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 REPLY BRIEF

JOHN N. MAHER
KEVIN J. MIKOLASHEK
MAHER LEGAL SERVICES PC
26 SOUTH 3RD STREET, NUMBER 68
GENEVA, ILLINOIS 60134
TEL: (708) 468-8155
JOHNMAHER@MAHERLEGALSERVICES.COM

ATTORNEYS FOR PLAINTIFF-APPELLANT
DAMON J. CLAIBORNE

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SUMMARY OF REPLY BRIEF

In his Opening Brief, Plaintiff-Appellant Damon J. Claiborne ("Claiborne") demonstrated that the Secretary of the Army ("Secretary") exceeded the limited scope of statutory authority Congress vested in him through the National Defense Authorization Act of 2013 ("NDAA of 2013") to create and enforce new policies designed to ensure that a soldier who is convicted of an offense involving sexual assault and not discharged from the Army as a part of that judicial sentence, is nevertheless processed for administrative separation after trial.

Before the district court and in his Opening Brief here, Claiborne confirmed that the Secretary, unilaterally and without congressional mandate, created a policy that required the initiation of separation proceedings against any soldier who had been convicted of a sexual assault, ***at any time***, even if that Soldier had already been the subject of separation proceedings in the past – something far more expansive than the limited grant of power Congress provided the Secretary.

By unilaterally and unlawfully expanding the reach of his grant of authority, the Secretary disregarded the Constitution and the Administrative Procedure Act to revive a matter that had already been finalized 10 years prior. As applied to Claiborne, the Secretary's new policy resulted in the Army's looking to conduct that occurred a decade in the past, which had been the subject of not only judicial proceedings, but also administrative separation proceedings, and that had been

resolved in Claiborne's favor. The Secretary then reversed that outcome to Claiborne's detriment, depriving him and his family of retired pay and medical care for life, goals Claiborne spent 19 years and 7 months, including substantial time in combat, pursuing.

Stated differently, Claiborne and the Secretary already had their day in court (or, more accurately, day in court and day before the administrative separation board). The issue was resolved in Claiborne's favor so much so that the Secretary went so far to enter into a contract to authorize Claiborne's retirement at 20 years of active duty service, after promoting him twice and placing the care of junior male and female soldiers in his trust.

The Secretary's decision to re-litigate these past proceedings runs afoul of the Secretary's own regulation prohibiting administrative double jeopardy, breached his contract with Claiborne promising retirement, and violated the well-settled Constitutional principle that unless Congress dictates otherwise, prohibition of any conduct must be applied prospectively, not retroactively. *See e.g., Green v. United States*, 376 U.S. 149, 160 (1964) ("retroactivity is not favored in the law."); *Cort v. Crabtree*, 113 F.3d 1081, 1087 (9th Cir. 1997) (this Court refused to apply rule retroactively in the absence of specific congressional language authorizing retroactive enforcement); *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 835 (9th Cir. 1997) (this 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) (this Court held that absent legislative intent to the contrary, statutes do not operate retroactively).

These questions of law, briefed to the district court, went misinterpreted because the lower court erroneously adopted the Secretary's request for judicial deference rather than applying *de novo* review as Claiborne urged with citation to authority. *See e.g., Ramirez Alejandre v. Ashcroft*, 319 F.3d 365, 377 (9th Cir. 2003) (*en banc*) (whether an agency's procedures comport with due process requirements presents a question of law reviewed *de novo* - noting no deference is owed to agency); *accord*, *Gilbert v. Nat'l Transp. Safety Bd*., 80 F.3d 364, 367 (9th Cir. 1996).

That the district court did not apply the *de novo* standard of review requires reversal on this point alone. But again, before this Court, the Secretary largely restates his distracting points which avoid the real issue - that judicial deference to military personnel decisions simply does not apply when an Article II appointed official disregards the Constitution, exceeds the scope of enabling legislation, and all but destroys a family's life - the life Claiborne and his family strove for and relied upon through combat deployments over the course of 19 years and five months of active duty military service, only to be involuntarily separated a mere

seven months before vesting in retired pay and medical benefits for life – based on conduct that had been both judicially and administratively put to rest.

