No. 18-36023

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAMON J. CLAIBORNE,

Plaintiff-Appellant,

v.

MARK T. ESPER, SECRETARY OF THE ARMY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
NO. 3:15-CV-01192-BR
HONORABLE ANNA J. BROWN

PLAINTIFF-APPELLANT'S OPENING BRIEF

JOHN N. MAHER
KEVIN J. MIKOLASHEK
MAHER LEGAL SERVICES PC
7 EAST MAIN STREET, NUMBER 1053
ST. CHARLES, ILLINOIS 60174
TEL: (708) 468-8155
JOHNMAHER@MAHERLEGALSERVICES.COM

ATTORNEYS FOR PLAINTIFF-APPELLANT
DAMON J. CLAIBORNE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

This appeal arises from the United States District Court for the District of Oregon and challenges the Secretary of the Army's (Secretary) administrative determination to involuntarily separate Appellant Damon J. Claiborne (Claiborne) just months before he met 20 years of active duty military service to qualify for monthly retired pay and medical benefits for the rest of his life.

Claiborne raises three main issues: (1) the Secretary failed to follow agency regulations which prohibit administrative double jeopardy, that is, the Secretary used a single incident of misconduct for which Claiborne was retained in service in 2006, but then used it again as the basis to separate him nearly 10 years later -- just months before he would have become eligible for a military retirement; (2) the Secretary promulgated a policy (rule) that added sweeping temporal language beyond the statutory grant of authority, then applied it retroactively without congressional authorization to resurrect a 10-year-old adjudication and remove Claiborne based on the same conduct resolved a decade prior; and (3) the Secretary based his removal decision on a specific finding of a "demonstrated proclivity" for misconduct – a determination having no support whatsoever in the record below.

(1) **Administrative Double Jeopardy.** Because the Secretary adjudicated the matter in 2006 in Claiborne's favor, Claiborne should not have been subject to

a second administrative proceeding for the identical conduct that had been adjudicated in his favor a decade prior.

Between 2006, when the Secretary retained Claiborne, and 2015, when the Secretary separated Claiborne, the Secretary promoted him twice, sent him to war in Iraq and Afghanistan, trusted the lives of young soldiers to his care, awarded him medals, ribbons, sent him to schools and professional training, and thought him so deserving of the honor of retirement that the Secretary entered into a contract that authorized service to at least 20 years.

The district court erred by concluding that the provision against administrative double jeopardy does not apply because this time, the Secretary used a different provision of the regulation to re-adjudicate and reverse the 2006 finding in 2015. Put differently, the district judge gave no meaning or effect to the regulatory provision barring repeat administrative adjudications.

(2) **The Secretary exceeded congressional authority in applying the rule retroactively.** Claiborne also challenges the Secretary's promulgation of a rule, and subsequent enforcement of it, which set in motion the resurrection of a 2006 adjudication that had been finalized in Claiborne's favor. In response to Section 572 of the National Defense Authorization Act of 2013 (Section 572), the Secretary added far-reaching temporal language to the implementing regulation that was not contained in the enabling statute. This resulted in the unconstitutional

adoption and use of retroactive enforcement authority without congressional authorization. Specifically, the Secretary applied the new rule to revive an issue that the Secretary resolved in 2006 in Claiborne's favor, and used it to not only breach the Secretary's contract with Claiborne authorizing him 20 years of service, but also deny him and his family military retired pay at the eleventh hour.

The district court did not address Claiborne's showing of Supreme Court and Ninth Circuit precedent holding that promulgation and retroactive application of administrative regulations are unconstitutional unless specifically authorized by Congress. The district court declined to adopt *de novo* review of the constitutionality of the rule and its enforcement, but instead, disposed of the question based on judicial deference to the agency.

The district court also overlooked Claiborne's point that the Secretary departed from fundamental notice requirements to comply with due process. Specifically, there was no notice in 2006, when the Secretary retained Claiborne, that 10 years into the future, or at any point for that matter, the Secretary could unilaterally decide to remove him for the very same conduct that had already been fully adjudicated in Claiborne's favor.

(3) **One event does not constitute a "demonstrated proclivity."** Claiborne also showed that the Secretary's decision was not supported by the record. The final agency determination was that Claiborne should be separated based on his

"demonstrated proclivity" for misconduct. However, nowhere in the trial court's opinion and order is mention or application of Supreme Court and Ninth Circuit precedent that discusses the well-established proposition that a single instance cannot and does not rise to a "demonstrated proclivity," which was a fundamental basis for the Secretary's decision.

For these reasons, as discussed more fully below, the Secretary's decision should be set aside and vacated, and the Secretary should be directed to place Claiborne on the list of retired servicemembers.

STATEMENT OF THE CASE

In June 2015, Claiborne brought the underlying action seeking an injunction to prevent the Secretary from involuntarily discharging him just months shy of his 20-year anniversary, at which time he would have been eligible to retire. (ER Docket Sheet).

The district court initially granted a temporary restraining order to stop the Secretary from removing Claiborne. *Id*. After hearing, the district court denied the injunction and the Secretary involuntarily discharged Claiborne in July 2015. While denying the injunction, the district court stayed the lawsuit while Claiborne exhausted his remedies before two of the Secretary's Boards: The Army Discharge Review Board and the Army Board for the Correction of Military Records. *Id*. Over the course of the next two years, neither Board authorized the relief

Claiborne sought – retirement or the opportunity to continue service a few short months to reach 20 years of time in service. (ER Amended Complaint).

The case was re-opened in October 2017 before the district court. *Id*. Upon cross-motions for judgment on the administrative record, the district court disagreed with Claiborne's showing that the Secretary failed to follow the Agency's regulations, exceeded his statutory authority, and based the adjudication decision upon an incorrect finding unsupported by the record. 5 U.S.C. § 706(2)(A); (ER Opinion and Order).

STATEMENT OF JURISDICTION

The district court had jurisdiction to entertain Claiborne's challenges to the Secretary's failure to follow agency regulations, rulemaking, and adjudication pursuant to 28 U.S.C. § 1331 (Federal question), 5 U.S.C. §§ 701-706 (Administrative Procedure Act) (APA), and 28 U.S.C. § 1391 (mandamus).

