No 20 -

In the Supreme Court of the United States

Damon J. Claiborne,

Petitioner,

v.

Secretary of the Army,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI

JOHN N. MAHER*
KEVIN J. MIKOLASHEK
MAHER LEGAL SERVICES PC
26 South 3rd Street, Number 68
Geneva, Illinois 60134
john@maherlegalservices.com
lawyersdefendingwarriors.com
Tel: (708) 468-8155

Counsel for Petitioner
*Counsel of Record

August 10, 2020

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Secretary violated departmental regulations that prohibited administrative double jeopardy by subjecting Claiborne, months before he vested in a 20-year retirement, to a second adjudication for the very same conduct that had been addressed and finalized in Claiborne's favor 10 years previously, and then reversed the result to deprive Claiborne and his family of retired pay and medical care for the balance of his life.

The Ninth Circuit, in rejecting Claiborne's constitutional challenges, wrote, "those regulations allow the [Secretary] to change [his] mind about separation decisions." *Claiborne v. McCarthy*, No. 18-36023, 2020 U.S. App. LEXIS 7846 (9th Cir. Mar. 12, 2020).

The assertion that the "[Secretary] could always change [his] mind" is a finding entirely inconsistent with administrative law, constitutional due process, and smacking of King George III's tyrannical rule over the American colonies: delete the word "Secretary" and insert the word "King," and the Ninth Circuit's reasoning reads, "the King could always change his mind." The American Constitution and this Court's jurisprudence say otherwise.

2. Whether the Secretary exceeded the authority Congress delegated to him in the applicable enabling statute by unilaterally adding sweeping temporal language to promulgate and retroactively

enforce a rule that resurrected a 10-year old adjudication and reversed the prior result to deprive Claiborne and his family of retired pay and medical care for the balance of his life.

3. Over a 20-year record with one incident of misconduct in 2005 which had been litigated and finalized before the department in 2006, whether the Secretary's finding in 2015 that Claiborne had a "demonstrated proclivity" for misconduct was arbitrary, capricious, and unconstitutional.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Damon J. Claiborne (Claiborne),[1] appellant below. Respondent is the United States by and through the Secretary of the Army, appellee below. Petitioner is not a corporation.

PROCEEDINGS BELOW

Claiborne v. McCarthy, No. 18-36023, 2020 U.S. App. LEXIS 7846 (9th Cir. Mar. 12, 2020).

Claiborne v. Sec'y of the Army, No. 3:15-cv-01192-BR, 2018 U.S. Dist. LEXIS 195014 (D. Or. Nov. 15, 2018).

[1] Petitioner Claiborne deeply appreciates the substantial assistance of Law Graduate Colette Degrange and Law Students Michael Palacios and Khalfani Mar'Na from the Northern Illinois University College of Law in the preparation of this petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutory Provisions

Regulation

Other Authorities

JURISDICTION

This Court possesses jurisdiction pursuant to 28 U.S.C. § 1254(1). On March 12, 2020, the United States Court of Appeals for the Ninth Circuit affirmed the United States District Court for the District of Oregon's November 15, 2018, dismissal of Claiborne's constitutional and Administrative Procedure Act claims. Pursuant to this Court's March 19, 2020 order, Claiborne's Petition for a Writ of Certiorari is due on or before August 10, 2020.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. art. I, § 8. cls. 1, 9, 14, 16
U.S. Const. art II
U.S. Const. art. III, §§ 1, 2 cl. 1

STATUTORY PROVISIONS INVOLVED

5 U.S.C. §§ 701 – 706
10 U.S.C. § 1169
10 U.S.C. § 12732
28 U.S.C. § 1254

INTRODUCTION

This case arises from the United States Court of Appeals for the Ninth Circuit's having affirmed the United States District Court for the District of Oregon's dismissal of Claiborne's constitutional challenges to the Secretary of the Army's (Secretary) administrative determination to involuntarily separate him just months before he met 20 years of

active duty military service, qualifying for monthly retired pay and medical benefits for the rest of his life. Claiborne raised three main issues before the lower courts:

(1) the Secretary departed from the law of this Court and all Circuit Courts of Appeals that he was bound to follow departmental regulations which prohibit processing a person for involuntary separation for the same conduct, twice; that is, the Secretary used a single incident of misconduct for which Claiborne was retained in service in 2006—finalizing the matter—then used the same basis to separate him nearly ten years later, just months before he would have become eligible for retired pay and medical care for life;

(2) the Secretary promulgated a new policy (rule) that added sweeping temporal and operative language that was not contained in the statutory delegation of authority, then applied it retroactively without congressional authorization to resurrect a ten-year-old adjudication and remove Claiborne based on the same conduct addressed and resolved a decade prior; and

(3) the Secretary based his removal decision on a *post hoc* finding that Claiborne had a "demonstrated proclivity" for misconduct – a determination having no support whatsoever in the record below.

