Volume 230 Issue 3 2023

MILITARY LAW REVIEW

Articles

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Academic Journal No. 27-100-230-3

Military Law Review

Volume 230 **Issue 3** **2023**

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Articles

Lectures

Headquarters, Department of the Army, Washington, D.C.

Academic Journal No. 27-100-230-3, 2023

Military Law Review
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CITATION: Cite this issue of the *Military Law Review* as 230 MIL. L. REV. [page number] (2023).

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MILITARY LAW REVIEW

Volume 230 **Issue 3**

REGULATORY RECLASSIFICATION OF PFAS COULD BE A BRAC-BREAKER*

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I. Introduction

The Base Realignment and Closure (BRAC) process represents a powerful mechanism for leaders in both the executive and legislative branches of government to shape the military instrument of national power.[1] By their nature, BRAC decisions enable strategic military goals and have critical impacts on military operations and capabilities.[2] These decisions are also politically sensitive and highly contentious in part because of the perception that closing or realigning military installations

* This article was originally submitted to the faculty of the USAF Air Command and Staff College in February 2022, in partial fulfillment of the graduation requirements for the degree of Master of Military Operational Art and Science. It has been updated and modified for publication. The opinions and conclusions expressed in this article are solely those of the author and do not reflect the opinion of the Judge Advocate General, the Judge Advocate General's Corps, the U.S. General Services Administration, or any other department or agency of the U.S. Government.

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1 *See* CHRISTOPHER T. MANN, CONG. RSCH. SERV., R45705, BASE CLOSURE AND REALIGNMENT (BRAC): BACKGROUND AND ISSUES FOR CONGRESS 1-2 (2019).

2 *See, e.g.,* Adam Smith & Christopher Preble, *Another BRAC Now*, 12 STRATEGIC. STUD. Q. 3, 5-6 (2018); Frederico Bartels, *A New Defense Strategy Requires a New Round of BRAC*, 13 STRATEGIC. STUD. Q. 73, 88 (2019); Kevin L. Parker, *Thinking Differently About Air Bases: Evolving with the Evolving Strategic Environment*, 33 AIR & SPACE POWER J. 52, 52 (2019).

will bring economic devastation to nearby communities.[3] Over several iterations, the BRAC process has evolved into the primary method for the DoD to right-size its domestic infrastructure, avoiding enormous maintenance costs at outdated facilities so that it can focus resources on its next potential wartime conflict.[4] But there are two parts of this bargain: in exchange for being able to reduce its maintenance costs and shed unnecessary infrastructure, the BRAC process expects the DoD to transfer this property into private ownership as quickly as possible.[5] The BRAC authorities even provide the DoD with the unique ability to transfer excess property to non-federal recipients at no cost, with the expectation that the property will be quickly redeveloped and jobs will be created.[6] One simply cannot think about BRAC without also thinking about the DoD's mandate to support the rapid economic development of transferred properties.

With varying degrees of success, the DoD has long sought to balance this mandate for rapid economic development against its legal obligation to address environmental contamination on properties that are slated for transfer under BRAC.[7] Unfortunately, an emerging environmental issue threatens to dramatically upset this balance by not only disrupting pending and future BRAC transfers, but also forcing the DoD to revisit prior BRAC transfers. Chemicals known as PFAS are now known to contaminate a growing list of 687 current and former installations.[8] The DoD is "still in the early phases of investigating PFAS" releases that span six decades.[9] Official cost estimates of remediating this contamination currently "exceed" $2 billion,[10] but these estimates are almost meaningless. They are based on conservative fiscal assumptions that only quantify cleanup costs when they become both "probable and reasonably estimable."[11] In

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[3] *See* Richard A. Wegman & Harold G. Bailey, Jr., *The Challenge of Cleaning Up Military Wastes When U.S. Bases are Closed*, 21 ECOLOGY L. Q. 865, 868-69 (1994); Bartels, *supra* note 2, at 76.
[4] *See* MANN, *supra* note 1, at 1-5.
[5] *See* MANN, *supra* note 1, at 5.
[6] MANN, *supra* note 1, at 7.
[7] *See* Wegman & Bailey, *supra* note 3, at 911-23; U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-151, MILITARY BASE REALIGNMENTS AND CLOSURES: DOD HAS IMPROVED ENVIRONMENTAL CLEANUP REPORTING BUT SHOULD OBTAIN AND SHARE MORE INFORMATION 23 (2017) [hereinafter GAO-17-151].
[8] U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-421, FIREFIGHTING FOAM CHEMICALS: DOD IS INVESTIGATING PFAS AND RESPONDING TO CONTAMINATION, BUT SHOULD REPORT MORE COST INFORMATION 12-13 (2021) [hereinafter GAO-21-421].
[9] *Id.* at 21 tbl.1, n."c".
[10] *Defense Environmental Restoration: Hearing Before House Appropriations Subcomm. on Def.,* 117th Cong. 6 (2022) (statement of Richard Kidd, Deputy Assistant Sec'y of Def. for Env't & Energy Resilience) [hereinafter Kidd 2022].
[11] GAO-21-421, *supra* note 8, at 21-22.

reality, DoD's potential liability is much greater than these estimates suggest.[12] In none of the 687 cases has DoD yet quantified the cost of long-term cleanup actions; rather, DoD has only quantified the cost of initial site assessments and, in 78 cases, the cost of studying the feasibility of various cleanup options.[13] The DoD's efforts to understand the true extent of PFAS contamination are further complicated by the fact that the majority of its former installations long ago transferred into non-federal ownership as part of the BRAC process, and have been subsequently redeveloped into a wide variety of private land uses.[14] Department of Defense officials have testified that "it will be years before we fully define the problem and decades before it is completely cleaned up."[15]

Meanwhile, as the DoD struggles to answer basic questions about the size and extent of its PFAS contamination problem, the EPA is poised to fundamentally alter the existing regulatory framework upon which DoD's plans and modest cost estimates are based. These proposed regulatory changes would classify some or all PFAS chemicals as "hazardous substances" under applicable federal law.[16] Congressional testimony by DoD officials has strongly suggested that such a designation is unnecessary because the DoD already has the legal authority to remediate PFAS contamination at its current and former bases.[17] However, many communities and state regulators are dissatisfied with the scope and pace of the DoD's PFAS response to date. Although PFAS contamination presents several interrelated challenges that the DoD will need to work through in the coming decades, this article focuses specifically on the potential for regulatory reclassification of PFAS to expand the DoD's liability to clean up contaminated properties while simultaneously disrupting past, pending, and future BRAC property transfers.

In the face of great factual and regulatory uncertainty, this article aims to help the DoD's environmental and real property managers prepare for the implications of EPA's proposed regulatory changes. Department of

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[12] GAO-21-421, *supra* note 8, at 20.
[13] GAO-21-421, *supra* note 8, at 15 fig.4.
[14] *See* MANN, *supra* note 1, at 6 fig.1.
[15] Kidd 2022, *supra* note 10.
[16] Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415 (Sept. 6, 2022) (to be codified at 40 C.F.R. § 302.4).
[17] *Remediation and Impact of PFAS: Hearing Before House Appropriations Subcom. on Mil. Const., Veterans Aff., and Related Agencies*, 117th Cong. 2 (2021) (statement of Paul Cramer, Principal Deputy of the Assistant Sec'y of Def. for Sustainment) [hereinafter Cramer]; *Addressing the Legacy of Dep't of Def. Use of PFAS - Protecting Our Communities and Implementing Reform: Hearing Before House Armed Services Subcomm. on Readiness*, 116th Cong. 2-3 (2020) (statement of Maureen Sullivan, Deputy Assistant Sec'y of Def. for Environment) [hereinafter Sullivan].

Defense practitioners require an objective answer to the following research question: "What impact, if any, would regulatory reclassification of PFAS have on DoD's real property remediation and disposal programs?" This article explores the scientific, legal, and regulatory driving forces that will shape the DoD's future response to PFAS contamination. Using the scenario planning methodology to explore the three most likely outcomes of EPA's proposed regulatory changes, this article maintains a particular focus on the impact to past, pending, and future BRAC property transfers. It explores the unique challenges that arise from remediating former military property that has already transferred into non-federal ownership and been redeveloped into private residences, businesses, and industrial uses. It considers the possibility that the proposed regulatory changes may ultimately require the DoD to seek enormous supplemental appropriations to pay for its increased liability, especially its liability to remediate PFAS contamination at these BRAC properties that have already been redeveloped. While the human health benefits of the proposed regulatory changes may ultimately outweigh these potential direct and indirect costs, it is nonetheless worthwhile for DoD managers to understand the full implications of what EPA has proposed.

II. Background: Driving Forces

There are numerous driving forces behind the DoD's emerging PFAS contamination problem. The following section seeks to explain the growing body of scientific research alongside the multifaceted statutory and regulatory frameworks that determine the DoD's responsibilities in both remediating contamination and transferring excess BRAC property to non-federal owners. As discussed below, these driving forces are interrelated, complex, and still evolving.

A. Overview of Proposed Regulatory Change

In recent years, a surge of momentum has formed behind an effort to designate some or all PFAS chemicals as hazardous substances under federal environmental law. For instance, the House of Representatives has passed several bills that would require the EPA to make this designation, although none ultimately have become law.[18] Simultaneously, for the past

[18] DAVID M BEARDEN ET AL., CONG. RSCH. SERV., R45986, FEDERAL ROLE IN RESPONDING TO POTENTIAL RISKS OF PER- AND POLYFLUOROALKYL SUBSTANCES *(PFAS)* 34-51 (2019).

three years, the EPA has sought public input as it considered more discretionary regulatory pathways to make the hazardous substance designation.[19] The 2020 campaign of President Biden explicitly favored a hazardous substance designation.[20] Consistent with this policy position, in October 2021, the EPA publicized a PFAS strategic roadmap document that outlines various "commitments" that it makes to addressing PFAS in the coming two years.[21] This roadmap includes the EPA's "commitment" to designate two specific PFAS chemicals (known as PFOA and PFOS, which will be discussed below) as hazardous substances through a formal rulemaking process.[22] The EPA took the first step toward fulfilling this commitment by issuing a proposed rule in September 2022, with a final rule expected in summer 2023.[23] In addition to designating two specific types of PFAS as hazardous, the EPA also plans to issue advance rulemaking notice of its intent to designate other types of PFAS as hazardous.[24] Presumably, these other types of PFAS could become designated as hazardous at some future date. Designation as a hazardous substance under this regulatory pathway requires EPA to conclude that "when released into the environment, [PFAS] may present a substantial danger to public health or welfare or the environment."[25] It is important to note that none of these designations will be legally effective until the respective rulemaking processes have been finalized and survive any potential legal challenges.[26]

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[19] *Id.* at 6.

[20] John Gardella, *PFAS Under Biden Administration – Change Is Coming*, 10 NAT'L. L. REV. 1, 1-4 (2020).

[21] U.S ENV'T PROT. AGENCY, PFAS STRATEGIC ROADMAP: EPA'S COMMITMENTS TO ACTION 2021-2024 (2021) [hereinafter EPA STRATEGIC ROADMAP].

[22] *Id.* at 17.

[23] *Id.;* Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415 (Sept. 6, 2022) (to be codified at 40 C.F.R. § 302.4).

[24] EPA STRATEGIC ROADMAP, *supra* note 21, at 17.

[25] Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Pub. L. No. 96-510, §102(a), 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675).

[26] For instance, courts have found that diphacinone did not qualify as a hazardous substance under CERCLA even though it was argued that EPA planned to list it in the future. *See* Hassayampa Steering Comm. v. Arizona, No. 89-16715, 1991 U.S. App. LEXIS 19727, at *4-5 (9th Cir. Aug. 16, 1991).

B. Overview of PFAS

1. History and Applications

The history of PFAS shares similarities with many other synthetic chemicals that were introduced into widespread use before a full scientific understanding of their environmental and human health effects had been attained. The first PFAS chemicals were invented in the 1930s, and quickly became renowned for repelling water and oil, resisting adhesion, and reducing friction.[27] In turn, these characteristics led to PFAS being used for a wide variety of commercial and industrial purposes.[28] For instance, in the 1940s, PFAS were introduced in non-stick coatings, such as popular cooking products.[29] In the 1950s, these uses expanded to include numerous stain- and water-resistant products, including carpets, food containers, and waterproof fabrics and leathers.[30] The widespread adoption of products containing PFAS has not relented, and today such products can be found in retail stores and restaurants across America.

Until 1967, the U.S. military had not played a significant role in the history or development of PFAS. But in that year, while engaged in combat operations in the Gulf of Tonkin during the Vietnam War, the aircraft carrier USS *Forrestal* was devastated by a petroleum-based fire that killed 134 sailors and injured 161 more.[31] This tragic event prompted DoD to seek more effective firefighting technologies.[32] Soon thereafter, firefighting foams containing PFAS were developed through a partnership between DoD and the 3M Corporation.[33] These foams have come to be known as aqueous film forming foams (AFFF).[34] It is the unique heat-resistant qualities of PFAS that make AFFFs especially effective at both extinguishing petroleum-based fires and preventing them from reigniting.[35] As opposed to some other uses of PFAS, the deployment of

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[27] INTERSTATE TECH. & REG. COUNCIL, HISTORY AND USE OF PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS) 1 (2020).
[28] *Id.* at 2.
[29] *Id.*
[30] *Id.*
[31] GAO-21-421, *supra* note 8, at 1.
[32] GAO-21-421, *supra* note 8, at 1.
[33] GAO-21-421, *supra* note 8, at 1; Mike Hughlett, *Firefighting Foam Trials Present Next BigPFAS Challenge for 3M,* STAR TRIBUNE (Oct. 1, 2022, 8:00 AM), https://www.startribune.com/3m-faces-next-pfas-hurdle-bellwether-cases-regarding-firefighting-foam/600211948.
[34] U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE REMEDIATION PLAN FOR CLEANUP OF WATER IMPACTED WITH PERFLUOROOCTANE SULFONATE OR PERFLUOROOCTANOIC ACID 1 (2020) (hereinafter DOD REMEDIATION PLAN).
[35] GAO-21-421, *supra* note 8, at 1.

AFFF often provides PFAS with a direct entry point into the environment because the foams come into contact with both soil and groundwater.[36] Fifty years after their military introduction, AFFFs (and thereby PFAS) have now been used extensively, both in training and emergency operations, across all military services for decades.[37] In fact, the DoD continues to use AFFFs to this day, viewing them as mission-critical lifesaving tools because of their firefighting effectiveness.[38] The DoD has recently curtailed the use of AFFF in training, but continues using AFFF for emergency fire suppression while simultaneously seeking to develop alternatives.[39]

In addition to DoD's widespread use of PFAS through AFFF, there are other noteworthy military uses of PFAS that bear further examination. For instance, PFAS have been used in fire-resistant aviation hydraulic fluids, which can be released during routine maintenance activities as well as mechanical malfunctions and accidents.[40] Similarly, PFAS have been found in numerous types of industrial equipment used by the military, including automotive, aerospace, and aviation systems.[41]

To date, the DoD's investigations have focused almost exclusively on past releases of PFAS through AFFF. However, a recent report from the DoD Inspector General found that the DoD may be ignoring other important sources of PFAS releases.[42] The report cites one such example at Camp Grayling, Michigan, where there were no known historical releases of AFFF in the area.[43] Nonetheless, Camp Grayling tested for high levels of PFAS contamination in its groundwater.[44] Investigation ultimately identified a suspected source location that indicated the release occurred near a station that was used for washing equipment, including military vehicles.[45] The report suggests that examples like Camp Grayling could prove to be far more widespread than currently known, especially because DoD's investigation of PFAS contamination has, to date, been

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[36] U.S. DEP'T OF DEF., OFF. OF INSPECTOR GEN., NO. DODIG-2021-105, EVALUATION OF THE DEPARTMENT OF DEFENSE'S ACTIONS TO CONTROL CONTAMINANT EFFECTS FROM PERFLUOROALKYL AND POLYFLUOROALKYL SUBSTANCES AT DEPARTMENT OF DEFENSE INSTALLATIONS 2 (2021) (hereinafter DOD IG REPORT).
[37] GAO-21-421, *supra* note 8, at 1, 29.
[38] U.S. DEP'T OF DEF., PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS) TASK FORCE, PROGRESS REPORT 3 (2020).
[39] *Id*.
[40] DOD IG REPORT, *supra* note 36, at 30.
[41] *See* INTERSTATE TECH. & REG. COUNCIL, *supra* note 27, at 1.
[42] DOD IG REPORT, *supra* note 36, at 28.
[43] DOD IG REPORT, *supra* note 36, at 31.
[44] DOD IG REPORT, *supra* note 36, at 31.
[45] DOD IG REPORT, *supra* note 36, at 31.

narrowly focused on AFFF releases.[46] As a result, the DoD may be significantly undercounting the actual number of PFAS releases and affected installations.

2. Environmental and Human Health Concerns

Although there are many different types of PFAS chemicals, it is their common characteristics that make these chemicals problematic for the environment, wildlife, and humans. EPA estimates that the PFAS family of chemicals includes more than 1,200 unique compounds that share similar chemical structures.[47] With so many variations, it is not surprising that the scientific understanding of many of these chemicals is still developing.[48] Some of the most manufactured and, to date, most studied of these chemicals are known as perfluorooctanoate (PFOA) and perfluorooctane sulfonate (PFOS).[49] Studies of PFAS have concluded that, to varying degrees, these chemicals tend to bio-accumulate in organisms and demonstrate long-term persistence in the environment.[50] It is this lack of degradation over time that has earned PFAS the nickname "forever chemicals."[51]

According to EPA, human exposure to certain types of PFAS (most notably PFOA and PFOS) can lead to negative health effects.[52] In tests of laboratory animals, PFOA and PFOS were found to cause tumors, damage reproductive systems, inhibit developmental processes, impair liver and kidney functions, and cause various other immunological effects.[53] Human epidemiological studies indicate similar but more limited findings.[54] EPA has not, to date, designated any types of PFAS chemicals as known or suspected carcinogens, though it is closely monitoring ongoing scientific studies.[55]

The risk that PFAS poses to humans depends significantly upon possible exposure pathways. While drinking water presents one of the most common exposure pathways for humans, it is not the only one.

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[46] DOD IG REPORT, *supra* note 36, at 31.
[47] U.S. ENV'T PROT. AGENCY, EPA'S PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS) ACTION PLAN 12 (2019) [hereinafter PFAS ACTION PLAN].
[48] *See id.* at 13.
[49] BEARDEN ET AL., *supra* note 18, at 3-4.
[50] BEARDEN ET AL., *supra* note 18, at 4.
[51] BEARDEN ET AL., *supra* note 18, at 4.
[52] PFAS ACTION PLAN, *supra* note 47, at 13.
[53] PFAS ACTION PLAN, *supra* note 47, at 13.
[54] PFAS ACTION PLAN, *supra* note 47, at 13.
[55] PFAS ACTION PLAN, *supra* note 47, at 32-33.

Scientific research on this subject is still ongoing, but other common exposure pathways appear to be human ingestion of PFAS-contaminated food, inhalation of PFAS-contaminated dust and air, and dermal contact with PFAS-contaminated substances.[56] Also, PFAS have been detected in plant root structures, agricultural crops, and also higher up the food chain, in meat and dairy products.[57] At a minimum, these studies suggest that remediation actions focused exclusively on treating human drinking water are unlikely to address all potential human exposure pathways.

3. PFAS Migration and Remediation

The current scientific understanding of PFAS migration processes and available remediation technologies are serious concerns for environmental managers. Recent studies indicate that it can take several decades for PFAS to migrate from contaminated soil into groundwater.[58] Studies of AFFF releases have also concluded that PFAS soil contamination is often orders of magnitude higher than the resulting concentration of PFAS that migrates into groundwater.[59] In addition, because of the complex and inter-connected qualities of natural groundwater systems, PFAS migration into groundwater can make it extremely difficult for scientists to determine original contamination points, and discrete groundwater plumes can be detected as far as six miles away from the point at which PFAS were originally discharged.[60] These findings suggest that narrowly focused groundwater treatment strategies may be inadequate to achieve lasting results because treatment of the symptom (groundwater contamination) does not address the root cause (soil contamination). In fact, the presently known state of PFAS contamination could conceivably become more dire as previously unmigrated PFAS begins to migrate into water sources in the coming decades. In light of these incredibly long lag times, high concentrations in soil, and difficulty in determining original PFAS contamination points, the remediation of PFAS has been described as

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[56] Elsie M. Sunderland et al., *A Review of the Pathways of Human Exposure to Poly- and Perfluoroalkyl Substances (PFASs) and Present Understanding of Health Effects*, 29 J. EXPOSURE SCI. & ENV'T EPIDEMIOLOGY 131, 133-36 (2018).
[57] *Id.* at 136.
[58] Bo Guo et al., *A Mathematical Model for the Release, Transport, and Retention of Per- and Polyfluoroalkyl Substances (PFAS) in the Vadose Zone*, WATER RES. RSCH., Feb. 2020, at 1, 10.
[59] *Id.*
[60] Adam Baas et al., *The Use of PFAS at Industrial and Military Facilities: Technical, Regulatory, and Legal Issues*, 49 ENV'T L. REP. NEWS & ANALYSIS 10109, 10117 (2019).

particularly challenging.[61] Scientists note that PFAS soil treatment strategies are still in the very early stages of development, which will require significant amounts of additional time, research, and field validation in the future.[62]

4. Initial Regulatory Response

Despite growing public concern and a mounting body of scientific evidence indicating that PFAS cause negative human health effects, to date EPA has not issued enforceable limits on PFAS in drinking water.[63] The closest EPA has come to nationwide regulation was its issuance in May 2016 of a non-enforceable drinking water health advisory issued pursuant to the Safe Drinking Water Act (SDWA).[64] This advisory recommended PFOA and PFOS drinking water limits of 70 parts per trillion (PPT).[65] Recently, in June 2022, EPA issued an updated drinking water advisory that recommends dramatically reduced PFOA limits of 0.004 PPT and PFOS limits of 0.02 PPT.[66] These levels are far lower than previous levels. It is also noteworthy that this advisory expanded the types of subject PFAS chemicals to include not just PFOA and PFOS, but also types of PFAS chemicals known as GenX chemicals and perfluorobutane sulfonic acid (PFBS).[67]As will be discussed below, the DoD has historically given tremendous weight to these (non-enforceable) numbers: they have been the dispositive threshold that the DoD uses to determine whether remediation actions are needed at installations contaminated by PFAS.[68]

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[61] Reza Mahinroosta & Lalantha Senevirathna, *A Review of the Emerging Treatment Technologies for PFAS Contaminated Soils*, 255 J. ENV'T MGMT. 109896, 109896 (2020).
[62] Ramona Darlington et al., *The Challenges of PFAS Remediation*, MIL. ENG'R, Jan.-Feb. 2018, at 58, 59-60.
[63] BEARDEN ET AL., *supra* note 18, at 5.
[64] BEARDEN ET AL., *supra* note 18, at 15. It is worth noting that, pursuant to the SDWA, EPA has issued administrative orders against three current or former DoD installations due to high levels of PFOA and PFOS contamination in human drinking water. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-78, DRINKING WATER: DOD HAS ACTED ON SOME EMERGING CONTAMINANTS BUT SHOULD IMPROVE INTERNAL REPORTING ON REGULATORY COMPLIANCE 20 tbl.3 (2017). These orders were based on specific factual scenarios and do not set nationwide precedent.
[65] BEARDEN ET AL., *supra* note 18, at 15.
[66] U.S. ENV'T PROT. AGENCY, OFF. OF WATER, ADVISORY 822-F-22-002, TECHNICAL FACT SHEET: DRINKING WATER HEALTH ADVISORIES FOR FOUR PFAS (PFOA, PFOS, GENX CHEMICALS, AND PFBS) 4 (2022) [hereinafter EPA 2022 DRINKING WATER HEALTH ADVISORY].
[67] *Id.* at 1.
[68] DOD REMEDIATION PLAN, *supra* note 34, at 4; GAO-21-421, *supra* note 8, at 16.

C. Overview of CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, is the seminal legal authority that governs DoD's responsibility to remediate environmental contamination.[69] Further, CERCLA overlaps and interacts with other environmental statutes as well, most notably the Resource Conservation and Recovery Act (RCRA).[70] However, the DoD "prefers to follow" CERCLA as its primary framework for environmental remediation, aiming to satisfy compliance obligations with overlapping statutes through the CERCLA framework.[71] Befitting a complicated but exceptionally important statute like CERCLA, the text of the law and its regulations are also interpreted by a large body of caselaw that has arisen from numerous lawsuits involving CERCLA.[72] As will be discussed below, CERCLA contains numerous authorities, obligations, definitions, and distinctions that are of critical importance in understanding the applicable regulatory treatment of PFAS.[73] In addition, some sections of CERCLA that are specific to federal agencies control relevant aspects of the DoD's real property management functions, including the transfer and disposal of excess real property under BRAC.[74]

1. Section 104: Voluntary Response Authority

Section 104 of CERCLA grants the president broad voluntary authority to respond to environmental contamination across the country. In turn, this authority has been delegated chiefly to the EPA, but also to the DoD in cases where contamination results from a release at a military facility or from a military vessel.[75] Although the EPA has an important

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[69] *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Federal Facilities*, U.S. ENV'T PROT. AGENCY (Mar. 28, 2022), https://www.epa.gov/enforcement/comprehensive-environmental-response-compensation-and-liability-act-cercla-and-federal.

[70] 42 U.S.C. §§ 6901-6992.

[71] U.S. DEP'T OF DEF., 4715.20, DEFENSE ENVIRONMENTAL RESTORATION PROGRAM (DERP) MANAGEMENT encl.3, para. 4(a)(1)(b)(2) (9 Mar. 2012) (C1, 31 Aug. 2018).

[72] PETER L. GRAY, THE SUPERFUND MANUAL: A PRACTITIONER'S GUIDE TO CERCLA LITIGATION 1 (2017).

[73] *See generally id.* at 1-30.

[74] John F. Seymour, *Transfer of Federal Lands: Compliance with Section 120(H) of the Comprehensive Environmental Response, Compensation, and Liability Act*, 27 COLUM. J. ENV'T L. 173, 177 (2002).

[75] GRAY, *supra* note 72, at 2. Executive Order 12580 delegates to the secretary of defense response authority under CERCLA section 104 "where either the release is on or the sole

role to play in certain response actions under CERCLA section 104, this presidential delegation of authority means that the DoD, rather than the EPA, has been the lead agency in responding to PFAS contamination on current and former military installations.[76] As discussed below, however, this voluntary response authority is also limited by significant distinctions that CERCLA draws between different categories of substances.

The primary limitation on the DoD's voluntary response authority arises from CERCLA's vastly different treatment of "hazardous substances" and "pollutants or contaminants."[77] These terms are not interchangeable. The EPA maintains a finite list of hazardous substances that have been so designated either through statute or a regulatory process.[78] To date, no PFAS have been designated as hazardous substances.[79] In opposition to the relatively clear-cut list of hazardous substances, CERCLA defines a "pollutant or contaminant" far more loosely to mean "any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment . . . may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions . . . or physical deformations."[80] Importantly, however, the mere presence of a "pollutant or contaminant" is not sufficient to justify the use of section 104 response authority.[81] Instead, the release of such pollutant or contaminant must also "present an imminent and substantial danger to the public health or welfare."[82]

This inflexible "imminent and substantial danger" requirement that CERCLA section 104 imposes on pollutants or contaminants stands in stark contrast to its treatment of hazardous substances, the mere presence of which justifies voluntary response actions.[83] Accordingly, the DoD can be understood to possess voluntary response authority whenever it releases a hazardous substance.[84] But it does not possess voluntary response authority whenever it releases a pollutant or contaminant; this authority is

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source of the release is from any facility or vessel under the jurisdiction, custody, or control" of the Department of Defense. Exec. Order No. 12,580 ¶ 2(e)(1), 3 C.F.R. 193 (1988).

[76] *See* BEARDEN ET AL., *supra* note 18, at 20.

[77] *See* GRAY, *supra* note 72, at 9-10.

[78] 40 C.F.R. § 302.4 (2022).

[79] U.S. ENV'T PROT. AGENCY, PFAS ACTION PLAN: PROGRAM UPDATE 9 (2020).

[80] 42 U.S.C. § 9601(33) (2012). It is worth noting that releases of petroleum products are categorically excluded from section 104. GRAY, *supra* note 72, at 10.

[81] GRAY, *supra* note 72, at 10.

[82] 42 U.S.C. § 9604(a)(1) (2012).

[83] GRAY, *supra* note 72, at 9-10.

[84] *See* GRAY, *supra* note 72, at 9-10.

limited to situations where the release "present[s] an imminent and substantial danger to the public health or welfare."[85] It is worth noting that voluntary response authority is always permissive in nature.[86] Other sections of CERCLA may compel action, but the DoD has no affirmative obligation under section 104 to undertake any cleanup actions, even when the contamination may satisfy the imminent endangerment requirement.[87]

Although it is not required, the DoD gives tremendous weight to EPA's non-enforceable PFAS drinking water advisory standards that were mentioned in the previous section.[88] More specifically, using the CERCLA section 104 voluntary response authority framework, the DoD has historically determined that PFOA and PFOS (but not other types of PFAS) are pollutants or contaminants that present an imminent and substantial danger to the public health or welfare when they are present in human drinking water above the 70 PPT threshold.[89] As will be discussed later, all significant DoD actions under CERCLA section 104 have, to date, been contingent on these conditions. Stated differently, the DoD has not considered PFOA or PFOS contamination to satisfy the imminent endangerment requirement under section 104 in cases where: (1) PFOA or PFOS contaminate only soil, (2) PFOA or PFOS contaminate groundwater sources that are not used for human drinking water,[90] and/or (3) PFOA or PFOS contaminate drinking water below the (previous) 70 PPT threshold.[91] The DoD has viewed these scenarios as outside the limits of its authority under CERCLA section 104 because of the lacking imminent endangerment.[92] It remains to be seen whether the DoD will consider the EPA's June 2022 PFAS drinking water advisory limits in the same fashion as the prior health advisories.[93] If so, then future use of the DoD's

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[85] GRAY, *supra* note 72, at 10.
[86] *See* BEARDEN ET AL., *supra* note 18, at 25.
[87] BEARDEN ET AL., *supra* note 18, at 25 (discussing a Senate-passed bill (S. 1790), which ultimately failed to become law, but that would have amended DoD's authorities to compel response whenever DoD releases a hazardous substance, pollutant, or contaminant).
[88] DOD REMEDIATION PLAN, *supra* note 34, at 4.
[89] DOD REMEDIATION PLAN, *supra* note 34, at 4; GAO-21-421, *supra* note 8, at 18.
[90] GAO-21-421, *supra* note 8, at 18. DoD has generally not addressed drinking water when levels were below EPA's previous recommended advisory threshold of 70 PPT in human drinking water. *Defense Environmental Restoration: Hearing Before the House Appropriations Subcomm. on Def.,* 117th Cong. 6 (2021) (statement of Mark Correll, Deputy Assistant Sec'y of the Air Force for Env't, Safety and Infrastructure) [hereinafter Correll].
[91] DOD REMEDIATION PLAN, *supra* note 34, at 4; Letter from Suzanne Bilbrey, Director, USAF Env't. Dir., to State of N.M. Ground Water Quality Bureau 2 (Jan. 10, 2019) [hereinafter Bilbrey NOV Response Letter].
[92] Bilbrey NOV Response Letter, *supra* note 91, at 2.
[93] *See* EPA 2022 DRINKING WATER HEALTH ADVISORY, *supra* note 66, at 1.

voluntary response authority will be satisfied whenever DoD's activities can be attributed to human drinking water contamination that exceeds 0.004 PPT for PFOA, 0.02 PPT for PFOS, 10 PPT for GenX Chemicals, and 2,000 PPT for PFBS.[94]

Once the statutory prerequisites for voluntary response authority have been satisfied, the DoD does not then have unlimited discretion to carry out cleanup actions however it sees fit. Rather, any cleanup actions must conform with standards set forth in EPA-promulgated regulations known as the National Contingency Plan (NCP).[95] More details about the NCP are contained below in the discussion of CERCLA section 121. The NCP contains a mechanism to prioritize the most hazardous sites in the United States, known as the National Priorities List (NPL), which is administered by EPA.[96] There are more than 1,300 individual sites listed on the NPL, of which approximately 140 are managed by the DoD.[97] The inclusion of a DoD installation on the NPL carries great significance because it gives EPA decision-making authority over the selection of remedial actions at such facilities, although the responsibility to carry out these actions remains with the DoD.[98] It is worth noting that, to date, no DoD installations have been added to the NPL based on PFAS contamination alone, because the system that the EPA uses to determine inclusion on the NPL focuses on hazardous substances.[99] Even in cases where a contaminated DoD facility is not listed on the NPL, however, the DoD is nonetheless required to consult with the affected state government before selecting remedial actions.[100] In addition, DoD cleanup actions at non-NPL facilities generally must achieve state cleanup standards.[101]

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[94] *See* EPA 2022 DRINKING WATER HEALTH ADVISORY, *supra* note 66, at 1.
[95] GRAY, *supra* note 72, at 13.
[96] DAVID M. BEARDEN, CONG. RSCH. SERV., R41039, COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT: A SUMMARY OF SUPERFUND CLEANUP AUTHORITIES AND RELATED PROVISIONS OF THE ACT 7 (2012).
[97] *Superfund: National Priorities List (NPL),* U.S. ENV'T PROT. AGENCY (Mar. 11, 2022), https://www.epa.gov/superfund/superfund-national-priorities-list-npl; *National Priorities List (NPL) Sites – by State*, U.S. ENV'T PROT. AGENCY (July 13, 2022), https://www.epa.gov/superfund/national-priorities-list-npl-sites-state.
[98] *See* 42 U.S.C. § 9620(e)(4)(A).
[99] *See* BEARDEN, *supra* note 96, at 6; Carly Johnson, *How the Safe Drinking Water Act and the Comprehensive Environmental Response, Compensation, and Liability Act Fail Emerging Contaminants: A Per- and Polyfluoroalkyl Substances (PFAS) Case Study*, 42 MITCHELL HAMLINE L. J. PUB. POL'Y & PRAC. 91, 108 (2020).
[100] BEARDEN, *supra* note 96, at 30-31.
[101] BEARDEN, *supra* note 96, at 30-31; *see* Letter from Stephen G. Termaath, Chief, BRAC Prog. Mgmt. Div., to State of Mich. Water Res. Div. 3-4 (Dec. 7, 2018) [hereinafter Termaath NOV Response Letter].

