration Reform Acts of 2006[88] and 2007.[89] The Act remained pending throughout 2007 and the Senate declined to vote on it.

In 2007, during the height of the Armed Services recruiting crisis, Senator Dick Durbin (D–Ill.) introduced a new version of the DREAM Act.[90] Contrary to the previous versions of the Act, it contained a provision that an eligible undocumented alien could obtain conditional legal residency by serving in the Armed Services.[91] The military provision appealed to members of the Armed Services because recruitment was suffering due to the Global War on Terrorism.[92] However, opponents of the bill claimed that the Act would encourage unauthorized immigration and migration and should be enacted only as

[83] Development, Relief, and Education for Alien Minors Act, S. 1291, 107th Cong. (2001).

[84] DREAM Act of 2011, *supra* note 8.

[85] Development, Relief, and Education for Alien Minors Act of 2003, S. 1545, 108th Cong. (2003).

[86] Development, Relief, and Education for Alien Minors Act of 2005, S. 2075, 109th Cong. (2005).

[87] Development, Relief, and Education for Alien Minors Act of 2007, S. 774, 110th Cong. (2007).

[88] Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. §§ 621–32 (2006).

[89] Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. §§ 621–32 (2007).

[90] Development, Relief, and Education for Alien Minors Act of 2007, S. 2205, 110th Cong. (2007).

[91] *Id*. § 4(d).

[92] *See* 153 CONG. REC. S12091 (daily ed. Sept. 26, 2007) (statement of Sen. Durbin). Senator Durbin discussed the appeal of the DREAM Act of 2007 to the Pentagon. In particular, he mentioned comments by Bill Carr, the Acting Secretary of Defense for Military Personnel Policy, who said the DREAM Act is "very appealing" to the military because it would apply to the "cream of the crop of students" and would be "good for readiness."

part of broader immigration reform.[93] Ultimately, the Senate again declined to vote on the bill.

In March 2009, Senator Durbin and several co-sponsors reintroduced the bill in both chambers.[94] Aside from some additional requirements for applicants, the bill remained essentially the same. Congress continued to consider the bill throughout 2010, making numerous changes to address concerns raised about the bill.[95] On September 21, 2010, the Senate maintained its filibuster and the bill stopped progress.[96] On September 22, 2010, Senator Durbin and Senator Dick Lugar (R–Ind.) reintroduced the first of three more versions of the bill which was eventually rendered moot in Senate.[97] The House of Representatives passed the DREAM Act on December 8, 2010,[98] but failed in the Senate to reach the 60-vote threshold necessary for it to advance to the floor.[99]

On May 11, 2011, Senator Durbin reintroduced the Act in the Senate[100] and Representative Howard Berman (D–Cal.) concurrently reintroduced the Act in the House of Representatives.[101] On June 22, 2011, Senator Robert Menendez (D–N.J.) introduced it as a part of the Comprehensive Immigration Reform Act of 2011.[102] The House of

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[93] *See* Stephen Dinan, *'Dream' for Illegals Gets a Wake-up Call; Bill Amended to Boost Support*, WASH. TIMES, Sept. 20, 2007, at A1 (citing comments by Senator John Coryn (R–Tx.), who worried that the DREAM Act would create a " 'Trojan horse' to try to find citizenship for a broader group of people").

[94] Development, Relief, and Education for Alien Minors Act of 2009, S. 729, 111th Cong. (2009) (Reintroduced by Senator Durbin); American Dream Act, H.R. 1751, 110th Cong. (2009).

[95] Development, Relief, and Education for Alien Minors Act of 2010, S. 3827, 111th Cong. (2010); Development, Relief, and Education for Alien Minors Act of 2010, S. 3962, 111th Cong. (2010); Development, Relief, and Education for Alien Minors Act of 2010, S. 3992, 111th Cong. (2009).

[96] 156 CONG. REC. S7235-7262 (daily ed. Sept. 21, 2010).

[97] Development, Relief, and Education for Alien Minors Act of 2010, S. 3827, 111th Cong. (2010); Development, Relief, and Education for Alien Minors Act of 2010, S. 3962, 111th Cong. (2010); Development, Relief, and Education for Alien Minors Act of 2010, S. 3963, 111th Cong. (2010); Development, Relief, and Education for Alien Minors Act of 2010, S. 3992, 111th Cong. (2010).

[98] 156 CONG. REC. H8223-8226 (daily ed. Dec. 8, 2010) (passing with a vote of 216 to 198).

[99] 156 CONG. REC. S10665-10666 (daily ed. Dec. 18, 2010) (cloture on the motion not reached with a vote of 55 to 41).

[100] DREAM Act of 2011, *supra* note 8.

[101] Development, Relief, and Education for Alien Minors Act of 2011, H. 1842, 111th Cong. (2011).

[102] Comprehensive Immigration Reform Act of 2011, S. 1258, §§ 141–49 (2011).

Representatives referred the Act to the Subcommittee on Immigration Policy and Enforcement, where it currently resides, and both Senate Acts are before the United States Committee on the Judiciary for review.

On June 15, 2012, the Department of Homeland Security announced it would exercise broad prosecutorial discretion in enforcing the current immigration laws for individuals previously described in the DREAM Act, to include individuals who "are honorably discharged veteran[s] of the Coast Guard or Armed Forces of the United States."[103] Two months later, United States Citizenship and Immigration Services unveiled a formal application for the Deferred Action for Childhood Arrivals process that would allow these individuals to apply for a "discretionary determination to defer removal action of an individual as an act of prosecutorial discretion."[104]

On March 16, 2013, Senator Charles Schumer (D–N.Y) and a bipartisan coalition of seven co-sponsors introduced the Border Security, Economic Opportunity, and Immigration Modernization Act.[105] The Immigration Modernization Act incorporated the bulk of the original DREAM Act legislation; however, it increased the requirement of military service to four years.[106] The Senate is currently considering the legislation[107] while the House of Representatives remains deeply divided

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[103] Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to Acting Comm'r, U.S. Customs & Border Prot. et al., subject: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (15 June 2012) (on file with author).

[104] *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP AND IMMIGRATIONSERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD (last visited Oct. 9, 2013).

[105] Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013). This legislation would permit any qualifying undocumented immigrant to apply for Provisional Resident Immigrant status, whereas the DREAM Act of 2011 only permits certain classes of individuals to become Conditional Legal Residents.

[106] *Id.* § 245D(b)(1)(A)(iv)(II).

[107] 159 CONG. REC. S4518 (daily ed. June 17, 2013).

over immigration reform.[108] It is unlikely that this version of the DREAM Act will become law.[109]

The DREAM Act has supporters and opponents taking stances that are in opposition to the party line.[110] However, with support from both Democrats and Republicans, passage of the DREAM Act becomes more likely. Given that Congress will pass some version of the DREAM Act in the future, it is vital for the drafters to conduct a historical study of the previous laws involving military service for immigration status. International and domestic experiences will provide important lessons and talking points for the drafters as they struggle to create legislation that will garner support from both parties. This article previously outlined the domestic history of similar laws and now provides an international comparison.

III. Status for Service: An International Comparison

As other countries have found, the practice of offering immigration status to non-citizens is a valuable recruiting tool that opens the door to a pool of highly qualified individuals who are otherwise barred from enlistment due to their status as non-citizens.[111] Likewise, the original intent of the military service option of the DREAM Act was to address the recruiting crisis that occurred about five years after the 2001 terrorist

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108 *See* Fawn Johnson, *House GOP Makes Aggressive Opening Bid on Immigration*, NAT'L J. (Jun. 18, 2013), http://www.nationaljournal.com/daily/house-gop-makes-aggressive-opening-bid-on-immigration-20130618.

109 Chris Cillizza & Sean Sullivan, *The Senate is Going to Pass Immigration Reform. And the House Doesn't Care*, WASH. POST (Jun. 25, 2013), http://www.washington post.com/blogs/the-fix/wp/2013/06/25/the-senate-is-going-to-pass-immigration-reform-and-the-house-doesnt-care/.

110 *CNN/Heritage Foundation Debate* (CNN television broadcast, Nov. 22, 2011). During this debate, Republican Presidential Candidates Michele Bachmann and Mitt Romney vocalized their opposition to the DREAM Act while candidates Newt Gingrich and Rick Perry vocalized their support.

111 *See Contributions of Immigrants to the United States Armed Forces: Hearing Before the Comm. on Armed Services*, 109th Cong. 7 (2006) [hereinafter *Contributions of Immigrants*] (statement of Sen. Edward Kennedy (D–Mass.), Member, Comm. on Armed Services). Discussing this pool of highly qualified enlistees, Senator Kennedy stated, "The DREAM Act is the right title, since the act will give thousands of bright, hard-working immigrant students a chance to pursue their 'American Dream.' By denying them these opportunities, we deny our country their intelligence, their creativity, their energy, and often their loyalty."

attacks.[112] A decade later, with a poor economy and high unemployment, the Armed Services does not lack the number of prospective enlistees;[113] however, the quality of prospective enlistees has declined.[114] In 2009, only about three in ten Americans of military age could meet the standards for military service.[115] In 2008, 35% of enlistees were medically disqualified, 18% were rejected due to drug or alcohol use or abuse, 5% had disqualifying misconduct or criminal records, 6% had too many dependents, and 9% scored in the lowest aptitude category on the enlistment test.[116] The DREAM Act could help reverse this downward recruiting trend.

The DREAM Act provides the Armed Services an opportunity to recruit the most highly qualified, motivated, and morally sound potential enlistees.[117] As Senator Durbin stated in 2007,

> These children have demonstrated the kind of determination and commitment that makes them successful students and points the way to the significant contributions they will make in their lives. They are

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[112] 153 CONG. REC. S9202 (daily ed. July 13, 2007) (statement of Sen. Durbin). Regarding the benefit of the DREAM Act to the military, Senator Durbin stated, "Some people might ask why the Senate should revisit immigration again and whether an immigration amendment should be included in the Defense authorization bill. The answer is simple: The DREAM Act would address a very serious recruitment crisis that faces our military." *Id.*

[113] *See Development, Relief, and Education for Alien Minors (DREAM) Act of 2011: Hearing Before the S. Judiciary Comm., Subcomm. on Immigration, Refugees, and Border Sec.*, 112th Cong. (2011) [hereinafter *DREAM Act Hearing*] (statement of Margaret Stock) (referring to recruiting officials who stated that the economy has been the most important factor affecting recruiting success).

[114] *Id.*

[115] William H. McMichael, *Most U.S. Youths Unfit to Serve*, ARMY TIMES (Nov. 3, 2009), *available at* http://www.armytimes.com/article/20091103/NEWS/911030311/Most-U-S-youths-unfit-serve-data-show.

[116] Otto Kreisher, *Armed Services Having Trouble Finding Qualified Recruits*, NAT'L J: CONG. DAILY (Mar. 24, 2008), http://www.nationaljournal.com/about/congressdaily.

[117] *See Contributions of Immigrants*, *supra* note 111 (statement of Sen. Kennedy, Member, Comm. on Armed Services) (emphasizing the documented alien contributions to the Armed Services by stating, "In all of our wars, immigrants have fought side by side with Americans—and with great valor. They make up five percent of our military today, but over our history have earned twenty percent of the Congressional Medals of Honor."); *DREAM Act Hearing*, *supra* note 113 (stating that a native-born American can join the Armed Services despite having a felony criminal conviction, whereas a DREAM Act enlistee will not progress beyond the "first gate" at Department of Homeland Security with such a record).

> junior [Reserve Officer's Training Corps] leaders, honor roll students, and valedictorians. They are tomorrow's [S]oldiers, doctors, nurses, teachers, and Senators.[118]

Further, the DREAM Act allows the Armed Services to recruit individuals with specialized linguistic skills, saving the Government the time and expense of language training.[119]

The concept of enlisting highly qualified non-citizen enlistees is hardly novel. France, Russia, and Israel all employ foreigners in their military service with the promise of immigration status or citizenship at the conclusion of the foreigner's honorable military service. Like the original military service amendment to the DREAM Act, all three countries began allowing foreigners to serve as a response to either a qualitative or quantitative recruiting shortage. The countries employ the foreigners in varying degrees of assimilation with regular troops; France maintains an elite unit composed of foreigners separate from its regular army while Russia and Israel augment their regular forces with foreigners. The practice of recruiting non-citizens and aliens to serve in the armed forces has been highly successful, particularly during times of conflict when a country found its forces stretched thin or sought highly specialized individuals.

A. The French Foreign Legion

France provides an example of how the DREAM Act could target highly qualified individuals for specialized service. The French Foreign Legion, one of the world's most elite fighting forces, is premised on the idea that foreigners are a force multiplier in combat.[120] The Legion was originally formed in the 19th century as a way for France to enforce its colonial empire with foreign adventurers.[121] French King Louis Philippe

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[118] 153 CONG. REC. S9202 (daily ed. July 13, 2007) (statement by Sen. Durbin).

[119] *See Contributions of Immigrants*, *supra* note 111 (statement of the Hon. David S.C. Chu, Under Secretary of Defense for Personnel and Readiness) ("One of the benefits of recruiting noncitizens to the military force of the United States is to be able to have a more diverse, and, specifically, a linguistically more competent military force than we could otherwise recruit.").

[120] DOUGLAS PORCH, THE FRENCH FOREIGN LEGION: A COMPLETE HISTORY OF THE LEGENDARY FIGHTING FORCE, at xi (1991).

[121] Simon Romero, *Camp Szuts Journal, Training Legionnaires to Fight (and Eat Rodents)*, N.Y. TIMES, Nov. 30, 2008, at A6 (describing the camp as one of the most "grueling courses in jungle warfare and survival").

issued a decree on March 9, 1831, authorizing the formation of *une compose d'etrangers*.[122] The decree stipulated that all applicants should possess a birth certificate, a "testimonial of good conduct," and a document from a military authority stating that the applicant had the necessary requirements to make a "good soldier."[123] Foreign men volunteered in droves with the promise of French citizenship and with dubious character references, resulting in a roughly organized group of foreign men who deserted the force regularly and drank excessively.[124] However, over the next 30 years, the Legionnaires became stellar and courageous soldiers who conducted some of the most dangerous missions for France.[125]

Today, if a man is physically fit and otherwise suitable for elite military service, he may become a Legionnaire regardless of his nationality.[126] A Legionnaire understands that when he enlists, he effectively signs away his nationality and places himself outside the protections of his home country.[127] A Legionnaire of foreign nationality can ask for French nationality after three years of honorable service.[128] After his service, the Legionnaire rarely declines his citizenship with France and frequently stays in his new homeland.[129]

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[122] JAMES WELLARD, THE FRENCH FOREIGN LEGION 22 (1974).

