UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KUSUMA NIO, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:17-cv-00998-ESH-RMM**
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (DKT. 177) AND IN OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT (DKT. 219)

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I. INTRODUCTION[1]

Although Defendants strive mightily to avoid it, this partial summary judgment motion is about one issue: whether USCIS's July 7 Policy requirement of a completed MSSD before adjudicating MAVNI soldier naturalization applications (the "MSSD Policy") violates § 706(2) of the Administrative Procedure Act ("APA") and/or the United States Constitution. Defendants have been afforded multiple opportunities to explain and support the MSSD Policy, but they have failed to do so. Indeed, even after Defendants repeatedly told the Court that the USCIS Administrative Record included all evidence necessary to show that the MSSD Policy was not contrary to law, the Court – on its own volition – authorized Defendants to cite to certain evidence outside of that record to defend against some of Plaintiffs' claims. But Defendants have again come up empty. The Record is devoid of any references to – let alone support for – the MSSD Policy, and that reality no longer can be concealed or obfuscated. Defendants' two-page "Statement of Facts" (Dkt. 219 ("Gov't Memo") at 10-12),[2] in which the term "MSSD" never appears and the concept of an MSSD is not discussed, puts to rest any argument that USCIS considered the MSSD Policy when it enacted the July 7 Policy.[3]

Faced with this record, Defendants attempt to change and evade the question. They focus the bulk of their opposition on a separate and distinct aspect of the July 7 Policy, namely the DoD background investigations that indisputably precede the MSSD adjudications. And Defendants criticize Plaintiffs for dwelling on the MSSD Policy, even though this Court specifically instructed the parties to separately brief the MSSD Policy. Apparently believing that

[1] Capitalized terms have the meaning ascribed to them in Plaintiffs' Memo (Dkt. 177).

[2] Plaintiffs separately have moved to strike certain non-Record and otherwise unauthorized or inappropriate material in Defendants' response.

[3] Defendants have abandoned their prior claim that they "do not agree" with Plaintiffs' Statement of Facts ("SOF"). Dkt. 186 at 3, n. 2. As such, the Court should deem Plaintiffs' SOF to be undisputed.

the DoD investigations aspect of the July 7 Policy is more defensible, Defendants seek to shoehorn all of their legal and factual arguments into that aspect. But, for multiple reasons, the shoe still does not fit.

First, while the question of whether the USCIS requirement of waiting for the completion of DoD background investigations is contrary to law was relevant at the outset of this litigation, it is now moot. Defendants essentially have admitted – in this Court and another court – that DoD background investigations of class members are complete. Consequently, the relevant challenge pertains to the post-investigation MSSD Policy, and Defendants' fixation on the "investigation" aspect of the July 7 Policy, which relies heavily on arguments they advanced when the DoD enhanced background investigations were still at issue, misses the mark entirely.[4]

Second, there is no merit to (or record support for) the notion that the MSSD Policy is just the continuation of the background investigations and therefore immune from any distinct legal challenge. Indeed, Defendants do not dispute that their own documents clearly distinguish the DoD investigations from the adjudications.

Third, the Administrative Record is barren of any reference to the MSSD because USCIS's sole justification for its July 7 Policy – at least until Plaintiffs learned about and challenged the MSSD aspect of it – was that it was appropriate to await the DoD enhanced background investigations because they could yield evidence that may bear upon a naturalization applicant's good moral character or attachment to the Constitution, two factors within USCIS's

[4] For similar reasons, Defendants' reference to the naturalization of 850 or 1,000 class members as evidence of the reasonableness of the July 7 Policy is inapposite. The class members who have naturalized to date are the ones who received favorable MSSDs. The fact that they were able to naturalize notwithstanding this extra-statutory precondition to naturalization does not mean that the MSSD Policy is lawful. It means only that these particular soldiers were able to persevere and naturalize despite the illegality of the MSSD Policy and the extreme hardship they suffered.

purview. Never once did USCIS seek to justify the July 7 Policy on the grounds that it also needed to await DoD's subsequent military suitability determination. Defendants point to nothing in the Administrative Record that shows that USCIS ever understood what an MSSD entails or how it relates to naturalization standards. Nor could it because the assessment being made in an MSSD is whether the soldier would meet the qualifications for obtaining a Top Secret security clearance, which the Supreme Court has made clear "does not equate with passing judgment upon an individual's character" and the denial of which "in no way implies disloyalty or any other repugnant characteristic." *Dep't of Navy v. Egan*, 484 U.S. 518, 528-29 (1988) (internal quotation marks omitted).

Further, there is no Administrative Record support for Defendants' current contention that USCIS believed that the MSSD was the "culmination" of the background investigations. And even if USCIS held such a belief, it was demonstrably wrong and cannot be legally sustained. Nor is there any record support for Defendants' newfound argument that it is more efficient or a resource-saver for USCIS to wait for DoD to make its MSSD determination before acting on a soldier's naturalization application. This argument makes no sense in any event, since USCIS repeatedly has represented that it will make – indeed that it must, by law, make – its own independent assessment of the information gathered during DoD's background investigation. Since USCIS claims it must review the information anyway, it cannot be more efficient to wait for the MSSD before doing so.

Fourth, Defendants claim that it is appropriate for USCIS to condition naturalization adjudication on an MSSD because an unfavorable MSSD may result in a soldier's uncharacterized discharge which may then render the soldier ineligible to naturalize. Here again, there is no evidence in the Administrative Record showing that USCIS ever truly considered this

rationale, let alone analyzed it under applicable law. Had USCIS done so, as explained below, it readily would have determined that waiting for discharges defies the express language and intent of 8 U.S.C. § 1440 and that by law, 10 U.S.C. § 12685, an uncharacterized discharge must be treated as a "discharge under honorable conditions" and would not preclude naturalization.

Nor do Defendants offer any serious defense to Plaintiffs' separate constitutional challenge to the MSSD Policy. Plaintiffs have shown that the MSSD Policy is an extra-statutory pre-condition to naturalization. Congress did not mandate that immigrant soldiers seeking to naturalize must first complete, much less "pass," the equivalent of a Top Secret security clearance background investigation and adjudication. Quite the contrary, Congress enacted an expedited path to naturalization for these class members with the sole military condition being an honorable service certification. Each class member, by definition, already has such a certification. Congress specified that USCIS apply no greater or more stringent "good moral character" standards to these soldiers than USCIS would apply to any other naturalization applicant. The requirement that these soldiers – unlike any other naturalization applicants – must undergo DoD MSSD adjudications before they can naturalize is a clear violation of the Uniform Rule of Naturalization and must be set aside.

II. ARGUMENT

A. THE INVESTIGATORY ASPECT OF THE JULY 7 POLICY IS MOOT

In their motion, Plaintiffs established that the investigatory aspect of the July 7 Policy likely was moot for purposes of the present APA § 706(2) challenge because Defendants have completed the SSBI/Tier 5, NIAC, and CI investigations for each class member for whom DoD intends to complete such investigations. Dkt. 177 ("Pl. Memo") at 16. In other words, it is no longer relevant whether or not it was unlawful for USCIS to implement a policy of delaying class member naturalization applications until DoD completed the enhanced background

investigations. The relevant inquiry, as identified by the Court when it established this briefing schedule, is whether or not the MSSD aspect of the USCIS policy is unlawful.

Crucially, Defendants do not deny the facts put forth by Plaintiffs demonstrating partial mootness – namely, the evidence that the investigations are done. Rather, Defendants' weak response is reduced to a footnote in which they assert: "[W]hile it is certainly true that the vast majority of class members have completed the Tier 5, NIAC and CI investigation portions of the background check, Defendants cannot confirm that this is true for every class member." Gov't Memo at 19 n.11. That empty response speaks volumes on this point. Defendants have had months to "confirm" or refute Plaintiffs' assertion, yet they have not done so. At the same time, their reporting to this Court does not identify any pending background investigation for any class member. Dkt. 224-2 (December 13, 2018 report shows dates in the "CI Screening Results at DoDCAF" column for 985 entries, shows "N/A" for the remaining 25 entries, and does not show a "pending" or blank entry in this column for any soldier).[5] Moreover, a DoD witness recently confirmed in federal court trial testimony that MAVNI investigations are "100% complete" and have been since April 2018.[6] On this record, the investigatory aspect of the Policy is moot.

[5] With respect to those class members who were discharged prior to completion of the investigations and are not being reinstated, any application of the investigatory aspect of the July 7 Policy would be *per se* arbitrary and capricious because USCIS would be waiting for an event that will never occur, *i.e.*, completion of the investigation. *See* Pl. Memo at 17.

[6] Specifically, at the trial in *Tiwari v. Mattis*, No. C17-00242-TSZ (W.D. Wash.), Joseph Simon, the senior counter-intelligence advisor to the Army G2 and Chief of Staff, testified that all CI reviews for MAVNIs were completed as of April 2018. *See* November 29, 2018 Trial Testimony of Joseph Simon at 134:3-15 and 135:4-13 ("Q: For those MAVNI service members for whom the CIFSR is a required part of their initial screening, the service members who completed their suitability requirements after September 30, 2016 [ ], do any of those service members still need a completed CIFSR? A. No. Q: Is there 100 percent completion of those CIFSRs? A: 100 percent."). This Court may take judicial notice of this. *Fletcher v. Evening Star Newspaper Co.*, 133 F.2d. 395, 395 (D.C. Cir. 1942) (per curiam); *see also Lark v. West*, 182 F. Supp. 794, 796 (D.D.C. 1960), *aff'd* 289 F.2d 898 (D.C. Cir. 1961).

Notwithstanding this evidence, Defendants contend that the investigatory aspect of the July 7 Policy remains relevant on the theory that is inseparable from the adjudicatory aspect of the Policy. *See* Gov't Memo at 19 n.11. According to Defendants, the two aspects of the policy cannot be "bifurcate[d]" and must only be considered "as a whole." *Id.* This argument is superficial and cannot withstand scrutiny. To the extent that the July 7 Policy itself requires the completion of *both* stages, there is no legal impediment to an independent assessment of each stage. *See, e.g.*, *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 236-37 (D.D.C. 2005) (Huvelle, J.) (vacating only part of a rule because the unlawful provisions were severable). Moreover, focusing on the MSSD Policy is proper, not only because this Court specifically directed the parties to separately address it (Dkt. 159 at 1), but also because, as a practical matter, the MSSD Policy is what currently is preventing USCIS's adjudication. *See* Pl. Memo at 4-7.

