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MILITARY LAW REVIEW

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CONDITIONS AND CIRCUMSTANCES NOT CONSTITUTING A PHYSICAL DISABILITY: A NEW CHAPTER

MAJOR ANDREW E. NIST[1]

When a young Soldier presents with mental health symptoms, the stakes are high. Despite every command effort to support a Soldier, there are times when mental health symptoms, the most severe of which being the desire to cause harm to others or oneself, can increase. Because many mental health conditions develop in early adulthood, ensuring that Soldiers have access to mental health providers quickly is of paramount importance. There are times when the weight of a mental health disorder is too heavy to carry; it is best for a Service member to return to their home of record to rely on the care of their Family members. These circumstances are rare, but due to the high stakes, it is important that every judge advocate understand the fastest administrative separation tools, empowering leaders to help their struggling Service members and treat them with kindness, dignity, and respect.

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Sometimes Soldiers suffer from "conditions and circumstances not constituting a physical disability"[1] (CCnCPD), which can serve as a basis to administratively separate the Soldier under Army Regulation (AR) 635-200, paragraph 5-14.[2] However, the leaders in their unit frequently misunderstand paragraph 5-14, which is arguably the most confusing provision in AR 635-200. This article examines the regulatory framework surrounding such separations, provides legal practitioners guidance on improving the processing of these separations, and offers recommendations on how to revise the regulation. It explains in practical terms what CCnCPD are for the legal practitioner. It then delves into the legal framework surrounding the separation of Soldiers, including an overview of the applicable legislation, Department of Defense (DoD) regulatory guidance, and Department of the Army guidance for separating Soldiers with CCnCPD. In addition, this article explores the regulatory frameworks established by the Departments of the Navy and Air Force, comparing and contrasting their implementing regulations with that of the Department of the Army. It then addresses immediate actions legal practitioners may take to streamline processing administrative separations under the current iteration of AR 635-200 and further argues for reading a voluntary administrative separation into the regulation.[3] Finally, it looks to the future, proposing language for an entirely new chapter.

I. Behavioral Health Conditions

Before addressing the law, legal practitioners should understand the magnitude of behavioral health conditions throughout the U.S. population and, consequently, the military. The National Institute of Mental Health (NIMH) found that 5.5 percent of U.S. adults suffer from serious mental illness (SMI).[4] However, when narrowed to young adults between

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[1] U.S. DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS encl. 3, para. 3(a)(8) (27 Jan. 2014) (C7, 23 June 2022) [hereinafter DODI 1332.14]. This article employs the common term CCnCPD from DODI 1332.14 instead of the various terms employed by the Services.

[2] U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 5-14 (28 June 2021) [hereinafter AR 635-200].

[3] *See* discussion *infra* section titled "Reading in a Voluntary Separation." General court-martial convening authorities (GCMCAs) may promulgate a policy letter to administer voluntary separations with a template request.

[4] *Mental Illness*, NAT'L INST. MENTAL HEALTH, https://www.nimh.nih.gov/health/statistics/mental-illness (Mar. 2023).

eighteen and twenty-five years old, that percentage jumps to 11.4 percent.[5] This figure is significant because the NIMH defines SMI as "a mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities," such as workplace performance.[6] Two categories of mental illness, personality and adjustment disorders, merit further discussion as they feature prominently below.[7]

A. Personality Disorders

Within the broader category of behavioral health conditions are personality disorders, which the DoD carves out from other CCnCPD.[8] Generally, a personality disorder "is an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible."[9] Importantly, personality disorders have "*an onset in adolescence or early adulthood*, [are] stable over time, and lead[] to distress or impairment."[10] Personality disorder refers to a larger group of twelve cognizable disorders that share the previously mentioned criteria.[11] A 2007 study of the prevalence of personality disorders in the general population indicates that 9.1 percent of the U.S. population has a personality disorder of some variety, a statistic echoed in the *Fifth Edition of the Diagnostical and Statistical Manual of Mental Disorders* (DSM-5).[12] Personality disorders uniquely affect military ranks, as 45 percent of the active-duty force consists of Soldiers aged twenty-five years or younger—the prime demographic for the onset

