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**SEMPER FI?<sup>1</sup> THE INFIDELITY OF THE SEVENTH  
CIRCUIT IN APPLYING A GOOD MORAL  
CHARACTER REQUIREMENT TO NATURALIZING  
WAR VETERANS**

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INTRODUCTION

*O'Sullivan v. United States Citizenship and Immigration Service* presented the U.S. Court of Appeals for the Seventh Circuit with a question of first impression.<sup>2</sup> That is, whether “aliens who served honorably in the U.S. military in times of war [must make] a showing of good character when applying to become naturalized citizens.”<sup>3</sup> Unfortunately for these veterans, the Seventh Circuit incorrectly interpreted the plain language of the naturalization statutes and held that such aliens must show good moral character before becoming citizens.<sup>4</sup> Particularly troubling is the reasoning by which the court

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<sup>1</sup> Semper Fi is the motto of the Marine Corps and is short for the Latin phrase *semper fidelis*, which means “always faithful.” [http://hqinet001.hqmc.usmc.mil/HD/Historical/Customes\\_Traditions/Marine%20Corps\\_Motto.htm](http://hqinet001.hqmc.usmc.mil/HD/Historical/Customes_Traditions/Marine%20Corps_Motto.htm).

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<sup>2</sup> 453 F.3d 809, 814 (7th Cir. 2006).

<sup>3</sup> *Id.* at 812.

<sup>4</sup> *Id.* at 816.

reached its conclusion.<sup>5</sup> In order to provide aliens with this additional hurdle in the naturalization process, the court misquoted a key statute and employed a logic riddled with contradiction.<sup>6</sup>

Specifically, this Note will contend that the Seventh Circuit erred in *O'Sullivan* when it held that the standard naturalization requirement that aliens prove "good moral character"<sup>7</sup> also applies to aliens seeking to naturalize through statutory exceptions extended to wartime veterans.<sup>8</sup> The court should have held that, based on a plain reading of these statutes, a showing of good moral character is not required for wartime veterans to naturalize. Section one of this Note will explain the interaction of the naturalization statutes at issue in *O'Sullivan*. Section two will explain why the court correctly declined to defer to Citizenship and Immigration Services to interpret these statutes. Section three will describe the background and procedural history of *O'Sullivan*. Section four will explain the case law cited by the Seventh Circuit in the *O'Sullivan* decision. Finally, section five will identify errors in the court's analysis.

#### I. AN INTRODUCTION TO THE IMMIGRATION STATUTES APPLICABLE TO ALIEN WAR VETERANS SEEKING TO NATURALIZE

Justice Scalia once noted that "administrative law is not for sissies."<sup>9</sup> This is particularly true when attempting to elucidate consistent meanings from immigration and naturalization statutes, which have been described as a "labyrinthine . . . maze of hyper-technical statutes and regulations that engender . . . confusion for the

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<sup>5</sup> See *id.* at 815-16.

<sup>6</sup> *Id.* at 815 (misquoting 8 U.S.C.S. § 1427(a) by replacing the word "referred" with the word "mentioned").

<sup>7</sup> 8 U.S.C.S. § 1427(a)(3) (LexisNexis 2006).

<sup>8</sup> 8 U.S.C.S. § 1440(b)(1)-(3) (LexisNexis 2006).

<sup>9</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 511 (Administrative Law Lecture, delivered at Duke University School of Law, January 24, 1989).

Government and petitioners alike.”<sup>10</sup> The problem presented in *O’Sullivan* is particularly difficult: “whether [§] 1440 excuses aliens who served honorably in the U.S. military in times of war from making a showing of good moral character when applying to become naturalized citizens.”<sup>11</sup> The difficulty in answering this question stems from the extensive interplay between 8 U.S.C.S. §§ 1427, 1439, and 1440.<sup>12</sup> To limit confusion in this Note, the plain language of these statutes is provided in pertinent part below, along with a brief overview of how they interact.

A. 8 U.S.C.S. § 1427(a)

8 U.S.C.S. § 1427 details the fundamental residency requirements necessary to become a naturalized citizen of the United States,<sup>13</sup> such as the requisite length of time one must be physically present in this country and the different types of absences that are permitted during this period.<sup>14</sup> This statute also includes the good moral character component at issue in *O’Sullivan*.<sup>15</sup> Specifically, in relevant part, § 1427 states:

(a) Residence. No person, except as otherwise provided in this title, shall be naturalized unless such applicant . . . (3) *during all the periods referred to in*

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<sup>10</sup> Reply Brief of Petitioner-Appellant, at \*1, n.1, *O’Sullivan*, 453 F.3d 809, No. 05-2943, (7th Cir. October 28, 2005) (citing *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003)), 2005 WL 3738527.

<sup>11</sup> *O’Sullivan*, 453 F.3d at 812.

<sup>12</sup> *Boatswain v. Ashcroft*, 267 F. Supp. 2d 377, 379 (D.N.Y. 2003) (observing that “[w]ading through the statutory scheme is not a simple task because . . . the immigration laws are a patchwork, containing numerous inconsistencies and vagaries.”) (internal cites omitted).

<sup>13</sup> *O’Sullivan v. United States Citizenship & Immigration Serv.*, 372 F. Supp. 2d 1097, 1100 (D. Ill. 2005) *aff’d*, 453 F.3d 809, (stating that “[s]ection 1427(a) sets forth the general requirements for naturalization”).

<sup>14</sup> 8 U.S.C.S. § 1427(a)-(c) (LexisNexis 2006).

<sup>15</sup> 8 U.S.C.S. § 1427(a)(3); *O’Sullivan*. 453 F.3d at 812-13.

*this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.*<sup>16</sup>

The confusion in *O'Sullivan* “stems from the good character requirement’s placement in the naturalization statute” as a subset of the broader residency requirement.<sup>17</sup> The reason this placement is problematic is because the residency requirements of § 1427(a) are not applicable to naturalizing aliens who served in the armed forces during times of war.<sup>18</sup> Thus, the question in *O'Sullivan* is whether the good moral character requirement in § 1427(a)(3), is waived when the broader residency requirements to which it is attached, § 1427(a), are waived.<sup>19</sup>

*B. 8 U.S.C.S. § 1427(e)*

In its conclusion that alien wartime veterans are required to make a showing of good moral character, the court relied, in part, on 8 U.S.C.S. § 1427(e).<sup>20</sup> This section of the naturalization statute allows the Attorney General, when considering an applicant’s moral character, to consider conduct occurring prior to the five year period<sup>21</sup>

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<sup>16</sup> 8 U.S.C.S. § 1427(a) (emphasis added).

<sup>17</sup> *O'Sullivan*, 453 F.3d at 812.

<sup>18</sup> 8 U.S.C.S. § 1440(b)(2) (LexisNexis 2006) (stating that a “person filing an application under subsection . . . shall comply in all other respects with the requirements of this title, except that . . . no period of residence or specified period of physical presence within the United States or any State or district of the Service in the United States shall be required”).

<sup>19</sup> *O'Sullivan*, 453 F.3d at 813.