2. Section 106: Involuntary Abatement

Under CERCLA, the EPA (for releases on land), the U.S. Coast Guard (for releases in rivers and coastal waters), and states are empowered to serve as their own principal regulators.[102] This regulatory enforcement power is perhaps greater under CERCLA than any other environmental statute.[103] Regulators are authorized to issue administrative abatement orders, which are backed by hefty fines that can accumulate daily, in cases where the release of a hazardous substance (not pollutant or contaminant) poses "an imminent and substantial endangerment to the public health or welfare *or the environment*."[104] In practice, this regulatory authority is normally exercised after the polluter(s) have been requested to voluntarily undertake necessary response actions.[105] In cases where such voluntary compliance is achieved, regulators will enter into voluntary settlement agreements, known as consent orders, with the polluter(s).[106] In cases where polluter(s) do not voluntarily agree to undertake cleanup actions, the regulators can use their involuntary abatement authority under section 106 to compel abatement actions.[107]

Following initial confusion on the subject, amendments to CERCLA specifically made clear that federal agencies and military services are subject to CERCLA's involuntary abatement provisions to the same extent as private entities.[108] Therefore, as part of their enforcement powers, states, EPA, and U.S. Coast Guard (USCG) are authorized to collect information from, and inspect, DoD facilities.[109] In addition, with the concurrence of the U.S. attorney general, federal regulators can issue administrative abatement orders to the DoD and enter into settlement agreements for abatement actions involving hazardous substances.[110]

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[102] BEARDEN, *supra* note 96, at 22.
[103] LEE M. THOMAS & COURTNEY M. PRICE, GUIDANCE MEMORANDUM ON THE USE AND ISSUANCE OF ADMINISTRATIVE ORDERS UNDER SECTION 106 1 (1986) [hereinafter EPA MEMORANDUM].
[104] 42 U.S.C. § 9606(a) (emphasis added).
[105] EPA MEMORANDUM, *supra* note 103, at 2-3.
[106] EPA MEMORANDUM, *supra* note 103, at 2-4.
[107] EPA MEMORANDUM, *supra* note 103, at 2-4.
[108] *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Federal Facilities*, U.S. ENV'T PROT. AGENCY (Mar. 28, 2022), https://www.epa.gov/enforcement/comprehensive-environmental-response-compensation-and-liability-act-cercla-and-federal.
[109] *See id.*
[110] *See id.*

3. Section 107: Liability

Section 107 is arguably the most important section of CERCLA because it sets forth the financial obligation of "potentially responsible parties" (PRPs) to pay the costs associated with any cleanup actions that are required under CERCLA.[111] When financial liability attaches under CERCLA, it is the broadest possible liability allowed under the law.[112] This liability has been clarified by applicable caselaw to be "strict," "retroactive," and "joint and several."[113] According to the legal concept of strict liability, PRPs can be held liable even in cases where they did not behave negligently or contravene applicable restrictions.[114] Retroactive liability can be understood to make PRPs liable for releases that occurred prior to CERCLA's enactment in 1980.[115] Finally, joint and several liability can make any one of multiple PRPs independently liable for the full cost of remediating a given site, even if that PRP was only responsible for a fraction of the contamination.[116] The expansiveness of section 107 liability is virtually unprecedented in American law.

Because this incredibly broad financial liability attaches to any person or entity that is identified to be a PRP, classification as a PRP carries great legal significance. With limited exceptions, CERCLA defines PRPs to broadly include both current and former "owner[s] and operator[s] of [any] vessel or a facility . . . at which . . . hazardous substances were disposed of."[117] Surprisingly, however, the manufacture of hazardous substances does not, in itself, give rise to liability as a PRP.[118] This limitation means that the users of products containing hazardous substances generally cannot seek contribution from the manufacturer of such products under section 107.

It is noteworthy that CERCLA section 107 allows for great flexibility in who can assert liability against PRPs. The EPA is authorized to directly recover cleanup costs from PRPs as well as enter into voluntary settlement agreements, which can be enticing to PRPs because settlement can save extensive litigation costs.[119] In addition, states, Indian tribes, and the PRPs

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[111] BEARDEN, *supra* note 96, at 12.
[112] BEARDEN, *supra* note 96, at 13.
[113] BEARDEN, *supra* note 96, at 13.
[114] BEARDEN, *supra* note 96, at 13.
[115] BEARDEN, *supra* note 96, at 13.
[116] BEARDEN, *supra* note 96, at 13 (noting, however, that in such cases, the PRP being saddled with disproportionate liability can seek contribution from other PRPs through separate actions).
[117] 42 U.S.C. § 9607(a); BEARDEN, *supra* note 96, at 13.
[118] *See* 42 U.S.C. § 9607(a); BEARDEN ET AL., *supra* note 18, at 23.
[119] BEARDEN, *supra* note 96, at 23.

themselves can seek to recover cleanup costs from other PRPs.[120] Finally, the subsequent owner(s) of property that is later discovered to be contaminated can also impose cleanup liability on their PRP predecessors.[121] The clear intent of CERCLA's design was to give immediate cleanup the highest priority and urgency while simultaneously giving regulators and subsequent property owners tremendous leverage—even if it has the potential to be unfair—in forcing PRPs to fund the cleanup.[122]

The critical distinction between hazardous substances and pollutants or contaminants in CERCLA once again carries great significance, as it is a dispositive factor in determining liability under section 107. Liability under section 107 hinges on whether the release in question was of a hazardous substance.[123] If so, then the owner at the time of the release is a PRP, and therefore subject to (potentially) full cleanup cost liability under section 107.[124] Importantly, however, section 107 liability does not attach to releases of pollutants or contaminants.[125] In addition, section 107 liability attaches to all releases of hazardous substances regardless of whether there is any imminent endangerment to public health or the environment.[126]

4. Section 120(h): Real Property Transfer Requirements

Prior to transferring excess real property to non-federal owners, CERCLA generally requires the DoD to remediate any hazardous substances (not pollutants or contaminants) necessary to protect human health and the environment.[127] This statutory requirement is echoed in DoD policy.[128] Although CERCLA does not specify criteria for determining which remediations are necessary, the EPA sometimes reviews DoD determinations about necessary remediations prior to the transfer of large military facilities.[129] Long-term remedial actions can take

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[120] BEARDEN, *supra* note 96, at 23.
[121] *See* Bethlehem Iron Works, Inc. v. Lewis Industries, Inc., 891 F. Supp. 221 (E.D. Pa. 1995).
[122] *See* BEARDEN, *supra* note 96, at 25-27.
[123] 42 U.S.C. § 9607(a)(2).
[124] BEARDEN, *supra* note 96, at 12-13.
[125] *See* 42 U.S.C. § 9607(a) (discussing only hazardous substances).
[126] *See id.*
[127] *See* Seymour, *supra* note 74, at 193-94.
[128] *See* U.S. DEP'T OF DEF., INSTR. 4165.72, REAL PROPERTY DISPOSAL encl. 2, para. E2.1.4(a) (21 Dec. 2007) (C2 31 Aug. 2018).
[129] Seymour, *supra* note 74, at 194 n.67.

decades depending on numerous factors specific to each contaminated parcel, including: the nature and extent of contamination, available cleanup technologies, and the amount of funding that has been appropriated by Congress.[130] Because of unexpectedly long delays to the transfer of excess properties after CERCLA's enactment, Congress later amended the law to create two primary tools designed to alleviate these transfer delays.[131] The first allows for the DoD to "parcelize" contaminated properties so that the clean portions can be transferred while cleanup activities continue on the remaining portions.[132] The second allows for the transfer of some properties prior to the completion of all cleanup activities if, and only if, certain restrictive conditions are met.[133] In practice, the conditions imposed on these so-called "early transfers" can be highly cumbersome, which significantly limits DoD's use of the authority.[134] In addition, early transfers cannot occur in cases where cleanup actions are needed to protect public health.[135]

Section 120(h) also provides explicit clarity about the continuing liability of the United States in cases where hazardous substances (not pollutants or contaminants) are discovered after transfer has occurred. This continuing liability is consistent with the broad concept of strict, retroactive, joint and several liability under section 107. Section 120(h) requires each deed of conveyance to a non-federal owner to include a covenant warranting that remediation of hazardous substances (not pollutants or contaminants) "found to be necessary after the date of . . . transfer [will] be conducted by the United States."[136] Deeds are also required to provide the United States with continuing rights of access to all former federal property for the limited purpose of conducting cleanup actions found to be necessary after transfer.[137]

Despite the clear continuing liability language in section 120(h), as well as the covenant language that is required to be inserted into individual deeds of conveyance, some DoD policy documents use more limited language to describe the DoD's obligation to clean up the contamination of hazardous substances discovered after transfer. For instance, the DoD's

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[130] BEARDEN, *supra* note 96, at 33; Seymour, *supra* note 74, at 207.
[131] BEARDEN, *supra* note 96, at 32-33.
[132] BEARDEN, *supra* note 96, at 32-33.
[133] BEARDEN, *supra* note 96, at 32-33. This authority is commonly referred to as "early transfer" authority even though the statute does not use this term.
[134] *See* DAVID M. BEARDEN, CONG. RSCH. SERV., RS22065, MILITARY BASE CLOSURES: ROLE AND COSTS OF ENVIRONMENTAL CLEANUP 2 (2006).
[135] BEARDEN, *supra* note 96, at 33.
[136] 42 U.S.C. § 9620(h)(3)(A)(ii)(II); BEARDEN, *supra* note 96, at 32; Seymour, *supra* note 74, at 204-06.
[137] Seymour, *supra* note 74, at 206-07.

Defense Environmental Restoration Program (DERP) Management policy states that the DoD "may" conduct post-transfer cleanup actions if it is determined that "[a]pplicable statutory or regulatory requirements have changed and must be applied to the property."[138] This more discretionary "may" also appears in U.S. Navy policy.[139]

Although there is no direct precedent on point, there is little doubt that designation of a new hazardous substance that had not been so designated at the time of transfer would nonetheless still trigger CERCLA's broad conception of liability.[140] Neither section 120(h) nor any other part of CERCLA contains language indicating that the list of hazardous substances that may require post-transfer cleanup is frozen in time on the date of transfer; on the contrary, section 107 liability is stubbornly retroactive.[141] In the decades prior to CERCLA's enactment, for instance, federal law designated no hazardous substances, and the United States made no continuing liability covenants in its deeds. Nonetheless, section 107 has been interpreted to make the United States unambiguously liable for the cleanup of these subsequently designated hazardous substances.[142] Therefore, the DoD's curious characterization of continuing liability as being discretionary does not appear to be consistent with the text of CERCLA or its caselaw.[143]

5. Section 121: Cleanup Standards

For a statute that has the potential to impose such great financial liability and disrupt the transfer of excess federal property under BRAC, it is perhaps surprising that CERCLA does not require uniform cleanup standards. In fact, both the types of cleanup actions required and the stringency of such actions can vary widely from site to site, even for similar levels of the same contaminants.[144] As mentioned previously,

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[138] U.S. DEP'T OF DEF., 4715.20, DEFENSE ENVIRONMENTAL RESTORATION PROGRAM MANAGEMENT encl. 3, para. 10(c)(3)(a)(4) (9 Mar. 2012) (C1 31 Aug. 2018).
[139] U.S. DEP'T OF NAVY, ENVIRONMENTAL RESTORATION PROGRAM MANUAL para. 14-2 (2018).
[140] *See* Michael Heard Snow, *Too Little, Too Late: Congress's Attempt to Regulate Forever Chemicals Through Military Appropriations*, 45 WM. & MARY ENV'T. L. & POL'Y REV. 277, 307-08 (2020).
[141] BEARDEN, *supra* note 96, at 13.
[142] *See* BEARDEN, *supra* note 96, at 13.
[143] *See* Patrick J. Paul, *PFAS Gaining Legislative and Regulatory Traction*, NAT. RES. & ENV'T., Spring 2020, at 55-56; John L. Ropiequet, *Environmental Law Litigation Under CERCLA*, 47 AMER. JURIS. TRIALS § 11 (2021).
[144] BEARDEN, *supra* note 96, at 10.

cleanup actions generally must be consistent with the EPA-promulgated NCP. However, neither the statute nor the NCP require a specific cleanup level associated with individual hazardous substances, pollutants, or contaminants.[145] Instead, these authorities require simply that cleanup actions comply with "applicable or relevant and appropriate . . . requirement[s]" (ARARs) that will assure protection of human health and the environment.[146] These ARARs provide regulators and PRPs with a surprising amount of elasticity in determining which cleanup actions (if any) are necessary at a given site.[147] For instance, they normally incorporate state laws and regulations as well as any overarching federal environmental laws and regulations.[148] Because CERCLA does not impose its own standards, the ARAR concept can be viewed as a loosely defined "umbrella" requirement that incorporates by reference a virtually unlimited range of other state and federal authorities.[149]

The single most significant driver of ARAR selection—and therefore the ultimate cleanup remedy selection—is the anticipated future land use of a contaminated property.[150] In practice, it is a property's anticipated land use that most strongly influences both the degree of cleanup necessary and the types of cleanup actions that could achieve such cleanup levels.[151] For instance, regulators generally require far more stringent and costly cleanup actions when the anticipated future use of a property is residential because of the associated risks to residents who, by nature of living and recreating on the property, have greater exposure.[152] In contrast, commercial and industrial uses frequently require less stringent (and less costly) cleanup actions, in part because land use controls (such as deed restrictions) can be used to prohibit activities that are deemed unsafe, such as residential uses and drinking water extraction.[153] On this point, the EPA has issued guidance for how regulators can consider the anticipated future land use in determining whether various remedies will achieve the desired cleanup standards at specific sites.[154] This guidance advises regulators to

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[145] *See* BEARDEN, *supra* note 96, at 10.
[146] 42 U.S.C. § 9621(d)(2)(A).
[147] BEARDEN, *supra* note 96, at 10.
[148] BEARDEN, *supra* note 96, at 10.
[149] BEARDEN, *supra* note 96, at 10.
[150] BEARDEN, *supra* note 134, at 2.
[151] BEARDEN, *supra* note 134, at 2.
[152] BEARDEN, *supra* note 134, at 2.
[153] BEARDEN, *supra* note 134, at 2.
[154] Memorandum from Elliott P. Laws, Assistant Administrator, Solid, Waste, and Emergency Response, U.S. Env't Prot. Agency to Regional Directors 4-8 (May 25, 1995).

discuss potential land uses with local officials, city planning departments, and the public as early as possible in the CERCLA process.[155]

The anticipated land use at the time that an excess property is transferred out of federal ownership carries long-term significance. As discussed above regarding section 120(h), the DoD has continuing liability in cases where hazardous substances (not pollutants or contaminants) are discovered after transfer has occurred. However, in such cases, the DoD's obligation is limited to only those standards (ARARs) that are applicable to the land use that was anticipated at the time of transfer.[156] For example, if the transferee of a former DoD property now intends to use it for residential purposes, even though the DoD was originally only required to clean the property to industrial standards, the identification of additional contamination after transfer does not then require the DoD to clean the property to residential standards.[157] In that case, the DoD would only be required to achieve industrial cleanup standards.[158] In other words, any costs required to make property suitable for a different land use than was originally required of the DoD are borne by the transferee.[159] This limitation prevents transferees from upgrading their given land use any time additional hazardous substances are discovered that require DoD response.[160]

The universe of potential ARARs that could affect the DoD's remediation of PFAS is rapidly expanding as states promulgate wide-ranging standards that are intended to fill the void of enforceable federal standards. Many states have already promulgated regulations that are equally as stringent as the EPA's pre-June 2022 advisory limit of 70 PPT for PFOA and PFOS in human drinking water.[161] Other states have promulgated more restrictive standards for human drinking water.[162] Still others have expanded the types of regulated PFAS chemicals beyond just PFOA and PFOS.[163] In light of the EPA's June 2022 health advisory, it is likely that many states will adopt the EPA recommended limits as enforceable standards. Doing so would not only expand the universe of regulated PFAS chemicals to include GenX and PFBS, but it would also

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[155] *See id.* at 4-5.
[156] BEARDEN, *supra* note 134, at 3-4.
[157] BEARDEN, *supra* note 134, at 3-4.
[158] BEARDEN, *supra* note 134, at 3-4.
[159] BEARDEN, *supra* note 134, at 4.
[160] *See* BEARDEN, *supra* note 134, at 3-4.
[161] Jennifer Black et al., *Perfluoroalkyl and Polyfluoroalkyl Substances: Using Law and Policy to Address These Environmental Health Hazards in the United States*, 31 HEALTH MATRIX: J. L.-MED. 341, 363-64 (2021).
[162] *Id.*
[163] *Id.*

impose a far more restrictive limit for PFOA (0.004 PPT) and PFOS (0.02 PPT) than existed previously.

A particularly noteworthy trend is that an increasing number of states have promulgated enforceable PFAS limits not only for human drinking water, but also for groundwater and even soil and air.[164] This expansion of regulated media appears to track the evolving scientific understanding of potential human exposure to include pathways beyond simply drinking water.[165] As the human health effects of PFAS become better understood over time, many observers believe that a flood of state PFAS regulation is inevitable.[166] All of these state-based regulations could become important drivers of DoD's cleanup obligations if they are considered to be ARARs under CERCLA.[167]

6. Funding Cleanup Actions

Although CERCLA contains authorities and imposes financial liabilities for required cleanup actions, the law does not provide a source of funds that is available to the DoD outside of its normal appropriations.[168] Many people are familiar with CERCLA because of its creation of the so-called "Superfund." While this is a source of funds that can be used to pay for cleanup actions in certain circumstances, it is generally not available to federal agencies.[169] In addition, although Congress has created a Judgment Fund that is available to pay for litigated claims against the United States, this fund is not available to federal agencies in cases where Congress has otherwise provided separate appropriations for that purpose.[170] The Department of Justice has also recently restricted the use of the Judgment Fund to exclude cases where a final sum certain dollar amount has not been determined.[171] This restriction particularly impacts CERCLA litigation because of the numerous factual unknowns that can take years or decades to resolve in such cases.[172] Because of the above, DoD's cleanup actions must generally

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[164] *Id.* at 365.
[165] *See id.*
[166] *See id.* at 367.
[167] *See id.* at 368.
[168] BEARDEN, *supra* note 96, at 1.
[169] BEARDEN, *supra* note 96, at 1.
[170] BEARDEN, *supra* note 96, at 28.
[171] Memorandum from Claire McCusker Murray, Principal Deputy Associate Attorney General, U.S. Dep't of Just., to Env't & Nat. Res. Div. 1 (Mar. 5, 2020).
[172] Sylvia Carignan & Ellen M. Gilmer, *Superfund Cleanup Deals Could Get Trickier After Federal Memo*, BLOOMBERG LAW (Sep. 17, 2020, 6:00 AM), https://news.bloomberglaw

be paid out of its own appropriated DERP accounts (for active installations) and BRAC accounts (for former installations).[173]

7. Overview of DoD Response Actions to Date

The DoD has been commended for following non-enforceable EPA guidance, but at the same time, it has also been criticized for taking a measured approach in responding to PFAS.[174] Because no PFAS have yet been designated as hazardous substances, the DoD's only effective option under CERCLA has been to use its voluntary response authority to respond to releases of PFAS that it determines satisfy section 104's imminent endangerment requirement for pollutants or contaminants. As mentioned above, DoD actions have been consistent with EPA's pre-June 2022 guidance that only views limited categories of PFAS (namely PFOA and PFOS) as pollutants or contaminants that present an imminent endangerment to public health (and this only when they exceed the threshold of 70 PPT in human drinking water).[175] In such cases, the DoD has taken immediate steps to protect public health, such as providing affected persons with "bottled water, installing drinking water treatment systems, and connecting [nearby residents to municipal water systems instead of wells]."[176] The DoD has generally not taken response actions for contamination that is either below the 70 PPT threshold or not present in human drinking water.[177]

Despite spending approximately $1.1 billion through the end of fiscal year 2020, the DoD still has an incomplete picture of the extent of PFAS contamination on its current and former installations.[178] As mentioned above, the DoD's investigations have largely focused on known or suspected releases of AFFF.[179] The most recent publicly available data indicates that the "DoD has identified 687 . . . installations with known or

.com/environment-and-energy/superfund-cleanup-deals-could-get-trickier-after-federal-memo.

[173] BEARDEN, *supra* note 96, at 31.

[174] *See*, *e.g.*, GENNA REED ET AL., UNION OF CONCERNED SCIENTISTS, A TOXIC THREAT: GOVERNMENT MUST ACT NOW ON PFAS CONTAMINATION AT MILITARY BASES 1-8 (2018).

[175] *See* DOD REMEDIATION PLAN, *supra* note 34, at 4. It remains to be seen whether DoD will consider EPA's June 2022 PFAS drinking water advisory limits in the same fashion as the prior health advisories.

[176] GAO 21-421, *supra* note 834, at 17.

[177] GAO 21-421, *supra* note 834, at 18.

[178] GAO 21-421, *supra* note 834, at 20

[179] DOD IG REPORT, *supra* note 36, at 28.

suspected releases [of AFFF]."[180] Of these, 108 are former installations that were closed under the BRAC process.[181] Department of Defense officials have testified that they cannot yet prioritize any of these former installations because an insufficient number have been adequately tested.[182] Initial site inspections are not expected to be completed until the end of 2023.[183] Consequently, the DoD's factual understanding of the extent of PFAS contamination remains in a constant state of flux, and its list of contaminated sites continues to grow almost every month. In addition, because the DoD's focus has been on AFFF rather than other potential sources of PFAS contamination, it is likely to identify additional contaminated sites in the future.[184]

The DoD's PFAS response has been privileged to enjoy the limited regulatory oversight that comes with exercising voluntary response authority under CERCLA section 104 for pollutants or contaminants. Several states and non-governmental organizations have expressed displeasure with the pace and limited scope of DoD's voluntary response actions.[185] In some cases, states have even attempted to enforce more restrictive state laws and regulations against the DoD in an effort to compel response actions that are both more accelerated and broader in scope. For example, in October 2018, the State of Michigan issued a notice of violation (NOV) to the Air Force for PFAS contamination at the former Wurtsmith Air Force Base (AFB), which Michigan viewed as a violation of state law that required immediate action.[186] The Air Force disputed the violation for the primary reason that the federal government is "immune under CERCLA from a state enforcing a requirement related to substances that are not CERCLA hazardous substances."[187] Similarly, the State of New Mexico issued a NOV to the Air Force in November 2018 based on PFAS contamination at Cannon AFB, which the state viewed as a violation of state law requiring immediate action. The Air Force once again disputed the violation, arguing that it is not subject to state regulation because PFAS are pollutants or contaminants under CERCLA rather than hazardous

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[180] GAO-21-421, *supra* note 834, at 12.
[181] GAO-21-421, *supra* note 834, at 13 fig.3.
[182] *See Remediation and Impact of PFAS: Hearing Before House Appropriations Subcom. on Mil. Const., Veterans Aff., and Related Agencies*, 117th Cong. 2 (2021) (statement of Paul Cramer, Principal Deputy Assistant Sec'y of Def. for Sustainment) [hereinafter Cramer].
[183] *Id.*
[184] DOD IG REPORT, *supra* note 36, at 28.
[185] *See, e.g.,* REED ET AL., *supra* note 174, at 1-8.
[186] Termaath NOV Response Letter, *supra* note 101, at 1-6.
[187] Termaath NOV Response Letter, *supra* note 101, at 4.

substances.[188] In March 2019, the State of New Mexico sued the Air Force in litigation that remains ongoing.[189] In an opposition brief, the Air Force highlighted that its voluntary response authority under CERCLA section 104 protects it from interference by state regulators in part because PFAS are not designated as hazardous substances under CERCLA.[190]

At the same time that the DoD has taken this hardline posture against state regulators attempting to alter its voluntary response under CERCLA section 104, the DoD has presented itself in a somewhat different light to Congress and members of the public. For instance, a DoD official recently testified before Congress that "DoD . . . is specifically authorized under CERCLA Section 104 to take cleanup action to address 'pollutants or contaminants' like PFAS. The DoD is thus taking cleanup actions, *even though* PFAS are not designated as a CERCLA hazardous substance."[191] This language is consistent with other official DoD testimony before Congress[192] as well as other public statements.[193] It conspicuously fails to mention the limited scope of PFAS releases that DoD considers to satisfy the imminent endangerment requirement that section 104 places on pollutants or contaminants, or that CERCLA does not impose such a requirement on hazardous substances. Perhaps more importantly, it also strongly suggests that a decision to designate some or all PFAS as hazardous substances may be unnecessary and unimpactful.

D. Overview of BRAC

At the end of the Cold War, Congress designed an orderly process to help it make difficult base closure decisions with a focus on military mission requirements rather than politics. The hallmark of this process is

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[188] Bilbrey NOV Response Letter, *supra* note 91, at 2.
[189] Complaint, State of N.M. v. United States, No. 1:19-cv-00178-LF-KBM, 2019 WL 1065864 (D.N.M. Mar. 5, 2019).
[190] Brief in Opposition to Plaintiff's Motion for Preliminary Injunction at 20, State of N.M. v. United States, No. 1:19-cv-00178-MV-JFR, 2019 WL 6605644 (D.N.M. Sept. 7, 2019).
[191] *Remediation and Impact of PFAS: Hearing Before House Appropriations Subcom. on Mil. Const., Veterans Aff., and Related Agencies*, 117th Cong. 3 (2021) (statement of Richard Kidd, Deputy Assistant Sec'y of Def. for Env't & Energy Resilience) (emphasis added).
[192] *Addressing the Legacy of Dep't of Def. Use of PFAS - Protecting Our Communities and Implementing Reform: Hearing Before House Armed Servs. Subcomm. on Readiness*, 116th Cong. 2-3 (2020) (statement of Maureen Sullivan, Deputy Assistant Sec'y of Def. for Env't) [hereinafter Sullivan].
[193] Paul Ney, *Keynote Address by the Honorable Paul Ney, General Counsel of the U.S. Department of Defense at the Charleston Law Review and the Riley Institute 12th Annual Law and Society Symposium*, 14 CHARLESTON L. REV. 425, 433 (2020).

that the executive and legislative branches jointly appoint an independent blue-ribbon commission of experts who are given evaluation criteria to make DoD-wide basing recommendations.[194] Following open hearings, public comment, and data validation from the Government Accountability Office (GAO), these recommendations are then transmitted to Congress, which can either accept or reject the recommendations in their entirety.[195] Importantly, the recommendations cannot be amended by members of Congress, many of whose constituents may be directly impacted by any recommended base closures.[196] In addition, Congress has restricted the DoD's ability to close installations outside of the BRAC process.[197]

With regard to the aforementioned evaluation criteria, it is worth noting that BRAC Commissions have generally not considered environmental cleanup costs or timelines as part of their selection processes.[198] Though perhaps surprising on its face, this ignorance has in fact been quite deliberate. After all, CERCLA sections 107 and 120(h) impose incredibly broad liability for cleanup costs regardless of whether any particular base is closed under BRAC.[199] In addition, it is argued that considering cleanup costs would create a "perverse incentive" to favor the retention of contaminated installations and the disposal of uncontaminated installations.[200] GAO has largely agreed with this approach, in part because of the difficulty of estimating cleanup costs prior to the completion of investigative studies and plans.[201]

Over the course of five BRAC rounds between 1988 and 2005, the DoD has been directed to close 120 major installations, complete 79 major downsize actions (known as realignments), and perform 990 minor closures and realignments.[202] With heightened sensitivity to the potential for dire economic impacts that base closure and realignment actions can have on nearby communities,[203] Congress directed the DoD to operate on an expedited timeline, completing all BRAC real property disposal actions within a six-year implementation period.[204] The DoD was also given special legislative authority to transfer BRAC properties directly to local

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[194] *See* MANN, *supra* note 1, at 2-3.
[195] MANN, *supra* note 1, at 3.
[196] MANN, *supra* note 1, at 2-3.
[197] MANN, *supra* note 1, at 14..
[198] DEF. BASE CLOSURE AND REALIGNMENT COMM'N, 2005 DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION REPORT TO THE PRESIDENT 334 (2005).
[199] *See id.*
[200] *Id.*
[201] *See id.*
[202] GAO-17-151, *supra* note 7, at 5 tbl.1.
[203] *See* Wegman & Bailey, *supra* note 3, at 868-69.
[204] *See* MANN, *supra* note 1, at 3; GAO-17-151, *supra* note 7, at 5.

communities (not coincidentally named "economic development conveyances") at no cost so that these properties could be expeditiously redeveloped.[205] Under normal property disposal authorities, the United States requires transferees to pay fair market value for property, with limited exceptions.[206] The clear intent of Congress was to turn BRAC properties into economically productive (non-federal) uses as quickly as possible.

These economic development goals were further supported by a unique indemnity provision that Congress inserted into section 330 of the National Defense Authorization Act (NDAA) for Fiscal Year 1993.[207] This law aimed to provide reassurance to developers and other transferees of former BRAC property by requiring DoD to indemnify new BRAC property owners against claims from third parties for personal injury or property damage arising from DoD's release of any hazardous substance, pollutant, or contaminant.[208] This exceedingly rare instance of congressionally authorized indemnity can be viewed as a supplement to the DoD's traditional PRP liability under CERCLA. Section 330 expressly stated that indemnification shall not be construed as affecting or modifying in any way DoD's liability under CERCLA.[209] While the text of section 330 focuses on claims from third parties, applicable caselaw has clarified that a third party does not have to actually sue a BRAC transferee for the transferee to assert liability against the DoD under section 330.[210] In one case, a state regulator's mere threat of fining a BRAC transferee was held to satisfy section 330's requirements, with the end result being that the DoD was held liable for the BRAC transferee's expenses in remediating newly discovered asbestos contamination.[211] The transferees of former BRAC property thus enjoy multiple pathways to assert cleanup liability against the DoD; these include not only the traditional pathways under CERCLA sections 107 and 120(h), but also section 330 when transferees

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[205] MANN, *supra* note 1, at 7.

[206] CHUCK MASON, CONG. RSCH. SERV., R40476, BASE REALIGNMENT AND CLOSURE (BRAC): TRANSFER AND DISPOSAL OF MILITARY PROPERTY 5 (2013).

[207] Pub. L. No. 102-484, 106 Stat. 2315, 2371 (1992); 10 U.S.C. § 2687 note (Indemnification of Transferees of Closing Defense Property).

[208] *Id.*

[209] *Id.* § 330(e).

[210] *See* Richmond Am. Homes of Col., Inc. v. United States, 75 Fed. Cl. 376, 391 (2007) (holding that the threat of fines by a state regulator against a BRAC transferee satisfied the third party claim requirement of section 330); *see also* Indian Harbor Ins. Co. v. United States, 704 F.3d 949, 956 (Fed. Cir. 2013) (holding that expenditures associated with cleanup costs that a state regulator demanded of a BRAC transferee were recoverable under section 330).

[211] *See Richmond*, 75 Fed. Cl. at 391.

incur cleanup costs as a result of claims from third parties or demands from environmental regulators.[212]

Despite lofty expectations for the DoD to rapidly implement BRAC decisions, the BRAC authorities do not provide the DoD with any relief from the CERCLA requirements discussed above. In fact, CERCLA section 120(h)'s requirement to remediate hazardous substances (not pollutants or contaminates) prior to transfer has proven to be the primary reason that the DoD has failed to transfer a large number of BRAC properties (in many cases even several decades after the initial BRAC decision).[213] Of the approximately 388,000 acres of former base property designated for transfer over the five BRAC rounds, approximately 315,000 acres (81%) have been transferred out of DoD custody and control.[214] Approximately 73,000 acres (19%) remain to be transferred because of long-term environmental remediation actions that are still underway.[215] To be clear, these transfer delays existed long before the DoD's current PFAS problem became widely known, and they are largely caused by CERCLA's requirement to remediate hazardous substances (not pollutants or contaminants). Although PFAS have likely been released on many of these 73,000 acres, it is not the remediation of PFAS that have caused their delay.

There is no doubt that that many of the 315,000 acres that have already been transferred out of DoD ownership are, to varying degrees, contaminated with PFAS. In addition, pursuant to the clear intent of Congress, many of these properties have been subsequently redeveloped into a variety of (economically productive) industrial, commercial, and even residential uses by their new owners. At the time of transfer, the DoD had no reason to suspect that PFAS may later be designated as hazardous substances that it may be required to remediate. Thus, in many of these cases, the DoD is likely to have ensured the properties are safe for less restricted land uses, such as residential and recreational. Unfortunately, to date, the DoD's public release of data about PFAS contamination has been coarse rather than granular: it identifies contaminated former installations but does not contain any estimates of the acreage or land use of the contaminated individual parcels that make up these former installations. Moreover, the DoD's released data focuses almost exclusively on water

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[212] *See id.; see also* 32 C.F.R. § 175 (2022) (Indemnification or Defense, or Providing Notice to the Department of Defense, Relating to a Third-Party Environmental Claim).

[213] MANN, *supra* note 1, at 5-6. DoD's BRAC implementation policy echoes this requirement. U.S. DEP'T OF DEF., 4165.66-M, BASE REDEVELOPMENT AND REALIGNMENT MANUAL para. C8.5 (1 Mar. 2006) (C1, 31 Aug. 2018).

[214] MANN, *supra* note 1, at 41.

[215] *See* MANN, *supra* note 1, at 41.

contamination levels, providing very little information about soil contamination.

Despite lengthy delays to fully implementing past rounds of BRAC, numerous commentators have argued that BRAC is a necessary part of the United States' national defense strategy and urgently needs to be continued through future rounds.[216] The primary justification is that BRAC, by offloading of excess infrastructure, enables the DoD to realign its budget to reflect existing military needs over the ever-increasing maintenance costs of facilities that have outlived their useful lives.[217] The DoD estimates that the prior BRAC rounds continue to save it $11.9 billion in recurring annual savings,[218] although this number is disputed.[219] Realignment actions also help facilitate joint basing, which many view as an efficient way of pooling resources to reduce redundancy across the DoD enterprise.[220] In addition, the National Defense Strategy continues to suggest that the DoD should "work to reduce excess property and infrastructure, providing Congress with options for a [BRAC round]."[221]

III. Scenario Planning Methodology

The following sections aim to apply the scientific, legal, and regulatory driving forces discussed above to the three most likely scenarios that will occur as a result of the EPA's stated commitment to designate some or all PFAS chemicals as hazardous substances.[222] Scenario 1 preserves the status quo: the EPA ultimately fails to finalize its planned rulemaking process, which means no PFAS are designated as hazardous substances. In Scenario 2, the EPA is successful in designating PFOA and PFOS as hazardous substances. In Scenario 3, the EPA ultimately designates all PFAS (not just PFOA and PFOS) as hazardous substances. Each of these three scenarios is analyzed below, with a particular focus on the potential impact to DoD's real property remediation and disposal programs under BRAC.

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[216] *See*, *e.g.*, Smith & Preble, *supra* note 2, at 5-6; Bartels, *supra* note 2, at 88; Parker, *supra* note 2, at 52.
[217] Smith & Preble, *supra* note 2, at 5; David S. Sorenson, *More Military Base Closures? Considering the Alternatives*, 35 DEF. & SEC. ANALYSIS 23, 24 (2019).
[218] Bartels, *supra* note 2, at 84 fig.2.
[219] MANN, *supra* note 1, at 7.
[220] *See* MANN, *supra* note 1, at 8.
[221] *See*, *e.g.*, JAMES MATTIS, SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA: SHARPENING THE AMERICAN MILITARY'S COMPETITIVE EDGE 10 (2018).
[222] EPA STRATEGIC ROADMAP, *supra* note 21, at 17.