What is more, the district court side-stepped, that is, failed to address the Secretary's implausible finding that 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).

The Secretary's justification is nowhere supported in the record, and the district judge erred by ignoring the Supreme Court and Ninth Circuit decisions Claiborne presented that hold, intuitively and legally, that one act cannot be a "demonstrated proclivity," and therefore, the Secretary's adjudication was arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706.

Beyond the unconstitutional promulgation and enforcement of unauthorized retroactive policies against him and manufacturing a justification out of thin air, (demonstrated proclivity), Claiborne also demonstrated that the Secretary cobbled together his position piecemeal, "cherry-picking" which provisions of the otherwise controlling regulation, Army Regulation (AR) 635-200, would apply, (not the least of which was the direct bar against administrative double jeopardy), relying on those discrete provisions favoring the Secretary and disregarding those

favoring Claiborne to reverse the Agency's 10-year old decision - which must be arbitrary in its strictest sense.

Nothing in the Secretary's Answering Brief ("Ansr. Br.") undermines Claiborne's having established that the Secretary's decision to separate him immediately before his retirement vesting was the direct result of exceeding statutory authority, enforcing unconstitutional retroactive implementing policies, creating a justification *post hoc* (demonstrated proclivity), and cherry-picking which parts of the controlling regulation to apply and which parts to ignore (bar to administrative double jeopardy). All of this to say the Secretary's conduct violates separation of powers and is arbitrary and capricious, which neither the Constitution nor the Administrative Procedure Act condone.

For these reasons, the Secretary's determination to separate Claiborne as a direct result of policies implemented through the NDAA of 2013, is "arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law," and should be reversed and vacated. 5 U.S.C. § 706(2)(A) (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);" *Nat'l Mining Ass'n v. Zinke*, No. 14- 17350, 2017 WL 6327944, at *13 (9th Cir. Dec. 12, 2017)).

REPLY ARGUMENTS

I. THE SECRETARY'S DETERMINATION TO SEPARATE CLAIBORNE MERELY 7 MONTHS BEFORE HIS 20-YEAR RETIREMENT VESTED, BASED ON NEW ADMINISTRATIVE POLICIES THE SECRETARY PROMULGATED TEN YEARS AFTER CLAIBORNE'S CASE WAS CLOSED, SHOULD BE REVERSED AND SET ASIDE AS UNCONSITUTIONAL AND VIOLATIVE OF THE ADMINISTRATIVE PROCEDURE ACT.

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). The District Court declined to apply the correct standard of review, which is prejudicial legal error justifying reversal on this point alone.

The NDAA of 2013 provided new guidance to the Secretary to administratively implement:

> (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 (emphasis added).

To implement this requirement, 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).

The language "***regardless of when the conviction for a sex offense occurred***" was not contained in the enabling statute, but inserted and adopted by the Secretary without congressional authority. He then used his newly-promulgated policies to resurrect Claiborne's 2005 judicial proceeding and 2006 administrative separation proceeding to fire Claiborne in 2015, just months shy of retirement

eligibility, a very harsh and totally unlawful abuse of Article II authority delegated from the Congress under Article I.

Another constitutional issue: the Secretary did not have the statutorily-mandated power to enforce the newly-announced directives retroactively, that is, go back 10 years to resurrect an issue that had been heard, decided, resolved, and then reverse it.

Although Congress authorized and required 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***.

In enacting NDAA of 2013, Congress directed the Secretary to promulgate and enforce new policies to solve a problem: the very rare instance where a soldier convicted of sexual assault was not sentenced to be separated from the Army. The congressional solution: begin follow-on administrative proceedings after the judicial proceedings to separate the soldier from the ranks.