<sup>20</sup> *Id.* at 815.

<sup>21</sup> 8 U.S.C.S. § 1427(a)(1) (stating “immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application has been physically present therein for periods totaling at least half of that time and who

preceding the filing of a naturalization application.<sup>22</sup> Specifically, § 1427(e) states:

(e) Determination. In determining whether the applicant has sustained the burden of establishing good moral character and the other qualifications for citizenship specified in subsection (a) of this section, the Attorney General shall not be limited to the applicant's conduct during the five years preceding the filing of the petition, but may take into consideration as a basis for such determination the applicant's conduct and acts at any time prior to that period.<sup>23</sup>

The *O'Sullivan* court found it particularly persuasive that this section of § 1427 distinguished between “good moral character” and “other qualifications for citizenship.”<sup>24</sup>

#### C. 8 U.S.C.S. § 1440(b)

8 U.S.C.S. § 1440 provides aliens that served in the United States military during times of war a short cut to become naturalized.<sup>25</sup> This short cut is achieved by waiving the standard residency requirements detailed in § 1427(a) that are otherwise necessary to naturalize.<sup>26</sup> Specifically, § 1440(b) provides this exception:

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has resided within the State or within the district of the Service in the United States in which the applicant filed the application for at least three months”).

<sup>22</sup> 8 U.S.C.S. § 1427(e) (LexisNexis 2006).

<sup>23</sup> *Id.*

<sup>24</sup> *O'Sullivan*, 453 F.3d at 815.

<sup>25</sup> For example, when President George W. Bush issued an executive order that declared “the war against terrorists of global reach” an “armed conflict” it was done “solely in order to provide **expedited naturalization** for aliens and noncitizen nationals serving in an active-duty status in the Armed Forces of the United States.” Exec. Order No. 13,269, 67 FR 45,287 (July 8, 2002) (emphasis added).

<sup>26</sup> *O'Sullivan*, 453 F.3d at 813.

(b) Exceptions. A person filing an application under subsection (a) of this section shall comply in all other respects with the requirements of this title, except that--  
... (2) no period of residence or specified period of physical presence within the United States or any State or district of the Service in the United States shall be required;<sup>27</sup>

This exception is unique to wartime veterans;<sup>28</sup> another statute govern the naturalization of veterans that served during times of peace.<sup>29</sup>

*D. 8 U.S.C.S. § 1439*

8 U.S.C.S. § 1439 is often viewed as the naturalization statute for alien veterans serving in times of peace.<sup>30</sup> While it does govern veteran peacetime naturalization,<sup>31</sup> it also applies to any alien that has “served honorably for one year in the military” regardless of whether that service was during a time of conflict.<sup>32</sup> Thus, “[m]any service members will now be eligible [to naturalize] under both [§ 1439] and [§ 1440], though their application may only be filed under one provision.”<sup>33</sup>

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<sup>27</sup> 8 U.S.C.S. § 1440(b) (LexisNexis 2006).

<sup>28</sup> 8 U.S.C.S. § 1440(a) (requiring that any veteran naturalizing under this statute must have served during a “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”).

<sup>29</sup> See 8 U.S.C.S. § 1439 (LexisNexis 2006).

<sup>30</sup> See, e.g., *O’Sullivan*, 453 F.3d at 815 (stating that § 1439 “sets out the naturalization requirements for peacetime veterans”).

<sup>31</sup> This Note will follow the lead of the *O’Sullivan* court and refer to § 1439 as a “peacetime” naturalization statute for the sake of consistency and for the ease of the reader.

<sup>32</sup> Major Michael Kent Herring, *A Soldier’s Road to U.S. Citizenship--Is a Conviction a Speed Bump or a Stop Sign?*, *Army Law.*, June 2004, at 20, 23.

<sup>33</sup> *Id.* at n.57.

Like § 1440, § 1439 relaxes the naturalization requirements of § 1427 for alien veterans serving in the military.<sup>34</sup> This statute, however, only lessens the residency requirements; it does not do away with them entirely.<sup>35</sup> Significantly, § 1439 also includes an explicit good moral character provision.<sup>36</sup> This provision requires:

(e) Moral character. Any such period or periods of service under honorable conditions, and good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during such service, shall be proved by duly authenticated copies of the records of the executive departments having custody of the records of such service, and such authenticated copies of records shall be accepted in lieu of compliance with the provisions of [8 USCS § 1427(a)].<sup>37</sup>

This requirement has no counterpart in 8 U.S.C.S. § 1440.<sup>38</sup>

*E. 8 C.F.R. § 329.2(d)*

Federal regulations also affect judicial interpretation of these naturalization statutes when deference is afforded to the Immigration and Naturalization Service (“INS”), Citizenship and Immigration

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<sup>34</sup> *Id.* at 23-24.

<sup>35</sup> 8 U.S.C.S. § 1439(d) (LexisNexis 2006) (stating that an “applicant shall comply with the [residency] requirements of [§1427], if the termination of such service has been more than six months preceding the date of filing the application for naturalization, except that such service within five years immediately preceding the date of filing such application shall be considered as residence and physical presence within the United States”).

<sup>36</sup> 8 U.S.C.S. § 1439(e).

<sup>37</sup> *Id.*

<sup>38</sup> 8 U.S.C.S. § 1440 contains only three sections: “(a) Requirements”; “(b) Exceptions”; and (c) a revocation of citizenship provision.

Services (“CIS”), or other administrative agencies.<sup>39</sup> “Because Congress did not specify the time period during which a qualifying noncitizen veteran should demonstrate good moral character, the [INS] promulgated a regulation” to answer that question.<sup>40</sup> Specifically, that regulation states that an applicant:

(d) Has 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;<sup>41</sup>

## II. *CHEVRON* DEFERENCE

Although the question of whether § 1440 has an implied good moral character requirement is an issue of first impression, litigation surrounding this requirement is not new.<sup>42</sup> But courts often possess a mechanism to answer difficult questions of statutory interpretation: deference to the administrative agency that is responsible for enforcing the naturalization statutes.<sup>43</sup> This deference, known as *Chevron*

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<sup>39</sup> See, e.g., *Boatswain v. Gonzales*, 414 F.3d 413, 416-17 (2d Cir. 2005); *Lopez v. Henley*, 416 F.3d 455, 457-58 (5th Cir. 2005); *Nolan v. Holmes*, 334 F.3d 189, 197-98 (2d Cir. 2003).

<sup>40</sup> *Santamaria-Ames v. Immigration and Naturalization Serv.*, 104 F.3d 1127, 1129 (9th Cir. 1996).

<sup>41</sup> 8 C.F.R. § 329.2(d) (LEXIS 2006).

<sup>42</sup> See, e.g., *Petitions for Naturalization of F—G-- & E—E—G--*, 137 F. Supp. 782 (D.N.Y. 1956) (denying Petitioners’ naturalization because they could not show good moral character as a result of committing adultery during the “five years preceding the filing of their petitions.”); *In re Brodie*, 394 F. Supp. 1208, 1211 (D. Or. 1975) (holding that homosexuality, while not “conform[ing] to the preferences of the majority” does not preclude a showing of good moral character).