[123] *Id*. at 22.

[124] *Id.* at 22–23.

[125] *Id*. at 28.

[126] *A New Opportunity for a New Life*, FRENCH FOREIGN LEGION—RECRUITING, http://www.legion-recrute.com/en/?SM=0 (last visited Oct. 9, 2013) [hereinafter FRENCH FOREIGN LEGION—RECRUITING] ("Whatever your origins, nationality or religion might be, whatever qualifications you may or may not have, whatever your social or professional status might be, whether you are married or single, the French Foreign Legion offers you a chance to start a new life . . . .").

[127] WELLARD, *supra* note 122, at 132.

[128] *Questions*, FRENCH FOREIGN LEGION—RECRUITING, *supra* note 126 ("[A candidate for citizenship] must have been through 'military regularization of situation' and be serving under his real name. He must no longer have problems with the authorities, and he must have served with 'honour and fidelity' for at last three years.").

[129] WELLARD, *supra* note 122, at 132. Wellard describes one legionnaire, "Big" Nichols, who served in the United States Army as an officer during World War I. He received the *Legion d'Honneur* for an act of bravery involving a blazing ammunition ship at Marseilles. Nichols remained in the legion until his early 60s, at which point the French Government required him to reenlist for one year at a time. Each year, Nichols pleaded with the Commandant for permission to serve one more year and his final duty was to play the tuba in the Legion's band. *Id.*

The French Foreign Legion has not been without criticism. Some complain that the cadre used to train the Legionnaires could be used to improve *la regulaire* soldiers.[130] Others question a Legionnaire's loyalty towards France.[131] However, no empirical data exists to support either of these criticisms and the Legionnaires continue to perform with great valor in Afghanistan, the Ivory Coast, Chad, and Kosovo.[132]

American scholars and commentators have studied the French Foreign Legion as an example of how to successfully target relatively small numbers of highly qualified enlistees to augment its ranks. During the most recent recruiting crisis, some commentators advocated creating a "foreign legion" using the same premise as the French Foreign Legion.[133] However, such a plan came with concerns, to include attracting human rights abusers and mercenaries, or members of terrorist groups desiring to create sleeper cells in the military.[134] One can mitigate these concerns by examining the past courageous and reliable performance of non-citizen servicemembers in our nation's conflicts, and by considering the experiences of other countries.[135] Further, one can look at the success enjoyed by the French Foreign Legion and the typical Legionnaire's devotion toward France to understand that the non-citizens have a tremendous sense of patriotism. Further, the French Foreign Legion is a model of a successful recruiting tool for France and can serve as a model for the United States in recruiting highly qualified elite Soldiers during a time when the United States has the ability to be more selective in its accessions. Specifically, the DREAM Act has the ability

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[130] PORCH, *supra* note 120, at 632.

[131] *Id*. at 633.

[132] *See Legionnaires Code of Honour*, FRENCH FOREIGN LEGION—RECRUITING, *supra* note 126. The French Foreign Legion has a strict code of honor, with each man swearing allegiance to France, solidarity with his fellow Legionnaire regardless of his nationality, race or religion, promising to be courageous, disciplined, well-mannered, tidy, and proud of his service with the legion as an "elite soldier."

[133] Peter Schweizer, *All They Can Be, Except American*, N.Y. TIMES, Feb. 18, 2003, at A23 (proposing an "American Foreign Legion" akin to the French Foreign Legion, to augment active-duty forces that are stretched thin and reserves that are stressed by prolonged mobilization).

[134] Bryan Bender, *Military Considers Recruiting Foreigners*, BOSTON GLOBE, Dec. 26, 2006, at 1A (discussing how foreign citizens serving in the military is a hotly contested issue but may solve the recruiting crisis).

[135] *See Contributions of Immigrants*, *supra* note 111 (statement of General Peter Pace) ("Not only are [non-citizen servicemembers] courageous, but they bring . . . a diversity, especially in a current environment where cultural awareness, language skills, and just the family environment from which they come, are so important to our understanding of the enemy and our ability to deal with them.").

for the Government to be selective in its recruitment, requiring each enlistee to be even more morally qualified than a non-DREAM Act enlistee.[136]

B. Russian Foreign Legion

In contrast to France's goal of recruiting small numbers of elite fighters, Russia opened its military ranks to foreigners and offered citizenship in exchange for military service in response to a recruiting crisis resulting from its shrinking population.[137] The Ministry of Defense originally created the program in 2004 as an enlistment method for citizens of the former Russian states, now known as the Commonwealth of Independent States (CIS).[138] The Russian government hoped the foreign enlistees would help fill the nearly 150,000 vacancies in their combat units.[139] The original plan offered the "conscientious and diligent soldier"[140] Russian citizenship through a simplified procedure, the opportunity to attend a higher education institution in Russia, and all the benefits afforded a Russian citizen, to include medical insurance, a foreign travel passport, and the right to live and work wherever he desires in the country.[141]

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[136] *Compare* DREAM Act of 2011, *supra* note 8, § 3(b) (requiring the enlistee to possess and maintain "good moral character" since the date he entered the United States and prohibiting an alien from enlisting if he was convicted of any offense that carries a maximum sentence of more than one year of confinement, or three or more offenses and was imprisoned for more than ninety days), *with* U.S. DEP'T OF ARMY, REG. 601-210, ACTIVE AND RESERVE COMPONENTS ENLISTMENT PROGRAM paras. 4-6 and 4-7 (8 Feb. 2011) (RAR 12 Mar. 2013) (allowing a regular enlistee to obtain a waiver for multiple civil and criminal convictions and major misconduct, to include felony offenses such as driving while intoxicated, drug offenses, and domestic abuse).

[137] Lidia Okorokova, *Russia's New Foreign Legion*, MOSCOW NEWS (Nov. 25, 2010), http://themoscownews.com/news/20101125/188233351.html (quoting Alexander Golts, a military expert and an activist with the Solidarnost opposition movement, who said the measure was likely aimed at plugging gaps in the military due to Russia's shrinking population).

[138] Viktor Litovkin, *A Foreign Legion for Russia*, CTR. FOR DEF. INFO. RUSSIA WKLY, http://english.pravda.ru/russia/politics/20-11-2003/4125-army-0/ (last visited Oct. 21, 2013) (discussing the evolution of Russia's foreign legion).

[139] *Id*. (stating the rationale behind opening Russian ranks to foreign troops).

[140] *Id*.

[141] *Id*. (outlining the benefits a foreigner would receive if serving in the Russian foreign legion).

Six years later, the Russian President expanded the program to non-CIS individuals. A foreign-born individual may enlist for five years in the Russian Defense Forces and will become eligible for citizenship after three years.[142] Should an enlistee fail to serve all five years, he loses his eligibility for citizenship.[143] Recent changes to the law ease requirements for these foreign troops to enlist and subsequently apply for citizenship. For example, foreigners would no longer be required to have a Russian passport before signing their enlistment contract. Further enlistment requirements are that an enlistee need only be conversant in Russian and have his fingerprints.[144] However, officials expect a vast influx of impoverished Africans from countries accustomed to fighting, such as Zimbabwe and Somalia, for the chance to become Russian citizens or obtain a Russian passport.[145]

Aside from Russia's military action against Georgia in 2008, there have been very few opportunities to observe the Russian foreign soldiers since the program's inception.[146] However, quantitatively, the program appears to be a success, with non-citizen soldiers filling the ranks and performing as well or better than their citizen contemporaries.[147] Accordingly, the United States could use this data to show that the DREAM Act could be used to boost the number of qualified servicemembers in its ranks should another recruiting crisis occur.

C. Israeli Defense Force

Israel's experience of offering immigration status for military service provides an example of law that meets both qualitative and quantitative recruiting goals. During its War of Independence, Israel opened the Israeli Defense Forces (IDF) to non-citizen foreigners in its IDF *Mahal*

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[142] *Contract Service: Terms of Admission*, MINISTRY OF DEF. OF THE RUSSIAN FEDERATION, http://eng.mil.ru/en/career/soldiering/conditions.htm (last visited Oct. 9, 2013).
[143] *Id.*
[144] Okorokova, *supra* note 137.
[145] *Id.*
[146] *See generally* Clifford J. Levy, *Putin Suggests U.S. Provocation in Georgia Clash*, N.Y. TIMES, Aug. 29, 2008, at A1 (providing background information about the conflict between Russia and Georgia in 2008).
[147] *CIS Servicemen Join Russian Army to Obtain Citizenship* (BBC International Reports television broadcast, Aug. 17, 2006) (stating that in the 138th motor-rifle brigade, there are 20 foreigners who "give their all" to the service, are "motivated," and serve without conflict between them and the Russian servicemen).

program, which offers the opportunity for non-citizens persons of Jewish descent to serve in the Israeli army.[148] During the War, 3,500 volunteers from 37 different countries came to Israel's defense.[149] Many volunteers were experienced World War II combat veterans who served with distinction in every branch of the IDF.[150]

The *Mahal* troops performed with great valor during the War for Independence. Recognizing the importance of non-citizen soldiers in the IDF, Israel's first Prime Minister, David Ben-Gurion, said:

> The participation of . . . men and women of other nations in our struggle cannot be measured only as additional manpower, but as an exhibition of the solidarity of the Jewish people . . . without the assistance, the help and the ties with the entire Jewish people, we would have accomplished naught . . . some of our most advanced services might not have been established were it not for the professionals who came to us from abroad . . .[151]

The *Mahal* troops serve side-by-side with members of the regular IDF, although historically, some units were nearly exclusively composed of *Mahal* soldiers.[152] Today, an applicant who is Jewish or who has Jewish parents or grandparents may join the IDF *Mahal* if he enlists for at least 18 months of service.[153] He or she may make *Aliyah* (immigrate

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[148] *Machal—Volunteers in the IDF*, ALIYAHPEDIA, http://www.nbn.org.il/aliyahpedia/army/584-machal-volunteers- in-the-idf.html (last visited Oct. 9, 2013). These troops are interchangeably referred to as "*Machal*" or "*Mahal*." This article refers to them in the latter.

[149] *Focus on Israeli Volunteers*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (May 1, 1999), http://www.mfa.gov.il/mfa/mfaarchive/1990_1999/1999/5/focus%20on%20israel-%20machal%20-%20overseas%20volunteers [hereinafter *Focus on Israeli Volunteers*] (providing information about contributions by Mahal soldiers during Israel's 1948 War for Independence).

[150] *Id*. (noting that 119 overseas volunteers lost their lives in the War of Independence, four of whom were women and eight of whom were non-Jewish).

[151] *Id*.

[152] *Id*. For example, the 7th Armored Brigade included about 250 English-speaking Mahal soldiers. The brigade was commanded by Ben Dunkelman, a decorated WWII Canadian veteran who had previously been involved in the preparations of the "Burma Road" to Jerusalem and organized mortar support in the battles for the relief of besieged Jerusalem. *Id.*

[153] *MAHAL: Assistance for Volunteer Enlistees in the IDF*, ISRAEL DEFENSE FORCES, http://dover.idf.il/IDF/English/information/enlistment/Mahal/default.htm (last visited Oct. 9, 2013).

to Israel) at the completion of his or her service, and further eligible IDF *Mahal* members may obtain Israeli citizenship.[154] Similar to the DREAM Act, the *Aliyah* applicant must complete a mandatory time of service in order to successfully immigrate.[155]

As shown by the *Mahal* successes during the War for Independence, the *Mahal* soldier is highly motivated and possesses a strong sense of patriotism—and religious devotion—which results in superior battlefield performance.[156] Israel's success with its *Mahal* program is helpful as an example for the United States to successfully recruit highly qualified non-citizen enlistees.

IV. Analysis

This section describes the Army's procedures for administratively separating a Soldier. Additionally, it proposes that deportation is a collateral consequence of separation for a conditional legal resident with fewer than two years of active duty service. It further analyzes how the courts view respite from deportation, with some viewing it as a heightened interest and others declining to do so. Finally this section suggests that deportation is a collateral effect of a DREAM Act Soldier's separation prior to two years of completed service, concluding that the current administrative separation process is inadequate for a DREAM Act Soldier with fewer than two years of service.

A. Enlisted Separations

In order to understand the issue at hand, the reader must have a basic understanding of the method by which the Army discharges Soldiers. The Army separates Soldiers punitively at a Court-Martial[157] with a dishonorable or bad-conduct discharge or administratively with a characterization of service of honorable (HON), general under honorable conditions (GEN), or other than honorable circumstances (OTH).[158] The different options for the characterization of service afford the separated

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[154] *Id.*
[155] *Id.*
[156] *See Focus on Israeli Volunteers*, *supra* note 149.
[157] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 103 (2012) [hereinafter MCM].
[158] AR 635-200, *supra* note 11, para. 3-7.