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[5] *Id.*
[6] *Id.*
[7] *See infra* Sections titled "Overview of Applicable Law and Regulations" to "Rewriting AR 635-200, Paragraph 5-14."
[8] *See infra* Section titled "DoDI 1332.14."
[9] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 645 (5th ed. 2013) [hereinafter DSM-5] (emphasis added).
[10] *Id.*
[11] *Id.* at 645-46. The twelve cognizable personality disorders are paranoid personality disorder, schizoid personality disorder, schizotypal personality disorder, antisocial personality disorder, borderline personality disorder, histrionic personality disorder, narcissistic personality disorder, avoidant personality disorder, avoidant personality disorder, dependent personality disorder, obsessive-compulsive personality disorder, personality change due to another medical condition, and other specified personality disorder and unspecified personality disorder. *Id.*
[12] Mark F. Lenzenweger et al., *DSM-IV Personality Disorders in the National Comorbidity Survey Replication*, 62 BIOLOGICAL PSYCHIATRY 549, 556 (2007); DSM-5, *supra* note 9, at 646.

of a personality disorder.[13] Soldiers with a personality disorder are likely to experience interpersonal issues in the workplace, which, if serious enough, may result in adverse action.

B. Adjustment Disorders

In addition to personality disorders, the Army carves out adjustment disorders from other CCnCPD.[14] Unlike personality disorders, the DSM-5 notes that adjustment disorders are common in the general population.[15] Adjustment disorders nest within the larger category of "[t]rauma- and stressor-related disorders," all of which share one common diagnostic criterion: "exposure to a traumatic or stressful event."[16] As discussed in the DSM-5, an adjustment disorder diagnosis is appropriate when five criteria are met:

> 1) The development of emotional or behavioral symptoms in response to an identifiable stressor(s) within [three] months of the onset of the stressor(s).
>
> 2) . . . [C]linically significant [symptoms,] as evidenced by . . . [m]arked distress out of proportion to the severity or intensity of the stressor . . . [and/or] [s]ignificant impairment in social, occupational, or other important areas of functioning.
>
> 3) The stress-related disturbance does not meet the criteria for another mental disorder and is not merely an exacerbation of a preexisting mental disorder.
>
> 4) The symptoms do not represent normal bereavement

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[13] U.S. DEP'T OF DEF., 2020 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY vii (2020).
[14] *See* AR 635-200, *supra* note 2, para. 5-14; *see infra* section titled "Separation for Other Designated Physical or Mental Conditions."
[15] DSM-5, *supra* note 9, at 286-87.
[16] *Id.* at 265.

> 5) Once the stressor or its consequences have terminated, the symptoms do not persist for more than an additional [six] months.[17]

The behavioral health provider, command legal team, or chain of command's failure to process Soldiers for separation promptly may result in the loss of a Soldier to suicide, as adjustment disorders correspond with "an increased risk of suicide attempts and completed suicide."[18] Compounding matters, existing treatment regimens limit behavioral health providers, as recent studies conclude that developing standardized treatment plans for behavioral health practitioners requires additional research.[19]

II. Overview of Applicable Law and Regulations

With a firm understanding of behavioral health conditions, legal practitioners must next understand the legal framework surrounding CCnCPD administrative separations. Authority to administratively separate a Soldier flows from the U.S. Constitution to the President and Congress,[20] the Secretary of Defense, the Services, and the local chain of command for a particular Soldier.