Upon cross-motions for judgment on the administrative record without a hearing, the district court issued its opinion and order disposing of the matter with prejudice on November 15, 2018, and entered final judgment for the Secretary the same day. (ER Docket Sheet). Claiborne filed his notice of appeal on December 7, 2018, within 60 days of the date the district court entered judgment in favor of the Secretary. *Id*. This appeal is timely filed pursuant to Fed. R. App. P. 4(a)(1)(B) and the Court possesses jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the Secretary violated agency regulations that prohibited administrative double jeopardy by subjecting Claiborne to a second separation proceeding for the very same conduct that had been adjudicated 10 years earlier, concluded in Claiborne's favor, and then reversed the result against Claiborne.

2. Whether the Secretary exceeded his statutory authority by adding sweeping temporal language that was not contained in the enabling legislation to promulgate and retroactively enforce a new rule that resurrected a 10-year old adjudication and reversed the prior result to deprive Claiborne of retirement.

3. Whether the record contains evidence to support the Secretary's finding that Claiborne had a "demonstrated proclivity" for misconduct which was a substantial justification for the Secretary's removal determination.

STATEMENT OF FACTS

Claiborne is a 48-year-old combat veteran of Iraq, Afghanistan, the Gulf War, and overseas service in South Korea as well as various installations across the United States. (ER Opinion and Order). Since 2006, when the Secretary retained him, his service record was stellar, with promotions, positions of greater responsibility, professional schooling, awards, decorations, and entrustment with the lives of junior personnel in combat environments. (ER Amended Complaint). He is married and responsible for eight dependent children. *Id*.

In all, Claiborne spent 19 years, four months, and four days on active duty achieving the rank of Staff Sergeant (E-6), a non-commissioned officer. *Id*. Given his record of service, the Army entered into an agreement by which in exchange for his continued service, the opportunity to reach 20 years was provided. Reaching the 20-year mark was important to Claiborne because at that point, under Federal law, he was eligible for an active duty retirement with monthly payments for life, medical care, as well as reduced monthly payments for his spouse and family upon his death. (ER Amended Complaint).

However, the Secretary discharged him against his will six months and several days before the critical retirement eligibility vesting date. *Id*. The Secretary's involuntary discharge deprived Claiborne and his family of approximately $600,000 in retired pay in 2018 dollars, reduced retired pay under the Survivor Benefit Plan (SBP) to Claiborne's spouse and/or children upon his death, and the honor of transfer to the retired rolls rather than involuntary administrative separation. *Id*.

The Secretary claimed he was lawfully justified in separating Claiborne in 2015 because in 2005, he entered an *Alford*[1] plea to sexual misconduct involving a minor female in Kitsap, Washington whom he met in a bowling alley and thought

---

[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

was 19 years old. *Id*. Claiborne spent one-year in civilian confinement and upon release in 2006, was still in the Army. (ER Opinion and Order). The Secretary processed Claiborne for involuntary separation based on the civilian misconduct and conviction. *Id*. However, the Secretary retained him on active duty after a hearing, finding him a "deserving Soldier." *Id*.

Since then, the Army promoted Claiborne twice, sent him to various professional development programs for skills and leadership training, awarded him medals and ribbons for accomplishments and commendatory service, deployed him to combat zones, entrusted the lives of junior male and female Soldiers to him, appraised him annually as a successful performer, and contracted to authorize his service to at least 20 years. *Id*.

Since 2005, there has been no "new" misconduct whatsoever. *Id*.

The NDAA 2013 tasked the Secretary to establish policies to process for administrative separation any Soldier whose conviction for sexual assault is final and who is not punitively discharged from the Armed Forces in connection with such conviction. Public Law 112-239, Section 572.

To implement the statutory mandate, the Secretary enacted directives (Army Directive 2013-21 and ALARACT 035/2014). (ER Opinion and Order). But, in so doing, the Secretary added the following language, not contained in the NDAA, "***regardless of when the offense occurred***." *Compare* Public Law 112-239, Section 572 *with* Army Directive 2013-21 and ALARACT 035/2014.

After the Army issued Army Directive 2013-21 and ALARACT 035/2014 in 2013 and 2014 respectively, Claiborne's ten-year-old conviction from 2005 came to light again. Notwithstanding the previous administrative hearing at the conclusion of which the Secretary retained him, his intervening years of successful performance, combat service, promotions, taking care of junior Soldiers, good conduct, and contract to retire at 20 years, the Secretary involuntarily separated Claiborne just months shy of his retirement eligibility date.

The Secretary justified Claiborne's separation concluding that his "suitability for continued service was reassessed based upon his demonstrated proclivity for sexual misbehavior. Based upon that reassessment, it was determined his services were no longer required." (ER Opinion and Order).

STATUTORY AND REGULATORY AUTHORITIES

The statutory and regulatory arrangement that authorizes the Secretary to involuntarily discharge Soldiers before their enlistment expires begins with 10 U.S.C. § 1169, which is implemented by US Department of the Army Regulation 635-200, *Active Duty Enlisted Separations* (AR 635-200). The organic statute states in part:

> No regular enlisted member of an armed force may be discharged before his term of service expires, except—

> (1) as prescribed by the Secretary concerned;
> (2) by sentence of a general or special court martial; or
> (3) as otherwise provided by law.

10 U.S.C. § 1169.

The Secretary's implementing regulation states in part:

> Separation per this regulation normally should not be based on conduct that has already been considered at an administrative or judicial proceeding and disposed of in a manner indicating that separation was not warranted.

AR 635-200, Chapter 1-17b.

Chapter 1-17b (3) of the same controlling regulation goes further and uses mandatory language that:

> No soldier will be considered for separation because of conduct that … [h]as been the subject of an administrative separation proceeding resulting in a final determination by a separation authority that the Soldier should be retained.

Id.

The National Defense Authorization Act (NDAA) of 2013 provided new guidance to the Secretary as part of the Department of Defense sexual assault prevention and response program. In it, Congress created:

> (2) A requirement that the Secretary of each military department establish policies to require the processing for administrative separation of any member of the Armed Forces under the jurisdiction of such Secretary whose conviction for a covered offense is final and who is not

> punitively discharged from the Armed Forces in connection with such conviction. Such requirement—
>
> (A) shall ensure that any separation decision is based on the full facts of the case and that due process procedures are provided under regulations prescribed by the Secretary of Defense.

