ORAL ARGUMENT NOT SCHEDULED

No. 20-5320

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ANGE SAMMA *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF DEFENSE *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

All parties appearing before the district court and in this Court are listed in the Brief for Appellants. There were no amici in the district court.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellants.

C. Related Cases

References to related cases appear in the Brief for Appellants. The relevance of these cases is discussed below at page 8 note 4.

/s/ Scarlet Kim

SCARLET KIM

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GLOSSARY

APA	Administrative Procedure Act
AR	Administrative Record
DOD	Department of Defense
FBI	Federal Bureau of Investigation
JA	Joint Appendix
LPRs	Lawful permanent residents
MAVNI	Military Accessions Vital to the National Interest
NDAA	National Defense Authorization Act
Op.	Opinion
Selected Reservists	Service members in the Selected Reserve of the Ready Reserve
USCIS	United States Citizenship and Immigration Services

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to the Brief for Appellants and in the addendum to this brief.

STATEMENT OF THE ISSUE

The Immigration and Nationality Act provides that "[a]ny person who, while an alien or a noncitizen national of the United States, has served honorably as a member of the Selected Reserve of the Ready Reserve or in an active-duty status" in the military "during any . . . period which the President by Executive order shall designate as a period . . . involving armed conflict with a hostile foreign force . . . may be naturalized . . . ." 8 U.S.C. § 1440(a).[1] The question presented is whether the Department of Defense has statutory authority to require non-citizens serving during a period of armed conflict to serve a minimum period of time before they may receive an honorable service certification in order to apply for citizenship under section 1440.

[1] The full text of 8 U.S.C. § 1440 is set out in the Addendum to Defendants' brief at A-3.

STATEMENT OF THE CASE

INTRODUCTION

Plaintiffs represent a class of thousands of non-citizens serving in the United States Armed Forces during the ongoing armed conflict that the President declared after the September 11, 2001 attacks. For more than 150 years, Congress has rewarded non-citizen service members with expedited paths to citizenship, and for the last century, it has distinguished the service of non-citizens serving during armed conflict by granting them immediate eligibility to apply for citizenship. By doing so, Congress sought to give these service members an opportunity to naturalize before potentially risking their lives for their new country. Today, under the Immigration and Nationality Act ("INA"), non-citizens serving during peacetime are eligible to naturalize if they have "served honorably . . . for one year," 8 U.S.C. § 1439(a), and non-citizens serving during armed conflict are eligible to naturalize if they have "served honorably," *id*. at § 1440(a).

Following Congress' instruction, the military regularly certified that non-citizens serving during armed conflict had "served honorably" for purposes of naturalization with no time-in-service requirement. Indeed, by the end of the first decade of the armed conflict that began with the September 11, 2001 attacks, Defendant Department of Defense ("DOD") was working hand-in-hand with United

States Citizenship and Immigration Services ("USCIS") to enable non-citizens undergoing basic training across every DOD military branch to receive honorable service certifications when they entered training and U.S. citizenship by graduation.

But in 2017, the Trump Administration disregarded the INA and upended the military's longstanding practice. It issued a policy (the "Delayed Citizenship Policy" or the "Policy") that withheld honorable service certifications for purposes of naturalization until service members met certain minimum time-in-service requirements—180 days for active duty service members, and one year for service members in the Selected Reserve of the Ready Reserve ("Selected Reservists"). These new requirements meant that no service member could naturalize by graduation from basic training, and they caused the dismantling of the joint DOD–USCIS program across the military's basic training sites. Under the Delayed Citizenship Policy, many non-citizens serving in the current armed conflict were no longer able to obtain citizenship prior to their assignment to a duty station or even deployment to combat.

In 2020, on behalf of a class of non-citizen service members, Plaintiffs challenged the Delayed Citizenship Policy, and the district court enjoined Defendants from enforcing the time-in-service requirements against class members. As the district court held, the Policy is unlawful because it violates 8 U.S.C. § 1440.

The statute's text—as well as its purpose, structure, and history—make clear that non-citizens serving during armed conflict are eligible to apply for naturalization with no minimum period of service, and that DOD has only a ministerial duty to determine, when requested to do so, whether a service member has "served honorably." The military's own long history of honorable service certification for naturalization purposes overwhelmingly supports this interpretation.

In their opening brief, Defendants represent that the goal of the Delayed Citizenship Policy was to align DOD's requirements for certifying honorable service for naturalization with its requirements for "honorable-service characterizations in the context of discharging service members." Defs.' Br. 1–2. But that purported justification would render section 1440 meaningless. Under DOD's current discharge policy, service members must serve at least a year before they are eligible to receive an honorable service characterization at discharge. Were the military to apply this same requirement to non-citizens seeking an honorable service certification for naturalization, non-citizens would have to wait at least a year—*i.e.* the same amount of time during peacetime *and* armed conflict—before seeking citizenship. That would nullify the expedited path to citizenship Congress created specifically for non-citizens serving during armed conflict.

Defendants kept their appeal in abeyance for three years on the basis that they have been reconsidering their policy options. But the statute gives them no options, because Congress did not authorize them to impose a minimum service requirement before non-citizens serving during armed conflict are eligible to apply for naturalization. Respectfully, this Court should affirm the district court's judgment.

STATUTORY BACKGROUND

A. Naturalization Based on Military Service

In addition to United States citizens, lawful permanent residents ("LPRs") and persons from the Marshall Islands, Micronesia, and Palau may enlist in the U.S. military. 10 U.S.C. § 504(b)(1)(A)–(C). The INA lays out two expedited pathways through military service for these non-citizens. First, 8 U.S.C. § 1439 provides that non-citizens who have "served honorably at any time . . . for a period or periods aggregating one year . . . may be naturalized." And second, 8 U.S.C. § 1440—the provision at issue in this case—provides that non-citizens who have "served honorably" during a designated period of armed conflict "may be naturalized."[2]

[2] In 2002, President George W. Bush issued an Executive Order designating the period "beginning on September 11, 2001" as a period of armed conflict for purposes of section 1440. Exec. Order No. 13269, 67 Fed. Reg. 45287 (Jul. 8, 2002). That armed conflict continues to this day.

The INA grants the Attorney General "authority to naturalize persons as citizens of the United States." 8 U.S.C. § 1421(a). The Attorney General has authorized USCIS to implement his authority. *See* 8 C.F.R. § 310.1; *see also* Homeland Security Act, Pub. L. No. 107-296, § 451(b), 116 Stat. 2135, 2196 (2002). Section 1440 mandates that for service members seeking naturalization during armed conflict, "[t]he executive department under which such person served shall determine whether persons have served honorably . . . ." 8 U.S.C. § 1440(a). USCIS has prescribed Form N-426 for the military branches to use for that purpose. *See* 8 C.F.R. § 329.4; USCIS, N-426, Request for Certification of Military or Naval Service, https://perma.cc/N7CG-QHEU. Service members may apply to USCIS for naturalization once the relevant military branch has certified their honorable service. *See* 8 C.F.R. § 329.4.

Once an individual applies for naturalization, USCIS must conduct an investigation, which includes "a review of all pertinent records, police department checks, and a neighborhood investigation in the vicinities where the applicant has resided and has been employed . . . for at least the five years immediately preceding the filing of the application." 8 C.F.R. § 335(a). USCIS also obtains a full criminal background check from the FBI. *See* 8 C.F.R. § 335.2(b). And for any applicant with military service, USCIS also conducts a Defense Clearance Investigative Index

query with DOD to determine "whether the applicant has any derogatory information in his or her military records." USCIS, *USCIS Policy Manual*, Vol. 12, Pt. A, Ch. 6, https://bit.ly/4gOI7j9. After completing its investigation, USCIS must conduct an examination at which a USCIS officer interviews the applicant under oath. *See id.* § 335.2(a). If the applicant has complied with the requirements for naturalization in the INA and its implementing regulations, USCIS "shall grant the application." *Id*. § 335.3. However, citizenship granted pursuant to 8 U.S.C. § 1440 may be revoked "if the person is separated from the Armed Forces under other than honorable conditions before the person has served honorably for a period or periods aggregating five years." 8 U.S.C. § 1440(c).

FACTUAL BACKGROUND

A. The History of Honorable Service Certifications for Naturalization During Periods of Armed Conflict

Defendants spend much of their brief discussing the history of what they call "military characterizations of service," Defs.' Br. 3–6, but they omit the specific history that is relevant to this case. The only history the government describes involves characterizations of service for the purpose of *discharge* (or "separation"). Whatever *that* history may be, it is not the history of characterizations of service for the purpose of *naturalization* during *armed conflict*. This is the most relevant history, and it reflects that—until Defendants issued the Delayed Citizenship Policy—the

military regularly certified whether non-citizens serving during armed conflict had served honorably for purposes of naturalization with no time-in-service requirement and when requested by the service member, as section 1440 requires.

Below, the district court found—based on the undisputed facts—that "no durational . . . requirement" for certifying honorable service for purposes of naturalization "existed prior to the [Delayed Citizenship] policy." JA 41.[3] It also found that Defendants had "fail[ed] to show that" military characterizations of service for purposes of discharge "have *ever* been applied to or are relevant to an N-426 certification." JA 43 (emphasis added). Rather, the undisputed facts demonstrated that "at least as early as 2003, if not earlier, DOD certified an N-426 based on the service member's record at the time he submitted his form." JA 41. In a related case, the same district court found that this practice, which Defendants have never disputed, "consisted of a cursory records check to determine if the enlistee (1) was in the active duty or the Selected Reserves, (2) had valid dates of service, and (3) had no immediately apparent *past* derogatory information in his service record." *Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 21, 28–29 (D.D.C. 2017) (describing

[3] The district court found that, "at least from 1968"—when Congress amended section 1440 to apply to any designated period of armed conflict—"until 2017, there were no . . . durational requirements" for service members seeking an honorable service determination for purposes of naturalization. JA 36–37, 43.

the "unrebutted evidence of DOD's past practice in certifying N-426s"). In that same related case, Defendants represented that "DoD has *always contemplated* that the application for naturalization will take place simultaneous with attendance at basic military training." JA 170 (*Kirwa* Tr. 25:11–19) (emphasis added).

Beginning in 2009, DOD, in partnership with USCIS, formalized and streamlined the longstanding military practice regarding honorable service certifications for purposes of naturalization through the Naturalization at Basic Training Initiative. *See* JA 10–11 (Op. at 10–11) (citing *Kirwa*, 285 F. Supp. 3d at 29; *Nio v. U.S. Dep't of Homeland Sec.*, 270 F. Supp. 3d 49, 55–56 (D.D.C. 2017)).[4]

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[4] *Kirwa* and *Nio* were class actions challenging other portions of the Delayed Citizenship Policy on behalf of different classes of non-citizen service members. In *Kirwa*, Selected Reservists who were not LPRs, but enlisted through the Military Accessions Vital to the National Interest ("MAVNI") program, challenged DOD's refusal to issue them honorable service certifications pursuant to the Policy. *See* JA 3–4 (Op. at 3–4) (explaining the genesis and 2016 shutdown of the MAVNI program); *id*. at 19–21 (summarizing *Kirwa* history). In *Nio*, MAVNI Selected Reservists who had received honorable service certifications sued DOD for, *inter alia*, revoking those certifications pursuant to the Policy. *See id*. at 21–24. In both cases the district court ruled for the plaintiff classes, and DOD did not appeal. *See Nio*, No. 17-cv-0998, 2020 WL 6266304 (D.D.C. Aug. 20, 2020) (entering final judgment for plaintiff class); Judgment, *Kirwa*, No. 17-cv-1793, ECF No. 235 (D.D.C. Sept. 2, 2020). In *Kirwa*, the court held that DOD has "a ministerial duty to certify Form N-426s" and that "DOD must expeditiously certify or deny . . . N-426s based on . . . existing military records." 285 F. Supp. at 41–42. The court ordered defendants to "use their best efforts to certify or deny Form N-426s, as was done for the *Nio* plaintiffs, within two business days of receipt." Amended Order at 1–2,

Pursuant to the Initiative, non-citizens serving in the Army, Navy, Air Force, and Marines received honorable service certifications at the start of basic training, following which "USCIS conducte[d] all naturalization processing including the capture of biometrics, the naturalization interview, and administration of the Oath of Allegiance on the military base." JA 10–11 (Op. at 10–11) (quoting *Kirwa*, 285 F. Supp. 3d at 29). In a different related case, Defendants themselves explained that "'[t]he goal'" of the Initiative, "'which was generally achieved, was for the naturalization process to be completed by the end of [basic training],' typically around 10 weeks." JA 11 (Op. at 11) (quoting AR 48 (*Nio* Miller Decl. ¶ 9) and citing *Kirwa*, 285 F. Supp. 3d at 29; *Nio*, 270 F. Supp. 3d at 55–56).[5]

B. The Delayed Citizenship Policy

In October 2017, the Trump Administration issued the Delayed Citizenship Policy, which imposed time-in-service requirements before non-citizens serving

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Kirwa v. Dep't of Def., No. 17-cv-1793, ECF No. 32 (Oct. 27, 2017). "Generally, DOD has been able to comply with a two-day turnaround from submission of the N-426 to return." JA 21 (Op. at 21).

[5] Unlike active duty service members, who begin their service by shipping to basic training, some Selected Reservists begin their service by participating in drills and shipping to basic training later. The district court found, based on the undisputed facts, that before the Delayed Citizenship Policy, DOD would also issue honorable service certifications to these Selected Reservists without a time-in-service requirement and before they shipped to basic training. JA 45.

during armed conflict could obtain honorable service certifications, thereby substantially delaying their ability to apply for citizenship. JA 70–73. The Policy provided that service members may not receive honorable service certifications until they complete "basic training requirements" and serve a minimum period of time—180 days for active duty service members, and one year for Selected Reservists. JA 71–72.

The Delayed Citizenship Policy's new requirements consisted of a "durational component" and an "active duty component." Plaintiffs challenged both. The "durational component" consisted of the time-in-service requirements (*i.e.* 180 days or one year). The "active duty component" consisted of the requirement that Selected Reservists complete basic training, which constitutes active duty, before they may receive an honorable service certification. As explained above, some Selected Reservists begin their service by participating in drills and ship to basic training later. *See supra* p. 9 n.5. Under the Policy, these Selected Reservists could not receive an honorable service certification until they completed basic training.

The Policy included no statement of the purpose for these new requirements, or why Defendants decided to break with longstanding military practice in imposing them. On appeal, Defendants state that the policy's requirements "were broadly similar to requirements that the military has imposed for nearly four decades when

making similar honorable-service characterizations in the context of discharging service members." Defs.' Br 1–2; *see id.* at 15. But this is a post-hoc rationalization, as Defendants provide no contemporaneous citation documenting that purpose, and there is no such explanation in the Policy. Defendants also portray the Policy as the result of a "comprehensive review" of another military program related to the enlistment of non-citizens, which found "inconsistent treatment" of honorable service certifications. They represent that they intended the new policy to become a "standard" that would remedy variations across "units and military departments." Defs.' Br. 10–11. But this story is simply not true. As discussed above, well before DOD issued the Delayed Citizenship Policy, *every* DOD military branch had instituted a program, in partnership with USCIS, to issue honorable service certifications for purposes of naturalization during basic training so that service members could graduate as U.S. citizens. *See supra* pp. 8–9. That process was consistent across "units and military departments." *See Kirwa*, 285 F. Supp. 3d at 28–29.

Finally, the Delayed Citizenship Policy included additional requirements for non-citizens seeking an honorable service certification that are not the subject of this appeal and remain in force. In particular, the Policy stated that a non-citizen may not receive a certification if he is "the subject of pending disciplinary action or pending

adverse administrative action or proceeding" or "the subject of a law enforcement or command investigation." JA 71. In addition, the Policy required a non-citizen seeking a certification to have met "prescribed screening requirements set forth in Department of Defense Instruction 1304.26, 'Qualification Standards for Enlistment, Appointment and Induction,' and other applicable DoD or Military Department policy." JA 71. Among the screening requirements set forth in DOD Instruction 1304.26 is one focused on "Character/Conduct," which evaluates, *inter alia*, whether a person "[h]as exhibited antisocial behavior or other traits of character that may render the applicant unfit for service" or received "an unfavorable final determination" based on DOD background checks. U.S. Dep't of Def., Instr. No. 1304.26, *Qualification Standards for Enlistment, Appointment and Induction* 9–10 (Oct. 26, 2018), https://bit.ly/3Nbf7Vr. Accordingly, all non-citizens seeking an honorable service certification for purposes of naturalization must still meet these requirements before they may obtain the certification and apply for citizenship.

PROCEDURAL HISTORY

Plaintiffs challenged the Delayed Citizenship Policy's new requirements on behalf of a class of non-citizens serving in the U.S. military. They alleged that both the "durational component" and the "active duty component" of the Policy violated the Administrative Procedure Act ("APA") because they were (1) arbitrary and

capricious; (2) contrary to law and in excess of statutory jurisdiction; (3) resulted in agency action unlawfully withheld and unreasonably delayed; and (4) were enacted without notice and comment. *See* 5 U.S.C. § 706; 5 U.S.C. § 553. The district court granted summary judgment to the Plaintiff class, holding that both components of the challenged policy were arbitrary and capricious, JA 34–51, contrary to law, and constituted agency action unlawfully withheld, JA 51–61.[6]

The district court's final Order and Judgment vacated both components of the challenged policy, enjoined Defendants from withholding honorable service certifications from "any class member based on a failure" to meet those requirements, and ordered Defendants to "endeavor to certify or deny a submitted Form N-426 expeditiously, but in no case shall it take longer than . . . 30 days." JA 63–65.[7]

On June 17, 2021, while this appeal was pending, DOD issued a memorandum rescinding the Delayed Citizenship Policy while it reconsidered "its policy on required service in order to certify honorable service for the purpose of applying for

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[6] The court did not reach the merits of the notice-and-comment claim. JA 61 n.43.