Soldier decreasing rights and benefits upon separation. For that reason, the separation authority generally increases in rank. An HON characterization provides the separated Soldier with the most post-service rights and OTH characterization provides him the least.[159] When authorized, the separation authority may issue an administrative separation with a GEN characterization to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an HON characterization.[160] Most importantly for a DREAM Act Soldier, the separating authority will not afford a Soldier with fewer than six years of service a formal separation proceeding for an HON or GEN characterization at discharge.[161]

A commander who is a special court-martial convening authority[162] is authorized to *sua sponte* approve or disapprove separation (without a formal separation proceeding) under certain provisions of AR 625-200 when the Soldier's conduct does not warrant an OTH characterization of service.[163] As a result, some battalion and most brigade commanders have tremendous power to approve a Soldier's separation with a characterization of service of HON or GEN if the Soldier has fewer than six years of service—all this without providing the Soldier any meaningful opportunity to be heard aside from the Soldier's written submissions.[164]

If the Soldier has served more than six years of service, he is entitled to a formal separation proceeding. The Army regulation provides some specific rights at this administrative hearing, beginning with notice of the

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[159] *Id*. For further information and a helpful chart on benefits at separation, the reader can visit http://www.knox.army.mil/sja/documents/Adlaw/VA_Benefits_Chart.pdf.
[160] *Id*.
[161] *Id*. para. 2-2(c)(4) (identifying Soldiers who are entitled to a board upon recommendation for separation).
[162] *See* UCMJ art. 19 (2012). Maximum punishment under a Special Court-Martial is generally one year of confinement, forfeiture of two-thirds pay per month for twelve months, and in most circumstances, a Bad Conduct Discharge. *Id.* art. 23. Generally, a brigade commander may convene a Special Court-Martial, although in practice, the General Court-Martial Convening Authority usually reserves authority to do so.
[163] AR 635-200, *supra* note 11, paras. 1-19(c) and 2-2(c)(2). For many bases for separation under this regulation, the approval authority need only notify the Soldier of his rights and provide him an opportunity to submit matters on his own behalf. *Id.*
[164] *Id*. para. 2-2. A Soldier may submit matters in writing to the approval authority for his or her consideration. No in-person meeting is required. *Id.* The author acknowledges that very few battalion commanders possess the requisite qualifications to be the separation authority for these types of discharges; however, it is still a possibility under the regulation and is most commonly seen in headquarter or Special Troops battalions.

potential characterization of service both recommended and possible and notification that the Soldier may consult with military or civilian counsel.[165] At the separation board, the command may call witnesses to prove to the three-member board[166] the allegations of the separation.[167] The Soldier may cross-examine the witnesses and may call witnesses of his own to disprove the allegations or to provide the separation board mitigating and extenuating facts.[168] The board deliberates on the veracity of the allegations and presents its findings and recommendations for retention or separation.[169] The separation authority considers the board's recommendations and may approve them completely, partially, or may disregard them.[170] The separation authority may not separate the Soldier with a characterization of service that is more severe than recommended by the board.[171]

The separated Soldier's appellate rights are minimal. He may first appeal to the Army Discharge Review Board, which has authority to upgrade a discharge or to issue a new discharge, but it does not have authority to reverse or vacate a discharge.[172] His secondary means of appeal is through the Army Board for Correction of Military Records (ABCMR), which has statutory authority to "correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice."[173] Further, the ABCMR may,

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[165] *Id*. The initiating commander must also notify the Soldier that he may submit statements on his or her own behalf and may obtain copies of all documents that will be sent to the separation authority supporting the proposed separation. Finally, the commander must notify the Soldier that he is entitled to an administrative hearing before an administrative separation board if the Soldier has more than six years of active duty service or if the commander is recommending a characterization of service of other than honorable.

[166] *Id.* para. 2-7(a). The composition of the board is at least three experienced commissioned, warrant, or noncommissioned officers in the rank of Sergeant First Class or higher and senior to the respondent.

[167] *Id.* para. 2-12(a). The board makes findings as to whether the allegations are supported by a preponderance of the evidence and if so, whether the findings warrant separation.

[168] *Id*. para. 2-10(d)(3). The Soldier may request witnesses to testify at the board proceeding after a showing that the witness' testimony would be relevant.

[169] *Id*. para. 2-7(b)(2).

[170] *Id*. para. 2-4.

[171] *Id*.

[172] 10 U.S.C. § 1553 (2011). The board consists of five members charged with reviewing discharges and dismissals of any former member of the armed services.

[173] *Id.* § 1552(a)(1).

subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.[174]

The commander has an established method to administratively separate a Soldier from the Army. The Army regulation may afford eligible Soldiers procedural safeguards, to include a formal administrative separation board, but the regulation allows commanders to separate some Soldiers with a procedure as simple as providing notice to the Soldier and obtaining two or three signatures. While not required under the current regulation, this established procedure could easily be expanded to protect the rights of conditional legal resident Soldiers.

B. Respite from Deportation as a Heightened Interest

In general, the courts have found that the Army's separation procedures are constitutionally adequate for Soldiers who are citizens or permanent legal residents.[175] More specifically, the courts declined to name a property or liberty interest that would create a constitutional requirement for more explicit procedural safeguards.[176] However, should the DREAM Act permit conditional legal residents to enlist in the Army, the courts will be forced to reevaluate the interests at stake for these Soldiers facing potential deportation. The following section proposes that deportation is a factor that should be significant enough to warrant additional safeguards in the current administrative separation procedures.

As the courts have found, in order for procedural due process rights to become available to a Soldier, he must demonstrate the potential for a loss of property or liberty.[177] Property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings

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[174] *Id.* § 1553(b). The board can change a discharge or dismissal or issue a new discharge.

[175] *Cf.* Mindes v. Seaman, 453 F.2d 197, 201–02 (5th Cir. 1971). If this article argued that respite from deportation is a liberty interest, at this point it would discuss the two-part threshold requirement and four-part framework for determining whether a court should review a military decision.

[176] *See* Guerra v. Scruggs, 942 F.2d 270, 277–78 (4th Cir. 1991).

[177] *Contra* Major Charles C. Poché, *Whose Money Is It: Does the Forfeiture of Voluntary Education Benefit Contributions Raise Fifth Amendment Concerns?*, ARMY LAW., Mar. 2004, at 1, 17 (suggesting that the immediately vested educational benefits from the G.I. Bill are "property interests" that give rise to procedural due process protections at an administrative separation hearing or a separation action).

that secure certain benefits and that support claims of entitlement to those benefits."[178] In other words, the Soldier must have a legitimate entitlement to some property at the time of the separation in order to claim a right to it, not just a mere expectancy of the property. The courts do not believe continued military service is an entitlement because the Army has broad statutory discretion to discharge Soldiers.[179]

For a DREAM Act Soldier, the collateral effect of an administrative separation is not merely the loss of immediately vested military benefits or the inability to continue his military service; rather, it is probable deportation at his subsequent removal proceeding. The courts have come close to naming respite from deportation as a liberty interest but have thus far declined to name it as such. However, the language used by the Supreme Court in its decisions regarding deportation of undocumented aliens suggest that the act of deporting someone who has deeply embedded roots in the United States is of grave enough significance to warrant due process protections that generally occur when a liberty interest is at stake.

At the heart of this debate is the concept of fundamental fairness and the notion that the U.S. Government may not deprive an individual of life, liberty, or property without adequate notice and an opportunity to be heard.[180] The courts often use the concept of fundamental fairness in conjunction with the concept of procedural due process. As previously noted, procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.[181]

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[178] Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
[179] *See* Rich v. Secretary of Army, 735 F.2d 1220, 1226 (10th Cir. 1984) (holding that the petitioner had no property right in continued employment with the Army because of the discretion afforded the Secretary under 10 U.S.C. § 1169(1)).
[180] U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").
[181] Matthews v. Eldridge, 424 U.S. 319, 332–34 (1976) (The Court made a three-part test to determine the constitutionality of any deprivation of property or liberty. First, the court must identify the private interest that will be affected by the official action. Second, the court must identify the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. Third, the court must identify the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.).

The Supreme Court has consistently held that some form of hearing is required before depriving an individual of his property or liberty.[182] Further, the courts have generally found that the Fifth Amendment even protects undocumented aliens from invidious discrimination by the Government.[183] The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."[184] The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."[185] For the DREAM Act Soldier like Private Gonzales, he failed to meet the qualifications for conditional residency upon the brigade commander's separation. At his removal proceeding, the Government meets its burden to show there is no basis for him to remain in the country by merely showing he did not complete his two-year service obligation.[186] Therefore, the "meaningful time" for any additional protections was at the time of Private Gonzales's separation proceeding, to which he was not entitled because of his time in service.

Because deportation is a collateral effect of his separation, a DREAM Act Soldier like Private Gonzales has much more at stake in his continued service than a citizen or permanent legal resident servicemember.[187] As previously noted, the courts have declined to find

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[182] *Id.* at 333; Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974).

[183] One must note that most of the cases involving due process for aliens involve petitioners who are not lawfully in the United States. In the case of the DREAM Act Soldier, the alien's presence is lawful, a fact which should afford him even more protections under the Fifth Amendment. *See* Matthews v. Diaz, 426 U.S. 67, 77 (1976); *See also* Christopher Nugent, *Ensuring Fairness and Due Process for Noncitizens in Immigration Proceedings*, 36 HUM. RTS. MAG., Winter 2009, at 18–20 (The author provides a helpful discussion about the struggle for due process rights for non-citizens in immigration proceedings.).

[184] Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

[185] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[186] 8 U.S.C. § 1427 (2011) (discussing basis for removal of a DREAM Act candidate).

[187] *See* Major Richard D. Belliss, *Consequences of a Court-Martial Conviction for United States Servicemembers Who Are Not United States Citizens*, 51 NAV. L. R. 53, 57–58 (2005) (Major Belliss discusses the consequences of a court-martial conviction on lawful permanent residents. The author notes that the Court of Military Appeals found immigration consequences for a drug or crime of moral turpitude conviction is collateral and thus neither the defense attorney nor military judge has any obligation to notify the accused of the potential that he would face deportation as a result of his conviction. Fortunately for lawful permanent resident accused servicemembers, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) changed this requirement and defense attorneys and judges must

a property interest in continued military service for servicemembers who are both citizens and legal permanent residents.[188] However, the stakes become much higher for conditional legal resident enlistees who face the threat of deportation to a foreign country to which they have no ties, should they be separated prior to the requisite two years of honorable military service. The reader should recall the relative ease at which Private Gonzales's brigade commander was able to separate him under the provisions of the Army regulation. His opportunities in the United States are much greater than in Mexico, as evident by his strong desire to engage in combat on behalf of the only country he knows. Given the opportunities he will be denied, the lack of significant criminal or moral wrongdoing, and the lack of notice in the proceeding, and considering that removal is a collateral and inevitable effect of the separation proceeding, the Government is required to afford him the appropriate level of rights at the "meaningful time," which is at his separation proceeding.

Because the DREAM Act is still in its draft form and conditional legal residents may not serve in the military, this issue is not yet ripe for adjudication in court. However, the Supreme Court and some federal courts view deportation very seriously, giving respite from deportation a heightened interest that comes close to a liberty interest.[189] Accordingly, Congress, the DoD, and the Army should recognize this heightened interest and allow for the requisite procedural due process rights at the appropriate time, which is prior to the removal proceeding.

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advise a defendant that his or her plea of guilty may subject them to non-favorable immigration action.)

[188] *See* Guerra v. Scruggs, 942 F.2d 270, 278 (4th Cir. 1991) (denying existence of statutory property interest); Sims v. Fox, 505 F.2d 857, 860–62 (5th Cir. 1974) (denying property right in continued military employment when basis is mere expectancy); Rich v. Sec'y of the Army, 735 F.2d 1220, 1226 (10th Cir. 1984) (denying property right in continued military employment) (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

[189] *See* Cruzan by Cruzan v. Dir., Missouri Dept. of Health, 497 U.S. 261, 279 (1990) (citing Youngberg v. Romeo, 457 U.S. 307, 321 (1982)) (Because this article acknowledges that respite from deportation is not a liberty interest, it will not discuss the second prong of the inquiry to determine whether a Constitutional violation has occurred. Determining that a person has a "liberty interest" under the Due Process Clause does not end the inquiry; "whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." Here, there is little state interest in deporting someone who has no criminal record and desires to be a contributing member of society so much that he or she enlists in the armed services.).

Although declining to name respite from deportation as an official liberty interest, the deprivation of which would trigger Constitutional protections, the Supreme Court has repeatedly used language to convey the significance of deportation to an alien who has deeply embedded roots in the United States. The Court defined a liberty interest as a function of a person's ability to pursue an occupation of his pleasing. In *Butcher's Union Slaughterhouse and Livestock Landing Co. v. Crescent Slaughterhouse Co.*, the Court said:

> The right to follow any of the common occupations of life is an inalienable right, it was formulated as such under the phrase "pursuit of happiness" in the declaration of independence, which commenced with the fundamental proposition that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.[190]

Given this definition, the Supreme Court and some federal courts have come close to identifying relief from deportation as a "liberty interest." In *Bridges v. Wixon*, the Court discussed the significance that must be given to procedures involving the threat of deportation.[191] The Court stated, "Meticulous care must be exercised lest the procedure by which [the detainee] is deprived of [his] liberty not meet the essential standards of fairness."[192] Justice Douglas continued, noting that "it must be remembered that although deportation technically is not criminal punishment it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling."[193] The Court

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[190] 111 U.S. 746, 762 (1884).

> The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the fourteenth amendment. The court assents to this general proposition as embodying a sound principle of constitutional law.

Id.

[191] 326 U.S. 136 (1948).

[192] *Id*. at 154.

[193] *Id*. at 147 (citing Cummings v. Missouri, 71 U.S. 277 (1866); *Ex parte Garland*, 71 U.S. 333 (1866)).

specifically noted that they were dealing with deportation of aliens whose roots may have become "deeply fixed in this land."[194] Most poignantly, as stated by Mr. Justice Brandeis speaking for the Court in the frequently cited case of *Ng Fung Ho v. White*, deportation may result in the loss "of all that makes life worth living."[195]

The federal courts are split in their interpretation of respite from deportation as a liberty interest. The Eighth Circuit expressly found that respite from deportation, even for a conditional legal resident, is not a liberty interest: "As a threshold requirement to any due-process claim . . . [the] alien must show that he or she has a protected property or liberty interest."[196] Further, the court reminded appellant that the court has "held [that] there is no constitutionally protected liberty interest in discretionary relief from removal."[197] The court reasoned that in those circumstances, because there is no liberty interest, the Due Process Clause does not apply, and, because there is no constitutional question or question of law, the court lacked jurisdiction to even hear the claim.[198]

In stark contrast, the Third Circuit adopted a more generous view toward a conditional resident, discussing the alien's liberty interests at stake with deportation. In *Leslie v. Attorney General of the United States*, the petitioner was a conditional legal resident who faced deportation because of a qualifying felony. Identifying the "grave consequences of removal," the court underscored the seriousness of deportation by stating that "the draconian and unsparing result of removal is near-total preclusion from readmission to the United States, with only a remote possibility of return after twenty years."[199] The *Leslie* court recalled Justice Douglas in *Bridges*, citing his comments that removal "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom" and the Court's conclusion that "deportation is a penalty—at times a most serious one—

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[194] *Id.* at 154.
[195] 259 U.S. 276, 284 (1922).
[196] Garcia-Mateo v. Keisler, 503 F.3d 698, 700 (8th Cir. 2007); Etchu-Njang v. Gonzales, 403 F.3d 577, 585 (8th Cir. 2005).
[197] *See Garcia-Mateo*, 503 F.3d at 700 (voluntary departure); *Etchu-Njang*, 403 F.3d at 585 (cancellation of removal); Jamieson v. Gonzales, 424 F.3d 765, 768 (8th Cir. 2005) (adjustment of status); Nativi-Gomez v. Ashcroft, 344 F.3d 805, 808–09 (8th Cir. 2003) (adjustment of status).
[198] *See* Ibrahimi v. Holder, 566 F.3d 758, 766 (8th Cir. 2009); *see also* Pinos-Gonzalez v. Mukasey, 519 F.3d 436, 439 (8th Cir. 2008) (claiming lack of jurisdiction to cancel the removal action).
[199] 611 F. 3d 171, 181 (3d Cir. 2010).