<sup>43</sup> See *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 416 (1999) (stating “that judicial deference to the Executive Branch is especially appropriate in the immigration context”); *but see Mei v. Ashcroft*, 393 F.3d 737, 739 (7th Cir. 2004) (stating that “[s]ince the Board hasn’t done anything to particularize the meaning of

deference, becomes available when a court is faced with interpreting an ambiguous statute.<sup>44</sup> In that instance, a court cannot “simply impose its own construction . . . ,” but must inquire as to whether the administering agency has promulgated a relevant interpretation of the statute at issue.<sup>45</sup> If an administrative interpretation exists, then the court must determine if that construction of the statute is reasonable.<sup>46</sup> If it is, then *Chevron* deference applies and the court can rely upon the agency interpretation.<sup>47</sup>

There are circumstances, however, when reliance on *Chevron* deference is inappropriate.<sup>48</sup> For example, if there are certain substantive issues present, such as strong constitutional claims<sup>49</sup> or because of the procedural context of the case generally.<sup>50</sup> In *O’Sullivan*, the Seventh Circuit correctly decided not to defer to CIS, because the judicial review of a claim for citizenship must be made *de*

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‘crime involving moral turpitude,’ giving *Chevron* deference to its determination of that meaning has no practical significance”).

<sup>44</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *E.g.*, *Gonzales v. Oregon*, 126 S. Ct. 904, 914-15 (2006) (explaining that “[d]eference in accordance with *Chevron*, however, is warranted only ‘when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.’” (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001))).

<sup>49</sup> *Whitaker v. Thompson*, 353 F.3d 947, 952 (D.C. Cir. 2004) (acknowledging “that the canon of constitutional avoidance can trump *Chevron*”); *see* *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (holding that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress”).

<sup>50</sup> *See, e.g.*, 8 U.S.C.S. § 1421(c) (LexisNexis 2006) (stating that a review of a denial of citizenship “shall be *de novo*, and the court shall make its own findings of fact and conclusions of law”).

*novo*.<sup>51</sup> Because the court could not use *Chevron* deference to defer to CIS's interpretation of the naturalization statutes, it follows that it is improper for the court to rely on case law where such deference was given.<sup>52</sup>

However, arguably because of a lack of case law on this issue, the court did consider cases from other circuits where *Chevron* deference was given to the CIS (or INS) interpretation of the good moral character requirement.<sup>53</sup> In fact, none of the cases to which the court cites addresses whether “§ 1440 entirely excuses qualifying aliens from the good moral character requirement” in a way that is on point with the present case.<sup>54</sup> To its credit, the court does not specifically cite to any of these cases when it gives its holding, but it uses them as a backdrop to support the new rule it established in the Seventh Circuit.<sup>55</sup>

### III. BACKGROUND ON *O'SULLIVAN*

When he was twelve, Daniel O'Sullivan moved from Jamaica to the United States.<sup>56</sup> After graduating from high school, O'Sullivan

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<sup>51</sup> *O'Sullivan v. United States Citizenship and Immigration Serv.*, 453 F.3d 809, 811-12 (7th Cir. 2006) (relying on 8 U.S.C.S. § 1421(c) that states a review of a denial of citizenship “shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application”); *see, e.g., Adiemereonwu v. Gonzales*, 2005 U.S. Dist. LEXIS 9681, at \*11 (D. Tex. 2005) (explaining that “if CIS denies a naturalization application -- and that denial has been confirmed after an administrative appeal, consisting of a hearing before a senior naturalization officer -- the rejected applicant may seek de novo judicial review of the denial in the United States district court for the district in which he resides”).

<sup>52</sup> *See O'Sullivan*, 453 F.3d at 812, n.2 (criticizing *Boatswain v. Gonzales*, 414 F.3d 413 (2d Cir. 2005) for relying on *Nolan v. Holmes*, 334 F.3d 189 (2d Cir. 2003) and “the petitioner’s concession that the statutory interpretation upheld as reasonable in *Nolan* was binding in this new [*de novo*] context”).

<sup>53</sup> *O'Sullivan*, 453 F.3d at 814-15.

<sup>54</sup> *Id.* at 812.

<sup>55</sup> *Id.* at 812-16.

<sup>56</sup> *Id.* at 810.

entered active military duty in September 1976 where he “served in the Marines and the Air Force during the Vietnam hostilities and was honorably discharged from the military in December 1981.”<sup>57</sup> After leaving the military O’Sullivan “had children, was consistently employed, and paid taxes.”<sup>58</sup> However, in August, 2000, he was convicted of the aggravated felony of being “party to the crime of manufacture or delivery of less than five grams of cocaine.”<sup>59</sup> After serving his sentence in Wisconsin state prison, O’Sullivan “was immediately transferred to the custody of the Department of Homeland Security which had initiated removal proceedings against him while he was incarcerated.”<sup>60</sup> In the midst of the removal proceedings, O’Sullivan filed a petition to become a naturalized citizen under 8 U.S.C. § 1440.<sup>61</sup> However, his petition was denied because of an inability to satisfy the good moral character requirement based on his aggravated felony conviction.<sup>62</sup> O’Sullivan appealed, but was denied by CIS, and subsequently denied by a federal district court under the same rationale.<sup>63</sup>

Before the Seventh Circuit, O’Sullivan argued that the good moral character requirement in § 1427(a) refers only to the specific time periods of mandatory residence mentioned in § 1427(a)(1)-(2).<sup>64</sup> Because § 1440(b) removes any obligation to satisfy that residency requirement, there is no time period to which the good moral character requirement could possibly attach.<sup>65</sup> Consequently, O’Sullivan

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<sup>57</sup> *O’Sullivan v. United States Citizenship & Immigration Servs.*, 372 F. Supp. 2d 1097, 1098 (D. Ill. 2005)

<sup>58</sup> *O’Sullivan*, 453 F.3d at 810.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 810-11.

<sup>61</sup> *Id.* at 811.

<sup>62</sup> *Id.*; see 8 USCS § 1101 (f) (8) (LexisNexis 2006) (barring anyone “who at any time has been convicted of an aggravated felony” from making a showing of good moral character).

<sup>63</sup> *O’Sullivan*, 453 F.3d at 811.

<sup>64</sup> Reply Brief of Petitioner-Appellant, at \*2, *O’Sullivan*, 453 F.3d 809, No. 05-2943, (7th Cir. October 28, 2005), 2005 WL 3738527.