The analysis for each of the scenarios considers the impact to a specific former installation, Wurtsmith AFB, Michigan, which was fully decommissioned pursuant to the 1991 BRAC round.[223] In total, the installation consisted of approximately 4,600 acres nestled between the shores of Lake Huron and the Huron-Manistee National Forests.[224] Nearly half of Wurtsmith's land was conveyed to the local airport authority, which today operates a public airport on the airfield and industrial areas.[225] The airport is home to numerous small businesses focused on aircraft maintenance, manufacturing, and other industrial services.[226] Another approximately 2,000 acres were conveyed to the local township through BRAC's economic development conveyance authority.[227] These areas include the base's 758 family housing units, which have been redeveloped and sold to private owners, in addition to the base's dormitory, which has been converted into 86 condominium units for seniors.[228] Along with this significant housing supply, Wurtsmith offers numerous amenities that have either been built or adapted from the former base's infrastructure, including a 50-acre outdoor sports complex, three churches, a live theater, a public library, a community college, a public hospital, and numerous small commercial businesses.[229] Approximately 274 acres of Wurtsmith remain untransferred due to ongoing environmental remediation actions that are unrelated to PFAS.[230] It also is worth noting that the EPA proposed adding Wurtsmith to the NPL in 1994, but this addition was never finalized.[231] Before its closure, Wurtsmith had fewer than 700 civilian jobs. Today, over 1,600 people work at the former installation.[232]

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[223] *Wurtsmith Air Force Base, Michigan Redevelopment Profile,* U.S. DEP'T OF DEF. OFF. OF LOCAL DEF. CMTY COOPERATION (Oct. 2020), https://oldcc.gov/project/wurtsmith-air-force-base-michigan-redevelopment-profile [hereinafter *Wurtsmith Profile*].
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] DEP'T OF AIR FORCE, CIVIL ENG'G CTR, AIR FORCE BRAC PROGRAM SNAPSHOT: FORMER WURTSMITH AFB 1 (2018) [hereinafter WURTSMITH SNAPSHOT].
[231] *Wurtsmith Air Force Base, Oscoda, MI, Cleanup Progress*, U.S. ENV'T PROT. AGENCY, https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.schedule&id=0503675 (last visited Dec. 22, 2022).
[232] *Wurtsmith Profile*, *supra* note 223.

Unfortunately, despite the above economic successes, all is not well at Wurtsmith. In 2010, sampling near one of Wurtsmith's former fire training areas revealed high levels of PFAS contamination in the groundwater.[233] Subsequent investigation has confirmed extensive PFAS contamination that extends well beyond the borders of the former base: measured plumes of PFAS-contaminated groundwater total at least eight square miles.[234] Drinking water tests in the area have shown PFOA and PFOS contamination levels as high as 2,923 PPT, while groundwater tests indicate PFOA and PFOS contamination levels exceeding 171,000,000 PPT.[235] These levels far exceed the EPA's current (non-enforceable) threshold of 0.004 PPT (for PFOA) and 0.02 (for PFOS) in drinking water.[236] In 2018, the State of Michigan promulgated new rules that mirror the EPA's then-existing 70 PPT advisory limit for PFOA and PFOS, [237] thereby making this threshold an enforceable ARAR with which the DoD's voluntary response actions must comply. In that same year, the State of Michigan issued a NOV to the Air Force for violations of state law in an attempt to accelerate the voluntary remediation actions underway at the former base.[238] The Air Force responded in part that it would not comply with the NOV because the United States is immune from attempts by states to regulate substances that are not classified as hazardous under CERCLA.[239]

Using its voluntary response authority under CERCLA section 104, the DoD has completed the preliminary assessment and site inspection phases of the CERCLA process, and is currently preparing for the remedial investigation phase.[240] As it studies potential long-term remedial actions, the Air Force operates a facility to pump and treat PFAS-contaminated groundwater.[241] It has also paid to provide affected landowners and neighbors with bottled water and connections to municipal water systems

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[233] *Former Wurtsmith Air Force Base (Oscoda, Iosco County*), MICHIGAN PFAS ACTION RESPONSE TEAM, (Mar. 25, 2022), https://www.michigan.gov/pfasresponse/investigations/sites-aoi/iosco-county/wurtsmith.

[234] Keith Matheney, *Air Force Snubs Michigan Law on Tainted Well Fixes,* DETROIT FREE PRESS (Apr. 25, 2017, 8:57 PM), https://www.freep.com/story/news/local/michigan/2017/04/25/air-force-snubs-michigan-law-demanding-new-water-hookup-wurtsmith/100909266.

[235] U.S. DEP'T OF DEF., PFAS SNAPSHOT: WURTSMITH AIR FORCE BASE 2 (2020).

[236] *See* EPA 2022 DRINKING WATER HEALTH ADVISORY, *supra* note 66, at 4; WURTSMITH SNAPSHOT, *supra* note 230, at 1.

[237] STATE OF MICH., OVERVIEW OF MICHIGAN'S SCREENING VALUES & MCLS: PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS) 4 (2021).

[238] Termaath NOV Response Letter*, supra* note 101, at 3.

[239] Termaath NOV Response Letter*, supra* note 101, at 3.

[240] *See* WURTSMITH SNAPSHOT, *supra* note 228.

[241] *See* WURTSMITH SNAPSHOT, *supra* note 228 at 2.

to avoid any human consumption of contaminated drinking water through nearby wells.[242] The Air Force has spent more than $85 million on cleanup actions at Wurtsmith—and counting.[243]

IV. Results

Table 1. Summary of each scenario's impact on the DoD's real property remediation and disposal programs under BRAC.

	Scenario 1: No PFAS Designated as Hazardous	*Scenario 2: PFOA and PFOS Designated as Hazardous*	*Scenario 3: All PFAS Designated as Hazardous*
Impact on Pending and Future BRAC Transfers	CERCLA § 120(h) allows the DoD to continue transferring PFAS-contaminated property under BRAC.	CERCLA § 120(h) prevents the DoD from transferring PFOA- and PFOS-contaminated property until necessary remedial actions are complete or regulator approval is obtained.	CERCLA § 120(h) prevents the DoD from transferring any PFAS-contaminated property until necessary remedial actions are complete or regulator approval is obtained.
Impact on Former DoD Property	CERCLA §§ 107 & 120(h) prevent owners and regulators from asserting cleanup liability against the DoD or forcing them to undertake cleanup actions for PFAS contamination. CERCLA § 104 prevents them from voluntarily remediating PFAS contamination that fails to satisfy the imminent endangerment requirement.	CERCLA §§ 107 and 120(h) allow current owners and regulators to assert liability or force cleanup actions for PFOA or PFOS contamination. CERCLA § 104 allows the DoD to voluntarily remediate all PFOA or PFOS contamination.	CERCLA §§ 107 and 120(h) allow current owners and regulators to assert liability or force cleanup actions for all PFAS contamination. CERCLA § 104 allows the DoD to voluntarily remediate all PFAS contamination.
Impact on DoD Remediation Efforts	CERCLA § 106 prevents regulators from altering the pace or scope of the DoD's voluntary cleanup actions that are conducted under CERCLA § 104. CERCLA § 121 cleanup standards (ARARs) are only required at sites that the DoD voluntarily remediates under CERCLA § 104.	CERCLA § 106 allows regulators to alter the pace or scope of the DoD remedial actions when PFOA or PFOS contamination poses an imminent endangerment to public health, welfare, or the environment. CERCLA § 121 cleanup standards (ARARs) are required at all sites that the DoD remediates for PFOA or PFOS contamination.	CERCLA § 106 allows regulators to alter the pace or scope of DoD remedial actions when any PFAS contamination poses an imminent endangerment to public health, welfare, or the environment. CERCLA § 121 cleanup standards (ARARs) are required at all sites that DoD remediates for PFAS contamination.

[242] WURTSMITH SNAPSHOT, *supra* note 228 at 2.
[243] *Former Wurtsmith Air Force Base (BRAC 1991)*, AIR FORCE CIVIL ENGINEER CENTER, https://www.afcec.af.mil/Home/BRAC/Wurtsmith.aspx (last visited Dec. 23, 2022).

A. Scenario 1: Status Quo

1. Impact on Pending and Future BRAC Transfers

The EPA's failure to designate any PFAS as hazardous substances would result in a lack of legal or policy incentives for the DoD to change its current practices in transferring pending and future BRAC properties that may be contaminated with PFAS to non-federal owners. Pursuant to Congress's intention of using BRAC to encourage economic development, many of these properties would continue to be transferred at no cost to the recipients.[244] CERCLA section 120(h) represents the primary obstacle to the timely transfer of BRAC properties, but it applies only to hazardous substances.[245] Accordingly, the DoD would be free to continue disposing of properties that may have PFAS contamination without any requirement to remediate prior to transfer. It is true that, at least in cases where PFAS contamination has been identified and disclosed, it may be difficult for the DoD to find interested transferees, many of whom may be concerned about the implications of owning PFAS-contaminated property. However, the DoD's disclosure obligations under CERCLA section 120(h) would not be implicated by non-hazardous substances like PFAS in this scenario.[246]

2. Impact on Former DoD Property

The status quo would continue to prevent regulators and the owners of property that has already been transferred under BRAC from successfully asserting PFAS cleanup liability against the DoD under CERCLA sections 107 or 120(h).[247] For instance, the operator of the public airport at the former Wurtsmith AFB would have no legal recourse under CERCLA to compel DoD cleanup actions or to assert cleanup liability against the DoD, even though the PFAS contamination levels at the site are orders of magnitude higher than the levels that the DoD considers to satisfy the imminent public endangerment requirement of CERCLA section 104. This result is directly attributable to the wording of CERCLA sections 107 and 120(h), which only impose cleanup liability for hazardous substances.[248] The DoD may voluntarily decide to commence the cleanup actions desired by the Wurtsmith community and affected neighbors, but

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[244] *See* MANN, *supra* note 1, at 7.
[245] *See* MANN, *supra* note 1, at 5-6.
[246] *See* Seymour, *supra* note 74, at 184-92.
[247] *See* 42 U.S.C. §§ 9607(a), 9620(h).
[248] *See id.*

it will not be legally compelled to do so, and in fact, would be free to reverse course or significantly narrow the scope or timing of its response actions at a future date.[249] Applied more broadly, this principle would prevent the owners of any past, pending, or future BRAC property transfers from either compelling or seeking DoD contribution toward the cleanup of PFAS contamination on their property, even in cases of extreme concentrations.

Under the status quo scenario, it is conceivable that a BRAC transferee could assert PFAS remediation liability against the DoD pursuant to the indemnification provision of section 330 of the NDAA of 1993, which is triggered not only by hazardous substances, but also by pollutants or contaminants.[250] Importantly, however, section 330 also requires a BRAC transferee's asserted remediation costs to be based on a claim from a third party or an abatement order from a regulator, in addition to satisfying other procedural requirements.[251] Even when these conditions are satisfied, the DoD then has an opportunity to defend itself directly against the third party claimant or environmental regulator.[252] One possible defense the DoD would have to claims based on an environmental regulator's abatement order would be that the regulator's abatement authority under CERCLA section 106 requires the presence of a hazardous substance (not pollutant or contaminant) that poses "an imminent and substantial endangerment to the public health or welfare or the environment."[253] To date, there are no known examples of PFAS remediation costs being successfully asserted against the DoD in this indirect manner (through a BRAC transferee). Accordingly, the DoD's potential PFAS cleanup liability under section 330 remains an untested legal theory—at least for the moment.

3. Impact on DoD Remediation Efforts

The DoD would remain on its current path to addressing PFAS contamination at current and former installations. Despite public

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[249] *See* BEARDEN ET AL., *supra* note 18, at 25.

[250] 10 U.S.C. § 2687 note. This type of claim would require the BRAC transferee to convince a court that the types of PFAS giving rise to their claim should be considered pollutants or contaminants under CERCLA. This would not be difficult in light of DoD's determination that PFAS are pollutants or contaminants that justify its use of voluntary response authority under CERCLA section 104. *See*, *e.g.*, Cramer, *supra* note 17, at 2.

[251] *See* Richmond Am. Homes of Col., Inc. v. United States, 75 Fed. Cl. 376, 391 (2007); *see also* 32 C.F.R. § 175 (2022).

[252] 10 U.S.C. § 2687 note, § 330(c) (Indemnification of Transferees of Closing Defense Property).

[253] 42 U.S.C. § 9606(a).

assurances from DoD officials that it can remediate PFAS "*even though* PFAS are not designated as a CERCLA hazardous substance,"[254] The DoD's voluntary response authority would remain limited in important ways. Most significantly, CERCLA section 104 permits DoD remediation of pollutants or contaminants like PFAS only when they pose an imminent endangerment to public health.[255] Under this scenario, the DoD would have no immediate legal or policy reasons to change its existing practice of considering only PFOA and PFOS to satisfy the imminent public endangerment requirement, and only when these chemicals are present in human drinking water (not soil or other groundwater) above the EPA's recommended health advisory limits. Accordingly, under this scenario, the DoD would continue to categorically exclude from consideration any PFAS cleanup actions that fail to satisfy these preconditions. Furthermore, state and federal regulators would have no ability to compel the DoD to alter the pace or scope of its voluntary responses because their involuntary abatement authority is contingent on the presence of hazardous substances.[256]

4. Unknown Factors

The status quo would offer no resolution to the existing factual uncertainty over the extent of the DoD's PFAS contamination, nor would it resolve the existing regulatory uncertainty about rapidly changing state laws that may become ARARs with which DoD's voluntary remedial actions must comply. As discussed, the DoD currently has a very limited understanding of the extent of potential PFAS contamination on current and former installations, and it will take many more years before its understanding even begins to approach a stage that can be described as comprehensive.[257] In the coming years and decades, as the DoD completes the numerous site investigations that are currently underway, it will move to the next stages of the CERCLA process. These stages require the DoD to study the feasibility of various remediation options. Importantly, remedial actions at both NPL and non-NPL sites will have to achieve those state cleanup standards that are determined to be ARARs.[258] The list of

[254] Cramer, *supra* note 17, at 2 (emphasis added); *see also* Sullivan, *supra* note 17, at 2-3.
[255] GRAY, *supra* note 72, at 10.
[256] *See* 42 U.S.C. § 9606(a).
[257] *See* GAO-21-421, *supra* note 8, at 20.
[258] BEARDEN, *supra* note 96, at 10. At NPL sites, DoD would continue to be required to implement remedial actions that are selected by EPA. Non-NPL sites would continue to constitute the vast majority of DoD's CERCLA cleanup locations because EPA will not be

potential ARARs is both extremely dynamic and state specific. Although it is difficult to predict the future PFAS regulatory landscape across all states, the clear trend today is toward more restrictive PFAS standards at the state level.[259] The DoD will be required to achieve these standards at sites that the DoD considers to satisfy the imminent public endangerment requirement of CERCLA section 104.

Finally, it remains possible that some other regulatory action by the EPA, such as SDWA drinking water limits, would have an impact on the DoD cleanup actions under the status quo scenario. The EPA's roadmap specifically includes a "commitment" to creating a national drinking water regulation for PFOA and PFOS by fall 2023,[260] though it remains to be seen whether this regulation will be finalized and enforceable against the DoD. Nationwide drinking water standards would be considered ARARs under CERCLA.[261] Accordingly, the DoD would be required to achieve these standards when exercising its voluntary response authority. States could also continue enacting drinking water standards that are more restrictive than the federal standards, and these state standards could also be considered ARARs if they have general applicability and do not impose more stringent standards against the DoD than are imposed on non-federal parties.[262]

B. Scenario 2: Only PFOA and PFOS are Designated as Hazardous Substances

1. Impact on Pending and Future BRAC Transfers

If the EPA successfully finalizes its proposed rule to designate PFOA and PFOS as hazardous substances, the resulting impact to the DoD would be substantial. Nearly all pending and future BRAC transfers of PFOA- and PFOS-contaminated property would be indefinitely delayed until necessary remediation actions could be completed and regulatory approvals obtained.[263] Although the possibility of so-called "early transfers" could represent an exception to this rule by allowing transfer to precede cleanup actions, these exceptions require compliance with

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able to add additional sites based purely on PFAS contamination. *See* BEARDEN, *supra* note 96, at 10.

[259] *See* Black et al., *supra* note 161, at 367.

[260] EPA STRATEGIC ROADMAP, *supra* note 21, at 12-13.

[261] *See* BEARDEN, *supra* note 96, at 10.

[262] *See* BEARDEN, *supra* note 96, at 10.

[263] *See* Seymour, *supra* note 74, at 194-204.

challenging preconditions, and historically represent a small minority of BRAC transfers.[264] Accordingly, the vast majority of the DoD property slated for BRAC transfer that is currently known, or later discovered, to be contaminated by PFOA or PFOS would immediately become untransferable for an indefinite period of time.[265] Another factor that could lead to transfer delays is likely to come from the existing lack of effective technologies to treat PFOA and PFOS soil contamination, though it is possible that such transfers could nonetheless proceed if regulators agree that restrictive land use controls could protect public health and the environment without requiring physical cleanup actions.[266] Such land use restrictions, however, could potentially undermine the economic development potential of the excess property. Finally, because CERCLA requires the United States to disclose whether any hazardous substances (not pollutants or contaminants) have been released, disposed, or stored on a given property prior to transfer,[267] the DoD would be required to spend considerable time researching its records for evidence of such activities on all properties that are designated for transfer under BRAC.

2. Impact on Former DoD Property

Scenario 2 would impact the DoD's obligation to remediate property that has already transferred to non-federal owners under BRAC in ways that are both dramatic and unquantifiable, given the incomplete state of existing knowledge. As discussed previously, CERCLA section 120(h) requires deeds to covenant that the DoD will conduct any hazardous substance remediation "actions found to be necessary after the date of . . . transfer."[268] These covenants are consistent with CERCLA section 107, which would impose the broadest possible liability under the law—joint, several, and retroactive—on the DoD for any PFOA or PFOS releases that occurred during its ownership of the property.[269] Scenario 2, therefore, introduces new DoD liability to private, non-federal parties, which would be a direct result of EPA's designation of PFOA and PFOS as hazardous

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[264] *See* BEARDEN, *supra* note 134, at 2; U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-433, MILITARY BASE CLOSURES: PROGRESS IN COMPLETING ACTIONS FROM PRIOR REALIGNMENTS AND CLOSURES 26 (2002).
[265] *See* Seymour, *supra* note 74, at 193-94.
[266] *See* BEARDEN, *supra* note 134, at 3-4.
[267] 42 U.S.C. § 9620(h).
[268] *Id.* § 9620(h)(3)(A)(ii)(II).
[269] *See* BEARDEN, *supra* note 96, at 12-13.

substances.[270] This new liability could result in dozens, hundreds, or even thousands of claims, lawsuits, and regulatory enforcement actions that would not only take up considerable DoD resources to manage, but also would ultimately compel the DoD to remediate PFOA and PFAS contamination at its former properties.

Remediation of former DoD property presents unique challenges that are avoided when the DoD remediates property that has not yet transferred into private ownership. Under BRAC, many of these former DoD properties were transferred for the explicit purpose of encouraging redevelopment and economic stimulus.[271] Accordingly, many of these former properties have been subsequently redeveloped into a variety of new land uses, such as residential, recreational, commercial, and industrial. Remediating these properties would present significant logistical challenges because of the potential for disrupting the new land uses. While groundwater treatment might be able to occur without significant issue, soil treatment technologies are still under development and have the potential to be far more disruptive.[272] The potential for disruptive soil treatment therefore increases the risk that the DoD could be required to compensate the owners of redeveloped former BRAC property for their lost profits, temporary relocation costs, and the loss of their use of the property during remediation treatment.

As under Scenario 1, regulators would be empowered to require the DoD's remedial actions under Scenario 2 to comply with a rapidly expanding universe of potential ARARs.[273] The DoD has continuing liability to the non-federal owners of former BRAC property in cases where hazardous substances (in this case PFOA and PFOS) are discovered after transfer has occurred.[274] However, the DoD's obligation is limited to only those ARARs that are applicable to the land use that was anticipated

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[270] As discussed in Scenario 1, it remains conceivable under Scenario 2 that a BRAC transferee could successfully assert liability against DoD pursuant to the indemnification provision of section 330 of the NDAA of 1993. DoD liability in this scenario would be triggered if certain types of PFAS were determined to be pollutants or contaminants under CERCLA. 10 U.S.C. § 2687 note. Even if that condition were satisfied, however, the BRAC transferee's remediation costs would also need to be based on a claim from a third party or an order from an environmental regulator, in addition to satisfying other procedural requirements under section 330. *See* Richmond Am. Homes of Col., Inc. v. United States, 75 Fed. Cl. 376, 391 (2007); 32 C.F.R. § 175 (2022). To date, there are no known examples of PFAS remediation costs being successfully asserted against DoD in this indirect manner, so it remains an untested legal theory.

[271] *See* MANN, *supra* note 1, at 7.

[272] *See* Darlington et al., *supra* note 62, at 59-60.

[273] *See* BEARDEN, *supra* note 96, at 10.

[274] *See* BEARDEN, *supra* note 96, at 33.

at the time of transfer.[275] Thus, the designation of PFOA and PFOS as hazardous substances would provide both regulators and the current owners of former BRAC property an opportunity to compel the DoD compliance with modern ARARs that never previously existed, as long as these modern ARARs are applicable to the land use that was anticipated at the time of transfer.[276]

Using the Wurtsmith AFB example, Scenario 2 would open multiple new avenues for property owners and regulators to compel the DoD to alter the pace and scope of its current voluntary activities at the former installation. For instance, the owners of the dozens of residential and recreational lands that are spread across Wurtsmith would be empowered to force the DoD to complete whatever additional remediation of PFOA and PFOS is found necessary after transfer. These remedial actions would require consultation with the State of Michigan, and would also be required to comply with any ARARs applicable to residential and recreational land uses, which are generally the most stringent standards. Alternatively, the State of Michigan could also initiate enforcement actions against the DoD or seek the DoD's financial contribution toward cleanup actions that Michigan regulators direct. These actions and contributions would once again be required to achieve compliance with any ARARs applicable to residential and recreational land uses.[277]

It is critical to understand that the DoD's obligation to return to previously transferred property for hazardous substance remediation under this scenario is not necessarily a one-time commitment. On the contrary, the DoD could be required to return to former BRAC properties each time a previous ARAR is deemed to insufficiently protect human health or the environment.[278] For instance, immediately after PFOA and PFOS are designated as hazardous substances, it is likely that the DoD will be compelled to bring the Wurtsmith properties into compliance with whatever state and federal ARARs regulate groundwater and drinking water. However, bringing the Wurtsmith properties into compliance with applicable ground and drinking water standards does not mean that the DoD is subsequently released from its CERCLA obligations. Rather, the State of Michigan and the EPA would remain free to promulgate more restrictive water standards—or perhaps create new soil standards—many years or even decades later. The DoD would have a continuing liability to return to the former Wurtsmith properties and bring them into compliance

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[275] BEARDEN, *supra* note 134, at 3-4.
[276] *See* BEARDEN, *supra* note 134, at 3-4.
[277] *See* BEARDEN, *supra* note 134, at 3-4.
[278] *See* BEARDEN, *supra* note 134, at 3-4.

with such future ARARs whenever the previous ARARs are determined to insufficiently protect human health or the environment.

Unfortunately, because the DoD soil sampling at Wurtsmith has prioritized airfield areas, it is impossible to know exactly which properties and land uses are most affected by PFOA and PFOS contamination. While it is clear that much of the soil and groundwater underneath the Wurtsmith airfield is contaminated with PFAS, it remains unclear whether other areas—such as Wurtsmith's many residential, educational, healthcare, recreational, or commercial properties—also have significant levels of soil or groundwater contamination.[279] If so, the owners of these properties and Michigan state regulators would be empowered to compel the DoD to comply with current and future ARARs applicable to those land uses.[280]

3. Impact on DoD Remediation Efforts

Designation of PFOA and PFOS as hazardous substances would fundamentally alter the DoD's current use of voluntary response authority under CERCLA section 104. The existing limits on this authority, which the DoD regularly cites in court and adversarial proceedings, would essentially vanish as a result of PFOA and PFOS's designation as hazardous substances.[281] Instead, the DoD would be capable of taking voluntary response actions for any PFOA or PFOS contamination that can be attributed to its actions, regardless of whether the contamination occurs in soil, groundwater, or drinking water, and regardless of whether the contamination poses an imminent endangerment to human health.[282] For PFAS other than PFOA and PFOS, however, the DoD is likely to continue its existing practice of viewing the imminent public endangerment requirement as a legal impediment for using its voluntary response authority under CERCLA section 104.

The role of outside regulators—and the potential cleanup standards they might impose—would expand dramatically for all types of DoD property, including past, pending, and future BRAC properties, as well as the existing inventory of DoD real property and installations. In addition, the DoD would be answerable to outside regulators for PFOA and PFOS

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[279] Existing land use controls at Wurtsmith prevent water extraction from much of the property that has been transferred under BRAC. AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, PUBLIC HEALTH ASSESSMENT: WURTSMITH AIR FORCE BASE, OSCODA, IOSCO COUNTY, MICHIGAN, EPA FACILITY ID: MI5570024278, at 1 (2001).
[280] *See* BEARDEN, *supra* note 134, at 3-4.
[281] *See* GRAY, *supra* note 72, at 9-10.
[282] *See* GRAY, *supra* note 72, at 9-10.

contamination that migrates onto neighboring property that it has never owned, such as the private property abutting Wurtsmith AFB. Contrary to the current situation, where the DoD has been successful in contesting attempts by state regulators to alter the pace or scope of the DoD's voluntary response actions, the DoD is likely to have far less success with this approach in Scenario 2. Whenever a state regulator could demonstrate that PFOA or PFOS contamination poses an imminent endangerment to either human health *or the environment*, that regulator would be able to impose severe penalties and administrative orders to direct the DoD's immediate (involuntary) cleanup response.[283] In addition, EPA's decision-making authority over the selection of remedial actions at DoD sites that are listed on the NPL could become particularly significant because EPA would also gain the authority to add new DoD sites to the NPL based purely on their PFOA and PFOS contamination.[284] The end result of these changes is that the DoD would find itself with far less independence in overseeing its response to PFOA and PFOS contamination.

4. Unknown Factors

Finally, although Scenario 2 would represent a legal sea change, it is also extremely difficult to quantify the difference in the DoD's potential financial liability between Scenarios 1 and 2. The lack of uniform cleanup standards and the lack of existing cleanup technologies pose two significant hurdles, but the lack of basic information about the size and extent of DoD-caused PFOA and PFOS contamination represents a more fundamental hurdle to quantifying potential liability. Based on the dramatic expansion of voluntary cleanup actions available under CERCLA section 104, the expanded role of regulators who would become empowered to compel involuntary cleanup actions, and the ability of non-federal owners of BRAC property to assert liability against the DoD for cleanup actions, it seems clear the DoD is likely to engage in substantially more cleanup actions under Scenario 2 than it is under Scenario 1. However, until the DoD completes assessments and feasibility studies at sites that are known or suspected to have AFFF or other types of PFOA or PFOS releases, it is simply impossible to quantify how much of this difference would be attributable to the regulatory reclassification of PFOA and PFOS.

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[283] *See* 42 U.S.C. § 9606(a).
[284] *See* BEARDEN, *supra* note 96, at 6-7.

C. Scenario 3: All PFAS are Designated as Hazardous Substances

1. Impact on Pending and Future BRAC Transfers

The EPA's designation of all PFAS chemicals as hazardous substances would only compound the immediate and indefinite delays to transferring pending and future BRAC properties that were described in Scenario 2. These properties would need to be screened for the presence of hundreds of new hazardous substances, and if such chemicals are present, the DoD would need to complete cleanup actions and/or receive regulatory approvals prior to transfer.[285] The DoD's disclosure obligations under CERCLA would likewise require lengthened timelines as the DoD completes comprehensive searches of its records to find evidence of past storage, disposal, or release of any PFAS chemicals. In sum, the impact on pending and future BRAC transfers is very similar to Scenario 2, except the expanded list of hazardous substances presents significantly more potential delays to timely transfer under BRAC.

2. Impact on Former DoD Property

The new liability that the DoD would owe to the current owners of its former property under Scenario 2 would be significantly enlarged under Scenario 3. The right of these landowners, as well as regulators, to force (involuntary) DoD response actions would be applicable to a far greater number of new hazardous substances than under Scenario 2. In addition, the DoD's continuing obligation to remediate this expanded list of hazardous substances would increase the possibility that the DoD could be required to complete new remediation actions each time a previous ARAR is deemed to insufficiently protect human health or the environment.[286] As under Scenario 2, the remediation of former DoD property that has been subsequently redeveloped after transfer presents considerable logistical problems, especially for the remediation of PFAS-contaminated soil. These remedial actions increase the likelihood that the DoD could be required to pay landowners for lost profits, relocation costs, and other compensation during periods of intensive remediation.

Returning to the Wurtsmith example, it is important to consider that all DoD actions to date have taken place under a framework that assumes only PFOA and PFOS satisfy the imminent endangerment requirement of

[285] *See* Seymour, *supra* note 74, at 194-204.
[286] *See* BEARDEN, *supra* note 134, at 3-4.

CERCLA section 104. Accordingly, DoD investigations have focused primarily on AFFF releases near the airfield. The DoD has conducted very little investigation of any other types of releases, largely disregarding non-PFOA and non-PFOS types of PFAS contamination. Interestingly, however, publicly released sampling data near the Wurtsmith airfield indicates that dozens of other types of PFAS chemicals (not just PFOA and PFOS) are abundant in Wurtsmith's soil, groundwater, and drinking water.[287] If these other types of PFAS were designated as hazardous substances, the Wurtsmith property owners, as well as Michigan regulators, could force cleanup actions in accordance with any ARARs that apply to the land uses anticipated at the time of original transfer under BRAC.

3. Impact on DoD Remediation Efforts

Designation of all PFAS chemicals as hazardous substances would, once again, fundamentally alter the DoD's use of voluntary response authority under CERCLA section 104. Once all PFAS chemicals become designated as hazardous, the DoD would no longer need to make distinctions when using its voluntary response authority based on whether contamination poses an imminent endangerment to public health. Instead, all PFAS chemicals, as hazardous substances, would be eligible for voluntary remedial actions under CERCLA section 104 in whatever medium they are located.[288]

Another noteworthy feature of Scenario 3 is the expanded role of regulators. As under Scenario 2, these regulators would be empowered to compel the DoD to alter the pace and scope of its current voluntary cleanup actions, which have to date largely disregarded all types of PFAS other than PFOA and PFOS. Any time a regulator could show that PFAS contamination poses an imminent endangerment to public health *or the environment*, the DoD could be forced to comply with involuntary abatement orders.[289] As discussed below, however, there may be significant regulatory hurdles to implementing enforcement systems under Scenario 3.

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[287] *See* Memorandum from Catharine Varley, BRAC Environmental Coordinator, U.S. Air Force, for Record (Dec. 8, 2021).
[288] *See* GRAY, *supra* note 72, at 9-10.
[289] *See* 42 U.S.C. § 9607(a)(2).

4. Unknown Factors

There are two primary unknown factors that characterize Scenario 3. The first is regulatory: given the hundreds of different types of PFAS chemicals, it remains to be seen whether all of these chemicals would be treated as a singular category, or if each would receive its own standards.[290] Normally, state and federal ARARs are created from risk-based analyses tied to various land uses and exposure pathways. However, given the incredible diversity of PFAS, it may be challenging for regulators to conduct detailed analyses for each type of PFAS, especially analyses that could withstand scrutiny and legal challenge. Health and environmental studies of PFAS have, to date, focused predominantly on PFOA and PFOS. Far less is known about the risks of other types of PFAS.[291] In addition, it remains possible that other types of PFAS present different risks than PFOA or PFOS based on different exposure pathways in both humans and wildlife.

The second unknown factor is factual: whereas the DoD is still in the early stages of understanding the extent of PFOA and PFOS contamination, it is almost completely in the dark about the extent of contamination from other types of PFAS. As discussed, the DoD's focus has been on PFOA and PFOS releases through AFFF.[292] Not only has this approach missed PFOA and PFOS contamination from non-AFFF sources, but it has also largely ignored all other types of PFAS. Therefore, under Scenario 3, the DoD would need to invest considerable resources to even begin understanding the possible extent of its liability for the hundreds of types of PFAS chemicals that are likely spread across its current and former installations.

V. Conclusion

Based on the three scenarios discussed above, it appears likely that the EPA's designation of some or all PFAS chemicals as hazardous substances would cause a large increase in the number, scope, and intensity of remediation actions for which the DoD would be responsible.[293] This

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[290] *See* Baas, *supra* note 60, at 10120-21.
[291] *See* BEARDEN ET AL., *supra* note 18, at 4-5.
[292] DOD IG REPORT, *supra* note 36, at 28.
[293] It is theoretically possible that DoD could voluntarily undertake many of the remediation actions contemplated in Scenarios 2 and 3 if it were to reexamine its interpretation of CERCLA section 104. More specifically, if DoD expanded the scope of PFAS contamination it considers under the imminent public endangerment requirement

potential increase would come at a high cost, especially at former BRAC properties like Wurtsmith AFB, and this cost represents an unmistakable risk to the DoD's budgets and warfighting mission. Reclassification of PFAS therefore significantly increases the danger that appropriators will be forced to make difficult tradeoffs between funding important DoD mission requirements and the DoD's extensive new environmental cleanup liabilities. Given the incomplete state of existing knowledge, however, it is impossible to quantify the DoD's potential new outlays at this point.[294] There are simply too many unknown variables regarding the extent of contamination, which types of PFAS are involved, which cleanup technologies are able to remediate the contamination, which land uses are most affected, and which state and federal standards will be considered ARARs that will be applicable to these land uses.[295]

Reclassification of PFAS is also likely to disrupt the DoD's disposal of excess real property under BRAC. As discussed, all pending and future BRAC property transfers would be delayed indefinitely, thereby directly undermining Congress's expectation that the DoD conduct BRAC transfers as quickly as possible.[296] However, one must also consider that Congress could have designed BRAC to waive the DoD's compliance obligation with CERCLA section 120(h) if Congress truly prioritized rapid economic development over environmental cleanup, but it did not do so. Moreover, PFAS-contaminated property is likely to have reduced potential for economic development until the contamination has been remediated.[297] In this sense, pausing all pending and future BRAC transfers until PFAS remediation actions are complete could actually support, rather than undermine, Congress's long-term economic development goals.

One thing that can be known with complete certainty is that reclassification would reduce or eliminate the flexibility that the DoD now enjoys in how it remediates and disposes of BRAC properties. In this

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that currently constricts its use of CERCLA section 104, DoD could voluntarily undertake many of the exact same remediations that become involuntary under Scenarios 2 and 3. Conceivably, much of the scientific evidence that EPA will cite in its justification for classifying some or all PFAS chemicals as hazardous substances could equally justify DoD's expansion of the PFAS contamination that it considers to pose an imminent public endangerment. At the same time, however, DoD has always given significant deference to EPA's subject matter expertise. It would be highly unusual for DoD to disregard that expertise by making its own determinations about the circumstances in which specific chemicals pose an imminent public endangerment.

[294] *See* GAO-21-421, *supra* note 8, at 21.

[295] *See* GAO-21-421, *supra* note 8, at 21-22.

[296] *See* MANN, *supra* note 1, at 7.

[297] *See* BEARDEN, *supra* note 134, at 1.

sense, reclassification can be viewed as a permanent guarantee that DoD will take appropriate cleanup actions.[298] It eliminates the perceived risk under the status quo scenario that the DoD could later narrow the scope or decelerate the pace of its voluntary cleanup actions.[299] External regulators and landowners would become the primary drivers of the DoD's remediation actions at former BRAC properties upon the designation of PFAS as hazardous substances. And because these external parties largely do not have significant influence under the status quo scenario, reclassifying PFAS as hazardous substances necessarily results in the DoD losing control over its current approach to addressing PFAS contamination.