[7] Defendants' opening brief addresses only the durational component of the Delayed Citizenship Policy. It does not address the requirement that Selected Reservists also serve active duty before receiving an honorable service certification. They have therefore waived appeal of that ruling. *See infra* pp. 17–18.

naturalization." Letter Pursuant to FRAP 28(j) at 2, *Samma v. Dep't of Def.*, No. 20-5320 (D.C. Cir. June 23, 2021). For three years, Defendants filed status reports in this Court every sixty days indicating that a policy review was underway. And in their opening brief, Defendants have reiterated that they are "reconsidering the issue of whether to impose a time-in-service requirement and, if so, what that requirement should be." Defs.' Br. 14 n.2.[8]

SUMMARY OF ARGUMENT

The language and purpose of 8 U.S.C. § 1440, and the structure of the INA, plainly establish that non-citizens serving during armed conflict are eligible to apply for naturalization without serving any minimum period of time. The text of section 1440 requires only that a non-citizen serving during armed conflict have "served honorably" in order to apply for citizenship. This text stands in stark contrast to the one-year service requirement Congress imposed in 8 U.S.C. § 1439, the adjoining provision granting an expedited path to citizenship to non-citizens serving during peacetime. By using different words, in consecutive provisions of the same statute,

[8] Plaintiffs agree with Defendants that this appeal is not moot because it is not "'absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" Defs.' Br. 14 n.2 (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000)). To the contrary, Defendants have made it very clear that it may recur.

Congress intended to treat non-citizens serving during armed conflict differently than those serving during peacetime.

The legislative and statutory history of section 1440 and its predecessor statutes illuminate Congress' intent behind granting non-citizens serving during armed conflict immediate eligibility to apply for citizenship. When amending the statute in 1968 and 2003, Congress explained that its goal was to ensure non-citizens serving during armed conflict have an opportunity to naturalize before serving overseas, potentially in a combat zone. The legislative history of two predecessor statutes—passed during World Wars I and II—further confirms this intent. And the enactment in 1953 of a temporary provision, section 1440a, granting eligibility to naturalize to non-citizens who "served honorably" for 90 days during the Korean War, demonstrates that Congress knew how to articulate a minimum period of service for non-citizens serving during armed conflict, and that it deliberately chose not to do so in section 1440.

Finally, the military's own longstanding practice has been to issue honorable service certifications for purposes of naturalization with no time-in-service requirement. In fact, for nearly a decade during the current armed conflict, the military actively facilitated the issuance of these certifications during basic training so that non-citizens could graduate from training—following which they could be

assigned overseas, including to combat—as U.S. citizens. This practice has long co-existed with, and is entirely consistent with, Defendants' practice of characterizing honorable service for purposes of discharge. Indeed, if Defendants, true to their word, sought to align the two practices today, the result would be to abolish expedited naturalization under section 1440 and nullify that pathway to citizenship for non-citizens serving during armed conflict.

ARGUMENT

The Department of Defense Lacks Statutory Authority Under Section 1440 to Require Non-Citizens Serving During Armed Conflict to Serve a Minimum Period of Time Before Applying for Citizenship.

The APA instructs a reviewing court to "hold unlawful and set aside agency action . . . not in accordance with the law," 5 U.S.C. § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U.S.C. § 706(2)(C). The APA "incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024). Accordingly, "[c]ourts interpret statutes, no matter the context," including under the APA, "based on the traditional tools of statutory construction." *Id*. at 2268.

In this case, the underlying question is whether 8 U.S.C. § 1440 gives DOD authority to promulgate time-in-service requirements for purposes of naturalization

under section 1440. The text, purpose, structure, and history of section 1440, supported by DOD's own longstanding practice, all lead to the same conclusion—it does not.

A. The text of Section 1440 does not authorize Defendants to impose a minimum period of service.

When "addressing a question of statutory interpretation," courts "begin with the text." *City of Clarksville v. FERC*, 888 F.3d 477, 482 (D.C. Cir. 2018). The text of section 1440 does not authorize Defendants to impose a minimum period of service before non-citizens serving during armed conflict may apply for citizenship. Defendants' entire textual analysis rests on section 1440's language that the "executive department . . . shall *determine* whether persons have served honorably." 8 U.S.C. § 1440(a) (emphasis added). But—particularly after the Supreme Court's recent decision in *Loper Bright*—the word "determine" standing alone cannot bear that interpretive weight. The meaning of that phrase is resolved by its lineage, which shows that Congress inserted it in 1948 to *streamline* naturalization, by replacing the requirement that the military copy, authenticate, and transfer to the courts the entire service record of non-citizens applying for naturalization.

As an initial matter, section 1440 applies to both Selected Reservists *and* active duty service members. The text of section 1440 states that any non-citizen who "has served honorably as a member of the Selected Reserve of the Ready

Reserve *or* in an active-duty status" during a designated period of armed conflict "may be naturalized." 8 U.S.C. § 1440(a) (emphasis added). As discussed above, Plaintiffs challenged both the durational and active duty components of the Delayed Citizenship Policy, the latter of which required Selected Reservists who had already begun their service by drilling to serve "in an active-duty status" (by completing basic training) before they could receive an honorable service certification. *See supra* pp. 10, 12–13. Because Defendants' opening brief addresses only the durational component of the Policy, they have waived appeal of the district court's ruling that the active duty component was arbitrary and capricious, contrary to law, and constituted agency action unlawfully withheld. *See World Wide Mins., Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1160 (D.C. Cir. 2002).

The text of Section 1440 makes clear that—for Selected Reservists and active duty service members alike—the only prerequisite to apply for naturalization during a period of armed conflict is to have "served honorably." 8 U.S.C. § 1440(a). On its face, this language imposes no minimum period of service before non-citizens serving during armed conflict can apply for naturalization.

Nor does the text of section 1440 delegate to DOD the authority to establish a minimum period of service. Defendants' textual argument to the contrary rests on a single word—that section 1440 states DOD "shall *determine* whether persons have

served honorably." 8 U.S.C. § 1440(a) (emphasis added). They argue that Congress' use of the word "determine" means that "Congress 'expressly delegated' to the Department 'the authority to give meaning to' the statutory concept of honorable service." Defs.' Br. 19 (quoting *Loper Bright*, 144 S. Ct. at 2263). But section 1440 is nothing like the statutes that the quoted portion of *Loper Bright* highlights, which explicitly give agencies authority to define standards or issue regulations related to specific terms. *See* 144 S. Ct. at 2263 & n.5.[9] It is those types of statutes where Congress has "'expressly delegate[d]' to an agency the authority to give meaning to" particular terms. *Id*. at 2263. Section 1440 contains no such explicit standard-setting delegation. Nor does it "empower" DOD "to prescribe rules to 'fill up the details' of a statutory scheme," *id*. (quoting *Wayman v. Southard*, 10 Wheat. 1, 43

[9] *Batterton v. Francis* concerned a Social Security Act provision requiring a state to provide assistance where a child "has been deprived of parental support . . . by reason of the unemployment (*as determined in accordance with standards prescribed by the Secretary*) of his father." 432 U.S. 416, 419 (1977) (emphasis added); *see also* 29 U.S.C. § 213(a)(15) (exempting from Fair Labor Standards Act "any employee employed on a casual basis in domestic service employment to provide companionship services for individuals who . . . are unable to care for themselves (*as such terms are defined and delimited by regulations of the Secretary*)" (emphasis added)); 42 U.S.C. § 5846(a)(2) (requiring notification to Nuclear Regulatory Commission when a facility regulated pursuant to the Atomic Energy Act "contains a defect which could create a substantial safety hazard, *as defined by regulations which the Commission shall promulgate*" (emphasis added)).

(1825)),[10] or "to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable,'" *id*. (quoting *Michigan v. EPA*, 576 U.S. 743, 752 (2015)).

The critical textual clause in section 1440 is borrowed from an earlier statute. Congress first enacted this language in a 1948 amendment to the Nationality Act of 1940, the immediate predecessor statute to the INA. *See* Defs.' Br. 7–8. Prior to 1948, the Nationality Act required non-citizens applying for naturalization on the basis of military service to prove they had "served honorably" by filing with a United States District Court either (1) two affidavits of citizen service members "of a noncommissioned or warrant officer grade, or higher," or (2) "a duly authenticated copy of the record of the executive department having custody of the record of petitioner's service, showing that the petitioner is or was during the present war a member serving honorably." Act of Second War Powers, Pub. L. No. 77-507, § 1001, 56 Stat. 176, 182 (1942). In 1948, Congress added the "executive department . . . shall determine" language and replaced the option of "a duly authenticated copy" of the service record with a "duly authenticated certification from the executive

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[10] *Wayman* concerned, *inter alia*, the 17th section of the Judiciary Act of 1789, which "enacts, 'That all the said Courts shall have power' 'to make and establish all necessary rules for the orderly conducting business in the said Courts, provided such rules are not repugnant to the laws of the United States.'" 23 U.S. at 42.

department under which the petitioner is serving" that "state[s] whether the petitioner has served honorably." An Act to Amend the Nationality Act of 1940, Pub. L. No. 80-567, 62 Stat. 281-82 (1948). Thus, the addition of the "executive department shall determine" phrase in 1948 simply reflected Congress' decision that, instead of sending authenticated copies of every applicant's service records to the courts, the military should certify that the applicant had served honorably. Indeed, an Immigration and Nationality Service ("INS") official described how "impractical" it was "to have the War or Navy Department, in each individual case, have an authenticated copy of these records sent to the courts," and noted that, during World War I, expedited naturalization of non-citizens at Camp Dix "could not possibly have been done if in every one of those cases we would have had to send to headquarters here to get an authenticated copy of the record." *Naturalization of Aliens in the Armed Forces of the United States: Hearing on H.R. 6073, H.R. 6416, and H.R. 6439 Before the H. Comm. on Immigration and Naturalization*, 77th Cong. 12 (statement of Dr. Henry B. Hazard, Assistant to Comm'r, Immigration & Naturalization Serv.) ("*Naturalization of Aliens*").[11]

[11] Available at https://bit.ly/4gL6aQa.

Congress therefore added the "executive department . . . shall determine" language, not to delegate to DOD some discretionary authority to *delay* the naturalization process, but to *streamline* it, by eliminating the need for the military to copy, authenticate, and transfer a service member's entire record to the courts, particularly when the military, versed in reading service records, could easily locate the necessary information. This point is further supported by the statute's use of the mandatory "shall," instructing that DOD "*shall* determine whether persons have served honorably." 8 U.S.C. § 1440(a) (emphasis added); *see id*. at § 1440(c) (stating that DOD "*shall* . . . prove[] by a duly authenticated certification . . . whether the applicant served honorably") (emphasis added); *see also Bridgeport Hosp. v. Becerra*, 108 F.4th 882, 887 (D.C. Cir. 2024) ("While the word 'may' is permissive and signals discretion, the word 'shall' generally signals a mandatory duty.").

Indeed, in attempting to dismiss the related case of *Nio*, Defendants previously agreed that, with respect to honorable service certifications under section 1440, "DOD serves a ministerial role in determining if an individual is serving honorably." JA 61 (Op. at 61); *see Citizens for Resp. and Ethics in Washington v. Trump*, 302 F. Supp. 3d 127, 136 (D.C. Cir. 2018) ("A ministerial duty is one that admits of no discretion, so that the official in question has no authority to determine whether to perform the duty."). In *Kirwa*, the district court noted this prior litigation position

when holding that DOD serves only a ministerial role in certifying honorable service for purposes of naturalization, and even stated that "DOD is arguably judicially estopped from changing its position based on a change in litigation interests." *Kirwa*, 285 F. Supp. 3d at 38 & n.18; *see also* JA 61 (Op. at 61) ("In fact, DOD and USCIS acknowledged in *Nio* that certifying Form N-426 is ministerial.").

Defendants do not otherwise engage with the text of section 1440. Rather, they point to what is not there: "additional guidance . . . regarding the conditions under which a noncitizen's service should be considered 'honorable.'" Defs.' Br. 18–19. So, Defendants argue, because section 1440 does not expressly *prohibit* DOD from imposing a time-in-service requirement, the statute must grant the agency broad discretion to do so. *See id.* But this argument turns *Loper Bright*'s approach to agency discretion on its head. Where a statute expressly delegates "to an agency the authority to give meaning to a particular statutory term," the "statute's meaning may well be that the agency is authorized to exercise a degree of discretion." *Loper Bright*, 144 S. Ct. at 2263. Nowhere has the Supreme Court suggested that where a statute does not "*exclude specifically* the discretion to promulgate requirements," Defs.' Br. 19 (emphasis added), it gives the agency a green light to do so. Under Defendants' theory, section 1440's silence should be interpreted as permission to write in an additional, substantive, non-statutory requirement before non-citizens

serving during armed conflict may seek naturalization. That reading of section 1440's text is untenable and cannot square with the statute's limited mandate to DOD.

Finally, if section 1440 gives any agency authority to interpret its requirements, it is USCIS, the agency "responsible for implementing" the statute, not DOD. *Loper Bright*, 144 S. Ct. at 2262. USCIS interprets the statute to confer eligibility for naturalization on non-citizens serving during armed conflict with no minimum period of service. In a 2010 rule promulgated to reflect Congress' 2003 amendment to section 1440, DHS stated that "aliens who served in the U.S. Armed Forces during specific periods of hostilities were eligible for naturalization *without having served for any particular length of time* so long as the service was in an active-duty status." Naturalization for Certain Persons in the Armed Forces, 75 Fed. Reg. 2785 (Jan. 19, 2010) (emphasis added). It then explained that it was updating its regulations to extend that same benefit to Selected Reservists. *Id*. (citing National Defense Authorization Act for Fiscal Year 2004, § 1702, 117 Stat. 1392, 1691–93).

B. The purpose of Section 1440, which is also reflected in the statutory structure of the INA, is to grant non-citizens serving during armed conflict eligibility to apply for citizenship without requiring a minimum period of service.

"After examining the plain text" of a challenged statute, the Court "move[s] on to the statute's structure [and] purpose." *Noble v. Nat'l Ass'n of Letter Carriers,*

AFL-CIO, 103 F. 4th 45, 50 (D.C. Cir. 2024) (citing *Genus Med. Techs., LLC v. FDA*, 994 F.3d 631, 641 (D.C. Cir. 2021). "The words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sierra Club v. Wheeler*, 956 F.3d 612, 616 (D.C. Cir. 2020) (quoting *Util. Air Regul. Grp. v. Env'tl Prot. Agency*, 573 U.S. 302, 3230 (2000)). Thus, in interpreting the requirement that non-citizens must have "served honorably" to seek naturalization, the Court "must consider not only the ordinary meaning of this term, but also, among other things, 'the problem Congress sought to solve' in enacting the statute in the first place." *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 781 (D.C. Cir. 2012).

The problem Congress sought to solve is clear. In sections 1439 and 1440 of the INA, Congress provided expedited paths to citizenship to non-citizens serving in the military. Section 1439 provides an expedited path during *peacetime* and requires non-citizens to have "served honorably . . . for a period or periods aggregating one year" to trigger naturalization eligibility. *See* 8 U.S.C. § 1440(a). In the subsequent section, Congress grants non-citizens serving during *armed conflict* an expedited path to citizenship with no minimum period of service, requiring only that they have "served honorably." One section imposes a time-in-service requirement; the other does not. It is reasonable to conclude that Congress therefore deliberately omitted any prescription of a minimum period of service in section 1440. *See Russello v.*

United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration omitted)); *see also Sandoz Inc. v. Amgen Inc.*, 582 U.S. 1, 20 (2017) ("'Had Congress intended to' impose two timing requirements in [the provision at issue], 'it presumably would have done so expressly as it did in the immediately' following subparagraph." (quoting *Russello*, 464 U.S. at 23)).

By enacting sections 1439 and 1440, Congress treated service members potentially risking their lives by serving during armed conflict differently than those serving during peacetime. Defendants abrogate that intent when they argue that "section 1440's silence on the matter is meant to convey nothing more than a refusal to tie the agency's hands as to whether a time-in-service requirement should be used, and if so to what degree." Defs.' Br. 28 (quotation marks and citation omitted). If Defendants were correct, they could exercise their discretion by effacing any distinction between the INA's separate peacetime and armed conflict provisions—a result that would make no sense. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose

are available"). And yet, that is precisely what the Delayed Citizenship Policy purported to do by requiring Selected Reservists serving during armed conflict to wait a year—*i.e.* an equivalent amount of time in both peacetime *and* armed conflict—before seeking citizenship. *See* JA 50–51 (Op. at 50–51) ("[T]he Reservist Minimum Service Requirement has the practical effect of requiring Reservists to serve the same amount of time to be eligible to naturalize under both § 1440 and § 1439 . . . erasing the benefit of § 1440 for Reservists.").

In fact, Defendants' position on appeal is even more extreme than the Delayed Citizenship Policy suggests. Their sole justification for the Policy is that it was meant to align honorable service certifications for purposes of naturalization with honorable service characterizations for purposes of discharge. *See* Defs.' Br. 3–6, 14–15, 19–22. Under DOD's current discharge policy, no service member—active duty or Selected Reservist—may receive an honorable service characterization at discharge before having served at least one year. *See infra* pp. 51–52. Thus, Defendants' proposal to align both policies would require all service members to wait a year, at minimum, before seeking citizenship, collapsing any distinction between sections 1439 and 1440.

Finally, Defendants argue that their interpretation of section 1440 is actually "buttressed by the differing nature of the two requirements" because section 1439's

one-year requirement is not "tie[d] . . . to the notion of honorable service" but "is best understood as defining the quantity of peacetime service that Congress believes is appropriately required in exchange for an expedited path to naturalization." Defs.' Br. 29. But Defendants' argument flies in the face of the plain text of section 1439, which requires that a non-citizen have "served *honorably* . . . for a period or periods aggregating one year." 8 U.S.C. § 1439(a) (emphasis added). Thus, both sections 1439 and 1440 tie eligibility for citizenship "to the notion of honorable service."

C. The legislative and statutory history of Section 1440 further supports the conclusion that Congress intended non-citizens serving during armed conflict to be eligible to apply for citizenship without serving a minimum period of time.