The Ninth Circuit, in rejecting Claiborne's constitutional challenges, wrote, "those regulations allow the [Secretary] to change [his] mind about

separation decisions," *Claiborne v. McCarthy*, No. 18-36023, 2020 U.S. App. LEXIS 7846 (9th Cir. Mar. 12, 2020).

The assertion that the "[Secretary] could always change [his] mind" is a finding entirely inconsistent with administrative law, constitutional due process, and smacking of King George III's tyrannical rule over the American colonies: delete the word "Secretary" and insert the word "King," and the Ninth Circuit's reasoning reads, "the King could always change his mind." The American Constitution and this Court's jurisprudence say otherwise.

Allowing the lower court decisions to stand sets a dangerous precedent that Article II secretaries can arbitrarily "cherry-pick" what portions of their controlling regulations to enforce and what provisions to ignore, to interpret delegations of Article I authority without regard for the presumption that legislation and regulations are applied prospectively rather than retroactively, then contrive out of thin air a *post hoc* justification that can be found nowhere in the record to destroy a 20-year career literally at the eleventh hour before retirement benefits would apply. And the Article III courts, reviewing pursuant to separation of powers, turned a blind eye to the constitutional issues presented, thereby defeating a founding principle of meaningful judicial review of the other branches of government and thereby disserving checks and balances.

Allowing the decisions to stand without correction will have widespread ramifications for the millions of

Americans who answer the call to serve in uniform. How can they manage a career in service, plan for their futures, and care for their families if—at any time—the relevant service secretary could always make a last-minute arbitrary decision declining to provide retirement benefits at 20 years of service? Knowing this, many may be hesitant and forego service. Congress passed laws to encourage career military service to benefit the nation's vital national interests.[2] The Secretary arbitrarily frustrated those purposes.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

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. The district court initially granted a temporary restraining order to stop the Secretary from removing Claiborne. The district court subsequently denied the injunction and the Secretary involuntarily discharged Claiborne in July 2015.

While denying the injunction, the district court stayed the lawsuit while Claiborne pursued remedies before two of the Secretary's Boards: The Army Discharge Review Board and the Army Board for the Correction of Military Records. 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.

[2] *See, e.g.*, 10 U.S.C. § 12732.

The case was re-opened in October 2017 before the district court. 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.

Today, Claiborne is a 50-year-old combat veteran of Iraq, Afghanistan, the Gulf War. Since 2006, when the Secretary retained him, his service record was stellar, with promotions, professional schooling, awards, and entrustment with the lives of junior male and female personnel in combat environments. In all, Claiborne spent 19 years, four months, and four days on active duty achieving the rank of Staff Sergeant. 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, and monthly payments for his family upon his death.

However, the Secretary discharged him against his will six months before the critical retirement eligibility vesting date. The Secretary's discharge deprived Claiborne and his family of approximately $600,000 in retired pay in 2015 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.

The Secretary claimed he was lawfully justified in separating Claiborne in 2015 because in 2005, he entered an *Alford*[3] plea to sexual misconduct involving a minor female in Kitsap, Washington, whom he met in a bowling alley and thought was 19 years old. Claiborne spent one year in civilian confinement and upon release in 2006, was still in the Army. In 2006, the Secretary processed Claiborne for separation based on the civilian misconduct and conviction. However, the Secretary retained him on active duty after a hearing, finding him a "deserving Soldier."

Since then, the Army promoted Claiborne twice, sent him to various schools for skills and leadership training, awarded him medals, deployed him to combat zones, entrusted the lives of other Soldiers to him, appraised him annually as a successful performer, and contracted to authorize his service to at least 20 years. Since 2005, there had been no "new" misconduct whatsoever.

The National Defense Authorization Act of 2013 (NDAA of 2013) directed 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. Pub. L. 112-239, § 572, 126 Stat. 1632 (Jan 2013)(emphasis added).

---

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

To implement the statutory mandate, the Secretary enacted directives (Army Directive 2013-21 and ALARACT 035/2014). But, in so doing, the Secretary added the following temporal language, not contained in the enabling statute, "***regardless of when the offense occurred***." (emphasis added) *Compare* Public Law 112-239, § 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."

REASONS TO GRANT THE PETITION

(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, a point the controlling regulation makes clear.

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 and essentially read the provision "out" of the regulation. So did the Ninth Circuit.

Neither the district court nor the Ninth Circuit addressed the Secretary's having failed to consider a material aspect of the problem: why it was okay to retain Claiborne for ten years, but then at the eleventh hour, separate him, when if the Secretary waited a short six months, all interests would have been served—the Secretary would have Claiborne out of the ranks and Claiborne would be retired. Nowhere did the Secretary nor the lower courts discuss this viable, practical, and fair-minded solution.