A. Department of Defense Instruction 1332.14

The Secretary of Defense, acting pursuant to 10 U.S.C. § 1169[21] and through his designee, the Under Secretary of Defense for Personnel and Readiness, promulgated DoD Instruction (DoDI) 1332.14, which implements the various Title 10 provisions as they relate to the separation of enlisted Service members. Enclosure 3 outlines sixteen bases for separation, including a broad category of separations for the convenience of the Government and a category of separations for disability.[22] Nested within the nine separations for the convenience of the Government is a

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[17] *Id.* at 286-87.
[18] *See id.* at 287.
[19] *See* Paulina Zelviene & Evaldas Kazlauskas, *Adjustment Disorder*, 14 NEUROPSYCHIATRIC DISEASE & TREATMENT 1, 377 (2018).
[20] *See* U.S. CONST. arts. I, § 8, II, § 2.
[21] 10 U.S.C. § 1169 empowers the Secretary of Defense to promulgate regulations governing the separation of Service members from the Armed Forces.
[22] *See* DODI 1332.14, *supra* note 11, encl. 3.

subparagraph titled "Conditions and Circumstances not Constituting a Physical Disability."[23]

1. Conditions and Circumstances Not Constituting a Physical Disability Separations

DoDI 1332.14 authorizes the separation of Service members with CCnCPD "that interfere with assignment to or performance of duty."[24] Within this broad administrative mandate is a carveout for Service members with a "personality disorder, or other mental disorder not constituting a physical disability."[25] An additional carveout exists for those Service members "unsuitable for deployment or worldwide assignment."[26]

For all CCnCPD separations relating to physical ailments, such as airsickness and enuresis, DoDI 1332.14 requires that "the enlisted Service member [be] formally counseled on their deficiencies and . . . given an opportunity to correct those deficiencies," and further notes that "[s]eparation processing will not be initiated until the enlisted Service member has been counseled in writing that the condition does not qualify as a disability."[27] Read another way, this counseling requirement is the only limit for separating Service members with purely physical, non-behavioral health issues that do not constitute a disability.[28]

Several restrictions, however, exist when separating a Service member for personality disorders and other mental disorders. To begin the process, a behavioral health provider must diagnose the Service member and determine "that the disorder is so severe that the [Service] member's ability to function effectively in the military environment is significantly impaired."[29] With this diagnosis in hand, the chain of command must clear several administrative hurdles before initiating separation of that Service member.[30]

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[23] *Id.* encl. 3, para. 3(a)(8).
[24] *Id.* encl. 3, para. 3(a)(8)(a).
[25] *Id.* encl. 3, para. 3(a)(8)(c).
[26] *Id.* encl. 3, para. 3(a)(8)(b). The administrative limits for separating Service members for "unsuitab[ility] for deployment or worldwide assignment" are outside the scope of this article. *Id.*
[27] *Id.* encl. 3, para. 3(a)(8)(a).
[28] *See id.* para. 3(a).
[29] *Id.* encl. 3, para. 3(a)(8)(c)(1).
[30] *Id.*

First, DoDI 1332.14 implores "supervisors, peers, and others, as necessary to establish that the behavior is persistent," to document "specific deficiencies," presumably stemming from the Service member's behavioral health condition.[31] If, after being counseled, the "specific deficiencies" continue to manifest themselves in the workplace, then the chain of command has cleared the first administrative hurdle, establishing that "the behavior is persistent, interferes with assignment to or performance of duty, and has continued after the Service member was counseled and afforded an opportunity to overcome those deficiencies."[32]

Second, DoDI 1332.14 requires the Service member to be "counseled in writing on the diagnosis of a personality disorder, or other mental disorder not constituting a physical disability."[33] However, the instruction does not specify who must conduct this counseling session with the Service member, nor is it clear when to counsel the Service member.[34]

Finally, the chain of command may not separate Service members "who have served or are currently serving in imminent pay danger areas," as well as Service members who are the victim of sexual assault or sex-related offenses, intimate partner violence, and spousal-abuse offenses, unless the Surgeon General of their respective service approves the separation.[35] DoDI 1332.14 also mandates that "unsatisfactory performance or misconduct" separations trump separation for behavioral health reasons.[36]