To the extent that the DoD missions are impacted by the diversion of resources to conduct new PFAS remediation actions, critics may complain that such a result is unfair and unwise. After all, the former BRAC properties are likely to have the most stringent cleanup standards by virtue of their subsequent redevelopment, and many of these same properties were given away for free.[300] If the DoD had known that PFAS could potentially be designated as hazardous several decades after transfer, it may have insisted on more restrictive land uses (such as industrial or commercial) and land use controls (such as prohibitions on drinking water extraction) as part of the BRAC transfer process. In turn, these restrictions could potentially have saved the DoD significant resources because it would now be able to avoid compliance with the more stringent ARARs that are routinely imposed on unrestricted land uses (such as residential).[301] Others might respond to this criticism by pointing out that, at least between a polluter and innocent transferees who played no part in the contamination, it would be unfair and unwise to do anything other than require the polluter (as CERCLA does) to bring its former properties in line with modern standards aimed at protecting public health and the environment. It was entirely reasonable for the transferees of former BRAC property to redevelop their property in accordance with the land use restrictions that the DoD negotiated upon transfer. In fact, that is exactly what Congress intended when it created the economic development conveyance authority under BRAC.[302]

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[298] *See* Melanie Benesh, *It's Time to Designate PFAS a "Hazardous Substance,"* ENV'T WORKING GRP. (July 3, 2019), https://www.ewg.org/news-insights/news/its-time-designate-pfas-hazardous-substance.

[299] *See id*.

[300] *See* Ronald A. Torgerson, *Base Closure Process Much Longer Than Planned*, NAT'L DEF. (Dec. 1, 2001), https://www.nationaldefensemagazine.org/articles/2001/11/30/2001december-base-closure-process-much-longer-than-planned.

[301] *See* BEARDEN, *supra* note 134, at 2.

[302] *See* MANN, *supra* note 1, at 7.

One could argue that the difficult position in which the DoD may soon find itself was at least partially self-created. As discussed in this article, the cost estimates that the DoD has provided to Congress greatly downplay what appears to be potentially massive PFAS cleanup liabilities.[303] The DoD policy documents mischaracterize its obligation to remediate polluted former BRAC properties as somehow being discretionary.[304] In public, DoD officials have given the impression that its voluntary approach adequately addresses the PFAS problem,[305] but in court, the DoD has stonewalled dissatisfied states who attempt to alter the pace or scope of this approach.[306] These same officials have strongly implied that reclassifying PFAS would be unnecessary and have little impact.[307] It is possible that these decisions contributed to a lack of public and congressional awareness about the potential for reclassification of PFAS to impact the DoD's budgets.[308] Now that the EPA has "committed" to designating some or all PFAS as hazardous,[309] however, it remains to be seen whether the DoD will begin to publicly emphasize the many ways in which its hands will be tied under a new regulatory framework, and the many ways this changed classification will impact its budget.

VI. Recommendations

Department of Defense managers could benefit from being prepared for the possibility that some or all PFAS chemicals will become designated as hazardous substances in the near term. The following recommendations aim to provide these practitioners with realistic ways for the DoD to meet the potential challenges ahead.

First, the scope of the studies and investigations that the DoD currently conducts using its voluntary response authority may need to be expanded. These studies are now focused on the identification of past releases of AFFF and the resulting impact on drinking water.[310] While such releases are certainly worth investigating, the DoD would benefit from

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[303] *See* GAO-21-421, *supra* note 8, at 21.
[304] *See* U.S. DEP'T OF DEF., 4715.20, DEFENSE ENVIRONMENTAL RESTORATION PROGRAM MANAGEMENT encl. 3, para. 10(c)(3)(a) (9 Mar. 2012) (C1, 31 Aug. 2018); U.S. DEP'T OF NAVY, ENVIRONMENTAL RESTORATION PROGRAM MANUAL para. 14-2 (2018).
[305] *See* Cramer, *supra* note 17, at 2; Sullivan, *supra* note 17, at 2-3.
[306] *See* Complaint, State of N.M. v. United States, No. 1:19-cv-00178-LF-KBM, 2019 WL 1065864 (D.N.M. Mar. 5, 2019).
[307] *See* Cramer, *supra* note 17, at 2; Sullivan, *supra* note 17, at 2-3.
[308] *See* GAO-21-421, *supra* note 8, at 20-25.
[309] EPA STRATEGIC ROADMAP, *supra* note 21, at 17.
[310] *See* GAO-21-421, *supra* note 8, at 12-20.

exhaustively investigating other types of PFAS contamination throughout its current and former inventory of real property, including non-PFOA and non-PFOS contamination.[311] In addition, the DoD's long-term interests would be served from widespread soil sampling as well.

Second, DoD practitioners could benefit from revisions to policy documents that use discretionary language to describe the DoD's obligation to return to former BRAC properties in which hazardous substance contamination is discovered after transfer.[312] These policy documents introduce confusion to a legal obligation that is clear under both CERCLA section 107 and the section 120(h) covenants contained in each deed that conveys BRAC property to non-federal landowners.[313]

Third, the DoD's future efforts to respond to PFAS contamination could be improved by close monitoring of state laws and regulations involving PFAS. As discussed, these state laws and regulations represent potential ARARs with which the DoD's cleanup actions (both voluntary and involuntary) will need to comply.[314] If current trends continue, the DoD can expect a wide variation of standards across the country, including standards that are more stringent than potential EPA (federal) standards, and also standards that apply not only to drinking water but also to soil.[315] Many of these standards could also be tied to specific land uses that vary from state to state. As the dynamic regulatory landscape evolves, it will be imperative that the DoD closely monitors potential state laws and regulations that could become ARARs. In addition, the DoD has a legitimate interest in ensuring that states do not impose stricter standards against current and former military installations than are imposed on other properties.

Fourth, the DoD's effectiveness in managing a potential flood of claims, enforcement actions, and litigation may be improved by a concerted effort to expand the DoD's existing management capacity in the near term. These claims, enforcement actions, and lawsuits could impact the DoD immediately upon the finalization of the EPA's proposed rule(s),[316] especially because such actions carry stiff penalties that can accumulate daily.[317] Accordingly, the DoD may need to strengthen its

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311 *See* DOD IG REPORT, *supra* note 36, at 28.

312 *See, e.g.,* U.S. DEP'T OF DEF., 4715.20, DEFENSE ENVIRONMENTAL RESTORATION PROGRAM MANAGEMENT encl. 3, para. 10(c)(3)(a) (9 Mar. 2012) (C1, 31 Aug. 2018); U.S. DEP'T OF NAVY, ENVIRONMENTAL RESTORATION PROGRAM MANUAL para. 14-2 (2018).

313 *See*, *e.g.*, Paul, *supra* note 143, at 2; Ropiequet, *supra* note 143, § 11; Snow, *supra* note 140, at 307-08.

314 *See* BEARDEN, *supra* note 96, at 10.

315 *See* Black et al., *supra* note 161, at 363-64.

316 *See* 42 U.S.C. § 9606(a).

317 *See* EPA MEMORANDUM, *supra* note 103, at 2-3.

programmatic capability to not only track the multitude of claims that arise from different jurisdictions, but also to make enough tangible progress in its cleanup efforts to satisfy regulators and adjudicative tribunals.

Finally, the DoD's implementation of future BRAC rounds could be aided if decisionmakers find ways to consider environmental contamination as part of the BRAC recommendation process. Past BRAC commissions purposely did not account for environmental contamination in the weighing of alternatives.[318] However, given the pervasive use of PFAS chemicals for decades across hundreds of military installations, the DoD is likely to experience significant challenges in implementing BRAC decisions if decisionmakers continue to ignore the costs and time associated with environmental remediation. Ultimately, these challenges may reduce the DoD's effectiveness in disposing of excess BRAC property and consolidating its operations at existing installations contaminated with PFAS.

[318] *See* DEF. BASE CLOSURE AND REALIGNMENT COMM'N, 2005 DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION REPORT TO THE PRESIDENT 334 (2005).

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"EQUALITY OF TREATMENT": HOW SERVICE MEMBERS OF COLOR ARE DISPROPORTIONATELY IMPACTED BY THE MILITARY LAW ENFORCEMENT'S TITLING PROCESS

MAJOR REANNE R. WENTZ*

The inequality experienced today is part of the legacy of our nation's past. It is also, more specifically, the harvest of the military's own history of racial exclusion, followed by racial segregation and discrimination. It is, as well, intimately linked to and reinforced by social conditions existing in the larger society. White and non-white alike are preconditioned before coming into the service. Racial bias in military justice should not come as a surprise . . . In a society permeated by racism, it is again too much to expect that any institution of that society—including the military—is going to completely transcend discrimination. It is, in some measure, going to reflect it.[1]

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[1] 1 DEP'T OF DEF. TASK FORCE ON THE ADMIN. OF MIL. JUST. IN THE ARMED FORCES, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES, at x (Nov. 30, 1972) [hereinafter TASK FORCE REPORT].

I. Introduction

President Harry S. Truman, grandson of slave owners, Missouri native, and former white supremacist,[2] signed the order ending segregation in the Armed Forces on July 26, 1948.[3] The brief, but significant, executive order declared, "there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion, or national origin."[4] Despite President Truman's efforts, discrimination based on race has hounded the services in myriad ways. Disparities in the administration of military justice recently came to light in 2017 with a report by the non-profit organization Protect Our Defenders (POD).[5] The report triggered Congressional interest, and in response, Congress sought additional analysis from the Government Accountability Office (GAO)[6] and the Defense Advisory Committee on Investigations, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD).[7] The conclusions were consistent: at various points between investigation and prosecution, Service members of color had a different experience with military justice than their white counterparts.[8]

However, the hearings and reports referenced above are not the first time the military has reckoned with its justice system failing to treat its members equally. The history of military justice is replete with anecdotal, and often tragic, evidence of racially-disparate treatment.[9] Discrimination

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[2] DeNeen L. Brown, *How Harry S. Truman Went from Being a Racist to Desegregating the Military*, WASH. POST (July 26, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/07/26/how-harry-s-truman-went-from-being-a-racist-todesegregating-the-military. Although President Truman is heralded as the groundbreaking integrator of the military, desegregation was arguably already happening informally in World War II. RONALD W. PERRY, RACIAL DISCRIMINATION AND MILITARY JUSTICE 14 (1977). During World War II, "there was tremendous pragmatic pressure to assign men based on their individual skills and expertise instead of their color. Faced with a 'sink or integrate' decision, the military as a whole opted for integration." *Id.* at 14-15.

[3] Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948).

[4] *Id.*

[5] DON CHRISTENSEN & YELENA TSILKER, PROTECT OUR DEFENDERS, RACIAL DISPARITIES IN MILITARY JUSTICE (2017) [hereinafter POD REPORT].

[6] U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-344, MILITARY JUSTICE: DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL AND GENDER DISPARITIES (2019) [hereinafter 2019 GAO REPORT].

[7] DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION AND DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, REPORT ON RACIAL AND ETHNIC DATA RELATING TO DISPARITIES IN THE INVESTIGATION, PROSECUTION, AND CONVICTION OF SEXUAL OFFENSES IN THE MILITARY (2020) [hereinafter DAC-IPAD DISPARITIES REPORT].

[8] *Id.* at 13; POD REPORT, *supra* note 5, at i–ii; GAO REPORT, *supra* note 6, at 38.

[9] One example is the court-martial of Cadet Johnson Whittaker. Whittaker was a Black cadet at West Point in 1880. John F. Marszalek, Jr., *A Black Cadet at West Point*,

AMERICAN HERITAGE (August 1971), https://www.americanheritage.com/black-cadet-west-point. On April 5, 1880, Whittaker received a threatening note and two days later, on April 7, he was found beaten, covered in blood and tied to the bed in his room. *Id.* Whittaker reported being dragged from his bed and attacked by three men. *Id.* Whittaker's ears and hands were cut, he was strangled, and struck on the head and face. *Id.* Following a cursory investigation that lasted approximately a day, the commandant of cadets determined Whittaker faked the attack. *Id.* On April 9, a court of inquiry began to further inquire into the event, where Whittaker was painstakingly interrogated. *Id.* Using handwriting analysis, the court of inquiry eventually determined Whittaker had written the threatening note and maimed himself. *Id.*

The following year, Whittaker was court-martialed for "conduct unbecoming an officer and a gentleman, in violation of United States Military Academy Regulations, and with conduct prejudicial to good order and discipline." *Id.* The first charge was for writing the threatening note and mutilating himself and the second was for lying to the court of inquiry. *Id.* During the trial, members heard about the ostracism Whittaker faced while he was at West Point. *Id.*; *Cadet Whittaker's Trial: Finding Out Objections Other Cadets Had to Him*, N.Y. TIMES, Feb. 18, 1881, at 3. Cadet Joseph Kittle testified, "I never knew anybody in the class who spoke to him except officially." *Id.* Kettle continued to say that he objected to Whittaker because of his hair oil that had a "disagreeable odor" and "partly to [Whittaker's] color." *Id.* The theory of the prosecution was that Whittaker committed these acts because he was "backward in his studies" and to get revenge on the academy for the ostracism. *Arguing for Whittaker: Ex-Gov. Chamberlain Summing Up a Famous Case*, N.Y. TIMES, June 2, 1881, at 3; Marszalek, *supra*. During his closing argument, Whittaker's defense attorney, Daniel Chamberlain, noted that both Whittaker and West Point itself were on trial. *Id.* Chamberlain stated, "[t]he fact of the peculiar relations arising from Whittaker's race cannot be overlooked. Those relations were non-recognition, non-intercourse, compulsory isolation as to all unofficial matters." *Id.* Chamberlain's argument methodically dismantled the government's theory of the case, pointing out issues like the manner in which Whittaker was tied up would have required the mattress be removed and then replaced, which would have been impossible for Whittaker to do by himself with his hands tied. *Id.* The prosecutor, a judge advocate, Major Asa Bird Gardiner, not only called Whittaker a coward for not resisting if this attack did occur, but also used disturbingly racist arguments, including that "[Black people] are noted for their ability to sham and feign . . . ." Marszalek, *supra*. Whittaker was found guilty, sentenced to be dishonorably discharged from West Point, pay a fine, and to be confined at hard labor. *Id.*

After review by The Judge Advocate General found numerous errors in the proceedings against Whittaker, President Chester A. Arthur overturned Whittaker's court-martial and set aside his sentence on March 22, 1882, which meant he could return to West Point. *Id.* However, because Whittaker had failed his Philosophy class in June 1880, he was separated from the United States Military Academy and never returned. *Id.* In 1995, President Bill Clinton posthumously awarded Whittaker his Army commission in an effort to address the "plainly racist purge" of Whittaker from West Point. John F. Harris, *The Late Lieutenant*, WASH. POST (July 25, 1995), https://www.washingtonpost.com/archive/lifestyle/1995/07/25/the-late-lieutenant/e7b7f2ad-31b5-4d40-b316-85df5027e344.

The Houston Riot Trials are also a grim example of race issues in the administration of military justice. An all-Black infantry regiment was sent to guard a construction site near Houston, Texas. Fred L. Borch III, *"The Largest Murder Trial in the History of the United States": The Houston Riots Courts-Martial of 1917*, ARMY LAW., Feb. 2011, at 1. Violence erupted between members of the infantry regiment, the Houston police, local civilians, and National Guardsmen after a Houston police officer beat two Black Soldiers. *Id.* Shortly

is evidenced not just in intermittent examples, but is also consistently, empirically proven by data. In 1972, the Task Force on the Administration of Military Justice of the Armed Forces analyzed a variety of metrics to show that the problem was not merely anecdotal.[10] The Task Force concluded "the military system does discriminate against its members on the basis of race and ethnic background. The discrimination is sometimes purposive; more often, it is not."[11]

In various reports over the last five decades, disparate results based on race appear throughout military justice.[12] Of particular importance to this paper are the disproportionate rates that Soldiers[13] of color face

after, a single general court-martial was convened with sixty-three Soldiers involved in the violence as accused. *Id.* at 2. All sixty-three Soldiers were represented by a single defense counsel, who was not an attorney. *Id*. At the end of the trial, thirteen Soldiers were sentenced to death, forty-one sentenced to life imprisonment, four sentenced to lesser terms of confinement, and five were acquitted. *Id.* Two days after the sentence was announced, the Army executed the thirteen Soldiers, by hanging, in a mass execution. *Id.*

The military has not executed anyone since John Bennett, who was Black, in 1961. *See* James J. Fisher, *A Soldier is Hanged*, KAN. CITY TIMES (Apr. 13, 1961) at 7. The history of the military's last executions is yet another example of race-based disparities. "[B]etween 1955 and 1960, all eight white Soldiers who were condemned to death, each of them a murderer, saw their sentences commuted by the Eisenhower administration." Richard A. Serrano, *The Hidden Segregation of Military Executions During the Civil Rights Movement*, TIME (Feb. 11, 2019, 12:37 PM), https://time.com/5525283/soldier-execution-civil-rights/. By contrast, the last eight Soldiers actually executed by the military were all Black. *Id.* Three out of the four Service members currently on death row at Fort Leavenworth, Kansas are persons of color. *Racial Disparity in the Military Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/military/racial-disparity-in-the-military-death-penalty (last visited Nov. 25, 2022); *see also* David C. Baldus, et al., *Racial Discrimination in the Administration of the Death Penalty (1984–2005)*, 101 J. OF CRIM. L. & CRIMINOLOGY 1227, 1293 (2011) Using a statistical analysis of death penalty cases, the authors found "systemic racial disparities in the administration of the military death penalty across the sixteen multiple-victim cases. These disparities cannot be explained by legitimate case characteristics or the effects of chance in a race-neutral system." *Id.*

[10] TASK FORCE REPORT, *supra* note 1, at 1.

[11] *Id.* at 17.

[12] POD REPORT, *supra* note 5, at i–ii; 2019 GAO REPORT, *supra* note 6, at 38; DAC-IPAD DISPARITIES REPORT, *supra* note 7, at 13.

[13] This paper will focus predominantly on the Army and its regulations. However, various reports found disparities in investigations in both the Navy and the Air Force. 2019 GAO REPORT, *supra* note 6, at 38; DAC-IPAD DISPARITIES REPORT, *supra* note 7, at 13. Further, the standard for titling and the process to remove titling and indexing information is fundamentally the same for the Air Force and Navy. *See generally*, U.S. DEP'T OF AIR FORCE, MANUAL 71-102, AIR FORCE CRIMINAL INDEXING (21 July 2020) [hereinafter AFMAN 71-102]; U.S. DEP'T OF NAVY, NAVAL CRIMINAL INVESTIGATIVE SERVICE MANUAL 1 (Aug. 2013) [hereinafter NCISMAN 1].

investigation by military law enforcement.[14] In addition to the emotional stress of being investigated,[15] there are collateral consequences on the individual being investigated, starting with being titled and indexed.[16] Although titling and indexing may seem insignificant, there are a number of consequences that can have a lasting impact on a Soldier's life. As the data suggest, law enforcement agencies investigate Service members of color more often, it then logically follows that more Service members of color are titled. Therefore, these Service members will disproportionately suffer the effects of being titled and indexed in various databases—even if the case is not supported by probable cause or the Service member faces no punishment.

When Department of Defense (DoD) law enforcement investigates a Service member, he or she will likely be titled and indexed very early in the investigation, using a standard lower than probable cause. Titling is a process unique to the military, in which the law enforcement agent will place the name of an individual in the subject block of a Law Enforcement Report (LER).[17] Placing a name in the subject block occurs "as soon as the investigation determines there is credible information that the subject committed a criminal offense."[18] Credible information is defined as "[i]nformation disclosed or obtained by a criminal investigator that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to lead a trained investigator to presume the fact or facts in question are true."[19] Comparatively, probable cause is defined as "[a] reasonable ground to suspect that a person has committed or is committing a crime . . . more than a bare suspicion, but

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[14] Matthew Cox, *Calls to Military Law Enforcement Reveal Racial Disparities, Army General Says*, MILITARY.COM (26 Feb. 2021), https://www.military.com/daily-news/2021/02/26/calls-military-law-enforcement-reveal-racial-disparities-army-general-says.html; 2019 GAO REPORT, *supra*, note 6, at 38; DAC-IPAD DISPARITIES REPORT, *supra* note 7, at 13.

[15] *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 822 (2015). (discussing the "intangible psychological costs relating to uncertainty or anxiety stemming from [a] pending trial" following a civilian arrest).

[16] U.S. DEP'T OF DEF., INSTR. 5505.07, TITLING AND INDEXING IN CRIMINAL INVESTIGATIONS (Feb. 28, 2018) [hereinafter DoDI 5505.07] Note: the numbering of DoDI 5505.07 changed from 5505.7 to 5505.07, but the regulation remained substantively the same; *see also*, U.S. DEP'T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING Glossary (27 Sept. 2016) [hereinafter AR 190-45] (defining "title" and "index").

[17] AR 190-45, *supra* note 16, Glossary. An LER is "[a]n official written record of all pertinent information and facts obtained in a USACID and MP law enforcement report or criminal investigation." U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES Glossary (21 July 2020) [hereinafter AR 195-2]. Law Enforcement Reports were previously known as Reports of Investigation (ROI). *Id.* at Summary of Change.

[18] DoDI 5505.07, *supra* note 16, para. 1.2a.

[19] *Id.* para. G.2.

less than evidence that would justify a conviction."[20] The subject is titled before a determination of probable cause is made by an attorney.[21] Simply put, credible evidence is a much lower standard than probable cause. Further, the current titling and indexing process allows law enforcement to use this incredibly low standard to create, maintain, and use a record on an individual. A subject may be titled for an offense for which they were never prosecuted or otherwise punished. Worse, a subject may be titled for an offense for which there was not even probable cause to believe he or she committed the offense.

Once someone is titled, the information is indexed in the Defense Central Index of Investigations (DCII) "to ensure this information is retrievable for law enforcement or security purposes in the future."[22] Although the DoD and its law enforcement agencies adamantly maintain that "titling and indexing are administrative procedures and will not imply any degree of guilt or innocence," [23] there are adverse collateral consequences that may arise merely because someone is titled as the subject of an investigation. These can be informally sorted into tangible and intangible. A tangible consequence may be, for example, revocation, suspension, or denial of a security clearance.[24] An intangible consequence would be that a commander becomes aware that one of his or her Soldiers was investigated and titled, which may cause the commander to form a negative bias about the Soldier or have an already-formed bias confirmed based solely on the titling information. As of 1994, at least twenty-seven federal agencies had access to the DCII and the information contained therein could be "used to determine promotions, to make employment

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[20] *Probable Cause*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[21] *Compare* AR 195-2, *supra* note 17, para. 3-16(b) *with* DODI 5505.07, *supra* note 16, para. 1.2(a) (Army Regulation requires coordination with an attorney for determining whether there is probable cause for each offense, but the DOD Instruction mandates that a subject be titled "as soon as . . . there is credible information that the subject committed a criminal offense."). *See also* Memorandum of Agreement between Office of The Judge Advocate General, Office of Special Trial Counsel and U.S. Army Criminal Investigation Division, subject: Legal Coordination for CID Law Enforcement Reports 2 (16 Sept. 2022) [hereinafter JAG MOA 2022] (delineating the necessary coordination between law enforcement personnel and judge advocates to manage criminal allegations and determine probable cause).

[22] DODI 5505.07, *supra* note 16, para. 3.1.

[23] DODI 5505.07, *supra* note 16, para. 1.2(c); *see also* AR 195-2, *supra* note 17, para. 4-4(b) (stating "the decision to list a person's name in the title block of [an LER] is an investigative determination that is independent of judicial, nonjudicial, or administrative action taken against an individual or the results of such action").

[24] *See* U.S. DEP'T OF ARMY, REG. 380-67, PERSONNEL SECURITY PROGRAM para. I-12 (24 Jan. 2014) [hereinafter AR 380-67] (providing guidelines to determine security clearance eligibility).

decisions, to assist in assignment decisions, to make security determinations, and to assist criminal investigators in subsequent investigations."[25] However, at present, it is nearly impossible to ascertain precisely which agencies and entities have access to the DCII and for what purposes.

In 2021, Congress ordered the Secretary of Defense to reform the process by which someone can request to have their name and identifying information removed from the subject block of an LER and from any databases where law enforcement sent the information.[26] The new law requires that individuals have the ability to expunge or correct law enforcement records if probable cause did not or does not exist to believe that the person committed the offense.[27] In an indirect way, Congress raised the standard for someone to be titled from "credible information" to "probable cause." This is a good first step in addressing the problems with titling and indexing. However, the change is inadequate because the onus is on the titled Service member to have the record corrected or expunged entirely. The expectation is that a junior-enlisted[28] Service member will know he or she was titled, be aware that it may cause negative ramifications in the future, and understand how to go about correcting it. Further, this process will still likely take a substantial amount of time to complete, during which the Service member will remain titled and may lose career opportunities, pay, or other benefits. Moreover, because the titling determination happens so early in the investigation, it has the potential to taint the rest of the investigation and the disposition of the case. The expungement process outlined by Congress fails to address these issues because it only mandates change well after the Service member has been titled. In order to adequately address the consequences of titling, the DoD must change the process by which someone is titled and indexed.

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[25] Major Patricia A. Ham, *The CID Titling Process—Founded or Unfounded?*, ARMY LAW. 1, 5 (Aug. 1998) (citing DAB REPORT, *infra* note 106, at 90). Major Ham's article was published in 1998 and, at the time, she cited to multiple sources that indicated it was possible that more than twenty-seven agencies had access to the DCII, and that additional entities could be granted access. *Id*.

[26] WILLIAM M. (MAC) THORNBERRY NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2021, PUB. L. NO. 116-283, § 545, 134 Stat. 3388, 3613-15 (2021) [hereinafter FY21 NDAA].

[27] *Id.* § 545(c).

[28] Although by no means definitive for all cases, as an example of who is being court-martialed and convicted, the data in the DAC-IPAD Court-Martial Adjudication Data Report showed that in adult-victim sexual assault cases from the fiscal year 2018, the vast majority of the accused were in the paygrade of E-4 or below. DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, AND DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, COURT-MARTIAL ADJUDICATION DATA REPORT 9 fig.4 (2019).

Titling and indexing can have a significant and lasting effect on the Soldier and on the military justice process as a whole. It is vital to take steps to address the inequities found in the military justice system, at all points—from investigation to disposition of the offense. The military justice system must be seen as fair or it will be entirely ineffectual.[29] Correcting race-based disparities will require rooting out bias and addressing the causes of it. In the meantime, Congress and the DoD must take steps to mitigate the consequences of unequal treatment. This can be accomplished, in part, by changing titling and indexing.

This paper first reviews the history of racial disparities in military justice, specifically in military law enforcement investigations. Next, it explains the titling process and what potential impacts that being titled may have on an individual. Finally, to address these concerns, this paper proposes a three-fold solution. First, there must be more clarity regarding how titling and indexing impacts Service members. Second, an individual should not be titled for an offense until law enforcement agents complete a substantial portion of the investigation and an attorney makes a probable cause determination. Final determination on probable cause and criminal indexing will rest with the Criminal Investigation Division (CID).[30] Third, the Secretary of Defense must actually promulgate the change mandated by Congress to reform the process to amend law enforcement records and remove a subject's information from various databases.

II. Numbers Don't Lie: More Service Members of Color are Involved in the Military Justice Process, Starting with Investigation

For half a century, both Congress and the DoD have had clear proof that Service members of color are not treated the same as their white colleagues regarding discipline. Despite the ample evidence, both entities continue to call for more analysis and more data in an attempt to understand the causes of the disparity. Throughout its history, the military

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[29] Daniel Lam, *They Faced Racial Bias in Military Discipline. That can Impact National Security*, NPR NEWS (Sept. 14, 2021, 6:28 PM), https://www.npr.org/2021/08/22/1028765938/racial-bias-military-discipline-national-security-combat-readiness. *See also* Michael T. Klare, *Protests Force the US Military to Face Its Own Racism*, THE NATION (Jun. 10, 2020), https://www.thenation.com/article/world/military-racism (arguing that racial discrimination broadly and the military's inability or unwillingness to confront it "complicate[s] US efforts to rally a new ideological crusade against Beijing and Moscow" because of the hypocrisy between the United States policy positions on racism and civil rights and the actions of its law enforcement officers and military).

[30] JAG MOA 2022, *supra* note 21, at 2.

justice system has been a topic of close Congressional attention, but increasingly so in the last fifteen years.[31] More than 600 bills involving military justice have been introduced in Congress just since 1973—half of those in the last decade alone.[32] Evidence that the military was mishandling the investigation and prosecution of sexual assault resulted in the bulk of the recent increased interest.[33] In addition to sexual assault cases, members of Congress have also recently been concerned about racial disparity in the military justice system.[34] This is not the first time racial disparities in the military justice system have been investigated. Multiple reports and analyses have concluded that racial disparities exist in the administration of military justice. Some of the earliest reports conclude that it is merely a perception problem on the part of Service members of color and a communication problem on the part of leadership.[35] Later studies used the numbers of actions like non-judicial punishment (NJP) or pretrial confinement to empirically show race-based discrepancies actually exist.[36] Despite the incongruity between the early reports and the data-based studies, there is consistency in that the specter of discrimination has threatened the fair administration of military justice for decades.

A. "[T]hugs" with a "[C]hip on [T]heir [S]houlder"

In the late 1960s and early 1970s, incidents at a Marine base and aboard two naval ships prompted increased scrutiny on race issues in the military, with a specific interest in military justice.[37] In December 1969,

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[31] *See* Max Jesse Goldberg, *Congressional Influence on Military Justice*, 130 YALE L.J. 2110, 2133 (2021).
[32] *Id.*
[33] *Id.*
[34] *See* Jennifer Steinhauer, *Pushing Beyond Sex Assault, Gillibrand Faces Resistance to Military Bill*, N.Y. TIMES (July 14, 2021), https://www.nytimes.com/2021/07/14/us/politics/sexual-assault-military-felonies.html. Senator Kirsten Gillibrand has been one of the leading advocates for substantial transformation of how the military justice system handles sexual assault crimes. She also argues that her proposal to remove commanders from the decision to prosecute all felonies would help combat racial injustice. *Id.*
[35] *See* discussion *infra* Section II.A.
[36] *See* discussion *infra* Section II.B.
[37] The reports produced because of these incidents were not the first evaluation of integration and race issues in the military. In 1962, President John F. Kennedy convened the President's Committee on Equal Opportunity in the Armed Forces. The 1963 Report produced by the Subcommittee did not directly address military justice, but found that Black Service members and their families suffered pervasive discrimination, both on and

the Special Subcommittee to Probe Disturbances on Military Bases of the House Armed Services Committee issued a report relating to an incident at Camp Lejeune, North Carolina.[38] On July 20, 1969, a physical altercation took place between groups of Black[39] and white Marines outside of a club, which resulted in one Marine's death.[40] After hearings at Camp Lejeune and in Washington, D.C., the subcommittee aptly concluded, "Camp Lejeune and the Marine Corps have a race problem because the Nation has a race problem."[41]

According to the report, the young, Black Marines were "probably more bitter" and entering the Marine Corps "fresh from scars of all the

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off base. Emily Ludolph, *The Military's Discrimination Problem was So Bad in the 1960s, Kennedy Formed a Committee*, N.Y. TIMES (July 16, 2019), https://www.nytimes.com/2019/07/16/us/the-militarys-discrimination-problem-was-so-bad-in-the-1960s-kennedy-formed-a-committee.html; PRESIDENT'S COMM. ON EQUAL OPPORTUNITY IN THE ARMED FORCES, EQUALITY OF TREATMENT AND OPPORTUNITY FOR NEGRO MILITARY PERSONNEL STATIONED WITHIN THE UNITED STATES 10-11 (1963), http://blackfreedom.proquest.com/wp-content/uploads/2020/09/desegarmed1.pdf. Additionally, these were not the only events that prompted action by the DoD. In 1971, there was an altercation in the barracks on Travis Air Force Base, California, between a Black and white Airman. KRISTY N. KAMARCK, CONG. RSCH. SERV., R44321, DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED SERVICES: BACKGROUND AND ISSUES FOR CONGRESS 18 (2019). The fight "escalated into riots that ended in 135 arrests, 10 injuries, the death of a civilian firefighter, and significant property damage." *Id.* In response, the DoD "established the Race Relations Education Board, required race relations training for all [Service members], and opened the Defense Race Relations Institute (DRRI)" which was the precursor to the Defense Equal Opportunity Management Institute. *Id.*

[38] STAFF OF SPECIAL SUBCOMM. TO PROBE DISTURBANCES ON MIL. BASES, 91ST CONG., INQUIRY INTO THE DISTURBANCES AT MARINE CORPS BASE, CAMP LEJEUNE, N.C., ON JULY 20, 1969 (1969) [hereinafter CAMP LEJEUNE REPORT].

[39] Throughout this paper, the author will use the term "Black" rather than "African-American." The choice of language used to identify oneself is deeply personal and the two terms are not necessarily interchangeable. *See* Katherine E. Ridley-Merriweather et al., *Exploring How the Terms "Black" and "African-American" May Shape Health Communication Research*, HEALTH COMMC'N 4 (2021). The history, connotations, and present use of each term exceeds the scope of this paper. Most of the studies and reports regarding military racial disparities use the term "Black." Additionally, as of August 2021, fifty-eight percent of polled Black Americans did not have a preference between "Black" or "African-American." Justin McCarthy and Whitney Dupree, *No Preferred Racial Term Among Most Black, Hispanic Adults*, GALLUP (Aug. 4, 2021), https://news.gallup.com/poll/353000/no-preferred-racial-term-among-black-hispanic-adults.aspx.

[40] STAFF OF SPECIAL SUBCOMM. TO PROBE DISTURBANCES ON MIL. BASES, 91ST CONG., INQUIRY INTO THE DISTURBANCES AT MARINE CORPS BASE, CAMP LEJEUNE, N.C., ON JULY 20, 1969, at 5054-55 (Comm. Print 1969) [hereinafter CAMP LEJEUNE REPORT].

[41] *Id.* at 5055. In the report, the Subcommittee noted, "Indeed, we recognize that a serious race problem exists at Camp Lejeune and in the Marine Corps for, in fact, it exists in every corner of the United States. It exists in all the services, and certainly the tragic events of July 20, 1969, at Camp Lejeune present strong and real evidence of its presence." *Id.* at 5054.

racial trauma that is prevalent in our society."[42] Although there were complaints about discrimination in the administration of military justice, the Subcommittee attributed these complaints not to real discrimination, but to "militarization" and "polarization" of some Black Marines, as well as a failure of communication by leaders.[43] The report concluded that this incident was caused by a few Black Marines "who fanned the flames of racism, misconceptions, suspicions, and frustrations."[44] In an effort to combat this, the report recommended commanders ensure "the administration of military justice . . . [is] carefully and continually explained to avoid the many misconceptions and misunderstandings that seemed to have developed concerning these matters."[45] Essentially, and somewhat puzzlingly, the 1969 Camp Lejeune Report concluded that there was not actually a problem or disparity regarding military justice, promotions, or duty assignments. The only real issue was a few Marines, who had likely experienced racism and discrimination in the civilian world,[46] perceived that race was impacting command decisions, and inappropriately expressed their frustrations.