Public Law 112-239, Section 572.

In response, on November 7, 2013, the Secretary issued Army Directive 2013-21, which provides in pertinent part:

> Commanders will initiate the administrative separation of any Soldier convicted of a sex offense . . . whose conviction did not result in a punitive discharge or dismissal. This policy applies to all personnel currently in the Army, ***regardless of when the conviction for a sex offense occurred*** and regardless of component of membership and current status in that component.

Army Directive 2013-21(3) (emphasis added).

And on February 14, 2014, the Secretary issued ALARACT (an acronym indicating a message sent to "All Army Activities") 035/2014, which instructed, in part:

> Upon discovery that a soldier within their command sustained a sex offense conviction that did not result in a punitive discharge or dismissal, commanders will initiate an administrative separation action. This policy applies to all personnel currently in the Army, ***regardless of when the conviction for a sex offense occurred***.

Since at least 2006, the following provision of AR 635-200 existed:

> Separation under this paragraph is the prerogative of the Secretary of the Army. Secretarial plenary separation authority is exercised sparingly and seldom delegated. Ordinarily, it is used when no other provision of this regulation applies, and early separation is clearly in the best interest of the Army.

AR 635-200 Chapter 5-3a.

SUMMARY OF THE ARGUMENT

The Secretary's decision to separate Claiborne is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

I. The Secretary violated agency regulatory prohibitions by subjecting Claiborne to administrative double jeopardy. The Secretary ignored agency policy prohibiting administrative separation proceedings for conduct that had already been the subject of previous proceedings, except in limited circumstances not applicable to Claiborne. Despite this prohibition against administrative double jeopardy, the Secretary hastily used Army Directive 2013-21 and ALARACT 035/2014, which are silent as to how the Secretary should proceed where the sexual misconduct at issue had already been adjudicated administratively, to involuntarily separate Claiborne.

II. The Army exceeded the authority Congress granted to it by statute by adding expansive time-based language in its rule then retroactively enforcing it to reach back nearly a decade, revive, and re-adjudicate a decided issue on the basis of the new rule that was not in effect at the time of the prior adjudication. The provision of the NDAA 2013 relevant here, required "each military department to establish policies to require the processing for administrative separation of any member of the Armed Forces … whose conviction for a covered offense is final and who is not punitively discharged from the Armed Forces in connection with such conviction." Public Law 112-239, Section 572.

It also required that the military departments "ensure that any separation decision is based on the full facts of the case and that due process procedures are provided under regulations prescribed by the Secretary of Defense." *Id.*

Congress did not, however, authorize the military departments to promulgate a directive that would go back in time, and would result in a blanket reversal of agency adjudications that had occurred years earlier regarding the very same matter and parties. The Secretary's implementation of Congress's direction is inconsistent with the authority granted by Congress. Stated more simply, the Secretary acted beyond his mandate in issuing the Army Directive and the ALARACT message. Moreover, the implementation of the Army Directive and ALARACT message ignore the fundamental "due process procedures" Congress mandated with its enabling legislation.

III. As a matter of law, a person cannot demonstrate a proclivity for misconduct through a single incident. Claiborne claims the Secretary's decision to separate him based on his "demonstrated proclivity for sexual misbehavior" is not supported by the record and thus entitled to no deference. The United States Supreme Court and this Circuit have uniformly found that there can be no "demonstrated proclivity" where, like here, the evidence is comprised of only one occurrence. The district court wholly failed to address this issue, and in doing so erred as a matter of law.

What is more, the record below shows that the Secretary did not consider important parts of the problem and viable alternative solutions. In six months and a few days, both the Secretary's objective of removing Claiborne, and Claiborne's objective of retirement, could have been mutually achieved. The record, however, does not reflect the Secretary's consideration of this option, nor justifications for rejecting it.

ARGUMENT

I. THE SECRETARY VIOLATED AGENCY REGULATIONS THAT PROHIBITED ADMINISTRATIVE DOUBLE JEOPARDY BY REINITIATING INVOLUNTARY SEPARATION PROCEEDINGS THAT HAD BEEN ADJUDICATED 10 YEARS EARLIER AND THAT HAD BEEN CONCLUDED IN CLAIBORNE'S FAVOR

A. Standard of Review

Pursuant to the APA, this Court may set aside an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Nat'l Mining Ass'n v. Zinke*, No. 14- 17350, 2017 WL 6327944, at *13 (9th Cir. Dec. 12, 2017). "The generally applicable standards of §

706 require the reviewing court to engage is a substantial inquiry." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). Although the Secretary's decision is entitled to the presumption of regularity, "that presumption is not to shield his action from a thorough, probing, in-depth review." *Overton Park*, 401 U.S. at 415.

An agency's failure to follow its own established procedures or regulations constitutes a violation of the APA. *Miller v. Henman*, 804 F.2d 421, 424 (7th Cir. 1986); *Montilla v. I.N.S.*, 926 F.2d 162, 167 (2d Cir. 1991) (holding that "'where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures'" (quoting *Morton v. Ruiz*, 415 U.S. 199 (1974)).

Although deference is given to military decision making in general, courts do not abdicate their duty to review military actions which violate the military's own regulations. *Gunning v. Walker*, 663 F. Supp. 941, 943 (D. Conn. 1987); *see also Phillips v. United States*, 910 F. Supp. 101, 108 (E.D.N.Y. 1996) (holding that the APA requires Secretary to act in accordance with the procedures it has imposed upon itself to ensure that due process requirements are met). Deference "is not synonymous with abdication, especially where issues of a constitutional dimension are raised." *Gunning*, 663 F. Supp. at 943 (citing *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981)).

Judicial review of military decisions is less deferential when the actions of the Secretary are in violation of the agency's own regulations or beyond their powers, and do not involve matters "'reasonably relevant and necessary to furtherance of our national defense.'" *Mack v. Rumsfeld*, 784 F.2d 438, 439 (2d Cir.1986).