<sup>65</sup> *Id.*

maintains that under a plain reading of § 1440, aliens that qualify for naturalization under this section need not make a showing of good moral character.<sup>66</sup>

O'Sullivan supported this interpretation by comparing and contrasting the two different statutes under which veterans may naturalize, § 1439 and § 1440.<sup>67</sup> As stated in Section II, § 1439 relaxes the naturalization requirements of § 1427 for those veterans of the military in times of peace, but nonetheless explicitly includes a good moral character requirement.<sup>68</sup> A requirement for which there is no equivalent in § 1440.<sup>69</sup> O'Sullivan urged the court "to find that the express mention of a moral character requirement for peacetime veterans shows that Congress would have expressly required wartime veterans to prove good moral character, if that was Congress's will."<sup>70</sup>

Despite these arguments, on July 6, 2006, a three-judge panel of the Seventh Circuit issued a unanimous decision affirming "the district court's denial of O'Sullivan's petition for naturalization."<sup>71</sup> This panel, composed of Chief Judge Flaum, who wrote the opinion, and Judges Posner and Kanne,<sup>72</sup> held that Congress viewed the good moral character and residency requirements separately and thus held that even alien war veterans must make a showing of good moral character.<sup>73</sup> The court gave four reasons for its holding.<sup>74</sup> First the court found that good moral character was not a subset of the residency requirements.<sup>75</sup> Second, the court found that the plain language of § 1427(a) required a showing of good moral character

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<sup>66</sup> *Id.* at 1.

<sup>67</sup> Brief of Petitioner-Appellant, at \*4, *O'Sullivan*, 453 F.3d 809, No. 05-2943, (7th Cir. August 15, 2005), 2005 WL 3738525.

<sup>68</sup> 8 U.S.C.S. § 1439(e) (LexisNexis 2006).

<sup>69</sup> Compare 8 U.S.C.S. § 1440 (LexisNexis 2006), with 8 U.S.C.S. § 1439(e).

<sup>70</sup> *O'Sullivan*, 453 F.3d at 814.

<sup>71</sup> *Id.* at 817.

<sup>72</sup> *Id.* at 809.

<sup>73</sup> *Id.* at 815.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

“during all periods *mentioned*” in the statute, regardless of whether the actual residency requirements applied.<sup>76</sup> Third, the court concluded that the good moral character requirement was intended to be separate from the residency requirements because it was listed separately in § 1427(e).<sup>77</sup> The court also explained that the explicit presence of the good moral character provision in § 1439 is the result of unique concerns applicable only to naturalizing *peacetime* veterans.<sup>78</sup> Consequently, such a provision is not necessary in § 1440.<sup>79</sup> The inquiry into the court’s reasoning will be further developed below in Section V.

#### IV. CASE LAW IN *O’SULLIVAN*

In *O’Sullivan*, the Seventh Circuit cites to three “sister circuit” decisions that all held a showing of good moral character is required in order to naturalize under § 1440.<sup>80</sup> However, these cases, from the Second, Fifth, and Ninth Circuit Court of Appeals respectively, are distinguishable from *O’Sullivan* by either the standard of review or by the issue presented.<sup>81</sup> These cases are briefly considered below for two purposes: first, to survey the landscape of recent litigation involving § 1440 and the good moral character requirement and second, to illustrate how any reliance on these cases in *O’Sullivan* is misguided.

##### A. *The Second Circuit: Nolan v. Holmes*

The court first considered a Second Circuit case, *Nolan v. Holmes*.<sup>82</sup> There, Nolan was an alien wartime veteran who was

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<sup>76</sup> *Id.* (emphasis in original).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 815-16.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See id.* at 814-15.

<sup>82</sup> *Id.* at 814 (citing *Nolan v. Holmes*, 334 F.3d 189 (2d Cir. 2003)).

convicted of an aggravated felony.<sup>83</sup> Once deportation proceedings began against him, however, he filed a petition for *habeas corpus* to terminate these removal actions in order to apply to naturalize under § 1440.<sup>84</sup> Nolan's petition was dismissed because the district court found that the Board of Immigration Appeals correctly held that he was ineligible to naturalize because of an inability to prove good moral character.<sup>85</sup> Nolan appealed the denial of his petition for *habeas corpus* to the Second Circuit, arguing that § 1440 lacks "any specific statement requiring that an applicant . . . demonstrate good moral character, or that any particular period of good moral character [be] maintained."<sup>86</sup>

Before deciding the issue, the Second Circuit conducted a detailed analysis of the statutory language and the legislative history of the naturalization statutes.<sup>87</sup> In its statutory analysis, the court found particularly persuasive the differences between § 1440 and § 1439; specifically that § 1439 included an explicit good moral character requirement which was absent in § 1440.<sup>88</sup> The *Nolan* court noted that:

In light of the fact that both [§ 1440] and [§ 1439] deal with the naturalization of persons who have served in the Armed Forces (differentiating between persons who served in active-duty status during wartime and those who did not) and the fact that the two sections, enacted together in 1952, contain some clearly parallel provisions, it is difficult to infer that the substantive differences between the sections were not intended. Thus . . . the appropriateness of interpreting [§ 1440] as including [a good moral character] requirement for

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<sup>83</sup> *Nolan*, 334 F.3d at 190.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Brief of Petitioner-Appellant, at \*17, *Nolan v. Holmes*, 334 F.3d 189, No. 01-2608, (2d Cir. November 29, 2001), 2001 WL 34316415.

<sup>87</sup> *Nolan*, 334 F.3d at 195-202.

<sup>88</sup> *Id.* at 197.

naturalization is simply not clear from the face of the statute.<sup>89</sup>

Thus, based on its analysis of the plain language of the statutes the Second Circuit found that “the precise interplay between [§ 1427 and § 1440] is hardly clear.”<sup>90</sup>

Despite this statutory ambiguity, however, the *Nolan* court found that the legislative history of the naturalization statutes supported a finding that § 1440 possesses an implied good moral character requirement.<sup>91</sup> The Second Circuit found particularly relevant a 1968 Senate Report on the differences between § 1440 and § 1439.<sup>92</sup> That report described only “three basic differences” between the two statutes:

The peacetime serviceman must have a minimum of 3 years service, the wartime serviceman has no minimum required. The peacetime serviceman must petition while still in the service or within 6 months after its termination, the wartime serviceman has no limitation. The peacetime serviceman needs a lawful admission for permanent residence, while the wartime serviceman can substitute in its stead his induction or enlistment while in the United States.<sup>93</sup>

Notably lacking in this identification of differences is any mention of the good moral character requirement.<sup>94</sup>

Because of the ambiguity of the naturalization statutes, the Second Circuit, through the use of *Chevron* deference, was able to

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 198-201.

<sup>92</sup> *Id.* at 200-01.

<sup>93</sup> S. REP. No. 90-1292, at 4519-20 (1968) (cited by *Nolan*, 334 F.3d at 201).