Furthermore, even if the Court were to accept Defendants' claims that the July 7 Policy is "a single final agency action" that cannot be "bifurcated," that would mean only that the remedy is to set aside the entire rule – not just the MSSD aspect of it – to enable USCIS to take the necessary corrective action. *See, e.g.*, *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 1000 (D.C. Cir. 2013) (vacating an entire order because the unlawful provisions of the order were not severable). Otherwise, an agency would be permitted to take any action it desired – regardless of its lawfulness – simply by bundling its unlawful actions with other, lawful ones. Defendants cite no authority for such an alarming proposition.[7]

[7] Beyond the investigations, there is ample evidence that the first half of the adjudicatory stage – the MSSR/NSD completed by DoDCAF – has been completed as well for class members. This evidence includes Defendants' reporting on the individual Plaintiffs/class representatives, all of whom have MSSRs. If so, the only remaining task is the Army HR department's determination (or MSSD) after "weigh[ing] any known risk factors against the need for that individual's skill set" (SOF ¶ 16). Here, in particular, there is no arguable overlap between that balancing analysis and any standard for naturalization relevant to USCIS.

B. THE MSSD POLICY VIOLATES 5 U.S.C. § 706(2)

1. The MSSD Policy Is Not in Accordance with Law

USCIS's MSSD Policy is contrary to law and must be set aside by the Court. MSSDs (and the NSD determinations on which they are based) are military-specific personnel adjudications conducted for purposes of authorizing or maintaining a service-member's clearance to access classified information or to hold a national security position. These military-specific adjudications – applicable only to DoD service members and personnel – are performed by military departments and units that have no lawful role in the naturalization process and no expertise under the Immigration and Nationality Act ("INA"), and involve standards that are fundamentally different than the "good moral character" requirement of the INA. Although Defendants repeatedly insinuate otherwise, this lawsuit does not challenge ***DoD's policy*** of requiring MSSDs for its personnel, including class members here. Instead, this lawsuit challenges ***USCIS's policy*** of refusing to adjudicate naturalization applications for class members unless and/or until DoD informs USCIS that the soldier has received a final MSSD.

Nothing in the federal immigration law that authorizes expedited naturalization for the soldier class members here even contemplates separate MSSD ***adjudications*** as a prerequisite to naturalization. And, while afforded every opportunity to do so in this litigation, Defendants have failed to identify any other circumstance in which USCIS requires that an applicant must first complete an MSSD adjudication before he or she can become a naturalized citizen. Defendants' failure to support their position is not surprising, given that DoD's sole authorized role in the naturalization process is complete once it certifies a soldier's "honorable service." 8 U.S.C. § 1440(b)(3). That determination already has been made by the Army for each class member. Dkt. 72 at 1 (certifying class of soldiers who have "been issued Form N-426s certifying honorable service"); *see also Nio v. Dep't of Homeland Sec.*, 323 F.R.D. 28, 32 (D.D.C. 2017).

Instead, Defendants' only response is that "Congress left it to the discretion of USCIS to decide what investigation and which background checks are necessary for any naturalization application." Gov't Memo at 14; *see also id*. at 21 ("The statute can in no way be read to somehow limit USCIS's discretion in how it conducts statutorily required background investigations."); *id.* at 1, 16-17 (same). Of course, that sweeping assertion is not accurate. USCIS surely cannot act in a discriminatory manner or apply its discretion in an unconstitutional fashion. Nor could the agency create a "ceiling" that, from a practical perspective, makes naturalization unattainable. Likewise, USCIS cannot act contrary to the underlying statute or ignore the statutory requirements imposed by the APA. Moreover, the "floor" identified by Defendants certainly has been met for this population because they are subject to not only one FBI background check, but two, as well as the other aspects of the DoD background checks, such as the Tier 5 investigation. But the Court need not even entertain Defendants' argument about discretion relating to *investigations* because MSSDs are adjudications, not investigations. Thus, any discretion that USCIS has in the area of investigations is irrelevant to this case now.

2. The Administrative Record Does Not Provide a Reasonable Justification for the MSSD Policy

As Defendants acknowledge, the record must show that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Gov't Memo at 13 (alterations in original) (internal quotation marks omitted). Yet, Defendants have not come close to satisfying these standards for the MSSD Policy. Indeed, the Administrative Record for the July 7 Policy *never even mentions MSSDs* or any similar type of adjudication, let alone explains why such an adjudication should be a prerequisite to naturalization. *DHS* Defendants admit as much by acknowledging that they rely on the *DoD* Administrative Record for DoD's separate and

subsequent October 13 Policy (the "DoD CAR") on this point: "Here, the 'agency's path' is easily discerned simply by reading the July 7 Guidance together with the September 2016 Memo to which it cites. USCIS CAR at 5; DoD CAR at 0130." Gov't Memo at 26-27.

The most glaring problem with Defendants' contention is that USCIS, itself, did not "read" or consider the September 2016 Memo when it developed the July 7 Policy. We know this for certain because USCIS did not include the September 2016 Memo when it certified the Administrative Record for the July 7 Policy. When *Plaintiffs* sought to supplement the USCIS record with the September 2016 Memo and other documents (Dkt. 133 at 11-12), Defendants' immediate response was as follows: "We've read plaintiffs' motion and we believe that the record, as certified by Mr. Renaud, is the record in this case." April 11, 2018 Tr. 15:9-15.[8] As a result, USCIS's litigation description of the "agency's path" as being tied to any specific contents of the September 2016 Memo is demonstrably false.

Moreover, while Plaintiffs recognize that the Court has authorized Defendants to rely on the DoD CAR where "necessary" for rebuttal, Dkt. 217 at 1, the agency cannot alter historical facts or create new rationales. The pertinent inquiry here is whether the agency "examined" the relevant information. Here, USCIS admitted (repeatedly and clearly) that it did not.

Defendants claim that USCIS's failure to reference an MSSD in the Administrative Record simply is because the naming convention came later. Gov't Memo at 26. But that assertion, too, is wrong and directly refuted by the MAVNI policy flow for FY2016 and FY2017, which repeatedly references the "MSSD." PA 155-157. Regardless, Defendants never explain why USCIS did not use any other naming convention for the MSSD or reference the adjudicative guidelines or Army suitability standard. Moreover, Defendants never explain how USCIS

[8] To this day, Defendants do not acknowledge the September 2016 Memo as part of the USCIS Administrative Record, as Defendants cite to the DoD CAR when referencing it.

supposedly managed to examine and consider any important aspects of the September 2016 Memo, and yet not know the difference between a Tier 5 and a DCII three weeks later (AR 260). Defendants also ignore that the agency decision maker, on the day the July 7 Policy was released, in sworn testimony referenced the September 2016 Memo and the "background investigations" it required (AR 248), where the September 2016 Memo only refers to two items as a "background investigation" – the Tier 3 and Tier 5 conducted by OPM.

Defendants cannot claim that USCIS understood, let alone considered, what an MSSD was or entailed at the time it issued the July 7 Policy. USCIS also cannot know what an MSSD may entail in the future because, according to USCIS, it does not have any control over DoD. *See* Dkt. 128 at 23 (Defendants arguing, with citation to a Renaud declaration, that "USCIS has no control over" DoD's process and "USCIS has no ability to ensure" that the process will remain the same and therefore it is reasonable for USCIS to *not* rely on DoD in order to ensure that there is a procedure "performed consistently over time for all naturalization applicants"). By failing to even consider what an MSSD entailed, USCIS could not have provided "a rational connection between the facts found and the choice made."

Finally, the only justification for the July 7 Policy actually set forth in the Administrative Record, and repeated throughout Defendants' submissions, is that the enhanced DoD background checks might reveal "derogatory information" that USCIS would consider in adjudicating a soldier's application. SOF ¶ 18; *see also* Gov't Memo at 2, 11, 14, 17-18, 20-21, 23, 24, 25.[9] But no matter how many times Defendants repeat it, this assertion does not support the *MSSD*

[9] No MAVNI soldiers have been denaturalized. *See* November 28, 2018 Trial Testimony of Stephanie Miller at 130-131, *Tiwari v. Mattis*, No. C17-00242-TSZ (W.D. Wash.) ("Q: How many naturalized U.S. citizens who have entered through the MAVNI program have been denaturalized? A: None as of yet."). This fact puts into question the materiality of the information about two MAVNI soldiers mentioned in the Administrative Record that USCIS "would have considered" (AR 2).

Policy. Rather, the "information" that USCIS claims it will consider is gathered and "adjudication ready" for USCIS purposes no later than the completion of the DoD investigation reports, which occurs before the MSSD even begins. SOF ¶ 3. Not a single document within the entire Administrative Record is an MSSR/NSD memo or MSSD memo.

For the very same reason, any purported "national security" concerns have no relevance here. Class members subjected to the MSSD Policy already have completed their DoD investigations. All of the investigatory information that will be gleaned about the applicant is already assembled and available. USCIS is thus able to make its own determination (as it must) as to whether an individual is eligible to naturalize under the INA.[10]

Defendants do not dispute that all of the relevant investigation information is gathered before the MSSD adjudication begins. Yet, for the first time in this litigation, they posit an entirely new excuse for USCIS's inaction, arguing that "nothing in the administrative record remotely supports the claim that USCIS has ready access to" the underlying investigation materials that are provided to DoDCAF. Gov't Memo at 27. If true (as there is no Administrative Record cite to support this new assertion), it is both disturbing and consequential. The Court will recall that USCIS's entire justification for its July 7 Policy was that it needed to consider the information gathered by DoD. *See* Gov't Memo at 2, 11, 14, 20-21, 23, 24, 25; *see also id.* at 17-18 ("USCIS has determined that DoD background checks are a valuable source of information that may uncover facts directly bearing on the applicant's eligibility for

[10] Defendants tout two instances of DoD providing "interview transcripts" to USCIS (Gov't Memo at 23 n.13). Regardless of whether Defendants' description of events is accurate (which it is not because these "transcripts" are not from any aspect of the so-called DoD enhanced background investigations but rather are reports from separate *criminal* investigations being conducted by DCIS and the Army CID), what is important to the current question is the fact that the CI reports, which are complete and available *prior* to the MSSD adjudication starting, include the CI interviewer's "transcript." In other words, even Defendants' own tortured justification for the July 7 Policy demonstrates why its MSSD aspect is not supported.

naturalization"). Thus, almost seventeen months after the July 7 Policy enactment, USCIS is now suggesting that it does not have the means to actually access and evaluate the investigative information it claimed was necessary to make its naturalization decision. A policy that lacked – and perhaps still lacks – a means for USCIS to access the DoD information USCIS says it is waiting for is facially arbitrary and capricious. This is particularly troubling for those class members who have received unfavorable MSSDs, since it means that USCIS cannot evaluate for itself the underlying "derogatory" information.