Outside of the limitations placed on the chain of command to involuntarily separate a Soldier, DoDI 1332.14 contemplates voluntary separations for CCnCPD; the regulation places explicit limitations on involuntary CCnCPD separations, which imply the existence of a voluntary separation for CCnCPD, as discussed further below.[37]

2. Disability Separations

Legal practitioners must also be able to distinguish conditions and circumstances that *do* constitute a physical disability from CCnCPD. Department of Defense Instruction 1332.14 briefly addresses the concept

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[31] *Id.* encl. 3, para. 3(a)(8)(c)(1)(b).
[32] *Id.*
[33] *Id.* encl. 3, para. 3(a)(8)(c)(3).
[34] *See id.* encl. 3, para. 3(a).
[35] *Id.* encl. 3, para. 3(a)(8)(c)(4)–(5).
[36] *Id.* encl. 3, para. 3(a)(8)(d).
[37] *See id.* encl. 3, para. 3(a)(8)(f); *infra* section titled "Reading in a Voluntary Separation."

of disability separations in one-half page of text, simply empowering the Services to issue regulatory guidance for the separation of Service members with disabilities.[38] Department of Defense Instruction 1332.14 does not define "disability" or "physical disability" and employs both terms interchangeably throughout its text.[39] However, DoDI 1332.14 does refer the reader to DoDI 1332.18, which defines a "disability" as:

> A medical impairment, mental disease, or physical defect which is severe enough to interfere with the Service member's ability to adequately perform his or her duties, regardless of assignment or geographic location. A medical impairment, mental disease, or physical defect standing alone does not constitute a disability. The term includes mental disease, but not such inherent defects as developmental or behavioral disorder.[40]

This definition of a "disability" is unhelpful. If a disability, in its most basic form, is (1) some "medical impairment, mental disease, or physical defect" that is (2) "severe enough to interfere with the Service member's ability to perform his or her duties,"[41] it is unclear what distinguishes it from CCnCPD, which require "conditions and circumstances not constituting a physical disability that interfere with assignment to or performance of duty."[42]

Instead, the more illuminating definition is what triggers a Service member's referral to the Integrated Disability Evaluation System (IDES). A physician may refer a Service member to the IDES if they have: (1) "[o]ne or more medical conditions that may, singularly [or] collectively, . . . prevent the Service member from reasonably performing the duties of their office [or] rank"; (2) "[a] medical condition that represents an obvious medical risk to the health of the member or to the health or safety of other members"; or (3) "[a] medical condition that imposes unreasonable requirements on the military to maintain or protect the Service member."[43] These criteria clarify that a "disability" is an acute

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[38] *See* DODI 1332.14, *supra* note 1, encl. 3, para. 4.
[39] *See id.* enc l. 3, *passim*.
[40] U.S. DEP'T OF DEF., INSTR. 1332.18, DISABILITY EVALUATION SYSTEM Glossary, at 66 (10 Nov. 2022) [hereinafter DODI 1332.18].
[41] *Id.*
[42] DODI 1332.14, *supra* note 1, encl. 3, para. 3(a)(8)(a).
[43] DODI 1332.18, *supra* note 40, sec. 5.2(a).

medical condition,[44] whereas CCnCPD may or may not interfere with a Service member's ability to perform their duties.[45] Another way to distinguish between the two terms is that DoDI 1332.18 states that "medical authorities *will* refer eligible Service members into the [disability evaluation system],"[46] but DoDI 1332.14 provides that commanders, if authorized by their Service secretary, "*may* authorize separation on the basis of [CCnCPD]."[47]

B. Army Regulation 635-200

The Department of the Army implements DoDI 1332.14 through AR 635-200 and includes provisions governing CCnCPD under paragraph 5-14.[48] This paragraph fits within the broader provisions of the regulation's chapter 5, which lays out "separation for the convenience of the Government,"[49] and is analogous to the provisions in DoDI 1332.14, enclosure 3, paragraph 3.[50]