[that] cannot be doubted."[200] Finally, the *Leslie* court recalled the words of Judge Rendell in his dissenting opinion of *Ponce-Leviva v. Ashcroft*: "We must always take care to remember that, unlike in everyday civil proceedings, the liberty of an individual is at stake in deportation proceedings."[201] In sum, although the Supreme Court and some of the federal courts use language suggesting that respite from deportation could be a deprivation of liberty severe enough to warrant full Constitutional protection, no court has officially stated as much.

Revisiting Private Gonzales, he has now been separated from the Army with no administrative separation hearing, DHS removed his conditional residency status, he now faces an alien removal proceeding as an undocumented alien. At the removal proceeding, the Government meets its burden of proof by showing by a preponderance of the evidence that Private Gonzales's immigration status reverted to his previous undocumented status when his command separated him and he no longer meets the requirements for conditional residence under the DREAM Act.[202] Given the administrative separation proceedings and the courts' emphasis on the importance of the decision to deport an individual, this article next discusses why Private Gonzales's administrative separation procedure is effectively his alien removal hearing.

C. Deportation as a Collateral Effect of Separation

Private Gonzales is at risk for deportation if he is separated prior to two years of service or if he is separated with anything but an Honorable Discharge. The language of the DREAM Act is clear: "The Secretary shall terminate the conditional permanent resident status of an alien, if the Secretary determines that the alien . . . was discharged from the Uniformed Services and did not receive an honorable discharge."[203] Further, if the alien "ceases to meet the requirements" of this section, he "shall return to the immigration status the alien had immediately prior to receiving permanent resident status on a conditional basis or applying for such status, as appropriate."[204] In other words, when Private Gonzales is separated from the Army prior to completing two years of service or with

[200] *Id*. (citing Bridges v. Wixon, 326 U.S. 135, 154 (1945)).
[201] Ponce-Leiva v. John D. Ashcroft, 331 F.3d 369, 381 (3d Cir. 2003) (Rendell, J., dissenting).
[202] *See supra* pp. 15–16; *infra* Appendix A.
[203] DREAM Act of 2011, *supra* note 8, § 4.
[204] *Id*. § 4(d)(1).

a discharge that is not an Honorable Discharge, he will become an undocumented alien whose location is known to the Government, potentially initiating deportation procedures. The Government need only show that Private Gonzales failed to meet the qualifications for his conditional residency and can easily produce the separation paperwork signed by his brigade or battalion commander. Thus, the Army's separation action is effectively Private Gonzales's removal proceeding and should be treated as such.

The courts uniformly agree that any evidence offered during a removal proceeding must be probative and fundamentally fair, invoking notions of due process protections.[205] The majority of these cases involve a conditional legal resident or undocumented alien who commits a felony that makes him ineligible to remain in the United States. Private Gonzales is clearly distinguishable from a felon seeking a stay from deportation. Further, consider his situation with that of another Soldier facing administrative separation. The other Soldier will involuntarily leave the Army and move back to his home state, presumably with his friends, family, and livelihood intact, while Private Gonzales may be deported to Mexico. The difference in the effect of the separation is highly significant.

Another provision exists for Private Gonzales to obtain conditional legal residency under the DREAM Act. He could have entered a college or university, having been granted conditional legal residency for six years. Under this provision, the government would have allowed him six years to complete two years towards at least a bachelor's degree.[206] Any reversion back to his prior status would have occurred at the completion of that six years if he had not either acquired a bachelor's degree or completed at least two years in good standing towards such a degree.[207] However, as stated in the introduction, this option is unlikely for an undocumented alien with limited access to student aid.[208] The DREAM Act student has six years to complete two years of work prior to his status reverting while the DREAM Act Soldier can have his status reverted in fewer than two years.[209] Consequently, the DREAM Act

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[205] *See, e.g.*, Felzcerek v. INS, 75 F.3d 112, 115 (2d Cir. 1996); Baliza v. INS, 709 F.2d 1231, 1234 (9th Cir. 1983); Cunanan v. INS, 856 F.2d 1373, 1374 (9th Cir. 1988); Olabanji v. INS, 973 F.2d 1232, 1234 (5th Cir. 1992).
[206] DREAM Act of 2011, *supra* note 8, § 5.
[207] *Id.*
[208] *See supra* Part I.A.
[209] DREAM Act of 2011, *supra* note 8, § 5.

Soldier needs more protection during any administrative determinations that have the potential to affect his residency status. A modification to the Army's administrative separation procedures can remedy this inequity.

D. The Inadequacy of the Current Proceedings

Understanding deportation is a collateral effect of administrative separation for a conditional legal resident Soldier under the DREAM Act, this article now describes why the protections afforded him under the current regulations are inadequate to protect his rights. As previously described, certain provisions of AR 635-200 allow for a battalion commander with a legal advisor to approve administrative separations with no oversight.[210] The battalion commander who may be authorized to approve some administrative separations usually has little formal legal training and is not bound by any recommendations of his legal advisor.[211] More commonly, a brigade commander will act as the separation authority. Under the current Office of The Judge Advocate General (OTJAG) training model, the brigade commander has limited—if any—training in immigration law.[212] Further, under this same training model, the brigade commander's legal advisor has little to no experience in immigration law aside from routine legal assistance issues and would not have the professional expertise to advise the commander on a separation action that will result in a default removal proceeding.[213]

Recall Private Gonzales's proposed separation action: Since Private Gonzales has served for fewer than six years, he is not entitled to a

[210] *See supra* Part IV.A.

[211] The author was the legal advisor to a battalion commander for thirteen months from December 2009 until January 2011for a battalion commander who had little legal training whatsoever. Additionally, AR 635-200 does not require a legal review of administrative separations prior to the commander approving the separation.

[212] *See* Memorandum from Dean, The Judge Advocate Gen.'s School, to Students, 218th Senior Officer's Legal Orientation (SOLO) Course, subject: Course Administrative Instructions (22 July 2011) (discussing course content for brigade and select battalion commanders, which does not include any training on immigration law).

[213] This assertion is based on the author's recent professional experiences in the Judge Advocate Officer's Basic Course in 2007, as Chief of Client Services from February 2008 until June 2009, and as a legal assistance attorney from January until May 2011.

separation board.[214] Further, he has no appellate rights under the provisions of AR 635-200.[215] The approving authority has removed the condition he must meet to maintain his conditional legal residency, and DHS may immediately remove his conditional status. Since he reverts to his original status—that of an undocumented alien—he may face a removal proceeding where the Government need only show that he is ineligible to remain in the country. Private Gonzales has just been effectively advised and deported by a host of individuals (commander, government counsel, and defense counsel) who, by no fault of their own, lack specialized training in immigration law, with a limited opportunity to be heard, and without any appellate rights. This scenario underscores why a heightened separation board is the best option for a DREAM Act Soldier facing separation prior to his two years of service.

Given the potential risks at every step in this process, any fiscal and administrative burdens placed upon the Army by requiring additional procedural requirements are more than reasonable.[216] This article has established the DREAM Act Soldier's interest in having more procedural safeguards at the separation proceeding. The Government has an interest in affording servicemembers the rights appropriate to the level of potential deprivation, even if this deprivation does not rise to the level of requiring full Constitutional protection. Most significantly, the Government has an interest in attracting the highest quality undocumented recruits, some of whom would decline to enlist due to the fear of arbitrary separation and subsequent deportation. The next section proposes changes to both the Army regulations and the legislation in order to protect the Soldier's and the Government's interests in the case of a conditional legal resident soldier facing administrative separation.

V. Recommendations

Clearly, the law, policies, and regulations should change and the most advantageous time to plan for the changes is in advance of the law. Private Gonzales suffered a significant injustice after being separated from the Army and subsequently deported. This scenario would not

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[214] AR 635-200, *supra* note 11, para.13-8 (The commander may approve the separation of a Soldier with fewer than six years of service without affording him an administrative separation board.).

[215] *Id.* para. 13 (noting that some chapters of this regulation provide for an appeals process, such as a separation under Chapter 19 for the Qualitative Management Program).

[216] Matthews v. Eldridge, 424 U.S. 319, 334 (1976).

occur today because the Army requires an enlistee to possess either United States citizenship or permanent legal residency. However, given the eventuality of the DREAM Act becoming law, this article proposes changes to both the legislation and the Army regulations to protect Soldiers like Private Gonzales from a situation similar to the hypothetical one in this article. Fortunately, with the repeal of "Don't Ask, Don't Tell" (DADT),[217] the Army has recent experience in rapidly changing the administrative separation procedures for members of a limited group to ensure it protects the rights of its Soldiers facing separation.

A. Methods of Change

This section compares three methods to ensure the Army protects the interests of a DREAM Act Soldier. One method is to change the legislation itself prior to the President signing it into law. Another method is to change Army regulations. The third method is to change both the legislation prior to its passage into law, delegate authority to remove the servicemember's conditional status to the service secretaries, and incorporate intraservice changes at the DoD and service level. Although all three methods are viable, this section concludes that the third method would be the most effective.

There are advantages to the first method of simply changing the legislation and creating additional safeguards within the text of the law.[218] The law would be clear-cut, unequivocal, and would leave no room for interpretation by the separate armed services. However, once the DREAM Act is passed and signed into law, a change to the enacted legislation would require an amendment through Congress.[219] The second method of change is to simply change the regulations at the service-specific level to incorporate additional procedural safeguards into each service's regulations. Although this method of change allows the most flexibility for each service, the possibility exists that a service may not change its regulation at all. Further, the regulatory variance could be too great between the services.

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[217] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2, 124 Stat. 3515 (2010).

[218] For example, the DREAM Act could contain a section called "Implementation at the Armed Service Level." In this section, the text of the legislation could specifically outline the changes to the separation procedures for the services.

[219] The U.S. Code is the compendium of laws currently in force. Any changes to the Code would require a new law.

The third—and preferred—method of regulatory change is a hybrid of the first two methods. DHS should delegate its authority to qualify or remove the conditional residency status of current and former DREAM Act servicemembers to the DoD service secretaries. Likewise, the Secretary of Education should have authority to qualify or remove the conditional residency status for all DREAM Act students.[220] Such a delegation could be written into the legislation, and the DoD could take all appropriate measures to enact the changes. Additionally, DoD could use a DoD Directive (DoDD)[221] and Instruction (DoDI)[222] to create new policy and implement policy change uniformly throughout the services. The DoDD and DoDI could direct the separate services to amend their regulations in a certain manner while maintaining a level of autonomy from the legislative branch. This hybrid option allows the DoD more flexibility to make multiple revisions and allows the separate services the flexibility to tailor their regulations to meet the needs of the service while staying within the boundaries of the DoDD and DoDI.[223]

B. DADT Repeal as a Model for Change

The repeal of DADT is the model of how the DoD and the Army quickly updated their policies and regulations in response to the changing legal landscape. With increasing pressure to end DADT and trial set that year for a federal judge in California to rule on DADT's constitutionality, on February 2, 2010, the Secretary of Defense directed the DoD to quickly review regulations used to implement DADT.[224] The Secretary solicited recommended changes to the service regulations that would enforce the law in a fairer and more appropriate manner for a selected group of servicemembers.[225] On September 9, 2010, Judge

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[220] DREAM Act of 2011, *supra* note 8, § 4.
[221] U.S. DEP'T OF DEF., INSTR. 5025.01, DOD DIRECTIVES PROGRAM (28 Oct. 2007). A DoDD establishes policy.
[222] *Id.* A DoDI implements policy.
[223] *Id.*
[224] Robert M. Gates, Sec'y of Def., Statement on "Don't Ask, Don't Tell" (Feb. 2, 2010) (speaking about the high-level working group he appointed in response to the President's announcement the week prior that he would work with Congress to repeal DADT).
[225] *Id.* ("[T]he working group will undertake a thorough examination of all the changes to the department's regulations and policies that may have to be made. These include potential revisions to policies on benefits, base housing, fraternization and misconduct, separations and discharges, and many others."). Secretary Gates further stated, "Simultaneous with launching this process, I have also directed the Department to quickly review the regulations used to implement the current Don't Ask Don't Tell law

Virginia Phillips of the U.S. District Court for Central California ruled that DADT was unconstitutional.[226] On October 12, 2010, Judge Phillips granted an immediate injunction prohibiting the DoD from enforcing DADT, which included prohibiting separations under the service regulations for homosexual conduct.[227] After a series of stays and appeals, which included the Supreme Court refusal to intervene, the demise of DADT was imminent. On December 22, 2010, President Obama signed legislation that led to the eventual appeal of DADT.[228]

Within one year, the DoD and the Army worked tirelessly to keep abreast of the rapidly changing law by effectively using DoDIs and Rapid Action Revisions to AR 635-200. The DoD issued a series of DoDIs, implementing new policies regarding separations based on homosexual conduct, ordering the separate services to "[i]mplement Service policies, standards, and procedures consistent with [the DoDI] and ensure they are administered in a manner that provides conformity and clarity of separation policy to the extent practicable in a system based on command discretion."[229]

In early 2011, a mere three months after the President signed the DADT Appeal Act, the Under Secretary of Defense published a memorandum regarding the repeal of DADT and its future impact on policy.[230] Included as an attachment to the memorandum were changes to the DoDIs and DoDDs that would be effective upon the date of

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and, and within 45 days, present to me recommended changes to those regulations that, within existing law, will enforce this policy in a fairer manner."