(2) **The Secretary exceeded congressional authority in creating an unconstitutional retroactive rule and applying the rule retroactively.** Claiborne also challenged 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 NDAA of 2013, 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. It is well settled that the law does not favor retroactivity.

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 well-founded argument 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 ten years into the future, or at any point for that matter, the Secretary could willy-nilly decide to remove him for the very same conduct that had already been fully adjudicated in Claiborne's favor.

The Ninth Circuit, in a stretch, found that creating a new administrative rule—and including self-directed temporal language in that rule—that did not exist when Claiborne's case was adjudicated ten years in the past, then using that rule to go back ten years and

re-open Claiborne's settled transaction, was not retroactive, but prospective, and therefore constitutional. The reasoning is fundamentally flawed.

(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.

The Ninth Circuit gave this point short treatment in concluding that it was not relevant to the Secretary's overall determination. This, again, is "reading out" a basis on which the agency relied—a basis that is plainly arbitrary, capricious, unconstitutional, and not in accordance with the law.

SECTION 572 OF THE NDAA OF 2013 & ARMY REGULATION 635-200

The statutory and regulatory framework that authorizes the Secretary to involuntarily discharge soldiers before their enlistment expires begins with 10 U.S.C. § 1169, which is implemented by 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 (emphasis added).

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 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.

H.R. 4310, 112th Cong. § 572 (2013) (enacted as Public Law 112-239, § 572, 126 Stat. 1632).

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***.

Id., (emphasis added).

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.

ARGUMENTS

I. The Secretary Picked those Portions of the Controlling Regulation that Supported his Decision and "Read Out" those Provisions that Favored Claiborne.

Title 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." *Id.* 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).

AR 635-200, which governs administrative separations for active duty Army enlisted personnel like Claiborne, provides 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 1-17(b) (emphasis added).

Likewise, chapter 1-17b (3) of this controlling regulation establishes 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.*

There is no factual dispute that the Secretary based the July 2015 separation decision against Claiborne on conduct that was already considered at a 2005 trial and a 2006 administrative proceeding, which ended in the Secretary's decision to retain Claiborne. Similarly, there is no dispute that Claiborne has not engaged in misconduct since 2005 that would form the basis of a new proceeding. There can be no dispute that the Secretary's 2015 decision to separate Claiborne runs contrary to the provisions of the regulation that prohibits successive separation proceedings for the same conduct, but the Secretary ignored them.

There are very limited circumstances under which it may be appropriate to separate a soldier after he or she has already been the subject of an earlier separation process:

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 regulatory exceptions applied to Claiborne. And further, there is nothing in Section 572, the Army Directive, or the ALARACT Message, to indicate any intention to supplant Army Regulation 635-200's applicability.

The Secretary did not amend the regulation's prohibition against successive separation proceedings; the Secretary ignored it when initiating separation proceedings against Claiborne for the same conduct, a second time. In doing so, the Secretary abused his discretion by violating the very regulations promulgated in the agency's own separation procedures manual. *See, e.g.*, *Citizens to Preserve Overton Park Inc.*, *v. Volpe*, 401 U.S. 402 (1971) (discussing requirement for executive agencies to follow procedures.)

A district court may set aside an administrative 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*, 877 F.3d 845, 866 (9th Cir.2017) (quoting 5 U.S.C. § 706(2)(A)). "The general applicability standards of 706 require the reviewing court to engage is a substantial inquiry." *Overton Park,* 401 U.S. at 415. 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." *Id.*

This Court and all Federal Circuit Courts of Appeals have held that an agency's failure to follow its own established procedures or regulations constitutes a violation of the APA. But the Secretary here, and both the district and court of appeals failed, to apply this well-settled point of law to Claiborne. *See, e.g., NLRB v. Beverly Enterprises-Massachusetts, Inc.,* 174 F.3d 13, 35 (1st Cir. 1989) (noting that the NLRB must comply with its own regulation) (citing *Service v. Dulles*, 354 U.S. 363 (1957)); *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, 235 (1974)); *Leslie v. A.G. of the United States*, 611 F.3d 171, 180 (3d Cir. 2010) (noting that "rules promulgated by a federal agency that regulate the rights and interests of others are controlling upon the agency") (quoting *Columbia Board. Sys., Inc. v. United States*, 316 U.S. 407, 422 (1942)); *Electronic Components Corp. v. NLRB*, 546 F.2d 1088, 1090 (4th Cir. 1976) ("[i]t is well settled that the rules and regulations of an administrative agency are binding upon it as well as upon the citizen even when the administrative action