1. Voluntary versus Involuntary Separations

As noted above, under DoDI 1332.14, the Services may separate Service members both voluntarily and involuntarily for CCnCPD. AR 635-200, paragraph 5-2, unlike DoDI 1332.14, explicitly states that it "contains policies and procedures for voluntary and involuntary separations for the convenience of the Government."[51] However, a careful reading reveals that paragraph 5-14 does not address voluntary separations, and the regulatory language only establishes the parameters for involuntarily separating a Soldier.[52]

2. Separation for Other Designated Physical or Mental Conditions

AR 635-200, paragraph 5-14, provides four distinct CCnCPD, referred to as "[o]ther designated physical or mental conditions," and their prerequisites that may qualify for administrative separation.[53] The four sub-bases for separation include adjustment disorder, personality disorder,

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[44] *Id.*
[45] *See* DoDI 1332.14, *supra* note 11, encl. 3, para. 3(a)(8).
[46] DoDI 1332.18, *supra* note 40, sec. 5.2(a) (emphasis added).
[47] DoDI 1332.14, *supra* note 1, encl. 3, para. 3(a)(8)(a) (emphasis added).
[48] *See* AR 635-200, *supra* note 2, para. 5-14.
[49] *See id.* ch. 5.
[50] *See* DoDI 1332.14, *supra* note 1, encl. 3, para. 3.
[51] AR 635-200, *supra* note 2, para. 5-2.
[52] *See id.* para. 5-14.
[53] *See id.*

other mental conditions, and other physical conditions.[54] This regulatory construct differs substantially from DoDI 1332.14 in that it parses out four sub-bases, discussed in turn below.

a. Adjustment Disorder. The first basis is adjustment disorder, which begins with a behavioral health provider diagnosing the Soldier with the disorder.[55] After making this diagnosis, the behavioral health provider must obtain corroboration from the installation director of psychological health.[56] The behavioral health provider must further document three findings to support a separation for adjustment disorder: (1) there have been "one or more incidents of acute adjustment disorder;" (2) the Soldier "does not respond to behavioral health treatment or refuses treatment when one or more treatment modalities have been afforded or attempted;" and (3) "the condition [will] continue to interfere with assignment to or performance of duty even with treatment."[57] The behavioral health provider annotates these findings in a Department of the Army Form (DA Form) 3822, Report of Mental Status Evaluation.[58]

Although not explicitly mentioned in paragraph 5-14 of AR 635-200, the behavioral health provider completing the DA Form 3822 should notify the Soldier's chain of command of the adjustment disorder diagnosis and recommend that the chain of command consider separation under paragraph 5-14.[59] The importance of this implied task cannot be overstated. Soldiers experiencing "an episode of adjustment disorder [that] has persisted for longer than [six] months . . . must be referred to the [IDES]."[60]

The next step in the process falls to "a responsible official," typically the company commander, to counsel the Soldier and inform them that their diagnosis of adjustment disorder interferes with the Soldier's ability to perform their duty.[61] AR 635-200, paragraph 5-14, notes that "[s]eparation processing may not be initiated under this paragraph until the Soldier has been counseled formally, in writing, concerning deficiencies and has been

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[54] *See id.*
[55] *Id.* para. 5-14(a)(6)(a).
[56] *Id.* para. 5-14(d).
[57] *Id.* para. 5-14(a)(6)(a).
[58] *See id.* para. 5-14(d).
[59] *See id.* para. 5-14.
[60] *Id.* para. 5-14(a)(6)(c).
[61] *Id.* paras. 1-17(b), 5-14(j).

afforded ample opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records."[62] This "ample opportunity to overcome those deficiencies" stands in contrast to the requirement in DoDI 1332.14 that Service members be given "an opportunity."[63] AR 635-200 does not specify what "ample opportunity to overcome those deficiencies" means, leaving this determination to the chain of command, in consultation with their servicing legal advisor.[64] In addition to counseling the Soldier about their deficiencies, the commander or other responsible official must inform the Solider that their adjustment disorder diagnosis "does not qualify as a disability."[65]