[226] Log Cabin Republicans v. U.S., No. CV 04-08425-VAP (Ex.), 2010 WL 3526272 (C.D. Cal. 2010), *amended and superseded by* 716 F. Supp. 2d 884 (C.D. Cal. 2010), *vacated by* Log Cabin Republicans v. U.S., 658 F. 3d 1162 (9th Cir. 2011).

[227] Order Granting Permanent Injunction (In Chambers) at 14–15, *Log Cabin Republicans*, No. CV 04-08425-VAP, 2010 WL 3526272.

[228] Don't Ask, Don't Tell Repeal Act of 2010, *supra* note 217; *see* President Barack Obama, Remarks at Signing of the Don't Ask, Don't Tell Repeal Act of 2010 (Dec. 22, 2010).

[229] U.S. DEPT. OF DEF., INSTR. 1332.14, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (28 Aug. 2008) (C3, 30 Sept. 2011) (further directing the service secretaries to "[e]nsure enlisted separation policies, standards, and procedures are applied consistently; ensure fact-finding inquiries are conducted properly; ensure abuses of authority do not occur; and ensure that failure to follow the provisions contained in this issuance results in appropriate corrective action."); U.S. DEPT. OF DEF., INSTR. 1332.30, SEPARATION OF REGULAR AND RESERVE COMMISSIONED OFFICERS (11 Dec. 2008) (C2, 20 Sept. 2011).

[230] Memorandum from Under Sec'y of Def., to Sec'ys of the Military Dep'ts., subject: Repeal of Don't Ask Don't Tell and Future Impact on Policy (28 Jan. 2011).

repeal.[231] In preparation for the appeal, on February 23, 2011, the Secretary of the Army issued Department of the Army Directive 2011-1, which detailed Army policy to "ensure consistency with the repeal of [DADT]."[232] Less than six months later, the President certified to Congress that the Armed Forces were prepared to implement the repeal in a manner that was consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.[233] On September 20, 2011, the repeal took effect and DADT no longer existed.[234]

The Army's response throughout these changes was to incorporate two Rapid Action Revisions to AR 635-200 to comply with the DoDIs. The first Rapid Action Revision, dated April 27, 2010, raised the level of the commander authorized to initiate fact-finding inquiries and separation proceedings to the level of a general or flag officer in the Soldier's chain of command.[235] This revision also required a lieutenant colonel or higher to conduct the fact-finding inquiry,[236] and a general or flag officer in the Soldier's chain of command to be the separation authority.[237] Additionally, the revision significantly increased the procedural due process protections afforded the selective group of Soldiers facing separation for homosexual behavior.[238] The second Rapid Action Revision, dated September 6, 2011, implemented the repeal by "deleting all references to separation for homosexual conduct and concealment of pre-service and prior-service homosexual conduct."[239]

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231 *Id.*
232 U.S. DEPT. OF ARMY, DIR. 2011-1, REPEAL OF "DON'T ASK, DON'T TELL" (23 Feb. 2011).
233 Certification (Jul. 21, 2011) http://www.whitehouse.gov/sites/default/files/uploads/dadtcert.pdf (signed and certified pursuant to the DADT Repeal Act by President Obama, Secretary of Defense Gates, and Chairman of the Joint Chiefs of Staff Michael Mullen).
234 Don't Ask, Don't Tell Repeal Act of 2010, *supra* note 217.
235 U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS para. 15-6 (14 Dec. 2012) (RAR, 27 Apr. 2010).
236 *Id.* para. 15-1.
237 *Id.*
238 *Id.* The change revised what constituted "credible information" to initiate an inquiry or separation proceeding. For example, it specified that information provided by third parties should be given under oath and discouraged the use of overheard statements and hearsay. It also specified certain categories of confidential information that would not be used for purposes of homosexual conduct discharges. *Id.*
239 AR 635-200, *supra* note 11, at Summary of Change.

The Army's response to the DADT repeal effectively protected the rights of a selective group of Soldiers throughout the evolving legal landscape. In the span of one year, through the use of DoDDs, DoDIs, and rapid action revision regulatory changes, the DoD and the Army created additional procedural safeguards for a select class of Soldiers and trained an entire force about the new policy.[240] The DREAM Act has been in the legislative process for over ten years with the same two-year military service requirement in the proposed legislation for several Congresses, and the Army has even more time to prepare for the change.

C. Proposed Changes

With the DADT repeal, the Army recently had the opportunity to effect regulatory change in response to a rapidly changing legal environment. Similarly, a hybrid approach to change, using the text of the legislation, a delegation of authority, and instructions, directives, and service-specific regulatory change, will ensure the Government protects a DREAM Act Soldier's rights. After proposing changes at the legislative and DoD level, the majority of this section will address the specific changes to AR 635-200 that will ensure the Army affords a conditional legal resident Soldier the appropriate procedural protections to protect his rights.[241]

First, Congress should amend the DREAM Act prior to its passage by delegating authority to remove the conditional residency status for a former DREAM Act servicemember to the appropriate service secretary. Likewise, Congress should delegate authority to remove the conditional residency status for a former DREAM Act student to the Secretary of

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[240] Specialist Paul Holston, *'Don't Ask Don't Tell' Repeal Training in Progress*, U.S. ARMY (May 23, 2011), http://www.army.mil/article/56925/.

[241] AR 635-200, *supra* note 11, para. 1-20(d). Interestingly, the Army already identified a risk to permanent legal resident Soldiers and built an additional notice provision into the regulation:

> Commanders, in coordination with the servicing staff judge advocate, will counsel permanent resident aliens enlisted in the Army for three or more years who wish to fulfill naturalization requirements through honorable military service . . . . Counseling should include an explanation that voluntary or involuntary separation could affect fulfillment of the naturalization requirements.

Id.

Education. Both Secretaries have specialized experience and knowledge that allows them to make an informed and educated decision based on the facts of each case. For example, the Secretary of the Army could review Private Gonzales's entire separation action with a good understanding of the reasons why the command separated him from the Army, whether the command followed the correct procedures, and what, if any, service-specific mitigating or extenuating circumstances exist that would affect his removal. Conversely, DHS does not have any specialized knowledge about the administrative separation procedures and may not have the same appreciation for mitigating or extenuating circumstances.

Second, in advance of the DREAM Act becoming law, the DoD should issue a DoDI that implements a new policy for enlisted separations in the event of a conditional permanent resident. The DoDI should mandate that the separate services amend their regulations regarding administrative separations and should become effective upon the law's passage.

Third, the Army should make a Rapid Action Revision to AR 635-200, to become effective when the DREAM Act becomes law. The Army should add a chapter to AR 625-200 entitled "Separation Procedures for Conditional Legal Residents of the United States."[242] As this section next describes, the separation procedures for a conditional legal resident should be similar to those at a removal proceeding.

D. Proposed Separation Proceedings

This section proposes a change to AR 635-200 when the Soldier pending separation is a conditional legal resident. At a time when the defense budget is stretched thin, this article acknowledges that the training and procedural requirements proposed would create additional fiscal and administrative burdens on the OTJAG and the commands; however, any hardships are necessary to provide the requisite amount of procedural and substantive protections for our DREAM Act Soldiers. The ideal proceeding should afford the Soldier the same rights and procedures as that of an alien at a removal proceeding.[243] Given the current state of budgetary concerns and the inability to assess the number

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[242] *See infra* Appendix D (proposing a new chapter for AR 635-200).
[243] *See infra* Appendix B.

of Soldiers who will enlist under the DREAM Act, this article acknowledges the aspirational nature of such a proposal.

First, as the Army quickly realized during the DADT repeal process, the initiating, investigative, and separation authority for a conditional legal resident should be more senior than for a citizen-Soldier facing separation. The Army can easily sustain this change, which would place no additional fiscal burden on the organization. The initiating commander should be a general or flag officer in the Soldier's chain of command. The risk of erroneous deprivation is so great that it requires the most senior level oversight; therefore, the Secretary of the Army should approve any separation of a conditional legal resident. This authority needs to remain at the highest level and should be non-delegable because of the entrusted experience inherent in officers of such rank and position.[244]

Second, a conditional legal resident Soldier facing separation prior to two years of active duty service, regardless of the proposed characterization of service, should be afforded a separation board. Prior to the board, the commander should show that he provided the Soldier ample rehabilitative opportunities, to include a mandatory rehabilitative transfer.[245] Each Army command should have a highly trained standing board available to conduct this separation proceeding if the DREAM Act results in a high enough number of enlistees to warrant the fiscal burden. General officer commanders should identify a colonel to be the standing president of the board, and the OTJAG should create specialized training for him or her. Such training should include intensive training on immigration law and evidence and discussions with sitting Immigration Judges (IJs). Prior to any board, the OTJAG should assign the president a highly trained legal advisor in the rank of Major or higher who has undergone at least the same immigration law training as the government and defense attorneys involved in the process. Additionally, the OTJAG should identify government and defense attorneys at each installation who can represent the command and the Soldier at a separation proceeding. These specially trained attorneys should attend and

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[244] *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 1-5 (18 Mar. 2008) (RAR, 20 Sept. 2012) (discussing privilege to command and characteristics of command leadership).

[245] *See* AR 635-200, *supra* note 11, para. 1-16(a). The regulation already requires the command to conduct a rehabilitative transfer prior to the command initiating separation. However, the regulation allows the command to waive this transfer. *Id.* In practice, the command generally waives the rehabilitative transfer.

approved immigration law course and should sit through a certain number of civilian removal proceedings as part of the training.[246]

Alternatively, if a minimal number of individuals enlist under the provisions of the DREAM Act, OTJAG should train select individuals to be highly qualified immigration law experts (HQEs) who attend each separation board. These HQEs should be neutral parties who can answer immigration questions from all parties involved. Even if the Army decides that the DREAM Act Soldier will receive a standard board proceeding instead of the heightened procedure this article proposes, the HQE could provide a wealth of knowledge to the government and defense attorneys, the legal advisor, the staff judge advocate, and the president of the board.

Fourth, the rights and procedures at a DREAM Act Soldier's separation board should be similar to that of an alien at a removal proceeding. The courts have found that the Fifth Amendment protects aliens from deprivation of life, liberty, or property by the federal government without due process of law and entitles aliens to removal proceedings that comport with due process.[247] In the context of a removal proceeding, due process requires notice reasonably calculated to provide actual notice of the proceedings and a meaningful opportunity to be heard.[248] This "meaningful opportunity to be heard" includes a reasonable opportunity to present evidence on the alien's own behalf.[249] A removal proceeding may be fundamentally unfair, in violation of due process, if an alien is prevented from reasonably presenting his case.[250]

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[246] *See, e.g.*, Lieutenant Colonel Maureen A. Kohn, *Special Victim Units: Not a Prosecution Program but a Justice Program*, ARMY LAW., Mar. 2010, at 68 (showing that the proposal for specialized attorneys is not novel; the Army trains prosecutors and hires highly qualified experts to advise on sexual assault cases.); *Legal Services During the MEB/PEB Processes*, OFFICE OF THE SOLDIER'S COUNSEL, THE JUDGE ADVOCATE GENERAL'S CORPS, https://www.jagcnet.army.mil/8525740300753073/0/56C016A9D039C927852573F000552C3B (last visited Oct. 21, 2013). The Army determined that soldiers facing a Medical or Physical Evaluation Board did not have adequate representation throughout the process. Therefore, OTJAG trained specialized attorneys to represent these soldiers. The OTJAG could do the same for attorneys specializing in immigration law.

[247] Ramos v. Gonzales, 414 F.3d 800 (7th Cir. 2005); Mohamed v. TeBrake, 371 F. Supp. 2d 1043 (D. Minn. 2005).

[248] Hussain v. Gonzales, 424 F.3d 622 (7th Cir. 2005).

[249] *Id.*

[250] Leslie v. Attorney Gen. of U.S., 611 F.3d 171 (3d Cir. 2010); United States v. Jauregui, 314 F.3d 961, 962–63 (8th Cir. 2003) (establishing that Fifth Amendment due process protections to which an alien is entitled include the right to demand the filing of a

Further, although aliens have no Sixth Amendment right to counsel at deportation hearings, due process requires that such hearings be fundamentally fair.[251]

Accordingly, like the IJ, the president of the board should have the authority to subpoena witnesses[252] that he believes would be helpful for the board's decision.[253] Like a removal proceeding, the burden of proof should be on the command to prove, by clear and convincing evidence,[254] that the allegations upon which the command based the separation action are true and warrant separation.[255] Further, the board should permit a DREAM Act Soldier to offer evidence in extenuation[256] regarding the effect of his removal from the country, and should require in-person testimony by witnesses.[257] The regulation should expressly state that this type of evidence is always relevant to the board's decision.

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written notice, obtain legal representation, examine evidence against him or her, present evidence, cross-examine government witnesses, appeal the immigration judge's decision to the Board of Immigration Appeals, and challenge the constitutionality of removal procedures and standards).

[251] U.S. CONST. amend. V; Rosales v. Bureau of Immigration and Customs Enforcement, 426 F.3d 733, 736–37 (5th Cir. 2005).

[252] *See* UCMJ arts. 47 & 135 (2008) (giving subpoena power to the president of a board of inquiry). This article suggests that this proceeding is a board of inquiry, much like an investigation under the provisions of UCMJ, Article 32.

[253] 8 U.S.C. § 1427(a) (2011). In a removal proceeding, the IJ's responsibilities are significant; he administers oaths, receives evidence, and interrogates, examines, and cross-examines the alien and any witnesses.

[254] *See* BLACK'S LAW DICTIONARY 17 (9th ed. 2009). This language indicates the standard at a removal proceeding is "Clear and Convincing Evidence," which is defined as "Evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials." *Id.*

[255] 8 U.S.C. § 1427(a). At a removal proceeding, if the alien is unlawfully present in the United States, the burden of proof is on the alien to prove he is "clearly and beyond doubt" entitled to be admitted and is not inadmissible and by "clear and convincing evidence" and that he is lawfully present in the United States pursuant to a prior admission. However, the burden of proof is on the service, if alien has been admitted to United States, to prove he is deportable based on "reasonable, substantial, and probative evidence". *Id.*

[256] *See* MCM, *supra* note 157, R.C.M. 1001(C)(1)(b) (establishing that even during a criminal trial, a military accused is permitted wide latitude to present evidence during sentencing that may "lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency"). This article proposes at least that same standard for the separation proceeding.