A 1973 report from the Special Subcommittee on Disciplinary Problems in the U.S. Navy of the House Armed Services Committee (HASC) similarly found that it was a perception problem on the part of Black Sailors and a communication problem on the part of leadership, not the presence of actual discrimination or disparate treatment.[47] The 1973 report was the culmination of investigation into an incident aboard the USS *Kitty Hawk*, which turned violent, and a non-violent protest aboard the USS *Constellation*.[48] The subcommittee was charged with

[42] *Id.* at 5055–56.
[43] *Id.* at 5056.
[44] *Id.* at 5052.
[45] *Id.*
[46] Although *de jure* segregation had, in theory, ended by the 1970s in the United States through the landmark Supreme Court ruling in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000e et seq.), the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. § 10301) and the Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§3601-3619), racism and discrimination were still pervasive in the United States. As an example, the use of "dog-whistle politics" by President Richard Nixon was used to "gain the support of white voters who had vague anxieties about [B]lack criminality." *Editor's Introduction: Responding to the Cumulative Damage of Racism*, 77 AM. J. OF ECON. & SOCIO. 581, 593 (2018).
[47] STAFF OF H. ARMED SERVS. COMM., 92ND CONG., REPORT BY SPECIAL SUBCOMM. ON DISCIPLINARY PROBLEMS IN THE U.S. NAVY 17685 (Comm. Print 1973) [hereinafter NAVY REPORT].
[48] *Id.* at 17674–79.

investigating "the alleged racial and disciplinary problems" aboard the two naval ships.[49] Like the 1969 Camp Lejeune Report, the 1973 Navy Report determined:

> During the course of this investigation, we found *no substantial evidence* of racial discrimination upon which we could place true responsibility for causation of these serious disturbances. Certainly there were many *perceptions* of discrimination by young blacks, who, because of their sensitivity to real or fancied oppression, often enlist with a "chip on their shoulder." . . .
> To repeat, what many of these men view as discrimination is, more often than not, a perception rather than a reality.[50]

The 1973 Navy Report was less holistic than the 1969 Camp Lejeune Report in considering external factors, like pervasive discrimination in the civilian world. The former report baldly and somewhat dismissively concluded the following regarding the violent riot on the USS *Kitty Hawk*:

> [T]he riot . . . consisted of . . . a very few men, . . . [with] below-average mental capacity, most of whom had been aboard for less than one year, and all of whom were [B]lack. . . . [They] acted as 'thugs' which raises doubt as to whether they should ever have been accepted into military service in the first place.[51]

In neither the 1969 Camp Lejeune Report nor the 1973 Navy Report did the investigating body appear to actually look to statistics, for example, rates of NJP, rates of law enforcement investigation, or courts-martial to determine if there was discrimination or disparity. For this reason, the 1973 Navy Report, specifically, was "read with some suspicion by social-scientist observers, who, among other things, worried that the formal interviews conducted by special congressional committees do not always render an accurate picture of the situation."[52] It was not until the four-volume 1972 Task Force Report and the 1977 book, *Racial Discrimination and Military Justice*, by Ronald W. Perry, did the examination of racial disparity in military justice include an analysis of the actual numbers, as opposed to merely the opinions of those who gave statements and of the subcommittee members. The other deficiency in both of the early reports

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[49] *Id.* at 17673.
[50] *Id.* at 17685.
[51] *Id.* at 17670.
[52] PERRY, *supra* note 2, at 1.

is that the investigating bodies began with the assumption that there was no actual discrimination.[53] Instead, both reports lauded the military for its efforts to integrate and seemed to allude to the notion that the military had been working tirelessly toward that goal since 1948.[54] The problem was with a few, radicalized Black Service members, rather than systemic discrimination within the services themselves.

B. Task Force Concludes that Systemic Racial Discrimination Exists in Military Justice

On April 5, 1972, the then-Secretary of Defense Melvin R. Laird commissioned the Task Force on the Administration of Military Justice in the Armed Forces.[55] Similar to the current focus on racial disparity in the military justice system, the 1973 Task Force was precipitated, in part, by a contemporary report from a civilian advocacy organization, the National Association for the Advancement of Colored People (NAACP), which highlighted discrimination of Black Service members stationed in West Germany.[56] The NAACP report and Congressional interest prompted President Nixon to direct a "fresh look" at the question of racial discrimination in the military justice system.[57] The purpose of the Task Force was to identify and assess discrimination in military justice, making recommendations to address the issue.[58] Whereas the 1969 Camp Lejeune Report and the 1973 Navy Report presumed that there were no racial disparities, the Task Force assumed the opposite: that racial disparities existed in the administration of justice in the military and that there was a

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[53] *See* PERRY, *supra* note 2, at 2. Perry only discusses the 1973 Navy Report, but the 1969 Camp Lejeune Report is similarly short-sighted. In the latter, the authors noted there were allegations of "isolated instances" of the use of racial slurs and "isolated allegations of racial prejudice in promotions or duty assignments. But these allegations were not substantiated." CAMP LEJEUNE REPORT, *supra* note 38, at 5056.

[54] CAMP LEJEUNE REPORT, *supra* note 38, at 5056; NAVY REPORT, *supra* note 47, at 17685. *See also* U.S. DEP'T OF DEF., BD. ON DIVERSITY AND INCLUSION, RECOMMENDATIONS TO IMPROVE RACIAL AND ETHNIC DIVERSITY AND INCLUSION IN THE U.S. MILITARY 2 (2020) (noting "[a]lthough DoD had declared racial equality a priority, the necessary practices, procedures, and trainings were not in place to address race relations in the Armed forces" in the 1960s and 1970s).

[55] 1 DEP'T OF DEF. TASK FORCE ON THE ADMIN. OF MIL. JUST. IN THE ARMED FORCES, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 1 (Nov. 30, 1972) [hereinafter TASK FORCE REPORT].

[56] *Id.* at 2.

[57] *Id.*

[58] *Id.* at 2-3.

disparity in punishment rates.[59] The Task Force, co-chaired by the First Army Commander and the General Counsel of the NAACP,[60] considered statements from witnesses, statistical information, the results from an opinion survey of Service members, and on-site interviews at various military installations.[61]

The Task Force determined the available data showed a "clearly discernable disparity in disciplinary rates between [B]lack and white servicemen."[62] For example, the Task Force evaluated NJP data from across the services between June 5 and July 5, 1972.[63] During that time, a greater number of Black Service members received NJP, approximately 25 percent, than the percentage of the Black Service member population at the participating installations, approximately 16 percent.[64] Similarly, in evaluating pre-trial confinement data, the Task Force found not only were Black Service members disproportionately placed in pre-trial confinement, but also that the length of time spent in pre-trial confinement was, on average, five days longer than white Service members and was the longest of any racial group in the study.[65]

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[59] *Id.* at 2.
[60] *Id.* at 3.
[61] *Id.* at 4.
[62] *Id.* at 25. The TASK FORCE REPORT is the first to voice a consistent complaint among those attempting to study racial disparities in military justice—lack of comprehensive data. *See id.* at 24. This was echoed by the DAC-IPAD in its Report on Racial and Ethnic Data. *See* DAC-IPAD DISPARITIES REPORT, *supra* note 7, at 13. Although the GAO REPORT states that there are disparities, the GAO forthrightly put the lack of data problem in the name of the report ("*Military Justice: DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities*"). GAO REPORT *supra* note 6. The perpetual obstacle of lack of consistent data should be solved by the implementation of Article 140a, Uniform Code of Military Justice, which requires the Secretary of Defense to prescribe uniform standards and criteria for data collection. UCMJ art. 140a(a)(1) (2021). The Department of Defense has directed "each Service to maintain and operate a military justice case processing and management system that will track every investigation initiated by military law enforcement . . . ." DAC-IPAD DISPARITIES REPORT, *supra* note 7, at 15.
[63] The Task Force received data from all of the military services, with each service submitting data from "preselected commands and installations." 3 DEP'T OF DEF. TASK FORCE ON THE ADMIN. OF MIL. JUST. IN THE ARMED FORCES, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES, at 91 (Nov. 1, 1972) [hereinafter TASK FORCE REPORT, VOL. III].
[64] *Id.* at 95. Strikingly, the quantum of punishment did not vary significantly between Black, white and "Spanish Surnamed" Service members. *Id.* at 96.
[65] *Id.* at 119. The Report continued, "[Black Service members] are less likely to be discharged in lieu of trial than [white Service members] or other minority group individuals" and "[white Service members] were over *twice as likely to be released without trial or Article 15 punishment* than [Black Service members]." *Id.* at 120 (emphasis added).

C. More of the Same

In April 1995, the GAO consolidated seventy-two studies related to discrimination in the military.[66] This GAO collection of studies failed to include the 1972 Task Force Report but states "[s]tudies done in the 1970s and 1980s showed no disparities in discipline rates between blacks and whites . . . ."[67] However, contrary to this conclusion, the GAO cited to a 1992 report from the Defense Equal Opportunity Management Institute (DEOMI), which lists at least three reports from the late 1970s, all of which found racial disparities in arrests, the administration of NJP and courts-martial.[68] Despite the supposed lack of empirical proof, the GAO noted the perception of bias in the administration of discipline was "prevalent not only in the Navy but throughout the services."[69] Studies in the 1990s, using various data, showed Black Service members were "overrepresented in the populations of [Service members] receiving judicial and nonjudicial punishments."[70] In April 1992, the DEOMI hosted a Uniform Code of Military Justice (UCMJ) conference to discuss the "disparity phenomenon" and next steps to address it.[71] At that conference, the Army planned to initiate a study to establish a "paper trail" from investigation to court-martial, presumably to be able to track disparity issues.[72] Given the present lack of comprehensive data almost thirty years later, that initiative appears to have failed.[73]

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[66] U.S. GOV'T ACCOUNTABILITY OFF., GAO/NSIAD-95-103, EQUAL OPPORTUNITY: DOD STUDIES ON DISCRIMINATION IN THE MILITARY 1 (1995) [hereinafter 1995 GAO REPORT].
[67] *Id.* at 5.
[68] CASE K. TONG & LIEUTENANT COLONEL CATHY A. JAGGARS, DEF. EQUAL OPPORTUNITY MGMT. INST., PHASE 1 REPORT: AN INVESTIGATION INTO THE DISPARITY OF JUDICIAL AND NON-JUDICIAL PUNISHMENT RATES FOR BLACK MALES IN THE ARMED SERVICES App'x A (1992) [hereinafter DEOMI REPORT].
[69] 1995 GAO REPORT, *supra* note 66, at 42. Notably, in a 1974 study by the Navy Personnel Research and Development Center, the authors conclude, based on disciplinary data and questionnaire responses, that an "overwhelming majority of blacks believed military justice favors whites . . . . *[b]ecause many whites also shared this belief*, the Navy cannot overlook the probability that discriminatory incidents [are] taking place abord ships." PATRICIA J. THOMAS ET AL., NAVY PERSONNEL RSCH. AND DEV. CTR., PERCEPTIONS OF DISCRIMINATION IN NON-JUDICIAL PUNISHMENT viii (1974) (emphasis added).
[70] 1995 GAO REPORT, *supra* note 66, at 5.
[71] DEOMI REPORT, supra note 68, at 3.
[72] *Id.* at 4.
[73] *See* 2019 GAO REPORT, *supra* note 6, at 66; *see also* Barry K. Robinson & Edgar Chen, *Déjà Vu All Over Again: Racial Disparity in the Military Justice System*, JUST SECURITY (Sept. 14, 2020), https://www.justsecurity.org/72424/deja-vu-all-over-again-racial-disparity-in-the-military-justice-system (noting that "one of the principal takeaways from the [HASC hearing on racial disparities] was that a lack of reliable, consistent data stood in the way of pinpointing the root causes of these disparities").

D. Current events: Protect Our Defenders (POD) Lights a Fire

Larger interest[74] in racial disparities in military justice appeared relatively dormant until 2017, when POD published a report using data obtained by the Freedom of Information Act (FOIA) that showed "for every year reported and across all service branches, [B]lack [S]ervice members were substantially more likely than white [S]ervice members to face military justice or disciplinary action."[75] Regarding the Army, POD found that Black Soldiers were 1.61 times more likely to face general or special court-martial than white Soldiers.[76]

The POD report received considerable coverage by news media.[77] In 2019, the GAO released a report on the issue that was more comprehensive than the POD Report. The GAO Report found that Black, Hispanic, and male Service members were more likely "to be the subjects of recorded investigations in all of the military services."[78] In the Army, that disparity was the highest, where a Black Soldier was 2.11 times more likely to be the subject of an investigation than a white Soldier.[79] The DAC-IPAD DISPARITIES REPORT also found that "Black Service members are disproportionately affected by allegations of sexual offenses at the investigative stage."[80] At a hearing on June 16, 2020, of the HASC Subcommittee on Military Personnel, Lieutenant General (LTG) (Ret.) Charles N. Pede, then The Judge Advocate General of the United States

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[74] There appear to be few, if any, studies or reports specifically about military justice between the early 1990s and 2017. However, racism in the ranks of the armed services, generally, did not go unnoticed. *See e.g.* SCHUYLER WEBB AND WILLIAM HERMANN, DEF. EQUAL OPPORTUNITY MGMT. INST., HISTORICAL OVERVIEW OF RACISM IN THE U.S. MILITARY 17 (2002) (providing a host of horrifying accounts of overt racism including the 1992 mock lynching of the only Black Soldier in a unit as "punishment for being late for a unit meeting"); Evan Thomas, *At War in the Ranks*, NEWSWEEK (Aug. 10, 1997, 8:00 PM), https://www.newsweek.com/war-ranks-172396 (describing two Black Service members who argued that their persecution by the military was based on their race).

[75] POD REPORT, *supra* note 5, at i.

[76] POD REPORT, *supra* note 5, at 13.

[77] *See, e.g.*, Safina Samee Ali, *Black Troops More Likely to Face Military Punishment than Whites, New Report Says*, NBC NEWS (June 7, 2014, 10:12 PM), https://www.nbcnews.com/news/nbcblk/black-troops-more-likely-face-military-punishment-whites-new-report-n769411; Greg Price, *Is the Military Racist? Black Troops Punished Far More than White Service Members, Study Finds*, NEWSWEEK (June 7, 2017, 11:23 AM), https://www.newsweek.com/black-troops-study-punishment-622334; Tom Vanden Brook, *Black Troops as Much as Twice as Likely to be Punished by Commanders, Courts*, USA TODAY (June 7, 2017, 11:55 AM), https://www.usatoday.com/story/news/politics/2017/06/07/black-troops-much-twice-likely-punished-commanders-courts/102555630.

[78] 2019 GAO REPORT, *supra* note 6, at 38.

[79] 2019 GAO REPORT, *supra* note 6, at 41 fig.5.

[80] DAC-IPAD DISPARITIES REPORT, *supra* note 7, at 13.

Army, stressed the need to further assess the problem.[81] During the hearing, LTG Pede told the subcommittee he directed a "comprehensive assessment with the Provost Marshal General to get left of the allegation, left of the disposition decision, to examine why the justice system is more likely to investigate certain Soldiers and what our investigation and command decisions tell us about the issue."[82] As of this writing, nearly three years later, the results of that comprehensive assessment have yet to be published or otherwise made available to the public. Nevertheless, even only considering the 2019 GAO Report, the POD Report, and the DAC-IPAD Disparities Report, what becomes alarmingly evident is Service members of color, in particular Black Service members, are "more likely to be suspected of and investigated for wrongdoing, but ended up being convicted and punished less or at about the same rate as white troops. In other words, there apparently is some insidious bias in how the military initiates investigations into wrongdoing . . . ."[83]

Racial disparities in the military justice system are not new, and neither is stakeholder awareness of the problem.[84] For decades, Congress and the military have known Service members of color are treated differently than their white peers in the context of discipline. Even without a dozen studies specifically about the military justice system, there is substantial evidence that Black Americans are more likely to be

[81] *On Racial Disparity in the Military Justice System – How to Fix the Culture: Hearing Before the Subcomm. On Mil. Personnel, H. Armed Servs. Comm.,* 116th Cong. 2-4 (2020) (statement of Lieutenant General Charles N. Pede, The Judge Advocate General, U.S. Army) [hereinafter LTG Pede HASC Statement].

[82] U.S. H. ARMED SERVS. COMM., *20200616 MLP Hearing: "Racial Disparity in the Military Justice System – How to Fix the Culture,*" 1:26:00 YOUTUBE (June 16, 2020), https://www.youtube.com/watch?v=nDGIXB4wMAg&t=6486s [hereinafter HASC 2020 Hearing Recording].

[83] Mark Thompson, *Racism in the Ranks*, PROJECT ON GOV'T OVERSIGHT (Jul. 8, 2020), https://www.pogo.org/analysis/2020/07/racism-in-the-ranks.

[84] Robinson & Chen, *supra* note 73 (noting that "the United States armed forces have been mired in a maddening loop of racial disparity with respect to its own military justice system for over half a century").

searched,[85] arrested,[86] or stopped[87] by civilian law enforcement, so the notion that there is disparate treatment in the military should not be a surprise.

Although none of the military reports provide a cause, inequity is apparent. There is nothing explicit in any of the military law enforcement policies or the UCMJ that would clearly explain why there is disparity in treatment. Further, there is evidence that military police are actually more empathetic and have a stronger focus on non-violent de-escalation than civilian police.[88] Nevertheless, "[i]f the net effect of the action, or inaction, is to discriminate against individuals or groups, the question of intent or motivation need not be considered."[89] Regardless of intent, the fact remains that Black Service members are more likely to be the subjects of law enforcement investigations. Consequently, the policy of titling and indexing has a disparate impact on them. Although all aspects of racial disparities in military justice must be addressed, fixing the titling process is one of the simplest, quickest, and most effective solutions.

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[85] In a ten-month period, the Los Angeles Times found that twenty-four percent of black drivers and passengers were searched, compared with sixteen percent of Latinos and five percent of white people, even though police were more likely to find contraband after searching white people. Ben Poston & Cindy Chang, *LAPD searches Blacks and Latinos more. But They're Less Likely to have Contraband than Whites,* L.A. TIMES (Oct. 8, 2019, 3:52 PM), https://www.latimes.com/local/lanow/la-me-lapd-searches-20190605-story.html.

[86] Pierre Thomas et al., *ABC News Analysis of Police Arrests Nationwide Reveals Stark Racial Disparity*, ABC NEWS (June 11, 2020, 5:04 AM), https://abcnews.go.com/US/abc-news-analysis-police-arrests-nationwide-reveals-stark/story?id=71188546. Between 2014 and 2016, more than half of the arrests in the city of Charlottesville, Virginia, were black men, despite them only making up approximately 8 percent of the city's population. Ben Hitchcock, *Race-based Bias: Consultants Demonstrate Racist Policing, Council Says Study Didn't Go Far Enough*, C-VILLE (Feb. 4, 2020, 4:47 AM), https://www.c-ville.com/race-based-bias-consultants-demonstrate-racist-policing.

[87] "A Black person is five times more likely to be stopped without just cause than a white person." *Criminal Justice Fact Sheet,* NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, CRIMINAL JUSTICE FACT SHEET, https://naacp.org/resources/criminal-justice-fact-sheet (last visited Nov. 28, 2022). In Washington, D.C., Black people make up forty-six percent of the city's population, but made up seventy percent of the traffic stops during a one-month period in 2018. Paul Duggan, *A Disproportionate Number of D.C. Police Stops Involved African Americans*, WASHINGTON POST (September 9, 2019, 7:26 PM), https://www.washingtonpost.com/local/public-safety/a-disproportionate-number-of-dc-police-stops-involved-african-americans/2019/09/09/6f11beb0-d347-11e9-9343-40db57cf6abd_story.html.

[88] Andrea Scott, *'Everybody We Deal with is Trained to Kill'– Why We Don't See Military Police Brutality*, TASK & PURPOSE (Nov. 6. 2020, 6:23 PM), https://taskandpurpose.com/news/what-do-military-police-do.

[89] TASK FORCE REPORT, *supra* note 1, at 21-22.

III. Titling and Indexing

Titling and indexing have a relatively short but complicated history of competing interests. On one side are members of Congress and organizations outside of the DoD, troubled by the standard used to title the subjects of investigations, how that data is used, and the lack of reasonable process by which someone can amend or expunge their information from LERs or databases. On the other side are the DoD and its law enforcement agencies who believe that titling and indexing in the DCII merely "create[s] an administrative index of investigations, searchable by subject name or other identifying data"[90] and maintain that the DCII is a vital tool for investigators.[91] However, the DCII is not the only location where this information may be stored and used by various entities. Facilitating legal, ethical, and effective crime fighting as well as conducting thorough investigations for those seeking clearance to access classified information are legitimate goals. Nevertheless, it remains unclear whether titling and indexing have actually helped investigators and, more importantly, whether whatever assistance they have provided should outweigh the interests of the individual Soldier.

A. Congress Gets Ignored: An Abridged History of Titling and the DCII

The DoD established the DCII[92] in 1967 as a centralized repository for investigations and security determinations by DoD agencies.[93] Much of the history of the DCII and titling went substantially undisturbed until 1990, when the HASC directed the military services "to revise their procedures along the lines used by the Army to ensure that probable cause has been proven before 'titling' occurs."[94] The HASC further directed that

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[90] DEP'T OF DEF. OFF. OF INSPECTOR GEN., REVIEW OF THE IMPLEMENTATION OF DOD INSTRUCTION 5505.7, "TITLING AND INDEXING SUBJECTS OF CRIMINAL INVESTIGATIONS IN THE DEPARTMENT OF DEFENSE" PHASE I – THE DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS 8 (July 7, 2000) [hereinafter 2000 DOD IG REPORT].

[91] *See id.*

[92] This database is currently known as the Defense Central Index of Investigations, but was previously known as the Defense Clearance and Investigations Index. *See* Ham, *supra* note 25, at 3.

[93] DEP'T OF DEF. OFF. OF INSPECTOR GEN., NO. D-2001-136, AUDIT REPORT: DEFENSE CLEARANCE AND INVESTIGATIONS INDEX DATABASE, i (June 7, 2001) [hereinafter 2001 DCII AUDIT REPORT].

[94] LESLIE ASPIN, NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1991, H.R. REP. NO. 101-665, at 216 (1990).

the services "expunge from their records the names of all individuals who have been 'titled' without probable cause" and directed the Department of Defense Inspector General (DoD IG) to "monitor the implementation" of these directives.[95] The Committee was concerned with the titling process and the availability for redress because an individual's "name is included in law enforcement records 'ad infinitum' and is usually not expunged unless the individual proves his innocence."[96] Despite the use of the word "directs," the DoD seemingly interpreted the HASC committee's words as mere recommendation and produced a report evaluating the feasibility of that recommendation.[97]

In the 1991 report, DoD IG agreed that investigative organizations needed consistent titling and indexing policies, but found that the probable cause standard would have a "significant negative impact" on investigations because "it would severely limit the entry of names into the [DCII]."[98] In addition to the probable cause determination process being "lengthy and time consuming,"[99] DoD IG was concerned because if a case was closed as unfounded using the probable cause standard, the individual would no longer be listed in the DCII.[100] In fact, DoD IG warned of "erasing millions of records of investigations" if the HASC titling standard were to be adopted.[101] Presumably, the records subject to purging would have been those cases for which there was no probable cause to believe either that a UCMJ offense had occurred or that the individuals listed in the title block committed that offense. Essentially, DoD IG warned that if the higher probable cause standard was adopted for titling, fewer records would be maintained in the DCII database which, ironically, seems to be the same goal of the HASC in directing the uniform standard be probable cause. To DoD IG, the HASC's concern about the negative impact on individuals who were listed in the DCII was outweighed by "[t]he value of maintaining investigative information . . . to show that an allegation was raised, pursued, proved, disproved, or in some instances, to establish a modus operandi."[102]

At the time of the 1991 DoD IG Report, Army Criminal Investigation Division (CID) was the only military law enforcement agency that used

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[95] *Id.*
[96] *Id.*
[97] DEP'T OF DEF. INSPECTOR GEN., NO. 91FBD013, REVIEW OF TITLING AND INDEXING PROCEDURES UTILIZED BY THE DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS, Executive Summary (1991) [hereinafter 1991 DOD IG REPORT].
[98] *Id.* at 2.
[99] *Id.* at 5.
[100] *Id.*
[101] *Id.* at 11.
[102] *Id.* at 3.

the probable cause standard for titling.[103] As a result of the report, the DoD issued Department of Defense Instruction (DoDI) 5505.7 in 1992.[104] Rather than probable cause, this instruction mandated the use of the credible information standard to title and index someone.[105]

Shortly after the issuance of DoDI 5505.7, two organizations outside of the DoD released reports that called into question not only the standard for titling, but also expressed concern for the detrimental impacts on those individuals listed in the DCII. In 1995, the Advisory Board on the Investigative Capability of the Department of Defense (DAB) issued its report.[106] The report followed congressional recommendation that the Secretary of Defense assess the capabilities of the defense criminal investigative organizations.[107] Specifically regarding titling, while recognizing the value for military investigators to be able to identify and retrieve investigations, the DAB concluded, "[w]e find the current number of organizations, and thus, individuals, with access to the DCII troubling, *especially in light of the credible information standard for titling and indexing* and the sheer number -- approximately 19 million -- of individuals whose identities appear in the system."[108] The DAB Report further noted that the credible information standard is "very broad and subjective . . . with no second party review of the determination,"[109] and the difficulty for an individual to remove their name from the DCII was "unfair."[110] In 1999, the National Academy of Public Administration (NAPA) conducted a study relating to sex crime investigations.[111] The NAPA study recommended that DoDI 5505.7 use the probable cause standard, rather than credible information, and that information should not be entered into the DCII until probable cause was determined.[112]

Possibly because of these conclusions and in addition to its prior interest, the HASC, in its committee report on the Fiscal Year 2001 National Defense Authorization Act (FY01 NDAA), recommended a

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[103] *Id.* at 2; *see also* Captain Paul M. Peterson, *CID ROI: Your Client and the Title Block*, ARMY LAW. 49, 49 (Oct. 1987) (noting that titling was "one of the final steps in the CID investigation process" and that it was a determination using the probable cause standard).
[104] Ham, *supra* note 25, at 8.
[105] Ham, *supra* note 25, at 8.
[106] 1 ADVISORY BD. ON THE INVESTIGATIVE CAPABILITY OF THE DEP'T OF DEF., REPORT OF THE ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITY OF THE DEPARTMENT OF DEFENSE (1995) [hereinafter DAB REPORT].
[107] *Id.* at v.
[108] *Id.* at 45 (emphasis added).
[109] *Id.* at 45–46.
[110] *Id.* at 46.
[111] NAT'L ACAD. OF PUB. ADMIN., ADAPTING MILITARY SEX CRIME INVESTIGATIONS TO CHANGING TIMES: SUMMARY REPORT (1999) [hereinafter NAPA REPORT].
[112] *Id.* at 19.

section that would specifically require probable cause for the entry of subjects into the DCII.[113] The committee was "concerned that the standard for the [DoD] for titling a crime suspect as established by [DoDI] 5505.7 requires 'credible information.' This standard appears to be significantly different from the 'probable cause' standard common in state and federal criminal procedure."[114] The HASC's recommendation did not make its way into the final version of the FY01 NDAA.[115] Nevertheless, the same year, DoD IG conducted a review on the implementation of DoDI 5505.7.[116] The 2000 DoD IG Report expressly addressed the concerns of both DAB and NAPA, but disregarded both[117] and emphasized at several points: titling of subjects and entry into the DCII is only administrative and is not intended to function as criminal history data.[118] As part of explanatory background information, the report concluded the pre-DoDI 5505.7 probable cause standard by the Army "treated the DCII as a criminal history database for the purpose of identifying likely criminals, rather than for its intended function as an administrative database for the purpose of identifying the existence of investigative files."[119] Indeed, the DoD IG contrasted the DCII with "criminal history indices such as the National Crime Information Center (NCIC), operated by the Federal Bureau of Investigation (FBI)."[120] In actuality, as discussed *infra*, the distinction between being used as a criminal history database and being merely an administrative database is almost non-existent for the DCII.[121]

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[113] H.R. REP. NO. 106-616, at 368 (2000).
[114] *Id.*
[115] FLOYD D. SPENCE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2001, PUB. L. NO. 106-398, § 552, 114 Stat. 1654, 1654A-125 (2000). The law did require the Secretary of Defense to establish a policy to create a uniform process, which would allow for any individual who had been entered into "a central index for potential retrieval and analysis by law enforcement organizations" to obtain a review of that designation and would require the expungement of identifying information if it was "determined the entry of such identifying information on that individual was made contrary to [DoD] requirements." *Id.*
[116] DEP'T OF DEF. OFF. OF INSPECTOR GEN., REVIEW OF THE IMPLEMENTATION OF DOD INSTRUCTION 5505.7, "TITLING AND INDEXING SUBJECTS OF CRIMINAL INVESTIGATIONS IN THE DEPARTMENT OF DEFENSE" PHASE I – THE DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS (July 7, 2000) [hereinafter 2000 DOD IG REPORT].
[117] *Id.* at iii.
[118] *Id.* at iii, 1, 5, 8-9.
[119] *Id.* at 1.
[120] *Id.* at 5.
[121] In its 1991 report, DoD IG justified maintaining entries in the DCII at the lower credible information standard because to adopt the probable cause standard would lead to the "loss of valuable law enforcement information." 1991 DOD IG REPORT, *supra* note 97, at 11.

Of the alleged tension between the harm caused to the individuals listed in the DCII and law enforcement interests, the DoD IG bluntly concluded:

> [T]his evaluation found no evidence to support the contention that the credible information standard is misunderstood, or that titling or indexing subjects of investigations under such a standard have, in and of themselves, harmed the subjects of investigations in any way. Similarly, the present policy of titling and indexing at the start of an investigation has not been found to produce unfair results. On the contrary, accomplishing such actions at the beginning of an investigation has benefited the [DoD] investigative and security community through increased awareness of mutually significant case files. Further, the practice lessens the potential of multiple investigations of the same person.[122]

Despite the questionable claim that no one was being harmed, DoD IG conducted a follow-on review focused on surveying the use of data by those who have access to the DCII.[123] Cryptically, the survey results indicated "some users misunderstand the purpose of the DCII and uses of the criminal investigative data contained therein, and that additional training of non-[Defense Criminal Investigative Organizations] DCII users is necessary."[124] The report gave no indication about who was misusing the data or how, but proposed solutions which included sanctions, training, informational banners, and examination for DCII users.[125] Between the DoD IG reports in the early 2000's and the FY 2021 NDAA, the titling and indexing processes were mostly undisturbed.[126]

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[122] 2000 DOD IG REPORT, *supra* note 116, at 17-18.

[123] DEP'T OF DEF. INSPECTOR GEN., DEPARTMENT OF DEFENSE POLICY CONCERNING TITLING AND INDEXING OF INDIVIDUALS IN THE DEFENSE CLEARANCE AND INVESTIGATIONS INDEX (2002), https://apps.dtic.mil/sti/citations/ADA400229 [hereinafter 2002 DOD IG REPORT].

[124] *Id.* at 5.

[125] *Id.* at 6.

[126] Although not in formal legislation, members of Congress recently developed an interest not only in the titling process but also in racial disparities in military law enforcement investigations. In the advance policy questions to Ms. Michele A. Pearce during her confirmation to be General Counsel of the Department of the Army on August 4, 2020, the Senate Armed Services Committee (SASC) specifically asked Ms. Pearce about racial disparity and titling. SENATE ARMED SERVS. COMM., ADVANCE POLICY QUESTIONS FOR MS. MICHELE PEARCE, NOMINEE TO BE GENERAL COUNSEL OF THE DEPARTMENT OF THE ARMY (2020), https://www.armed-services.senate.gov/imo/media/doc/Pearce_APQs.pdf. When

B. Current Events: Titling, the Databases, and Removing Information

Regardless of the urging to the contrary, the standard to add a person's name in the title block of an LER remains credible information, rather than probable cause. A subject will be titled as soon as the low threshold is met, likely extremely early in the investigation. The titled subject's information will then be indexed in at least the DCII, but likely more than that one database. After being included in the title block of the LER and indexed in various databases, the ability for a titled subject to remove his or her information is remarkably difficult. All of this leaves titled Service members stranded, weathering the consequences without relief.

1. Current Titling Standard

The most current version of DoDI 5505.07, effective February 28, 2018, uses the incredibly low credible information standard for titling set in 1992.[127] However, the probable cause standard has a thorough history of judicial interpretation by way of the Fourth Amendment, which safeguards the right of people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, . . . and no Warrants shall issue, but upon probable cause . . . ."[128] Simply put, unreasonable searches and seizures are those without either a warrant or probable cause.[129] Law enforcement may not arrest an individual without a warrant or probable cause.[130] Comparing the probable cause standard to credible information, the Army Board for Correction of Military Records (ABCMR) described of the latter, it "require[s] *only the merest scintilla of evidence* far below the burdens of proof normally borne by the government

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asked what steps she would take to address racial disparities in the Army investigations, she replied:

> In 99 [percent] of all criminal investigations, the victim or complainant identifies the alleged offender. Army investigators have little to no influence over who is identified as an alleged offender, and Army investigators have no discretion in whether to open an investigation or not, since they are required to investigate all criminal allegations in accordance with both D[o]D and Army policies.

Id. at 14. When asked if the processes to be removed from the title block and DCII were fair, Ms. Pearce responded that they were. *Id.*

[127] DoDI 5505.07, *supra* note 16, para. 1.2.

[128] U.S. CONST. amend. IV.

[129] Herring v. United States, 555 U.S. 135, 136 (2009).

[130] *See* United States v. Watson, 423 U.S. 411, 423-24 (1976).

in criminal cases (beyond a reasonable doubt), in adverse administrative decisions (preponderance of the evidence), and in searches (probable cause)."[131]

When there is credible information an offense was committed and the subject committed it, the subject's name will be placed in the title block of the report of investigation and that information will go into at least the DCII.[132] Later, if there is evidence that supports a finding of probable cause, the offense will be "founded."[133] When an offense is founded, which means there is probable cause to support the offense, information from the investigation will be forwarded to the FBI's NCIC.[134] Essentially, if a subject of an investigation is titled, but it is unfounded, the information will go into at least the DCII. For a founded offense, the information will not only go into the DCII, but also the NCIC. The information in the DCII is supposedly retained to "ensure [it] is retrievable for law enforcement or security purposes in the future."[135] According to the Defense Counterintelligence and Security Agency (DCSA), "DCII access is limited to the Department of Defense and other federal agencies that have adjudicative, investigative and/or counterintelligence missions."[136]

In the regulations that reference titling, the common refrain is that being titled or indexed is merely administrative and should not have any "judicial or adverse administrative" consequences.[137] Fundamentally, the DoD asserts that because titling and indexing is only administrative, it

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[131] [Redacted Name], ABCMR No. AR20170014461 (Army Bd. for Corr. of Mil. Recs., Oct. 22, 2014), https://boards.law.af.mil/ARMY/BCMR/CY2014/20140014461.txt (emphasis added).

[132] DoDI 5505.07, *supra* note 16, paras. 1.2(a), 3.1. The only listed reason for delaying indexing in the DCII is "operational security." *Id.* para. 1.2(a).