A fair reading of the enabling statute here envisions that Congress sought to solve prospective problems of having a convicted sexual assaulter still within the Army's ranks in those very rare occasions where the sentence in court did not include a punitive discharge. However, nowhere in the enabling statute did Congress authorize the Secretary to unilaterally insert broad sweeping language to

cull its ranks retroactively and re-open concluded cases that had already been through judicial and administrative proceedings.

In 2006, the Secretary applied existing regulations to Claiborne's conduct to adjudicate the matter. Final adjudication resulted in expectations that Claiborne would remain in the Army and the Army would retain Claiborne. Ten years later, the Secretary enacted new rules and applied them retroactively without congressional authority to the very same conduct. The Secretary's Article II abuse of authority delegated by Article I cannot stand under Article III review.

A. Because the Secretary Exceeded His Statutory Authority Contained in the Enabling Statute, His Determination to Prevent Claiborne's Retirement Violates the Constitution, the Administrative Procedure Act, and Cannot Be Sustained.

Nowhere in his Answering Brief or before the lower court did the Secretary cite precedent to support the idea that an Article II-appointed official can inject broad language when implementing a statutory directive to create retroactive enforcement power over conduct that was addressed a decade prior. There is no cognizable authority to do so.

If the Congress did not direct the Secretary to create new policies as part of the NDAA 2013, Claiborne's 10-year-old case - which had already been through both judicial and administrative processes – would not have been resurrected and he would not have been separated merely months before he and his family would have vested in retired pay and medical benefits for life, much of which earned in

hostile fire zones leading junior male and female soldiers and safeguarding their well-being.

The Administrative Procedure Act, 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).

The NDAA of 2013 did not authorize the Secretary to alter the past legal consequences of conduct which occurred in the past. Indeed, before the district court, the Secretary conceded this point, which is consistent with a plain reading of the provision at issue. [The Secretary] "did not institute disfavored retroactive policies." ER Docket Sheet, Secretary's Opposition at 15. Comparison of the relevant statutory text with the Secretary's implementing rule makes this clear.

Pursuant to Supreme Court precedent, Section 572, as legislation, is prospective in applicability. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988); *Landgraf v. USI Film Prods*., 511 U.S. 244, 265 (1994). Reading the statute to avoid the significant constitutional issue of impermissible retroactivity leaves no doubt that the legislation is 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 of the NDAA of 2013, 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 this situation, 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, especially given the presumption that legislation is prospective in application, coupled with the absence of language authorizing retroactive application of it.

In carrying out Congress' instructions, the Secretary missed the mark, went several steps too far, and reached well outside the bounds of the statutory mandate. There is absolutely nothing in Section 572 that indicates congressional intent for the Secretary to take a broad sweep of the ranks and re-start administrative proceedings that had been resolved years earlier.

The Secretary 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. The Secretary's enforcement of the Army Directive and ALARACT against Claiborne is the very type of broad over-reaching that upsets resolved cases, produces results that are fundamentally at odds with Constitutional principles, and therefore requires judicial intervention.

Claiborne respectfully asks this Court utilize its Article III powers to cabin the executive branch within its Congressionally-authorized authority vacate the Secretary's unlawful adjudication against him. 5 U.S.C. § 706; *see also*, *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).

B. The Secretary Errantly Claims the New Army Directive and ALARACT Were Used Against Claiborne "Prospectively" not "Retroactively."

The Secretary claims he acted within the scope of the NDAA of 2013 and that neither the ALARAT nor the Army Directive, as applied to Claiborne, were unlawful or unconstitutional. Answ. Br. at 18. "This is because section 572 was enacted on an existing framework of 10 U.S.C. § 1169(1) and the Army Regulation which already gave the Army discretion to discharge a soldier in Plaintiff's circumstances. The Directive and ALARACT are in line with section 572, 10 U.S.C. § 1169(1) and the Army's regulatory framework." *Id*.