Because the Administrative Record fails to provide a reasoned explanation or reasonable justification for the MSSD Policy, the policy is arbitrary and capricious and should be set aside.

3. Defendants' Flawed "Waiting for Discharge" Argument

Defendants also attempt to prop up the MSSD Policy by speculating that a soldier with an unfavorable MSSD might be discharged in the future with an "other than honorable" discharge characterization, thereby impacting the soldier's eligibility to naturalize. Gov't Memo at 29.

This contention fails for numerous reasons. ***First***, USCIS's justification is contrary to law. According to Defendants, "failure of these background checks could lead to discharge from the military and make an individual unable to meet the honorable service requirement." Gov't Memo at 9. As Defendants recently articulated, "[t]he government thinks that an uncharacterized discharge would not be sufficient to naturalize under 1440." Oct. 3, 2018 Tr. 38:23-25. This is a fundamental misstatement of the law.

Chapter 14 of Army Regulation 135-178, entitled "Separation for Other Reasons," governs the separation of members of the Army Reserve for "security reasons." *See* AR 135-178 at 14-1*h* (discharge "*For Security Reasons*"). These regulations make clear that an "other than honorable" discharge is *not authorized* in connection with any discharge under Chapter 14, including any discharge for "security reasons." Specifically, Regulation 14-2 provides:

> The service of a Soldier separated under this section will be characterized as honorable, unless an uncharacterized description of service is required by paragraph 2-11, or a characterization of general (under honorable conditions) is warranted under chapter 2, section III.

AR 135-178 at 14-2. Accordingly, under Army regulations, a soldier discharged "for security reasons" may receive only a discharge characterized or described as honorable, general (under honorable conditions), or uncharacterized. The regulations further establish that an uncharacterized description of service is *not* a separation "under other than honorable conditions." *See* AR 135-178 at 2-7 (distinguishing between separation "with characterization of service as honorable, general (under honorable conditions) or under other than honorable conditions" and separation "with an uncharacterized description").

Moreover, 8 U.S.C. § 1440(a) is clear that any individual who has separated from service is eligible to naturalize if he or she "was separated under honorable conditions." Regardless of the label attached by the Army, any discharge given to a class member in this case – including any "uncharacterized" discharge – is "under honorable conditions" *as a matter of federal law*, unless a specific finding is made by a court martial or other board of officers that the discharge is under other than honorable conditions:

> A member of a reserve component who is separated for cause, except under section 12684 of this title [irrelevant here], is entitled to a discharge under honorable conditions unless … the member is discharged under conditions other than honorable under an approved sentence of a court-martial or under the approved findings of a board of officers convened by an authority designated by the Secretary concerned.

10 U.S.C. § 12685. DoD and other military regulations likewise make clear that uncharacterized or "entry level discharges" must be treated as "honorable" or "general-under honorable conditions" discharges for all purposes for which a characterization is required.[11]

[11] *See* Department of Defense Instruction 1332.14 at Enclosure 3, 3c(1)(c) ("With respect to administrative matters outside this instruction that require a characterization as honorable or

Nothing in the Administrative Record or otherwise suggests that the many hundreds of MAVNI soldiers in this Class will be subjected to courts-martial or other boards of officers to make the specific findings necessary to issue discharges under other than honorable conditions. In fact, even when the Army signals the presence of "derogatory" information that will require separation/discharge, the Army provides MAVNI soldiers with N-426s acknowledging their service as honorable. For example, Plaintiff Wanjing Li was provided another N-426 in June 2018 that had the following language in the "Remarks" section of the form:

Significant derogatory information found to require separation.

But, in Part 5 of the form, the Army certified as follows:

Part 5. Character of Service (To be completed by Certifying Official)

State whether the requestor served honorably or is currently serving honorably for each period of military service the requestor served (refer to **Part 3. Periods of Military Service**). If you answer "No," provide details in **Part 7. Remarks**.

1. Honorable Period of Military Service 1 ☒ Yes ☐ No

Plaintiff Li is not an isolated example. Dozens of N-426s were completed in this exact same manner. If the Army realizes that it cannot ignore this law,[12] USCIS should realize it as well.

An agency rule founded on a misunderstanding of applicable law is not adequately justified. Because USCIS's policy is based on the erroneous proposition that a MAVNI's

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general, an entry-level separation will be treated as the required characterization."); 32 C.F.R. § 724.109(a)(4)(ii) (Navy Regulations) ("With respect to administrative matters outside the administrative separation system that require a characterization of service as Honorable or General, an Entry 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.").

[12] *See Kirwa v. Dep't of Def.*, 285 F. Supp. 3d 21, 28 (D.D.C. 2017) ("[T]he United States Army Human Resources Command published a document ... which ... states: 'As a general rule, a Soldier is considered to be serving honorably unless a decision has been made, either by the Soldier's commander or a court martial, to discharge him/her under less than honorable conditions. ... If Under Less than Honorable Conditions, the N-426 character of service item will NOT read honorable.'").

potential future discharge is relevant to the question of naturalization eligibility, it must be set aside.

Second, the "possibility" that a soldier with an unfavorable MSSD "may" "ultimately" be discharged under other than honorable conditions is rank speculation. Defendants have provided no evidence that a single MAVNI soldier ever was discharged with an other than honorable characterization based on a completed unfavorable MSSD.

Third, § 1440 is clear that a soldier's discharge may be considered for purposes of naturalization only if the discharge *already* has occurred. Specifically, § 1440(a) provides:

> Any 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, air, or naval forces of the United States during ... [any] period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who, ***if separated*** from such service, was separated under honorable conditions, may be naturalized as provided in this section ....

8 U.S.C. § 1440(a) (emphasis added). Section 1440(c) specifies the means by which *future* discharges are to be dealt with under the statute:

> Citizenship granted pursuant to this section may be revoked in accordance with section 1451 of this title 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).[13] Thus, Congress made the relevant policy determination on this issue and resolved the question in favor of soldiers who volunteered to serve in times of armed conflict.

Finally, Defendants' argument also is contrary to Congress' decision to eschew minimum-service/waiting-period requirements. On its face, § 1440 contains no minimum-service

[13] Defendants admit that this Court already has stated that honorable service under § 1440 refers to *past* service. Gov't Memo at 29-30 n.17. Defendants' attempts to undermine this Court's finding (*id.*) fail as they have nothing to do with the unequivocal statement based on statutory language.

requirement and the statutory scheme as a whole confirms that no such requirement was intended. For example, 8 U.S.C. § 1439, which provides a path to naturalization for those serving in the armed forces during peacetime, includes a minimum period of service requirement. Congress knew how to include a minimum-service requirement as a condition of eligibility for naturalization and did not do so for soldiers seeking naturalization under § 1440.[14]

Obviously, any currently serving soldier faces a future discharge. Thus, any rule that allowed USCIS to stop processing naturalization applications based on the speculative possibility of an adverse future discharge necessarily would create *de facto* minimum-service and waiting-period obligations. *See Grace v. Whitaker*, No. 18-cv-01853, 2018 U.S. Dist. LEXIS 213105, *4-5, 59 (D.D.C. Dec. 19, 2018) (finding unlawful USCIS policies because "it is the will of Congress—not the whims of the Executive—that determines the standard"); *Plunkett v. Castro,* 67 F. Supp. 3d 1, 10 (D.D.C. 2014) (Huvelle, J.) ("An agency action is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider" (internal quotations omitted)). Indeed, under Defendants' rationale, USCIS could stop the adjudication of all military applications pending the individual applicant's complete performance of his or her multi-year service obligation.

[14] The legislative history further confirms the intent of Congress on this point. The 1968 Senate Report compares, for example, 8 U.S.C. § 1440 (§ 329 of the INA) with 8 U.S.C. § 1439 (§ 328 of the INA) and makes clear that Congress intentionally omitted any minimum service requirement for those serving during wartime and naturalizing under § 1440: "The peacetime serviceman must have a minimum of 3 years' service, ***the wartime serviceman has no minimum required***." S. Rep. No. 90-1292, at 5 (1968) (emphasis added); *see also Nolan v. Holmes,* 334 F.3d 189, 201 (2d Cir. 2003) (relying on the 1968 Senate Report and the differences between § 1440 and § 1439 to determine Congressional intent). The Senate Report likewise makes clear that § 1440(a) includes no "waiting period." S. Rep. No. 90-1292, at 4 ("Section 329 of the Immigration and Nationality Act deals with wartime service, and provides that an alien or noncitizen national who has served honorably ... may be naturalized ***without regard to*** the requirements concerning age, residence, physical presence, court jurisdiction, or ***a waiting period***." (emphasis added)).

4. Defendants' New Justifications Are Impermissible and Meritless

Facing the reality that the Administrative Record offers no support for (or even any mention of) the MSSD Policy, Defendants conjure up new arguments. These late-developed rationalizations cannot be considered because they, too, find no support in the Administrative Record. *See Oceana*, 384 F. Supp. 2d at 224-25 ("In evaluating whether the agency articulated a basis for its decision, the Court cannot rely on post hoc rationalizations. Instead, it must look to the justification provided by the agency in the record." (citing *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1276 (D.C. Cir. 2005))); *see also Kirwa v. Dep't of Def.*, 285 F. Supp. 3d 257, 270 n.11 (D.D.C. 2018) ("Miller's explanation for the October 13th Guidance is a post-hoc rationalization that was adopted after litigation was instituted …."). Moreover, all of the agency's post hoc rationalizations otherwise lack merit and should be rejected by the Court on that account.