[133] AR 190-45, *supra* note 16, Glossary (defining "Founded offense"). *See also* AR 195-2, *supra* note 17, Glossary. Notably, AR 195-2 defines a founded offense as "[a] determination made by law enforcement, in conjunction with the appropriate prosecution or legal representative." *Id.*

[134] AR 190-45, *supra* note 16, paras. 4-1(a), 4-1(b)(1). *See also*, JAG MOA 2022, *supra* note 21, at 1. The NCIC is a database that allows "criminal justice agencies" to obtain a variety of information, including "criminal histories." *National Crime Information Systems,* U. S. DEP'T OF JUST., https://www.justice.gov/tribal/national-crime-information-systems (last visited Nov. 30, 2022). Similarly, any deoxyribonucleic acid (DNA) collected during the course of the investigation will only be sent to the United States Army Criminal Information Laboratory to be included in the Combined DNA Index System (CODIS) after the investigator makes a determination that there is probable cause with concurrence of a judge advocate. AR 190-45, *supra* note 16, para. 2-8(e)(1)–(2).

[135] DoDI 5505.07, *supra* note 16, para. 3.1.

[136] *Defense Central Index of Investigations*, DEF. COUNTERINTEL. AND SEC. AGENCY, https://www.dcsa.mil/is/dcii/ (last visited Nov. 30, 2022).

[137] *See* AR 190-45, *supra* note 16, para. 4-3(a); DoDI 5505.07, *supra* note 16, para. 1.2.f.; 32 C.F.R. § 635.13(c) (2017).

justifies using a standard below probable cause. However, the DoD also claims to keep titling information in the DCII specifically for law enforcement purposes, including "*establishi[ing]* a modus operandi."[138] The 1991 DoD IG Report provided an example of the need to maintain information on "unfounded allegations" because if "previous allegations were similar to the new allegations, [it would lend] some credibility to the new allegations."[139] If it is true that the DCII is different from "criminal history indices" like NCIC, [140] that belies the rationale of using the information to establish something like modus operandi. Using a previous investigation to establish a pattern of misconduct "is illogical unless there is an underlying assumption that the allegations against an individual who is merely titled in an [LER] are true."[141] Further, as will be discussed at length *infra*, who exactly has access to this information and how it is used is confusing and ambiguous, leaving titled Service members to wonder when and how it might affect them in the future.

2. Removing Information from the DCII and Law Enforcement Records

Once indexed in the DCII, "the information will remain in the DCII . . . unless there is mistaken identity or it is later determined no credible information existed at the time of titling and indexing."[142] This standard is nearly impossible for applicants to hurdle because credible information is such a low standard.[143] The "mistaken identity" provision is not as helpful as it appears because it "does not mean that someone other

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[138] 1991 DoD IG REPORT, *supra* note 97, at 11 (emphasis added).

[139] *Id*. The report also cites child abuse cases by DoD teachers and doctors that were "resolved by commanders before a judicial finding of probable cause." *Id*. at 12. The report claims "[c]ases have been identified where the subject is allowed to resign from the [DoD] and solicit employment with" other government agencies. *Id.* "The military investigative file is the only record of the investigation that can be used to alert public health and safety officials to such investigations," thus justifying maintenance of unfounded offenses. *Id.*

[140] 2000 DoD IG REPORT, *supra* note 90, at 5.

[141] Ham, *supra* note 25 at 14.

[142] DoDI 5505.07, *supra* note 16, para. 1.2(d). The standard for the removal of information from a title block is the same across the services because it comes from an instruction that is applicable to all services under the DoD.

[143] Telephone Interview with Timothy M. MacArthur, Clinical Professor and Director, Mason Veterans and Servicemembers Legal Clinic (Feb. 15, 2022); Telephone Interview with Jeffrey F. Addicott, Professor of Law and Director, Warrior Defense Project (Mar. 22, 2022). Both practitioners indicated that although there was a substantial number of people seeking help with titling and indexing issues, the rate of success in getting this information removed was extremely low.

than the subject is found to have committed the offense. Rather, it means that someone with the same name as the listed subject should have been entered as the subject instead."[144] Essentially, an individual could only have his or her name removed if someone with the exact same name committed a crime, but the other identifying information, like social security number, was input incorrectly. If someone believes they were wrongly indexed in the DCII—either because of mistaken identity or lack of credible information—that person "may appeal to the DoD [c]omponent head to obtain a review of the decision."[145] In the Army, that means submitting a request to the director of the U.S. Army Crime Records Center.[146] Should the DoD component head not grant relief, the Service member may submit a request to their respective service's board for correction of military records. The Service member may not apply to those boards until after he or she goes through the administrative process with the service law enforcement agency.[147] Applicants to any of the service boards must file their application for relief within three years "after an alleged error or injustice" is or should have been discovered.[148] If the application is outside of the prescribed statute of limitations, the board may deny the application entirely or may review it if the untimely filing is excused "in the interest of justice."[149] The titled Service member must not only know, or reasonably should have known, that they were titled and indexed, but also understand that the titling may have a detrimental impact

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[144] Ham, *supra* note 25, at 5.

[145] DoDI 5505.07, *supra* note 16, para. 3.2.

[146] AR 195-2, *supra* note 17, para. 4-4(c). In the Navy, the individual submits the request to the director of the naval criminal investigative service headquarters. NCISMAN 1, *supra* note 13, para. 23-11. Notably, the NCISMAN states, "Once the subject of a criminal investigation is indexed, the name shall remain in the DCII, e*ven if a later finding is made that the subject did not commit the offense* under investigation . . . ." *Id.* para. 23-8(d)(1) (emphasis added). However, NCISMAN goes on to state that a person may be removed from the title block in the case of mistaken identity or if there was no credible information at the time. *Id.* para. 23-8(d)(1)(a)-(b). In the Air Force, the request goes to the Department of the Air Force – criminal justice information cell. AFMAN 71-102, *supra* note 13, para. 9.2.

[147] 32 C.F.R. § 581.3(d)(3) (2022) 32 C.F.R. § 723.3(c)(4) (2022); 32 C.F.R. § 865.3(c)(3) (2022). *See generally* U.S. DEP'T OF DEF., DIR. 1332.41, BOARDS FOR CORRECTION OF MILITARY RECORDS (BCMRS) AND DISCHARGE REVIEW BOARDS (DRBS) (Mar. 8, 2004)(C1 Feb. 2, 2022) [hereinafter DODD 1332.41]; 10 U.S.C. § 1552 (outlining authorities for the service boards for records correction).

[148] 32 C.F.R. § 581.3(d)(2) (2022). *See also* 32 C.F.R. § 723.3(b) (2022); 32 C.F.R. § 865.3(f) (2022). The Navy standard is slightly more lenient because it does not contain the "should have known" caveat; only actual discovery of the error triggers the three-year time limit. 32 C.F.R. § 723.3(b) (2022).

[149] 32 C.F.R. § 581.3(d)(2) (2022); 32 C.F.R. § 723.3(b) (2022); 32 C.F.R. § 865.3(f)(2) (2022).

on them, and then also exhaust all of their administrative remedies within three years in order to be considered by the service record correction boards.

In addition to removing their information from the DCII, titled subjects may also want to remove their name from the subject block of the LER in an effort to stem any additional effects from being listed. In the Army, the regulations pertaining to the removal of an individual's name from the subject or title block of an LER are confusing and downright contradictory. To clarify, one's name can only be removed from the DCII as described above. Even if a subject's name is removed from the title block of an LER, the subject will remain in the DCII.[150] To remove a name from the subject or title block of an LER, one paragraph of Army Regulation (AR) 190-45 allows it "only if it is determined that there is *not probable cause* to believe the individual committed the offense for which he or she is listed as a subject."[151] Another document, Department of the Army Pamphlet (DA Pam.) 190-45, provides "procedural guidance for the preparation and reporting of [LERs]."[152] In discussing naming the subject of an investigation, one paragraph simultaneously says, "The entry 'none' will be used as the subject/suspect entity in a status LER, final LER, and supplemental LER, when all offenses pertaining to that entity are determined to be unfounded," and, "When an actual entity (person) other than 'unknown' is listed in the subject/suspect block, and all offenses are determined to be unfounded, that entity will remain listed in the subject/suspect block."[153] The confusing interplay between regulatory guidance is not new,[154] and it continues.

In the National Defense Authorization Act for Fiscal Year 2021 (FY 21 NDAA), Congress mandated significant changes to the process by which someone can request amendment or expungement of the title block of a law enforcement report of investigation.[155] The Secretary of Defense must establish a process through which a titled individual can request correction or expungement of criminal investigation reports, an entry into

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[150] AR 190-45, *supra* note 16, para. 3-6(a).

[151] *Id.* (emphasis added). If a law enforcement agent determines there is probable cause supported by corroborating evidence, an offense can be founded. If he makes a determination that the "criminal offense was not committed or did not occur" the offense would be unfounded. *Id.* at Glossary (defining "unfounded offense").

[152] U.S. DEP'T OF ARMY, PAM. 190-45, ARMY LAW ENFORCEMENT REPORTING AND TRACKING SYSTEM para. 1-1 (18 Apr. 2019) [hereinafter DA PAM. 190-45].

[153] *Id.* para. 1-5(d)(4).

[154] *See* Ham, *supra* note 25, at 13.

[155] WILLIAM M. (MAC) THORNBERRY NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2021, PUB. L. NO. 116-283, § 545, 134 Stat. 3388, 3613-15 (2021) [hereinafter FY21 NDAA].

the DCII, and "[a]ny other record maintained in connection with [an investigation report or an entry in the DCII] . . . in any system of records, records database, records center, or repository maintained by or on behalf of the [d]epartment."[156] Those records "shall" be corrected or expunged when:

> (A) *Probable cause* did not or does not exist to believe that the offense for which the person's name was placed or reported . . . occurred, or insufficient evidence existed or exists to determine whether or not such offense occurred.
> (B) *Probable cause* did not or does not exist to believe that the person actually committed the offense for which the person's name was so placed or reported . . . or insufficient evidence existed or exists to determine whether or not the person actually committed the offense.
> (C) Such other circumstances, or on such other bases, as the Secretary may specify in establishing the policy and process, which circumstances and bases may not be inconsistent with the circumstances and bases provided by subparagraphs (A) and (B).[157]

By the plain language of this statute, the clear congressional intent is if someone is titled, he or she should be able to request an amendment to that record not only if probable cause did not exist that a crime occurred at the time the record was made, but also if probable cause does not presently exist for that crime. Similarly, the FY 21 NDAA also states a record should be amended if there is no probable cause, either at the time or presently, to believe that the person committed the offense. This is a seismic shift to the standard outlined in DoDI 5505.07, which currently states, "when reviewing the appropriateness of a titling or indexing decision, the reviewing official will only consider the investigative information *at the time of the decision* to determine if the decision was made in accordance with [the credible information standard]."[158] The recent legislation further requires certain considerations that "shall" be weighed in determining whether there is a basis for correction or expungement. These considerations include "the extent or lack of

[156] *Id.* § 545(a)(1)–(3).
[157] *Id.* § 545(c)(1)(A)–(C) (emphasis added).
[158] DoDI 5505.07, *supra* note 16, para. 3.3 (emphasis added); *see also* AR 190-45, *supra* note 16, para. 4-3(d), which "emphasize[s] that the credible information error must occur at the time of listing the entity as the subject of the LER rather than subsequent investigation determining that the LER is unfounded."

corroborating evidence," whether adverse action was initiated, and the outcome of that adverse action.[159] None of these extremely relevant considerations are listed anywhere in DoDI 5505.07.

In addition to making it easier to remove information from the title block of an LER, Congress also required the DoD to assist someone who has been titled to "correct, expunge or remove, [or] take other appropriate action on . . . any record maintained . . . outside of the [DoD] to which such component provided, submitted, or transmitted information about the covered person, which information has or will be corrected in, or expunged or removed from, [DoD] records."[160] The law mandates the DoD to make it easier to become untitled and help titled individuals remove or amend the information located outside of the DoD. These changes are definitely beneficial to subjects of investigations and must be implemented. However, more than a year after the FY 21 NDAA became law, this author is unable to find any evidence that the Secretary of Defense has taken any action to facilitate any of these modifications.

The current standard for being titled is exceedingly easy to meet and the ability to become untitled is disturbingly difficult. Therefore, the likelihood of being titled and remaining titled is high. Given the fact that Black Soldiers are subjected to military law enforcement investigations at higher rates than white Soldiers, it logically follows that more Black Soldiers are titled, will remain titled and indexed in various databases, and suffer the collateral ramifications.[161] In order to stem this, the timing and standard for titling must change and the Secretary of Defense must follow through on the legislative mandate.

IV. After Being Titled

Titling and indexing in and of themselves can result in a variety of consequences that can occur in the short-term or decades later. In 2014, an Army veteran and survivor of sexual assault applied to receive her nursing license.[162] Her application was delayed because law enforcement titled her

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[159] FY 21 NDAA, *supra* note 155, § 545(c)(2)(A)-(C).
[160] FY 21 NDAA, *supra* note 155, § 545(c)(3)(B).
[161] This is a conclusion based on the simple fact that if Black Soldiers are investigated more and the standard for titling is incredibly low, it logically follows that a disproportionate number of Black Soldiers will be titled.
[162] *M-VETS Helps a Survivor of Military Sexual Trauma Clear Erroneous UCMJ Titling Decision*, ANTONIN SCALIA LAW SCHOOL: M-VETS (Sept. 11, 2020), https://mvets.law.gmu.edu/2020/09/11/m-vets-helps-a-survivor-of-military-sexual-trauma-clear-erroneous-ucmj-titling-decision [hereinafter M-VETS PRESS RELEASE].

in 1991 for sodomy and false official statement.[163] While still serving in the military, the woman reported she was sexually assaulted.[164] Agents from CID questioned the victim and the alleged perpetrators, who claimed the encounter was consensual. Law enforcement agents determined they did not believe the victim and titled her for sodomy and false official statement.[165] Weeks after the report and initiation of the investigation, one of the perpetrators confessed to CID.[166] There was no adverse administrative or criminal action taken against the victim, and she left the service with an honorable discharge.[167] Following the discovery of her titling, she sought out the help of a civilian veteran's legal clinic, which helped her get the information related to her titling removed, and continue the process of obtaining her nursing license.[168] This is a rare success story and it still took her years to complete the process with the assistance of an attorney.[169] The service boards for correction of military records, which determine whether to amend or alter the title block in an LER, have reading rooms available online for many of their decisions.[170] The board granted the applicant relief in almost none of the cases involving the removal of information from the titling block of an LER or ROI.[171]

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[163] *Id.* As this person was in the Army and titled in 1991, the standard for titling her would have been probable cause. *See* 1991 DOD IG REPORT, *supra* note 97, at 2; *see also* Ham, *supra* note 25, at 6.

[164] *M-VETS Helps a Survivor of Military Sexual Trauma Clear Erroneous UCMJ Titling Decision*, ANTONIN SCALIA LAW SCHOOL: M-VETS (Sept. 11, 2020), https://mvets.law.gmu.edu/2020/09/11/m-vets-helps-a-survivor-of-military-sexual-trauma-clear-erroneous-ucmj-titling-decision [hereinafter M-VETS PRESS RELEASE].

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Army Board for the Correction of Military Records*, DEP'T OF DEF. (May 11, 2022), https://boards.law.af.mil/ARMY_BCMR.htm; *Air Force Board for the Correction of Military Records*, DEP'T OF DEF. (Dec. 3, 2022), https://boards.law.af.mil/AF_BCMR.htm; *[Board] for Correction of Naval Records*, DEP'T OF DEF. (Oct. 31, 2022), https://boards.law.af.mil/NAVY_BCNR.htm; *Coast Guard Board of the Correction of Military Records*, DEP'T OF DEF. (Jan. 15, 2021), https://boards.law.af.mil/CG_BCMR.htm.

[171] *See, e.g.,* [Redacted Name], ABCMR No. AR20190000919 (Army Bd. for Corr. of Mil. Recs., Oct. 18, 2019), https://boards.law.af.mil/ARMY/BCMR/CY2019/20190000919.txt. The applicant in this case was titled in 2008 for wrongful disposition of government property, a violation of Article 108, UCMJ. *Id.* The applicant was never prosecuted, but was given an oral reprimand. *Id.* Ten years, two deployments, and two promotions later, the applicant was prohibited from attending the sergeants major course because he was titled. *Id.* The Army Board for the Correction of Military Records (ABCMR) denied his request to correct the LER. *Id. But see* Ham, *supra* note 25, at 16–17 (describing two ABCMR cases in which the applicants were granted their requested relief, including

The consequences of titling, who uses the information, and how it is used is obscure.[172] The only thing that is unambiguous is the mantra that titling and indexing is an administrative procedure and "judicial or adverse administrative actions will not be taken [against individuals or entities] based solely on the existence of a titling or indexing record in a criminal investigation." [173] Notwithstanding this claim, there can be negative consequences for being titled, most of which are not formal judicial or adverse administrative actions. First, it is important to consider where this information goes. Second, it is equally important to consider specific negative consequences like security clearance issues, possible promotion issues, confirmation bias, as well as the mere existence of the record and its potential for future use by law enforcement.

A. Where Does It Go?

After an LER is initiated, the report may be indexed in more than one system, including the DCII, the Law Enforcement Defense Data Exchange (LE D-DEx), and the Army Law Enforcement Reporting and Tracking System (ALERTS). Titled subjects should be fully informed of how the information in these systems will be used because, as acknowledged by Army regulation, being titled and indexed "may have an impact upon their military or civilian careers."[174]

1. The DCII

The DCII has its own website with links to Resources and Frequently Asked Questions, but there is no link that leads to a list of agencies that

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removing information from the DCII.) Major Ham concludes the "ABCMR is listening and willing to act." *Id.* However, that may no longer be the case.

[172] Although in a slightly different context, in considering the collateral consequences of an arrest on immigration, public housing, social services and education, Eisha Jain commented on the difficulty of finding accurate information about the collateral, non-criminal consequences of an arrest. Jain, *supra* note 15, at 859. "Accurate information about how arrests are used can thus be difficult to find," and "[o]n a practical level, when criminal defense attorneys voluntarily assume the additional work of attempting to negotiate noncriminal consequences, they may have no access to timely, relevant information that will allow them to engage in effective advocacy." *Id.* at 859-60.

[173] DoDI 5505.07, *supra* note 16, para. 1.2 (f); *see also* 32 C.F.R. § 635.13(c) (2022); AR 190-45, *supra* note 16, para 4-3(a); NCISMAN 1, para. 23-2(b); AFMAN 71-102, Glossary, (defining "titling" and stating that "titling and indexing do not, in and of themselves, imply any degree of guilt or innocence").

[174] AR 195-2, *supra* note 17, para. 1-4(g)(2).

have access to the information in the database and why they have access. In order to find this information, one may attempt to obtain it through FOIA.[175] Alternatively, because the DCII is covered by the Privacy Act of 1974 (Privacy Act),[176] the agency who maintains the records is required to publish a system of records notice (SORN). The SORN that pertains to the DCII generally outlines who may be able to access the information and broadly for what purposes, but fails to provide specific details.

Congress passed the Privacy Act because of concerns about the "collection, maintenance, use, and dissemination of personal information by Federal agencies."[177] Further, "the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information."[178] The Privacy Act includes a number of protections for individual information kept in a "system of records." A system of records "means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual." [179] The Privacy Act prohibits the disclosure of records contained within a system of records unless the individual to whom the record pertains requests the record be disclosed or provides written consent for the record to be disclosed.[180] The law also requires each agency that maintains a system of records to publish a SORN in the Federal Register that includes, among other information, "each routine use of the records contained in the system, including the categories of users and the purpose of such use" and "the policies and practices of the agency

[175] Through FOIA, the author requested a list of all agencies who have access specifically to the DCII and for what purposes. The system of records notice that covers the DCII, discussed *infra*, also covers several other databases, so the information responsive to this FOIA request would help clarify exactly how the DCII information is used. In their response, the defense counterintelligence and security agency stated that "DCII access is limited to the [d]epartment of [d]efense and other federal agencies that have adjudicative, investigative and/or counterintelligence missions." It further directed the author to the system of records notice. Memorandum from the Defense Counterintelligence and Security Agency to Author 1 (Apr. 19, 2022) (on file with author).

[176] Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified as amended at 5 U.S.C. § 552a) [hereinafter Privacy Act].

[177] *Id.* § 2(a)(1) (1974). Despite the noble goals of the Privacy Act, in considering the vast expansion of authority to collect and use Americans' data, the Brennan Center described the Privacy Act as "increasingly little more than a fig leaf." RACHEL LEVINSON-WALDMAN, BRENNAN CTR. FOR JUST., WHAT THE GOVERNMENT DOES WITH AMERICANS' DATA 7 (2013) [hereinafter BRENNAN CENTER PRIVACY REPORT].

[178] Privacy Act, *supra* note 176, § 2(a)(3).

[179] 5 U.S.C. § 552a(a)(5).

[180] *Id.* § 552a(b). The law also provides twelve exceptions to this general prohibition. *Id.* § 552a(b)(1)–(12).

regarding storage, retrievability, access controls, retention, and disposal of records."[181]

The DCII is a system of records because it is a group of records that contains information that is retrieved by an identifying particular.[182] Accordingly, there should be a SORN published in the Federal Register. A SORN previously existed for the DCII, but was rescinded on June 14, 2021.[183] It was rescinded because the DoD began maintaining the DCII, along with seven other systems of records, as part of the Personnel Vetting Records Systems (PVRS).[184] The DoD published the SORN for the PVRS on October 17, 2018, noting that the system was intended to "allow[] DoD to conduct end-to-end personnel security, suitability, fitness, and credentialing processes."[185] The PVRS SORN lists thirty-three routine uses for which records may be disclosed outside of the DoD, many of which generally pertain to security investigations, suitability for Government employment, and eligibility for access to facilities or information systems.[186] However, one purpose for which records in the DCII may be disclosed is "[t]o any source from which information is requested in the course of an investigation, to the extent necessary to identify the individual under investigation, inform the source of the nature and purpose of the investigation, and to identify the type of information requested."[187] Further, a record may be disclosed

> [t]o the appropriate [f]ederal, [s]tate, local, territorial, tribal, foreign, or international law enforcement authority or other appropriate entity where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law, whether criminal, civil, or regulatory in nature, and whether arising by general statute or by regulation, rule or order issued pursuant thereto. The relevant records in the system of records may be referred, as a routine use, to the agency concerned and charged with the responsibility of investigating or prosecuting such violation or charged

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[181] *Id.* § 552a(e)(4)(D)–(E).
[182] The User's Guide, which would presumably explain exactly how the information is retrieved "is only accessible to users after they log into DCII." *DCII [Frequently Asked Questions]*, DEF. COUNTERINTEL. AND SEC. AGENCY, https://www.dcsa.mil/is/dcii/dcii_faqs (last visited Dec. 8, 2022).
[183] Privacy Act of 1974; System of Records, 86 Fed. Reg. 31487 (June 14. 2021).
[184] *Id.*
[185] Privacy Act of 1974; System of Records, 83 Fed. Reg. 52420, 52421 (Oct. 17, 2018).
[186] *See id.* at 52423-25.
[187] *Id.* at 52424.

> with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto.[188]

This language is incredibly broad and it, taken along with the thirty-two other possible routine uses, paints an indecipherable picture of how the records in the DCII may actually be used. The lack of transparency and specific information makes it exceedingly difficult for indexed subjects to fully understand how they will be impacted and for attorneys to advise their clients on second- and third-order effects.

2. Law Enforcement Defense Data Exchange

Although not mentioned in DoDI 5505.07, information in the title block of an LER also likely goes into the LE D-DEx. In an increasingly data-driven world, policing is no exception. While the analysis of data may help police officers become more efficient and effective, the increased use of data is also concerning.

Currently, all DoD law enforcement agencies participate in the Law Enforcement Defense Data Exchange.[189] The intent of the LE D-DEx is to "share [criminal justice information] across organizational boundaries to enhance the [DoD's] crime prevention and investigative lead sharing."[190] Criminal justice information (CJI) is defined as "data necessary for LEAs to perform their mission and enforce the laws, *including but not limited to*: biometric, identity history, person, organization, property, and case or incident history data."[191] Although titling information is not specifically mentioned, it arguably falls within this definition. Law enforcement agencies will, "[t]o the maximum extent possible, . . . share all CJI."[192] The agency responsible for LE D-DEx, NCIS, describes the database as "one of the largest law enforcement information sharing systems in the world."[193] It allows "patrol officers, investigators, or analysts . . . to gather critical and otherwise inaccessible information using [LE D-DEx's] robust

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[188] *Id.* at 52425.
[189] This database is run by NCIS and is also known as the Law Enforcement Information Exchange. *LInX/D-DEx*, NAVAL CRIM. INVESTIGATIVE SERV., https://www.ncis.navy.mil/Mission/Partnership-Initiatives/LInX-D-Dex (last visited Dec. 9, 2022) [hereinafter LE D-DEX WEBSITE].
[190] U.S. DEP'T OF DEF., INSTR. 5525.16, LAW ENFORCEMENT DEFENSE DATA EXCHANGE (LE D-DEX) para. 3(a) (Aug. 29, 2013) (C3 Oct. 30, 2020) [hereinafter DODI 5525.16].
[191] *Id.* Glossary (defining "CJI") (emphasis added).
[192] *Id.* encl. 3, para. 1(c).
[193] LE D-DEX WEBSITE, *supra* note 189.

search and analysis features.[194] "Users can find, identify and analyze suspects, relationships, criminal methods of operation, histories and mugshots" all via this database.[195] The information uploaded to the LE D-DEx is "documented criminal justice information obtained by DoD [law enforcement agencies] in connection with their official law enforcement duties."[196]

As the LE D-DEx is a system of records, it also has a published SORN.[197] In the LE D-DEx SORN, it provides categories of individuals covered by the system, its purpose, and how the records may be disclosed.[198] The categories of individuals covered include "any individual involved in, *or suspected of being involved in a crime* . . . and/or any individual named in an arrest, booking, parole and/or probation report."[199] The purpose for the database is to improve communication and sharing of law enforcement data between law enforcement agencies.[200] This seems to be an overlap with the DCII, which is also intended to preserve all law enforcement investigations so that they may be retrieved by law enforcement "in the future."[201]

The DoDI governing the LE D-DEx states that only DoD law enforcement agencies can access the LE D-DEx.[202] However, the records in the LE D-DEx may be released to any "law enforcement authority" where it is relevant "for their situational awareness," and to any individual or organization "where such disclosure may facilitate the apprehension of fugitives, the location of missing persons, the location and/or return of stolen property or similar criminal justice objectives."[203] The DoD uses LE D-DEx to share CJI with the FBI's National Data Exchange System (N-DEx).[204] Notably, N-DEx contains information that is not otherwise contained in the NCIC or III databases, like incident and case reports and corrections data.[205]

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[194] LE D-DEX WEBSITE, *supra* note 189.
[195] LE D-DEX WEBSITE, *supra* note 189.
[196] DODI 5525.16, *supra* note 190, encl. 3, para 1(a).
[197] Privacy Act of 1974; System of Records, 75 Fed. Reg. 24931 (May 6, 2010).
[198] *Id.*
[199] *Id.* (emphasis added).
[200] *Id.*
[201] DODI 5505.07, *supra* note 16, para. 3.1.
[202] DODI 5525.16, *supra* note 190, encl. 3, para. 1(f).
[203] Privacy Act of 1974; System of Records, 75 Fed. Reg. 24931 (May 6, 2010).
[204] AR 195-2, *supra* note 17, para. 3-16(f).
[205] Jeffrey Fisher & Nicole Lemal-Stefanovich, *The National Data Exchange (N-DEx): A Leader in Information Sharing*, FED. BUREAU OF INVESTIGATION L. ENF'T BULL., https://leb.fbi.gov/articles/featured-articles/the-national-data-exchange-n-dex-a-leader-in-information-sharing (last visited Jan. 4, 2023) (calling the information contained in the N-DEx "vast," claiming that the database houses nearly one billion records).

B. Consequences

There are wide-ranging effects that may follow titling and indexing. These consequences may or may not have a lasting impact, but any of them can cause significant disruption for a titled Service member. Aside from impacts on the individual, if Black Service members are titled at disproportionately higher rates, that can have a ripple effect on the diversity of the Armed Forces as well the integrity of investigations and prosecutions.

1. Suspension of Favorable Personnel Actions

One of the first things that will follow a titling decision, is a suspension of favorable personnel actions (flag), which precludes both favorable actions and movement of the Soldier.[206] Upon titling by law enforcement, commanders are required to flag that Soldier.[207] A flag for a law enforcement investigation is a nontransferable flag, which means that a Soldier "may not be voluntarily reassigned to another unit."[208] The flag may only be removed after the commander submits a department of the Army (DA) form 4833 to CID.[209] Commanders complete a DA form 4833 after both the investigation and any potential adverse action. Therefore, a Soldier would be flagged from the point that a law enforcement office determined there was credible information, throughout the investigation, and until after the commander submits the DA Form 4833.

In the meantime, the Soldier is unable to change units, reenlist, appear before a promotion board, receive individual awards, attend military or civilian schools, retire or resign, or receive payment of enlistment bonus.[210] A Soldier can be flagged for a substantial length of time because titling happens so early in the investigative process. Flagging serves legitimate purposes, and Soldiers who are under investigation should be prohibited, in some way, from leaving the Army and its jurisdiction. However, while a Soldier is flagged under the current system, he or she is losing career opportunities and pay during this likely lengthy period. This

[206] U.S. DEP'T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAG) para. 2-1(a) (5 Apr. 2021) [hereinafter AR 600-8-2].
[207] *Id.* para. 2-2(h).
[208] *Id.* para. 2-2.
[209] *Id.* para. 2-9(b)(10)(a). A DA Form 4833 is a commander's report of disciplinary or administrative action. AR 190-45, *supra* note 16, para. 4-7. It is a record of the "action[] taken against identified offenders" and to "[r]eport the disposition of offenses investigated by civilian [law enforcement] agencies. *Id.* para. 4-7(a)(1)–(2).
[210] AR 600-8-2, *supra* note 206, para. 3-1(a)–(j).

could affect promotion and retention merely because there is credible information—not probable cause—to believe they committed a crime. By waiting to title and flag a Soldier until a probable cause determination is made, he or she will suffer fewer undue administrative impacts because the decision would be made later in the process. Further, by using a probable cause standard, there would be more evidence and, therefore, more reason to believe that the Soldier may have committed a crime.

2. Denial of Security Clearance

In order to be enlisted in the Army, all applicants must undergo an entrance national agency check (ENTNAC).[211] An ENTNAC includes a search of the DCII.[212] As discussed above, a search of the DCII would likely reveal any information relating to a titling decision. If an individual is only titled, but the case is unfounded or was never prosecuted in any way, that may not disqualify very junior enlisted Service members in certain military occupational specialties (MOS) that do not require any kind of clearance. If an individual wants to become either a commissioned officer or warrant officer, a secret clearance is required.[213] To obtain a secret clearance, personnel must undergo a specific adjudicative process as outlined by AR 380-67, Appendix I.[214] One of the thirteen considerations in determining whether to grant a clearance is history of criminal conduct.[215] Merely an "[a]llegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted" is something that "could raise a security concern and may be disqualifying."[216] The same paragraph also lists considerations that "could mitigate security concerns" including "time . . . elapsed since the criminal behavior," coercion into committing the offense, "evidence of successful rehabilitation," and "[e]vidence that the person did not commit the offense."[217]

If the subject of an investigation already possesses a security clearance, upon receipt of "initial derogatory information," a commander must decide whether to "suspend subject's access to classified information

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[211] U.S. DEP'T OF ARMY, REG. 380-67, PERSONNEL SECURITY PROGRAM para. 3-14 (24 Jan. 2014) [hereinafter AR 380-67].
[212] *Id.* app. B, para. B-1(a).
[213] *Id.* para. 3-14(a).
[214] *Id.* app. I.
[215] *See id*. app I, para. I-12; *see also id.* para. 2-4(h).
[216] *Id.* app. I, para. I-12(b)(3).
[217] *Id.* app. I, para I-12(c)(1)–(4).

or assignment to sensitive duties."[218] Further, the commander must forward any "credible derogatory information" to the U.S. Army Central Clearance Facility (CCF) to process the denial or revocation of already-granted clearance or access using the considerations outlined in Appendix I.[219] In the context of a criminal investigation, a Service member may have their clearance suspended in the short-term and revoked in the long-term.

Consider the hypothetical example of a Black sergeant who was accused of stealing a roommate's gaming console and was subsequently titled for larceny. The case was not founded because additional investigation revealed that the roommate's boyfriend actually stole the machine and pawned it for money to buy drugs. Even with the alternative culprit, the sergeant would remain titled for the larceny and the information uploaded into at least the DCII. The following year, the sergeant wanted to participate in the Army's Green to Gold[220] program to become a commissioned officer. Assuming the previous titling did not prohibit his acceptance into the program, his application for the requisite secret clearance would, at best, be delayed. He would likely be forced to respond to the DCII entry. At worst, his clearance would be denied and he would be unable to join the officer corps.

A situation like this matters because diversity in the officer corps is lacking. A DoD report found white officers make up seventy-three percent of active component officers, whereas Black officers make up just eight percent.[221] As of May 2021, there were forty-one four-star generals and admirals, but only two were Black.[222] This lack of diversity is not only unrepresentative of the United States population as a whole,[223] but it also harms readiness.[224] Multiple reasons[225] may explain why the officer corps

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[218] *Id.* para. 8-3.
[219] *Id*. para. 8-2(a).
[220] *See generally* U.S. DEP'T OF ARMY, CADET COMMAND REG. 145-6, ARMY ROTC GREEN TO GOLD POLICY (1 Jan. 2019).
[221] U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE BOARD ON DIVERSITY AND INCLUSION REPORT: RECOMMENDATIONS TO IMPROVE RACIAL AND ETHNIC DIVERSITY AND INCLUSION IN THE U.S. MILITARY 8 (Dec. 15, 2020) [hereinafter DOD DEI REPORT].
[222] Robert Burns & Lolita C. Baldor, *Top US General Urges Greater Racial Diversity in Military*, AP NEWS (May 5, 2021), https://apnews.com/article/race-and-ethnicity-government-and-politics-1deffc0efb652716aa44dab756b614d1.
[223] *See* DOD DEI REPORT, *supra* note 221, at 8; *see also* Helene Cooper, *African-Americans are Highly Visible in the Military, but Almost Invisible at the Top*, N.Y. TIMES (May 25, 2020), https://www.nytimes.com/2020/05/25/us/politics/military-minorities-leadership.html.
[224] *See* DOD DEI REPORT, *supra* note 221, at 4 (stating that diversity and inclusion "are fundamental necessities to force readiness").
[225] These reasons include a history of being excluded from combat arms, a lack of role models and mentorship, and overt institutional racism. Tom Vanden Brook, *Where are the*

and upper echelon military leadership are almost entirely white and male. However, if Black Service members are more likely to be investigated by military law enforcement, which could lead to things like the loss or denial of a security clearance, it is yet another reason why they may not become officers, and if they do, why they may not continue on to senior leadership.[226] If this only happens to one or two Black Service members, not only is the officer corps losing diversity, but also dozens of young enlisted Soldiers and officers are losing a potential mentor.

