Introduction

Yvona Rodriguez’s story embodies many of the contradictory experiences of noncitizen soldiers and veterans in the US military. As soldiers and veterans, they represent and protect the ideals of the nation-state. Yet, as noncitizens, they are deportable ‘others.’ Rodriguez was born in Ecuador and immigrated to the United States, where he became a lawful permanent resident. He served in the Marines for eight years, including deployments in both Iraq and Afghanistan. As a result of his service, he developed Post-Traumatic Stress Disorder (PTSD) and began self-medicating with marijuana after anti-depressants prescribed by his doctor did not help. Rodriguez received four misdemeanor charges for possession of marijuana and drug paraphernalia, because medical marijuana is not legal in his home state of Virginia. When Rodriguez returned to the US after a trip to Ecuador, he was stopped by Customs because his misdemeanor charges made him eligible for deportation. He was handcuffed and detained at the airport. In a later interview, Rodriguez remembered thinking to himself, “What have I done to this country? Why I am I being treated this way? I sacrificed so much for this country. I swore an oath to the Constitution. Is that not enough?” Rodriguez was placed in deportation proceedings and had to fight for his right to remain in the US in front of an immigration judge. His case was terminated without prejudice, allowing him to stay. However, not all veterans receive such positive decisions.

2 Ibid.
3 Ibid.
The idea of a veteran facing possible deportation is at odds with popular perceptions of America’s respect for military service and patriotism. Yet, noncitizen soldiers and veterans have fewer rights than citizens. Traditional ideas about the rights of soldiers, such as those in the Geneva Convention do not explicitly address citizenship and are too narrow to guarantee rights to noncitizen soldiers and veterans. Three case studies are used to elucidate how the US military understands the rights of noncitizen soldiers and veterans in practice: Filipino World War II veterans, the deportation of veterans after changes to federal immigration law in 1996, and today’s Military Accession Vital to the National Interest (MAVNI) program. All three case studies highlight the differential treatment of soldiers and veterans based on their citizenship status, which prevents them from receiving the same rights and benefits as other soldiers and veterans. Noncitizen and citizen recruits sign the same enlistment contracts when they join the military, which gives the impression that all soldiers have the same rights. However, these contracts cannot change the reality that access to rights depends on citizenship.

**Historical Precedents: The Rights and Responsibilities of Citizen Soldiers**

Influential ideas about the rights and responsibilities between the state and soldiers in a nationalized army emerged in the Napoleonic period. After the French Revolution, citizens received rights from the state in return for fulfilling duties. One such duty was fighting on behalf of the state if conscripted. Napoleon’s use of a nationalized army created a precedent for conceptualizing soldiers as citizens and for seeing military service as one part of a larger relationship with the state.

The idea that a soldier would also be a citizen was taken for granted such that citizenship was not mentioned in the definition of Armed Forces in Article 43 of Protocol I of the Geneva

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The Geneva Convention outlined the rights of combatants with a focus on how soldiers should be treated by the adverse party, such as in the Third Geneva Convention Relative to the Treatment of Prisoners of War. The drafters of the convention may have seen requiring certain minimum treatment of soldiers in the course of their regular duties as an overreach or there may have been an assumption that it would be in a party’s best interest to treat their own soldiers well. The drafters may not have enumerated rights that combatants are entitled to receive from their own government because they assumed that soldiers would have all the rights of citizens, except for the rights they gave up when they became soldiers.

The drafters of the Geneva Convention only mentioned citizenship status when explaining who is not a soldier. In Article 46 of Protocol I to the Geneva Convention, they define a mercenary as someone who “is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict.” Yvona Rodriguez and other noncitizens who served in the US military are undoubtedly soldiers according to the Geneva Convention. Unlike mercenaries, they are residents in territory controlled by the US and are not motivated primarily by personal gain. However, the drafters of the Geneva Convention inherited ideas about the relationship between the state and soldiers in a nationalized army which influenced their understanding of combatants’ rights. As a result, citizenship was presumed and the responsibilities of a government toward its soldiers were not enumerated. This lack of international standards allowed governments to determine individually how they would treat noncitizen soldiers and veterans.