<sup>94</sup> *Nolan*, 334 F.3d at 200-01.

defer to the INS interpretation of § 1440.<sup>95</sup> And the INS interpretation of § 1440 is that alien war veterans are required to show good moral character.<sup>96</sup> Thus, Nolan was required to show good moral character in order to naturalize.<sup>97</sup> However, because the *Nolan* court deferred to the INS in reaching its holding, it is improper for the *O'Sullivan* court to rely upon *Nolan* when the issue before it must be reviewed *de novo*.<sup>98</sup>

*B. The Fifth Circuit: Lopez v. Henley*

A second case to which the Seventh Circuit cited was *Lopez v. Henley*, a Fifth Circuit case that, like *Nolan v. Holmes*, utilized *Chevron* deference.<sup>99</sup> Also similar to *Nolan*, the issue before the Fifth Circuit arose as a petition for a writ of habeas corpus to appeal a deportation order.<sup>100</sup> In a short opinion, the Fifth Circuit found the statutes ambiguous and relied on *Nolan* to find the INS interpretation reasonable.<sup>101</sup> Specifically, the *Lopez* court cited a long passage from *Nolan* and agreed that:

Notwithstanding Congress's desire to reward aliens who have served the United States in its Armed Forces, it hardly seems unreasonable for the INS to have inferred

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<sup>95</sup> *Id.* at 198.

<sup>96</sup> 8 C.F.R. § 329.2(d) (LexisNexis 2006).

<sup>97</sup> *Nolan*, 334 F.3d at 195.

<sup>98</sup> The procedural posture in *O'Sullivan* precludes the use of *Chevron* deference. *O'Sullivan v. United States Citizenship and Immigration Serv.*, 453 F.3d 809, 811-12 (7th Cir. 2006); compare *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (permitting a court to defer to an administrative agency when a statute is ambiguous and the agency interpretation is reasonable), with 8 U.S.C.S. § 1421(c) (stating that a review of a denial of citizenship “shall be *de novo*, and the court shall make its own findings of fact and conclusions of law”).

<sup>99</sup> *O'Sullivan*, 453 F.3d at 814 (citing *Lopez v. Henley*, 416 F.3d 455 (5th Cir. 2005)).

<sup>100</sup> *Lopez*, 416 F.3d 456.

<sup>101</sup> *Id.* at 457-58.

that Congress would not have intended to single out persons trained and/or experienced in physical confrontations for elimination of the requirement of good moral character.<sup>102</sup>

Because of *Chevron* deference to the INS, the Fifth Circuit required a showing of good moral character by aliens seeking to naturalize under § 1440.<sup>103</sup> Accordingly, because of the exercise of *Chevron* deference, and just as in *Nolan*, any reliance by the Seventh Circuit on *Lopez* is improper.<sup>104</sup>

C. *The Ninth Circuit: Santamaria-Ames v. INS*

The only case that the *O'Sullivan* court cited to that did not rely on *Chevron* deference was *Santamaria-Ames v. INS*.<sup>105</sup> Procedurally, *Santamaria-Ames* is remarkably similar to *O'Sullivan*.<sup>106</sup> *Santamaria-Ames* was born in Peru and entered into the United States Army in 1974.<sup>107</sup> However, after three Article 15 violations and fifteen counseling sessions for disciplinary violations in his first nine months of active duty, *Santamaria-Ames* was honorably discharged from the Army due to unsuitability.<sup>108</sup> His civilian life was similarly unsuccessful.<sup>109</sup> By 1989, *Santamaria-Ames* had accumulated “twenty arrests, five felony convictions and twelve misdemeanor convictions.”<sup>110</sup> In 1981 deportation proceedings began against him,

<sup>102</sup> *Id.* at 458; *Nolan*, 334 F.3d at 198.

<sup>103</sup> *Lopez*, 416 F.3d at 458.

<sup>104</sup> *See supra* note 98.

<sup>105</sup> *O'Sullivan v. United States Citizenship and Immigration Serv.*, 453 F.3d 809, 814 (7th Cir. 2006) (citing *Santamaria-Ames v. Immigration and Naturalization Serv.*, 104 F.3d 1127, 1130 (9th Cir. 1996)).

<sup>106</sup> Both cases arose from a denied naturalization petition. *See O'Sullivan*, 453 F.3d at 811; *Santamaria-Ames*, 104 F.3d at 1130.

<sup>107</sup> *Santamaria-Ames*, 104 F.3d at 1129.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

but, after a series of rejected appeals for a waiver of deportability, Santamaria-Ames filed to become a naturalized citizen in 1992.<sup>111</sup>

However, before the Ninth Circuit, Santamaria-Ames did not claim that alien war veterans were exempt from showing good moral character.<sup>112</sup> Instead, he argued that the “INS is precluded from examining character issues predating the . . . one year period” before his naturalization application to determine if he meets the “good moral character” requirement.<sup>113</sup> The Ninth Circuit concluded that conduct occurring previous to the one year period before filing could be considered in the naturalization application and the denial of Santamaria-Ames’ application for citizenship was upheld.<sup>114</sup>

*Santamaria-Ames* does not elucidate any answers for the Seventh Circuit. These two cases are distinguishable because Santamaria-Ames essentially conceded the primary assertion at issue in *O’Sullivan*.<sup>115</sup> Thus, it would be disingenuous for the *O’Sullivan* court to take an unchallenged assumption from *Santamaria-Ames* (i.e. that alien war veterans must show good moral character in order to naturalize) and use it as precedent to support a holding where that assumption is being challenged.

#### V. ERRORS IN THE *O’SULLIVAN* ANALYSIS

It is not clear how much the Seventh Circuit actually relied upon the circuit cases it cited in *O’Sullivan*.<sup>116</sup> Ultimately, however, the

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<sup>111</sup> *Id.* at 1130.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1131.

<sup>115</sup> *Id.* at 1130; *O’Sullivan v. United States Citizenship and Immigration Serv.*, 453 F.3d 809, 814 (7th Cir. 2006) (acknowledging that Santamaria-Ames “did not claim, as *O’Sullivan* does, that the good moral character requirement is waived for wartime veterans”).

<sup>116</sup> While the court announces its holding with the introduction, “[l]ike our sister circuits,” it declined to cite to the cases it previously mentioned in any of its actual analysis. *O’Sullivan*, 453 F.3d at 815.

court seemed to base its holding on four arguments.<sup>117</sup> First, that good moral character is not a subset of the residency requirements.<sup>118</sup> Second, the court found that the language of § 1427(a) requires that, in order to become a naturalized citizen, alien wartime veterans must show they are of good moral character “during all periods *mentioned* in the subsection” including the present.<sup>119</sup> Third, the court found that § 1427(e) indicated that Congress viewed residency requirements different from the “good moral character” requirements, because they were listed separately in that statute.<sup>120</sup> Finally, the court explained that “[a]lthough § 1439 explicitly discusses good moral character, it does so only in contexts that are relevant only to peacetime veterans.”<sup>121</sup> Therefore the absence of this phrase in § 1440 could not support the inference that good moral character does not need to be shown by the wartime alien veteran.<sup>122</sup>

A. *First Argument: Good Moral Character is not a Subset of the Residency Requirement*

The Seventh Circuit first supports its holding that aliens who naturalize under § 1440 are required to show good moral character by declining to “interpret the good moral character requirement as a subset of the residency requirement.”<sup>123</sup> Unfortunately, little further analysis accompanies this declaration.<sup>124</sup> The court merely adds that the good moral character requirement does not disappear simply “because it is found in a subsection with the heading ‘residence.’”<sup>125</sup>

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<sup>117</sup> *Id.* at 815-16.

<sup>118</sup> *Id.* at 815.