The legislative and statutory history of section 1440 further supports Plaintiffs' reading of the statute. *See Genus Med. Techs.*, 994 F. at 641 (turning to legislative history and finding it "underscores [the] analysis" of statutory text, structure, and purpose); *see also Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 720 (2018) ("Lastly, the statutory history . . . corroborates our reading of the text."). This history illuminates Congress' reasons for creating two different expedited paths to citizenship based on service during peacetime or during armed conflict: Congress intended for non-citizens serving during armed conflict, who might sacrifice their lives on behalf of the United States, to naturalize *before* any

potential assignment overseas, so that they could be citizens of the nation on whose behalf they might be fighting and dying.

Congress' intent is consistently reflected in the legislative and statutory history of section 1440 as well as two predecessor statutes passed during World Wars I and II. In addition, Congress' passage in 1953 of section 1440a—a temporary provision in the INA granting non-citizens who "served honorably" for 90 days during the Korean War eligibility to naturalize—further confirms that Congress knew how to write in a minimum period of service in the armed conflict context and deliberately chose not to in section 1440. Finally, judicial interpretations of section 1440, as well as of its immediate predecessor provision in the Nationality Act of 1940, accord with this reading, and Congress is presumed to have adopted these judicial interpretations in its subsequent amendments to the INA.

1. The legislative and statutory history of Section 1440

In 1968, Congress amended section 1440 to expand naturalization eligibility to non-citizens who had "served honorably" in the Vietnam War, as well as any future periods of armed conflict; the Plaintiff class members owe their eligibility for expedited naturalization to this amendment. *See* Act to Amend the Immigration and Nationality Act to Provide for the Naturalization of Persons Who Have Served in Active-Duty Service in the Armed Forces of the United States During the Vietnam

Hostilities, or in Other Periods of Military Hostilities, Pub. L. No. 90-633, § 1, 82 Stat. 1343 –44 (1968).[12] The Senate Judiciary Committee Report accompanying the amendment began by stating that Congress has provided for "the expeditious naturalization" of non-citizen service members "for more than 100 years," and that "[e]xemptions granted wartime servicemen . . . have been more liberal than those given for services rendered during peacetime." JA 121.[13] The Report then explicitly compared sections 1439 and 1440 and explained that while the "peacetime serviceman must have a minimum of [what was then] 3 years' service, the wartime serviceman has no minimum required." JA 123. The Report also expounded on section 1440's purpose—to ensure that the wartime serviceman obtain citizenship *prior to combat deployment*:

> [Section 1440] places the emphasis properly on the period of the time of the military service by the alien in times of war . . . with due recognition of the dangers and risks inherent in such service wherever it might be because of the ever-present possibility of reassignment to the war zones of operation. Under the amended language, a serviceman is afforded an opportunity to acquire citizenship *before he is assigned*

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[12] Until that point, section 1440 applied to those who had served honorably in World Wars I and II and the Korean War.

[13] In fact, Congress has provided an expedited path to citizenship for non-citizens who served during armed conflict since the Civil War. *See, e.g.*, An Act to Define the Pay and Emoluments of Certain Officers of the Army, and for Other Purposes, Pub. L. No. 37-200, § 21, 12 Stat. 594, 597 (1862) (permitting "any alien" who "has been or shall be hereafter honorably discharged . . . to become a citizen" upon proof of one year's residency within the United States).

> *to active combat*, whereas if service in a defined combat zone is a condition to the acquisition of citizenship, the serviceman killed in action could never avail himself of the special benefits provided by his adopted country.

JA 131 (emphasis added).

In 2003, Congress again amended section 1440, this time to expand naturalization eligibility to Selected Reservists, who together with active duty service members make up the Plaintiff class. *See* National Defense Authorization Act for Fiscal Year 2004, § 1701, Pub. L. No. 108-136, 117 Stat. 1392, 1691–93 (2003).[14] The legislative discussion of the amendment reinforced that its purpose was to ensure that active duty service members *and* Selected Reservists could seek naturalization prior to potential assignment overseas during a period of armed conflict. *See* JA 173–76 (149 Cong. Rec. 27280–83). In introducing the amendment, one of its co-sponsors began by stating: "Sadly, 10 immigrant soldiers were killed in Iraq. The President did the right thing by granting those who died posthumous citizenship, but it is clear that we must do more to ease the path to citizenship for *all* immigrants who serve in our forces." JA 173 (149 Cong. Rec. 27280) (emphasis added). Another co-sponsor explained that Selected Reservists "deserve a

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[14] In the same bill, Congress also amended 8 U.S.C. § 1439 by reducing from three years to one year the period of honorable service required to qualify for naturalization during peacetime.

naturalization process that does not unnecessarily delay the grant of citizenship or impose other restraints because they are stationed in another country." JA 174 (149 Cong. Rec. 27281). Finally, a representative speaking in support of the amendment declared that it "provides a process of *immediate* naturalization for our selected reserve Armed Forces serving during a time of hostility . . . and it is only fair to extend this benefit to reserve as well as active duty personnel serving our country in a time of war." JA 176 (149 Cong. Rec. 27283) (emphasis added).

These specific explanations of congressional intent starkly emphasize how DOD's time-in-service requirements exceed its authority under section 1440. Take, for example, the Delayed Citizenship Policy's requirement that active duty service members serve a minimum of 180 days before they may receive an honorable service certification. The Army has acknowledged:

> The legislative record for 8 USC § 1440 indicates that the statute was intended to encompass service during a particular time period "because of the ever-present possibility of reassignment to the war zones of operation." *Once a Soldier has completed basic military training, they are subject to such reassignment*.

AR 41 (Army Input on N-426 Certification) (emphasis added). Basic training comprises ten weeks, *see* JA 11 (Op. at 11 (quoting AR 48 (*Nio* Miller Decl. ¶ 9))); thus, under DOD's time-in-service requirement, active duty service members must wait a minimum of approximately three and a half more months after completing

such training—by which time they are subject to the "ever-present possibility of reassignment to the war zones of operation"—before they can even seek an honorable service certification in order to apply for naturalization.[15] By the time active duty service members receive citizenship under the Delayed Citizenship Policy, they will already be at their duty stations; they may very well already be deployed to a combat zone or even killed in action.[16]

That Congress deliberately intended section 1440 to grant non-citizen service members immediate eligibility to apply for naturalization is further illustrated by its

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[15] They are still months away from receiving citizenship. The military can take up to 30 days to process a request for an honorable service certification for purposes of naturalization. *See* AR 1 (2020 DOD Memorandum at 1). Only upon receipt of the certification can a service member then apply for naturalization. According to USCIS, the average processing time for naturalization applications is 5.2 months, but can be much longer depending on the field office. *See Progress on USCIC Processing Times,* under the menu *Newsroom*, on the page *Stakeholder Messages,* USCIS, https://perma.cc/YB9W-A4Y7 (last updated Apr. 3, 2024); *Check Case Processing Times*, USCIS, https://egov.uscis.gov/processing-times (7.5 months in Houston, TX; 9 months in Anchorage, AK; 11.5 months in Norfolk, VA as of September 21, 2024).

[16] The Delayed Citizenship Policy purported to address this obvious conflict with the purpose of section 1440 by providing that non-citizens who have served "at least one day of active duty service in a location designated as a combat zone" can be eligible for an honorable service certification for purposes of section 1440 naturalization. JA 72. But allowing certification only *after* a service member begins service in a combat zone means that she will be risking her life on behalf of the United States as a non-citizen for most of a year or more, *see supra* p. 33 n.15, in obvious conflict with the clear purpose of the statute.

enactment in 1953 of a temporary provision—8 U.S.C. § 1440a—to benefit non-citizens who served during the Korean War. That provision granted any non-citizen "who, after June 24, 1950, and not later than July 1, 1955, . . . actively served . . . honorably . . . *for a period or periods totaling not less than ninety days*" eligibility to apply for naturalization. An Act to Provide for the Naturalization of Persons Serving in the Armed Forces of the United States after June 24, 1950, Pub. L. No. 83-162, § 1, 86 Stat. 108, 108–110 (1953) (emphasis added).[17] Congress' explicit inclusion of a minimum period of service in section 1440a is markedly different from section 1440, which at that point articulated no such minimum for non-citizens who had "served honorably" in World Wars I and II. At the same time, the House and Senate Judiciary Committee Reports on section 1440a reflect a continued desire for non-citizens serving during the Korean War to naturalize before assignment overseas. Thus, both Reports explain:

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[17] Section 1440a required that any non-citizen seeking naturalization pursuant to its terms file his petition "not later than December 31, 1955." 67 Stat. at 108. In 1961, Congress amended section 1440 to permit non-citizens who had served during the Korean War and had not benefited from section 1440a to seek naturalization past that deadline. *See* Act to Amend the Immigration and Nationality Act, Pub. L. No. 87-301, § 8, 75 Stat. 650, 654 (1961); *see also* JA 122 (1968 Report at 4 ("In 1961 Korean veterans were extended benefits identical with those of veterans of World War I and World War II and *the requirement of service for 90 days* and the physical presence of 1 year *were eliminated*." (emphasis added))).

> The routine naturalization procedure is impracticable in the case of the serviceman who, in the course of his training, is transferred from camp to camp with a final brief stop at the embarkation center before leaving for an overseas destination and—possibly—combat duty. Even more complicated is the case of the alien admitted temporarily who may return from honorable front-line service in the ranks of the Armed Forces of the United States to find himself confronted with an order of deportation. Consideration must also be given to the most unfortunate complications that might arise should an alien fall prisoner to the forces of an enemy state of which he is still technically a national.

H. Judiciary Comm., *Naturalization of Alien Servicemen and Veterans*, H.R. Rep. No. 83-223, at 2 (1953); S. Judiciary Comm., *Providing for the Naturalization of Persons Serving in the Armed Forces of the United States after June 24, 1950*, S. Rep. No. 83-378, at 2 (1953).

Moreover, when Congress amended section 1440 in 1968, it was legislating against a backdrop of judicial interpretation that accords with Plaintiffs' reading. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40 (2009) ("Congress is presumed to be aware of, and to adopt, a judicial interpretation of a statute when it re-enacts a statute without change."). For example, in *United States v. Rosner*, the court considered a government challenge to the naturalization of a non-citizen service member under section 1439 on the grounds that he had not served active duty. 249 F.2d 49, 51–52 (1st Cir. 1957). The court noted that while section 1440 (at that time) required a person to have "served honorably in an active duty status" and section 1440a required a person to have "actively served," it omitted "any

reference to active service" in section 1439. *Id.* at 51. It then concluded that "[i]t would not be illogical to contend that Congress intended to require higher standards of military service in [section 1440] and 8 U.S.C. § 1440a in return for allowing aliens who had not been lawfully admitted to the United States for permanent residence the advantage of *practically immediate citizenship* under the provisions of [section 1440] and only a one year period of residence under 8 U.S.C. § 1440a." *Id.* (emphasis added); *see also id*. at 52 ("[Section 1439] . . . requires a period of three years in military service, unlike [section 1440], which sets *no minimum length of period of time* served . . . and 8 U.S.C. § 1440a, which requires a period of ninety days in active military service." (emphasis added)). And in *In re Garcia*, the court read section 1440 to "permit[] an alien who serves the country's defense in war time to have an advantage, in terms of naturalization, not a disadvantage over one who has served in peace time," including because of "the time requirement which exists only in section 1439." 240 F. Supp. 458, 459–60, 460 n.5 (D.D.C. 1965).

2. The legislative and statutory history of predecessor statutes to Section 1440

Ignoring all of the above, Defendants rely heavily on the history of a predecessor statute to the INA—the Nationality Act of 1940. That Act originally provided that a "person . . . who has served honorably at any time . . . for a period or periods aggregating three years . . . may be naturalized." An Act to Revise and

Codify the Nationality Laws of the United States into a Comprehensive Nationality Code, Pub. L. No. 76–853, § 324, 54 Stat. 1137, 1149–1150 (1940). In 1942, Congress amended the Act to provide that those "who ha[ve] served or hereafter serve[] honorably" in World War II could seek citizenship without meeting the three year service requirement or any other time-in-service requirement. Act to Further and Expedite the Processing of War, Pub. L. No. 77-199, § 1001, 56 Stat. 176, 182 (1942).

Defendants claim that "when a Representative inquired during a committee hearing whether the proposed [amendment] 'simply make[s] it mandatory that any one who joins the army immediately gets citizenship,' an official with the INS explained that the bill did not contain such a requirement because the noncitizen's 'service must be honorable.'" Defs.' Br. 22 (quoting *Naturalization of Aliens* at 12) (statements of Rep. A. Leonard Allen and Dr. Hazard, Assistant to Comm'r, Immigration & Naturalization Serv.). From that response, Defendants argue that Congress intended to give DOD broad discretion to define the meaning of "honorable service," including through a time-in-service requirement. Defs.' Br. 22.

But Defendants' account of the history of the 1942 amendment is deeply misleading and woefully incomplete. Defendants omit that, what immediately follows its selected quotation is the same Representative then inquiring "How long

does he render service?," and the INS official immediately responding "No particular period of time." *Naturalization of Aliens* at 12. Defendants also omit that a short time later, when a Representative inquired, "But in this bill, as I understand it, you propose that when a fellow goes in the army *immediately* he becomes *eligible to make application*," the ranking member of the committee (Rep. Noah Mason) responded, "Yes." *Id*. at 14 (emphasis added).

By cherry-picking dialogue discussing immediate *citizenship*, Defendants engage in sleight of hand. *See also* Defs.' Br. 22–23 ("Similarly, during the same hearing, a different Representative clarified that the legislation was not intended to provide a noncitizen with 'citizenship papers the next day after he joins the army.'" (quoting *Naturalization of Aliens* at 14)). Plaintiffs have never asserted that section 1440 requires *USCIS* to confer *citizenship* as soon as non-citizens begin military service. Rather, they assert that section 1440 makes them *eligible to apply* for citizenship and therefore requires *DOD* to process their request for an honorable service certification without imposing a time-in-service requirement.

Defendants claim that the district court, which agreed with Plaintiffs' view, JA 56–58, rejected their reading because it erred in "pars[ing] the relevant statements as drawing a distinction between when a noncitizen service member may *apply* for naturalization and when he will in fact *receive* citizenship." Defs.' Br. 23 (emphasis

added). But in fact, the very legislative history cited by Defendants confirms that this distinction was top of Congress' mind:

> Mr. Allen. [I]n this bill, as I understand it, you propose that *when a fellow goes in the army immediately he becomes eligible to make application* and so forth.
>
> Mr. Mason. Yes.
>
> Mr. Allen. He hasn't had time to show his loyalty; he hasn't had time to show anything.
>
> Mr. Mason. But he is in the army –
>
> Mr. Allen. I know, but he hasn't had time to show anything.
>
> Mr. Mason. *We aren't going to give him his citizenship papers the next day after he joins the army*, in any instance.

Naturalization of Aliens at 14 (emphasis added). As this exchange demonstrates, the Representatives were indeed explicitly distinguishing between eligibility "to make application" for citizenship and obtaining "citizenship papers."[18]

Moreover, at least two contemporaneous judicial rulings confirm the district court and Plaintiffs' reading of the 1942 amendment. In *Petition of Delgado*, a district court considered whether a non-citizen service member qualified for

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[18] This distinction is hardly "fine-grained," as Defendants assert. Defs.' Br. 23. If that were true, receipt of an honorable service certification would be akin to receipt of citizenship. But as explained above, once a service member receives their honorable service certification, they must then apply for naturalization. *See supra* p. 5–6. That process includes the submission of biometrics; a USCIS investigation, including background checks by the FBI and DOD; and a USCIS interview. *See id*. pp. 5–6. This process can take months and even up to a year. *See supra* pp. 33 n.15.

citizenship under the 1942 amendment. 57 F. Supp. 460 (N.D. Cal. 1944). Analyzing the amendment, the court concluded that it "establishes no prerequisites as to duration of service," and thus, "[a] regular Coast Guardsman, serving honorably for one day or one week, is eligible for citizenship." *Id*. at 461. And in *United States v. You Lo Chen*, the court recognized that the 1942 amendment "does not prescribe any particular length of service, nor require that it be combatant, or overseas service. It is only required that the alien shall have served honorably." 170 F.2d 307, 310 (1st Cir. 1948).[19]

The import of these decisions extends not just to analysis of the 1942 amendment but to section 1440 as well. Defendants themselves describe a single statutory history beginning from "Congress's initial decision in 1940 to require that a noncitizen serve 'honorably' to be eligible for expedited naturalization" to "its subsequent decisions in reenacting versions of sections 1439 and 1440 since that time." Defs.' Br. 21. This Court must therefore presume that Congress was aware of *Delgado* and *You Lo Chen*, and adopted their interpretations of "honorably"—that

[19] The court revoked Mr. Chen's citizenship because he was "[n]ever sworn into the military service," and "there can be no military . . . service to be characterized as honorable, or otherwise, until the alien, by induction or enlistment, shall have become a member of one of the armed services." 170 F.2d at 309–10.

is, permitting service members to receive such a certification with no time-in-service requirement—when it enacted, and later reenacted, section 1440.

The 1942 amendment is not the only predecessor statute that elucidates Congress' consistent intent to ensure non-citizens serving during armed conflict have immediate eligibility to apply for citizenship. For example, in 1918, Congress authorized "any alien serving in the military . . . in the present war" to "file his petition for naturalization . . . without proof of the required five years' residence within the United States." An Act to Amend the Naturalization Laws and to Repeal Certain Sections of the Revised Statutes of the United States and Other Laws Relating to Naturalization, Pub. L. No. 65-144, 40 Stat. 542, 542 (1918). This statute also contained an analogous "served honorably" requirement. Specifically, it required that the record for examining the petition for naturalization include "the honorable discharge certificate of such alien . . . or the certificate of service showing good conduct, signed by a duly authorized officer." 40 Stat. at 543.