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6 Ibid., 228.
Noncitizen Soldiers and Veterans Historically: Filipino World War II Veterans

The government’s treatment of Filipino World War II veterans is an egregious example of differential treatment of veterans based on their citizenship status, exemplified by the US government’s failure to fulfill its promises to those who had served in its military. During WWII, the Philippines was under the control of the US. Many Filipinos fought in WWII in groups formed or recruited by the US government. These groups included the Philippine Scouts, the Philippine Commonwealth Army, recognized guerilla units, and the New Philippine Scouts. All Filipino members of these groups had sworn allegiance to both the United States and the Philippines. In 1941, President Roosevelt ordered the Philippine Commonwealth Army and U.S. Armed Forces stationed in the Philippines to merge in order to create the U.S. Army Forces in the Far East. In 1944, the President of the Commonwealth of the Philippines, Sergio Osmena, issued an executive order which inducted recognized guerilla groups into the Commonwealth Army. According to scholar Satoshi Nakano, “This order was generally understood as inducting qualified guerrillas into the U.S. Army, thus making them eligible to receive military salaries and full veterans’ benefits, since the Commonwealth Army was part of the U.S. Army.” As a result, veterans expected financial payments, educational benefits, and access to health care. Additionally, Filipino soldiers were promised that they would become eligible for US citizenship. In an interview with the a reporter from the LA Times, Filipino veteran Jose Ibarra

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8 Ibid., 36.
9 Ibid., 36.
10 Ibid., 36.
Salcedo said, “I can still remember his words. ‘Come fight with us and we’ll make you U.S. citizens.’ They promised us everything.”

Unfortunately, the US government denied the 200,000 Filipino veterans who had survived the war most of these promised benefits. The US government did not allow Filipino veterans to immigrate to the US or become citizens. Additionally, the Supplementary Appropriation Rescission Act of 1946 said that serving in the Philippine Commonwealth Army or authorized guerilla groups during WWII would not be considered active US military service when determining military benefits. By this time, the Philippines had gained independence. The Filipino and US governments tried to negotiate how to allocate responsibility for providing veterans’ benefits, but were not able to create a system that would compensate Filipino veterans equally to their American counterparts.

President Truman reflected on the Rescission Act a year after signing it in a letter to the President of the Senate and the Speaker of the House:

You will recall that upon approving the Rescission Act I took exception to that portion of the Act which limited veterans' benefits available to Philippine Army veterans. I stated, among other things, that enactment of that legislation did not release the United States from its moral obligation to provide for the heroic Philippine Army veterans who sacrificed so much for the common cause during the war.

Despite acknowledging the “moral obligation” of the US, Truman did not change the government's policy toward Filipino veterans. Filipino veterans did not receive any of the

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15 Ibid., 45.
16 Ibid., 46.
remaining promised military benefits until decades later. Almost 50 years after the US
government’s initial promise, the Immigration Act of 1990 gave Filipino veterans the right to
immigrate to the United States and become citizens.18 Scholar Satoshi Nakano believes Congress
was willing to include this provision because of the Bush administration’s favorable approach to
veterans’ issues and because most of the Filipino veterans were in their 70s and not expected to
migrate.19

In 2009, the US government gave Filipino veterans one-time payments in recognition of
their service. Filipino veterans who had become US citizens were eligible for $15,000, while
noncitizens were only eligible for $9,000.20 This payment disparity is yet another example of the
differential treatment of veterans based on citizenship status. Of the 250,000 Filipinos who
served alongside US troops in World War II, only about 15,000 Filipino veterans were still alive
in 2009 to receive those one-time payments. Families of deceased veterans were not eligible to
receive the payments. When interviewed by CNN about the 2009 decision, Filipino veteran
Franco Arcebal said:

> It does not correct the injustice and discrimination done to use 60 years ago…We
> were not granted school benefits. We were not granted hospital benefits…And in
> the 60 years, several billion dollars were saved by the U.S. government for not
> paying 250,000 of us. Now we are only 15,000. And the amount they’ve giving us
> is a small amount. But we appreciate that. Because it will finally recognize our
> services.21

Though separated by 62 years, both Truman and Arcebal used moral language when discussing
the US treatment of Filipino veterans. Truman referred to a “moral obligation,” while Arcebal
referenced an “injustice.” The nature of this moral relationship seems based on two ideas: the

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18 Nakano, “Nation, Nationalism, and Citizenship,” 42.
19 Ibid., 42.
20 Josh Levs, “U.S. to pay ‘forgotten’ Filipino World War II veterans.”
21 Ibid.
state’s general duty to soldiers and veterans in return for their service and the explicit promises about veterans benefits and the right to immigrate. As residents of a territory under US control, the Filipino veterans fulfilled their duty to the US through their allegiance and military service but they did not receive access to their full rights as veterans in return. The US government fulfilled some of their explicit promises to the Filipino veterans decades later. However, the state’s broader duty to Filipino veterans remains unsatisfied because of the discriminatory nature of their treatment.