(a) Defendants' Piggy-Backing "Process" Argument

A principal new argument advanced by Defendants is that the MSSD adjudication is part (*i.e.*, the "conclusion" or "culmination") of the enhanced DoD background check "process." *See, e.g.*, Gov't Memo at 2, 20, 26, 34. Defendants' after-the-fact labeling does not pass muster because an agency is required to provide a contemporaneous justification for its rules. Moreover, this self-serving labeling is contradicted by DoD's documents (from before and after July 7, 2017), which illustrate when the background checks are complete and "adjudication ready."

Again, all of the additional information gathered and generated during the DoD background checks is, by definition, complete and available before the MSSD can even begin. And the MSSD assessments cite only to that very same information, meaning that USCIS could do the same if it intended to rely on the enhanced background check information to make a

"good moral character" assessment. This point is illustrated by the MSSR ("military service suitability recommendation") memo, generated by DoDCAF during the adjudication process, and the MSSD memo, generated by the Army G-1. SOF ¶ 4. MSSR memos simply ***copy and paste*** language from the standards that are being applied (*i.e.*, one or more of the Adjudicative Guidelines) and ***cite to*** pages from the underlying investigative reports, as illustrated below:

> Per the Adjudicative Guidelines, conditions that could raise a security concern and may be disqualifying include:
>
> CIFSR pages 1-3, 13
>
> The Subject's foreign contacts and/or interests make them vulnerable to be manipulated or induced to help a foreign state and is not in the best interest of the United States and therefore is of a security concern. (Guideline B, Attachment 5)

And the MSSD memos are even less informative as they merely identify the Adjudicative Guidelines factor (*e.g.*, Foreign Influence) relied on for an unfavorable MSSD. Defendants do not dispute these points.[15]

The fact that these memos rely on and cite only to the underlying background investigation reports (*e.g.*, the CI report referred to as the "CIFSR" above and the SSBI report), proves that DoD collects all of the information ***prior*** to the adjudications conducted by the DoDCAF and the Army G-1. In other words, the background information is collected and available to an adjudicator well before the supposed "concluding" MSSD. Given that the core investigation reports include not only the information collected but findings by OPM (in the case of SSBIs), and the CI interviewer and CI reviewer (in the case of CIFSRs), the actual "conclusion" of the background investigations occurs when these reports are generated and not when the information within those reports is separately analyzed for military personnel purposes

[15] Plaintiffs are prepared to provide the Court with example SSBI and CI reports as well as example MSSR and MSSD memos.

by DoDCAF and the Army under the Adjudicative Guidelines and then the Army's personnel standards. When the background investigation information is "adjudication ready" for DoD purposes (SOF ¶ 3), it is equally adjudication ready for USCIS purposes.

Thus, Defendants' rationale cannot support the MSSD Policy, regardless of the labeling. USCIS's litigation position – portrayal of the MSSD as being part of the background check process – warrants no more credence than would an argument that service at BCT or completion of a MAVNI's "continuous monitoring" by DoD (*i.e.*, once a soldier has completed his/her full term of service) is the "conclusion" of the investigation "process." This Court should see the MSSD Policy for what it is: USCIS capriciously moving the naturalization goal post well beyond anything that falls within the meaning of a background investigation.

(b) Defendants' Unsupported and Unfounded "Resources" Argument

Next – and without providing any supporting data or analysis whatsoever – Defendants claim that the MSSD Policy is justified because waiting for the MSSD purportedly conserves "resources." Gov't Memo at 28.

However, nowhere in the Administrative Record is the concept of conserving "resources" mentioned, let alone explained, as the basis for the July 7 Policy. Rather, the agency's express justification for the rule is that the enhanced background checks might reveal information that USCIS would consider in making its naturalization eligibility determination. Indeed, Defendants' new "resources" argument is hopelessly inconsistent with the agency's stated justification for the July 7 Policy. Defendants now attempt to justify the MSSD aspect of the rule by highlighting the exact opposite – that the agency will ***not*** consider the information

revealed in the background checks for "the vast majority" of the soldiers in question.[16] Once again, the agency has tied itself up in knots with its ever-shifting claims.

Not only is this so-called "resources" rationale missing from the Administrative Record, but there is no evidence that USCIS considered this rationale at all until its most recent briefing. In fact, the primary "efficiency" rationale offered by USCIS in its prior briefing was that its MSSD Policy would "enable[] much more rapid adjudication in cases with favorable MSSDs when compared to a process in which USCIS would obtain the raw background check research from DoD without waiting for the MSSD." Dkt. 186 at 20. However, as Plaintiffs established in the prior round of briefing, USCIS's MSSD Policy slows down naturalization application processing for all applicants. Those who eventually receive favorable MSSDs and who otherwise would have moved very quickly to naturalization (because USCIS presumes there is no material derogatory information in their background reports) still must wait for completion of those lengthy MSSDs before USCIS will adjudicate their applications. The remaining group of soldiers (*i.e.*, those who receive unfavorable MSSDs) must first await completion of lengthy MSSD adjudications by DoD and ***then*** must await the ***further*** review of the same underlying files by USCIS (assuming that DoD will provide them). Now that Plaintiffs have refuted USCIS's "rapid adjudication" argument, Defendants have changed their "justification" yet again, almost seventeen months post-Policy enactment, further exposing the Policy's arbitrary and capricious nature. *See Plunkett*, 67 F. Supp. 3d at 10 ("An agency action is arbitrary and capricious if the agency ... offered an explanation for its decision that runs counter to the

[16] Defendants do not explain (or support) what they mean by "vast majority," but any suggestion that even the majority of class members are receiving favorable MSSDs is belied by Defendants' own reporting. Out of approximately 2,500 *Nio* class members, Defendants' most recent reporting indicates that less than 1,000 have naturalized, and the total naturalized plus "suitable" number is 1,240. Dkt. 224-2.

evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." (internal quotations and citations omitted)).

In any event, Defendants offer no facts or data (in the Administrative Record or otherwise) to support their contention that it is more efficient for USCIS to proceed in this manner. Defendants' arguments are bald, last-minute litigation-driven assertions that cannot salvage the MSSD Policy.

Finally, Defendants' argument raises another serious question about the legality of the MSSD Policy. As now articulated, the policy creates a mechanism by which USCIS outsources to DoD an initial assessment ***under the immigration laws*** of the materiality of information for purposes of determining good moral character and attachment to the Constitution. Under USCIS's MSSD Policy, it is ***DoD's judgment and determination*** that places soldiers into one of two presumptive categories: one category where derogatory information is deemed immaterial for purposes of the immigration laws (those found to have favorable MSSDs) and one category where derogatory information is deemed material for purposes of the immigration laws (those found to have unfavorable MSSDs). And DoD is performing these initial assessments based on standards and factors (such as the Adjudicative Guidelines, military needs, *etc*.) that are unmoored from the naturalization laws. Defendants admit that the legal standards for MSSD determinations and the standards for naturalization are not coextensive, but merely "overlap," and that "some factors considered [in the MSSD] may be less relevant in the naturalization context." Gov't Memo at 28. Indeed, Defendants further admit that DoD may adjudicate an MSSD unfavorably because, in its view, an individual may become a "disciplinary case[]" or "disrupt good order, morale and discipline," Gov't Memo at 7 – factors which are unique to military service and have no bearing on eligibility for naturalization.

Moreover, even if an unfavorable MSSD is based on so-called "security concerns," DoD's security decisions are fundamentally different than that which might be relevant to naturalization. An MSSD is performed by DoDCAF solely to determine a soldier's eligibility to obtain clearance to access classified information or to hold a national security position. That is the very reason the MSSD process includes application of the Adjudicative Guidelines. As the Supreme Court has made clear, such clearance determinations have no bearing on good moral character. *Egan*, 484 U.S. at 528-29. Yet, Defendants nevertheless have admitted that, in applying the July 7 Policy, USCIS is equating an unfavorable MSSD or so-called "unmitigable derogatory information" to lack of good moral character for naturalization purposes. *See* Oct. 3, 2018 Tr. 45:23-25. That plainly is improper given the difference in legal standards.

Likewise, on the existing record, USCIS's converse presumption – that a favorable MSSD must mean "that no significant derogatory information was located during the DoD enhanced background checks" – is not supported, given that the adjudicatory aspect of the DoD process allows for a favorable MSSD not because of the lack of so-called "derogatory" information in the background checks, but because the Army's need for the soldier's skills outweighs the information (SOF ¶ 16). The outsourcing of such determinations to DoD under these conditions plainly gives rise to the potential for contradictory and discriminatory results based solely on military skills or a military commander's preference, enabling one soldier to naturalize and one not, notwithstanding background checks yielding similar or identical so-called "derogatory information."

No immigration law permits DoD to make determinations (presumptive or otherwise) regarding the materiality of information under the immigration laws, and USCIS has no authority or basis for outsourcing such determinations to DoD. At a minimum, USCIS must thoroughly

justify the need and basis for such outsourcing in the Administrative Record for such action, which it has failed to do in this case. *See, e.g., Yuen Jung v. Barber*, 184 F.2d 491, 497 (9th Cir. 1950); *Khan v. Gonzales*, No. 8:07CV29, 2007 U.S. Dist. LEXIS 52489, at *5-7 (D. Neb. July 18, 2007); *see also Egan*, 484 U.S. at 528-29.

(c) Defendants' Incongruous "MAVNIs vs. LPRs" Argument

Defendants attempt to justify the MSSD Policy with yet another reason not found in USCIS's Administrative Record: by contrasting MAVNIs and lawful permanent residents ("LPRs"). *See* Gov't Memo at 1, 14; *see also id*. at 24 n.15. Defendants' attempt to draw justification from such a comparison collapses upon examination.