In discussing the 1918 statute, senators emphasized that the nearly 125,000 non-citizen soldiers then serving in the Army should not be sent to fight in a war overseas without first obtaining their citizenship. *See* 56 Cong. Rec. S5009 (daily ed. Apr. 12, 1918) (statement of Sen. Hardwick) ("It is impossible, or at least it is unfair, to send these soldiers to the battle line in Europe until they have been

naturalized and made citizens of this country, so that they will not be subjected to charges of treason against the governments and princes of whom they were formerly subjects. The War Department is not willing to subject these men to that sort of danger. It is not fair to them and it is not just to the country."). Indeed, in the very legislative history to the 1942 amendment that Defendants cite, an INS official describes participating in naturalizing thousands of non-citizens at Camp Dix, one of the largest training camps, in the "three days before they embark[ed] for Europe" during World War I. *Naturalization of Aliens* at 16. Thus, a long line of legislative and statutory history supports the interpretation that section 1440 permits non-citizens serving during armed conflict to apply for naturalization—and therefore obtain an honorable service certification—with no time-in-service requirement so that they may obtain their citizenship before potentially placing their lives at peril in service to this country.

3. Defendants' irrelevant post-enactment legislative and statutory history

Defendants cite two additional purported pieces of legislative history. First, they cite a 2019 Senate Armed Services Committee Report on the Fiscal Year 2020 National Defense Authorization Act ("FY 2020 NDAA"). Defs.' Br. 24. This 643-page report contains a single paragraph entitled "Expedited naturalization of non-citizen servicemembers," where the Committee simply "notes that DOD . . . provides

non-citizen servicemembers an expedited path to naturalization upon," *inter alia*, "[c]ompletion of 180 consecutive days of Active-Duty service." S. Rep. No. 116-48, at 187–88 (2019). The Report expresses no view about the legality or wisdom of the Delayed Citizenship Policy. In any event, the Report post-dates the relevant amendments to section 1440 and is thus entitled to no weight as legislative history. *See, e.g.*, *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.").

Second, Defendants cite Congress' enactment, in the FY 2020 NDAA, of a provision "directing the Secretary of Defense to promulgate regulations relating to the processing of N-426 requests and, in particular, to 'designate the appropriate level for the certifying officer.'" Defs.' Br. 24 (citing FY 2020 NDAA, Pub. L. No. 116-92, div. A, tit. V, subtitle C, § 526, 133 Stat. 1198, 1356 (2019)). The FY 2020 NDAA did not amend section 1440. Nevertheless, Defendants argue that by authorizing DOD to designate *who* can sign N-426 forms, it somehow authorizes DOD to decide *when* non-citizen service members are eligible for naturalization during armed conflict. That is a leap of logic unsupported by the actual text, purpose, structure, or history of section 1440 as discussed above. Read together with section 1440, the FY 2020 NDAA cannot disturb the conclusion that section 1440 grants

non-citizens serving during armed conflict eligibility to apply for naturalization with no minimum period of service.

D. The military's own precedent and history reflect a longstanding practice of determining whether non-citizens serving during armed conflict have served honorably for purposes of naturalization without requiring a minimum period of service.

Defendants rely heavily on the history of the military's service characterizations for purposes of *discharge* in support of their argument that they may require non-citizens to serve a minimum period of time before certifying honorable service for purposes of *naturalization* during *armed conflict*. Defs.' Br. 19–22. But the military's own longstanding practice—reflecting an interpretation of section 1440 consistent with Plaintiffs'—has been to issue honorable service certifications for purposes of naturalization with no time-in-service requirement. For decades, the military has conceptually distinguished this practice from its practice of service characterizations for purposes of discharge and, indeed, the two are entirely consistent with one another. Finally, were Defendants to align the two practices today, the terms of its current discharge policy—which require all service members to serve at least a year before becoming eligible to receive honorable service characterizations at discharge—would eradicate section 1440 as a pathway to citizenship for non-citizens serving during the current armed conflict.

1. Military precedent and history of certifying honorable service for purposes of naturalization during armed conflict

As discussed above, the district court found, based on the undisputed facts, that before 2017, the military had no time-in-service requirement for non-citizens serving during armed conflict who sought honorable service certifications in order to apply for naturalization. *See supra* p. 7. It also found that the military had *never* applied its policy on service characterizations for purposes of discharge to honorable service certifications for purposes of naturalization. *See id.* Rather, the military *consistently* determined whether non-citizens had served honorably for purposes of naturalization with no time-in-service requirement—and *consistently* issued such certifications when requested by service members, *see id.* at pp. 7–8; *see also* JA 39–40 (Op. at 39–40) (discussing guidance from the Army and Navy documenting this practice).

As also discussed above, in 2009, DOD partnered with USCIS to implement the Naturalization at Basic Training Initiative, which enabled non-citizens serving across all DOD military branches to receive honorable service certifications at the start of basic training and graduate as U.S. citizens. *See supra* pp. 8–9. In a related case, Defendants repeatedly touted that Initiative and represented that "DoD has *always contemplated* that the application for naturalization will take place simultaneous with attendance at basic military training." JA 170 (*Kirwa* Tr. 25:11–

19) (emphasis added) ("DoD and DHS actually have worked it out such that they have USCIS officials present during basic military training in order to help facilitate with the paperwork and to have that process move as quickly as possible."). When the district court pressed Defendants on this point—"Is it still the anticipation when you get to basic training, that sometime within about 12 weeks you leave basic as a citizen? Is there anything about that [that's] changed?"—counsel confirmed that "that is still the intention, to marry the completion of the naturalization process with the completion of basic military training." JA 171 (*Kirwa* Tr. 64:12–19); *see also* Defs.' Opp. to Pls' Mot. for Prelim. Inj. at 4, *Kirwa*, 285 F. Supp. 3d 21 (D.D.C. Oct. 16, 2017) (No. 17-1793), ECF No. 20 ("DoD contemplates that [non-citizen] recruits will submit their application for naturalization at the time they arrive at [basic] training . . . ."). Nevertheless, the Initiative ended abruptly when Defendants issued the Delayed Citizenship Policy, which prohibited service members from seeking an honorable service certification for purposes of naturalization before a minimum of 180 days—*i.e.* over three and a half months after graduating from basic training.[20]

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[20] See Vera Bergengruen, *The US Army Promised Immigrants a Fast Track for Citizenship. That Fast Track Is Gone*, BuzzFeed, (Sept. 30, 2024), https://perma.cc/Y8V9-V4V4.

Defendants ignore this precedent and history and contend that the 1942 amendment and section 1440 were enacted "against the backdrop of th[e] system of service characterization" for purposes of *discharge*. Defs.' Br. 21. But the military's practice of issuing honorable service certifications for naturalization purposes with no time-in-service requirement appears to stretch back at least as far as 1942 and therefore co-existed for at least 75 years (until the 2017 policy change) with its *different* practice for service characterizations at discharge. And Defendants' effort to find historical evidence to support their position comes up empty. For example, they cite *Patterson v. Lamb*, where a U.S. citizen was drafted during World War I, but was discharged, due to the armistice, before he boarded the train to basic training. *See* 329 U.S. 539, 540–41 (1947). The Army issued him a certificate of "Discharge from Draft," *id*., and the Court agreed that that was an adequate characterization of his discharge, *see id.* at 545. That case had nothing to do with honorable service certifications for *naturalization*. Indeed, during World War I, thousands of non-citizens received their citizenship while at basic training before deploying overseas. *See Naturalization of Aliens* at 16 (INS official describing how thousands of non-citizens were naturalized at Camp Dix, one of the largest training camps, in the "three days before they embark[ed] for Europe").

Defendants also cite *Patterson* and a few other cases as evidence that "this Court and the Supreme Court have repeatedly reaffirmed the military's substantial discretion to develop substantive standards to guide . . . characterization decisions, including the discretion to develop time-in-service requirements." Defs.' Br. 16; *see id.* at 4–5 (citing *Davis v. Woodring*, 111 F.2d 523, 524 (D.C. Cir. 1940)); *id.* at 20 (citing *Roelofs v. Secretary of the Air Force*, 628 F.2d 593, 597–98 (D.C. Cir. 1980)). But each case cited by Defendants relates to service characterizations for purposes of *discharge*; Defendants cite *no* case related to honorable service certifications for purposes of *naturalization*. *See* JA 43 (Op. at 43) (explaining "[n]either" *Patterson* nor *Davis* "relates to or discusses characterization of service for purposes of naturalization, nor does either case hold, as defendants claim, that the military needs a sufficient amount of time in order to make an honorable service determination"). As Plaintiffs explain above, at least two decisions interpret the 1942 amendment, *see supra* pp. 39–40 (discussing *Petition of Delgado* and *You Lo Chen*), and at least two decisions interpret section 1440, *see supra* pp. 35–36 (discussing *Rosner* and *In re Garcia*), as granting non-citizens serving during armed conflict eligibility to naturalize with no minimum period of service. *This* is the background against which Congress amended section 1440 in 1968 and 2003 to expand naturalization eligibility to the Plaintiff class. And it is consistent with the military's own well-

established practice, reflecting its longstanding understanding that section 1440 grants non-citizens serving during armed conflict immediate eligibility to apply for naturalization. *See Loper Bright*, 144 S. Ct. at 2262 ("Interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning.").

2. Consistency between the military's service characterizations for discharge and honorable service certifications for naturalization

The military's policy on service characterizations for discharge is also entirely consistent with its pre-Policy practice on honorable service certifications for naturalization. Defendants' argument focuses centrally on a 1982 military regulation entitled "Enlisted Administrative Separations," which was intended "to provide guidance to the Military Departments . . . on enlisted administrati[ve] separation policy." 47 Fed. Reg. 10162 (Mar. 9, 1982). The government highlights that pursuant to the regulation, service members within their first 180 days of continuous active military service are considered to be in "entry level status" and, if discharged, receive an "uncharacterized Entry Level Separation." Defs.' Br. 6 (quoting 47 Fed. Reg. at 10175, 10183). But this regulation does not apply to honorable service certifications for *naturalization*, as its very title reflects: "Enlisted Administrative *Separations*." In fact, the regulation explicitly carves out "administrative matters outside this Part that require a characterization as Honorable or General," 47 Fed. Reg. at 10183;

naturalization is one such matter.[21] For those matters, DOD instructs that an "Entry Level Separation shall be treated as the required characterization"—*i.e.* Honorable or General. 47 Fed. Reg. 10183–84; *see Alam v. U.S. Citizenship & Immig. Servs.*, 592 F. Supp. 3d 810, 815 (D. Minn. 2022) ("DoD instructions treat an 'uncharacterized' discharge as 'under honorable conditions' when 'administrative matters outside this instruction . . . require [such] a characterization. . . . [A] soldier who receives an uncharacterized discharge should be treated as having received a discharge "under honorable conditions" when administrative processes require it. The completion of an N-426 may be exactly that kind of administrative process . . . .").[22] Little surprise, then, that the district court found that the standards in the

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[21] The current version of Form N-426 gives only two options, via checkbox, for the required service characterization: "honorably" or "not honorably." *See* https://perma.cc/N7CG-QHEU.

[22] The government states that the 1982 regulation is "materially similar to the current guidelines governing characterizations of service." Defs.' Br. 6 (citing Instruction No. 1332.14). Until August 1, 2024, DOD Instruction No. 1332.14 *was* materially similar to the 1982 regulation and contained identical language regarding non-discharge administrative matters. *See, e.g.*, Instruction No. 1332.14, at 32 (June 23, 2022), https://bit.ly/4gNLLKk; AR 89 (Instruction No. 1332.14, at 32 (Apr. 12, 2019)). On August 1, 2024, eighteen days before Defendants' opening brief was filed in this appeal, DOD issued a new Instruction No. 1332.14, which eliminated this language. *See* Instruction No. 1332.14 (Aug. 1, 2024). However, Navy Regulations continue to include this language. *See* 32 C.F.R. § 724.109(a)(4)(ii) ("With respect to administrative matters outside the administrative separation system that require a characterization of service as Honorable or General, an Entry

regulation "have [n]ever been applied to or [been] relevant to an N-426 certification." JA 45.

Finally, if Defendants seek to align service characterizations for discharge with honorable service certifications for naturalization, as their brief strongly suggests is their intention, *see* Defs.' Br. 1–6, 10–11, 15–16, 19–22, the result would be to eradicate section 1440 altogether as an expedited pathway to naturalization. In 2022, DOD amended its policy on "Enlisted Administrative Separations" so that *all* service members—active duty or Selected Reserve—must effectively serve at least *365 days* before graduating out of entry level status. *See* Instruction No. 1332.14, at 60 (Aug. 1, 2024); Instruction No. 1332.14, at 55 (June 23, 2022).[23] In other words, the military now requires a service member to serve for at least a full year in order to establish a record warranting an honorable characterization of service for purposes

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Level Separation shall be treated as the required characterization. An Entry Level Separation for a member of a Reserve component separated from the Delayed Entry Program is under honorable conditions.").

[23] Active duty service members remain in entry level status "during the first 365 days of continuous active military service; or the first 365 days of continuous active military service after a service break of more than 92 days of active service." Instruction No. 1332.14, at 60 (Aug. 1, 2024). For Selected Reservists "ordered to active duty for training for one continuous period of 180 days or more," they remain in entry level status until "365 days after beginning training." *Id*. For Selected Reservists "ordered to active duty for training under a program that splits the training into two or more separate periods of active duty," they remain in entry level status until "180 days after the beginning of the second period of active-duty training." *Id*.

of *discharge*. If Defendants were to align this discharge policy with honorable service certifications for purposes of *naturalization* during *armed conflict*, then *all* non-citizen service members would have to wait at least a full year before they may apply for citizenship. The consequence would be to completely collapse Congress' distinction between naturalization during peacetime, which requires non-citizens to have "served honorably" for one year to trigger naturalization eligibility, and naturalization during armed conflict, which articulates no time-in-service requirement. *Compare* 8 U.S.C. § 1439 *with* 8 U.S.C. § 1440.[24] Such a result is clearly forbidden by the INA.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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[24] The current Instruction 1332.14 also contemplates many circumstances in which a non-citizen might have to serve well over a year before graduating from entry level status and becoming eligible for an honorable service characterization at discharge, *e.g.* Selected Reservists ordered to active duty for training over a continuous period of 180 days cannot graduate entry level status until they first graduate from training and *then* serve 365 days. In these scenarios, DOD would not only be violating section 1440, but also section 1439, which grants non-citizens eligibility to apply for naturalization after having served honorably for one year.

Dated: October 2, 2024

Respectfully submitted,

/s/ Scarlet Kim

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,771 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Scarlet Kim

SCARLET KIM

ADDENDUM

TABLE OF CONTENTS*

*Plaintiffs' addendum is consecutively paginated from Defendants' addendum.

Rules and Regulations

Federal Register
Vol. 75, No. 11
Tuesday, January 19, 2010

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 328 and 329

[CIS No. 2479–09; DHS Docket No. DHS–2009–0025]

RIN 1615–AB85

Naturalization for Certain Persons in the U.S. Armed Forces

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Final rule.

SUMMARY: This rule amends the Department of Homeland Security (DHS) regulations by implementing a statutory amendment reducing from three years to one year the length of time a member of the United States Armed Forces has to serve to qualify for naturalization through service in the Armed Forces. In addition, this rule amends DHS regulations by implementing a statutory amendment to include as eligible for naturalization individuals who served or are serving as members of the Selected Reserve of the Ready Reserve of the U.S. Armed Forces during specified periods of hostility. This rule also amends the regulations to remove the requirement to submit Form G–325B, Biographic Information, with Form N–400, Application for Naturalization, for applicants applying for naturalization through service in the U.S. Armed Forces. By eliminating the Form G–325B requirement, the rule will reduce the response burden and amount of time it takes U.S. Armed Forces members to complete the paperwork required with a naturalization application.

DATES: This rule is effective February 18, 2010.

FOR FURTHER INFORMATION CONTACT: Kristie Krebs, Office of Field Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 2nd Floor, Washington, DC 20529–2030; telephone number 202–272–1001. This is not a toll-free number. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

Prior to November 24, 2003, aliens who served in the U.S. Armed Forces during peacetime were eligible for naturalization after serving honorably for an aggregate period of three years. *See* Immigration & Nationality Act (INA) sec. 328(a), 8 U.S.C. 1439(a) (2002) (amended (2003)); 8 CFR 328.2(a). Additionally, aliens who served in the U.S. Armed Forces during specific periods of hostilities were eligible for naturalization without having served for any particular length of time so long as the service was in active-duty status. *See* INA sec. 329(a), 8 U.S.C. 1440(a) (2002) (amended (2003)); 8 CFR 329.2(a).

On November 24, 2003, Congress amended these requirements in title XVII of the National Defense Authorization Act for Fiscal Year 2004 (NDAA), (Pub. L. 108–136, 117 Stat. 1392 (2003)), and made them effective as if enacted on September 11, 2001. The NDAA reduced from three years to one year the period of military service required to qualify for naturalization through service in the U.S. Armed Forces during peacetime. *See* INA sec. 328(a); 8 U.S.C. 1439(a) (2003); *see also* NDAA sec. 1701(c)(2). In addition, the NDAA extended the benefit of naturalization not only to individuals who served honorably in an active duty status during specified periods of hostilities, but also to individuals who have served honorably as members of the Selected Reserve of the Ready Reserve of the U.S. Armed Forces during such periods of hostilities. *See* INA sec. 329(a); 8 U.S.C. 1440(a) (2003); *see also* NDAA sec. 1702.

U.S. Citizenship and Immigration Services (USCIS) has been applying these statutory amendments since the law was enacted on November 24, 2003. This final rule updates the regulations to reflect these amendments. In addition, this rule removes an unnecessary paperwork requirement in the naturalization application process for applicants with qualifying service in the U.S. Armed Forces.

II. Discussion

A. One Year or More of Military Service

Current regulations at 8 CFR 328.2(b) continue to list three or more years of service in the U.S. Armed Forces as an eligibility requirement for naturalization based on service in the U.S. Armed Forces. This final rule reduces the required number of years of service to one or more years in order to conform the regulations to the applicable statutory provision at section 328(a) of the INA, 8 U.S.C. 1439(a), as amended by the NDAA. *See* revised 8 CFR 328.2(b).