<sup>119</sup> *Id.* (emphasis in original).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

This explanation is not only counterintuitive, but contrary to established principles of statutory interpretation: a subset is not independent of the larger section in which it rests.<sup>126</sup>

Principles of statutory construction do allow a statute's structure to inform its text,<sup>127</sup> but the Seventh Circuit redefined the structure of § 1427(a) in order to change the meaning of the text by holding that § 1427(a)(3) is not a subset of § 1427.<sup>128</sup> This redefinition transforms the good moral character requirement from being the third prong of a three element test<sup>129</sup> to an independent test in § 1440 naturalizations.<sup>130</sup> However, this transformation runs contrary to the "law of statutory construction that, absent ambiguity or irrational result, the literal language of the statute controls."<sup>131</sup> Section 1427(a) is not confusing or ambiguous: it is a subsection<sup>132</sup> entitled "residence" and under which Congress placed three subsets,<sup>133</sup> one of which is the

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<sup>126</sup> *C.f.* *R. A. V. v. St. Paul*, 505 U.S. 377, 401 (1992) (White, Blackmun, O'Connor, JJ, concurring) ("It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.")

<sup>127</sup> *See, e.g., Exxon Mobil Corp. v. Allapattah Servs.*, 125 S. Ct. 2611, 2620 (2005) (stating that because "[o]rdinary principles of statutory construction apply...we must examine the statute's text in light of context, structure, and related statutory provisions); *Harris v. United States*, 536 U.S. 545, 553 (2002) (interpreting a criminal statute based upon its structure).

<sup>128</sup> *O'Sullivan*, 453 F.3d at 815.

<sup>129</sup> NORMAN J. SINGER, *SOUTHERLAND STATUTORY CONSTRUCTION*, vol. 1A, § 21.14, 179, (West Group, 2002) (stating that where "it is the legislative intent that all of the requirements must be fulfilled in order to comply with the statute, the conjunctive 'and' should be used").

<sup>130</sup> *O'Sullivan*, 453 F.3d at 815.

<sup>131</sup> *Edwards v. Valdez*, 789 F.2d 1477, 1481 (10th Cir. 1986).

<sup>132</sup> 8 U.S.C.S. § 1427(a) (LexisNexis 2006) is a subsection of 8 U.S.C.S. § 1427. *See* Miram-Webster Online, <http://www.m-w.com/dictionary/subsection> (defining a subsection as "a subdivision or a subordinate division of a section").

<sup>133</sup> 8 U.S.C.S. § 1427(a)(3) is a subset of 8 U.S.C.S. § 1427(a). *See* Miram-Webster Online, <http://www.m-w.com/dictionary/subset> (defining a subset as "a set each of whose elements is an element of an inclusive set").

good moral character requirement.<sup>134</sup> In the face of plain language, it is simply not in the power of the court to emasculate Congressional legislation by redefining statutory structure.<sup>135</sup>

*B. Second Argument: Good Moral Character Must be Shown  
“during all periods mentioned in the subsection”*

Second, the court concludes that § 1427(a) requires that the good moral character requirement must be shown “during all periods mentioned in the subsection.”<sup>136</sup> The court finds it noteworthy that this language was selected by Congress as opposed to language that would mandate a showing of good moral character “during the period of time an alien is required to have lived in the United States before naturalizing.”<sup>137</sup> From this, the court insists that because the five year period is still “mentioned” in § 1427(a) than “good moral character” must be shown even though there is no residency requirement to which it can attach.<sup>138</sup> Additionally, the court finds that § 1427(a) requires an alien to “show that he is *still* of good moral character” – a requirement that is not conditioned upon residence.<sup>139</sup>

First, the court misquotes § 1427(a)(3) as stating that good moral character must be shown “during all periods mentioned in the subsection.”<sup>140</sup> Rather § 1427(a)(3) properly states that “during all the periods referred to in this subsection [the alien] has been and still is a

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<sup>134</sup> 8 U.S.C.S. § 1427.

<sup>135</sup> See *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (explaining that when “the statute’s language is plain, ‘the sole function of the courts is to enforce it according to its terms’”) (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

<sup>136</sup> *O’Sullivan v. United States Citizenship and Immigration Serv.*, 453 F.3d 809, 815 (7th Cir. 2006) (citing 8 USCS § 1427(a)) (emphasis in original).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (emphasis supplied).

<sup>140</sup> Compare *O’Sullivan*, 453 F.3d at 815, with 8 U.S.C.S. § 1427(a)(3) (LexisNexis 2006).

person of good moral character.”<sup>141</sup> This is a meaningful and significant difference. The word “mention” is defined as “citing or calling attention to someone or something *especially in a casual or incidental manner.*”<sup>142</sup> Consequently, under the word “mentioned,” no connection is necessary between good moral character and residency in order to make the good moral character element applicable.<sup>143</sup> The court’s misquotation creates the false impression that § 1427(a)(1) and (2) are not intended to interact with § 1427(a)(3); but the tenuous relationship between these elements is something the court’s analysis *creates*, and then exploits.<sup>144</sup>

Thus, the Seventh Circuit is essentially presenting a strawman argument, because under the word “referred,” a relationship between good moral character and residency is established.<sup>145</sup> The word “refer” is defined as “to have relation or connection” or “to direct attention usually by *clear and specific* mention.”<sup>146</sup> By using “referred” instead of “mentioned,” Congress is specifically limiting the application of the good moral character requirement to that time period indicated by the residency requirements.<sup>147</sup>

This interpretation is not only substantiated by the plain language of the statute, but also by the structure of § 1427(a).<sup>148</sup> As stated above, the good moral character requirement is, in fact, a subset of a subsection titled “residence.”<sup>149</sup> Therefore, it is logical to conclude

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<sup>141</sup> 8 U.S.C.S. § 1427(a).

<sup>142</sup> See Miram-Webster Online, <http://www.m-w.com/dictionary/mention> (emphasis supplied).

<sup>143</sup> *O’Sullivan*, 453 F.3d at 815.

<sup>144</sup> *Id.*

<sup>145</sup> See 8 U.S.C.S. § 1427(a).

<sup>146</sup> Miram-Webster Online, <http://www.m-w.com/dictionary/refer> (emphasis supplied).

<sup>147</sup> *Marlowe v. Bottarelli*, 938 F.2d 807, 812 (7th Cir. 1991) (stating that courts should “presume that legislatures and agencies mean what they say . . . the ‘plain language’ of a statute or regulation will be the best indicator of the enacting body’s will”).

<sup>148</sup> See 8 U.S.C.S. § 1427(a).