B. The Secretary Violated Agency Regulations

The position the Secretary took before the district court is that in separating Claiborne in July 2015, the Secretary was merely enforcing the Army Directive and the ALARACT. But in doing so, the Secretary either ignored, or blatantly disregarded, relevant and applicable regulations. Specifically, the Secretary violated AR 635-200, which governs administrative separations for active duty Army enlisted personnel, and states that:

> Separation per this regulation normally should not be based on conduct that has already been considered at an administrative or judicial proceeding and disposed of in a manner indicating that separation was not warranted.

Id. Chapter 1-17b.

Chapter 1-17b (3) of the controlling regulation goes further and uses mandatory language that:

> No soldier will be considered for separation because of conduct that … [h]as been the subject of an administrative separation proceeding resulting in a final determination by a separation authority that the Soldier should be retained.

There is no dispute that the Secretary based the July 2015 decision to separate Claiborne on conduct that was already considered at an administrative proceeding in 2006, which ended in the Secretary's decision to retain Claiborne. Likewise, there is no dispute that Claiborne has not engaged in misconduct since 2006 that would form the basis of new proceeding. There can be no dispute that the Secretary's 2015 decision to separate Claiborne runs contrary to the provision of the regulation that prohibits administrative double jeopardy.

Further, the Secretary's regulation contemplates that there may be instances where it is appropriate to separate a Soldier after he or she has been the subject of the separation process earlier. The Secretary prescribed very limited circumstances where this could occur, which are:

> a) subsequent conduct or performance forms the basis for a new proceeding;
> b) the discovery of fraud or collusion not known at the time of the original proceeding; or
> c) the discovery of substantial new evidence not known at the time of the original proceeding.

Id., Chapter 1-17(b)(3)(a) - (c).

None of these exceptions to the Secretary's regulatory prohibition against administrative double jeopardy applies to Claiborne.

And further, there is nothing in the ALARACT Message and Army Directive to indicate any intention to supplant the Army's Regulation 635-200. The

Secretary did not amend the regulation's prohibition against administrative double jeopardy; the Secretary ignored it when the Secretary initiated separation proceedings against Claiborne for the second time for the same conduct. In doing so, the Secretary abused his discretion. *See, e.g., Overton Park, Inc.*, 401 U.S. at 402 (Court looked to whether Secretary followed necessary procedures).

C. The Secretary's Violations Cannot Withstand APA Review

Under the APA, courts may review an agency action to determine if the agency has violated its own regulations. *Service v. Dulles*, 354 U.S. 363, 387, (1957) (federal courts may review agency action to ensure its own regulations have been followed); *Webster v. Doe*, 486 U.S. 592, 602 n. 7 (1988) (an agency's failure to follow its own regulations subject to APA review).

In *Dulles*, a former State Department employee challenged his removal under the APA, asserting that the agency had violated its own regulations, which provided that the decision to discharge an employee "shall be reached after consideration of the complete file, arguments, briefs, and testimony presented." *Id.* at 387 (quoting section 393.1 of the relevant regulation). The State Department separated Dulles without complying with these requirements, and in doing so, the Government had violated its own regulations, and therefore abused its discretion. *Id.* at 387-88. In its opinion, the Court wrote that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature." *Id*. at 372.

As was the case in *Dulles*, in separating Claiborne, the Secretary violated its own regulation, and in doing so, abused its discretion. In initiating separating proceedings against Claiborne for the same conduct that had been the subject of a previous separation proceeding that resulted in a decision to retain him, the Secretary departed from the prohibition against administrative double jeopardy. To conclude otherwise, and to allow Claiborne's separation to stand, would render the Army's regulation and its due process protections meaningless.

In *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34 (1st Cir. 1989), then Circuit Judge Breyer explained that agencies must follow their own procedures so that those regulated can conform to the agency's precedent, and, the agency precedent serves as a check against arbitrary decision-making. The Court noted that unless an agency follows its rules, "those subject to the agency's authority cannot use its precedent as a guide for their conduct; nor will that precedent check arbitrary agency action." *Shaw's Supermarkets*, 884 F.2d at 41. Here, the regulations in place to protect against arbitrary decisions were not followed.

D. Plenary Authority Cannot Cure Unconstitutional Rulemaking and Adjudication

In an attempt to support the decision to separate Claiborne in violation of the prohibition against administrative double jeopardy, the Secretary argued below that his "plenary authority" contained in AR 635-200, Chapter 5-3, is a veritable "catch-all" exception that allows for separating Soldiers with unfettered discretion. If the Court were to accept this interpretation, the exception would swallow the rule, and would render meaningless the regulations prohibition against administrative double jeopardy. As described above, the regulation provides for only three instances in which re-initiating separation proceedings may be appropriate, i.e., subsequent conduct or performance that forms the basis for a new proceeding, the discovery of fraud or collusion, or the discovery of substantial new evidence. *See* AR 635-200, Chapter 1-17(b)(3)(a) - (c).

The concept *expressio unius est exclusio alterius* (*i.e.*, "the expression of one thing is the exclusion of the other") applies here. It stands to reason that if the Secretary had intended to create a "plenary authority" exception to its prohibition against administrative double jeopardy, he would have done so expressly. This leads to the logical conclusion that the use of Secretarial plenary authority to separate someone under Claiborne's circumstances is not contemplated by the regulation.

The question remains how one reconciles the requirement contained in the ALARACT and Army Directive that commanders separate Soldiers convicted of certain offenses on one hand, with the prohibition against administrative double jeopardy on the other. The answer is that the Secretary exceeded Congress's intent in both the promulgation of the ALARACT message and Army Directive, and enforcing the ALARACT and Army Directive in Claiborne's case.

What the Secretary could have – and should have – done was separate only those personnel convicted of certain sexual offenses who had not been the subject of separation proceedings in the past.

Neither the Army Directive 2013-21 nor the ALARACT describe how commanders should treat Soldiers who have already undergone administrative separation proceedings for earlier conduct. In light of this vacuum of guidance in both the Army Directive and the ALARACT, the Army should have followed the clearly-stated prohibition against administrative double jeopardy described in Army Regulation 635-200. In the end, the Court must conclude that the Secretary deviated from its own regulation prohibiting administrative double jeopardy when separating Claiborne, and in so doing, abused his discretion and violated the APA.