The Secretary claims that the Directive and ALARACT and "prospective and provide for the future initiation of individualized case-by-case adjudications, under already an existing Army regulation (Army Regulation 635-200, chapter 5-3 and chapter 2-6e)." *Id*. at 18-19.

But, beyond these conclusory statements, the Secretary offers no explanation for how his unilateral insertion of temporally sweeping language that is not found in the enabling legislation coupled with going back 10-years to resurrect a resolved transaction can be anything but unconstitutional retroactive ppromulgation and adjudication, violative of separation of powers, as well as arbitrary and capricious executive enforcement under the Administrative Procedure Act.

C. The Secretary Asks This Court to Ignore the NDAA of 2013, the Army Directive, and the ALARACT Because He Always Had "Plenary" Authority to Separate Claiborne at Any Time.

The Secretary seeks to justify his unconstitutional and arbitrary uses of congressionally-delegated authority by stating the NDAA of 2013, which required him to create new policies (Army Directive and ALARACT), are totally irrelevant because he always possessed plenary authority to separate Claiborne at any time pursuant to ¶ 5-3 of the otherwise controlling regulation, AR 635-200. Answ. Br. at 19-21.

The Secretary is mistaken. Since 2006, when the Secretary retained Claiborne on active duty through 2015, there was absolutely no indication in the

record that the Secretary intended to use his plenary authority against Claiborne. To be sure, he did not use it in 2006 to separate Claiborne after the first administrative separation Board of Officers and the chain-of-command determined to retain him as a "deserving soldier." The Secretary did not use his plenary authority in 2007 when Claiborne completed one year of probation after the Board of Officers determined to retain him. And the Secretary did not use it at any point between 2008 and 2015 to separate Claiborne.

Instead, the Secretary promoted Claiborne twice, sent him to professional education schools, placed him in positions of greater responsibility for the lives of junior male and female soldiers, repeatedly sent him to combat, and entered into a contract authorizing Claiborne to retire at 20 years of active duty service.

The *post-hoc* litigation position that Claiborne's separation is the result of the Secretary's exercising his discretion is a fallacy. The undisputed facts show that nearly a decade ago, both the Secretary and Claiborne viewed the matter as resolved, the parties' rights and obligations were fixed, the issue concluded, and the parties conducted themselves accordingly until the NDAA of 2013 and the Secretary's new policies in the Army Directive and ALARACT were promulgated and enforced against Claiborne.

The record makes pellucidly clear that it was the NDAA of 2013 that was the impetus for Claiborne's separation months before his retirement vesting. Had it

not been for the NDAA of 2013 and the Secretary's unconstitutional 10-year reach back through the Army Directive and ALARACT, all parties' interests would have been achieved -- Claiborne would be retired today, the Secretary would have him out of the ranks, and the American public's confidence that senior appointed officials abide by the limits Congress places upon them in enabling statutes is furthered.

That is not, however, the case. One of the reasons Article III courts exist is to check executive branch appointed officials who take it upon themselves to exceed congressional grants of authority, make law, and negatively affect a family's lives, without having been elected or held accountable by an electorate.

D. The Secretary Errantly Urges This Court to Ignore Supreme Court Precedent and Judicially Defer to His Executive Rulemaking and Adjudication Determinations.

Rather than address head-on the *ultra vires*, separation of powers, and retroactive constitutional claims Claiborne makes, the Secretary invokes a diversion and cites cases concerning judicial deference to military personnel decisions and asks this Court to defer to him. Answ. Br. at 7 – 9; 14. In doing so, the Secretary misses the mark.

Since initiating this case in July 2015, Claiborne challenges whether the Secretary, who derives his legal authority from Congress, followed the plain

language of the NDAA of 2013 in promulgating and adjudicating the new policies Congress directed him to create.