3. Commanders, Confirmation Bias, and Tunnel Vision

Titling and indexing can also lead to intangible consequences that are more difficult to clearly articulate or quantify, including influencing biases and tunnel vision in the investigation of the case. Army commanders, at all levels, are not only tasked with accomplishing a given mission, but also taking care of their Soldiers. In order to assist commanders in this endeavor, the Army developed the Risk Reduction Program (RRP).[227] The RRP is "an efficient way of assisting commanders in ascertaining and addressing high-risk behavioral problems." [228] As part of the RRP, commanders have access to the Commander's Risk Reduction Toolkit (CRRT).[229] The CRRT is a consolidated database that combines "[twenty-six] authoritative data sources displaying [forty] risk factors to present command officials with a consolidated history of each Solder's personal information and potential risk."[230] One of those twenty-six data sources is the Army law enforcement reporting and tracking system (ALERTS),[231]

Black Officers? US Army Shows Diversity in its Ranks but Few Promotions to the Top, USA TODAY (Sept. 1, 2020), https://www.usatoday.com/in-depth/news/politics/2020/09/01/military-diversity-army-shows-few-black-officers-top-leadership/3377371001.

[226] *See* Brief for Protect Our Defenders and Black Veterans Project as Amici Curiae Supporting Petitioner at 16, Jackson v. Braithwaite, No. 20-19, 2020 WL 6829074 (U.S. Nov. 23, 2020) (arguing that "[i]n addition to the stigma created by meritless accusations, such charges may entirely derail the promising careers of racial minorities who may otherwise be on track for leadership positions in the military").

[227] U.S. DEP'T OF ARMY, PAM. 600-24, HEALTH PROMOTION, RISK REDUCTION, AND SUICIDE PREVENTION para. 2-16 (14 Apr. 2015) [hereinafter DA PAM. 600-24].

[228] *Id.* para. 2-16(a).

[229] U.S. DEP'T OF ARMY, DIR. 2021-10, COMMANDER'S RISK REDUCTION TOOLKIT (15 Apr. 2021) [hereinafter AD 2021-10].

[230] *Id.* para. 3(a).

[231] *Id.* encl. para. 1(d).

which is an automated records management system (RMS).[232] When a criminal offense is reported to either military police or CID, an officer or agent will initiate the investigation in ALERTS.[233] A subject will be included if "credible information exists that would cause a trained investigator . . . to presume that the person committed a criminal offense."[234] If credible information exists to title a person, their information will be included in ALERTS, which feeds into the CRRT, which is accessible by battalion commanders, sergeants major, company commanders, and first sergeants.[235] Therefore, no fewer than four people in a Soldier's chain of command will have access to the information if he or she has been titled for an offense. These four people are the most directly responsible for the Soldier's welfare and must take that obligation seriously, but they are also the ones who are the most directly responsible for the professional development and discipline of the Soldier. Being titled could contribute to unconscious, implicit bias or explicit bias that results in intentional prejudice.[236]

As an example, consider if Specialist Smith was previously titled for false official statement; even if the case was unfounded, it would still likely appear in the CRRT and be available for her company commander and first sergeant to see. That one piece of information could affect the opinion and judgment of the company commander and the first sergeant because of confirmation bias. Confirmation bias is "the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand."[237] When the company commander sees that Specialist Smith was titled for false official statement, through the CRRT or elsewhere,[238] even if the commander knows how low the

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[232] AR 190-45, *supra* note 16, para. 1-4(4). "[ALERTS] tracks law enforcement cases from incident occurrence, case investigation, to final case disposition . . . ." DA PAM. 190-45, *supra* note 152, para. 4-1.

[233] DA Pam 190-45, *supra* note 152, para. 1-4(c). "Initial LERs are dispatched using ALERTS." *Id.* para. 2-3(b).

[234] *Id.* para 1-5(a).

[235] *See* AD 2021-10, *supra* note 229, para. 4(a).

[236] *See* Anna Mulrine Grobe, *Why do Black Troops Face a Harsher Form of Military Justice?*, CHRISTIAN SCI. MONITOR (Jul. 17, 2020), https://www.csmonitor.com/USA/Military/2020/0720/Why-do-Black-troops-face-a-harsher-form-of-military-justice (quoting a former Air Force judge advocate who said she witnessed both "inadvertent[]" discrimination and "personal prejudice [having] a ton of room to run").

[237] Raymond S. Nickerson, *Confirmation bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175 (1998).

[238] Another way that a commander might receive this information is through the blotter report. *See* AR 190-45, *supra* note 16, para. 7-15. The blotter report is distributed to the senior commander of an installation, the staff judge advocate and CID. *Id.* para. 7-15(c). The blotter report is also sent to commanders or supervisors of subjects or victims of a

titling standard is and sees that the case was unfounded, the company commander may, and probably will, assume that Specialist Smith is a liar. The company commander may do this consciously or subconsciously.[239] Either way, in every subsequent interaction with Specialist Smith, the company commander may be less likely to give Specialist Smith the benefit of the doubt and either knowingly or inadvertently look for evidence that confirms his suspicion that she is a liar.[240] The decisions that the company commander makes regarding Specialist Smith—including discipline and career advancement—are going to be different than any other Soldier in the commander's formation because she was titled and indexed.

Confirmation bias does not only affect how a commander treats a subordinate Soldier. It affects how police investigate. Tunnel vision can infect the entire criminal justice system and it starts with the police investigation. Tunnel vision is the "product of various cognitive 'biases,' such as confirmation bias, hindsight bias, and outcome bias."[241] It "leads investigators, prosecutors, judges, and defense lawyers alike to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion."[242] During the initial police investigation, tunnel vision "can be most damaging, because all later stages of the process feed off the information generated in the police investigation."[243] The DoD titling process has the potential to cause particularly devastating tunnel vision that could taint the entire investigation and disposition of the case because it forces law enforcement officers to affirmatively make a determination about a subject exceedingly early in the investigation.[244]

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crime. *Id.* Whereas the blotter report would come to a commander at the time of the investigation, the information in the CRRT may be available to a Soldier's commander after the initial investigation. Additionally, LERs are sent "through the field grade commander to the immediate commander" of the subject listed in the reports. *Id*. para. 4-2(c)(3).

[239] *See* Nickerson, *supra* note 237, at 175 (describing confirmation bias as "a less explicit, less consciously one-sided case-building process" when compared to building a case for one's position consciously).

[240] *See id. See also* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 312 (2006) (noting that "[e]mpirical research . . . demonstrates that people not only seek confirming information, they also tend to recall the information in a biased manner").

[241] Findley & Scott, *supra* note 240, at 307–08.

[242] Findley & Scott, *supra* note 240, at 292.

[243] Findley & Scott, *supra* note 240, at 295.

[244] Arguably, the credible information standard is lower than reasonable suspicion, which is required for police to stop and frisk an individual. *See* Terry v. Ohio, 392 U.S. 1 (1968). Reasonable suspicion is defined as "[a] particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity." *Reasonable Suspicion,* BLACK'S LAW DICTIONARY (11th ed. 2019). Credible information merely

Whereas tunnel vision and bias is, in part, caused by the mere identification of a subject early in a police investigation,[245] the titling requirement involves an intentional decision (whether there is credible information that this subject committed a crime) and specific action on the part of the officer (placing the subject's name in the title block). Titling is done at the earliest stages of the investigation and gives the law enforcement officer no opportunity to be neutral. Early titling can not only pollute the instant investigation[246] and subsequent disposition, but it can also affect any subsequent investigation in which the titled individual is a subject. Department of Defense law enforcement agencies want to be able to access prior investigations in case the subject is ever investigated again. This arguably increases the tunnel vision of investigators in any subsequent investigation—employing the "where there is smoke, there is fire" approach.[247]

4. Dirty Data Leaking out into Civilian Policing

Another concern about titling information is its use in data-based policing. The collection and use of individuals' personal data by private companies and the police is growing.[248] Federal and state government data collection, while slightly more regulated, is no different. Despite the best

requires information that "is sufficiently believable to lead a trained criminal investigator to presume the facts or facts in question are true." DODI 5505.07, *supra* note 16, Glossary, G.2 (defining "credible information").

[245] *See* Findley & Scott, *supra* note 240, at 316 (citing two cases in which the defendants were wrongfully convicted and concluding, "[c]onvinced by an early—although plainly flawed—eyewitness identification, police and prosecutors . . . sought evidence that would confirm guilt, not disconfirm it").

[246] *See id.* at 338 (noting that "[c]linical studies show that interrogators who approach an interrogation with a perception or presumption of guilt typically choose guilt-presumptive questions and use high-pressure tactics").

[247] *See* 1991 DOD IG REPORT, *supra* note 97, at 11 (arguing the need to maintain "unfounded allegations" in the DCII, because "[t]he previous allegations were similar to the new allegations, lending some credibility to the new allegations. *As a result, the new allegations were pursued*") (emphasis added).

[248] *See generally*, Louise Matsakis, *The WIRED Guide to Your Personal Data (and Who is Using It)*, WIRED (Feb. 15, 2019, 7:00 AM) https://www.wired.com/story/wired-guide-personal-data-collection (providing a detailed background of the use of personal, individual information by private companies). Police are also using geolocation data from private companies, like Google, to create "digital dragnets" by way of geofence warrants that identify people who were near the scenes of crimes. Jon Schuppe, *Cellphone Dragnet Used to Find Bank Robbery Suspect was Unconstitutional, Judge Says*, NBC NEWS (Mar. 7, 2022, 5:19 PM) https://www.nbcnews.com/news/us-news/geofence-warrants-help-police-find-suspects-using-google-ruling-could-n1291098.

intentions of the Privacy Act, a vast amount of miscellaneous data on individual Americans is increasingly being used for law enforcement and national security purposes.[249] Law enforcement databases, in particular, present significant concerns about their use. Some civilian law enforcement agencies are using predictive policing, which is a "system that analyzes available data to predict *where* a crime may occur in a given time window (place-based) or *who* will be involved in a crime as either victim or perpetrator (person-based)."[250] Although there is little publicly available indication that DoD law enforcement agencies are using predictive policing, NCIS, the organization that maintains the LE D-DEx, boasts that it "makes the identification and prosecution of criminals and terrorists not only possible, but easier."[251]

If Black Soldiers are investigated more often than their white counterparts, and titling is an incredibly low standard, it follows that the population of individuals indexed in both the DCII and LE D-DEx is likely to be disproportionately Black. Further, there may be entries in which a subject is listed in the title block without probable cause to support that he or she actually committed a crime. That data is arguably flawed, which produces flawed predictions for use by other law enforcement organizations who use that data.[252] Even if military law enforcement is not using predictive policing, "police data generated by the unlawful or biased practices and policies of a specific police department or division can corrupt practices and data in other jurisdictions, and skew decision-making throughout the criminal justice system." [253] Discriminatory practices, intentional or not, creates bad data, which is inherently unreliable.

V. Proposal and Conclusion

The titling process as it currently exists is harmful and has wide-reaching effects that Soldiers may never know about until they are impacted. It is vital that the DoD and Congress take genuine steps to address the problems caused by titling.

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[249] *See* BRENNAN CENTER PRIVACY REPORT, *supra* note 177, at 10–11.
[250] Rashida Richardson, Jason M. Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems and Justice*, 94 N.Y.U. L. REV. ONLINE 15, 21 (2019).
[251] LE D-DEX WEBSITE, *supra* note 189.
[252] "Given the nature of prediction, a racially unequal past will necessarily produce racially unequal outputs. To adapt a computer-science idiom, 'bias in, bias out.'" Sandra G. Mayson, *Bias in, Bias Out*, 128 YALE L. J. 2218, 2224 (2019).
[253] Richardson, *supra* note 250, at 47.

A. Proposal

The first, and possibly the most important step, is to make all of the information about titling and indexing much more transparent. By regulation, a commander is required to brief a titled Soldier that they will remain titled and indexed "whether action is taken against them or not."[254] Commanders are further instructed to inform the Soldier "of the purposes for which the reports are used." [255] Even if an enterprising Soldier attempted to conduct the research for himself or herself, the information is simply too difficult to find without special access or, perhaps, a FOIA request. This is unacceptable for a record created, stored, and used by the United States government that may have a significant effect immediately or years into the future. Merely having the information more easily available would not cause any adverse impacts on the effectiveness of law enforcement or on national security. In order to effectuate this, DoD law enforcement agencies should develop a form that is regularly updated and plainly explains what titling is, where the information is included, and what entities have access to it. This form would be provided to subjects immediately upon the inclusion of their name in the title block of an LER. The form may also explain what will happen if the subject's case is founded, including, but not limited to, inclusion of the subject's information in CODIS and NCIC. Finally, the form would outline the process to expunge or amend the law enforcement records and provide the contact information for the CRC and the ABCMR. Titled individuals must know specifically where this information goes, who can access it, and for what purposes they can access it because it can be used against them. It should be easily accessible by anyone, and should not require a law degree or FOIA request to obtain.

Second, the standard for titling and indexing should be probable cause as determined by an attorney, and the decision should not be made until there is enough evidence to adequately make the determination. Making this change might require an LER to be without a subject while the investigation is pending. However, that does not harm law enforcement objectives in any way. Changing the standard prevents entirely innocent people from being placed in the subject block of an LER. It would also allow commanders to wait to flag a Soldier until there is more than a "mere scintilla of evidence," thus avoiding the repercussions of a premature flag. A record should not exist of someone being investigated if there is not probable cause to support it.

[254] AR 195-2, *supra* note 17, para. 1-4(g)(2).
[255] *Id.*

In its 1991 report, the DoD IG found that the probable cause standard was "not effective" for law enforcement purposes for two reasons. First, there would be "too great a time delay" between the initial report and when "it is finally reported in a retrievable manner following a final determination of probable cause."[256] This would impair the "ability of . . . DCIOs to coordinate their investigative activity with the CID."[257] Second, "time delays in reporting final information to the DCII caused by the coordination process between the agent and [staff judge advocate] have an adverse impact on other [DoD] agencies conducting investigations."[258] This would be entirely addressed if law enforcement agencies were able to open a file with an intended subject to show that there is an investigation ongoing, but then only title and index the subject if there is probable cause to support the allegation. Further, if law enforcement agencies are going to use the information for investigatory purposes, for example, to establish modus operandi, it should be supported by at least probable cause. Credible information is too low a standard to keep using in light of how the information is used.

Third, the Secretary of Defense must promulgate the changes to the amendment and expungement process to LERs as required by the FY 21 NDAA. The current process to remove one's name from the title block and from databases where that information is indexed borders on absurdity because the standard to become titled is so low. As well, the DoD instruction currently only allows removal of the subject's name if there was not credible information at the time the determination was made. This allows for the ludicrous situation where someone was titled as a subject, but further investigation established an alibi or that another person committed the crime. That subject can never have their information removed from the title block of the LER if there was credible information at the time the agent made the decision to title them. This change could be easily implemented simply by amending the DoD instruction that governs titling and indexing.

None of these changes would significantly impair the ability of law enforcement officers to do their jobs, and they are necessary to prevent the disparate impact of titling on Soldiers of color. Amending the titling process also enables more impartial investigations and helps stem bias. These modifications are an uncomplicated way to curtail the negative effects of titling for the subjects who most deserve the reprieve. Fixing the titling and indexing process also addresses racially disparate impacts in

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[256] 1991 DOD IG REPORT, *supra* note 97, at 14.
[257] 1991 DOD IG REPORT, *supra* note 97, at 14.
[258] 1991 DOD IG REPORT, *supra* note 97, at 14.

the military justice process where the issue appears to be most concerning—to the left of the allegation,[259] during the investigation stage.

B. Conclusion

By his own account, Captain Gilberto De Leon was titled, but never charged, for participating in the Guard Recruiting Assistance Program (G-RAP). [260] This Army program was the subject of a massive CID investigation that was rife with problems.[261] Captain De Leon, who hails from Puerto Rico, participated in G-RAP in 2007, but in an article penned for the Military Times in 2022, he wrote of his experience after being titled and, presumably, indexed. According to Captain De Leon, the titling action "halts all progress" relating to promotion, advanced security clearance or applying for a civilian job.[262] During his career, Captain De Leon deployed multiple times, completed ranger school, and received the Meritorious Service and Bronze Star Medals.[263] After nearly two decades of service, his promotion to major was delayed and "[his] career is essentially over" as a result of his being titled.[264] Other Soldiers titled as part of the G-RAP investigation experienced problems with promotion, faced separation action, "suspen[ded] security clearances[,] loss of civilian

[259] *See* HASC 2020 Hearing Recording, *supra* note 82, 1:26:00.
[260] Gilberto De Leon, *I Never Committed a Crime and Was Never Charged, but an Army Fraud Probe Will Probably End my Career*, MILITARY TIMES (Mar. 15, 2022), https://www.militarytimes.com/opinion/2022/03/15/i-never-committed-a-crime-and-was-never-charged-but-an-army-fraud-probe-will-probably-end-my-career.
[261] Dave Philips, *Army Fraud Crackdown Uses Broad Net to Catch Small Fish, Some Unfairly*, N.Y. TIMES (May 28, 2017), https://www.nytimes.com/2017/05/28/us/national-guard-army-fraud-crackdown.html. *See also* Dennis P. Chapman, *Task Force Raptor: Failure of Military Justice*, CRIM. LAW PRAC. Winter 2021, at 19, 19-20 (condemning the investigation into the G-RAP program as an "overzealous quest in which Army investigators grew so single-minded in their pursuit of wrongdoing that they became blind to exculpatory evidence and willing to pronounce Soldiers guilty of fraud on evidence so thin that one might reasonably question whether they had implicitly adopted a presumption of guilt as their basic operating assumption"); Jeffrey F. Addicott, *The Army's G-RAP Fiasco: How the Lives and Careers of Hundreds of Innocent Soldiers Were Destroyed*, 51 ST. MARY'S L.J. 549, 559 (2020) ("[T]he investigation and the investigatory techniques employed by the CID were rampant with shocking levels of abuse, incompetence, and mismanagement.").
[262] De Leon, *supra* note 260.
[263] De Leon, *supra* note 260.
[264] De Leon, *supra* note 260.

employment[,] debarment from [f]ederal contracts[,] and impediments to securing employment in law enforcement."[265]

In 2009, a CID LER pertaining to Navy Lieutenant Christopher Code stated there was both "credible information" and "'probable cause' to believe that [Lieutenant] Code made a false statement."[266] Lieutenant Code was never charged,[267] and sought relief from his titling and indexing from the Army, the ABCMR and the District of Columbia Circuit Court.[268] His fight lasted more than seven years.[269] In the meantime, the Army used the titling decision alone to attempt to recoup the value of services, more than $40,000, that he allegedly obtained under false pretenses.[270] In 2020, after reviewing the facts of his case, the District of Columbia Court of Appeals held the ABCMR's decision that there was credible information supporting Code's titling and indexing was "arbitrary and capricious."[271]

These two stories are illustrative of the deeper problem with titling and indexing. The problem has not gone unnoticed, but has gone unrepaired by the DoD, which is similar to the predicament of racially disparate impacts in the military justice system, broadly. Congress and the DoD are aware of disparities that "persist in the same pattern: Minority [Service members] are more likely to be brought before the military justice system" but are no more likely than their white peers to be convicted or punished more severely.[272]

Racial disparities consistently appear at the investigation stage of the often-lengthy military justice process. Problematically, this is one of the places where it can do the most damage not only to the Soldier, but also to the investigation and disposition of a case. Therefore, titling and indexing must be significantly reevaluated and changed. The causes for bias early in the military justice process are still arguably unknown and, obviously, there is no quick or easy fix for bias or prejudice—implicit or otherwise. However, there is no need to wait, hand-wringing, for new data or a new

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[265] Chapman, *supra* note 261, at 45; *see also* Addicott, *supra* note 261, at 558 (calling the CID titling process a "highly dubious administrative practice [that] was particularly devastating to the hundreds of innocent and fully-exonerated participants in the G-RAP and AR-RAP in terms of promotions, security clearances, and job selection both in the military and civilian world").
[266] Code v. McCarthy, 959 F.3d 406, 413 (D.C. Cir. 2020).
[267] *Id.* at 417.
[268] *Id.* at 414–15.
[269] *See* Code v. McHugh, 139 F. Supp. 3d 465, 467 (D.C. Cir. 2015).
[270] *McCarthy*, 959 F.3d at 416–17.
[271] *Id.* at 416.
[272] Robinson & Chen, *supra* note 73.

understanding of the underlying causes of disparities.[273] Congress and the DoD have what they need to take action. Congress and the DoD must look for ways to mitigate the *consequences* of bias in addition to addressing biases themselves. Fixing the titling process is the just thing to do and, importantly, a step in the right direction toward "equality of treatment."

[273] *See* Robinson & Chen, *supra* note 73 (suggesting that the Military Services start "listening to the qualified voices that have been shouting out solutions for decades already").

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THIRD THOMAS J. ROMIG LECTURE IN PRINCIPLED LEGAL PRACTICE*

BRIGADIER GENERAL (RETIRED) JOHN S. COOKE†

It is always an honor to be here at the school. I appreciate you coming down to open this lecture, and I appreciate the invitation from General Martin and everyone at the school for having me here. It always feels like coming home. I am delighted to be here, and it is an honor to be here with the 70th Graduate Course. I want to thank you and all the people who are watching, as well, for your service to our country. I am very proud of my service, but I have to say, I do not think it was as difficult as some of the challenges that you face today.

When I was a captain back at Fort Bliss, I never gave a thought to whether some piece of advice or action that I was taking might have any consequences or be heard of beyond the borders of the installation. Today, even the tiniest issue can go viral, and so the pressure on everyone is just greater. With the complexity of the law and the operations that the military is engaged in now, there is just more pressure on you. Heaven knows we need people like you advising commanders and supporting Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen, so they can do the tough

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* This is an edited transcript of remarks delivered on 27 April 2022, to members of the staff and faculty, distinguished guests, and officers attending the 70th Graduate Course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. This lecture is in honor of the 36th Judge Advocate General of the Army, Major General Thomas J. Romig.

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things that they do. It is really an honor to be here with all of you. It is also an honor, of course, to deliver a lecture named for someone whom I think very highly of—Tom Romig. I know personally that he represents principled legal practice. Long before he was The Judge Advocate General, he and I served together in the personnel, plans and training office. I got to see every day what kind of a person he is. The finest officer, lawyer, and human being. I am truly honored to be able to give a talk in his name. Tom, I do not know if you can hear me at this point, but I want to extend my very best to you and Pam. I am sorry we could not see each other in person, but I look forward to the day when we can.

I want to unpack the title of this talk a bit more. It is the Thomas J. Romig lecture. I have already talked about him in principled legal practice. Let me take the word lecture first, because that suggests you all came here anticipating that I would talk, and you would listen; I won't let you down. I know you did not come expecting to be called on, but I would rather do this as a conversation. Therefore, I ask you to at least mentally engage in a conversation with me. Your experience and knowledge are more recent and more relevant to a lot of the things that I am going to address. As I talk about different things, I hope you will hold them up to your own knowledge and weigh them and engage in a mental conversation with me. My hope is that, at the end of all this, you will walk out of here with some pearls that you picked up from what I said or maybe just a few grains of sand that you can form into your own pearls. I hope you will again challenge what I say as we go through. Of course, there will be time for you to do that verbally later, and I welcome your comments and questions when we get there.

Then, there is the principled legal practice part of this. On one hand, that sounds almost trite. I mean, you are not going to have a lecture on unprincipled legal practice at some point. Who would not believe in principled anything? I am going to digress a little bit a few times, and here is the first digression. Think, if you will, about some event. This happens almost every week. Think over the last few years where some company, organization, or agency went off the rails and was in the news because something bad happened. A product failed, customers were dissatisfied with the service, or people were being abused. Maybe people, who belong to the organization or whom the organization worked with, were spending money on things they should not. All kinds of examples like that. When you look at those situations, typically look at whatever institution it was, and it had a principle, a slogan, a vision, or something that it was trying to accomplish, be it safety, customer service, clean environment, or whatever. If you peel the onion a little further back, you see that whatever it said it valued, that vision was not what it was doing. The principle part

goes with the practice part. Whatever it is that you are attempting to achieve must be done with that practice and that constant attention to it, and not just the talking the talk and walking a different walk.

Now, I have been asked today to talk about principled legal practice in the context of military justice, and I will do that. However, I want to start with another digression. I know some of you have heard this story. It is an old joke, actually, but it is about the captain of a ship who every day upon walking under the bridge would, without saying a word to any of the crew, walk to a cabinet, take a key from a pocket, open the cabinet, open a drawer, pull out a little box, look in the box, close the box up again, replace it, lock the cabinet, and then go grab a coffee mug and talk to the crew about whatever was going on the ship that day. This happened day after day, month after month, for a long time. The members of the crew were obviously quite curious what could be in that little box. Finally, one day, the captain, upon going onto the bridge, put the key in the lock and turned it. Then, alarms went off, and the captain was called down to an emergency below deck and left suddenly, leaving the key in the lock. The crew members looked at each other, seeing their opportunity. Finally, one brave member of the crew walked over, opened the cabinet, pulled out the box, looked inside, and inside was a note that said, "port is left, starboard is right." Now you know, that is a pretty poor captain of any seagoing vessel that does not know port from starboard. But the point of the story is that there are some things so basic and straightforward, you do not want to forget them. You cannot stop and be looking when the seas turn stormy, and the night is dark. You need to remind yourself of those things.

In the military justice context, I think that little box should contain the words discipline and justice. By discipline, I do not simply mean the threat of punishment. I said way back when I was on active duty that true discipline is not fear of punishment for doing something wrong. It is faith in the value of doing something right. True discipline is doing the hard thing, knowing what the right thing is, and doing it when it is very hard to do, or when it may put you at some risk in one way or another. That is discipline, and it is an internal thing. Justice is an external thing. It is a societal thing and it is more than just the military justice system, criminal law, and the procedures for enforcing it. It is an attitude. It is a culture that treats everyone, regardless of where they came from and who they are, with dignity and respect. It holds people accountable, and it accords them certain rights in the process. So, that is justice and discipline as I see it. Now, that has not always been the case, and I am going to talk about that as we proceed.

I am going to make the third digression. How many of you watched the streaming video series Get Back? It is about the Beatles. You have all

heard of the Beatles, right? Okay, I know I am old, but I hope you have at least heard a few songs by the Beatles. It is an eight-hour program that was distilled from hundreds of hours of recordings of the Beatles over a monthlong period in 1969, when they set out to record a record album. A record album is an old thing; it is like a big disc, but a record album, about a dozen songs from scratch. They had to write the songs, develop them, and then record them. As you watch this program over eight hours, you see them showing up in the studio, and you watch the bickering, joking, and just being bored. Through the first five or six hours, you would think they are never going to make a record album out of this. You know, they would plunk a few notes on a piano and then do this and that. In the last hour, they show the actual recording. They are on a rooftop in London, and crowds below are marveling at these wonderful songs. You see them, and it is like they have been playing these songs for years and loving it. They are having fun, and there is lessons from this program on how creativity works, how teamwork works, and how something like that gets accomplished.

Among the subtexts is history because, at idle moments in the course of this program, the Beatles would start strumming a few notes from a Chuck Berry song, a Muddy Waters song, from the blues artists from the Mississippi Delta and the south side of Chicago. These were people, who even before rock and roll became rock and roll, were making great music. The Beatles knew that, and they appreciated the history. They knew that they were building on something that took things in completely different directions, but they understood where their music came from. I think that is important to one of the poles on your compass—mastery of the law. I think if you are going to master anything, you need to understand its history. How did we get where we are now? You can know where we are now, but, if you do not understand how we got there, it is hard to really appreciate how it all works. That is the lesson I draw from the Beatles.

As I talk about justice and discipline, I want to trace back to the beginning of our country, back to 1775, when the Second Continental Congress adopted the Articles of War two weeks after creating the Army. The Articles of War were drawn essentially verbatim from the British Articles of War, which had their own roots in Roman law and other things. The bottom line was the Articles of War essentially made courts-martial an extension of the commander. They were instruments of the command, and they were designed to impose discipline. George Washington said discipline is the soul of an Army, and that is true. That was true then, and it is true today. The Articles of War also reflected British society, which was very stratified. You had aristocrats and the moneyed classes, and that is where the officers were drawn from. The enlisted soldiers were drawn

from other parts of society. They were uneducated and poor. They were often drawn from people who were frequented borrowers, and they were not enlisted in the sense that they walked down and signed up with a recruiting sergeant. They were often pressured into service. So those are the Articles of War, and how they began. As I said, they were largely designed to impose a form of discipline.

Washington was great a leader. He asked Congress during the Revolutionary War to increase the number of lashes that a court-martial could impose from 39 to 500. I guess Congress thought how much additional learning are we going to get out of the 400th lash? If they have not gotten it by the 100th, then that is enough. So, they imposed the limit of one hundred. Physical punishment was part of the system. The Articles of War remained in effect, and the Navy had its own articles, which were adopted shortly after and essentially were the same as the Articles of the War. We fought World War II under the Articles of War. Those articles were changed very little for 175 years. Whipping went out in the nineteenth century, but the structure of courts-martial as an extension of commanders remained essentially the same. There were a few changes made in the wake of World War I, but not many. About six million people served in the military in World War I, sixteen million Americans in World War II, better than one in eight members of our whole society. There were a lot of people exposed to the military justice system. There were over two million courts-martial in World War II. That exposure was wide, and these people came from all walks of life. Some were lawyers, bankers, and other professionals. They came away from the whole experience not being very pleased with the court-martial process. The system was not deemed to be fair and was punitive.

In the wake of World War II, reforms were proposed and, of course, a lot of other things were happening. The Department of Defense was formed, and the Army and the Navy were rolled into that. Then, the Air Force was created and rolled into that. We had a peacetime draft for the first time in our history. Congress felt that this anachronistic system had to change, and in the late forties, it held extensive hearings. The House held over three weeks of hearings, where witnesses from all walks of life testified about the military justice system. The end product was the UCMJ, which made a number of changes basically designed to change the commander's role with respect to the justice system. Obviously, the commander retained the power to invoke the system, to convene a court and to refer charges to it, and post-trial responsibilities. However, the idea was to try to insulate the court-martial itself and give it more of the trappings that a civilian criminal court would have. Now, in general courts-

martial, the accused was to be represented by a lawyer, which was not the case before. So, that is how we got the UCMJ in 1950.

I am going to take it decade by decade, and we are going to walk fairly quickly through this. The UCMJ was passed in May of 1950 with an effective date of May 31, 1951. By the time it became effective, we had been at war in Korea for eleven months. Seoul, Korea, had changed hands four times in that eleven-month period between the enactment of the UCMJ and its effective date. There was a lot going on by the time the UCMJ went into effect. However, there remained a lot of controversy about it during those hearings that I referred to. There were people who were opposed to making the several changes that Congress ultimately made, including the judge advocates general. One of the things that judge advocates general were most concerned about was the establishment of what was then called, as General Risch mentioned, the Court of Military Appeals. It was the precursor to the Court of Appeals for the Armed Forces. The judge advocates general thought that the court would interfere with their own supervisory role with respect to the military justice system, and those controversies continued during the fifties. The court did, in effect, interfere. It made some rulings throughout some of the manual for courts-martial provisions that it found were contrary to the code. The judge advocates general and others criticized that to the point where the judge advocates general tried several times in the 1950s to get Congress to abolish the Court of Military Appeals. Congress never did, and the system continued throughout the fifties. Basically, things sort of settled down by the 1960s. Yet, there was still interest in Congress in reforming the system because there was still a lot of criticism of the military justice system.

One of the books about military justice written in the 1960s titled *Military Justice System is to Justice as Military Music is to Music* is the impression that people had. The Supreme Court in the *O'Callahan* decision said courts-martial are singularly inept at the niceties of constitutional law. The perception of military justice was not that great in a lot of quarters, and there were some internal initiatives to improve the system. Major General Ken Hodson, The Judge Advocate General of the Army in the late sixties, was instrumental in helping to shepherd through Congress the Military Justice Act of 1968, which made some significant changes in the system. It changed the law officer to a military judge and gave the military judge more of the authority that a civilian judge would have, to include the authority to hold Article 39(a) sessions. Before that, when a court-martial convened, all the members had to be present for any hearing. The judge could not decide something on their own. The judge had to have the members there, and even when the judge decided something, that decision was subject to a vote most of the time by the

members on whether the judge's ruling would be upheld. Not to mention that the commander who convened the court could also overrule the court's rulings on several things. As a result, the Military Justice Act of 1968 was designed to fix that and to further insulate the court-martial process from outside influence, the command, the convening authority, and to give lawyers and judges more of the authority to conduct the proceedings in order to ensure that insulation. Another right that was established there was the right of the accused to be represented by legally qualified counsel in special courts-martial, as well as general courts-martial changes in the Military Justice Act of 1968 and the Manual for Courts Martial 1969. It is worth noting that, when the act was passed in October of 1968, our presence in Vietnam was at its peak. Half a million troops were serving in and around Vietnam at that time when the war was raging. As many as 500 service people were killed every week in Vietnam during that time. By August 1, 1969, when the act went into effect, we still had over 400,000 troops in Vietnam. I served with people who served in Vietnam during that time, and one of the common things in a court-martial record back then was to say, "trial suspended due to incoming rocket fire." This went into effect when we were busy with other things. That was the sixties.

We are not going to go all the way to the 2000s because my memory runs out in the eighties. So, in the seventies, things are a lot different. The big change here was that the Vietnam War ended, the draft ended, and the services converted to all volunteer, which was a disaster. I came on active duty in the seventies, and the Army was broken. The court-martial rates were through the roof with drugs and indiscipline type offenses. General Risch mentioned that I started out at Fort Bliss, Texas. I was a defense counsel for the first two years. We would not do that to people now. We would not insert somebody right out of the basic course as defense counsel, I hope. I also hope they are better than I was. In two years as a defense counsel, I represented almost 300 Soldiers in courts-martial. This was a little bit like night court or the equivalent of MASH. We were in and out and some cases would take a couple of hours to just run through. It was not like the sophisticated practice that you see nowadays, but that is a reflection of what the Army was like back then, and it had not changed by the late seventies. I was a trial judge in Germany from 1978 to 1980. In my two years there, I again presided over about 300 cases. The Army was in deep trouble. The other services also had trouble during that time because of the quality of the recruiting, morale, and everything else in the wake of Vietnam. Meanwhile, from 1974 to 1975, the Court of Military Appeals, which at that time consisted of three judges in about an eighteen-month period, took the Court in a very different direction. They started striking down several practices that had existed for a long time, curtailing

the powers of commanders, pushing military judges to be more assertive, and exercising more control over courts-martial. It was very controversial. By 1978, the judge advocates general, at least a couple of them, particularly the TJAG of the Navy, were very outspoken in their criticism of the court. By 1979, the Department of Defense general counsel even floated the idea of abolishing the Court of Military Appeals and transferring its jurisdiction to the U.S. Court of Appeals for the Fourth Circuit. A rather radical concept, but the point is there was this period of turbulence both in the services and in the court-martial process itself.