under review is discretionary in nature") (citing *Dulles*, 352 U.S. at 372); *Gov't of Canal Zone v. Brooks*, 427 F.2d 346 (5th Cir. 1970) ("it is a denial of due process for any government agency to fail to follow its own regulations providing for procedural safeguards to persons involved in adjudicative processes before it"); *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 545 (6th Cir. 2004) ("it is an elemental principle of administrative law that agencies are bound to follow their own regulations"); *Miami Nation of Indians of Ind., Inc. v. United States DOI*, 255 F.3d 342, 348 (7th Cir. 1986) ("the Act has been interpreted . . . to require agencies, on pain of being found to have acted arbitrarily and capriciously, to comply with their own regulations . . ."); *Coteau Properties Co. v. Department of Interior,* 53 F.3d 1466, 1475 (8th Cir. 1995) ("[i]t has been long settled that an agency must abide by its own regulations") (citing *Voyageurs Region Nat'l Park Ass'n v. Lujan*, 966 F.2d 424, 428 (8th Cir. 1992)); *John Doe v. Schachter*, 804 F. Supp. 53, 63 (N.D. Cal. 1992) (". . . 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") (citing *Dulles*); *Cotton Petroleum Corp. v. United States Dep't of Interior, Bureau of Indian Affairs*, 870 F.2d 1515, 1526 (10th Cir. 1989) ("[t]he failure of an agency to comply with its own regulations constitutes arbitrary and capricious conduct"); *Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir. 1986) ("[t]he failure of an agency to comply with its own regulations constitutes arbitrary and capricious conduct").

In this regard, *Blassingame v. Secretary of the Navy*, 866 F.2d 556 (2d Cir. 1986) is instructive because a military secretary failed to follow the agency's procedures when adjudicating a case against a Marine. The appellant sought review of the Navy's decision denying the appellant's request to change his undesirable discharge to an honorable discharge.

The Second Circuit found that because the agency failed to consider the Marine Corps' non-compliance with the terms of its own separation manual, the decision was made in violation of the Administrative Procedure Act. *Blassingame*, 866 F.2d at 560 *citing Dulles*, 354 U.S. at 387 (holding that federal courts may review agency action to ensure its own regulations have been followed).

The *Blassingame* court noted the prejudicial effect that an agency's action can have on the proceedings before it:

> The [agency boards] ignored the agency's failure to conduct the required investigation. Accordingly, they neglected to weigh the potential prejudicial effect of this non-compliance on any subsequent petition for discharge by appellant. But for the Corps's initial improper induction and subsequent failure to investigate, Blassingame's record might have been spared the blemish of an 'undesirable' discharge.

Id. at 560.

The regulatory noncompliance that the *Blassingame* court identified is present in here. Claiborne was the subject of administrative proceeding in 2006. That settled the transaction and for all concerned. For the Secretary to wait a decade and open another separation hearing on the same issues is precisely the same conduct condemned by *Blassingame* and other U.S. Circuit Courts of Appeals.

The Tenth Circuit Court of Appeals has also concluded that "[w]here it is shown that an administrative agency deviated from its established procedures, the presumption of administrative regularity does not apply." *Cotton Petroleum Corp.,* 870 F.2d 1515 at 1526, *quoting Wilson v. Hodel*, 758 F.2d 1369, 1372 (10th Cir. 1985). In *Cotton Petroleum*, the court found that the Assistant Secretary "[] failed to set forth, discuss and analyze all of the factors his own guidelines . . . required of him." *Cotton Petroleum*, at 1527. Just as the agency in *Cotton Petroleum* disregarded the requisite factors in arriving at its decision by failing to set forth or discuss the relevant factors, so too did the Secretary here pay no credence to the prohibition against processing for separation a person a second time. In so doing, the Secretary has subjected Claiborne to administrative double jeopardy in direct conflict with "[s]eparation 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***." Chapter 1-17(b) of AR 635-200 (emphasis added).

The Secretary's decision to disregard the prior proceedings and initiate new proceedings years later rendered the ultimate conclusion arbitrary and capricious, departing from the "reasoned decision-making" which this Court's jurisprudence requires agencies to engage in. *See Allentown Mack Sales & Services, Inc. v. NLRB*, 522 U.S. 359, 374 (1988); *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). In *State Farm*, this Court held that an agency decision will be deemed as arbitrary if:

> the agency has relied on factors for 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.

Id. at 43.