<sup>149</sup> See *supra* note 134.

that good moral character has a relationship to residency.<sup>150</sup> Moreover, the nature of this relationship conditions the relevancy of § 1427(a)(3) on the existence of § 1427(a)(1) and (2)<sup>151</sup> such that if the residency requirements represent a time frame of zero<sup>152</sup> then there is no time period to which the good moral character requirement can refer.<sup>153</sup>

Second, the Seventh Circuit's reasoning that the "still is" portion of § 1427(a)(3) requires aliens to show good moral character regardless of whether the preceding residency requirements apply<sup>154</sup> inherently presumes that Congress is grammatically incompetent. As the Second Circuit acknowledged, albeit inconclusively, in *Nolan*, "linguistic purists could argue that the precise phrase used in [§ 1427(a)] -- 'still is . . . of good moral character' -- connotes continuity, which logically cannot be shown if there is no relevant prior period."<sup>155</sup> Congress could have simply switched the word "still"<sup>156</sup> with "presently" and in that manner clearly communicated that the good moral character requirement is not limited to the periods of residency expressed in § 1427(a)(1)-(2). However, Congress chose to use "still."<sup>157</sup> Accordingly, the plain language of § 1427(a)(3) has a specific meaning that, contrary to the Seventh Circuit, ties good moral

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<sup>150</sup> *Id.*

<sup>151</sup> See 8 U.S.C.S. § 1427(a) (stating that a naturalizing alien must show good moral character "during all the periods referred to in this subsection").

<sup>152</sup> See 8 U.S.C.S. § 1440(b)(2) (LexisNexis 2006).

<sup>153</sup> Reply Brief of Petitioner-Appellant, at \*2, *O'Sullivan*, 453 F.3d 809, No. 05-2943, (7th Cir. October 28, 2005), 2005 WL 3738527 (questioning "how a good moral character requirement that is explicitly tied to a period can still exist when the period requirement is taken away"); see *Nolan v. Holmes*, 334 F.3d 189, 197 (2d Cir. 2003) (recognizing the possibility that § 1440 "was not intended to compel any showing [of good moral character] that another INA section requires in connection with a period of residence").

<sup>154</sup> *O'Sullivan v. United States Citizenship and Immigration Serv.*, 453 F.3d 809, 815 (7th Cir. 2006).

<sup>155</sup> *Nolan*, 334 F.3d at 197.

<sup>156</sup> Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/still> (follow "still[3adverb]") (defining still as "a function word to indicate the continuance of an action or condition").

<sup>157</sup> 8 U.S.C.S. § 1427(a)(3) (LexisNexis 2006).

character to the residency requirements.<sup>158</sup> Therefore, if the alien naturalizing under § 1440 is exempted from both of the residency requirements in § 1427 then there is nothing to which the good moral character requirement can refer, including the continuous, “still is,” requirement of § 1427(a)(3).<sup>159</sup>

*C. Third Argument: § 1427(e) Reveals Congress Views Good Moral Character and Residency as Distinct Requirements*

The court’s third argument is that because § 1427(e) separates the good moral character requirement from “other qualifications for citizenship,”<sup>160</sup> including the residency requirements, this indicates that Congress “viewed the two requirements as distinct.”<sup>161</sup> However, the Seventh Circuit neglects to explain the implication of this distinction.<sup>162</sup> While there is no doubt that residency requirements are different from a requirement to show good moral character,<sup>163</sup> the question in *O’Sullivan* is how these two different requirements are intended to interact with each other.<sup>164</sup>

Unfortunately, § 1427(e) is unable to answer this question because it relates to a different matter entirely.<sup>165</sup> This subsection of § 1427 is

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<sup>158</sup> 8 U.S.C.S. § 1427(a); *O’Sullivan*, 453 F.3d at 815.

<sup>159</sup> 8 U.S.C.S. § 1440(b) (LexisNexis 2006); 8 U.S.C.S. § 1427.

<sup>160</sup> 8 U.S.C.S. § 1427(e).

<sup>161</sup> *O’Sullivan*, 453 F.3d at 815.

<sup>162</sup> *Id.*

<sup>163</sup> *See, e.g.*, 8 U.S.C.S. § 1427(a) (listing good moral character and residence as two separate requirements).

<sup>164</sup> Compare Brief of Petitioner-Appellant, at \*7, *O’Sullivan*, 453 F.3d 809, No. 05-2943, (7th Cir. August 15, 2005), 2005 WL 3738525 (arguing that “a showing of good moral character need only be made for required periods of residency”), with Response of Respondent-Appellee, at \*10, *O’Sullivan*, 453 F.3d 809, No. 05-2943, (7th Cir. October 14, 2005), 2005 WL 3738526 (acknowledging that in § 1440 “Congress clearly recognized . . . that some of the general requirements, such as residency, may be waived[, b]ut there is no indication from the text of the statutes that Congress intended to waive a requirement of good moral character for naturalization purposes”).

<sup>165</sup> *See* 8 U.S.C.S. § 1427(e).

solely concerned with the ability of the Attorney General to take into consideration issues of good moral character and residence beyond the scope of the five year period given in § 1427(a)(1).<sup>166</sup> Thus, while § 1427(e) identifies good moral character and residence as separate requirements, such a distinction sheds no light upon the way these two requirements interact in § 1427(a).<sup>167</sup>

*D. Fourth Argument: Distinguishing Between § 1439 and § 1440*

Finally, the Seventh Circuit erred when it neglected to appreciate the significance of the presence of the good moral character requirement in § 1439 and the absence of this or similar requirement in § 1440.<sup>168</sup> Instead of taking this plain difference at its face, the *O'Sullivan* court relegated this crucial dissimilarity in the statutes to a difference in the time frames under which veterans may naturalize.<sup>169</sup> According to the court, the purpose for explicitly mentioning the good moral character requirement in the context of § 1439 is to allow peacetime veterans to utilize their military records to meet the requirements of § 1427(a).<sup>170</sup> The court explains this is necessary because aliens naturalizing under § 1439 must do so no later than six months after being honorably discharged and therefore may need to

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<sup>166</sup> See *Santamaria-Ames v. Immigration and Naturalization Serv.*, 104 F.3d 1127, 1132 (9th Cir. 1996) (holding that “the pertinent inquiry is whether the petitioner is presently of good moral character and has demonstrated good moral character [during the statutory period] . . . [but] [c]riminal conduct and other behavior prior to [this] period may be examined”); *Yuen Jung v. Barber*, 184 F.2d 491, 495 (9th Cir. 1950) (holding that the statutory five year period is the only material determiner of good moral character, but prior periods are “circumstantially relevant as bearing upon petitioner’s character”).

<sup>167</sup> See 8 U.S.C.S. § 1427(e); 8 U.S.C.S. § 1427(a).

<sup>168</sup> *O'Sullivan v. United States Citizenship and Immigration Serv.*, 453 F.3d 809, 815-16 (7th Cir. 2006); 8 U.S.C.S. § 1439(e); 8 U.S.C.S. § 1440.

<sup>169</sup> *O'Sullivan*, 453 F.3d at 815 (explaining that “[u]nlike wartime veterans, peacetime veterans must serve in the military one full year and apply within six months of discharge, or while still serving in the military”); compare 8 U.S.C.S. § 1439(a), with 8 U.S.C.S. § 1440(a).