[257] The Government should be prepared to have translators available for witnesses who do not speak English. The lack of a translator should not be the basis for denying a witness's testimony.

Fifth, a DREAM Act Soldier should have appellate rights similar to that of an alien at a removal proceeding.[258] Should the standing board recommend that the Soldier be separated from the Army with any discharge other than HON, the Soldier should have an immediate and mandatory review through OTJAG to the Secretary of the Army.[259] If the Secretary of the Army affirms the recommendation, the non-delegable authority to separate the DREAM Act Soldier should remain with the Secretary of the Army. The Soldier should remain on active duty and be afforded at least 30 days to submit additional evidence and to assert any claims of prejudice. As in a removal proceeding, a complete record of all testimony and evidence produced at the proceeding should be maintained at U.S. Army Human Resources Command.[260] The former DREAM Act Soldier should have the ability to appeal and overturn a separation action through the Secretary of Defense.

If the Army incorporates these changes into a new provision in AR 635-200, it will adequately protect the rights of its DREAM Act Soldiers. This article acknowledges the significant burdens this change would place on the DoD and the Army; however, any burdens are necessary to ensure the Army complies with the rights and protections that the law should afford this select class of individuals.

VI. Conclusion

> *We should be working on comprehensive immigration reform right now. But if election-year politics keeps Congress from acting on a comprehensive plan, let's at least agree to stop expelling responsible young people who want to staff our labs, start new businesses, and defend this country. Send me a law that gives them the*

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[258] Eta-Ndu v. Gonzales, 411 F.3d 977, 986 (8th Cir. 2005) (finding that the IJ does not have unfettered discretion to remove an alien, whether an undocumented or a lawful resident; if the IJ decides the Government has met its burden of proof by the burden of persuasion and removes the alien, the alien can make a due process challenge based on prejudice if defects in proceedings may well have resulted in deportation that would not otherwise have occurred).

[259] *Compare* 8 U.S.C. § 1427(a) (stating that the alien may file one motion to reconsider within 30 days of final administrative order of removal), *with* AR 635-200, *supra* note 11, ch. 2.

[260] 8 U.S.C. § 1427(a) (2011).

> *chance to earn their citizenship. I will sign it right away.*[261]

The DREAM Act would cause unfair consequences for a conditional legal resident Soldier facing separation should the Act become law without any changes to the legislation, DoD policy, or Army Regulations. Given that this Act has been pending in Congress for over a decade, the Government has no reason why it should not be prepared to fairly apply the law to the individuals who choose to enlist under the provisions of the Act. To fairly draft the DREAM Act, the United States should draw experiences from its own history of offering non-citizens immigration status or citizenship in exchange for their service. History shows that the most successful U.S. laws were carefully drafted to target highly specialized and qualified individuals in advance of their enlistment. Conversely, the least successful laws—those bestowing citizenship to veteran enslaved individuals, Filipinos, and Native Americans—were drafted more as compensation for military service instead of as a recruiting tool and often took years for the beneficiaries to finally obtain immigration status or citizenship.

Although today's non-citizen permanent legal resident Soldier has a streamlined path to citizenship, no such avenue exists for an undocumented individual or a conditional legal resident. The DREAM Act, which has been pending in Congress since 2001, will provide the qualified undocumented alien from the 1.5 generation the chance to enlist in the Armed Services and is a tremendous opportunity for the Armed Services to recruit highly qualified, specialized, and motivated individuals. Any opponents to the DREAM Act need only look at the recruiting successes enjoyed by France, Russia, and Israel to understand the value (both quantitative and qualitative) of opening the United States's military ranks to undocumented aliens. France recruited an entire elite fighting force of foreigners. In response to a recruiting crisis, Russia filled its ranks with motivated Soldiers with the promise of citizenship. Israel recruited foreigners loyal to the country and to the Jewish faith to fight in their War of Independence and has since maintained the highly successful recruiting program.

However, when the DREAM Act becomes law, the Soldiers who enlisted under its provisions are at danger of significant deprivations in the absence of any changes to the law itself, DoD policy, or Army

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[261] President Barack Obama, State of the Union Address (Jan. 24, 2012).

regulations. Specifically, a commander could separate a DREAM Act Soldier without any formal proceeding or meaningful opportunity to be heard prior to his two years of mandatory service. Such a separation would result in the Soldier losing his conditional resident status and reversion to his prior undocumented status. Consequently, the Soldier could face a removal proceeding and deportation based on his failure to complete his service under the provisions of the Act. Therefore, deportation is a direct collateral effect of the DREAM Act Soldier's separation proceeding.

The Supreme Court views respite from deportation as a heightened interest, as do some federal courts. However, no court has labeled an alien's respite from deportation as a liberty interest subject to full Constitutional protections. Given this heightened standard, the fact that deportation is a collateral effect of the DREAM Act Soldier's administrative separation, and the lack of procedural protections during separation proceedings for a Soldier with fewer than two years of service, Congress should amend the legislation and the DoD and the Army should change its policies and regulations to afford the Soldier a meaningful opportunity to be heard at the appropriate time prior to his separation.

Fortunately, the DoD and the Army can draw on their experiences in this exact area of regulatory change using their responses to the DADT repeal of 2011. Drawing upon the lessons learned throughout history, amending the legislation, using DoDIs to implement policy and updating AR 635-200 to create a separation proceeding for a DREAM Act Soldier that affords him the same procedural and substantive rights as an alien at a removal proceeding, the Government can protect its interests in recruiting highly qualified undocumented aliens while protecting the rights of the Soldier facing separation and potential deportation.

This article now revisits Private Gonzales, facing separation for a pattern of misconduct. Under the new policies and regulations, he immediately seeks counsel from a defense or legal assistance attorney specially trained in immigration law. The command convenes the standing administrative separation board, all of whom have received additional training in immigration issues. The legal advisor to the board president is a Major who has received the same immigration law training as the Soldier's attorney and the government counsel. At the board proceeding, Private Gonzales presents evidence regarding his PTSD, in addition to presenting mitigating and extenuating evidence regarding the

effect of his potential deportation to Mexico. The president of the board issues subpoenas for civilian witnesses to testify on Private Gonzales's behalf at the proceedings and was able to obtain documentary evidence for both the government and the Soldier. Private Gonzales secures in-person testimony from his mentor (his high school Advanced Placement English teacher) who testifies about the Soldier's potential in America.

During deliberations, the board concludes that the Government was not able to meet its burden of persuasion to prove the underlying basis for the separation by clear and convincing evidence. In making this determination, the board concludes that even if the Government had met its burden, Private Gonzales's potential, as shown by his mitigating and extenuating evidence was convincing enough that they would have recommended he be retained in the service. However, the command recommends that he receive treatment for his PTSD and alcohol abuse, which he does. After his treatment, Private Gonzales serves honorably and without incident for eighteen more years, retiring as a master sergeant, deploying in support of his country two more times, and eventually obtaining his U.S. citizenship.

Conversely, had the board recommended separation, the Secretary of the Army concurred and removed his conditional status, and DHS removed him from the country, the Army could rest assured that his rights had been protected throughout the entire process. That assurance is what lends the Army credibility in the eyes of its potential enlistees, and is well worth the effort and expense if it results in the ability to access a pool of highly qualified, motivated individuals to augment the military ranks.

Appendix A

Text of DREAM Act of 2011

S. 952

To authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children and for other purposes.

IN THE SENATE OF THE UNITED STATES
MAY 11, 2011

Mr. DURBIN (for himself, Mr. REID, Mr. LEAHY, Mr. SCHUMER, Mr. MENENDEZ, Mr. LEVIN, Mr. LIEBERMAN, Mr. AKAKA, Mr. BEGICH, Mr. BENNET, Mr. BINGAMAN, Mr. BLUMENTHAL, Mrs. BOXER, Ms. CANTWELL, Mr. CARDIN, Mr. CARPER, Mr. COONS, Mrs. FEINSTEIN, Mr. FRANKEN, Mrs. GILLIBRAND, Mr. HARKIN, Mr. KERRY, Ms. KLOBUCHAR, Mr. KOHL, Mr. LAUTENBERG, Mr. MERKLEY, Ms. MIKULSKI, Mrs. MURRAY, Mr. NELSON OF FLORIDA, Mr. REED, Mr. SANDERS, Mr. UDALL of Colorado, and Mr. WHITEHOUSE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Development, Relief, and Education for Alien Minors Act of 2011" or the "DREAM Act of 2011".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 2. DEFINITIONS.

In this Act:

(1) IN GENERAL.—Except as otherwise specifically provided, a term used in this Act that is used in the immigration laws shall have the meaning given such term in the immigration laws.

(2) IMMIGRATION LAWS.—The term "immigration laws" has the meaning given such term in section 101(a)(17) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(17)).

(3) INSTITUTION OF HIGHER EDUCATION.—The term "institution of higher education" has the meaning given such term in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002), except that the term does not include an institution of higher education outside the United States.

(4) SECRETARY.—Except as otherwise specifically provided, the term "Secretary" means the Secretary of Homeland Security.

(5) UNIFORMED SERVICES.—The term "Uniformed Services" has the meaning given the term "uniformed services" in section 101(a) of title 10, United States Code.

SEC. 3. CONDITIONAL PERMANENT RESIDENT STATUS FOR CERTAIN LONG-TERM RESIDENTS WHO ENTERED THE UNITED STATES AS CHILDREN.

(a) CONDITIONAL BASIS FOR STATUS.—Notwithstanding any other provision of law, an alien shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence under this section, to have obtained such status on a conditional basis subject to the provisions of this Act.

(b) REQUIREMENTS.—

(1) IN GENERAL.—Notwithstanding any other provision of law, the Secretary may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence on a conditional basis, an alien who is inadmissible or deportable from the United States or is in temporary protected status under section 244 of the Immigration and Nationality Act if the alien demonstrates by a preponderance of the evidence that—

(A) the alien has been continuously physically present in the United States since the date that is 5 years before the date of the enactment of this Act;

(B) the alien was 15 years of age or younger on the date the alien initially entered the United States;

(C) the alien has been a person of good moral character since the date the alien initially entered the United States;

(D) subject to paragraph (2), the alien—

(i) is not inadmissible under paragraph (2), (3), (6)(E), (6)(G), (8), (10)(A), (10)(C), or (10)(D) of section 212(a) of the Immigration and Nationality Act (8 U.S.C. 1182(a));

(ii) has not ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(iii) has not been convicted of—

(I) any offense under Federal or State law punishable by a maximum term of imprisonment of more than 1 year; or

(II) 3 or more offenses under Federal or State law, for which the alien was convicted on different dates for each of the 3 offenses and imprisoned for an aggregate of 90 days or more;

(E) the alien—

(i) has been admitted to an institution of higher education in the United States; or

(ii) has earned a high school diploma or obtained a general education development certificate in the United States; and

(F) the alien was 35 years of age or younger on the date of the enactment of this Act.

(2) WAIVER.—With respect to any benefit under this Act, the Secretary may waive the grounds of inadmissibility under paragraph (6)(E), (6)(G), or (10)(D) of section 212(a) of the Immigration and Nationality Act (8 U.S.C. 1182(a)) for humanitarian purposes or family unity or when it is otherwise in the public interest.

(3) SUBMISSION OF BIOMETRIC AND BIOGRAPHIC DATA.—The Secretary may not grant permanent resident status on a conditional basis to an alien under this section unless the alien submits biometric and biographic data, in accordance with

procedures established by the Secretary. The Secretary shall provide an alternative procedure for applicants who are unable to provide such biometric or biographic data because of a physical impairment.

(4) BACKGROUND CHECKS.—

(A) REQUIREMENT FOR BACKGROUND CHECKS.—The Secretary shall utilize biometric, biographic, and other data that the Secretary determines is appropriate—

(i) to conduct security and law enforcement background checks of an alien seeking permanent resident status on a conditional basis under this section; and

(ii) to determine whether there is any criminal, national security, or other factor that would render the alien ineligible for such status.

(B) COMPLETION OF BACKGROUND CHECKS.—The security and law enforcement background checks required by subparagraph (A) for an alien shall be completed, to the satisfaction of the Secretary, prior to the date the Secretary grants permanent resident status on a conditional basis to the alien.

(5) MEDICAL EXAMINATION.—An alien applying for permanent resident status on a conditional basis under this section shall undergo a medical examination. The Secretary, with the concurrence of the Secretary of Health and Human Services, shall prescribe policies and procedures for the nature and timing of such examination.

(6) MILITARY SELECTIVE SERVICE.—An alien applying for permanent resident status on a conditional basis under this section shall establish that the alien has registered under the Military Selective Service Act (50 U.S.C. App. 451 et seq.), if the alien is subject to such registration under that Act.

(c) DETERMINATION OF CONTINUOUS PRESENCE.—

(1) TERMINATION OF CONTINUOUS PERIOD.—Any period of continuous physical presence in the United States of an alien who applies for permanent resident status on a conditional basis under this section shall not terminate when the alien is served a notice to appear under section 239(a) of the Immigration and Nationality Act.

(2) TREATMENT OF CERTAIN BREAKS IN PRESENCE.—

(A) IN GENERAL.—An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsection (b)(1)(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(B) EXTENSIONS FOR EXTENUATING CIRCUMSTANCES.—The Secretary may extend the time periods described in subparagraph (A) for an alien if the alien demonstrates that the failure to timely return to the United States was due to extenuating circumstances beyond the alien's control.

(d) APPLICATION.—

(1) IN GENERAL.—An alien seeking lawful permanent resident status on a conditional basis shall file an application for such status in such manner as the Secretary may require.

(2) DEADLINE FOR SUBMISSION OF APPLICATION.—An alien shall submit an application for relief under this section not later than the date that is 1 year after the later of—

(A) the date the alien earned a high school diploma or obtained a general education development certificate in the United States; or

(B) the effective date of the final regulations issued pursuant to section 6.

(e) LIMITATION ON REMOVAL OF CERTAIN ALIENS.—

(1) IN GENERAL.—The Secretary or the Attorney General may not remove an alien who—

(A) has a pending application for relief under this section; and

(B) establishes prima facie eligibility for relief under this section.