**Noncitizens Soldiers and Veterans Today: Deported Veterans and MAVNI**

Background information about the relationship between immigration status and military service is necessary to understand the cases of deported veterans and the MAVNI program. The Immigration and Nationality Act (INA) permits US Citizenship and Immigration Services to expedite the naturalization process for soldiers and veterans. During peacetime, those wishing to apply through this expedited process must already be lawful permanent residents. In contrast, wartime military naturalization is available to all noncitizens, regardless of their legal status when they apply. President Bush signed an executive order on July 3, 2002 declaring that all noncitizens who served on or after September 11, 2001 are eligible for wartime naturalization. Unlike other forms of citizenship, citizenship acquired through peacetime and wartime military naturalization is conditional. Soldiers who receive citizenship through military service and leave the military under ‘other than honorable conditions’ before completing five years of service can have their citizenship revoked. The INA also allows for posthumous citizenship to be granted

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23 Ibid.
24 Ibid.
to members of the US armed forces who served honorably during a period of hostility and died as a result of a service-related injury or disease.25

As implied by the difference between peacetime and wartime military naturalization requirements, noncitizen soldiers and veterans can hold a range of immigration statuses. Despite these different immigration statuses, the most important distinction with regard to their access to rights is the distinction is between citizens and noncitizens. According to immigration scholar Susan Coutin, “the most significant legal distinction is between citizens, who cannot be deported legally, and noncitizens who are ineligible for particular rights and services and who can be deported if convicted of any of a broad range of criminal offenses.”26 The distinction between citizens and noncitizens sharpened in 1996, because legal changes made all noncitizens more vulnerable, regardless of legal status. For instance, these laws prevented lawful permanent residents from accessing most forms of federal assistance, expanded criminal offenses which made individuals deportable, and restricted waivers and judicial review which could prevent deportations based on discretion. As a result, Coutin explains, legal permanent residents were “subject to relatively inevitable deportation” if convicted of minor offenses, because immigration judges were not able to use discretion.27 This lack of discretion especially affects how veterans’ cases are adjudicated, since the judge cannot consider a veteran’s military service during deportation proceedings.

The Deportation of Veterans

Advocates for deported veterans, including the American Civil Liberties Union (ACLU), argue that the US military violated noncitizen soldiers and veterans’ rights in two ways: the US

25 Ibid.
27 Ibid., 297.
military did not help soldiers access their right to naturalize prior to the incident which made them deportable and that the US military has denied veterans’ access to benefits after deportation.\footnote{Bardis Vakili et al., “Discharged, Then Discarded: How U.S. Veterans Are Banished by the Country They Swore to Protect.” The American Civil Liberties Union of California (July 2016).} In both cases, the concern is over access to existing, formal rights. Implicit in many of these arguments is the idea that veterans have a common expectation of a right to remain in the US in exchange for their military service, even if this right was not formalized.

The US government impeded soldiers from exercising their right to naturalize by giving soldiers incorrect information or making the citizenship application process difficult. For instance, some soldiers were given misinformation by military recruiters, leading to them believe that military service automatically conferred citizenship on them or that their oath of enlistment entitled them to citizenship without an application process.\footnote{Ibid., 24.} As a result, “many did not realize that they were in fact not U.S. citizens until the federal government moved to deport them,” according to the ACLU.\footnote{Ibid., 24.} Soldiers who attempted to apply for citizenship during their military service could not complete the process because of their deployments. Prior to 2004, the interviews, fingerprinting, and oath ceremonies required for naturalization could only be performed within the US.\footnote{Ibid., 28.} In other instances, the US military lost soldiers’ naturalization applications, leading soldiers to believe their applications were being processed when they were not.\footnote{Ibid., 29.} Soldiers who did not naturalize remained vulnerable to deportation if they committed certain minor criminal offenses. Being convicted of certain offenses would also make veterans ineligible to naturalize, preventing them from gaining protection from deportation.
Once deported, veterans have difficulty accessing veterans’ benefits outside of the US. In one study, the ACLU found that only one of the deported veterans they interviewed with a service-related disability was able to obtain disability compensation, a pension, and medical benefits. Veterans are entitled to these benefits regardless of immigration status and their country of residence, but are unable to access them. For veterans to receive these financial and medical benefits, they must be evaluated by a Veterans Affairs (VA) doctor and diagnosed with a service-related disability. Deported veterans are unable to enter the US for these medical appointments and they are not offered abroad in countries without US military bases. Deported veterans are also unable to access medical treatment in VA facilities in the US. For example, veteran Jose Solorio died after being unable to access VA medical treatment when Customs and Border Protection refused his request to remain in the US long enough to receive a lung transplant.