B. Service in the Selected Reserve of the Ready Reserve During Periods of Hostilities

USCIS regulations, 8 CFR 329.2(a), currently limit eligibility for naturalization based on service during specified periods of hostilities to those who served honorably in an active duty status in the U.S. Armed Forces. In conformance with the expansion of eligibility made by the NDAA (*see* section 329(a) of the INA, 8 U.S.C. 1440(a)), this final rule extends eligibility for naturalization to include those individuals who have served honorably in the U.S. Armed Forces either in an active duty status or as a member of the Selected Reserve of the Ready Reserve. *See* revised 8 CFR 329.2(a). In addition, this rule amends the title of 8 CFR part 329 to include service in the Selected Reserve of the Ready Reserve. Currently, the title only lists active duty service as a basis for naturalization where service occurred during specified periods of hostilities.

C. Elimination of Requirement to Submit Form G–325B

Applicants applying for naturalization based on service in the U.S. Armed Forces have been required to submit Form G–325B, Biographic Information, along with Form N–400, Application for Naturalization. *See* 8 CFR 328.4, 329.4(a). Prior to 2001, USCIS sent applicants' completed Forms G–325B to the Department of Defense (DoD) for background checks. As part of improvements to this process, DoD authorized the USCIS in 2001 to conduct these background checks.

Subsequently, USCIS determined that the information collected on Form N–400 (*e.g.,* name, date of birth, Social Security number) was sufficient to perform the background checks. Therefore, USCIS discontinued sending Forms G–325B to DoD. Moreover, USCIS notes that it does not use the G–325B in its adjudication of Forms N–400, or for any other purpose.

Notwithstanding the discontinued use of Form G–325B, USCIS regulations continue to require applicants to submit the form with their naturalization applications. *See* 8 CFR 328.4 and 329.4(a). However, continuing to require Form G–325B would needlessly increase applicant response and USCIS processing times, as USCIS must issue a Request for Evidence and place the case on hold if the Form G–325B is not submitted with the Form N–400. Because the submission of a Form G–325B no longer serves a purpose in the adjudication process, this rule removes the Form G–325B submission requirement for applicants applying for naturalization under section 328 or 329 of the INA. *See* revised 8 CFR 328.4 and 329.4(a).

III. Regulatory Requirements

A. Administrative Procedure Act

The Administrative Procedure Act (APA) provides that an agency may dispense with notice and comment rulemaking procedures when an agency is promulgating an interpretative rule, a general statement of policy, or a rule of agency organization, procedure, or practice. *See* 5 U.S.C. 553(b)(A). The elimination of the requirement to submit Form G–325B is procedural in nature and does not alter the substantive rights of affected naturalization applicants. Accordingly, DHS finds that this part of the rule is exempt from the notice and comment requirements under the APA at 5 U.S.C. 553(b)(A).

The APA provides that an agency may dispense with notice and comment rulemaking procedures when an agency, for "good cause," finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." *See* 5 U.S.C. 553(b)(B). This rule amends DHS regulations to conform with the changes made by the NDAA, reducing from three years to one year the amount of time a member of the U.S. Armed Forces has to serve to qualify for naturalization and extending the benefit of expedited naturalization to members of the Selected Reserve of the Ready Reserve. INA sec. 328(a), 329(a); 8 U.S.C. 1439(a), 1440(a). These requirements were mandated by statute and DHS has applied these requirements since the law was enacted in 2003 (effective, with some exceptions, as if enacted on September 11, 2001). DHS views the act of promulgating this part of the rule as both ministerial and non-controversial. Accordingly, DHS finds that notice and comment is unnecessary and that this part of the rule is except from the notice and comment requirements under the APA at 5 U.S.C. 553(b)(B).

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. When an agency invokes the good cause exception under the Administrative Procedure Act to make changes effective through an interim final or final rule, the RFA does not require an agency to prepare a regulatory flexibility analysis. DHS has determined in this final rule that good cause exists under 5 U.S.C. 553(b) to exempt this rule from the notice and comment. Therefore, a regulatory flexibility analysis is not required for this rule. However, DHS does expect that this rule will not have a significant economic impact on a substantial number of small entities because it affects only individuals.

C. Executive Order 12866

This rule is not a significant regulatory action as defined under Executive Order 12866, section 3(f), Regulatory Planning and Review. Thus it has not been reviewed by the Office of Management and Budget (OMB).

D. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

E. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

F. Executive Order 13132: Federalism

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988: Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

H. Paperwork Reduction Act of 1995 (PRA)

Under the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (1995), all Departments are required to submit to OMB, for review and approval, any reporting or recordkeeping requirements inherent in a rule. This rulemaking does not propose to impose any new reporting or recordkeeping requirements under the PRA.

OMB previously approved the use of forms G–325, G–325A, G–325B, and G–325C under the same OMB Control No. 1615–0008. Removing the requirement to submit Form G–325B will reduce the number of respondents and annual burden hours associated with OMB Control No. 1615–0008. Accordingly, USCIS will submit the Form OMB 83–C, Correction Worksheet, to OMB to reduce the annual number of respondents and annual burden hours.

List of Subjects

8 CFR Part 328

Citizenship and naturalization, Military personnel, Armed Forces personnel, Application requirements, Residency requirements.

8 CFR Part 329

Citizenship and naturalization, Military personnel, Armed Forces personnel, Application requirements.

■ Accordingly, chapter I of Title 8 of the Code of Federal Regulations is amended as follows:

PART 328—SPECIAL CLASSES OF PERSONS WHO MAY BE NATURALIZED: PERSONS WITH 1 YEAR OF SERVICE IN THE UNITED STATES ARMED FORCES

■ 1. The heading for part 328 is revised as set forth above.

■ 2. The authority citation for part 328 continues to read as follows:

Authority: 8 U.S.C. 1103, 1439, 1443.

■ 3. Section 328.2 is amended by revising paragraph (b) to read as follows:

§ 328.2 Eligibility.

* * * * *

(b) Has served under paragraph (a) of this section for a period of 1 or more years, whether that service is continuous or discontinuous;

* * * * *

■ 4. Section 328.4 is amended by revising the last sentence to read as follows:

§ 328.4 Application.

* * * The application must be accompanied by Form N–426, Request for Certification of Military or Naval Service.

PART 329—SPECIAL CLASSES OF PERSONS WHO MAY BE NATURALIZED: PERSONS WITH ACTIVE DUTY OR CERTAIN READY RESERVE SERVICE IN THE UNITED STATES ARMED FORCES DURING SPECIFIED PERIODS OF HOSTILITIES

■ 5. The heading for part 329 is revised as set forth above.

■ 6. The authority citation for part 329 continues to read as follows:

Authority: 8 U.S.C. 1103, 1440, 1443; 8 CFR part 2.

■ 7. Section 329.2 is amended by revising paragraph (a) introductory text to read as follows:

§ 329.2. Eligibility.

* * * * *

(a) Has served honorably in the Armed Forces of the United States as a member of the Selected Reserve of the Ready Reserve or in an active duty status in the Armed Forces of the United States during:

* * * * *

■ 8. Section 329.4 is amended by revising the last sentence of paragraph (a) to read as follows:

§ 329.4. Application and evidence.

(a) *Application.* * * * The application must be accompanied by Form N–426, Request for Certification of Military or Naval Service.

* * * * *

Janet Napolitano,

Secretary.

[FR Doc. 2010–578 Filed 1–15–10; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0009; Directorate Identifier 2010–NE–01–AD; Amendment 39–16178; AD 2010–02–08]

RIN 2120–AA64

Airworthiness Directives; Turbomeca Turmo IV A and IV C Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

During a maintenance inspection before the first flight of the day, an oil leak was found on an engine deck. A circumferential crack on the intermediate bearing return flexible pipe union (pipe part number 9 560 17 606 0) was identified as the origin of the leak. A similar oil pipe union crack was then reported at the same location on another engine, on the same pipe part number. This pipe part number was approved as Modification TU 233 in 2008.

Although such cracks have been detected and did not lead to an in-service event, the possibility exists that some additional cracks could occur and may not be detected before the potential complete rupture of the union.

We are issuing this AD to prevent a helicopter engine in-flight shutdown resulting in an emergency auto-rotation landing or accident.

DATES: This AD becomes effective February 3, 2010.

We must receive comments on this AD by February 18, 2010.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Contact Turbomeca S.A., 40220 Tarnos, France; e-mail: *noria-dallas@turbomeca.com;* telephone 33 05 59 74 40 00, fax 33 05 59 74 45 15, or go to: *http://www.turbomeca-support.com,* for a copy of the service information identified in this AD.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Kevin Dickert, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *kevin.dickert@faa.gov;* telephone (781) 238–7117; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2009–0261–E, dated December 18, 2009 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

During a maintenance inspection before the first flight of the day, an oil leak was found on an engine deck. A circumferential crack on the intermediate bearing return flexible pipe union (pipe part number 9 560 17 606 0) was identified as the origin of the leak. A similar oil pipe union crack was then reported at the same location on another engine, on the same pipe part number. This pipe part number was approved as Modification TU 233 in 2008.

Although such cracks have been detected and did not lead to an in-service event, the possibility exists that some additional cracks could occur and may not be detected before the potential complete rupture of the union.

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 41

[DOD Directive 1332.14]

Enlisted Administrative Separations

AGENCY: Office of the Secretary, DOD.

ACTION: Amendment to final rule.

SUMMARY: This part, appearing in 46 FR 9571, January 16, 1981, is being revised to include as reason for separation, provisions on drug abuse. Immediate implementation is necessary to conform to DOD policy and implementing documents of the Military Departments. This part will continue to be used for administrative separation proceedings initiated on or before September 30, 1982.

EFFECTIVE DATE: January 28, 1982.

FOR FURTHER INFORMATION CONTACT: Colonel John L. Fugh, USA, Office of the Deputy Assistant Secretary of Defense (Military Personnel and Force Management), the Pentagon, Room 3D283, Washington, D.C. 20301; telephone 202–697–3387.

SUPPLEMENTARY INFORMATION: A complete revision of this part is published elsewhere in this part II. The complete revision will apply to separation proceedings initiated on or after October 1, 1982. For the information of the public, the relevant provisions of the Deputy Secretary of Defense Memorandum, "Alcohol and Drug Abuse," December 28, 1981, are as follows:

Urine Testing Procedures

"Section 1. General Guidance. Urinalysis for the purpose of testing for controlled substances may be used for a number of distinct purposes. First, it may be used to identify personnel for referral to counseling, treatment, and rehabilitation programs. Second, it may be used as evidence in actions under the Uniform Code of Military Justice in accordance with Section 2. Evidence of drug abuse that is produced in such tests also may be used in administrative actions as provided in this Enclosure.

"Section 2. Guidelines for Use of Urinalysis for Drug Testing.

"a. Mandatory urinalysis testing for controlled substances may be conducted during—

"(1) An inspection under Military Rule of Evidence 313;

"(2) A search or seizure under Military Rules of Evidence 311–317;

"(3) An examination for a valid medical purpose under Military Rule of Evidence 312(f) to determine a member's fitness for duty; to ascertain whether a member requires counseling, treatment, or rehabilitation for drug abuse; or in conjunction with a member's participation in a DOD drug treatment and rehabilitation program; or

"(4) Any other examination for a valid medical purpose under Military Rule of Evidence 312(f).

"b. Subject to limitations in Section 3, the results of mandatory urinalysis may be used to refer a member to a DOD treatment and rehabilitation program, to take appropriate disciplinary action, and to establish the basis for a separation and characterization in a separation proceeding in accordance with DOD Directives 1332.14 and 1332.30. The results of mandatory urinalysis may be used in other administrative determinations except as otherwise limited in this Enclosure or under rules issued by the Department of Defense or the military departments.

"Section 3. *Limitations on Use of Urinalysis Results.*

"a. Results obtained from urinalysis under Section 2.a.(3) may not be used against the member in actions under the Uniform Code of Military Justice and on the issue of characterization in separation proceedings.

"b. A member's voluntary submission to a DOD treatment and rehabilitation program, and evidence provided voluntarily by the member as part of initial entry into such a program, may not be used against the member in an action under the Uniform Code of Military Justice or on the issue of characterization in a separation proceeding.

"c. Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States may not be introduced against the patient in a court-martial except as authorized by a court order issued under the standards set forth in 21 U.S.C. 1175(b)(2)(C).

"d. The limitations in this Section do not apply to—

"(1) The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse (or lack thereof) has been first introduced by the member; and

"(2) Disciplinary or other action based on independently derived evidence, including evidence of drug abuse after initial entry into the treatment and rehabilitation program.".

PART 41—ENLISTED ADMINISTRATIVE SEPARATION

Accordingly, 32 CFR Part 41 is amended as follows:

1. In § 41.7, paragraphs (f) and (i)(6) are revised to read as follows:

§ 41.7 Reason for separation.

* * * * *

(f) *Personal abuse of drugs other than alcoholic beverages.* Discharge with an honorable discharge, or general discharge as warranted by the member's military record, when based on evidence developed as a direct or indirect result of a urinalysis test administered for identification of drug abusers, or by a member's volunteering for treatment for a drug problem under the Drug Identification and Treatment Program administered by his or her particular Armed Force, and:

(1) Member's record indicates lack of potential for continued military service; or

(2) Long-term rehabilitation is determined necessary and member is transferred to a Veteran's Administration or civilian medical facility for rehabilitation; or

(3) Member has failed, through inability or refusal, to participate in, cooperate in, or complete a drug abuse treatment and rehabilitation program.

Note.—Nothing in this section precludes separation under any other provision of this Part in appropriate cases involving a member who has been identified through urinalysis or who has volunteered for treatment, subject to the limitations on characterization in the Deputy Secretary of Defense memorandum, "Alcohol and Drug Abuse," dated December 28, 1981.

* * * * *

(i) * * *

(6) Drug abuse, which is the illegal, wrongful, or improper use, possession, sale, transfer or introduction on a military installation of any narcotic substance, intoxicating inhaled substance, marijuana, or controlled substance, as established by 21 U.S.C. 812, subject to the limitations on characterization in the Deputy Secretary of Defense Memorandum, "Alcohol and Drug Abuse," dated December 28, 1981.

* * * * *

(Title 10, U.S.C. 1162, 1163, 1169, 1170, 1172, and 1173)

M. S. Healy,

OSD Federal Register Liaison Officer, Department of Defense.

March 3, 1982.

[FR Doc. 82-6276 Filed 3-8-82; 8:45 am]

BILLING CODE 3810-01-M

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32 CFR Part 41

[DOD Directive 1332.14]

Enlisted Administrative Separations

AGENCY: Office of the Secretary, DOD.

ACTION: Final rule.

SUMMARY: This rule is being reissued to provide guidance to the Military Departments, including the Reserve Components thereof, on enlisted administration separation policy. It provides reasons for separation, standards for separation and characterization of service, and procedures for separation.

EFFECTIVE DATE: October 1, 1982.

ADDRESS: Copies of DOD Directive 1332.14 may be obtained, if needed, from the U.S. Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120. Attention: Code 301.

FOR FURTHER INFORMATION CONTACT: Colonel John L. Fugh, USA, Office of the Deputy Assistant Secretary of Defense (Military Personnel and Force Management), the Pentagon, Room 3D823, Washington, D.C. 20301, telephone 202–697–3387.

SUPPLEMENTARY INFORMATION: In FR Doc. 81–17882, appearing in the **Federal Register**. on June 17, 1981 (46 FR 31663), the Office of the Secretary of Defense published a proposed rule to revise DOD Directive 1332.14, Enlisted Administrative Separations. The Supplementary Information accompanying the proposed rule described the prior history of this rule.

In response to the notice of proposed rulemaking, DOD received comments from 12 different organizations and individuals. Each comment was reviewed with care. A number of changes were made in the proposed rule as a direct result of comments submitted by the public. Other changes were made as a result of the Department's overall reexamination of the proposed rule in light of the comments. The primary factors considered in evaluating the public comments are set forth in the following material in the Sectional Analysis.

The comments generally reacted favorably to the format, style, and clarity of the proposed rule. Several comments suggested the need for further clarification of the rule, and the final rule reflects the Department's efforts in this regard.

One comment suggested that the Department issue operational guidance for each section of the rule. The operational guidance will be provided by the Military Departments in their implementing documents. As a further means of insuring that operational problems under the final rule are addressed in a timely matter, the final rule delegates authority to modify or supplement the Enclosures to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics).

Specific comments were directed at a number of substantive and procedural provisions of the proposed rule, and these matters are discussed in the Sectional Analysis, below.

The reissuance applies to all enlisted administrative separations initiated on or after October 1, 1982. In addition, a separate amendment to the current directive has been issued which is applicable to separation proceedings as provided in the implementing documents of the military departments. The separate amendment which is published elsewhere in this Part II, concerns separations involving drug abuse, and is consistent with treatment of drug abuse in the new rule. Immediate implementation is necessary to conform separation policy to the Deputy Secretary of Defense Memorandum, "Alcohol and Drug Abuse," December 28, 1981. The separate amendment and the Deputy Secretary of Defense Memorandum are published elsewhere in this Part II.

The Supplementary Information and the Sectional Analysis contained herein are intended only to improve the internal management of the federal government, and are not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Sectional Analysis of the Final Rule

DOD Directive 1332.14, 32 CFR Part 41

Section 41.1. Reissuance and purpose. This is taken from § 41.1 of the proposed rule.

Section 41.2. Applicability and scope. This is taken from § 41.2 of the proposed rule with minor changes in terminology. In addition, the final rule deletes the references to the Coast Guard. The final rule will be applicable to the Coast Guard only when that service comes under the direct control of the Department of the Navy.

Section 41.3. Policy. This is taken from § 41.3 of the proposed rule. The final rule provides further detail, with particular emphasis on both the importance of the honorable service and the concept that military service is a calling different from any civilian occupation.