On this question, the district court found that the Secretary's use of Chapter 5-3, plenary authority authorized Claiborne's removal notwithstanding the provisions against administrative double jeopardy. Although briefed below, the district court failed to acknowledge that Chapter 5-3 existed in 2006 when Claiborne was retained and in the intervening decade, the Secretary did not deem his removal needed. To the contrary, he was promoted twice, sent to combat twice, awarded medals and ribbons, and entrusted with the lives of junior male and female personnel. Only until the Secretary promulgated a retroactive rule was it determined he should be separated months before his retirement.

The Army's reliance on the Secretary's plenary authority in AR 635-200, Chapter 5-3 to validate retroactive application of Army Directive 2013-21 and ALARACT 035/2014 is misplaced. Neither AR 635-200 nor the administrative record contain any expression of that curative capability. Put differently, the Secretary's plenary authority cannot transform an unconstitutional retroactive enforcement into a legitimate exercise of personnel management. The Court should therefore determine that the Secretary's decision to separate Claiborne, which indisputably was effected in disregard for the regulation prohibiting administrative double jeopardy, violated the APA.

II. THE SECRETARY EXCEEDED HIS STATUTORY AUTHORITY BY ADDING OPERATIVE LANGUAGE NOT CONTAINED IN THE ENABLING STATUTE TO PROMULGATE AN UNCONSTITUTIONAL RETROACTIVE RULE WITHOUT CONGRESSIONAL AUTHORITY WHICH RESURRECTED A 10-YEAR-OLD ADJUDICATION AND REVERSED IT BASED ON THE NEW RULE

A. Standard of Review

A court may refuse to defer to an agency's interpretation of a statute that raises serious constitutional concerns. *See Diouf v. Napolitano*, 634 F.3d 1081, 1090 (9th Cir. 2011) (explaining court will not defer to agency interpretation if it raises "grave constitutional doubts"); *Ma v. Ashcroft*, 257 F.3d 1095,1105 n.15

(9th Cir. 2001) (noting *Chevron* deference is not owed where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe); *Williams v. Babbitt*, 115 F.3d 657, 661-62 (9th Cir. 1997). Likewise, the constitutionality of an agency's regulation is reviewed *de novo*. *See Gonzalez v. Metropolitan Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999).

When an agency interprets a statute or regulation during rulemaking or adjudication, the agency has resolved questions of law. An agency's interpretation of a statutory grant of authority is reviewed *de novo*. *See Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1073 (9th Cir. 2003).

B. The District Court Erred by Failing to Review the Secretary's Retroactive Statutory Interpretation, Rulemaking, and Adjudication *de novo*

Claiborne recognizes that Congress directed the Secretary to create policies in response to Section 572, and that the Secretary's response was Army Directive 2013-21 and ALARACT 035/2014. The constitutional issue, however, is that the Secretary did not have the statutorily-delegated power to unilaterally add wide-ranging temporal language and then enforce the newly-announced rule retroactively.

Specifically, Section 572 did not direct the Secretary to go back 10 years to resurrect an issue that had been heard, decided, and resolved. More specifically, while Congress authorized the Secretary to enact the Army Directive and

ALARACT, Congress did not authorize the Secretary to insert the temporal language ***regardless of when the conviction for a sex offense occurred***. The Secretary created this language out of whole cloth, and in so doing, acted in the absence of Congressional authority.

In *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204 (1988), the Supreme Court established that (1) federal administrative rules may have legal consequences only for the future, and (2) a statutory grant of legislative rulemaking authority will not encompass the power to promulgate retroactive rules unless the legislature expressly conveys that power. *See id.* at 208-09.

The Supreme Court further explained, "[C]ongressional enactments . . . will not be construed to have retroactive effect unless their language requires this result. By the same principle, 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." *Id*. at 208.

In *Bowen*, the Court cited several cases, all of which dealt with the issue of retroactivity in the context of construing statutes or regulations, to support its reasoning noted above. *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141 (1944) (interpretation concerning retroactive application of Bankruptcy Act); *Miller v. United States*, 294 U.S. 435 (1935) (interpretation concerning retroactive application of a Veterans Administration regulation); *United States v. Magnolia Petroleum Co*., 276 U.S. 160 (1928) (retroactivity of a revenue statute); *Brimstone R.R. & Canal Co. v. United States*, 276 U.S. 104 (1928) (retroactivity of an ICC administrative order). *Bowen,* 488 U.S. at 208.

Since *Bowen*, the Supreme Court has reemphasized the importance of the presumption against retroactivity. The High Court has reiterated that the presumption is "deeply rooted in our jurisprudence" and "embodies a legal doctrine century older than our Republic" – *i.e*., that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products,* 511 U.S. 244, 257 (1994); *see also Lynce v. Mathis,* 519 U.S. 433 (1997).

Likewise, pursuant to the APA, the definition of a "rule" is "an agency statement of general or particular applicability and *future effect* designed to implement interpret, or prescribe law or policy…" 5 U.S.C. § 551(4) (emphasis added).

To overcome the presumption of prospectivity, the Supreme Court has held that Congress must declare unequivocally its intention to regulate past conduct — and even then, due process and equal protection demands may sometimes bar its way. *Pension Benefit Guar. Corp. v. R.A. Gray & Co*., 467 U.S. 717, 730 (1984). "Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf,* 511 U.S. at 272-73.

In 2006, the Secretary applied the regulations that existed at the time to Claiborne's conduct, and decided to keep Claiborne in the Army, serving his country on active duty. Both the Secretary and Claiborne expected finality accompanying the Army's 2006 decision. Yet ten years later, the Secretary enacted new rules and applied them retroactively without congressional authority.

Relying largely on the Supreme Court's decision in *Bowen,* Claiborne noted before the district court that the law disfavors retroactivity and that courts will not enforce retroactive agency policies where, like here, there is no express grant of authority enabling retroactive application of an administrative directive, rule, or regulation. *Green v. United States*, 376 U.S. 149, 160 (1964) ("Retroactivity is not favored in the law.").