These specific rights violations involve access to citizenship and veterans’ benefits, including medical treatment. Non-citizen veterans want—and deserve—access to the same rights as citizen veterans. They believe that all veterans have a right to belong and be considered part of the community. Unfortunately for noncitizen veterans, the US government only respects the right to belong and be considered part of the community unconditionally after death. Deported veterans have the right to be buried in a national cemetery and have a military funeral, allowing them to return to the US in death.

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33 Ibid., 44.
34 Ibid., 45.
35 Ibid., 46.
36 Ibid., 23.
The Military Accession Vital to National Interest (MAVNI) program demonstrates the legal precariousness of noncitizen soldiers, just as the risk of deportation reveals the legal precariousness of noncitizen veterans. Through the MAVNI program, the Secretary of Defense allows the armed forces to recruit certain noncitizens who have skills considered vital to the national interest, including noncitizens with language and cultural skills and health care professionals. As of 2014, around 50 languages were covered by the MAVNI program. Unlike other forms of military service which require enlistees to be lawful permanent residents, noncitizens with a variety of immigration statuses can participate in the MAVNI program. For example, soldiers serving through MAVNI can have DACA (Deferred Action for Childhood Arrivals), TPS (Temporary Protected Status), refugee status, or certain non-immigrant visas. As a result of holding these temporary statuses, MAVNI participants face legal vulnerability if their statuses were to expire because they would be immediately eligible for deportation.

This vulnerability was highlighted when the Trump Administration decided to rescind the DACA program. In response, Defense Secretary James Mattis said that those with DACA who are serving or have served in the military are safe from deportation even if the DACA program ends. He said, “Right now in terms of the DACA situation, in other words our guys on active duty, and that sort of thing or in the active delayed enlistment program, are not in any kind of jeopardy.” However, he noted that those who committed a felony or receive a deportation order from a judge still could be deported – both glaring exceptions to the idea that noncitizen soldiers are not in jeopardy. The Department of Homeland Security has jurisdiction over deportations,

38 Ibid.
39 Ryan Browne et al., “Mattis says DACA troops, veterans are not in ‘jeopardy,'” CNN, February 8, 2018.
not the Department of Defense. Harminder Saini, an Army recruit who has DACA is skeptical of Mattis’ promise: "It's really nice of him to say that, but I don't think his words really hold any weight because I doubt ICE will listen to what he says."\textsuperscript{40} Arizona Democratic Representative Ruben Gallego also expressed doubt, tweeting “Once they [DACA recipients] step off base, there's nothing that Mattis or anyone else could do to protect DREAMers serving in our military from deportation.”\textsuperscript{41}

Even those in the MAVNI program with other statuses are facing increased vulnerability as the program undergoes changes. The Pentagon is now requiring MAVNI recruits to undergo longer security screenings before enlisting and to serve for longer lengths of time before becoming eligible for expedited citizenship.\textsuperscript{42} Under these new rules, noncitizens serving through the MAVNI program must complete 180 consecutive days of active service or one year of service in the selected reserve. This change applies retroactively to troops already serving, who, under the previous rules, would have been allowed to apply for expedited naturalization after one day of service.\textsuperscript{43} These changes will affect about 10,000 noncitizens, some of whom have seen delays in when they could start basic training because of the additional security screening. Roughly 1,000 MAVNI recruits had their immigration visas expire while waiting for basic training, putting them at risk of deportation if their enlistment contracts were cancelled as the Army cancelled hundreds of enlistment contracts for noncitizen recruits in September 2017.\textsuperscript{44}

The rights of noncitizens serving in the MAVNI program are less clear-cut than those in the case of the deported veterans, who were promised certain benefits after the completion of