By the 1980s, things had sort of flipped back once again. In the late seventies, the smartest guy in the JAG Corps, a guy named Wayne Alley who had been a judge in several places, was the chief of criminal law for the Army in the Pentagon. At about that time, the federal courts had adopted the federal rules of evidence. The biggest change in evidentiary rules in the federal courts in a longtime, and then Colonel Alley thought the military needed to adopt something similar. He persuaded the Army leadership, as well as the other services, to adopt the military rules of evidence. They became effective in 1980 and that effort was so successful that the judge advocates general and the Department of Defense decided to go ahead and revise the rest of the manual, which in its form had not changed in over one hundred years. It had basically always been sort of a narrative of the court-martial process and was really written so that line officers could conduct courts-martial because, for most of that history that I described earlier, lawyers were not involved. Now that they were involved, it seemed appropriate to shift to a more rule-based approach. As General Risch said, I had the good fortune to be involved in that process and to see it from the inside. The end product was the Manual for Courts-Martial 1984, and part of that was also the Military Justice Act of 1983, which made some of the legislative changes that we could not seek through the manual process, including review of some cases by the Supreme Court. Again, these changes altered the commander's role. Most of the changes at this time did not really curtail powers that the commander had so much as just relieved the commander of some of the details, like detailing a military judge to a court-martial, which was really a ministerial act at that point. It helped to streamline the process. While all that was going on, good changes were happening in the military. One of the Reagan administration’s big initiatives was to build up the Armed Forces and to fund them. We saw a lot more money and resources being devoted to the service. Recruiting practices were changed significantly to make sure that we were getting the kind of quality people we needed, and by the mid-eighties we had gone from an Army that was broken to one that was getting pretty good. The proof is in the first Iraq War in the early nineties when

the services performed quite well. I am going to stop the history at this point and talk a bit about some of the themes and lessons that we can draw from it.

The first one goes back to what I talked about before, justice and discipline. Discipline had gone from something imposed on unwilling or recalcitrant people to something that is instilled and inspired by the court-martial system and by society in its approach to people and recognizing their dignity and autonomy and trying to foster that. William Tecumseh Sherman, a lawyer in the 1800s, said that justice and discipline are polar opposites. That may have been the case when all this started, but now they are joined. You cannot have one without the other. You need them both. To me, that is the overarching change that occurred throughout this time. It has happened in the court-martial process through some changes in the rules, but more in the changes in our attitudes and approach to what we are trying to get out of people and accomplish. Recognizing that courts-martial are important, it is a much broader approach to accomplish the justice and discipline that we want. Obviously, one trend has been the curtailment of the broad authority that commanders had under the original Articles of War. Their powers have been restricted at almost every step of this change. It is noteworthy that, for the most part during the period that I have talked about up through the eighties, the power of commanders were restricted because it was perceived that commanders had a thumb on the scale in favor of the prosecution, that they had a tendency to be too harsh, and that the imposition of discipline was given too much weight.

The changes that you are going to confront were made for a different reason. They were made because commanders were perceived rightly or wrongly, to be too lenient or too lax in exercising the prosecutorial function. That is a big change. I do not know the implications that really has going forward, but I think it is something that needs to be thought about. As commanders' roles and authorities were restricted, lawyers stepped in and gained more authority and responsibility throughout this whole process. Sometimes it was done through regulation, rule, statute, or by default. Somebody had to do it. Commanders were not allowed to do it or did not want to do it. Lawyers stepped in and, as we have seen, they did so under some difficult circumstances, including the Korean War, the Vietnam War, and the turbulence of the seventies. Each time lawyers stepped up and did it, they did it while controversy may have continued at higher levels. The Pentagon, politicians, and others may have continued to fight and argue over whether this was a good change or a bad change. The lawyers on the ground, the company grades and the field grades, were out there making it work and doing it the best they could. It did work, and the system has improved throughout that process. It has not always been a

straight linear line up. There has been bumps, but it has worked because people like you made it work. You put your head down and said, this is what we have got to do to get this done, and that is the broad history of it.

Let me widen the aperture for a minute, and then I am going to give you all a break, and we will come back and talk about all this. It is obvious that I have been around the track and have done a few more laps than most people. One thing I have learned is the value of listening and thinking. It sounds again so simple, but again, you go back to those companies and think about the people who go off the rails. We live in such a fast-paced world, and there is so much pressure to act. It is so much faster than when I started. Again, this is the old guy talking war stories. When I was first practicing law and you wrote something, it would be typed on a typewriter, and you had to actually think about what you were writing rather carefully because it was so clunky to make corrections that you wanted to get it right the first time. It took a while to compose a letter, legal document, or anything like that. You made sure it was right when you actually put your name on it. Oftentimes you would send it by mail to somebody or you would put it in distribution. You would put it in an envelope that got carried by a messenger somewhere, and then and it would be off your desk for a little while. Then, maybe a week later, you would get the response, and you would work on it. That all happens in an hour or less today. As a result, the reflective process is missing from a lot of things that we do.

We, as lawyers, get paid to think and that is what we are supposed to do. To the extent that you possibly can, I recommend stopping and thinking. I have been around when some of the folks at the center come into my office and look at me staring kind of blankly. I think they are a little worried and ask me, "are you-all right?" I tell them, "yes, I'm just thinking." You need to stop, stare out the window, and think sometimes. Then, to the extent you possibly can, find somebody who you trust and bounce things off them. Nine times out of ten, they are going to confirm pretty much what you are already thinking, and that is reassuring. They may add a little touch here and there, and that is very helpful. Every now and then, they are going to keep you from doing something dumb. So, when you've got a tough problem, stop and think about it.

When you talk about principal legal practice, it requires thought. What is the principle here? What are we trying to accomplish as we are all racing around to get something done? What are we trying to achieve? What principles are at stake? Are the principles consistent? Because sometimes you have a couple of principles, and they may be in tension with each other. How do we resolve that? How can we make this thing happen? So, that is what it is all about. It is going back to that cabin and taking out the little box to look inside and remind yourself what you know, what is really

important here, and what do I need to do to make sure that we are doing the right thing. I will stop there. I thank you again for your service and for your attention.

THE INAUGURAL KENNETH GRAY & PHYLLIS PROPP-FOWLE LECTURE ON DIVERSITY, EQUITY, AND INCLUSION*

MAJOR GENERAL (RETIRED) KENNETH D. GRAY†

It is great to be in Charlottesville again and to return to the JAG School, or as all of the old timers refer to it, "the legal center." Carolyn and I spent four wonderful years here. We spent the first year in the advanced class, now the graduate course that most of you in the audience are in, and moved back here to the criminal law division when, then the new school, was opened in 1975. So, you can see how long ago that was and how old I am. Our youngest son, Michael, was born at Martha Jefferson Hospital.

Lieutenant General Risch, sir, thank you for that very kind introduction. General Nardotti, madame general counsel, fellow general officers, distinguished guests, and those joining us virtually for this

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* This is an edited transcript of remarks delivered on 4 May 2022, to members of the staff and faculty, distinguished guests, and officers attending the 70th Graduate Course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. This lecture is in honor of Major General (Retired) Kenneth D. Gray and Lieutenant Colonel (Retired) Phyllis Propp-Fowle.

† Major General (Retired) Kenneth D. Gray was the Judge Advocate General's (JAG) Corps's first Black general officer. He was commissioned as a second lieutenant in the U.S. Army in 1966 after being named the distinguished military graduate of his Army Reserve Officers' Training Corp class. He then enrolled in West Virginia University's College of Law, under the Excess Leave Program, and earned his law degree in 1969. He was the only Black student in his law school class, and just the third Black student to graduate from the College of Law. Upon his graduation, he entered active duty in the JAG Corps, completed the Officer Basic Course, and went on to serve in various duty assignments, including a deployment to Vietnam. After returning from Vietnam, he was assigned to the Personnel, Plans and Training Office (PPTO), where he developed and implemented a program to improve the recruitment of Black and women lawyers into the JAG Corps. He spearheaded many initiatives, including recruitment visits to law schools with large minority attendance, and the creation of a paid summer internship for law school students within Army legal offices. He excelled in multiple leadership assignments throughout his career, including serving as the Deputy Staff Judge Advocate, 1st Armored Division; Staff Judge Advocate, 2d Armored Division; Chief, PPTO; and, Staff Judge Advocate, III Corps and Fort Hood. He was promoted to brigadier general in 1991. In 1993, he was promoted to major general, and was selected as The Assistant Judge Advocate General of the Army (now known as the Deputy Judge Advocate General). He retired from the Army in 1997 and has continued to serve in significant leadership roles in the civilian community to this day.

presentation, thank you for being here this morning as we celebrate this inaugural lecture, establishing the first leadership center Academic Chair on Diversity, Equity, and Inclusion. It is a privilege to speak on behalf of Lieutenant Colonel Phyllis Propp-Fowle. I am sure she would say the same if she could be here about how humbled we are to have this academic chair named in our honor. I know most of you have had the opportunity to read about Lieutenant Colonel Propp-Fowle, but for those who are joining us virtually and not aware of her achievements, let me take a few minutes to share with you about Lieutenant Colonel Propp-Fowle. I did ask her namesake, Ms. Phyllis Gaddis, if it was okay for me to read some of this to you and introduce her to you.

Lieutenant Colonel Phyllis Propp-Fowle was the first to open the door for women lawyers to serve our country as a Soldier and attorney. She was born in Jasper, Iowa, on May 8, 1908. She earned her law degree from the University of Iowa Law School in 1933, as the only woman in her graduating class. Lieutenant Colonel Phyllis Propp-Fowle was the U.S. Army JAG Corps' first female judge advocate, first female post judge advocate, the first female judge advocate to earn a combat patch and overseas service stripes, and the only female judge advocate to serve overseas during World War II. She joined the Women's Army Auxiliary Corps and was commissioned as a second lieutenant in October 1942. In September of the following year, Congress renamed the Women's Army Auxiliary Corps the Women's Army Corps and made it part of the Army. Because of her legal training, she requested transfer to The Judge Advocate General's Department. On May 4, 1944, her request for transfer was granted. She became the first woman to wear the JAG insignia on her collar, and she was assigned as the Post Judge Advocate at Fort Des Moines, Iowa. In January 1945, then Captain Propp-Fowle deployed to Europe and served in various assignments, including in the legal affairs section in the Office of the Staff Judge Advocate, European Theater, Paris, and then as the Chief, Legal Affairs Division, Judge Advocate Division, U.S. Forces European Theater in Heidelberg, Germany.

In 1947, the Army discharged all women, so then Major Propp-Fowle was released from active duty in July 1947. She was immediately hired as a civilian attorney in the Military Affairs Branch, Judge Advocate Division, Headquarters, European Command in Heidelberg, Germany. She also remained in the Judge Advocate General's Department as a reservist and was promoted to lieutenant colonel in 1949. Lieutenant Colonel Propp-Fowle retired from the Army Reserve as a lieutenant colonel in 1968. She died on June 12, 2000, at the age of 92, and the following year, she was inducted into the Iowa Women's Hall of Fame.

Today, we celebrate the establishment of the Leadership Center Academic Chair on Diversity, Equity, and Inclusion in her honor. Please join me in acknowledging the great service of Lieutenant Colonel Propp-Fowle–the Diversity, Equity, and Inclusion co-Chair.

It is an honor to be here to speak with you this morning. Now, I want to share my background with you. I know General Risch talked a little bit about that, but I want to talk about some of the life lessons I learned during my career and how I was able to overcome the many challenges that I faced along the way. I also want to talk about the historical perspective of diversity in The Judge Advocate General's Corps in the early 1970s and what it means in relation to TJAG's efforts today on diversity, equity, and inclusion. And finally, if we have time, I will share a little bit about my retirement and transition to West Virginia University to be the vice president for student affairs.

You know, it is a long journey from where I grew up in West Virginia to standing before you today. I grew up in Excelsior, West Virginia, a suburb of War, located in McDowell County, the southernmost county in the state of West Virginia, located near the Virginia border. Welch is a kind of county seat located about thirteen miles from where I grew up in Excelsior. It would take at least thirty-five minutes to drive from my home to Welch around the winding roads, through the mountains, and through a couple of the coal mining towns of Coretta and Coalwood.

Over in Coretta, my father worked in a coal company as a coal miner. The company store was also located in Coretta. Of course, most of you probably know that, when the miners were paid, they spent their money in the company store, so the coal companies paid their employees and then the workers returned it to them by going to the company store to make all their purchases. Coal mining was the major employer of the people in that county. As General Risch said, I grew up during segregation and attended school in Excelsior, an all-black school. All twelve grades were in that one school. The elementary students were on the first floor, junior high on the second floor, and the seniors were on the third floor. It was the only black school in the region, so black students were bused from as far away as Virginia to come to that school. I would say that when people complained about busing later on, they really did not know what busing was. Sometimes it would take those students two hours to get home. If they played football or basketball and had practice, they wouldn't get home until very late in the evening.

Anyway, I grew up there during segregation and all of you are probably familiar with *Plessy v. Ferguson*. It is a landmark decision that was decided in 1896 where the Supreme Court ruled that racial segregation laws did not violate the U.S. Constitution, as long as the facilities for each

race were equal in quality. A doctrine that came to be known as "separate but equal." That was the law of the land until 1954, when the Supreme Court decided *Brown v. Board of Education*. In that case, Chief Justice Warren delivered the opinion of the Court, and he stated, "We conclude that, in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs . . . are . . . deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." Although Brown was decided in 1954, it took ten years for it to reach McDowell County, where I grew up, which was the southernmost county in the state. There were locations in the state that integrated right away, but it took ten years for it to reach McDowell County. By that time, I had already graduated from school in 1962.

How many of you have heard of Homer Hickam? Homer is one of the rocket boys in the movie, *October Sky*. Anyone remember the movie, *October Sky*? It was based on his life story. Homer grew up in Coalwood, West Virginia, another coal mining town along that road to Welch. He grew up seven miles from where I lived. There were some similarities between us. His father was a coal miner, and my father was a coal miner. He was a couple of years ahead of me in school, but he attended Big Creek, the all-white school in the area. Our experiences were so different that we could have been a thousand miles apart. As many of you may know, Homer achieved success by later becoming a NASA engineer, which was his boyhood dream. Unlike Homer, I didn't dream of being a lawyer or a two-star general in the Army, or even a vice president at West Virginia University. I did dream about going to college, getting a good job, and being successful. My grandfather was a Baptist minister, and my father, a coal miner.

After eighteen years of working in the coal mines, my father was laid off because that is what they did back in those days when they got close to retirement. They would lay them off, so they would not pay them their retirement. My mother, who was a homemaker, went back to college and got her teaching degree and began to support the family. My family wanted me to have a life beyond the coal fields. They made it clear that, if I got an education, it would open doors to new worlds for me. My teachers also stressed the importance of a college education. They served as role models for African American students in that segregated school system. My parents and teachers stressed to me that I could do whatever I wanted to do or be whatever I wanted to be if I got an education. So, I have been fortunate to achieve many of my own dreams and to go further than I ever thought possible. It was not easy, and I had to overcome a lot of challenges and obstacles along the way.

As Booker T. Washington once said, "success is to be measured not so much by the position that one has reached in life, as by the obstacles which he has to overcome while trying to succeed." I managed to succeed by having a foundation of values that helped me through the hard times, believing in myself, never giving up, and looking back to draw strength from where I came from. I always remember something that my grandmother used to say to me, "sometimes you have to climb up the rough side of the mountain to reach your goals." That reference is to a gospel spiritual that was sung in our church. She knew that I would face a lot of challenges and obstacles in life and wanted to prepare me for the struggles ahead. She knew that I would need help from time to time to make it to the top, and she encouraged me to draw on my faith during times of struggle. I knew that whatever hurdles I would face, I had to work hard and never give up until I reached my goals. You know, Sir Winston Churchill was once invited to speak at the school that he attended as a youth. When he got up to speak, according to popular history, he simply said "never, ever, ever, ever give up, never give up, never give up, never give up," and sat down. I never, ever gave up because I knew the obstacles that I faced would not define me, but the way I responded to them would.

Dr. Martin Luther King Jr. said once that "the ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands during times of challenge and controversy." During my career, as I faced many challenges along the way, I drew strength from that quote, and I drew strength from looking back where I came from. I looked back to Excelsior Bottom, West Virginia, where my parents and teachers taught me about the difference between right and wrong and the importance of doing what is right. I look back to the ROTC Cadre at West Virginia State College, now West Virginia State University, where they taught me the professional ethics of being a Soldier. I look back to my law school professors at West Virginia University who taught me about the professional responsibility that is required of a lawyer. My success is based on those life lessons and how I learned to cope with the many life experiences I faced along the way.

It is important to have a strong foundation of values underlying all that we do. For me, that foundation is a set of values I learned in the Army and guide my everyday life. I call them the five C's: commitment, competence, candor, courage, and compassion. These are key qualities that a leader needs to have. They are qualities that transcend professional boundaries. I was always committed to what I was trying to accomplish, and I knew I had to be competent in all that I was doing. I had to know my job and do it well. Candor is absolute integrity. I had to be honest in all that I did. I had to have the courage to make potentially tough decisions and the

compassion to understand that everyone is human, and everyone makes mistakes that we need to learn from. There are so many people who touched my life throughout these years and helped me create a foundation for success. Upon that strong foundation, I was able to build a more successful career than I ever dreamed possible.

There are also four pillars that supported my successful career. The first is my law school experience of being the only African American student in the entire law school for the three years that I was there. I was the third African American student to graduate from the WV College of Law when I graduated in 1969. Carolyn and I have very fond memories of our time there, and we have made lifelong friends. That experience also allowed us to assimilate very well when we were assigned to JAG offices where we were the only African Americans in the office. You know, Morgantown, West Virginia, where WVU is located, was a lot different during that time. It was the mid-sixties. Most of you are too young to picture the sixties. There are a couple of us here who can do that. As African Americans, we were still in the struggle to be treated with dignity and respect.

I spent my first year in law school living in a residence hall because Carolyn had taken a job in Cleveland before I got accepted to law school. Then, she got a job during my second year of school at Flats Elementary School. It is no longer there. It was replaced by a hotel, which was then replaced by a bank. She got her first teaching job in West Virginia there. Unfortunately, we could not find a place to live. We would call, and the apartment would be available, but when we showed up to sign the lease, it was suddenly not available for us to lease. So, we decided that we were going to buy a mobile home. There was a mobile home park right near the school within walking distance, and the sign said, "we have spaces for rent." We decided to buy a mobile home. We returned to Morgantown about a week before that mobile home was to be delivered. You can probably guess what happened next. As an aside, back then, Lieutenant Gray did not have the savvy or common sense to realize what was going to happen next. My wife said sometimes that still exists. But I digress. So, we knock on the door of a mobile home park owner and explain our situation: "We are staying at a local motel, and our mobile home is coming in a week. Could we rent a space to park it? We are kind of desperate." There was this long pause. He looked at us and told us that he could not rent us a space because he would lose all of his current customers, and no future customers would want to rent if they knew we were living there. Now, if I stopped right there, in this story, the takeaway would be that this must be one racist individual, and this must be a racist town. However, that is not the end of the story. His next comment to us was that, while he

could not rent to us, he knew someone who would rent us a space, and he gave us that person's telephone number.

We returned to our motel desperate because this was kind of our last hope. I picked up the phone to call this person, and there was no dial tone, but I heard someone on the other end of the line, so I said, "hello." There was someone on the other end of the line who said "hello." This was the other mobile home park owner calling us to offer us a space to park our mobile home because the one person who could not rent to us had called him, told him about us, and we connected that way. So, one of takeaways here, and one of the life lessons that Carolyn and I learned well is that you cannot always believe that someone's actions are solely based on race. The mobile home park owner made an economic decision. That is what we concluded when he would not rent to us. The other life lesson was that there is a very basic good in most people, and sometimes it takes time for it to shine through. Here again, this is another instance where we are climbing up the rough side of that mountain and struggling to get to the top, to get towards our goal, and you have to have faith that a helping hand will be there to help you reach that goal. In the words of another spiritual gospel, "God may not be there when you want him, but he will be there right on time. He is an on-time God." Yes, he is.

The second pillar that supported my career consisted of the mentors that I had during my career. You heard comments that Lieutenant General Risch made describing the leadership at the time. Some of them were significant in providing advice and guidance that helped me be successful. The third pillar, the warrant officers, NCOs, and enlisted Soldiers who helped me adapt to the Army and to the JAG Corps. They are the backbone of the Army and the regiment. At WVU, my dedicated staff helped me be successful by their selfless dedication in getting the job done and making our students their number one priority. And, of course, the final pillar, the fourth pillar–my family, especially my bride and my best friend. Carolyn has been with me for fifty-six years this August. I cannot thank her and our two sons, Chris and Michael, enough for their support.

I know I stand on the shoulders of so many black officers who served before me, who paved the way for me to become the first black general of our Corps since its inception in 1775. I owe them a debt of gratitude for laying the foundation for me to be successful.

As I look back to my history in the Corps, I believe it is important for me to share with you what occurred related to diversity in the Army and the Corps. In the early seventies, when we still had a draftee Army, black Soldiers in the Army had expressed concerns of not having lawyers who looked like them to represent them in courts-martial. They did not feel the lawyers assigned to their cases understood their backgrounds, their

culture, and could not relate to them. This was their perception. Now, those lawyers were probably capable and competent to do their jobs and probably did their jobs, but, you know, sometimes perception takes the place of truth. So, in April 1972, because of those concerns about discrimination in the military justice system, then Secretary of Defense Melvin R. Laird established a task force on the administration of military justice in the Armed Forces. The task force looked at whether there was discrimination in the administration of military justice. Were the punishments and initiation of charges disproportionate based on race? The task force found evidence of both intentional and unintentional discrimination toward racial minorities in the military justice system. They also concluded that, in some cases, discrimination happened on purpose, but for the most part, it was not intentional, and it occurred despite the best efforts of commanders, staff, and service men and women to prevent it from occurring.

We know that, in 1973, when the all-volunteer force was initiated, some of the racial tension issues were addressed. Although some strides were achieved in racial equality and non-discrimination, some concerns about the treatment of and opportunities for racial minorities have persisted into the 21st century. So, what was the response of the Army and the Judge Advocate General Corps? As a result of what was happening in the Army and the perception of black Soldiers regarding representation in the early seventies, TJAG, then Major General George Prugh, decided to establish a minority lawyer recruiting program to focus on the recruitment of more black lawyers and more female lawyers. There were sixteen black judge advocates, and eight women judge advocates out of an active force of 1600 on active duty. Now, how did I become that minority recruiting officer for the corps? Well, when I returned from Vietnam in August of 1971, I was assigned to Fort Meade, Maryland, and I turned down an assignment to Hawaii because I was planning to leave the service. I had a job offer in Charleston, West Virginia, and I was planning to finish my obligation, get out, and go back home.

In October of 1971, I received a call to come to the Pentagon to meet The Judge Advocate General. It turned out to be an interview for the job of minority recruiter for the JAG Corps. When I was in Vietnam, I served in the Da Nang support command, and, during that time, a military judge would come to Da Nang to try all of our cases. That judge was Tom Crean. Tom was reassigned to the personnel, plans, and training office after his tour in Vietnam. I believe he was the one who recommended me for that particular job. I am sure I was not the first officer considered for the job because you had Captain Togo West in the Secretary of the Army's office and you had Captain Curtis Smothers up in the Secretary of Defense's

office. There were other black officers assigned in various jobs, but in any case, I got the job. When I went over for the interview, I took my wife with me, and they spent the whole time talking to her. They never really interviewed me. I think they just wanted to make sure I did not have two heads, two left feet, and could communicate well. They hired me for the job. I got part-time early on, and then, in late January 1972, I moved over to the Pentagon to be the minority recruiting officer for the JAG Corps full-time.

I developed the five-point program. Number one, as General Risch mentioned, making recruiting trips to the predominantly black law schools and making recruiting trips to those law schools that had a large minority lawyer student population. Second, we placed advertisements that were specifically designed and photographed in legal and other national publications, magazines showing black and female judge advocates performing duties as counsel or as a judge. Third, we worked with the National Bar Association to assist in recruiting black lawyers, and we made recruiting trips to the National Bar Association and American Bar Association's annual and mid-year meetings. Fourth, we actually set up recruiting booths in their exhibition halls to hand out materials, to talk to lawyers, and to tell them about the JAG Corp. This is probably the first time that any of this had ever occurred. We worked closely with the Army Reserve and National Guard to help identify lawyers who might want to come on active duty. And finally, number five, we established the summer intern program to hire fifty first-year law students and fifty second-year law students to come and work in our offices to see what our practice was. The idea was not necessarily to recruit them, but the idea was for them to come and see what we do, see the practice, and then return to law school to tell their classmates, serving as ambassadors for the JAG Corps. I guess the program is still in some form in existence today, some fifty years later. We are proud of that fact. Because I remember I can recall trying to get the last signature for that program and that last signature was a civilian in the basement of the Pentagon. Now, I have never been to the basement of the Pentagon. It was a scary place, but he was buried in a cubicle, probably about the same size as my cubicle up on the second floor. He had the power to sign that program and make it a reality. So, I am very proud of that.

Now, while not a part of the minority recruiting program, then about that same time, Tom Crean, who I mentioned, was in charge of creating or standing up the funded legal education program that had been approved by Congress in 1973. I had the privilege of serving on that first selection board of selecting the first twenty-five officers to come and go to law school and then subsequently come into the Corps. When I was reassigned to the advanced course, now the graduate course, following my tour there,

then Captain William P. Green Jr. replaced me, but assumed an expanded role in the personnel, plans, and training office. He was given the job of overall recruiting for the JAG Corps. He was instrumental in increasing our association with the National Bar Association by formally establishing the military justice section of the NBA.

Now, if we fast forward to current times, we know that George Floyd's death and the manner in which it occurred shocked the conscience of the Nation and led to many of the initiatives taking place today related to diversity, equity, and inclusion. I believe the foundation for the future of the Judge Advocate General's Corps has been set with the establishment of a policy on diversity, equity, inclusion, and accessibility and, of course, the implementation of the diversity, equity, and inclusion council and having its director, Colonel Rodriguez, be in charge. There has been a lot written about diversity, and a central theme running through the commentaries is that, when we talk about diversity, we are really talking about ourselves. We are all products of where we came from, how we were raised, and the values we learned growing up. Just as I shared my background with you, all of you also bring your cultural backgrounds, life experiences, and viewpoints to the subjects of diversity, equity, and inclusion. Diversity is not just about race. It encompasses race, but it also includes ethnicity, culture, gender, sexual orientation, language, religion, and many more. I believe General Risch recognized this in his policy memorandum on diversity, equity, inclusion, and accessibility when he said that the Soldiers, Civilians, and Family members of the judge advocate legal service possess the unique attributes, experiences, cultures, perspectives, and backgrounds to recruit, develop, and retain a diverse team of legal professionals.

Equity is fair treatment and access to the right assignments and the opportunity to compete for advancement. I believe equity requires a look back historically of what has taken place in the Judge Advocate General Corps and making a commitment to make changes, which I think this policy will do and will accomplish. Inclusion ensures, as Colonel Rodriguez talked about, that everyone is a part of the organization and that they feel welcomed and connected. Accessibility, of course, ensures everyone can use facilities, including those with disabilities. Finally, in paragraph four of the policy, General Risch emphasizes that the Army and our judge advocate legal services team are stronger because of our diversity, and we have a collective responsibility to ensure every member of the force has the opportunity to reach their potential.

Now, Colonel Rodriguez and I, as we began our discussions getting ready for this presentation today, we talked about a lot of things. We agree that it is clear the leaders at the top have made a commitment and set in

motion, cascading down from the top, the desire to create a more diverse JAG Corps. We also talked about whether diversity and inclusion are about reaching specific numbers of a demographic group. We basically concluded that it is not just about numbers, but it is about making those numbers count so the voices of those individuals can be heard, so they have input, and they are included in the decision-making. It is important for the leadership to treat everyone with decency, to make them not only feel included in our teams but each of them indispensable in our entire effort. That is your calling as a leader in this team, and that is why this work is so important. Now, having a policy from TJAG and a DEI council is a good start, but the reality is that we all are in this together. It is going to take all of us. It is going to take all of you to accomplish diversity, equity, inclusion, and accessibility in the judge advocate legal services. So, if we take the five Cs that I talked about— commitment, competence, candor, courage, and compassion— you will realize that all of us will have to commit ourselves to getting this done. We will have to commit ourselves as members of the team to make the policy succeed. We must be competent in carrying out the policy. In other words, we must have the knowledge, judgment, and skill to get it done. We must have the courage to recognize our differences and the strength to reach out to others who are not like us. It will take candor and honesty to be open and sincere about what needs to be done. And it will take compassion, which might mean changing things about us to do what is necessary to help others and to help the team be successful.

One of the takeaways from this is that the effort to create a more diverse, equitable, inclusive force is sincere. If we all have the commitment, competence, courage, candor, and compassion, we can get this done. This policy creates a pathway to those who have not felt included before. I believe it is going to be a challenge to make diversity, equity, and inclusion a reality, and tough for all of you as leaders. In their book, *The Leadership Challenge*, James Kouzes and Barry Posner talk about what it takes to lead. They discussed the five practices of leadership. You must model the way, set the example, and make sure values align with the vision of the policy. You must inspire shared vision to make sure other members of the team have those same values and vision to make the policy a reality. You must challenge the process by finding ways where necessary to change, grow, and improve to make the policy a reality. You must enable others to act so they feel empowered to lead at their level to make the policy a reality. You must encourage the heart by recognizing, appreciating, and where appropriate, celebrating and rewarding the accomplishments of the team. And of course, Kouzes and Posner say the

foundation of all of this is credibility because your team must believe in your credibility. Without credibility, you will not be able to lead this effort.

I want to leave you with a few concluding thoughts. When I was about to retire, I was not sure what I wanted to do. I would have lunch occasionally with some of my former law school classmates and one of them said to me one day, "you should do something that warms your heart." Well, the job as vice president for student affairs at West Virginia University was certainly a job that warmed my heart, but it almost did not happen. Four years earlier, as General Risch mentioned, I had been nominated for a vice president's position at West Virginia University. Well, I was just beginning my statutory tour, and I could not accept it because I had four years left to serve. Almost four years later, as I was about to retire from the Army, I remember receiving an invitation in the mail, inviting us to a football game and a pregame brunch. Of course, the invitation came from the West Virginia University president. Well, Carolyn and I go, and I thought maybe this is an opportunity to get a job at the end of my career here. We get to the brunch, and bump into the president as he was wandering around greeting everyone. We were chatting, and it was pretty clear he had no clue as to why we were there because I later learned that they had these rosters, and people get invited to these functions from that roster. As a member of the Academy of Distinguished Alumni, it was just my turn to get invited. So, we got to the game, and we get to the middle of the fourth quarter. No one has said a word about a job, so I turned to Carolyn, and I said, "well, I think we are going to have to come up with a different plan." The game ends and we are in the president's suite box, and we go down to the elevators, and they have locked the elevators down because the opposing coaches come down from the upper level. They lock the elevator so no one else can get on while they are going down. Someone said to us, "if you want to go down faster, there is a staircase right over there that you can walk down." It is a long way, but it is going down. So, we go over to the door, we open the door coming down from the upper level, and it is the president. The three of us join right there as we start down that long staircase, and we have an opportunity to chat. Of course, he is asking me to tell him my background. We get to the bottom and go our separate ways. Low and behold, he remembered that conversation when they needed a vice president for student affairs some few months later.

When I went to the interview for the job, I had interviews with the student affairs staff, students, faculty, university staff, and university leadership. My final interview of the evening was about 6:00 o'clock in the evening in the president's conference room and it was with the community folks, the chief of police, fire department chief, the city

manager, and the mayor. I did not know who was in what role. As I walked into the room, it turns out that the mayor of Morgantown was a woman, a black woman who had served several terms as the mayor, and she subsequently was overwhelmingly re-elected to several terms in the state legislature. Things have changed totally in that town.

My retirement ceremony was on Friday in the courtyard of the Pentagon that we affectionately called "ground zero" and in attendance was the Secretary of the Army Togo West and General Nardotti presiding. It was a magnificent event. It still brings significant emotion to me now because of all the people who were there, the band, and just the pomp and circumstances that surrounded my particular retirement. I retired on a Friday, had my retirement dinner on a Saturday night, drove to Morgantown on Sunday, and started my job as vice president that Monday. I do not recommend it. Take some time off because going from one tough job to another— you just need a little bit of a break.

Now, a week after the school started that fall, WVU was named the number one party school in the country by the Princeton Review. I have always been convinced that the only students who fill out those surveys that the Princeton Review sends out are people who are hanging around the student union, not going to class, not doing what they are supposed to do. They always love to put us as the number one party school. Every college has these issues with underage drinking. So, we had to come up with a program to combat underage drinking. We developed a weekend alternative program called, "Up All Night." I organized a task force to come up with a plan in about three or four weeks. As a military guy, I saw a problem, and I wanted to get it solved, but I did not realize that you cannot do that easily in academia. You know, you have to study the problem for six months. You come up with a plan and then you get a budget six months later, and maybe a year later, you implement the program. I remember briefing this at the president's meeting, and they were stunned with what I was going to do. There was a stunned silence because they looked at me like this will never work. I mean, is this guy new to our system? This is not going to work, but what they did not realize was that everything already existed, as I saw it. Everything already existed in our student union. We just moved it from earlier in the week to Thursday, Friday, and Saturday nights. Thursday because the students told us, and data showed, that Thursday is the biggest party night of the week for college students. We had a safe and fun alternative for our students to go to in their student union. We had food, fun activities, and we served a hot breakfast from midnight to 2:00 a.m. We cut it off at 2:00 a.m. because the bars closed at 3:00 am, and we wanted to get those folks in the bars a meal, so that when they went back to their residence, or off campus

residences, there were no issues there. Emergency room staff, nurses, and doctors told us this made a big difference in their patient numbers and prognoses. The damage in the residence halls went down, and the damage on off-campus housing also went down.

This program was so popular that colleges and universities from all over the country came to study the program to see if they could implement it and do the same thing. Good Morning America came and did a segment on our program as an alternative to underage drinking. I am very proud of that because the program still exists today. It was started in 1998, and it is still going on today in WVU, just like the summer intern program. I guess these are two of my legacies that I am most proud of.

I want to leave you with just a couple of comments here. When I was at the Pentagon, I used to hold a staff meeting every Monday morning to get ready for the week that was coming up. I continued that when I got to WVU, and I noticed at times during those meetings, my staff members would receive a telephone call on their cell phones. They would look at their phone and not answer the call. I finally asked one of them one day who was on the phone. He replied, "it was just my daughter." I told them then if calls come from your children, your parents, and so forth, always answer the phone. You never know when that call might be an emergency. What we are talking about in these meetings are topics that are important, yes, but your family comes first. The second thought I want to leave with you–how many of you have read James Patterson's book, *Suzanne's Diary for Nicholas*? Well, James Patterson fans did not particularly like the book and were disappointed because it was not an Alex Cross novel or it was not about the Women's Murder Club. It was a love story. I want to share something with you from the book that I shared with my staff at West Virginia University. In the book, Suzanne was a doctor at a major hospital. She worked so hard and was so stressed out that she had a heart attack at a very young age. The doctor treating her shared this philosophy with her that I think we can all use. It is called the lesson of the five balls, and it goes like this. He said, "imagine life is a game in which you are juggling five balls. The balls are called work, family, health, friends, and integrity. You are keeping all of them in the air, but one day you finally come to understand that work is a rubber ball. If you drop it, it will bounce back. The other four balls family, health, friends, and integrity are made of glass. If you drop one of these, it will be scuffed, nicked, and perhaps even shattered." Once you truly understand the lesson of the five balls, you will have the beginning of balance in your life.

On behalf of Lieutenant Colonel Phyllis Propp-Fowle, thank you for allowing me to speak to you today. God bless all of you who serve our

great country. God bless our regiment. God bless our Army, and God bless the United States of America. Thank you very much.