The Circuit Courts of Appeals are in line on this point of law. *See, e.g.*, *Penobscot Air Servs. v. FAA*, 164 F.3d 713, 719 (1st Cir. 1999) ("[t]he task of a court reviewing agency action . . . is to determine whether the agency has examined the pertinent evidence, considered the relevant factors, and 'articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'") (quoting *supra Motor Vehicle Mnfrs.*

Ass'n); *Lefrancois v. Mabus*, 910 F.Supp.2d 12 (D.D.C. 2012); *Neal v. Sec'y of Navy & Commandant of Marine Corps*, 639 F.2d 1029, 1037 (3rd Cir. 1981) (that agency action may be illegal if it is "arbitrary, or capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation, or mandatory published procedure of a substantive nature by which plaintiff has been seriously prejudiced, and money is due") (quoting *Skinner v. United States*, 594 F.2d 824 (Ct. Cl. 1979)); *Ohio Valley Envtl. Coalition v. Hurst*, 604 F. Supp. 2d 860, 880 (S.D. W. Va. 2009) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.") (quoting *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43);*Budhathoki v. Nielsen*, 898 F.3d 504, 516 (5th Cir. 2018) (agency action is arbitrary and capricious "when it is 'so implausible that it could not be ascribed to a difference in view or the product of agency expertise'"); *Glenn v. MetLife (Metro. Life Ins. Co.)*, 461 F.3d 660, 666 (6th Cir. 2006) (agency action should be upheld "if it is the result of a deliberate, principled reasoning process and if it is supported by substantial evidence."); *Abraham Lincoln Mem. Hosp. v. Sebelius*, 698 F.3d 536, 555 (7th Cir. 2012) ("where an agency has changed course it is 'obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first place.') (quoting *supra Motor Vehicle Mfrs. Ass'n.*); *Watson v. Arkansas Nat'l Guard*, 886 F.2d 1004 (8th Cir. 1989) (finding agency decisions to be overturned where the agency's decision-making process was deficient); *Cal. PUC v. FERC*, 879 F.3d 966, 973 (9th Cir. 2018) (". . . the court must uphold a

decision if the agency has 'examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.'") (quoting *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016)); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) ("The duty of a court reviewing agency action under the 'arbitrary or capricious" standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made."); *Miami-Dade County v. United States EPA*, 529 F.3d 1049, 1064 (11th Cir. 2008) (applying the *State Farm* rule against arbitrary and capricious agency action).

The Army is bound by the APA's "reasoned decision-making" requirement. *Allentown*, 522 U.S. at 374; *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 29. In separating Claiborne for misconduct which had previously been conclusively adjudicated, the Army disregarded its obligations under the APA. A decision on those grounds cannot be and was not the product of "reasoned decision-making."

The Secretary failed, without adequate justification, to reasonably consider important aspects of Claiborne's position. Indeed, the goals of both parties could have been achieved by merely allowing another seven months to pass. The Secretary's decision runs counter to the evidence that was in the administrative record before him. Claiborne's separation could have been accomplished in accordance with the law by simply letting a modest amount of time elapse.

Accordingly, cherry-picking which portions of the regulation to apply and ignore, then failing to consider material aspects of the problem to solve it, render the Secretary's decision 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.").

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.

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 (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).

This Court has repeatedly affirmed the presumption that, absent clear congressional intent, federal legislation should affect future actions rather than apply retroactively, writing, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

Further, while "[r]etroactivity provisions often serve entirely benign and legitimate purposes . . . a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.*, 267-68.

Under *Landgraf*, "when a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. The Court wrote, "congressional 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 v. Georgetown University Hospital,* 488 U.S. 204 (1988), this Court cited several cases**,** all of which dealt with the issue of retroactivity in the context of construing statutes or regulations, to support the reasoning noted above. *Bowen*, 488 U.S. at 208, citing *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).

Since *Bowen*, this Court has reemphasized the importance of the presumption against retroactivity. The 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,* 511 U.S. at 257; *see also Lynce v. Mathis,* 519 U.S. 433, 440 (1997) ("In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects").

This "requirement that Congress first make its intention clear helps ensure that Congress itself has

determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf,* 511 U.S. at 268.

The enabling statute here, Section 572 of the NDAA of 2013, did not exist when Claiborne's case resolved in 2006. I contains no grant of altered powers and thus, should be presumed as a Congressional mandate for future actions, *i.e.* prospective.

Section 572 instructed the Secretary of Defense to "modify the revised comprehensive policy for the Department of Defense sexual assault prevention and response program required by Section 1602 of the *Ike Skelton National Defense Authorization Act for Fiscal Year 2011*, Pub. L. 112-239, 572."*Id.* § 572 (2013) (enacted as Public Law 112-239, §572 126 Stat. 1632).

The congressionally-delegated authority was not an expansion of Secretarial power to reach back into time and upset settled transactions. Instead, consistent with the presumption of prospectivity in legislation, rulemaking, and adjudication of rules, Congress iterated the inclusion of:

> 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.

H.R. 4310, 112th Cong. § 572(a)(1) (2013) (enacted as Public Law 112-239, § 572 126 Stat. 1632).