Claiborne's central challenge is that the Secretary's decision to separate him months shy of full retired pay and medical benefits is "not in accordance with law" under the Administrative Procedure Act. The Secretary did not follow the Constitution when he unilaterally injected broad, sweeping, temporal language to upset a decade-old finalized determination, then disregarded Supreme Court and Ninth Circuit precedent by applying new policy retroactively and creating out of thin air a contrived justification ("demonstrated proclivity").

As constitutional challenges, the appropriate standard of review for the district court and before this Court is *de novo*, not, as the Secretary urges, through the limited lens of near total deference to the Secretary. Pursuant to *de novo* review, although the Secretary was required to create policies, he was legally obligated to follow the plain language of the enabling legislation as well as binding Supreme Court precedent in his promulgation and enforcement of the new policies Congress required. Here, he did neither. Accordingly, deference to the Secretary's unlawful acts would be injudicious.

E. The Secretary Unlawfully Picked and Chose Which Portions of His Agency Regulations to Apply and Which to Ignore.

Beyond the unconstitutional promulgation and enforcement of unauthorized retroactive policies against him, Claiborne also demonstrated that the Secretary

cobbled together, piecemeal, and "cherry-picked" what provisions of the otherwise controlling regulation, AR 635-200, would apply, to disfavor him and favor the agency, which must be arbitrary in its strictest sense.

For example, the Secretary's plenary authority found at ¶ 5-3, states that it is not used unless any other provision of the regulation applies. Claiborne demonstrated numbers of other provisions that apply, to include the bar against separating a soldier who had already been subject to judicial or administrative proceedings, which in Claiborne's case, he had been subject to both, retained, and went on to assemble a decade of rehabilitative successes and honorable service.

The exceptions to the "administrative double jeopardy" bar set forth in the regulation do not apply to Claiborne. Even so, after retaining him in service, promoting him twice to a senior non-commissioned officer, entrusting the lives and welfare of junior male and female soldiers to his care in combat, awarding him decorations, sending him to professional advancement schooling, the Secretary determined to deny him and his family retired pay and benefits at the 11th hour and 59th minute, under the guise of legitimate personnel management, which in reality, violates some of America's most sacrosanct constitutional principles – due process, separation of powers, checks and balances, and fundamental fairness.

The position the Secretary took before the district court and reasserts here 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.

This is the arguably the fourth time Claiborne has suffered consequences for his 2005 misconduct, on a record that can be fairly seen as the example of successful rehabilitation and reputable example of American justice and corrections goals: (1) he accepted responsibility and voluntarily entered into an *Alford* plea resulting in a criminal conviction (2005); (2) he spent one year in Washington state confinement with an excellent record (2006); (3) the Army processed him for separation upon release from civilian confinement, but because he was a "deserving soldier," retained him on active duty for the next 10 years

(2006); but (4) separated him in 2015 just shy of retirement eligibility based on the very same conduct that has already been considered at a judicial proceeding and an administrative separation proceeding, and disposed of in a manner indicating that separation was not warranted.

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. Likewise, there is no dispute that Claiborne has not engaged in misconduct since 2006 that would form the basis of new proceeding. The Secretary now asks this Circuit to omit or "read out" these controlling regulatory provisions, a request inconsistent with the law's requirement that the agency follow its own rules. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (Court looked to whether Secretary followed necessary procedures).

And further, there is nothing in the Army Directive and ALARACT 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. *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*, 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." 354 U.S. at 372.

As was the case in *Dulles*, in separating Claiborne, the Secretary violated its own regulation, and in doing so, abused his 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. *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 41 (1st Cir. 1989), ("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.)." Here, the regulations in place to protect against arbitrary decisions were not followed.

F. The Secretary Wrongly Claims Claiborne Waived his Constitutional Retroactivity Challenges

The Secretary errantly claims that Claiborne waived his challenge that the Secretary exceeded the authority Congress vested in him in the NDAA 2013. Answ. Br. at 16 – 17. The Secretary's claim is without merit.