Section 41.4. Responsibilities. 1. *The Secretaries of the Military Departments* (§ 41.4(a)). This subsection, which is new, assigns the responsibility for consistency in separation policy to the Secretaries of the Military Departments. The goal of consistency is limited by the phrase "to the extent practicable in a system that is based on command discretion." This limitation reflects the fact that separation policy is but one aspect of the Department's overall military personnel and force management policies. These policies give commanders the personnel tools needed to meet their readiness requirements. One of the primary features of military personnel policy is the grant of wide discretion to commanders in deciding upon appropriate actions, ranging from reprimands to courts-martial, in dealing with personnel problems. Absolute consistency in disposition of separation cases would be an illusory goal in view of the size of our armed forces, the variety of missions, and the diverse characteristics of different units and commanders. Moreover, a requirement of absolute consistency would unduly constrain the degree of discretion that must be provided to individual commanders to manage their units on the basis of first-hand knowledge of personnel and mission requirements. Subject to the foregoing considerations, there is a substantial potential for consistency in the application of separation policies. General requirements can guide the exercise of discretion by commanders in the use of separation policy, and can provide members facing separation with a set of basic procedural rights. This Directive provides for substantial consistency among the Military Departments in this regard, and the Secretaries of the Military Departments are charged with the responsibility of furthering the goal of consistency within their departments.

a. *Processing goals* (§ 41.4(a)(1)). This is similar to § 41.4(c) of the proposed rule, with minor changes in terminology.

b. *Periodic explanations* (§ 41.4(a)(2)). This is taken from § 41.4(a) of the proposed rule. The final rule adds a reference to the bar to Veterans Administration benefits in Pub. L. No. 97–66 (38 U.S.C. 3103).

c. *Provision of information during separation processing* (§ 41.4(a)(3)). This is taken from § 41.4(b) of the proposed rule, with minor changes in terminology. One comment noted that it was unclear whether the written information provided to the members upon separation would include notice about the Discharge Review Boards and Boards for Correction of Military Records. The final rule has been rewritten to make it clear that the written information should pertain to all the matters covered in this subsection. Another comment suggested that the same information be mailed to the former member a year after separation. This comment was rejected in view of the administrative burden and costs of providing information to the tens of thousands of persons separated each year, when such information would duplicate the material provided upon separation.

2. *The Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)* (§ 41.4(b)). This is taken from § 41.4(d) of the proposed rule, and has

This is taken from § 41.8(d) of the proposed rule with minor changes in terminology.

E. *Additional requirements for certain members of Reserve Components.* This is taken from § 41.8(e) of the proposed rule with minor changes in terminology. One comment recommended that reservists facing an Administrative Board be allowed to have the Board near their homes or be provided a sufficient period of time to arrange for attendance. These are matters which the member should address in the response to the notice under subsection C.3., and are appropriate for consideration as to whether the member has established good cause for delay under that section. The decision, however, rests with the sound discretion of the Convening Authority.

F. *Additional requirements for members beyond military control by reason of unauthorized absence.* This is taken from § 41.8(f) of the proposed rule with minor changes in terminology.

The existing 32 CFR Part 41 (46 FR 9571) and the change thereto, published in this Part II, shall continue to be used for administrative separation proceedings initiated on or before September 30, 1982.

Accordingly, 32 CFR Part 41 is revised to apply for administrative separation proceedings initiated on or after October 1, 1982, and reads as follows:

PART 41—ENLISTED ADMINISTRATIVE SEPARATIONS

Sec.
41.1 Purpose.
41.2 Applicability and scope.
41.3 Policy.
41.4 Responsibilities.
41.5 Effective date and implementation.
41.6 Definitions.
Appendix A Standards and Procedures

Authority: Title 10, U.S.C. 1162, 1163, 1169, 1170, 1172, and 1173.

§ 41.1 Purpose.

This Part establishes policies, standards, and procedures governing the administrative separation of enlisted members from the Military Services.

§ 41.2 Applicability and scope.

The provisions of this part apply to Office of the Secretary of Defense and the Military Departments (including their reserve components). The term "Military Services," as used herein, refers to the Army, Navy, Air Force and Marine Corps.

§ 41.3 Policy.

(a) It is the policy of the Department of Defense to promote the readiness of the Military Services by maintaining high standards of conduct and performance. Separation policy promotes the readiness of the Military Services by providing an orderly means to:

(1) Ensure that the Military Services are served by individuals capable of meeting required standards of duty performance and discipline;

(2) Maintain standards of performance and conduct through characterization of service in a system that emphasizes the importance of honorable service;

(3) Achieve authorized force levels and grade distributions; and

(4) Provide for the orderly administrative separation of enlisted personnel in a variety of circumstances.

(b) DOD separation policy is designed to strengthen the concept that military service is a calling different from any civilian occupation.

(1) The acquisition of military status, whether through enlistment or induction, involves a commitment to the United States, the service, and one's fellow citizens and servicemembers to complete successfully a period of obligated service. Early separation for failure to meet required standards of performance or discipline represents a failure to fulfill that commitment.

(2) Millions of Americans from diverse backgrounds and with a wide variety of aptitudes and attitudes upon entering military service have served successfully in the armed forces. It is the policy of the Department of Defense to provide servicemembers with the training, motivation, and professional leadership that inspires the dedicated enlisted member to emulate his or her predecessors and peers in meeting required standards of performance and discipline.

(3) The Military Services make a substantial investment in training, time, equipment, and related expenses when persons are enlisted or inducted into military service. Separation prior to completion of an obligated period of service is wasteful because it results in loss of this investment and generates a requirement for increased accession. Consequently, attrition is an issue of significant concern at all levels of responsibility within the armed forces. Reasonable efforts should be made to identify enlisted members who exhibit a likelihood for early separation, and to improve their chances for retention through counseling, retraining, and rehabilitation prior to initiation of separation proceedings. Enlisted members who do not demonstrate potential for further military service should be separated in order to avoid the high costs in terms of pay, administrative efforts, degradation of morale, and substandard mission performance that are associated with retention of enlisted members who do not conform to required standards of discipline and performance despite efforts at counseling, retraining, or rehabilitation.

(c) Standards and procedures for implementation of these policies are set forth in Appendix A to this part.

§ 41.4 Responsibilities.

(a) The *Secretaries of the Military Departments* shall prescribe implementing documents to ensure that the policies, standards, and procedures set forth in this part are administered in a manner that provides consistency in separation policy to the extent practicable in a system that is based on command discretion. The implementing documents also shall address the following matters:

(1) *Processing goals.* The Secretary concerned shall establish processing time goals for the types of administrative separations authorized by this part. Such goals shall be designed to further the efficient administration of the armed forces and shall be measured from the date of notification to the date of separation. Normally such goals should not exceed 15 working days for the Notification Procedure (Part 3, section B., Appendix A) and 50 working days for the Administrative Board Procedure (Part 3, section C., Appendix A) Goals for shorter processing times are encouraged, particularly for cases in which expeditious action is likely. Variations may be established for complex cases or cases in which the Separation Authority is not located on the same facility as the respondent. The goals, and a program for monitoring effectiveness, shall be set forth in the implementing document of the Military Department. Failure to process an administrative separation within the prescribed goal for processing times shall not create a bar to separation or characterization.

(2) *Periodic explanations.* The Secretary concerned shall prescribe appropriate internal procedures for periodic explanation to enlisted members of the types of separations, the basis for their issuance, the possible effects of various actions upon reenlistment, civilian employment, veterans' benefits, and related matters, and the effects of 10 U.S.C. 977 and Pub. L. No. 97-66, concerning denial of certain benefits to members who fail to complete at least 2 years of an original enlistment. Such explanation may be provided in the form of a written fact

sheet or similar document. The periodic explanation shall take place at least each time the provisions of the Uniform Code of Military Justice (UCMJ) are explained pursuant to Article 137 of the UCMJ. The requirement that the effects of the various types of separations be explained to enlisted members is a command responsibility, not a procedural entitlement. Failure on the part of the member to receive or to understand such explanation does not create a bar to separation or characterization.

(3) *Provision of information during separation processing.* The Secretary concerned shall ensure that information concerning the purpose and authority of the Discharge Review Board and the Board for Correction of Military/Naval Records, established under 10 U.S.C. 1552 and 1553 and 32 CFR Part 70 (DOD Directive 1332.28) is provided during the separation processing of all members, except when the separation is for the purpose of an immediate reenlistment. Specific counseling is required under 38 U.S.C. 3103(a) which states that a discharge under other than honorable conditions, resulting from a period of continuous, unauthorized absence of 180 days or more, is a conditional bar to benefits administered by the Veterans Administration, notwithstanding any action by a Discharge Review Board. The information required by this paragraph should be provided in the form of a written fact sheet or similar document. Failure on the part of the member to receive or to understand such explanation does not create a bar to separation or characterization.

(b) The *Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)* may modify or supplement the enclosures to this Directive, and may delegate the authority to establish reporting requirements for the reasons for separation (Part 1, Appendix A) to a Deputy Assistant Secretary.

§ 41.5 Effective date and implementation.

(a) This part applies only to administrative separation proceedings initiated on or after October 1, 1982.

(b) Part 41, effective December 29, 1976 shall continue to be used for administrative separation proceedings initiated on or before September 30, 1982.

§ 41.6 Definitions.

(a) *Member.* An enlisted member of a Military Service.

(b) *Discharge.* Complete severance from all military status gained by the enlistment or induction concerned.

(c) *Release from Active Duty.* Termination of active duty status and transfer or reversion to a reserve component not on active duty, including transfer to the Individual Ready Reserve (IRR).

(d) *Separation.* A general term which includes discharge, release from active duty, release from custody and control of the armed forces, transfer to the IRR, and similar changes in active or reserve status.

(e) *Military Record.* An individual's overall performance while a member of a Military Service, including personal conduct and performance of duty.

(f) *Separation Authority.* An official authorized by the Secretary concerned to take final action with respect to a specified type of separation.

(g) *Convening Authority.* (1) The Separation Authority or (2) a commanding officer who has been authorized by the Secretary concerned to process the case except for final action and who otherwise has the qualifications to act as a Separation Authority.

(h) *Respondent.* A member of a Military Service who has been notified that action has been initiated to separate the member.

(i) *Entry Level Status.* The first 180 days of continuous active military service. For members of a reserve component who have not completed 180 days of continuous active military service and who are not on active duty, entry level status begins upon enlistment in a reserve component (including a period of assignment to a delayed entry program) and terminates 180 days after beginning an initial period of entry level active duty training. For purposes of characterization of service or description of separation, the member's status is determined by the date of notification as to the initiation of separation proceedings.

Appendix A—Standards and Procedures

Table of Contents

Part 1—Reasons for Separation

A. *Expiration of Service Obligation.* 1. *Basis.* A member may be separated upon expiration of enlistment or fulfillment of service obligation. This includes separation authorized by the Secretary concerned when the member is within 30 days of the date of expiration of term of service under the following circumstances:

a. The member is serving outside the continental United States (CONUS); or

b. The member is a resident of a state, territory, or possession outside CONUS and is serving outside the member's state, territory, or possession of residence.

2. *Characterization or description.* Honorable, unless:

a. An Entry Level Separation is required under subsection C.3. of Part 2;

b. Characterization of service as General (under honorable conditions) is warranted under section C. of Part 2 on the basis of numerical scores accumulated in a formal, Service-wide rating system that evaluates conduct and performance on a regular basis; or

c. Another characterization is warranted upon discharge from the IRR under section E. of Part 3.

B. *Selected Changes in Service Obligations.* 1. *Basis.* A member may be separated for the following reasons:

a. General demobilization or reduction in authorized strength.

b. Early separation of personnel under a program established by the Secretary concerned. A copy of the document authorizing such program shall be forwarded to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics (ASD(MRA&L)) on or before the date of implementation.

c. Acceptance of an active duty commission or appointment, or acceptance into a program leading to such a commission or appointment in any branch of the Military Services.

d. Immediate enlistment or reenlistment.

e. Interservice transfer of inactive reserves in accordance with DOD Directive 1205.5.

2. *Characterization or description.* Honorable, unless:

a. An Entry Level Separation is required under section C. of Part 2;

b. Characterization of service as General (under honorable conditions) is warranted under section C. of Part 2 on the basis of numerical scores accumulated in a formal, service-wide rating system that evaluates conduct and performance on a regular basis; or

c. Another characterization is warranted upon discharge from the IRR under section E. of Part 3.

C. *Convenience of the Government.* 1. *Basis.* A member may be separated for convenience of the government for the reasons set forth in subsection C.4., below.

2. *Characterization or description.* Honorable, unless:

a. An Entry Level Separation is required under section C. of Part 2; or

b. Characterization of service as General (under honorable conditions) is warranted under section C. of Part 2.

3. *Procedures.* Procedural requirements may be established by the Secretary concerned, subject to procedures established in subsection C.4., below. Prior to characterization of service as General (under honorable conditions), the member shall be notified of the specific factors in the service record that warrant such a characterization, and the Notification Procedure (section B. of Part 3) shall be used. Such notice and procedure is not required, however, when characterization of service as General (under honorable conditions) is based upon numerical scores accumulated in a formal, service-wide rating system that evaluates conduct and performance on a regular basis.

4. *Reasons.* a. *Early release to further education.* A member may be separated under DOD Directive 1332.15 to attend a college, university, vocational school, or technical school.

b. *Early release to accept public office.* A member may be separated to accept public office only under circumstances authorized by the Military Department concerned and consistent with DOD Directive 1344.10.

c. *Dependency or hardship.* (1) Upon request of the member and concurrence of the government, separation may be directed when genuine dependency or undue hardship exists under the following circumstances:

(a) The hardship or dependency is not temporary;

(b) Conditions have arisen or have been aggravated to an excessive degree since entry into the Service, and the member has made every reasonable effort to remedy the situation;

(c) The administrative separation will eliminate or materially alleviate the condition; and

(d) There are no other means of alleviation reasonably available.

(2) Undue hardship does not necessarily exist solely because of altered present or expected income, family separation, or other inconveniences normally incident to Military Service.

d. *Pregnancy or childbirth.* A female member may be separated on the basis of pregnancy or childbirth upon her request, unless retention is determined to be in the best interests of the service under section A. of Part 2 and guidance

established by the Military Department concerned.

e. *Parenthood.* A member may be separated by reason of parenthood if as a result thereof it is determined under the guidance set forth in section A. of Part 2 that the member is unable satisfactorily to perform his or her duties or is unavailable for worldwide assignment or deployment. Prior to involuntary separation under this provision, the Notification Procedure (section B. of Part 3) shall be used. Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records.

f. *Conscientious objection.* A member may be separated if authorized under 32 CFR Part 75 (DOD Directive 1300.6).

g. *Surviving family member.* A member may be separated if authorized under 32 CFR Part 52 (DOD Directive 1315.14).

h. *Other designated physical or mental conditions.* (1) The Secretary concerned may authorize separation on the basis of other designated physical or mental conditions, not amounting to Disability (section D., below), that potentially interfere with assignment to or performance of duty under the guidance set forth in section A. of Part 2. Such conditions may include but are not limited to chronic seasickness or airsickness, enuresis, and personality disorder.[1]

(2) Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records.

(3) Separation on the basis of personality disorder is authorized only if a diagnosis by a psychiatrist or psychologist, completed in accordance with procedures established by the Military Department concerned, concludes, that the disorder is so severe that the member's ability to function effectively in the military environment is significantly impaired.

(4) Separation for personality disorder is not appropriate when separation is warranted under sections A. through N. or section P. of this Part. For example, if separation is warranted on the basis of unsatisfactory performance (section G.) or misconduct (section K.), the member should not be separated under this section regardless of the existence of a personality disorder.

(5) Nothing in this provision precludes separation of a member who has such a condition under any other basis set forth under this section (Convenience of the Government) or for any other reason authorized by this part.

(6) Prior to involuntary separation under this provision, the Notification Procedure (section B. of Part 3) shall be used.

(7) The reasons designated by the Secretary concerned shall be separately reported.

i. *Additional grounds.* The Secretary concerned may provide additional grounds for separation for the convenience of the government. A copy of the document authorizing such grounds shall be forwarded to the ASD(MRA&L) on or before the date of implementation.

D. *Disability.* 1. *Basis.* A member may be separated for disability under the provisions of 10 U.S.C. chapter 61.

2. *Characterization or description.* Honorable, unless:

a. An Entry Level Separation is required under section C. of Part 2; or

b. Characterization of service as General (under honorable conditions) is warranted under section C. of Part 2.

3. *Procedures.* Procedural requirements for separation may be established by the Military Departments consistent with 10 U.S.C. chapter 61. If separation is recommended, the following requirements apply prior to characterization of service as General (under honorable conditions): the member shall be notified of the specific factors in the service record that warrant such a characterization, and the Notification Procedure (section B. of Part 3) shall be used. Such notice and procedure is not required, however, when characterization of service as General (under honorable conditions) is based upon numerical scores accumulated in a formal, service-wide rating system that evaluates conduct and performance on a regular basis.

E. *Defective Enlistments and Inductions.* 1. *Minority.* a. *Basis.* (1) *Under age 17.* If a member is under the age of 17, the enlistment of the member is void, and the member shall be separated.

(2) *Age 17.* A member shall be separated under 10 U.S.C. 1170 in the following circumstances except when the member is retained for the purpose of trial by court-martial:

(a) There is evidence satisfactory to the Secretary concerned that the member is under 18 years of age;

(b) The member enlisted without the written consent of the member's parent or guardian; and

(c) An application for the member's separation is submitted to the Secretary concerned by the parent or guardian within 90 days of the member's enlistment.

b. *Description of separation.* A member separated under subparagraph E.1.a.(1), above, shall receive an order of release from the custody and control of the armed forces (by reason of void enlistment or induction). The separation of a member under subparagraph E.1.a.(2), above, shall be described as an Entry Level Separation.

c. *Procedure.* The Notification Procedure (section B. of Part 3) shall be used.