\textsuperscript{41} Ibid.
\textsuperscript{42} Ellen Mitchell, “Pentagon makes major changes to immigrant recruitment program,” \textit{The Hill}, October 13, 2017.
\textsuperscript{43} Ibid.
\textsuperscript{44} Ibid.
their service. From one point of view, the fact that many of the MAVNI recruits affected by the program’s changes have not begun basic training is crucial in determining rights. According to this line of thinking, MAVNI recruits are not entitled any rights as soldiers because they have not yet performed the responsibilities of soldiers. However, this reasoning does not adequately address the moral uneasiness associated the government canceling enlistment contacts based on possibly politically-motivated concerns about immigration. As demonstrated by this case, noncitizens’ willingness to defend the nation does not entitle them to consistent treatment by the government, which sees them as ‘other’ as opposed to potential ‘Americans-in-the-making.’

**Moral Ambiguities in the Relationship Between the State and Noncitizen Soldiers**

Historically, military service has been seen as one aspect of the consensual relationship between the government and its citizens. Citizens can influence the government through elections and receive benefits from the state. In return, citizens owe responsibility and loyalty to the state, which can be demonstrated through military service. However, noncitizen soldiers complicate this formulation because their rights are not based on their citizenship status or an existing relationship with the state. Instead, their relationship with the state is formalized during their enlistment in which their status changes from civilian to soldier. The process of becoming a soldier is characterized by one’s loss of rights, most significantly the loss of the right to life. In return, noncitizen soldiers are not granted any practical, formal rights. As the cases of Filipino World War II veterans, deported veterans, and MAVNI recruits demonstrate, access to one’s rights is mediated by citizenship status, regardless of one’s military service.

However, soldiers who enlist are often given the impression that they are gaining access to rights when they sign enlistment contracts. For example, the Armed Forces Enlistment/Reenlistment Document states that soldiers are “entitled to receive pay, allowances,
and other benefits."\(^{45}\) Yet, access to these benefits are dependent on laws and regulations, which may be changed. The Enlistment/Reenlistment Document continues:

> Laws and regulations that govern military personnel may change without notice to me. Such changes may affect my status, pay allowances, benefits, and responsibilities as a member of the Armed Forces **REGARDLESS** of the provisions in this enlistment/reenlistment document.\(^{46}\)

Legal scholar Jason Steck argues that the rights of those in the armed forces are further limited because enlistment contracts are not subject to the same contract law protections as other employment contracts. For instance, according to contract law, neither party in an employment contract can unilaterally alter the terms of the contract. However, the Supreme Court found in *Bell v. United States*, that military pay was determined by the statute, not the enlistment contract.\(^{47}\) Additionally, in *Crane v. Coleman*, a federal court found that individuals are still bound by their military enlistment contracts even when the government violates the contract, as long as the violation was of “terms that the court deem nonessential to the fundamental purpose of the enlistment contract.” Examples of violations of ‘nonessential’ terms include non-payment of enlistment incentives in a timely manner and not giving a military enlistee leave as promised.\(^{48}\)

The moral exploitation of soldiers further calls into questions whether enlistment contracts can adequately guarantee the rights of noncitizen soldiers and veterans. Michael Robillard and Bradley J. Strawser define moral exploitation as “a unique species of exploitation that involves unfairly burdening someone with added moral responsibility or moral decision-

\(^{46}\) Ibid.
\(^{48}\) Ibid., 456.
making.”49 This exploitation takes advantage of soldiers’ vulnerability. Robillard and Strawser do not list immigration status as a potential source of vulnerability, but the risk of deportation which permeates the experience of all noncitizens is certainly a vulnerability. Soldiers who naturalized through military service are also vulnerable, because their citizenship is conditional and can be revoked if they are dishonorably discharged. Moral exploitation prevents potential soldiers from freely and consensually entering into enlistment contracts and a relationship with the government.

Becoming a soldier, at its most basic level, is changing one’s status and relationship to the state. However, relationships to the state are defined by one’s citizenship above all. As a result, soldiers and veterans’ rights are best considered a type of citizenship right. Rules of war, like the Geneva Convention, are not an adequate recourse for soldiers denied rights by the government they are serving, because rules of war only govern hostilities and how adverse parties should treat each other. The US government has refused to broaden its understanding of who has access to rights commonly associated with citizenship to include noncitizen soldiers and veterans as potential ‘Americans-in-the-making.’

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