But the district court agreed with the Secretary's position that despite the impact on Claiborne's service, and that the conduct at issue had already been adjudicated a decade earlier, the rule had <u>no</u> retroactive application; rather, according to the Secretary, whose litigation position the district court adopted, there was only prospective application of new criteria under the new rule. (ER Opinion and Order). The district court also declined to address this question in light of *Bowen* and related precedent informing that *de novo* review was required concerning the constitutionality of the rule and its application, and instead, deferred to the Agency's rulemaking and adjudication determination. *Id*.

The district court erred. Congress did not authorize the Secretary to insert the temporal language ***regardless of when the conviction for a sex offense occurred***. Explaining why the statute does not contain retroactive language, it stands to reason, is congressional awareness that the law disfavors retroactivity. *Landgraf*, 511 U.S. at 265 ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence.").

The Secretary's new rule did not exist at the time of the 2006 adjudication in favor of Claiborne. Promulgated years later, in 2013 and 2014, the new rule attached new consequences to events completed 10 years before enactment. The new rule deprived Claiborne of legitimate expectations and upset a settled transaction. That is, the Secretary's rule altered the legal consequences of past actions that had already been adjudicated. *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."); *Williams v.*

Natural Gas Co. v. FERC, 3 F.3d 1544, 1554 (D.C. Cir. 1993) ("when there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given prospectively-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule.'").

Because Section 572 is prospective in applicability, the Secretary, by looking 10 years into the past, relied on factors which Congress neither intended nor authorized him to consider. *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co*., 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency relied on factors which Congress has not intended it to consider."). Accordingly, the new rule is unlawfully retroactive.

C. This Court Should Find that the Secretary Exceeded his Statutory Authority and Set Aside the Secretary's Rule and Decision

The APA, 5 U.S.C. § 706, states that the Court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." Section 706 further states that the Court "shall hold unlawful and set aside agency action, findings, and conclusions found to be – in excess of statutory jurisdiction, authority, or limitations." *Id*. § 706(1)(C).

Section 572 did not authorize the Secretary to alter the past legal consequences of past actions. Indeed, before the district court, the Secretary conceded this point, which is consistent with a plain reading of the provision at issue. (ER Docket Sheet, Secretary's Opposition at 15) ([The Secretary] "did not institute disfavored retroactive policies."). Comparison of the relevant statutory text with the Secretary's implementing rule makes this clear.

> (2) A requirement that the Secretary of each military department establish policies to require the processing for administrative separation of any member of the Armed Forces under the jurisdiction of such Secretary whose conviction for a covered offense is final and who is not punitively discharged from the Armed Forces in connection with such conviction. Such requirement—
>
> (A) shall ensure that any separation decision is based on the full facts of the case and that due process procedures are provided under regulations prescribed by the Secretary of Defense.

Public Law 112-239, Section 572.

Pursuant to longstanding legal principles and Supreme Court precedent, Section 572, as legislation, is prospective. *Bowen*, 488 U.S. at 208; *Landgraf*, 511 U.S. at 265. Reading the statute as written to avoid the significant constitutional issue of impermissible retroactivity leaves no doubt that the legislation and its implementing regulation are to be applied prospectively. *Edward J. DeBartolo Corp., v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construct the statute to avoid such problems…").

In enacting Section 572, the problem Congress sought to solve was those situations where a soldier is convicted of an offense involving sexual misconduct, but who was not discharged from the Army as part of the sentence adjudged at trial. In other words, Congress sought to avoid those rare circumstances when a soldier convicted of a sexual assault is allowed to return to the ranks, and continue serving alongside fellow soldiers.

To address these situations, Congress' instruction to the Secretary was to have a procedure in place to initiate *administrative* separation proceedings -- as opposed to *punitive/criminal* separation proceedings that had already occurred -- to ensure those convicted are not returned to the ranks, to potentially endanger other soldiers. All of this speaks to future misconduct, given the presumption that legislation is prospective in application, coupled with the absence of language authorizing retroactive application of it.

In creating the Army Directive and the ALARACT, however, the Secretary missed the mark, went several steps too far, and reached well outside the bounds of the Congressional mandate. There is absolutely nothing in Section 572 that indicates congressional intent for the Secretary to take a broad canvass of the ranks, and re-start administrative proceedings that had been resolved years earlier.

Upon implementation of the statute through the new rule, the Secretary was legally obligated to apply it prospectively, as his legal authority is derived from the congressional mandate. But the Secretary instead inserted temporal language that was not present in the plaint text of the law, by making the rule applicable "***regardless of when the conviction for a sex offense occurred***." By so doing, he not only exceeded his authority granted by Congress, but he also ran afoul of due process interests of "fair notice, reasonable reliance, and settled expectations," significant reasons why the law applies a presumption that new legislation governs only prospectively. *Landgraf*, 511 U.S. at 270.

In addition to *Bowen*, discussed more fully above, this Circuit's precedent invalidating retroactive application of regulations lacking specific grants of retroactive enforcement authority counsels the Court to invalidate the Army's retroactive application of the 2013 and 2014 Directive and ALARACT that swept back to 2005 to cause Claiborne's involuntary separation in 2015. *See Cort v. Crabtree*, 113 F.3d 1081, 1087 (9th Cir. 1997) (court refused to apply rule retroactively in the absence of specific congressional language authorizing retroactive enforcement); *see also Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 835 (9th Cir. 1997) (court declined to apply new standards retroactively to a case that arose prior to enactment of the new standards); *Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 814 (9th Cir. 1995) (stating that absent legislative intent to the contrary, statutes do not operate retroactively).

The same is true in other Circuits that refused to apply administrative rules retroactively. *See, e.g., Storey v. Shearson-American Express*, 928 F.2d 159 (5th Cir. 1991) (regulations of Commodities Futures Trading Commission regarding arbitration agreements); *Sierra Medical Center v. Sullivan*, 902 F.2d 388, 392 (5th Cir. 1990) (HHS "new provider" rule); *Criger v. Becton*, 902 F.2d 1348, 1354-55 (8th Cir. 1990) (FEMA flood insurance policy rule); *Gubisch v. Brady*, 49 Fair Empl. Prac. Cas. (BNA) 1063, 1069 (D.D.C. 1989) (holding that the EEOC had no authority to apply the legislative rule at issue retroactively, relying in part on Justice Scalia's interpretation of the APA in *Bowen); In re Perkins*, 106 Bankr. 863, 864-65 (E.D. Pa. 1989) (refusing to construe a Federal Reserve Board rule as retroactive).