2. *Erroneous.* a. *Basis.* A member may be separated on the basis of an erroneous enlistment, induction, or extension of enlistment under the guidance set forth in section A. of Part 2. An enlistment, induction, or extension of enlistment is erroneous in the following circumstances, if:

(1) It would not have occurred had the relevant facts been known by the government or had appropriate directives been followed;

(2) It was not the result of fraudulent conduct on the part of the member; and

(3) The defect is unchanged in material respects.

b. *Characterization or description.* Honorable, unless an Entry Level Separation or an order of release from the custody and control of the Military Services (by reason of void enlistment or induction) is required under section C. of Part 2.

c. *Procedure.* (1) If the command recommends that the individual be retained in military service, the initiation of separation processing is not required in the following circumstances:

(a) The defect is no longer present; or

(b) The defect is waivable and a waiver is obtained from appropriate authority.

(2) If separation processing is initiated, the Notification Procedure (section B. of Part 3) shall be used.

3. *Defective enlistment agreements.* a. *Basis.* A defective enlistment agreement exists in the following circumstances:

(1) As a result of a material misrepresentation by recruiting personnel, upon which the member reasonably relied, the member was induced to enlist with a commitment for which the member was not qualified;

(2) The member received a written enlistment commitment from recruiting personnel for which the member was

[1] Personality disorders are described in the Diagnostic and Statistical Manual (DSM-III) of Mental Disorders, 3rd Edition, Committee on Nomenclature & Statistics, American Psychiatric Association, Washington, D.C., 1978.

qualified, but which cannot be fulfilled by the Military Service; or

(3) The enlistment was involuntary. *See* 10 U.S.C. 802.

b. *Characterization or description.* Honorable, unless an Entry Level Separation or an order of release from the custody and control of the Military Services (by reason of void enlistment) is required under section C. of Part 2.

c. *Procedures.* This provision does not bar appropriate disciplinary action or other administrative separation proceedings regardless of when the defect is raised. Separation is appropriate under this provision only in the following circumstances:

(1) The member did not knowingly participate in creation of the defective enlistment;

(2) The member brings the defect to the attention of appropriate authorities within 30 days after the defect is discovered or reasonably should have been discovered by the member;

(3) The member requests separation instead of other authorized corrective action; and

(4) The request otherwise meets such criteria as may be established by the Secretary concerned.

4. *Fraudulent entry into military service.* a. *Basis.* A member may be separated under guidance set forth in section A. of Part 2 on the basis of procurement of a fraudulent enlistment, induction, or period of military service through any deliberate material misrepresentation, omission, or concealment which, if known at the time of enlistment, induction, or entry onto a period of military service, might have resulted in rejection.

b. *Characterization or description.* Characterization of service or description of separation shall be in accordance with section C. of Part 2. If the fraud involves concealment of a prior separation in which service was not characterized as Honorable, characterization normally shall be Under Other Than Honorable Conditions.

c. *Procedures.* The Notification Procedure (section B. of Part 3) shall be used except as follows:

(1) Characterization of service Under Other Than Honorable Conditions may not be issued unless the Administrative Board Procedure (section C. of Part 3) is used.

(2) When the sole reason for separation is fraudulent entry, suspension of separation (section B. of Part 2) is not authorized. When there are approved reasons for separation in addition to fraudulent entry, suspension of separation is authorized only in the following circumstances:

(a) A waiver of the fraudulent entry is approved; and

(b) The suspension pertains to reasons for separation other than the fraudulent entry.

(3) If the command recommends that the member be retained in military service, the initiation of separation processing is unnecessary in the following circumstances:

(a) The defect is no longer present; or

(b) the defect is waivable and a waiver is obtained from appropriate authority.

(4) If the material misrepresentation includes preservice homosexuality (subsection H.1.), the standards of paragraph H.1.c. and procedures of subsection H.3. shall be applied in processing a separation under this section. In such a case the characterization or description of the separation shall be determined under paragraph E.4.b., above.

F. *Entry Level Performance and Conduct.* 1. *Basis.* a. A member may be separated while in entry level status (§ 41.6(i)) when it is determined under the guidance set forth in section A. of Part 2 that the member is unqualified for further military service by reason of unsatisfactory performance or conduct (or both), as evidenced by inability, lack of reasonable effort, failure to adapt to the military environment or minor disciplinary infractions.

b. When separation of a member in entry level status is warranted by unsatisfactory performance or minor disciplinary infractions (or both), the member normally should be separated under this section. Nothing in this provision precludes separation under another provision of this Directive when such separation is authorized and warranted by the circumstances of the case.

2. *Counseling and rehabilitation.* Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. Counseling and rehabilitation requirements are important with respect to this reason for separation. Because military service is a calling different from any civilian occupation, a member should not be separated when this is the sole reason unless there have been efforts at rehabilitation under standards prescribed by the Secretary concerned.

3. *Description of separation.* Entry Level Separation.

4. *Procedures.* The Notification Procedure (section B. of Part 3) shall be used.

G. *Unsatisfactory Performance.* 1. *Basis.* A member may be separated when it is determined under the guidance set forth in section A. of Part 2 that the member is unqualified for further military service by reason of unsatisfactory performance. This reason shall not be used if the member is in entry level status (§ 41.6(i)).

2. *Counseling and Rehabilitation.* Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. Counseling and rehabilitation requirements are of particular importance with respect to this reason for separation. Because military service is a calling different from any civilian occupation, a member should not be separated when unsatisfactory performance is the sole reason unless there have been efforts at rehabilitation under standards prescribed by the Secretary concerned.

3. *Characterization or description.* The service shall be characterized as Honorable or General (under honorable conditions) in accordance with section C. of Part 2.

4. *Procedures.* The Notification Procedure (section B. of Part 3) shall be used.

H. *Homosexuality.* 1. *Basis.* a. Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.

b. As used in this section:

(1) Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts;

(2) Bisexual means a person who engages in, desires to engage in, or

intends to engage in homosexual and heterosexual acts; and

(3) A homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.

c. The basis for separation may include preservice, prior service, or current service conduct or statements. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that:

(a) Such conduct is a departure from the member's usual and customary behavior;

(b) Such conduct under all the circumstances is unlikely to recur;

(c) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;

(d) Under the particular circumstances of the case, the member's continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale; and

(e) The member does not desire to engage in or intend to engage in homosexual acts.

(2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

(3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.

2. *Characterization or description.* Characterization of service or description of separation shall be in accordance with the guidance in section C. of Part 2. When the sole basis for separation is homosexuality, a characterization Under Other Than Honorable Conditions may be issued only if such a characterization is warranted under section C. of Part 2 and there is a finding that during the current term of service the member attempted, solicited, or committed a homosexual act in the following circumstances:

a. By using force, coercion, or intimidation;

b. With a person under 16 years of age;

c. With a subordinate in circumstances that violate customary military superior-subordinate relationships;

d. Openly in public view;

e. For compensation;

f. Aboard a military vessel or aircraft; or

g. In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

3. *Procedures.* The Administrative Board Procedure (section C. of Part 3) shall be used, subject to the following guidance:

a. Separation processing shall be initiated if there is probable cause to believe separation is warranted under paragraph H.1.c., above.

b. The Administrative Board shall follow the procedures set forth in subsection C.5. of Part 3, except with respect to the following matters:

(1) If the Board finds that one or more of the circumstances authorizing separation under paragraph H.1.c., above, is supported by the evidence, the Board shall recommend separation unless the Board finds that retention is warranted under the limited circumstances described in that paragraph.

(2) If the Board does not find that there is sufficient evidence that one or more of the circumstances authorizing separation under paragraph H.1.c. has occurred, the Board shall recommend retention unless the case involves another basis for separation of which the member has been duly notified.

c. In any case in which characterization of service Under Other Than Honorable Conditions is not authorized, the Separation Authority may be exercised by an officer designated under paragraph B.4.a. of Part 3.

d. The Separation Authority shall dispose of the case according to the following provisions:

(1) If the Board recommends retention, the Separation Authority shall take one of the following actions:

(a) Approve the finding and direct retention; or

(b) Forward the case to the Secretary concerned with a recommendation that the Secretary separate the member under the Secretary's Authority (section O. of this Part 1).

(2) If the Board recommends separation, the Separation Authority shall take one of the following actions:

(a) Approve the finding and direct separation; or

(b) Disapprove the finding on the basis of the following considerations:

1 There is insufficient evidence to support the finding; or

2 Retention is warranted under the limited circumstances described in paragraph H.1.c., above.

(3) If there has been a waiver of Board proceedings, the Separation Authority shall dispose of the case in accordance with the following provisions:

(a) If the Separation Authority determines that there is not sufficient evidence to support separation under paragraph H.1.c., the Separation Authority shall direct retention unless there is another basis for separation of which the member has been duly notified.

(b) If the Separation Authority determines that one or more of the circumstances authorizing separation under paragraph H.1.c. has occurred, the member shall be separated unless retention is warranted under the limited circumstances described in that paragraph.

e. The burden of proving that retention is warranted under the limited circumstances described in paragraph H.1.c. rests with the member, except in cases where the member's conduct was solely the result of a desire to avoid or terminate military service.

f. Findings regarding the existence of the limited circumstances warranting a member's retention under paragraph H.1.c. are required only if:

(1) The member clearly and specifically raises such limited circumstances; or

(2) The Board or Separation Authority relies upon such circumstances to justify the member's retention.

g. Nothing in these procedures:

(1) Limits the authority of the Secretary concerned to take appropriate action in a case to ensure that there has been compliance with the provisions of this part;

(2) Precludes retention of a member for a limited period of time in the interests of national security as authorized by the Secretary concerned;

(3) Authorizes a member to seek Secretarial review unless authorized in procedures promulgated by the Secretary concerned;

(4) Precludes separation in appropriate circumstances for another reason set forth in this part; or

(5) Precludes trial by court-martial in appropriate cases.

I. *Drug Abuse Rehabilitation Failure.*

1. *Basis.* a. A member who has been referred to a program of rehabilitation for personal drug and alcohol abuse may be separated for failure through inability

or refusal to participate in, cooperate in, or successfully complete such a program in the following circumstances:

(1) There is a lack of potential for continued military service; or

(2) Long-term rehabilitation is determined necessary and the member is transferred to a civilian medical facility for rehabilitation.

b. Nothing in this provision precludes separation of a member who has been referred to such a program under any other provision of this part in appropriate cases.

c. Drug abuse rehabilitation failures shall be reported separately from alcohol abuse rehabilitation failures. If separation is based on both, the primary basis shall be used for reporting requirements.

2. *Characterization or description.* When a member is separated under this provision, characterization of service as Honorable or General (under honorable conditions) is authorized except when an Entry Level Separation is required under section C. of Part 2. The relationship between voluntary submission for treatment and the evidence that may be considered on the issue of characterization is set forth in subparagraph C.2.c.(6) of Part 2. The relationship between mandatory urinalysis and the evidence that may be considered on the issue of characterization is set forth in subparagraph C.2.c.(7) of Part 2.

3. *Procedures.* The Notification Procedure (section B. of Part 3) shall be used.

J. *Alcohol Abuse Rehabilitation Failure.* 1. *Basis.* a. A member who has been referred to a program of rehabilitation for drug and alcohol abuse may be separated for failure through inability or refusal to participate in, cooperate in, or successfully complete such a program in the following circumstances:

(1) There is a lack of potential for continued military service; or

(2) Long-term rehabilitation is determined necessary and the member is transferred to a civilian medical facility for rehabilitation.

b. Nothing in this provision precludes separation of a member who has been referred to such a program under any other provision of this part in appropriate cases.

c. Alcohol abuse rehabilitation failures shall be reported separately from drug abuse rehabilitation failures. If separation is based on both, the primary basis shall be used for reporting purposes.

2. *Characterization or description.* When a member is separated under this provision, characterization of service as Honorable or General (under honorable conditions) is authorized except when an Entry Level Separation is required under section C. of Part 2.

3. *Procedures.* The Notification Procedure (section B. of Part 3) shall be used.

K. *Misconduct.* 1. *Basis.* a. *Reasons.* A member may be separated for misconduct when it is determined under the guidance set forth in section A. of Part 2 that the member is unqualified for further military service by reason of one or more of the following circumstances:

(1) *Minor disciplinary infractions.* A pattern of misconduct consisting solely of minor disciplinary infractions. If separation of a member in entry level status is warranted solely by reason of minor disciplinary infractions, the action should be processed under Entry Level Performance and Conduct (section F., above).

(2) *A pattern of misconduct.* A pattern of misconduct consisting of (a) descreditable involvement with civil or military authorities or (b) conduct prejudicial to good order and discipline.

(3) *Commission of a serious offense.* Commission of a serious military or civilian offense if in the following circumstances:

(a) The specific circumstances of the offense warrant separation; and

(b) A punitive discharge would be authorized for the same or a closely related offense under the Manual for Courts-Martial, 1969 (Revised Edition), as amended.

(4) *Civilian conviction.* (a) Conviction by civilian authorities or action taken which is tantamount to a finding of guilty, including similar adjudications in juvenile proceedings, when the specific circumstances of the offense warrant separation, and the following conditions are present:

1 A punitive discharge would be authorized for the same or a closely related offense under the Manual for Courts-Martial; or

2 The sentence by civilian authorities includes confinement for six months or more without regard to suspension or probation.

(b) Separation processing may be initiated whether or not a member has filed an appeal of a civilian conviction or has stated an intention to do so. Execution of an approved separation should be withheld pending outcome of the appeal or until the time for appeal has passed, but the member may be separated prior to final action on the appeal upon request of the member or upon direction of the Secretary concerned.

b. *Reporting.* The Deputy Assistant Secretary (Military Personnel and Force Management), Office of the ASD (MRA&L), shall require separate reports under each subparagraph in paragraph K.1.a. for misconduct by reason of drug abuse, unauthorized absence, and such other categories as may be appropriate.

c. *Related separations.* Misconduct involving homosexuality shall be processed under section H. Misconduct involving a fraudulent enlistment is considered under subsection E.4., above.

2. *Counseling and rehabilitation.* Separation processing for a pattern of misconduct (subparagraphs K.1.a. (1) and (2)) may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. If the sole basis of separation is a single offense (subparagraph K.1.a.(3)) or a civilian conviction or a similar juvenile adjudication (subparagraph K.1.a.(4)), the counseling and rehabilitation requirements are not applicable.

3. *Characterization or description.* Characterization of service normally shall be Under Other Than Honorable Conditions, but characterization as General (under honorable conditions) may be warranted under the guidelines in section C. of Part 2. For respondents who have completed entry level status, characterization of service as Honorable is not authorized unless the respondent's record is otherwise so meritorious that any other characterization clearly would be inappropriate and the separation is approved by a commander exercising general court-martial jurisdiction or higher authority as specified by the Secretary concerned. When characterization of service Under Other Than Honorable Conditions is not warranted for a member in entry level status under section C. of Part 2, the separation shall be described as an Entry Level Separation.

4. *Procedures.* The Administrative Board Procedure (section C. of Part 3) shall be used, except that use of the Notification Procedure (section B. of Part 3) is authorized if separation is based upon subparagraphs K.1.a.(1) and K.1.a.(2) and characterization of service Under Other Than Honorable Conditions is not warranted under section C. of Part 2.

L. *Separation in Lieu of Trial by Court-Martial.* 1. *Basis.* A member may be separated upon request of trial by court-martial if charges have been preferred with respect to an offense for which a punitive discharge is authorized and it is determined that the member is unqualified for further military service

under the guidance set forth in section A. of Part 2. This provision may not be used when section B. of paragraph 127*c* of the Manual for Courts-Martial provides the sole basis for a punitive discharge unless the charges have been referred to a court-martial empowered to adjudge a punitive discharge.

2. *Characterization or description.* Characterization of service normally shall be Under Other Than Honorable Conditions, but characterization as General (under honorable conditions) may be warranted under the guidelines in section C. of Part 2. For respondents who have completed entry level status, characterization of service as Honorable is not authorized unless the respondent's record is otherwise so meritorious that any other characterization clearly would be inappropriate. When characterization of service Under Other Than Honorable Conditions is not warranted for a member in entry level status under section C. of Part 2, the separation shall be described as an Entry Level Separation.

3. *Procedures.* a. The request for discharge must be submitted in writing and signed by the member.

b. The member shall be afforded opportunity to consult with counsel qualified under Article 27(b)(1) of the UCMJ. If the member refuses to do so, counsel shall prepare a statement to this effect, which shall be attached to the file, and the member shall state that he or she has waived the right to consult with counsel.

c. Except when the member has waived the right to counsel, the request shall be signed by counsel.

d. In the written request, the member shall state that he or she understands the following:

(1) The elements of the offense or offenses charged;

(2) That characterization of service Under Other Than Honorable Conditions is authorized; and

(3) The adverse nature of such a characterization and possible consequences thereof.

e. The Secretary concerned shall also require that one or both of the following matters be included in the request:

(1) An acknowledgment of guilt of one or more of the offenses or any lesser included offenses for which a punitive discharge is authorized; or

(2) A summary of the evidence or list of documents (or copies thereof) provided to the member pertaining to the offenses for which a punitive discharge is authorized.

f. The Separation Authority shall be a commander exercising general court-martial jurisdiction or higher authority as specified by the Secretary concerned.

g. Statements by the member or the member's counsel submitted in connection with a request under this subsection are not admissible against the member in a court-martial except as authorized under Military Rule of Evidence 410, Manual for Courts-Martial.

M. *Security.* 1. *Basis.* When retention is clearly inconsistent with the interest of national security, a member may be separated by reason of security and under conditions and procedures established by the Secretary of Defense in DoD 5200.2–R.

2. *Characterization or description.* Characterization of service or description of a separation shall be in accordance with section C. of Part 2.

N. *Unsatisfactory Participation in the Ready Reserve.* 1. *Basis.* A member may be separated for unsatisfactory participation in the Ready Reserve under criteria established by the Secretary concerned under 32 CFR Part 100 (DoD Directive 1215.13).

2. *Characterization or description.* Characterization of service or description of a separation shall be in accordance with section C. of Part 2 and 32 CFR Part 100 (DoD Directive 1215.13).