Congress explicitly created a separate path to naturalization for foreign nationals serving in the military who are ***not*** LPRs. 8 U.S.C. § 1440(a) ("whether or not he has been lawfully admitted to the United States for permanent residence"); *see also* Gov't Memo at 4 ("naturalization under section 1440 does not require the applicant to be a lawful permanent resident"). In the past, USCIS correctly interpreted this language as Congress's recognition that the good moral character and attachment to the Constitution requirements for naturalization are less rigorous – from a look-back period perspective – for soldiers naturalizing under 8 U.S.C. § 1440.[17] When it loosened the requirements for them, Congress clearly knew and understood that soldiers applying under § 1440 were not LPRs. Defendants cannot now use the fact that these soldiers are not LPRs to justify subjecting them to naturalization standards that are more difficult to satisfy. *Plunkett,* 67 F. Supp. 3d at 10 ("[The] reviewing court shall set aside an agency action

[17] As opposed to the standard five-year requirement, each class member need only show that he/she "[h]as been, for at least *one year* prior to filing the application for naturalization, and continues to be, of good moral character, attached to the principles of the Constitution of the United States, and favorably disposed toward the good order and happiness of the United States." 8 C.F.R. § 329.2(d) (emphasis added).

that is ... in excess of statutory jurisdiction, authority or limitations."). Indeed, the law is clear that, except where the naturalization requirements are ***eased*** for these soldiers, soldiers naturalizing under § 1440 should be subject only to the same requirements that are imposed for naturalization generally. *See* 8 U.S.C. § 1440(b).

Defendants' "LPR" argument fails for another reason: The record establishes that DoD treats all non-citizen soldiers – including MAVNIs and LPRs – as risks requiring additional background checks and a second MSSD, with both sets of soldiers being "adjudication ready" at the same point and then being subjected to the same MSSD process. *See* MAVNI FY18 Policy Flow, Dkt. 119-20 (PA 154) (including LPRs and MAVNIs in MSSD "flow" after the background investigations are complete and "adjudication ready"); *see also* Order Granting Class Certification, Denying Motion to Dismiss, and Granting Preliminary Injunction, *Kuang v. Dep't of Def.*, No. 3:18-cv-03698-JST, Dkt. 68 (N.D. Cal. Nov. 16, 2018) (issuing injunction against DoD in action brought by LPRs subjected to MSSD process).

Nowhere does USCIS explain how to reconcile DoD's suspicion of all non-citizens or foreign nationals, requiring MSSDs for LPRs and MAVNIs alike, with USCIS's policy that applies *only* to MAVNIs. Nor could USCIS possibly adopt DoD's risk view as that would mean that ***every*** naturalization applicant (military and civilian alike) would require at least "enhanced" background checks equivalent to a Tier 3 check (*i.e.*, the check used to determine if someone qualifies for a Secret clearance) and application of the Adjudicatory Guidelines to the Tier 3 results for naturalization purposes.

5. <u>USCIS Failed to Consider Important Factors</u>

Defendants concede that this Court can reverse an agency action if the MSSD Policy "was not 'based on a consideration of the relevant factors.'" Gov't Memo at 13. Here, USCIS failed to consider numerous important factors.

First, as discussed above, USCIS failed to consider what an MSSD adjudication entails. Indeed, USCIS was wholly ill-informed and simply incapable of making a reasoned decision about any rule that implicated MSSDs as a core component. Defendants do not dispute that MSSD adjudications use the Adjudicatory Guidelines standards developed to govern access to classified information or to hold a national security position, meaning that MSSDs must err on the side of "unsuitable" findings, a standard which contrasts sharply with the congressional premise that citizenship for soldiers should be liberally granted. The Supreme Court recognizes this distinct purpose and expressly has cautioned against using clearance assessments in the manner USCIS does here:

> ***A clearance does not equate with passing judgment upon an individual's character.*** Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States. "***To be denied [clearance] on unspecified grounds in no way implies disloyalty or any other repugnant characteristic***."

Egan, 484 U.S. at 528-29 (emphasis added) (quoting *Molerio v. FBI*, 749 F.2d 815, 824 (D.C. Cir. 1984)). Nevertheless, USCIS adopted a rule requiring the completion of MSSDs as a prerequisite to adjudication of these soldiers' naturalization applications. In fact, the agency went one step further. It adopted the presumption that a favorable MSSD adjudication indicated that there was no material derogatory information for purposes of the INA and the counter-presumption that an unfavorable MSSD adjudication indicated otherwise. Oct. 3, 2018 Tr. 45:23-25 ("If you get a negative MSSD because you have unmitigable derogatory information, you are likely to not naturalize because you don't have good moral character.").[18] Making these

[18] Good moral character determinations are to be made by the "Service" (*i.e.*, USCIS) "on a case-by-case basis taking into account . . . the standards of the average citizen in the community of

presumptions without knowing what an MSSD entails (or will entail if changed by DoD, an eventuality over which USCIS claims to have no control) is irrational.

Second, USCIS failed to consider the adverse impact that the MSSD Policy would have on the regulated population. Just by way of example, Plaintiff Almeida's DoD background investigations were "adjudication ready" in September 2017. Yet, even though his risk profile by DoDCAF was identified only as "minor" and the family ties/influence that were identified did not prevent USCIS from granting his mother and sister LPR status in the last few months, USCIS still has not acted on his naturalization application, well over one year later. Prior to implementing the July 7 Policy, the average USCIS processing time for military naturalization applications – from start to finish – was approximately four months. SOF ¶ 24.

Again, Defendants do not dispute that USCIS failed to consider the adverse impact on the regulated population when it issued its rule. Indeed, as noted above, there is no indication in the

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residence." 8 C.F.R. § 316.10(a)(2). Even if USCIS could outsource its good moral character determination, DoD is not considering the standards of an average person in the community and has not considered the applicable statute, regulations, or precedent necessary for USCIS to presume a lack of good moral character based on MSSDs. *See, e.g.,* INA § 101(f); 8 C.F.R. § 316.10(b); *Nyari v. Napolitano*, 562 F.3d 916, 920–21 (8th Cir. 2009) ("We are aware of no case law—and the government concedes that there is none—in which a court reviewing a denial of a naturalization application has found that the applicant was not a person of good moral character based on the outcome of a civil administrative proceeding."); *Nemetz v. INS*, 647 F.2d 432, 436 (4th Cir. 1981) (holding that "Congress did not intend to bar a finding of good moral character merely because of an alien's private consensual sexual activities"); *Klig v. United States*, 296 F.2d 343, 346 (2d Cir. 1961) (reversing the denial of a former Communist Party member's naturalization application and stating that "[w]e do not require perfection in our new citizens"); *Lawson v. USCIS*, 795 F. Supp. 2d 283, 295 (S.D.N.Y. 2011) (good moral character found for applicant convicted of voluntary manslaughter); *Iqbal v. Bryson*, 604 F. Supp. 2d 822, 828 (E.D. Va. 2009) (reckless driving and assault charges were insufficient to find that applicant lacked good moral character); *Zaranska v. Dep't of Homeland Sec.*, 400 F. Supp. 2d 500, 505 (E.D.N.Y. 2005) (good moral character found for applicant convicted of assaulting a police officer); *Martin v. Gantner*, 443 F. Supp. 2d 367, 371 (E.D.N.Y. 2006) (good moral character found for applicant convicted of falsification of business records); *In re Denessy*, 200 F. Supp. 354, 356 (D. Del. 1961) ("Love of one's mother or of family heirlooms cannot be equated with lack of 'attachment' for the United States."); *In re Yee Wing Toon*, 148 F. Supp. 657, 659-60 (S.D.N.Y. 1957) (illicitly sending money to mother in China is not a bar to naturalization).

Administrative Record that USCIS knew about or considered the MSSD process at all, let alone its impact, when it adopted its policy change. Instead, Defendants callously and baselessly assert that any adversities suffered by these soldiers are mere "inconveniences" that do not merit USCIS consideration. Gov't Memo at 32. This claim overlooks the fact that the irreparable harm resulting from these delays already has been litigated and decided (against Defendants) in this case. *See, e.g., Nio v. Dep't of Homeland Sec.*, 270 F. Supp. 3d 49, 62 (D.D.C. 2017) (holding that "plaintiffs are suffering irreparable harm"). Since that decision, the harm has been exacerbated across the board, including that MAVNI soldiers have lost lawful status and/or been placed in removal proceedings. Plaintiffs are aware of four MAVNI soldiers in removal proceedings. *See, e.g.*, Gov't Memo at 31 n.18 (acknowledging at least two situations in which a MAVNI recruit was placed in removal proceedings); *see Calixto v. Dep't of Def.*, No. 1:18-cv-01551-ESH (D.D.C.), Dkt. 33 at 4, 9 (Plaintiffs' identification of additional cases of MAVNI soldiers in removal proceedings).[19] In addition, these serving U.S. Army soldiers lost the opportunity to participate in another major state and federal election cycle and to cast votes for those who will have a substantial impact on their lives as soldiers and naturalized citizens.

Third, Defendants do not dispute that USCIS gave no consideration to the statutory policies favoring expedited naturalization of military service members. Rather, Defendants assert that USCIS did not have to do so based on some artificial distinction between "substantive" and "processing" requirements. Gov't Memo at 32. Regardless of semantic labels, the MSSD Policy directly conflicts with several important aspects of the governing statute. The

[19] Defendants' comment that removal proceedings essentially do not count if they occur after discharge (Gov't Memo at 31 n.18) misses the point and trivializes MAVNIs' plight. The unlawful MSSD Policy is what prevented these soldiers from being naturalized prior to these removal proceedings being initiated. Further, threats of deportation for a MAVNI or family members, particularly to countries that have threatened to persecute MAVNIs and their relatives because the MAVNI soldier joined the U.S. Army, are not mere "inconveniences."

purpose of § 1440 is to ease and expedite the naturalization process for soldiers serving in time of armed conflict. *See* 8 U.S.C. § 1440(b) (relaxing the age, period of residence/presence, fee, and other standard naturalization requirements); *see also* S. Rep. No. 90-1292, at 3 (1968) ("Legislation providing for the expeditious naturalization of non-citizens who have rendered honorable service in the Armed Forces of the United States covers a span of more than 100 years of American history."). Furthermore, as demonstrated above, Congress specifically chose to make naturalization available under § 1440 for the soldiers in the class without any minimum-service requirement or other waiting period.

It is precisely because Congress has expressed a substantive policy favoring expedited naturalization, and without any waiting or service periods, that USCIS must consider the impact that the agency's rules have on Congress' substantive goals, even if the agency characterizes such a rule as one of "processing."[20] Were it otherwise, the agency would be free to defeat the substantive Congressional policy favoring expedited naturalization by placing so-called "procedural" obstacles in the path. Notably, Defendants previously conceded that all military naturalization applications are expedited. SOF ¶ 24; Renaud Decl., Dkt. 25-1 ¶¶ 4-5 (AR 258) (Defendants admit that prior to the MSSD Policy, military naturalization applications were processed twice as quickly as civilian applications).