Before the administrative boards and before the district court, Claiborne raised and briefed that the Secretary's promulgating and adjudicating of the Army Directive and ALARACT unlawfully went beyond the problem Congress sought solve and that the result was an unconstitutional adjudication of unlawful retroactive policies violative of the Administrative Procedure Act.

The main points in the district court were that the Secretary did not have the authority to create a retroactive policy nor enforce a retroactive policy, as reflected, for example, in the following points taken verbatim from Claiborne's *Opposition to the Secretary's Motion for Summary Judgment* before the district court:

> In his opening motion, Claiborne noted that nowhere in the administrative record did the Army identify the specific grant of authority to enforce newly-created rules or directives retroactively.
>
> Claiborne relied upon *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), where a unanimous Supreme Court invalidated under the Administrative Procedure Act (APA) an agency regulation that was promulgated with retroactive application but without the authority to enforce it retroactively.

> Like the regulation in *Bowen*, Claiborne established that the Army had no authority to create a directive, reach back 10 years prior to its creation, resurrect a determination to retain him in service, and reverse that decade-old decision to involuntarily separate him a mere seven months shy of a 20-year retirement.
>
> Now, the Army admits there is no grant of retroactive enforcement authority. As the Army noted, it "did not institute disfavored retroactive policies." Army Opposition at 15. On this point alone, Supreme Court precedent counsels the Court here to invalidate the Army's retroactive application of the Army Directive and ALARACT that triggered Claiborne's ultimate July 2015 involuntary separation followed by the Army Board for the Correction of Military Records (ABCMR)'s September 2017 affirmance of the separation decision. *See Bowen*, 488 U.S. at 209 (retroactivity is not favored in the law and regulation cannot be given retroactive effect absent a specific authorization from Congress); *see also Landgraf v. USI Film Products,* 511 U.S. 244, 257 (1994) ("prospectively remains the appropriate default rule").

(Dkt. 62) at pgs. 1-2.

Claiborne did not waive his claims. The Secretary's mischaracterization should be given no credence.

G. The Secretary Mistakenly Claims Claiborne Conceded the Legality of the Army Directive and ALARACT

The Secretary claims, also errantly, that Claiborne contradicts statements he made before the district court and that Claiborne conceded the legality of the Army Directive and ALARACT. Answ. Br. at 17 – 18. The Secretary's interpretation is, again, not consistent with the record.

Before the district court, Claiborne acknowledged that the Secretary was authorized to promulgate the new polices – indeed, Congress ***directed*** the Secretary to create the new policy. Public Law 112-239, Section 572.

What Congress did not authorize was the Secretary's unilateral instilment of a far-reaching temporal component to reach back a decade, revive, and reverse a settled issue. That always was and remains a fundamental thrust behind Claiborne's claims - that the Secretary's actions in this case are unconstitutional and in violation of the Administrative Procedure Act. Of course the Secretary was right to respond to Congress' mandate to him in the NDAA of 2013, but he was not right to introduce, out of whole cloth, a broad and wide-ranging retroactive policy in the absence of specific congressional authorization.

Likewise, to the extent the Secretary believes Claiborne abandoned his challenges to these policies, that is not the case. The Army Directive and ALARACT are valid executive responses to congressionally delegated authority – only to the extent that they comply with the Constitution and the authorities to manage military personnel granted by Congress and subject to judicial review pursuant to the Administrative Procedure Act.

At no time, however, did Claiborne concede that exceeding the scope of congressional authority and retroactive application, the key constitutional points before this Court, were abandoned. To the complete contrary – the constitutional

challenge is to the offending retroactive language and its application against Claiborne - not the authority to promulgate policy in the first place.

H. The Secretary's Attempt to Distinguish Supreme Court Cases Holding that Retroactive Administrative Policies Will Not Be Enforced is Unavailing

The Secretary seeks to distinguish the Supreme Court precedents upon which Claiborne relies as factually dissimilar, namely, that because the cases do not involve military personnel decisions, they are irrelevant. Answ. Br. at 18 – 19.