3. *Procedures.* The Administrative Board Procedure (section C. of Part 3) shall be used, except that the Notification Procedure (section B. of Part 3) may be used if characterization of service Under Other Than Honorable Conditions is not warranted under section C. of Part 2.

O. *Secretarial Plenary Authority.* 1. *Basis.* Notwithstanding any limitation on separations provided in this part the Secretary concerned may direct the separation of any member prior to expiration of term of service after determining it to be in the best interests of the Service.

2. *Characterization or description.* Honorable or General (under honorable conditions) as warranted under section C. of Part 2 unless an Entry Level Separation is required under section C. of Part 2.

3. *Procedures.* Prior to involuntary separation, the Notification Procedure (section B. of Part 3) shall be used, except the procedure for requesting an Administrative Board (paragraph B.1.g. of Part 3) is not applicable.

P. *Reasons Established by the Military Departments.* 1. *Basis.* The Military Departments may establish additional reasons for separation for circumstances not otherwise provided for in this part to meet specific requirements, subject to approval by the ASD (MRA&L).

2. *Counseling and rehabilitation.* Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records except when the Military Department concerned provides in its implementing document that counseling and rehabilitation requirements are not applicable for the specific reason for separation.

3. *Characterization or description.* Characterization of service or description of a separation shall be in accordance with section C. of Part 2.

4. *Procedures.* The procedures established by the Military Departments shall be consistent with the procedures contained in this part insofar as practicable.

Part 2—Guidelines on Separation and Characterization

A. *Separation.* 1. *Scope.* This general guidance applies when referenced in Part 1. Further guidance is set forth under the specific reasons for separation in Part 1.

2. *Guidance.* a. There is a substantial investment in the training of persons enlisted or inducted into the Military Services. As a general matter, reasonable efforts at rehabilitation should be made prior to initiation of separation proceedings.

b. Unless separation is mandatory, the potential for rehabilitation and further useful military service shall be considered by the Separation Authority and, where applicable, the Administrative Board. If separation is warranted despite the potential for rehabilitation, consideration should be given to suspension of the separation, if authorized.

c. Counseling and rehabilitation efforts are a prerequisite to initiation of separation proceedings only insofar as expressly set forth under specific requirements for separation in Part 1. An alleged or established inadequacy in previous rehabilitative efforts does not provide a legal bar to separation.

d. The following factors may be considered on the issue of retention or separation, depending on the circumstances of the case:

(1) The seriousness of the circumstances forming the basis for initiation of separation proceedings, and the effect of the member's continued retention on military discipline, good order, and morale.

(2) The likelihood of continuation or recurrence of the circumstances forming the basis for initiation of separation proceedings.

(3) The likelihood that the member will be a disruptive or undesirable influence in present or future duty assignments.

(4) The ability of the member to perform duties effectively in the present and in the future, including potential for advancement or leadership.

(5) The member's rehabilitative potential.

(6) The member's entire military record. (a) This may include:

(1) Past contributions to the Service, assignments, awards and decorations, evaluation ratings, and letters of commendation;

2 Letters of reprimand or admonition, counseling records, records of nonjudicial punishment, records of conviction by court-martial and records of involvement with civilian authorities; and

3 Any other matter deemed relevant by the Board, if any, or the Separation Authority, based upon the specialized training, duties, and experience of persons entrusted by this part with recommendations and decisions on the issue of separation or retention.

(b) The following guidance applies to consideration of matter under subparagraph A.2.d.(6)(a):

1 Adverse matter from a prior enlistment or period of military service, such as records of nonjudicial punishment and convictions by courts-martial, may be considered only when such records would have a direct and strong probative value in determining whether separation is appropriate. The use of such records ordinarily shall be limited to those cases involving patterns of conduct manifested over an extended period of time.

2 Isolated incidents and events that are remote in time normally have little probative value in determining whether administrative separation should be effected.

3. *Limitations on separation actions.* A member may not be separated on the basis of the following:

a. Conduct that has been the subject of judicial proceedings resulting in an acquittal or action having the effect thereof except in the following circumstances:

(1) When such action is based upon a judicial determination not going to the guilt or innocence of the respondent; or

(2) When the judicial proceeding was conducted in a State or foreign court and the separation is approved by the Secretary concerned.

b. Conduct that has been the subject of a prior Administrative Board in which the Board entered an approved finding that the evidence did not sustain the factual allegations concerning the conduct except when the conduct is the subject of a rehearing ordered on the basis of fraud or collusion; or

c. Conduct that has been the subject of an administrative separation proceeding resulting in a final determination by a Separation Authority that the member should be retained, except in the following circumstances:

(1) When there is subsequent conduct or performance forming the basis, in whole or in part, for a new proceeding;

(2) When there is new or newly discovered evidence that was not reasonably available at the time of the prior proceeding; or

(3) When the conduct is the subject of a rehearing ordered on the basis of fraud or collusion.

B. *Suspension of Separation.* 1. *Suspension.* a. Unless prohibited by this part a separation may be suspended for a specified period of not more than 12 months by the Separation Authority or higher authority if the circumstances of the case indicate a reasonable likelihood or rehabilitation.

b. During the period of suspension, the member shall be afforded an opportunity to meet appropriate standards of conduct and duty performance.

c. Unless sooner vacated or remitted, execution of the approved separation shall be remitted upon completion of the probationary period, upon termination of the member's enlistment or period of obligated service, or upon decision of the Separation Authority that the goal of rehabilitation has been achieved.

2. *Action during the period of suspension.* a. During the period of suspension, if there are further grounds for separation under Part 1, one or more of the following actions may be taken:

(1) Disciplinary action;

(2) New administrative action; or

(3) Vacation of the suspension accompanied by execution of the separation if the member engages in conduct similar to that for which separation was approved (but suspended) or otherwise fails to meet appropriate standards of conduct and duty performance.

b. Prior to vacation of a suspension, the member shall be notified in writing of the basis for the action and shall be afforded the opportunity to consult with counsel (as provided in paragraph B.1.f. of Part 3) and to submit a statement in writing to the Separation Authority. The respondent shall be provided a reasonable period of time, but not less than 2 working days, to act on the notice. If the respondent identifies specific legal issues for consideration by the Separation Authority, the matter shall be reviewed by a judge advocate or civilian lawyer employed by the government prior to final action by the Separation Authority.

C. *Characterization of Service or Description of Separation.* 1. *Types of characterization or description.* a. At separation, the following types of characterization of service or description of separation are authorized under this Part:

(1) Separation with characterization of service as Honorable, General (under honorable conditions), or Under Other Than Honorable Conditions.

(2) Entry Level Separation.

(3) Order of release from the custody and control of the Military Services by reason of void enlistment or induction.

(4) Separation by being dropped from the rolls of the Service.

b. Any of the types of separation listed in this section may be used in appropriate circumstances unless a limitation set forth in this section or in Part 1 (Reasons for Separation).

2. *Characterization of service.* a. *General considerations.* (1) Characterization at separation shall be based upon the quality of the member's service, including the reason for separation and guidance in paragraph C.2.b., below, subject to the limitations set forth under various reasons for separation in Part 1. The quality of service will be determined in accordance with standards of acceptable personal conduct and performance of duty for military personnel. These standards are found in the 10 U.S.C., Sections 801–940, UCMJ, directives and regulations issued by the Department of Defense and the Military Departments, and the time-honored customs and traditions of military service.

(2) The quality of service of a member on active duty or active duty for training is affected adversely by conduct that is of a nature to bring discredit on the Military Services or is prejudicial to good order and discipline, regardless of whether the conduct is subject to UCMJ jurisdiction. Characterization may be based on conduct in the civilian community, and the burden is on the respondent to demonstrate that such conduct did not adversely affect the respondent's service.

(3) The reasons for separation, including the specific circumstances that form the basis for the separation, shall be considered on the issue of characterization. As a general matter, characterization will be based upon a pattern of behavior rather than an isolated incident. There are circumstances, however, in which the conduct or performance of duty

reflected by a single incident provides the basis for characterization.

(4) Due consideration shall be given to the member's age, length of service, grade, aptitude, physical and mental condition, and the standards of acceptable conduct and performance of duty.

b. *Types of characterization.* (1) *Honorable.* The Honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for military personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate. In the case of an Honorable Discharge, an Honorable Discharge Certificate (DD Form 256) will be awarded and a notation will be made on the appropriate copies of the DD Form 214/5 in accordance with 32 CFR Part 45 (DoD Directive 1336.1).

(2) *General (under honorable conditions).* If a member's service has been honest and faithful, it is appropriate to characterize that service under honorable conditions. Characterization of service as General (under honorable conditions) is warranted when significant negative aspects of the member's conduct or performance of duty outweigh positive aspects of the member's military record.

(3) *Under Other Than Honorable Conditions.* (a) This characterization may be issued in the following circumstances:

1 When the reason for separation is based upon a pattern of behavior that constitutes a significant departure from the conduct expected of members of the Military Services.

2 When the reason for separation is based upon one or more acts or omissions that constitute a significant departure from the conduct expected of members of the Military Services. Examples of factors that may be considered include the use of force or violence to produce serious bodily injury or death, abuse of a special position of trust, disregard by a superior of customary superior-subordinate relationships, acts or omissions that endanger the security of the United States or the health and welfare of other members of the Military Services, and deliberate acts or omissions that seriously endanger the health and safety of other persons.

(b) This characterization is authorized only if the member has been afforded the opportunity to request an Administrative Board, except as provided in section L. of Part 1 (Separation in Lieu of Trial by Courts-Martial).

c. *Limitations on characterization.* Except as otherwise provided in this paragraph, characterization will be determined solely by the member's military record during the current enlistment or period of service to which the separation pertains, plus any extensions thereof prescribed by law or regulation or effected with the consent of the member.

(1) Prior service activities, including records of conviction by courts-martial, records of absence without leave, or commission of other offenses for which punishment was not imposed shall not be considered on the issue of characterization. To the extent that such matters are considered on the issue of retention or separation (subsection A.2. of this Part 2), the record of proceedings may reflect express direction that such information shall not be considered on the issue of characterization.

(2) Preservice activities may not be considered on the issue of characterization except as follows: in a proceeding concerning fraudulent entry into military service (subsection E.4. of Part 1), evidence of preservice misrepresentations about matters that would have precluded, postponed, or otherwise affected the member's eligibility for enlistment or induction may be considered on the issue of characterization.

(3) The limitations in subsection A.3., above, as to matters that may be considered on the issue of separation are applicable to matters that may be considered on the issue of characterization.

(4) When the sole basis for separation is a serious offense which resulted in a conviction by a court-martial that did not impose a punitive discharge, the member's service may not be characterized Under Other Than Honorable Conditions unless such characterization is approved by the Secretary concerned.

(5) Conduct in the civilian community of a member of a reserve component who is not on active duty or active duty for training may form the basis for characterization Under Other Than Honorable Conditions only if such conduct affects directly the performance of military duties. Such conduct may form the basis of characterization as General (under honorable conditions) only if such conduct has an adverse impact on the overall effectiveness of the service, including military morale and efficiency.

(6) A member's voluntary submission to a DoD treatment and rehabilitation program (for personal use of drugs) and evidence provided voluntarily by the member concerning personal use of drugs as part of initial entry into such a program may not be used against the member on the issue of characterization. This limitation does not preclude the following actions:

(a) The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse (or lack thereof) has been first introduced by the member; and

(b) Taking action based on independently derived evidence, including evidence of drug abuse after initial entry into the treatment and rehabilitation program.

(7) The results of mandatory urinalysis may be used on the issue of characterization except as provided in the Deputy Secretary of Defense Memorandum, "Alcohol and Drug Abuse," December 28, 1981, and rules promulgated thereunder.

3. *Uncharacterized separations.* a. *Entry Level Separation.* (1) A separation shall be described as an Entry Level Separation if separation processing is initiated while a member is in entry level status, except in the following circumstances:

(a) When characterization Under Other Than Honorable Conditions is authorized under the reason for separation (Part 1) and is warranted by the circumstances of the case; or

(b) The Secretary concerned, on a case-by-case basis, determines that characterization of service as Honorable is clearly warranted by the presence of unusual circumstances involving personal conduct and performance of military duty. This characterization is authorized when the member is separated under Part 1 by reason of selected changes in service obligation (section B.), Convenience of the Government (section C.), Disability (section D.), Secretarial Plenary Authority (secton O.), or an approved reason established by the Military Department (section P.).

(2) In time of mobilization or in other appropriate circumstances, the ASD (MRA&L) may authorize the Secretary concerned to delegate the authority in subparagraph (1)(b), above, (concerning the Honorable characterization) to a general court-martial convening authority with respect to members serving in operational units.

(3) With respect to administrative matters outside this Part that require a characterization as Honorable or General, an Entry Level Separation shall be treated as the required characterization. This provision does not apply to administrative matters that expressly require different treatment of

an Entry Level Separation except as provided in subparagraph (4), below.

(4) In accordance with 10 U.S.C. 1163, an Entry Level Separation for a member of a Reserve Component separated from the Delayed Entry Program is "under honorable conditions."

b. *Void enlistments or inductions.* A member shall not receive a discharge, characterization of service at separation, or an Entry Level Separation if the enlistment or induction is void except when a constructive enlistment arises and such action is required under subparagraph (3), below. If characterization or an Entry Level Separation is not required, the separation shall be described as an order of release from custody or control of the Military Services.

(1) An enlistment is void in the following circumstances:

(a) If it was effected without the voluntary consent of a person who has the capacity to understand the significance of enlisting in the Military Services, including enlistment of a person who is intoxicated or insane at the time of enlistment. 10 U.S.C. 504; Article 2(b), UCMJ.

(b) If the person is under 17 years of age. 10 U.S.C. 505.

(c) If the person is a deserter from another Military Service. 10 U.S.C. 504.

(2) Although an enlistment may be void at its inception, a constructive enlistment shall arise in the case of a person serving with a Military Service who:

(a) Submitted voluntarily to military authority;

(b) Met the mental competency and minimum 10 U.S.C. age qualifications of Sections 504 and 505 of, at the time of voluntary submission to military authority;

(c) Received military pay or allowances; and

(d) Performed military duties.

(3) If an enlistment that is void at its inception is followed by a constructive enlistment within the same term of service, characterization of service or description of separation shall be in accordance with subsection C.2. or paragraph C.3.a. of this Part 2, as appropriate; however, if the enlistment was void by reason of desertion from another Military Service, the member shall be separated by an order of release from the custody and control of the Service regardless of any subsequent constructive enlistment. The occurrence of such a constructive enlistment does not preclude the Military Departments, in appropriate cases, from either retaining the member or separating the member under section E. of Part 1 on the basis of the circumstances that occasioned the original void enlistment or upon any other basis for separation provided in this Part.

c. *Dropping from the rolls.* A member may be dropped from the rolls of the Service when such action is authorized by the Military Department concerned and a characterization of service or other description of separation is not authorized or warranted.

Part 3—Procedures For Separation

A. *Scope.* 1. The supplementary procedures in this Part are applicable only when required under a specific reason for separation (Part 1). These procedures are subject to the requirements set forth in Part 1 with respect to specific reasons for separation.

2. When a member is processed on the basis of multiple reasons for separation, the following guidelines apply to procedural requirements (including procedural limitations on characterization of service or description of separation):

a. The requirements for each reason will be applied to the extent practicable.

b. If a reason for separation set forth in the notice of proposed action requires processing under the Administrative Board Procedure (section C., below), the entire matter shall be processed under section C.

c. If more than one reason for separation is approved, the guidance on characterization that provides the greatest latitude may be applied.

d. When there is any other clear conflict between a specific requirement applicable to one reason and a general requirement applicable to another reason, the specific requirement shall be applied.

e. If a conflict in procedures cannot be resolved on the basis of the foregoing principles, the procedure most favorable to the respondent shall be used.

B. *Notification Procedure.* 1. *Notice.* If the Notification Procedure is initiated under Part 1, the respondent shall be notified in writing of the matter set forth in this section.

a. The basis of the proposed separation, including the circumstances upon which the action is based and a reference to the applicable provisions of the Military Department's implementing regulation.

b. Whether the proposed separation could result in discharge, release from active duty to a reserve component, transfer from the Selected Reserve to the IRR, release from custody or control of the Military Services, or other form of separation.

c. The least favorable characterization of service or description of separation authorized for the proposed separation.

d. The right to obtain copies of documents that will be forwarded to the Separation Authority supporting the basis of the proposed separation. Classified documents may be summarized.

e. The respondent's right to submit statements.

f. The respondent's right to consult with counsel qualified under Article 27(b)(1) of the UCMJ. Nonlawyer counsel may be appointed when the respondent is deployed aboard a vessel or in similar circumstances of separation from sufficient judge advocate resources as determined under standards and procedures specified by the Secretary concerned. The respondent also may consult with civilian counsel retained at the member's own expense.

g. If the respondent has 6 or more years of total active and reserve military service, the right to request an Administrative Board (section C.).

h. The right to waive paragraphs d., e., f. or g., above, after being afforded a reasonable opportunity to consult with counsel, and that failure to respond shall constitute a waiver of the right.

2. *Additional notice requirements.* a. If separation processing is initiated on the basis of more than one reason under Part 1, the requirements of paragraph B.1.a. apply to all proposed reasons for separation.

b. If the respondent is in civil confinement, absent without leave, or in a reserve component not on active duty or upon transfer to the IRR, the relevant notification procedures in sections D., E., or F. of this Part 3 apply.

c. Additional notification requirements are set forth in Part 1, sections C. and D., when characterization of service as General (under honorable conditions) is authorized and the member is processed for separation by reason of Convenience of the Government or Disability.

3. *Response.* The respondent shall be provided a reasonable period of time, but not less than 2 working days, to act on the notice. An extension may be granted upon a timely showing of good cause by the respondent. The decision of the respondent on each of the rights set forth in paragraphs 1.d. through g., above, and applicable provisions referenced in subsection 2. shall be recorded and signed by the respondent and counsel, subject to the following limitation:

a. If notice by mail is authorized under sections D., E., or F. of this Part 3 and the respondent fails to acknowledge