Subsections (A) and (B) provide clear parameters for Secretarial action—specifically requirements that Secretarial decisions are "based on the full facts of the case and that due process procedures are provided under regulations prescribed by the Secretary of Defense" and that such separation action is not taken by:

> alter[ing] the authority of the Secretary of the military department concerned to process members of the Armed Forces for administrative separation for other offenses or under other provisions of law.

H.R. 4310 § 572(a)(2)(A)-(B) (2013) (enacted as Public Law 112-239, § 572 126 Stat. 1632).

This is clear and unambiguous Congressional intent—the Secretary's authority was not expanded nor was the Secretary given the leeway to promulgate and enforce rules for actions having occurred ten years prior.

The Ninth Circuit erroneously conceded to the Secretary's *post hoc* litigation position when it should have examined the express *alteration* of the Secretary's authority—evident by the long line of legislative history of the National Defense Authorization Act of 2013 and its progeny. A clear and unambiguous reading the NDAA of 2013 reveals the parameters for Secretary action. Congress required new policies but did not delegate legislative authority to create or enforce those policies retroactively. Review of the legislative history makes this even

more clear than the absence of retroactive language contained in the plain language of the enabling statute.

For example, the Comprehensive Policy referred to in Section 1602, *supra*, was first presented to Congress in January 2005:

> provid[ing] a foundation for the Department to improve prevention of sexual assault, significantly enhance support to victims and increase reporting and accountability.

U.S. Dept. of Def., Sexual Assault Prevention and Response, *Mission and History* https://www.sapr.mil/mission-history [https://www.sapr.mil/mission-history]

The Policy created guidance on the structure, procedure, and process for investigating, reporting, and discharging members guilty of sexual assault in the military. The 2005 enabling statute did not grant discretionary and retroactive powers to the Secretary. Section 573 instructed the Secretary to:

> take such steps as may be necessary to ensure that (1) the United States Army Criminal Investigation Laboratory has the personnel and resources to effectively process forensic evidence used by the Department of Defense within 60 days of receipt by the laboratory of such evidence; (2)

> consistent policies are established among the Armed Forces to reduce the time period between the collection of forensic evidence and the receipt and processing of such evidence by United States Army Criminal Investigation Laboratory; and (3) there is an adequate supply of forensic evidence collection kits.

H.R. 4200, 108th Cong. § 573 (2004) (enacted as Pub. L. 108-375, § 573, 118 Stat. 1811).

The only relevant language in Section 576 exists in subsection (d) Methodology:

> In carrying out its examination under sub-section (b) and in formulating its recommendations under subsection(c), the task force shall consider the findings and recommendations of previous reviews and investigations of sexual assault conducted by the Department of Defense and the Armed Forces.

H.R. 4200 § 576(d).

Even when directing a review of concluded matters, Congress directed the Secretary to *only* use the information for prospective use.

Further, the plain meaning of the statutory framework reveals nothing beyond the mandate to ***respond*** to and prevent sexual violence in the

military, *i.e.* the Comprehensive Policy. Section 577 specifically related to the policy and procedure on ***prevention and response*** to sexual assaults. Again, this did not authorize the Secretary to go backwards in time and scour the ranks to upset settled transactions.

Section 542 of the House Committee Report contains the only use of the word "retroactive."

> This section would authorize the Secretary of Defense to award a military decorations to persons who have successfully completed joint professional military education phase I and to subsequently award a device to affix to that ribbon when a person has successfully completed joint professional military education phase II. These awards would be *retroactive* for any person who has completed either phase I or phase II since the sequenced approach to joint professional military education was enacted in 1989.

H. Rept. 108-491, at 321 (2004) (emphasis added).

Congress has shown itself fully capable of articulating retroactivity in a clear and unambiguous manner. The Secretary's assertion flies in the face of the presumption against retroactivity as articulated in *Bowen* and *Landgraf.*

The House Committee Report clarifies the procedural steps for submitting the task force report to the Committee and:

> [a]t the same time, the Secretary of Defense would also be required to provide to those committees an assessment of the effectiveness of the corrective actions being taken by the Department of Defense and military services as a result of various investigations and reviews into matters involving sexual assault.

H. Rept. 108-491, at 326 (2004).

No aspect of the NDAA of 2006 granted or expanded retroactive powers to the Secretary in responding to sexual assault. H.R. 1815, 109th Cong. (2006) (enacted as Pub. L. 109-163, 119 Stat. 3136).