Plaintiffs note that much of Defendants' brief mischaracterizes both the nature of the MSSD Policy, as well as the nature of Plaintiffs' claims, as mere concerns with delay. *See, e.g.*, Gov't Memo at 2, 3, 19. This characterization is fundamentally wrong.

[20] At the time of these soldiers' enlistment, Defendants equated expedited naturalization with expedited processing. *See, e.g.*, Dkts. 17-1, 17-2, 17-3, 17-4, 17-5 (using phrases such as "streamline[d] citizenship processing," "expedited processing," and "fast track").

Defendants are conflating the July 7 Policy with one consequence of that policy, which is delay. The July 7 Policy does not merely implicate issues of timing. Rather, as Defendants admit, the July 7 Policy categorically "direct[s] the Field not to complete naturalization adjudications under 8 U.S.C. § 1440(a) filed by MAVNI recruits until after those checks [including DoD MSSDs] have been completed." Gov't Memo at 12. While one consequence of this "no adjudication" directive is delay,[21] there are other unlawful aspects and/or harmful effects, such as outsourcing parts of the naturalization process to DoD, the addition of a requirement for naturalization, and the risk of inconsistent and discriminatory naturalization results.

Moreover, even if Defendants' unlawful policy could be characterized solely as a timing issue, it would not save the policy. While it is true that even a lawful policy may run afoul of the APA because of "unreasonable delay," *see* APA § 706(1), it does not follow that a policy is lawful under APA § 706(2) merely because one of its effects is delay, as Defendants appear to contend. For example, USCIS could not adopt a policy requiring field offices to "await" completion of DoD background checks (including MSSDs) for no reason at all, for an improper reason, or without an adequate basis or justification. But that is precisely what USCIS has done here. Likewise, USCIS could not adopt such a rule while ignoring other relevant and important considerations. Here, USCIS was required to consider the impact that its MSSD rule would have on the substantive congressional policy favoring expedited naturalization of service members,

[21] Plaintiffs' Complaint does, in fact, raise an "unreasonable delay" claim under APA § 706(1) but, per the Court's summary judgment briefing directive, resolution of that claim is deferred and beyond the scope of the current motions. And, while that unreasonable delay claim becomes more meritorious with the passage of time – particularly given that most class members' DoD background investigations were completed almost a year ago – it is inaccurate for Defendants to characterize that pending cause of action as Plaintiffs' "real complaint."

and then weigh that impact against the benefit that USCIS claims results from its rule. USCIS admits that it did not do so. Thus, USCIS failed to consider this very important factor.

Fourth, USCIS failed to consider, at the time that it adopted its policy change, whether DoD had the resources or intention to conduct complete investigations and follow-on adjudications. Nowhere in the Administrative Record is the feasibility of such an effort discussed, nor is there any evidence that the agency considered and reconciled DoD's then-existing plans for an *en masse* Secretarial plenary authority discharge of Plaintiffs and the Class. SOF ¶¶ 27, 28.

Here, too, Defendants do not contend that USCIS actually considered these factors when it issued the July 7 Policy. Instead, they allege that it is "simply false to assert ... that 'at the time USCIS issued this directive, it understood that ... DoD had no intention of conducting the 'enhanced DoD security checks' or 'intended to discharge these MAVNI Selected Reserve soldiers without performing such security checks.'" Gov't Memo at 33. Defendants then cite to the Government's court-ordered reporting ***subsequent to July 7, 2017*** to show that the background checks indeed were performed. *See generally* Gov't Memo at 32-33.

This proffer is another non-sequitur. It is an undeniable historical fact that, ***at the time USCIS issued its policy on July 7, 2017***, DoD intended to discharge the soldiers in question *en masse* without completing their enhanced background investigations or MSSDs. DoD's state of mind is captured and memorialized in the May 2017 DoD Memo that made clear that DoD: (a) did not have the resources to reasonably and timely conduct the investigations and MSSD adjudications at issue; (b) had no intention of performing such tasks; and (c) instead intended to discharge these soldiers without performing these tasks. SOF ¶ 27; May 19, 2017 "Action Memo," Dkt. 17-8 (PA 6-7). DoD "orally" changed its plans only after USCIS had issued its

July 7 Policy and only in direct response to this litigation. Defendants' post-July 7, 2017 court-ordered reporting – and the subsequent naturalizations – are a result of *post-July 7 Policy changes and do nothing to establish the lawfulness of the Policy*. Thus, USCIS indeed failed to consider that DoD had no intention of completing these tasks and otherwise lacked the resources to complete them in a reasonable and timely manner. And this Court is acutely aware that USCIS's failure to consider the latter problem, in particular, has created immigration status chaos for class members due to DoD's inability to complete the MSSD process for MAVNIs in a timely manner.

Fifth, USCIS failed to consider DoD's "time-out" policies when it adopted the MSSD Policy. Nowhere in the Administrative Record is there any evidence the agency considered that, at the time the July 7 Policy was put in place, DoD was not conducting MSSDs on class members, but rather was discharging them if they had not yet completed basic combat training within two years of enlistment. SOF ¶ 28. Again, Defendants do not dispute that they failed to consider this fact at the time the MSSD Policy was issued but instead proffer an inapposite response, claiming that "as early as ***July 27, 2017***, DoD took steps to ensure that the 'time-out' policy to which Plaintiffs refer is not being applied to any MAVNI recruits with pending background checks." Gov't Memo at 33 (emphasis added). This change, too, was made only in direct response to this litigation. And it does not alter the fact that USCIS issued its policy of halting the adjudication of naturalization applications pending completion of MSSDs which, at that point in time, DoD was not going to perform. One scarcely can conceive of a more arbitrary, capricious, and irrational agency action.[22]

[22] On a related note, USCIS claims that these discharge policies, which USCIS admits that it failed to consider, have had "minimal or no effect on MAVNI recruits with pending background checks" (Gov't Memo at 34), but Defendants do not provide any data to support that assertion or

Sixth, in its haste to issue its policy in the midst of litigation, USCIS failed to consider whether it even had the capability to implement and apply the policy as promulgated. SOF ¶ 29. Defendants do not deny that they failed to consider this.

C. DEFENDANTS' MSSD POLICY IS UNLAWFULLY RETROACTIVE

The MSSD Policy represents a stark departure from USCIS's prior policy, under which more than 10,000 MAVNI soldiers with backgrounds and characteristics similar to Plaintiffs and the Class were naturalized. For Plaintiffs and class members who enlisted in the military under the prior policy, and committed in their enlistment contracts to apply for naturalization as soon as possible, the MSSD Policy changes the legal landscape in two ways: (1) MAVNIs now are barred from having their naturalization applications processed to decision until an MSSD is completed and shared with USCIS[23] (and, in some instances, it never will be completed/shared[24]), and (2) MAVNIs who cannot "pass" the equivalent of a Top Secret security clearance adjudication will receive a naturalization denial decision. Oct. 3, 2018 Tr. 38:23-25, 45:23-25 (Defendants equate a negative MSSD to the lack of "good moral character" and state that "[t]he government thinks that an uncharacterized discharge would not be sufficient to naturalize").

Under the prior rule, MAVNI soldiers (including many who enlisted *contemporaneously with* some class members, whose enlistment dates range between March 2015 to September

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explain how many of the 450 already-discharged MAVNI soldiers who are identified by the Army as "other reason" discharges were the result of the time-out policies and whether those soldiers agree that the time-out policy had "minimal or no effect" on their lives. *See Calixto v. Dep't of Def.*, No. 1:18-cv01551-ESH (D.D.C.), Dkt. 27-2.

[23] *See* Def.'s Supplemental Br., *Gampala v. Dep't of Homeland Sec.*, No. 18-cv-02302-JSC, Dkt. 33 at 3 n.2 (N.D. Cal. Sept. 13, 2018) ("USCIS has a policy in place that ***prevents adjudication*** until it receives notification, by way of a final MSSD ...." (emphasis added)).

[24] Further, Defendants report that over 30 class members have been discharged without completed MSSDs. Dkt. 224-2. Under the MSSD Policy, these soldiers will not receive a naturalization decision.

2016), were processed for naturalization without an MSSD and were naturalized, even if they had the same type of so-called "unmitigable derogatory findings," such as the "foreign influence" of maintaining contact with family in another country, that warrants an unfavorable MSSD. May 19, 2017 "Action Memo," Dkt. 17-8 (PA 6-7) (discussing Group 1 and stating that 30% of the "MAVNIs in the Force" subjected to CI reviews were found to have "unmitigable derogatory findings"). Nothing in 8 U.S.C. § 1440 or the INA gives USCIS the ability to retroactively apply such a rule. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."); *Sierra Club v. Whitman*, 285 F.3d 63, 68 (D.C. Cir. 2002).

Moreover, Defendants' suggestion that this is simply an "adjudication" and "significant statutory interests" allow for retroactive application (Gov't Memo at 35) is misplaced. First, this is not an adjudication. *See* 5 U.S.C. § 551(7) ("'[A]djudication' means agency process for the formulation of an order."); *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 753 (D.C. Cir. 1987), *aff'd* 488 U.S. 204 (1988); *Kirwa*, Oct. 18, 2017 Tr. at 69:4-5 ("[T]hat's an adjudication. That's not what we have here."). Rather, as discussed in the next Section, the July 7 Policy is a legislative rule. Second, even if this was an adjudication, Defendants do not articulate any statutory interests served by the ***MSSD Policy*** and discuss only "USCIS's decision to await the results of DoD ***background checks***" (Gov't Memo at 35 (emphasis added)). As clearly established by now, these are two separate and distinct aspects of the July 7 Policy. Moreover, class members face grave inequities under the MSSD Policy: not only delays but new prerequisites to get to a naturalization decision and to be considered "eligible" for naturalization

by USCIS. These are requirements that did not exist when they enlisted and that will leave them in naturalization limbo, indefinitely, or subject them to naturalization denials.