Claiborne's separation, as it unfolded in this case, was not within the scope of the Secretary's Section 572 authority. The Secretary's implementation of the Army Directive and ALARACT represent the very type of broad over-reaching that upsets resolved cases and requires judicial intervention. For these reasons, the Secretary exceeded his statutory authority. *See, e.g., Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (Secretary exceeded statutory authority).

D. The Secretary's Rule Violated Due Process by Failing to Notify Claiborne in 2006 that at any Point Before Retirement Eligibility, the Secretary Could Remove Him for the Same Conduct

Whether an agency's procedures comport with due process requirements presents a question of law reviewed *de novo*. *See Ramirez Alejandre v. Ashcroft*, 319 F.3d 365, 377 (9th Cir. 2003) (*en banc*) (noting no deference is owed to agency); *Gilbert v. Nat'l Transp. Safety Bd*., 80 F.3d 364, 367 (9th Cir. 1996).

At no point did the Secretary notify Claiborne that upon retention in 2006, that the Secretary could at some undetermined point in the future, but before retirement eligibility, involuntarily separate Claiborne for conduct that had already been conclusively adjudicated. To the contrary, every action the Secretary took between 2006 and 2015, furthered the mutual understanding that Claiborne's past misconduct was resolved and that his service to our nation was on track to retirement.

III. THE DISTRICT COURT ERRED BY ENDORSING THE SECRETARY'S DECISION THAT CLAIBORNE HAD A "DEMONSTRATED PROCLIVITY" FOR MISCONDUCT WHERE THERE WAS ONLY A SINGLE INCIDENT

A. Standard of Review

This Court may reverse under the arbitrary and capricious standard if the agency has offered an explanation for its decision that runs counter to the evidence before the agency. *See Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010). The reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *See Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003).

B. The Supreme Court and this Circuit Uniformly Find That One Instance Cannot Support a Finding of "Demonstrated Proclivity"

The Secretary's September 27, 2017 separation decision explained:

> [Claiborne's] suitability for continued service was reassessed based upon his ***demonstrated proclivity*** for sexual misbehavior. Based upon that reassessment, it was determined his services were no longer required.

(ER Opinion and Order) (emphasis added).

The Secretary's factual premise, "demonstrated proclivity" for misconduct, has no support in the record. APA § 706(2)(A). In *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947), the Supreme Court held that in dealing with an agency determination, the reviewing court must judge the propriety of such action solely by the grounds invoked by the agency. That is, courts must base their review of the agency action on the reasons the agency actually gave.

The district court did not address this pivotal point under its APA review in the context of arbitrary agency decision-making. Because the record is totally void of any evidence of more than one single offense, which occurred in 2005, the

Secretary's determination that Claiborne had a "demonstrated proclivity" for sexual misbehavior cannot be supported by substantial evidence, must be a clear error of judgment, and suggests that the Secretary did not give this problem a "hard look." *Greater Boston Television v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (court will overturn agency decisions "if the court [became] aware . . . that the agency [h]ad not really taken a 'hard look' at the salient problems and ha[d] not genuinely engaged in reasoned decision-making.").

The Supreme Court recognized the important legal distinction between a single instance of misconduct and a demonstrated proclivity in *Board of the County Commissioners v. Brown*, 520 U.S. 397 (1994). There, the High Court noted in the context of whether a deputy's single fight during college showed a proclivity toward using excessive force against citizens during arrests if employed as a law enforcement officer, that a single occurrence is not a proclivity. The Court observed that "involvement in a single fraternity fracas does not demonstrate a proclivity to violence against the person." *Brown*, 520 U.S. at 413, n. 2); *see also McComb v. Jacksonville Paper Co*., 336 U.S. 187, 192 (1949) (repeated violations of the law demonstrate a proclivity for unlawful conduct); *United States v. Paramount Pictures, Inc*., 334 U.S. 131, 148 (1948) (several anti-trust violations demonstrate a proclivity to violate the law).

Likewise, the Ninth Circuit consistently draws a bright line between a single action and a proclivity. For example, in *United States v. Cherer*, 513 F.3d 1150, 1160 (9th Cir. 2008), this Court equated proclivity with the inability to control criminal, sexual impulses. Similarly, in *Carver v. Lehman*, 550 F.3d 883 (9th Cir. 2008), this Court characterized recidivist sexual offenders as having a proclivity for sexual misconduct.

Here, Claiborne admitted to a single act of sexual misconduct for which he was punished, and since has been rehabilitated, and has served as a model citizen and Soldier since 2005. His conduct has been so favorable as to warrant two promotions, several professional training programs, various awards for achievement, a stable marriage with eight children, clearly demonstrating that he has no criminal sexual impulses to constitute a "demonstrated proclivity" as the Army wrongly concluded.

In *Brown v. Mayle*, 283 F.3d 1019, 1036 (9th Cir. 2002), this Court reasoned that where a defendant "commits a second theft offence," she demonstrates a "proclivity toward stealing." Likewise, in *American Medical Response Northwest, Inc. v. Ace American Insurance Company*, 526 Fed App'x. 754, 757 (9th Cir. 2013), this Court noted that sexual abuse of several female employees constitutes a proclivity for sexual misconduct. But Claiborne's single encounter with a female who told him that she was 19 years old, and appeared to be that age, does not rise to the level of demonstrating a "proclivity" for sexual misconduct, as the Ninth Circuit cases delineate the bounds of "proclivity."

Unlike the appellant in *Brown*, *supra*, he has not committed a second offense and thus shows no proclivity toward sexual misconduct. And unlike the appellant in *American Medical Response, supra*, his offense involved a single act, not "abuse of several female employees."