(2) CERTAIN ALIENS ENROLLED IN PRIMARY OR SECONDARY SCHOOL.—

(A) STAY OF REMOVAL.—The Attorney General shall stay the removal proceedings of an alien who—

(i) meets all the requirements of subparagraphs (A), (B), (C), (D), and (F) of subsection (b)(1);

(ii) is at least 5 years of age; and

(iii) is enrolled full-time in a primary or secondary school.

(B) ALIENS NOT IN REMOVAL PROCEEDINGS.—If an alien is not in removal proceedings, the Secretary shall not commence such proceedings with respect to the alien if

the alien is described in clauses (i) through (iii) of subparagraph (A).

(C) EMPLOYMENT.—An alien whose removal is stayed pursuant to subparagraph (A) or who may not be placed in removal proceedings pursuant to subparagraph (B) shall, upon application to the Secretary, be granted an employment authorization document.

(D) LIFT OF STAY.—The Secretary or Attorney General may lift the stay granted to an alien under subparagraph (A) if the alien—

(i) is no longer enrolled in a primary or secondary school; or

(ii) ceases to meet the requirements of such paragraph.

(f) EXEMPTION FROM NUMERICAL LIMITATIONS.—Nothing in this section or in any other law may be construed to apply a numerical limitation on the number of aliens who may be eligible for adjustment of status under this Act.

SEC. 4. TERMS OF CONDITIONAL PERMANENT RESIDENT STATUS.

(a) PERIOD OF STATUS.—Permanent resident status on a conditional basis granted under this Act is—

(1) valid for a period of 6 years, unless such period is extended by the Secretary; and

(2) subject to termination under subsection (c).

(b) NOTICE OF REQUIREMENTS.—

(1) AT TIME OF OBTAINING STATUS.—At the time an alien obtains permanent resident status on a conditional basis under this Act, the Secretary shall provide for notice to the alien regarding the provisions of this Act and the requirements to have the conditional basis of such status removed.

(2) EFFECT OF FAILURE TO PROVIDE NOTICE.—The failure of the Secretary to provide a notice under this subsection—

(A) shall not affect the enforcement of the provisions of this Act with respect to the alien; and

(B) shall not give rise to any private right of action by the alien.

(c) TERMINATION OF STATUS.—

(1) IN GENERAL.—The Secretary shall terminate the conditional permanent resident status of an alien, if the Secretary determines that the alien—

(A) ceases to meet the requirements of subparagraph (C) or (D) of section 3(b)(1); or

(B) was discharged from the Uniformed Services and did not receive an honorable discharge.

(d) RETURN TO PREVIOUS IMMIGRATION STATUS.—

(1) IN GENERAL.—Except as provided in paragraph (2), an alien whose permanent resident status on a conditional basis expires under subsection (a)(1) or is terminated under subsection (c) or whose application for such status is denied shall return to the immigration status the alien had immediately prior to receiving permanent resident status on a conditional basis or applying for such status, as appropriate.

(2) SPECIAL RULE FOR TEMPORARY PROTECTED STATUS.—In the case of an alien whose permanent resident status on a conditional basis expires under subsection (a)(1) or is terminated under subsection (c) or whose application for such status is denied and who had temporary protected status immediately prior to receiving or applying for such status, as appropriate, the alien may not return to temporary protected status if—

(A) the relevant designation under section 244(b) of the Immigration and Nationality Act (8 U.S.C. 1254a(b)) has been terminated; or

(B) the Secretary determines that the reason for terminating the permanent resident status on a conditional basis renders the alien ineligible for temporary protected status.

(e) INFORMATION SYSTEMS.—The Secretary shall use the information systems of the Department of Homeland Security to maintain current information on the identity, address, and immigration status of aliens granted permanent resident status on a conditional basis under this Act.

SEC. 5. REMOVAL OF CONDITIONAL BASIS OF PERMANENT RESIDENT STATUS.

(a) ELIGIBILITY FOR REMOVAL OF CONDITIONAL BASIS.—

(1) IN GENERAL.—Subject to paragraph (2), the Secretary may remove the conditional basis of an alien's permanent resident

status granted under this Act if the alien demonstrates by a preponderance of the evidence that—

(A) the alien has been a person of good moral character during the entire period of conditional permanent resident status;

(B) the alien is described in section 3(b)(1)(D);

(C) the alien has not abandoned the alien's residence in the United States;

(D) the alien—

(i) has acquired a degree from an institution of higher education in the United States or has completed at least 2 years, in good standing, in a program for a bachelor's degree or higher degree in the United States; or

(ii) has served in the Uniformed Services for at least 2 years and, if discharged, received an honorable discharge; and

(E) the alien has provided a list of each secondary school (as that term is defined in section 9101 of the Elementary and Secondary Education Act of 1965 that the alien attended in the United States.

(2) HARDSHIP EXCEPTION.—

(A) IN GENERAL.—The Secretary may, in the Secretary's discretion, remove the conditional basis of an alien's permanent resident status if the alien—

(i) satisfies the requirements of subparagraphs (A), (B), (C), and (E) of paragraph (1);

(ii) demonstrates compelling circumstances for the inability to satisfy the requirements of subparagraph (D) of such paragraph; and

(iii) demonstrates that the alien's removal from the United States would result in extreme hardship to the alien or the alien's spouse, parent, or child who is a citizen or a lawful permanent resident of the United States.

(B) EXTENSION.—Upon a showing of good cause, the Secretary may extend the period of permanent resident status on a conditional basis for an alien so that the alien may complete the requirements of subparagraph (D) of paragraph (1).

(3) TREATMENT OF ABANDONMENT OR RESIDENCE.—For purposes of paragraph (1)(C), an alien—

(A) shall be presumed to have abandoned the alien's residence in the United States if the alien is absent from the United States for more than 365 days, in the aggregate, during the alien's period of conditional permanent resident status, unless the alien demonstrates to the satisfaction of the Secretary that the alien has not abandoned such residence; and

(B) who is absent from the United States due to active service in the Uniformed Services has not abandoned the alien's residence in the United States during the period of such service.

(4) CITIZENSHIP REQUIREMENT.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the conditional basis of an alien's permanent resident status may not be removed unless the alien demonstrates that the alien satisfies the requirements of section 312(a) of the Immigration and Nationality Act (8 U.S.C. 1423(a)).

(B) EXCEPTION.—Subparagraph (A) shall not apply to an alien who is unable because of a physical or developmental disability or mental impairment to meet the requirements of such subparagraph.

(5) SUBMISSION OF BIOMETRIC AND BIOGRAPHIC DATA.—The Secretary may not remove the conditional basis of an alien's permanent resident status unless the alien submits biometric and biographic data, in accordance with procedures established by the Secretary. The Secretary shall provide an alternative procedure for applicants who are unable to provide such biometric data because of a physical impairment.

(6) BACKGROUND CHECKS.—

(A) REQUIREMENT FOR BACKGROUND CHECKS.—The Secretary shall utilize biometric, biographic, and other data that the Secretary determines appropriate—

(i) to conduct security and law enforcement background checks of an alien applying for removal of the conditional basis of the alien's permanent resident status; and

(ii) to determine whether there is any criminal, national security, or other factor that would render the alien ineligible for removal of such conditional basis.

(B) COMPLETION OF BACKGROUND CHECKS.—The security and law enforcement background checks required by subparagraph (A) for an alien shall be completed,

to the satisfaction of the Secretary, prior to the date the Secretary removes the conditional basis of the alien's permanent resident status.

(b) APPLICATION TO REMOVE CONDITIONAL BASIS.—

(1) IN GENERAL.—An alien seeking to have the conditional basis of the alien's lawful permanent resident status removed shall file an application for such removal in such manner as the Secretary may require.

(2) DEADLINE FOR SUBMISSION OF APPLICATION.—

(A) IN GENERAL.—An alien shall file an application under this subsection during the period beginning 6 months prior to and ending on the date that is later of—

(i) 6 years after the date the alien was initially granted conditional permanent resident status; or

(ii) any other expiration date of the alien's conditional permanent resident status, as extended by the Secretary in accordance with this Act.

(B) STATUS DURING PENDENCY.—An alien shall be deemed to have permanent resident status on a conditional basis during the period that the alien's application submitted under this subsection is pending.

(3) ADJUDICATION OF APPLICATION.—

(A) IN GENERAL.—The Secretary shall make a determination on each application filed by an alien under this subsection as to whether the alien meets the requirements for removal of the conditional basis of the alien's permanent resident status.

(B) ADJUSTMENT OF STATUS IF FAVORABLE DETERMINATION.—If the Secretary determines that the alien meets such requirements, the Secretary shall notify the alien of such determination and remove the conditional basis of the alien's permanent resident status, effective as of the date of such determination.

(C) TERMINATION IF ADVERSE DETERMINATION.—If the Secretary determines that the alien does not meet such requirements, the Secretary shall notify the alien of such determination and, if the period of the alien's conditional permanent resident status under section 4(a)(1) has ended, terminate the conditional permanent resident status granted the alien under this Act as of the date of such determination.

(c) TREATMENT FOR PURPOSES OF NATURALIZATION.—

(1) IN GENERAL.—For purposes of title III of the Immigration and Nationality Act (8 U.S.C. 1401 et seq.), an alien granted permanent resident status on a conditional basis under this Act shall be considered to have been admitted as an alien lawfully admitted for permanent residence and to be in the United States as an alien lawfully admitted to the United States for permanent residence.

(2) LIMITATION ON APPLICATION FOR NATURALIZATION.—An alien may not apply for naturalization during the period that the alien is in permanent resident status on a conditional basis under this Act.

SEC. 6. REGULATIONS.

(a) INITIAL PUBLICATION.—Not later than 180 days after the date of the enactment of this Act, the Secretary shall publish regulations implementing this Act. Such regulations shall allow eligible individuals to apply affirmatively for the relief available under section 3 without being placed in removal proceedings.

(b) INTERIM REGULATIONS.—Notwithstanding section 553 of title 5, United States Code, the regulations required by subsection (a) shall be effective, on an interim basis, immediately upon publication but may be subject to change and revision after public notice and opportunity for a period of public comment.

(c) FINAL REGULATIONS.—Within a reasonable time after publication of the interim regulations in accordance with subsection (b), the Secretary shall publish final regulations implementing this Act.

(d) PAPERWORK REDUCTION ACT.—The requirements of chapter 35 of title 44, United States Code (commonly known as the "Paperwork Reduction Act") shall not apply to any action to implement this Act.

SEC. 7. PENALTIES FOR FALSE STATEMENTS.

Whoever files an application for any relief or benefit under this Act and willfully and knowingly falsifies, misrepresents, or conceals a material fact or makes any false or fraudulent statement or representation, or makes or uses any false writing or document knowing the same to contain any false or fraudulent statement or entry, shall be fined in accordance with title 18, United States Code, imprisoned not more than 5 years, or both.

SEC. 8. CONFIDENTIALITY OF INFORMATION.

(a) PROHIBITION.—Except as provided in subsection (b), no officer or employee of the United States may—

(1) use the information furnished by an individual pursuant to an application filed under this Act in removal proceedings against any person identified in the application;

(2) make any publication whereby the information furnished by any particular individual pursuant to an application under this Act can be identified; or

(3) permit anyone other than an officer, employee or authorized contractor of the United States Government or, in the case of an application filed under this Act with a designated entity, that designated entity, to examine such application filed under such sections.

(b) REQUIRED DISCLOSURE.—The Attorney General or the Secretary shall provide the information furnished under this Act, and any other information derived from such furnished information, to—

(1) a Federal, State, tribal, or local law enforcement agency, intelligence agency, national security agency, component of the Department of Homeland Security, court, or grand jury in connection with a criminal investigation or prosecution, a background check conducted pursuant to section 103 of the Brady Handgun Violence Protection Act (Public Law 103–159; 18 U.S.C. 922 note), or national security purposes, if such information is requested by such entity or consistent with an information sharing agreement or mechanism; or

(2) an official coroner for purposes of affirmatively identifying a deceased individual (whether or not such individual is deceased as a result of a crime).

(c) FRAUD IN APPLICATION PROCESS OR CRIMINAL CONDUCT.—Notwithstanding any other provision of this section, information concerning whether an alien seeking relief under this Act has engaged in fraud in an application for such relief or at any time committed a crime may be used or released for immigration enforcement, law enforcement, or national security purposes.

(d) PENALTY.—Whoever knowingly uses, publishes, or permits information to be examined in violation of this section shall be fined not more than $10,000.

SEC. 9. HIGHER EDUCATION ASSISTANCE.

(a) IN GENERAL.—Notwithstanding any provision of the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.), with respect to assistance provided under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.), an alien who has permanent resident status on a conditional basis under this Act shall be eligible only for the following assistance under such title:

(1) Student loans under parts D and E of such title IV (20 U.S.C. 1087a et seq. and 1087aa et seq.), subject to the requirements of such parts.

(2) Federal work-study programs under part C of such title IV (42 U.S.C. 2751 et seq.), subject to the requirements of such part.

(3) Services under such title IV (20 U.S.C. 1070 et seq.), subject to the requirements for such services.

(b) RESTORATION OF STATE OPTION TO DETERMINE RESIDENCY FOR PURPOSES OF HIGHER EDUCATION BENEFITS.—

(1) IN GENERAL.—Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is repealed.

(2) EFFECTIVE DATE.—The repeal under paragraph (1) shall take effect as if included in the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

Appendix B

Proposed Amendment to AR 635-200

Chapter 15
Administrative Separation Procedures for Conditional Legal Residents of the United States

Section I
Policy

15-1. General Policy

DoDI [####.##] contains general policies concerning separation proceedings for Conditional Legal Resident (CLR) Soldiers who enlisted pursuant to Public Law [##]. The initiating authority for a CLR Soldier is the first general or flag officer in the CLR Soldier's chain of command and the separation authority for a CLR Soldier is the Secretary of the Army in the following circumstances –

(1) A CLR Soldier with fewer than two years of active duty service is recommended for separation under any chapter except for a discharge under the provisions of Chapter 10 of this regulation and with any characterization of service.

(2) A CLR Soldier with more than two years of active duty service is recommended for separation under any chapter except for a discharge under the provisions of Chapter 10 of this regulation with a characterization of service less favorable than honorable.