D. THE MSSD POLICY VIOLATES 5 U.S.C. §§ 553 AND 552

1. The MSSD Policy Violates 5 U.S.C. § 553

Defendants adopted their MSSD Policy without complying with notice-and-comment rulemaking requirements. Along with the views expressed in the Attorney General's memorandum, *see* Pl. Memo at 31, the Attorney General has expressed the Justice Department's underlying understanding of separation of powers principles:

> [The Constitution does not give] unelected attorneys or political appointees ... the power to issue regulations outside of the process demanded by Congress. ... Too often, rather than going through the long, slow regulatory process provided in statute, agencies make new rules through guidance documents – by simply sending a letter. ... This cuts off the public from the regulatory process by skipping the required public hearings and comment periods – and it is simply not what these documents are for. Guidance documents should be used to reasonably explain existing law – not to change it.

Attorney General Jefferson B. Sessions, Remarks at the Federalist Society 2017 National Lawyers Convention (Nov. 17, 2017), *available at* https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-federalist-society-2017-national-lawyers.

The problem recognized by the Attorney General runs rampant here where Defendants try to justify the MSSD Policy by slapping a "July 7 Guidance" moniker on it. The attempt to recast the MSSD Policy as a good moral character evaluation fails just as a similar attempt failed in *Electronic Privacy Information Center v. U.S. Department of Homeland Security* (*EPIC*), 653 F.3d 1 (D.C. Cir. 2011). While Defendants seek to distinguish *EPIC* on the grounds that it implicated privacy interests that are not present here, Gov't Memo at 39-40, nothing in *EPIC* limits its holding in that manner. The test established in *EPIC* is whether the rule change affects the regulated population to such a degree that notice-and-comment rulemaking is required. *See*

EPIC, 653 F.3d at 6. The MSSD Policy has that impact. The MSSD Policy has nothing to do with any Congressionally-mandated USCIS investigations. Indeed, the MSSD is not an investigation at all. As such, the MSSD Policy is a legislative rule, which creates prerequisites for MAVNI naturalization applications processing and for naturalization under 8 U.S.C. §1440.

Defendants cite a handful of district court cases regarding an expanded FBI name check to support their "policy" argument. Gov't Memo at 38-39. As an initial matter, these cases were outside of the D.C. Circuit, decided years before *EPIC*, and involved Rule 12(b) motions to dismiss. More importantly, however, the issue in those cases was whether an expanded FBI background investigation that resulted in significant delays was a substantive rule. That is very different from the MSSD issue here, particularly where all of the DoD background investigations for MAVNI soldiers are complete. Under the MSSD Policy, USCIS will not adjudicate MAVNI's naturalization applications until it receives a final MSSD from DoD (which will never happen for some soldiers) and, for those soldiers who receive unfavorable MSSDs, Defendants' position is that naturalization will be denied. This departure from the prior rule substantively impacts the MAVNI population in a manner that requires a notice-and-comment period.

Defendants also argue that unspecified national security concerns exempt USCIS from notice-and-comment requirements. *See* Gov't Memo at 40-41. This is another red herring. The background checks are done.[25] If those background investigations yielded any evidence that implicates national security, USCIS already can act on it to the extent it affects naturalization eligibility. And, as discussed above in Section II.B.3(d), DoD's so-called "national security" concerns at the MSSD stage apply to all non-citizens (LPRs and MAVNIs alike), which is a

[25] Indeed, DoD would have been obliged to alert law enforcement authorities of any national security concerns identified in the investigations. Nothing in this lawsuit has ever sought to prevent DoD from conducting investigations and making such notifications.

stance that USCIS has not, and could not, adopt from a policy or feasibility perspective because it would require USCIS to identify ***all*** naturalization applicants as high-risk individuals that need to be subjected to the equivalent of a security clearance adjudication.

2. The MSSD Policy Violates 5 U.S.C. § 552

Defendants also failed to comply with the separate publication requirements of 5 U.S.C. § 552, which provides that, absent "actual and timely notice," "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1). Strangely, Defendants argue that Plaintiffs have failed to show they were "adversely affected" by the agency's failure to publish the MSSD Policy. Gov't Memo at 42-43. But that is not so at all. The record in this case is replete with references to the various ways Plaintiffs have been adversely affected by Defendants' failure to publish the MSSD Policy. *See Nio*, 270 F. Supp. 3d at 62 ("[T]he DHS Security Screening Requirement is causing irreparable harm to plaintiffs .... (internal quotations and citations omitted)); *Nio*, 323 F.R.D. at 30, 35 (incorporating reasoning of *Kirwa*, 285 F. Supp. 3d at 42 ("[D]elaying naturalization applications after applicants have been promised an expedited path to citizenship constitutes irreparable harm.")). Had Plaintiffs received adequate notice, they could have made different decisions and would have arranged their affairs differently.

Defendants' assertion that the statutes and regulations "put Plaintiffs on notice that USCIS conducts background checks for naturalization applicants," Gov't Memo at 43, is unsupported and disingenuous. Nowhere is there any evidence that Plaintiffs were informed by USCIS or DoD that they would need to complete (and pass) both a lengthy DoD enhanced

background investigation process and then a subsequent, months-long MSSD adjudication process before USCIS would adjudicate their naturalization applications.

As with § 553, Defendants cannot circumvent the APA's publication requirements simply by citing "national security" or the existence of classified documents (*see* Gov't Memo at 43). First of all, the referenced classified documents are not even a part of the Administrative Record and ***were not even reviewed by USCIS***. Second, USCIS was required to publish notice of the MSSD Policy and a brief statement (*e.g.*, the content of Defendants' July 7, 2017 internal email). The fact of adopting the MSSD Policy is not, itself, classified and does not in any way implicate issues of national security. Any argument to the contrary is disproved by the fact that the July 7, 2017 email has been in the public record for well over a year without incident. *See* Dkt. 31, Ex. B. Defendants' justification is further belied by their practice of publishing policies or notices which actually implicate national security. *See, e.g.*, 80 Fed. Reg. 79487 (Dec. 22, 2015).

E. THE MSSD POLICY VIOLATES THE NATURALIZATION CLAUSE

The extra-statutory eligibility conditions created by the MSSD Policy violate the Naturalization Clause of the United States Constitution. Plaintiffs previously explained in detail how the "good moral character" assessment authorized under the INA provides no shelter for Defendants' MSSD Policy. Indeed, not only is a forward-looking military service suitability determination not a proxy for "good moral character," but waiting for an MSSD defies Congress' mandate to expedite and ease the naturalization of military members. *See, e.g.*, 8 U.S.C. § 1440(b)(2); *see also* 8 C.F.R. § 329.2(d). If Congress wanted to impose MSSD conditions on all or even a subset of naturalization applicants, it could have done so. But, in the absence of such conditions, the Executive Branch is powerless under the Constitution to mandate them.

1. Plaintiffs Have Standing to Pursue Their Naturalization Clause Claim

Defendants' contention that persons applying for naturalization under the laws of the United States lack standing to claim a violation of the Naturalization Clause based on the Executive's imposition of extra-statutory naturalization eligibility conditions is an odd one. As shown below, courts have long-considered separation-of-powers claims – which encompass Naturalization Clause challenges – by individuals, on the merits. And there is no plausible argument that Plaintiffs here have not shown injury resulting from those new conditions.

Indeed, this Court already has found that a class of MAVNI soldiers pursuing naturalization under § 1440 has standing to bring a claim for violation of the Naturalization Clause. *Kirwa*, 285 F. Supp. 3d at 273. In so doing, the Court was persuaded, in part, by the reasoning of the district court in *Wagafe v. Trump*. No. C17-0094-RAJ, 2017 U.S. Dist. LEXIS 95887, at *22 (W.D. Wash. June 21, 2017) ("For once Congress 'establishes such uniform rule [of naturalization], those who come within its provisions are entitled to the benefit thereof as a matter of right, not as a matter of grace.'" (quoting *Schwab v. Coleman*, 145 F.2d 672, 676 (4th Cir. 1944))). More recently, another court within this district also has upheld a naturalization applicant's standing to bring a claim for violation of the Naturalization Clause. In *Jafarzadeh v. Nielsen*, the court adopted the reasoning of *Kirwa* and *Wagafe* to find that plaintiffs had standing to bring a claim that the Controlled Application Review and Resolution Program impermissibly intrudes on Congress's sole Naturalization Clause authority. 321 F. Supp. 3d 19, 35 (D.D.C. 2018). As Judge Bates explained, "it is not the constitutional violation alone that provides plaintiffs with standing in separation of powers cases. Rather, that violation must itself cause a separate injury to a plaintiff's interests, and it is that harm that provides standing to sue." *Id.* (emphasis in original) (collecting cases as part of a "list as long as one's arm … in which private parties alleged injuries sufficient to bring separation of powers claims" and finding sufficient

injuries in deprivation of right to travel and work and to maintain a family unit in the U.S.). Similarly, while addressing a slightly different constitutional problem, the Supreme Court in *INS v. Chadha* found that an individual had standing to challenge a one-House veto provision that usurped the authority delegated by Congress through proper legislative means to the Attorney General in the INA because the individual had suffered an injury that would be redressed by the requested relief. 462 U.S. 919, 935-36 (1983).

As persons suffering injuries as a result of Defendants' constitutional violations, including the deprivation of the fundamental rights and benefits that come along with citizenship and the ability to meet personal and professional obligations and goals, class members here have standing to bring their claim under the Naturalization Clause.

2. Defendants Have Violated the Naturalization Clause

Plaintiffs detailed in their opening brief and above the manner in which the separate MSSD aspect of the July 7 Policy imposes extra-statutory preconditions to MAVNI naturalizations. The unrebutted reality is that once honorable military service is certified, *Congress mandated that adjudication of naturalization for MAVNIs must be based on the same processes and factors applicable to every other naturalization applicant*. Yet, no other naturalization applicant's citizenship turns on completion of an MSSD by DoD or has USCIS effectively outsourcing a naturalization determination to DoD.

On this record, the law is clear. The imposition of extra-statutory naturalization procedures or criteria amounts to an unlawful usurpation of Congress's authority under the Naturalization Clause. *See Davis v. Dist. Dir., INS*, 481 F. Supp. 1178, 1183 n.8. (D.D.C. 1979) ("This Constitutional mandate empowers Congress *to define the processes* through which citizenship is acquired or lost, *to determine the criteria* by which citizenship is judged, and to fix the consequences citizenship or noncitizenship entail." (emphasis added) (internal quotations and

citation omitted)). Defendants' response improperly seeks to reframe this constitutional challenge into an APA-review rubric, citing APA cases, namely *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009), and *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994), neither of which raised constitutional questions. Gov't Memo at 47. Because this is a constitutional claim, however, USCIS's proffered interpretation of the statutory framework of the INA is not entitled to any deference. *See Alliance for Natural Health US v. Sebelius*, 714 F. Supp. 2d 48, 59 (D.D.C. 2010) ("The Court shall make 'an independent assessment of [the plaintiffs'] claim of constitutional right when reviewing agency decision-making,' and it need not accord deference to the agency's 'pronouncement on a *constitutional* question.'" (emphasis in original) (quoting *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979) & *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009))). *See also O'Sullivan v. USCIS*, 453 F.3d 809, 812 (7th Cir. 2006) (reviewing interpretation of naturalization criteria *de novo*).