Indeed, Sections 551, 552, 554, and 596 contain the only language relevant to sexual assault and other offenses, and those sections specifically discuss the law and regulations ***taking effect in the future***. For example, the offense of stalking under the Uniform Code of Military Justice specifically states it applies to offenses committed after the date that is 180 days after the date of the enactment of this Act

The explicit Congressional mandate in Section 554 uses the temporal language "whether or not" but the language confines the Secretaries action to solely the production of the report:

> Secretary of Defense shall prescribe in regulations a requirement that each covered member of the Armed Forces shall submit to an authority in the military department concerned designated pursuant to such regulations a timely report of any conviction of such member by any law enforcement authority of the United States for a violation of a criminal law of the United States, ***whether or not the member is on active duty at the time of the conduct*** that provides the basis for the conviction. The regulations shall apply uniformly throughout the military departments.

H.R. 1815, 109th Cong. § 554 (2006) (emphasis added).

Sections 623, 628, and 811 of H. Rept. 109-89 contain the only mentions of retroactivity. Section 623 contained the most explicit language on discretion and retroactivity, "[t]he section would authorize the Secretary of Defense to ***retroactively*** designate the period during which duty in a specific area would qualify the member to receive hostile fire or imminent danger pay." H. Rept. 109-89, at 340 (2005) (emphasis added).

Section 628 included another instance of explicit temporal intent, "The section would clarify that agreements paid under this subsection are

retroactively authorized if executed on or after October 5, 2004." H. Rept. 109-89, 628 (emphasis added).

And Section 811 stated:

> Currently, compensation of certain executives in excess of a "benchmark" set by regulations is unallowable. As a result, in *General Dynamics Corporation v. United States*, 47 Fed. Cl. 514 (2000), the Court held that application of the statutory cap to a contract awarded prior to the enactment section 808(e)(2) constituted a breach of contract, and that the government was liable for breach damages due to the *retroactive* application of the cap. This executive compensation would still be subject to a test of reasonableness.

Supra § 811, at 360 (2005).

Congress was fully aware of the use and concept of retroactivity and used the most direct application of it for other sections of the law, but not Section 572 of the NDAA of 2013.

Another example is the NDAA 2009 which contained only a single instance of retroactive application and no mention of prospective application.

> ***Retroactive*** Effectiveness of Amendments.—The amendment made

> by subsection (a) shall apply with respect to any sentence of a court-martial set aside by a Corrections Board on or after October 1, 2007, when the Corrections Board includes an order or recommendation for the payment of a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, that arose as a result of the conviction. In this subsection, the term "Corrections Board" has the meaning given that term in section 1557 of title 10, United States Code.

S.3001, 110th Cong. § 592 (2008) (enacted as Pub. L. 110-417 § 592, 122 Stat. 4356) (emphasis added).

When Congress authorized retroactive application of a statute, it wrote so both clearly and unambiguously.

Further, only Section 3507 of the 2009 NDAA spoke to matters related to sexual offenses but did not address the Comprehensive Policy, "[t]he Secretary of Transportation shall direct the Superintendent of the United States Merchant Marine Academy to prescribe a policy on sexual harassment and sexual violence applicable to the cadets and other personnel of the Academy" (referring to 46 U.S.C. § 51301). Instead, it directed the Secretary of Transportation to "direct the Superintendent of the United States Merchant Marine Academy to prescribe a policy on sexual harassment and sexual violence applicable to

the cadets and other personnel of the Academy." *Supra* § 3507. The accompanying Senate Report 110-335 contains no mention of either retroactive or prospective application of Pub. L. 110-417.

The 2010 NDAA contained four sections relating to sexual assault in the military.

Section 566 amended Section 576 of Pub. L. 108-375 in altering the timeline to implementation by striking "one year ***after*** the initiation of its examination under subsection (b)" and inserting "December 1, 2009." Section 567stated:

> [t]he Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a revised plan for the implementation of policies aimed at ***preventing*** and ***responding*** effectively to sexual assaults involving members of the Armed Forces."

H.R. 2647, 111th Cong. §567 (2010) (enacted as Pub. L. 108-375, §567, 123 Stat. 2190).

In enacting this legislation, Congress used language with prospective application and made no mention of retroactive authority. The reference in Section 567 to "prospective commanding officers," *Supra* § 567. H. Rept. 111-166 clarified the required contents of the report to the Committee when submitted by the Secretary of Defense. Additionally, it contained only

two explicit uses of prospectivity—unrelated to sexual offenses. H.R. Rept. 111-166, at 245 & 347 (2009).

Section 706 contained the only use of retroactivity, but it spoke directly to constructive eligibility of Tricare (*i.e.*, medical care) benefits:

> Section 1086(d) of title 10, United States Code, is amended— (1) by redesignating paragraph (4) as paragraph (5); and (2) by inserting after paragraph (3) the following new para-graph (4): (4)(A) If a person referred to in subsection (c) and described by paragraph (2)(B) is subject to a retroactive determination by the Social Security Administration of entitlement to hospital insurance benefits…

H.R. 2647, 111th Cong. § 706 (2010) (enacted as Pub. L. 108-375, § 706, 123 Stat. 2190).