<sup>170</sup> *O'Sullivan*, 453 F.3d at 815.

rely upon military records to establish good moral character.<sup>171</sup> The court elaborated, that it was not necessary for Congress to include a similar provision in § 1440, because wartime veterans often have shorter lengths of service and may apply for naturalization long after their service has ended.<sup>172</sup> Therefore, according to the Seventh Circuit, “military records could be significantly less helpful in determining their current moral character. It stands to reason, then, that Congress would not set hard-and-fast rules on the use of military records as a means for wartime aliens to prove good moral character.”<sup>173</sup>

The court’s explanation does not adequately explain this discrepancy between § 1439 and § 1440 for three reasons. First, while alien wartime veterans may choose to naturalize long after they leave military service as the Seventh Circuit suggests,<sup>174</sup> they need not do so.<sup>175</sup> In the event that a wartime veteran opted to naturalize immediately after being discharged or while still in military service, *O’Sullivan* requires that soldier to prove good moral character.<sup>176</sup> In such circumstances, the alien wartime veteran has same reliance on military records to prove good moral character as an alien serving in a time of peace and naturalizing under § 1439.<sup>177</sup> Because the reliance on recent military records is the same in both scenarios, the Seventh Circuit’s justification of the presence of the good moral character provision in § 1439 suggests that Congress should have included a

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 815-16.

<sup>174</sup> *Id.*

<sup>175</sup> Alien wartime veterans can apply to naturalize during their military service. *See* 8 U.S.C.S. § 1440(c) (stating that the successful naturalization of a soldier can be revoked if they are “separated from the service under other than honorable conditions”).

<sup>176</sup> *O’Sullivan*, 453 F.3d at 816 (holding that aliens naturalizing under § 1440 must satisfy the good moral character provision in § 1427(a)).

<sup>177</sup> *Cf. O’Sullivan*, 453 F.3d at 815 (explaining that peacetime veterans need the good moral character provision of § 1439(e) in order to prove good moral character through recent military records).

similar provision in § 1440.<sup>178</sup> Just like aliens who naturalize under § 1439, alien wartime veterans naturalizing under § 1440 need a good moral character provision that allows them to “show good moral character during their recent service through military records.”<sup>179</sup> Yet no similar, or any, good moral character provision exists in § 1440.<sup>180</sup> Thus, there are two explanations as to why § 1439 has a good moral character provision and § 1440 does not, either Congress overlooked the possibility that veterans naturalizing under § 1440 might do so immediately or else the court’s analysis on this provision was incomplete.<sup>181</sup>

Second, the Seventh Circuit’s analysis also fails to consider the relevancy of § 1427(e) on the differences between § 1439 and § 1440.<sup>182</sup> Section 1427(e) provides that the Attorney General “may take into consideration as a basis for [determining good moral character] the applicant’s conduct and acts at any time prior to that period.”<sup>183</sup> Accordingly, if an alien naturalizing under § 1440 is subject to the good moral character requirement in § 1427, then the Attorney General may find old military records of significant interest to reach a conclusion concerning an applicant’s good moral character.<sup>184</sup> Yet there is no provision in § 1440 that provides for the use of old military records to prove good moral character, despite the inclusion of such a provision in § 1439.<sup>185</sup>

Finally, nowhere on this issue does the Seventh Circuit in *O’Sullivan* cite to an applicable and extensive legislative record.<sup>186</sup>

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> See 8 U.S.C.S. § 1440 (LexisNexis 2006).

<sup>181</sup> See *supra* text accompanying notes 174-80.

<sup>182</sup> *O’Sullivan*, 453 F.3d at 815-16.

<sup>183</sup> 8 U.S.C.S. § 1427(e).

<sup>184</sup> *But see O’Sullivan*, 453 F.3d at 815 (explaining that aliens naturalizing under § 1440 may be far removed from their military service so that their “military records could be significantly less helpful in determining their *current* moral character”) (emphasis supplied).

<sup>185</sup> Compare 8 U.S.C.S. § 1439(e) (LexisNexis 2006), with 8 U.S.C.S. § 1440.

<sup>186</sup> See *O’Sullivan*, 453 F.3d at 812-16.

Unfortunately, however, the lack of citation did not prevent the court from asserting what are essentially Congressional intent arguments.<sup>187</sup> Such analysis is particularly troubling when the court is attempting to explain and rationalize why one statute contains a clause that a functionally similar statute does not; especially when both statutes were “enacted together . . . [and] contain some clearly parallel provisions.”<sup>188</sup> The Supreme Court has made this pillar of statutory interpretation clear: “[w]e do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.”<sup>189</sup> This canon of statutory construction is particularly relevant in *O’Sullivan*, because of the Seventh Circuit’s choice to rely solely on the plain language of the statutes to support its reasoning.<sup>190</sup>

This critique of the Seventh Circuit’s reasoning is further strengthened by legislation that occurred after the *O’Sullivan* opinion was issued.<sup>191</sup> Just less than three months after the Seventh Circuit decided *O’Sullivan*, a bill was proposed in the Senate that would add a good moral character requirement to § 1440.<sup>192</sup> Entitled the “Soldiers to Citizens Act,” this bill would amend § 1440 to require an alien wartime veteran to “demonstrate to the military chain of command . . . good moral character.”<sup>193</sup> This proposal by former Senate Majority Leader Bill Frist, serves as an additional indicator that

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<sup>187</sup> *Id.* at 815-16 (explaining the reasons why Congress mentions good moral character in § 1439 but not in § 1440).

<sup>188</sup> *Nolan v. Holmes*, 334 F.3d 189, 197 (2d Cir. 2003).

<sup>189</sup> *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005).

<sup>190</sup> *See O’Sullivan*, 453 F.3d at 812-16.

<sup>191</sup> S. 3947, 109th Cong. (2006).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

the plain language of § 1440 does not currently require naturalizing wartime veterans to prove good moral character.<sup>194</sup>

#### CONCLUSION

The *O'Sullivan* court erred in its holding that alien wartime veterans need to show good moral character in order to naturalize under § 1440. The Seventh Circuit not only failed to properly interpret the plain language of the naturalization statutes, including adequately explaining why § 1439 included a good moral character provision but § 1440 did not, but it also misquoted a relevant part of § 1440 and then relied upon that misquotation to reach its conclusion. Finally, the court did not cite to any legislative history, though it presumed to infer Congressional intent to support an opinion that ran contrary to the plain language of the relevant statutes. Whether based on policy preferences or simply out of a desire not to be the first circuit to break rank on this issue, the *O'Sullivan* court erred in interpreting § 1427 and § 1440 to require a showing of good moral character from alien wartime veterans.

While this ruling impacts a great many alien veterans serving in the armed forces, the effect of this impact is likely to be slight. If legislation passes that adds an explicit good moral requirement to § 1440 then *O'Sullivan* will not present any adverse consequences to veterans seeking to naturalize under § 1440. However, until such legislation passes, it is possible that *O'Sullivan* will discourage aliens from serving in the military, because misconstruing the plain language of § 1440 undermines the certainty and possibility of naturalization.

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<sup>194</sup> Compare 8 U.S.C.S. § 1440 (LexisNexis 2006), with S. 3947, 109th Cong. (2006).