Indeed, Defendants acknowledge that the other branches of government cannot disregard the naturalization requirements set by Congress. Gov't Memo at 48 (citing *INS v. Pangilinan*, 486 U.S. 875, 883-84 (1988)). It is well established that USCIS must "enforc[e] the public policy established by Congress," *INS v. Hibi*, 414 U.S. 5, 8 (1973), and cannot substitute its own judgment (or that of some other executive department) regarding the risk of naturalizing certain populations for the judgment of Congress.[26] In other words, claims of a "reasonable" interpretation or vague pronouncements of "national security" do not empower either USCIS or DoD unilaterally to impose naturalization eligibility pre-conditions that Congress did not specify.

[26] The case Defendants rely on for the prospect that the DHS Secretary has broad authority with respect to the immigration laws (Gov't Memo at 46) shows just the opposite. In *United States ex rel. Knauff v. Shaughnessy*, the Supreme Court considered a 1941 amendment where Congress had to explicitly legislate to say that the Executive could impose additional restrictions on entry during the "national emergency" of World War II. 338 U.S. 537 (1950).

Thus, Defendants' citation to 8 U.S.C. § 1103 for the idea that the DHS Secretary has "the broad authority to administer the provisions of the INA," Gov't Memo at 46, does not provide a defense to a Naturalization Clause challenge. As the Ninth Circuit has explained:

> Although the Secretary may believe that Congress made a mistake by passing the law as it did, the Secretary cannot re-write the law. The Secretary is charged with "the administration and enforcement" of the INA and "shall establish such regulations" as he deems necessary to enforce the INA. 8 U.S.C. § 1103(a)(1), (3). ***He may not, however, impose obligations not required by law***. The Secretary must defer to the supremacy of Congress's legislative enactments just as the courts may not appropriate Congress's legislative function.

Schneider v. Chertoff, 450 F.3d 944, 958 (9th Cir. 2006) (emphasis added) (analyzing compliance of DHS regulations with the Nursing Relief Act and finding that they could not impose additional requirements on a subset of individuals governed by the statute).[27]

3. The MSSD Policy Is an Extra-Statutory Precondition to Naturalization

As predicted by Plaintiffs in their opening brief (Pl. Memo at 37), Defendants could not cite to any provision in the INA that makes an MSSD a precondition to naturalization under § 1440. USCIS is precluded, whether through § 1446 or otherwise, from imposing the additional requirement of MSSDs on MAVNI applicants.[28] Indeed, under Defendants' broad and unfettered reading, USCIS presumably would be free to impose a more stringent English test on MAVNI applicants under the guise of administering the INA. Or USCIS could decide that

[27] While the *Schneider* court analyzed and voided the regulation at issue under the *Chevron* doctrine (which, as explained above does not apply here), it also noted that "[t]he [DHS] Secretary's regulation contravenes the very incentive – swift LPR processing – that Congress crafted to attract immigrant doctors to health professional shortage areas." 450 F.3d at 955 n.15.

[28] The cases Defendants cite for the idea that requiring enhanced background investigations complies with the Naturalization Clause, Gov't Memo at 48, are irrelevant and say nothing about background investigations or even naturalization. *See DeCanas v. Bica*, 424 U.S. 351 (1976) (upholding state law forbidding employment of undocumented immigrants); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (considering First Amendment claim by citizens challenging refusal of visitor visa to a foreign communist speaker).

MAVNI applicants must first visit the original Declaration of Independence at the National Archives in order to establish attachment to the Constitution. But, whatever the new requirement is, it is unconstitutional if it is not within Congress' specified eligibility criteria. *See, e.g.*, *Leung v. INS*, 642 F. Supp. 607, 609 (E.D.N.Y. 1986) (finding INS acted contrary to the statutory scheme in imposing "extraordinary or unreasonable" conditions when INS officers administered a subsequent English test and demanded that applicant return for an additional English test).

Defendants attempt to salvage their position by claiming that "the naturalization of foreign nationals serving in the military implicates national security concerns, particularly when these individuals have not been subject to the background checks required to become a lawful permanent resident." Gov't Memo at 1-2; *see also id.* at 14. But, as discussed above, this "MAVNI v. LPR" argument falls flat. *See Albernaz v. United States*, 450 U.S. 333, 341-42 (1981) ("Congress is predominantly a lawyer's body, and it is appropriate for us to assume that our elected representatives know the law. … It is not a function of this Court to presume that Congress was unaware of what it accomplished." (internal citations and quotations omitted)).[29] And nowhere do Defendants even attempt to confront the case law finding that requiring additional background checks violates the Naturalization Clause. *Schwab*, 145 F.2d at 675-76

[29] Of course, nothing prevents USCIS from following up on or further investigating a naturalization applicant based on that individual's circumstance, but that is not at all what is happening here. *See Schwab*, 145 F.2d at 676 (requiring adjudicator to pass upon naturalization petitions where he "does not point to anything in the evidence which could cause anyone to doubt the good character or attachment of any of the applicants" and instead "refuses to pass upon their applications solely because he is of opinion that [the entire group of] alien enemies who have come to the country from Germany so recently (although they have resided here as long as Congress requires) cannot really determine their attachment to this country because of emotional strains to which they have been subjected," explaining that "[t]his, however, is in effect to engraft an exception upon the general language of the statute and is a matter for Congress").

(refusing to read additional investigations for enemy aliens into the Nationality Act because "[i]t must be assumed that in passing the statute" Congress did not intend for more).

But, even more importantly, nothing offered by Defendants lends any support to the idea that DHS can require an *adjudication* from DoD in the form of an MSSD before processing a MAVNI naturalization application. Indeed, 8 C.F.R. § 335.1, on which Defendants attempt to rely for their supposedly broad background check authority, not only requires "the Service," *i.e.*, USCIS, to conduct the investigation but only refers to "investigation," not "adjudication." The investigations here are done.

4. USCIS Cannot Substitute DoD Adjudication for USCIS Adjudication

Defendants attempt to avoid the inevitable conclusion that they have imposed an extra-statutory requirement by conflating the entirety of the enhanced DoD background checks and the MSSD adjudication into one "process." But, as DoD's own process chart admits, the "investigation" is complete at the completion of the SSBI/Tier 5, NIAC, and CI, well before any "Final MSSD." SOF ¶ 3. Putting to the side the investigatory aspect of the enhanced DoD background check, conditioning naturalization on an MSSD ***adjudication*** clearly is contrary to the plain language of and intent of Congress in § 1440. DoD has no role in MAVNI naturalization applications beyond the ministerial role of certifying a Form N-426. USCIS, on the other hand, is explicitly charged with adjudicating "good moral character" and "attachment to the Constitution."

Analyzing the predecessor to § 1440 in *Yuen Jung*, the Ninth Circuit considered and rejected the idea that some other adjudication could take the place of USCIS's duty to actually, itself, examine and assess good moral character. 184 F.2d at 497 (finding that previous false representation of birthplace and use of forged documents could not *per se* bar naturalization under subsections for military service). The Ninth Circuit reasoned that "the language of [the

predecessor to § 1440], viewed in the light of the other provisions [in the immigration law requiring a showing of good moral character], compels a conclusion that it was the intent of Congress to test the applicant's fitness solely by his moral character, (and other required attitudes)," and not by some prior adjudication. *Id.* at 495. In this way, the Ninth Circuit rejected the idea that "Congress had enacted a legislative doctrine of predestination" that would allow USCIS to categorically find lack of good moral character simply based on a prior adjudicatory decision outside the immigration context because "the ultimate fact to be determined, and the only material one, is his moral character within the specified period." *Id.* Indeed, "[i]t is one matter, after all, to *review* the results of Plaintiff's background check, but another matter entirely to *interpret* these results." *Khan,* 2007 U.S. Dist. LEXIS 52489, at *7 (emphasis in original) (quoting *Khelifa v. Chertoff*, 433 F. Supp. 2d 836, 843 (E.D. Mich. 2006)) (explaining that it would be inappropriate for a district court to interpret results of an FBI background check in the first instance because USCIS "with their extensive knowledge and experience, are in the best position to interpret the results and make an initial determination on an application").

Defendants admit that DoD has been given the deciding vote, in contravention of the congressional mandate, by arguing that "it is nonetheless reasonable for USCIS to conclude that if an applicant receives a favorable MSSD, after review by the CAF, then the DoD background checks did not reveal concerning information relevant to good moral character or attachment to the U.S. Constitution." Gov't Memo at 28. Likewise, Defendants' assertion that USCIS possibly could look into the underlying information for unfavorable MSSDs is belied by the fact that they have not ever done so and instead appear to be waiting – perhaps indefinitely – to see if a discharge (another DoD personnel decision) occurs. *See* Gov't Memo at 29 (arguing reasonableness of USCIS waiting for MSSDs because an unfavorable MSSD may lead to

discharge under other than honorable conditions); Oct. 3, 2018 Tr. 38:23–25, 45:23–25 (Defendants equate a negative MSSD to the lack of "good moral character" and state that "[t]he government thinks that an uncharacterized discharge would not be sufficient to naturalize."). But Congress, and thus the Constitution, requires USCIS, not DoD, to adjudicate the naturalization applications here, and to do so based on the criteria established by Congress. *See Grace*, 2018 U.S. Dist. LEXIS 213105, at *4-5, 59 (finding USCIS asylum policies violate the APA and INA where the policies' "general rule runs contrary to the individualized analysis required by the INA" because "it is the will of Congress—not the whims of the Executive—that determines the standard").

III. CONCLUSION

For all the foregoing reasons, Plaintiffs request the Court to grant their Motion and to deny Defendants' Motion.

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Respectfully submitted,

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