What is important, however, are the administrative and constitutional law principles within *Bowen*, *Langraf*, and similar cases on which Claiborne relies, which remain valid and wholly instructive to show the Secretary's disregard for the legal prohibition against retroactivity.

For example, in *Bowen*, 488 U.S. at 208-09, 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. The Secretary does not, and cannot dispute these points of law.

"[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. The Secretary does not and cannot dispute these points of law, either.

The Court in *Bowen* cited several cases, all of which dealt with the issue of retroactivity in the context of construing statutes or regulations, to support its decision not to enforce a retroactive agency policy. *See, e.g.*, *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. The Secretary does not, and cannot, challenge these points of law.

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:" "[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 (1997). The Secretary does not dispute these points either.

Nor does the Secretary take issue with the Administrative Procedure Act's definition of an agency "rule" - "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 that policies and regulations will be applied 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.

The Secretary does not dispute these holdings and rationales. Nor does the Secretary convincingly establish that the Army Directive and ALARACT, promulgated in response to the NDAA of 2013, were lawfully applied.

I. The Secretary Seeks to Minimize His Arbitrary Finding, Totally Unsupported by The Record, that Claiborne Had a "Demonstrated Proclivity."

The Secretary seeks to diminish Claiborne's challenge to the Secretary's proclivity determination by mischaracterizing the "single use of the word 'proclivity' to establish that his discharge was arbitrary and capricious." Ansr. Br. at 23 – 24.

To be sure, Claiborne relies on far more than a "single" word, but instead, points to the rational the Secretary provided, and which the Court is dutybound to take at face value. 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).

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 Administrative Procedure Act review. Because the record is totally void of any evidence of more than one single offense 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.").

CONCLUSION

The Secretary exceeded the authority Congress granted when he added sweeping temporal language not found in the enabling statute to promulgate his new policies. The Secretary then retroactively enforced his new policies without congressional authorization to reach back a decade 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. Both the Secretary's rulemaking and enforcement violate separation of powers, and all but destroyed a family's financial and medical well-being in the process. The district court declined to review Claiborne's constitutional challenges under the correct standard of review, *de novo*.

As a matter of Supreme Court and Circuit law, a person cannot show a "demonstrated proclivity" for misconduct through a single incident. The Secretary's decision to separate him, in whole or in part, on his "demonstrated

proclivity for sexual misbehavior" is not supported by the record and thus entitled to no deference. The District Court wholly failed to address this issue, and in doing so erred as a matter of law.

Although briefed below, the district court failed to acknowledge that Chapter 5-3 (plenary authority) existed in 2006 when Claiborne was retained and in the intervening decade, the Secretary did not deem his removal needed. Only until the Secretary promulgated and enforced retroactive rules was it determined Claiborne 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.

The Secretary's plenary authority, whatever its actual limits might be, cannot transform an unconstitutional retroactive enforcement into a legitimate exercise of personnel management consistent with the Constitution. 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 Administrative Procedures Act.

Date: July 8, 2019

/s/ John N. Maher
John N. Maher
MAHER LEGAL SERVICES PC
26 South 3rd Street, Number 68
Geneva, Illinois 60134
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 Reply Brief contains 6,590 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: July 8, 2019

/s/ John N. Maher
MAHER LEGAL SERVICES PC
26 South 3rd Street, Number 68
Geneva, Illinois 60134
Tel: (708) 468-8155
johnmaher@maherlegalservices.com

Attorneys for Appellant Damon J. Claiborne

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 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: July 8, 2019

/s/ John N. Maher
MAHER LEGAL SERVICES PC
26 South 3rd Street, Number 68
Geneva, Illinois 60134
Tel: (708) 468-8155
johnmaher@maherlegalservices.com

Attorneys for Appellant Damon J. Claiborne