15-2. Notice and Action by Initiating Commander

Separation of a CLR Soldier always requires the notification and board procedure described in this chapter. The initiating commander will notify the Soldier in writing that his/her separation has been recommended per this regulation and chapter.

a. The commander will cite specific allegations on which the proposed action is based and will also include the specific provisions of this regulation authorizing separation.

b. The Soldier will be advised of –

(1) Whether the proposed separation could result in discharge or release from custody and control of the Army.

(2) The least favorable characterization of service or description of separation he/she could receive.

(3) The type of discharge and character of service recommended by the initiating commander and that the intermediate commander(s) may

recommend a less favorable type of discharge and characterization of service than that recommended by the initiating commander.

(4) The right to a hearing before an administrative separation board, regardless of his/her years of total active and reserve service.

(5) The right to consult with military counsel who has been specially trained in immigration law procedures within a reasonable time (not less than 3 duty days). Soldiers may also consult with civilian counsel at their own expense.

(6) The impact of a discharge on the Soldier's CLR status in accordance with Public Law [##].

c. The Soldier's commander or other designated individual will personally serve the Soldier with the memorandum of notification. The Soldier is required to sign an acknowledgment of receipt. The acknowledgment of receipt will be signed and dated on the date it is served.

d. If notice by mail is authorized and the Soldier fails to acknowledge receipt or submit a timely reply, that fact will not constitute a waiver of rights.

e. The Soldier will indicate on the Notification/Acknowledge/ Election of Rights (fig 2–4) whether he or she has filed an unrestricted report of sexual assault within 24 months of initiation of the separation action. The Soldier will also indicate whether he or she believes that this separation action is a direct or indirect result of the sexual assault itself or of the filing of the unrestricted report, if the above is true.

15-3. Action by the First General or Flag Officer in the Chain of Command

a. Upon receipt of the recommended action, the first general or flag officer in the chain of command will determine if there is sufficient evidence to verify the allegations. If no sufficient basis for separation exists, the separation authority will disapprove the recommendation and direct retention. If the recommendation is disapproved, the return memorandum will cite reasons for disapproval.

b. If the first general officer in the Soldier's chain of command determines that sufficient factual basis for separation exists, he/she will convene a separation board.

Section II
Administrative Board Procedure

15-4. Waiver
Any waiver of the administrative board procedure for a CLR Soldier must be approved by the Secretary of the Army.

15-5. Composition of the Board

a. A board convened to determine whether a CLR Soldier should be separated under the administrative board procedure will consist of at least three experienced commissioned, warrant, or noncommissioned officers, all of whom have received specialized training in general immigration law procedures. Enlisted Soldiers appointed to the board will be in grade sergeant first class (SFC) or above, and senior to the respondent. At least one member of the board will be serving in the grade of major or higher, and a majority will be commissioned or warrant officers. The senior member will be president of the board. The convening authority will appoint a non-voting recorder. OTJAG will also appoint a legal advisor who has been designated an expert in immigration law.

b. Care will be exercised to ensure that –

(1) The board is composed of experience, unbiased, specially trained officers. The officers should be fully aware of applicable regulations and polices pertaining to CLR Soldiers for whom the board is convened.

(2) If the respondent is a member of a minority group, the board will, upon written request of the respondent,
include as a voting member a member who is also a minority group member, if reasonably available.

(3) The board is provided a competent stenographer or clerk.

(4) The officer initiating the action prescribed in this regulation, or any intervening officer who had direct knowledge of the case, is not a member of the board.

c. The president will preside and rule finally on all matters of procedure and evidence. The rulings of the president may be overruled by a majority of the board. If appointed, the legal advisor will rule finally on all matters of evidence and challenges except to himself/herself. The appointed legal advisor will pay particular attention to cases that involve limited use evidence.

d. OTJAG, Administrative Law Division, will certify that the detailed military defense attorney, recorder, president of the board, and legal advisor received adequate training in immigration law, sufficient to

understand the specialized issues that may be raised during the separation proceeding of a CLR Soldier.

15-6. Witnesses

a. The ETS date or transfer status of each expected witness will be checked. This will ensure that essential military witnesses will be available at the board proceedings.

b. The appropriate commander will ensure that no witness is transferred or separated before the beginning of a board hearing except when an enlistment or period of service fixed by law expires. In such cases, an attempt will be made to obtain the Soldier's consent to retention. If he/she does not consent, the board president should use his subpoena power to compel the former Soldier's production.

15-7. Board procedures

a. A Soldier under military control will be notified in writing of the convening date of the board at least 60 days before the hearing. This will allow the Soldier and the appointed counsel time to prepare the case. The written notice will state that if the Soldier fails to appear before the board when scheduled by willfully absenting himself/herself without good cause, he/she may be discharged from or retained in the Service without personal appearance before aboard by express approval of the Secretary of the Army.

b. The Soldier will be notified of names and addresses of witnesses expected to be called at the board hearing. The Soldier will also be notified that the recorder of the board will, upon request of the Soldier, arrange for the presence of any available witness that he/she desires whose testimony is relevant to the proceedings. Matters in extenuation and mitigation regarding the CLR Soldier's immigration status is always relevant. A copy of the case file, including all affidavits and depositions of witnesses unable to appear in person at the board hearing will be furnished to the Soldier or the counsel as soon as possible after it is determined that a board will hear the case.

c. When, for overriding reasons, the minimum of 60 days cannot be granted, the president of the board will ensure that the reason for acting before that time is fully explained.

(1) The reason will be recorded in the proceedings of the board.

(2) Requests for an additional delay, normally not to exceed 30 days after initial notice, will be granted if the convening authority or president of the board believes such delay is warranted to ensure that the respondent receives a full and fair hearing.

(3) The decision of the president is subject to being overruled by the convening authority upon application by the recorder or the respondent; however, the proceedings need not be delayed pending review.

d. The commander will advise the Soldier, in writing, of the specific basis (subparagraph number and description heading) for the proposed discharge action. The commander will also advise the Soldier that he/she has the following rights:

(1) The Soldier may appear in person, with or without counsel for representation or, if absent, be represented by counsel at all open proceedings of the board.

(a) When the Soldier appears before a board without representing counsel, the record will show that the president of the board counseled the Soldier.

(b) The Soldier will be counseled as to type of discharge he/she may receive as a result of the board action, the effects of such a discharge in later life and on his/her immigration status, and that he/she may request representing counsel. The record will reflect the Soldier's response.

(2) The Soldier may, at any time before the board convenes or during the proceedings, submit any answer, deposition, sworn or unsworn written statement, affidavit, certificate, or stipulation. This includes depositions or affidavits of witnesses not deemed to be reasonably available or witnesses who are unwilling to appear voluntarily.

(3) The Soldier may request the attendance of witnesses. The Soldier may submit a written request for temporary duty (TDY) or invitational travel orders for witnesses. Such a request will contain the following matter:

(a) A synopsis of the testimony that the witness is expected to give.

(b) An explanation of the relevance of such testimony to the issues of separation or characterization.

(c) An explanation as to why written or recorded testimony would not be sufficient to provide a fair determination.

(4) The convening authority may authorize expenditure of funds for production of witnesses only if the presiding officer (after consultation with a judge advocate) or the specially trained legal advisor determines that—

(a) The testimony of a witness is not cumulative.

(b) The personal appearance of the witness is essential to a fair determination on the issues of separation, to include impact on immigration status, or characterization.

(c) Written or recorded testimony will not accomplish adequately the same objective.

(d) The need for live testimony is substantial, material, and necessary for a proper disposition of the case.

(e) The significance of the personal appearance of the witness, when balanced against the practical difficulties in producing the witness, favors production of the witness.

(5) Factors to be considered in the balancing test include the cost of producing the witness; the timing of the request for production of the witness; and the potential delay in the proceedings that may be caused by producing the witness or the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

(6) If the convening authority determines that the personal testimony of a witness is required, the hearing will be postponed or continued, if necessary, to permit the attendance of the witness.

(7) The hearing will be continued or postponed to provide the respondent with a reasonable opportunity to obtain a written statement from the witness if a witness requested by the respondent is unavailable in the following circumstances:

(a) When the presiding officer determines that the personal testimony of the witness is not required and the specially trained legal advisor concurs in writing.

(b) When the commanding officer of a military witness determines that military necessity precludes the witness's attendance at the hearing.

(c) When a civilian witness is unavailable after subpoena attempts by the president of the board.

(8) The Soldier may or may not submit to examination by the board. The provisions of UCMJ, Article 31, will apply.

(9) The Soldier and his/her counsel may question any witness who appears before the board.

(10) The Soldier may challenge any voting member of the board for cause only.

(11) The Soldier or counsel may present argument before the board closes the case for deliberation on findings and recommendations.

(12) Failure of the Soldier to invoke any of the above rights after he/she has been apprised of the same will not have an effect upon the validity of the separation proceedings.

e. When the board meets in closed session, only voting members will be present.

f. Except as modified per this regulation, the board will conform to the provisions of AR 15–6 applicable to formal proceedings with respondents. As an exception to AR 15–6, paragraph 3–7*b*, expert medical and psychiatric testimony routinely may be presented in the

form of affidavits. However, if the Soldier desires to present such evidence, he/she is entitled to have the witnesses appear in person, if they are reasonably available.

g. The proceedings of the board will be transcribed verbatim.

5-8. Evidence

a. Presentation of evidence. The rules of evidence for court-martial and other judicial proceedings are not applicable before an administrative separation board under this chapter. Reasonable restrictions will be observed, however, concerning relevancy and competency of evidence.

b. Newly discovered evidence. If prior to the beginning of the board hearing, the commander or the board recorder discovers additional evidence, similar in nature to that previously considered by the commander in recommending the separation, that evidence is admissible.

(1) Such evidence may be considered by the board as proof of an amended or new factual allegation in support of a reason for separation that was cited in the commander's recommendation for separation.

(2) When such additional evidence is considered and the board determines that the respondent has not had reasonable time to prepare a response to it, a reasonable continuance must be granted upon the respondent's request.

(3) If the newly discovered evidence constitutes a separate reason for separation that was not included in the notice of proposed separation, the case may be processed without the new evidence or the case must be returned to the commander for consideration as to whether an additional reason for separation should be included in the notice.

c. Burden of proof and persuasion. The Government must prove the allegations by clear and convincing evidence.

5-9. Findings and Recommendations of the Board

a. Findings.

(1) The board will determine whether each allegation in the notice of proposed separation is supported by clear and convincing evidence.

(2) The board will then determine per chapter 1, section II, whether the findings warrant separation. If more than one basis for separation was contained in the notice, there will be a separate determination for each basis.

b. Recommendations.

(1) The board convened to determine whether a Soldier should be separated for misconduct will recommend that the Soldier be—

(a) Separated because of misconduct. The board will recommend a characterization of service of honorable, general (under honorable conditions), or under other than honorable conditions.

(b) Separated because of unsatisfactory performance (except in fraudulent entry actions) if such was a stated basis for separation in the initial memorandum of notification and is included in the board's findings. Type of discharge certificate (honorable or general) to be furnished will be indicated.

(c) Retained in the Service. (See para 14–7 for guidance on retention of Soldiers convicted by civil court.)

(2) The board convened to determine whether a Soldier should be separated for unsatisfactory performance will recommend that he/she be—

(a) Separated because of unsatisfactory performance. The board will recommend a characterization of service of honorable or general (under honorable conditions).

(b) Retained in the Service.

(3) When the Soldier is absent without leave and fails to appear before the board, the discharge authority will be advised of that fact, together with any board recommendation for separation or retention made per (1) or (2) above.

(4) When the board recommends separation, it may also recommend that the separation be suspended per paragraph 1–18. But the recommendation as to suspension is not binding on the separation authority.

(5) If separation or suspension of separation is recommended, the board will also recommend a characterization of service or description of separation as authorized in chapter 3.

(6) Except when the board has recommended separation because of alcohol or drug abuse rehabilitation failure or misconduct (see chaps 9 and 14), or has recommended characterization of service under other than honorable conditions, the board will recommend whether the respondent should be retained in the IRR as a mobilization asset to fulfill the respondent's total military obligation.

c. The completed report of proceedings.

(1) The completed report of proceedings will be forwarded to the separation authority.

(2) If the board recommends separation with any characterization of service prior to the CLR Soldier's two years of active duty service, or at any time after such time when the board recommends separation with a characterization of service any less favorable than honorable, the verbatim transcript, findings and recommendations of the board, with

complete documentation and the recommendation of the convening authority, will be forwarded through OTJAG, Attn: Administrative Law Division, to Headquarters, Department of the Army for approval.

15-10. Separation Authority Action After Board Hearings

a. When the board is completed with a recommendation that the Soldier be separated in accordance with Chapter 15-8 of this regulation, the Secretary of the Army may take one of the following actions:

(1) Approve the board recommendations and direct separation of the Soldier for any basis.

(2) Disapprove the recommendation. Direct retention of the Soldier when the grounds for separation are not documented in the file, if the file does not indicate that the Soldier is without the potential for full effective duty and separation is not otherwise mandatory, or when the extenuating/mitigating evidence presented by the Soldier are severe enough to warrant further rehabilitative attempts.

b. It is the policy of HQDA not to direct separation per this chapter when a duly constituted board has recommended retention unless sufficient justification is provided to warrant separation by the Secretary of the Army, based on all the circumstances, as being in the best interest of the Army.

c. If the Secretary of the Army notes a defect that he deems to be harmless in a case in which separation has been recommended, he may direct separation. If there are substantial defects, he may take one of the following actions:

(1) Direct retention.

(2) If the board has failed to make the findings or recommendations required, return the case to the same board for compliance with this regulation.

(3) If there is an apparent procedural error or omission in the record of proceedings that may be corrected without reconsideration of the findings and recommendations of the board, return the case to the same board for corrective action.

(4) If the board error materially prejudiced a substantial right of the Soldier, the separation authority may act only as can be sustained without relying on the proceedings affected by the error.

15-11. Appellate Procedures

a. Upon an approved separation action by the Secretary of the Army, OTJAG, Administrative Law Division, Military Personnel law will certify that the proceedings were fundamentally fair and in accordance with this chapter.

b. Upon certification by OTJAG, Administrative Law Division, Military Personnel Law, each CLR Soldier will receive a mandatory appeal through the Secretary of Defense.