In *Standard Drywall, Inc. v. NLRB,* 547 Fed. App'x. 809 (9th Cir. 2013), this Court upheld the NLRB's finding that a union had a proclivity to engage in wrongful conduct was supported by substantial evidence: "[i]t was reasonable for the Board to conclude that the Carpenters would continue to engage in proscribed conduct given that this was the second instance of such conduct and given the breadth of the Carpenters' threatened future strikes." *Standard Drywall*, 547 Fed. App'x. at 811.

This Court's reasoning in *Standard Drywall* is applicable to Claiborne. It is not reasonable to conclude that he would engage in prohibited conduct because there was no second instance of such conduct, he has made no threats of future misconduct, and has lived peacefully and law-abidingly since 2005. *See also United States v. Hernandez*, 795 F.3d 1159, 1167-68 (9th Cir. 2015) (one who can "learn to control his conduct" does not show a proclivity to possess child pornography); *United States v. Dreyer*, 693 F.3d 803, 810 (9th Cir. 2012) (court observed repeated lies and exaggerations as a proclivity for falsehoods); *Frankl ex. rel. NLRB v. HTH Corp*., 693 F.3d 1051, 1061 (9th Cir. 2012) (continued defiance of the labor laws constituted a proclivity to violate the Act justifying a cease and desist order); *Hovey v. Ayres*, 458 F.3d 892, 930 (9th Cir. 2006) (neither a previous murder nor the kidnapping of a prison guard constituted "a proclivity for violence against adult, male prisoners or prison personnel"); *Brodit v. Cambra*, 350 F.3d 985, 1000 (9th Cir. 2003) (expert testimony that one sexual affair is not a proclivity to engage in deviant sexual acts).

Following the reasoning and analysis of the authorities *supra*, the Secretary's finding that Claiborne's "demonstrated proclivity for sexual misconduct" was "not based on consideration of the relevant factors," is not supported by the record, in fact runs contrary to the clear evidence of record, and therefore, cannot be upheld under the APA standard of judicial review. *Overton Park,* 401 U.S. at 416 (noting that upon judicial review of an agency decision, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment."); *see also Int'l Bhd. of Elec. Workers, Local 48*, 345 F.3d at 1054; *De la Fuente II*, 332 F.3d at 1220.

C. The Secretary's Determination Is Not the Result of Reasoned Decision-Making and is Not Supported by the Record

Agencies are required to engage is "reasoned decision-making." *Allentown Mack Sales & Services, Inc., v. NLRB*, 522 U.S. 359, 374 (1988). In *State Farm*, 463 U.S. 29 at 43, the Supreme Court defined an agency decision as arbitrary if:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the 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.

Tracing the Army's decision-making process demonstrates the following: (1) directives that were created years after Claiborne's 2005 offense was conclusively adjudicated (unpredictable, lack of notice, lack of due process); (2) that were retroactively applied without legal authority (unconstitutional); (3) where a nearly 20-year record of promotion, success, re-enlistment, and combat favoring retention for seven months was discounted (caprice); (4) the July 2015 separation based on identical conduct that already was adjudicated and Claiborne had been retained (administrative double jeopardy); (5) the record does not explain why after 19 years and five months, Claiborne had to be separated instead of retiring whereby, in a few months, both parties' objectives could have been satisfied (arbitrary); and (7) basing the separation on a finding that runs counter to the evidence ("demonstrated proclivity").

Surely this decision-making process is not the product of reasoned decision-making, considered factors that cannot be found in the record, contains clear errors of judgment, and the explanation "demonstrated proclivity" runs contrary to the evidence before the agency. *Chenery Corp*., 332 U.S. at 196 (agency rule arbitrary and capricious if the agency … offered an explanation for its decision that runs counter to the evidence…" and "[t]he reviewing court should not attempt itself to make up for such deficiencies; [the reviewing court] may not supply a reasoned basis for the agency's action that the agency itself has not given.").

The Secretary's goal of separation, and Claiborne's goal of retirement, could have been accomplished by merely allowing another seven months to go by. The Secretary had already let a decade go by at that point. The Secretary failed, without adequate justification, to give reasonable consideration to this important aspect of the problem -- the record contains no evidence as to the need to separate Claiborne when it did. Stated differently, the Secretary failed, without an adequate justification, to consider or adopt an important alternative solution to the problem addressed in the action, namely, that Claiborne's separation from the rolls could have been accomplished in accordance with the law by simply letting a modest amount of time elapse.

Accordingly, the Secretary's decision process and decision were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

5 U.S.C. § 706(2)(A); *Allentown*, 522 U.S. at 374 ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.").

CONCLUSION

For the foregoing reasons, this Court should vacate and set aside the Secretary's rule and decision to separate Claiborne, with instructions to authorize Claiborne to serve the remaining seven months on active duty or alternatively, transfer him to the retired rolls.

Date: April 17, 2019

<u>/s/</u> <u>John N. Maher</u>
Kevin J. Mikolashek
MAHER LEGAL SERVICES PC
7 East Main Street, Number 1053
St. Charles, Illinois 60174
Tel: (708) 468-8155
johnmaher@maherlegalservices.com

Attorneys for Appellant Damon J. Claiborne

STATEMENT OF RELATED CASES

Appellant Damon J. Claiborne is aware of no other related cases in this Court.

Date: April 17, 2019

/s/ John N. Maher
Kevin J. Mikoashek
MAHER LEGAL SERVICES PC
7 East Main Street, Number 1053
St. Charles, Illinois 60174
Tel: (708) 468-8155
johnmaher@maherlegalservices.com

Attorneys for Appellant Damon J. Claiborne

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8874 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

Date: April 17, 2019

/s/ John N. Maher
MAHER LEGAL SERVICES PC
7 East Main Street, Number 1053
St. Charles, Illinois 60174
Tel: (708) 468-8155
johnmaher@maherlegalservices.com

Attorneys for Appellant Damon J. Claiborne

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: April 17, 2019

/s/ John N. Maher
MAHER LEGAL SERVICES PC
7 East Main Street, Number 1053
St. Charles, Illinois 60174
Tel: (708) 468-8155
johnmaher@maherlegalservices.com

Attorneys for Appellant Damon J. Claiborne