While Section 255(a)(2)(D) of the NDAA 2009 used clear prospective language stating, "the ability to impose disproportionate defensive costs on *prospective* adversaries of the United States." H.R. 2447, 111th Cong. § 255(a)(2)(D) (2010) (enacted as Pub. L. 108-375, § 706, 123 Stat. 2190).

The use of temporal language is not foreign to previous National Defense Authorization Acts. Indeed, when Congress wants an agency to act pursuant to its mandates, it has shown that it is fully capable of using clear unambiguous language to that

effect—as it did in previous NDAAs. Section 572 of the 2013 NDAA is no exception. It only contains language falling into the presumption of <u>future</u> cases of sexual offenses:

> . . .who ***is not*** punitively discharged from the Armed Forces in connection with such conviction. . .

H.R. 4310, 112th Cong. § 572 (2013) (enacted as Pub. L. 112-239 § 572, 126 Stat. 1632) (emphasis added).

If Congress intended for this to be interpreted as inclusive of servicemembers who ***were not*** punitively discharged then it is more likely that the phrase "who has not been punitively discharged" would have been included.

Since it did not, we are bound to interpret this as it is written, *i.e.* future application consistent with the presumption of prospective legislative and regulatory effect. *See, e.g.*, *Bowen* and *Landgraf*, *supra*.

In enacting Section 572, Congress sought to correct those situations when a soldier is convicted of a sexual offense 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.

The Secretary certainly always retained the power to dictate policy and promulgate rules serving the

interest of his Department. However, the NDAA 2013 and its progeny never gave explicit retroactive application in the manner claimed by the appellee and unquestionably adopted by the Ninth Circuit and the district court below. Further, the only explicit Congressional language regarding retroactive and prospective application did not apply to sexual offenses having occurred in 2005. Sections 576, 571 & 577 Pub. L. 108-375; Sections 542, 551, 552, 554, 593 & 596 H. Rept. 108-491; Sections 555, 623, 628 & 811 H. Rept. 109-89; Section 592(c) Pub. L. 110-417; S. Rept. 110-335; Sections 255(a)(2)(D), 556, 567 & 706 Pub. L. 111-84; H. Rept. 111-166; and Pub. L. 111-383.

The NDAA 2013, its progeny, and legislative history show no explicit textual grant of plenary authority for the Secretary to separate any service member in Claiborne's position. Congress has shown a clear history of explicitly indicating when it desires both retroactive and prospective application. No such explicit use exists here. Therefore, the Secretary's implementation of language unsupported by evidence in favor of retroactive effect, exceeds the agency's statutory authority and is unconstitutional.

To overcome the presumption of prospectivity, this 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. 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 this Court's decisions in *Bowen* and *Landraf,* 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 lower courts 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 no retroactive application; rather, according to the Secretary, whose litigation position the lower courts adopted, there was only prospective application of new criteria under the new rule. The lower courts also declined to address this question in light of *Bowen, Landgraf,* 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 determinations. *Id.*

The lower courts 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 (stating that "the 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, 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 prospective-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 ten years into the past, relied on factors which Congress neither intended nor authorized him to consider. *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43 ("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 on its face and in its execution against Claiborne.

III. The Lower Courts Erred by Endorsing the Secretary's Arbitrary Decision that Claiborne had a "Demonstrated Proclivity" for Misconduct.

The Secretary's September 27, 2017, 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 premise, "demonstrated proclivity" has no support in the record. *See* § 706(2)(A). In *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947), this Court held that judicial review must judge the agency action solely by the groundsinvoked.

The district court did not address this point in the context of arbitrary agency decision-making. Because

the record is totally void of any evidence of more than one offense, the Secretary's determination that Claiborne had a "demonstrated proclivity" 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 "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.").

This Court has recognized the 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 Court noted that a single fight during college did not show a proclivity toward excessive force during arrests by a law enforcement officer, that a single occurrence is not a proclivity. "[I]nvolvement in a single fraternity fracas does not demonstrate a proclivity to violence…." *Brown*, 520 U.S. at 413, n. 2); *see also McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) (repeated violations of law demonstrate a proclivity); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 148 (1948) (several anti-trust violations demonstrate a proclivity).

CONCLUSION

Therefore, this Court should grant the Petition.

Respectfully submitted,

JOHN N. MAHER*
KEVIN J. MIKOLASHEK
MAHER LEGAL SERVICES PC
26 South 3rd Street, Number 68
john@maherlegalservices.com
kevin@maherlegalservices.com
Tel: (708) 468-8155

Counsel for Petitioner
*Counsel of Record

August 10, 2020