If the Soldier fails to overcome their deficiencies after "ample opportunity," the chain of command builds the administrative separation file to initiate separation under paragraph 5-14.[66] In addition to a completed DA Form 3822 and the required counseling statements, the Soldier receives medical screening using a DoD Form (DD Form) 2808 and a DD Form 2807-1.[67] The Soldier must also complete the Soldier for Life-Transition Assistance Program (SFL-TAP), as with all other separations.[68]

The command then submits all documentary evidence to the servicing legal office to compile the administrative separation file. Unlike other administrative separations, the legal office is not the final stop before initiating separation; rather, the complete administrative separation file must include a DA Form 7771, Enlisted Behavioral-Health Related Administrative Separation Checklist.[69] In section II of the form, a commander must certify detailed administrative tasks are complete; then, a medical reviewer must certify that they have reviewed the separation packet for conditions that would require review by The Surgeon General

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[62] *Id.* para. 5-14(j).
[63] *See* DODI 1332.14, *supra* note 1, encl. 3, para. 3(a)(8)(c)(2).
[64] *See* AR 635-200, *supra* note 2, para. 5-14(j).
[65] *Id.* para. 5-14(j).
[66] *See id.* para. 5-14.
[67] *Id.* para. 1-33; U.S. Dep't of Def., DD Form 2808, Report of Medical Examination (15 July 2019); U.S. Dep't of Def., DD Form 2807-1, Report of Medical History (29 Oct. 2018).
[68] *See* U.S. DEP'T OF ARMY, REG. 600-81, SOLDIER FOR LIFE - TRANSITION ASSISTANCE PROGRAM para. 7-2 (17 May 2016) [hereinafter AR 600-81].
[69] AR 635-200, *supra* note 2, para. 5-14(f); U.S. Dep't of Army, DA Form 7771, Enlisted Behavioral-Health Related Administrative Separation Checklist (01 June 2021) [hereinafter DA Form 7771].

(TSG).[70] Once this review is complete, the medical reviewer forwards the complete administrative separation packet to the commander for initiation.

b. Personality Disorder. Personality disorder separations follow the same process as separations for adjustment disorder, but they differ in one key area.[71] Unlike adjustment disorders, the behavioral health provider merely documents the diagnosis and includes a statement in the DA Form 3822 that "the Soldier's disorder is of sufficient severity to interfere with the Soldier's ability to function in the military."[72] As with adjustment disorders, the behavioral health provider must obtain the installation director of psychological health's corroboration of the diagnosis.[73]

*c. Other Mental Conditions Not Amounting to a Disability***.** In addition to personality and adjustment disorders, commanders may also choose to separate Soldiers for "other . . . mental conditions not amounting to disability."[74] As with the diagnosis of a personality disorder, the behavioral health provider is not required to document specific findings but must determine "that the Soldier's disorder is of sufficient severity to interfere with the Soldier's ability to function in the military" and document it appropriately on a DA Form 3822.[75] Beyond the difference in diagnosis, other mental condition separations follow the same administrative steps outlined above for adjustment and personality disorders, including corroboration by the installation director of psychological health.[76]

3. *Other Physical Conditions Not Amounting to a Disability*.

As with the aforementioned mental condition administrative separations, the key difference with other physical conditions not amounting to disability is the diagnosis. Army Regulation 635-200 outlines a non-exhaustive list of physical conditions that may qualify, including "airsickness, motion, or travel sickness," as well as "enuresis."[77]

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[70] AR 635-200, *supra* note 2, para. 5.14(m); DA Form 7771, *supra* note 69, secs. II, III.
[71] *See* AR 635-200, *supra* note 2, para. 5-14.
[72] *Id.* para. 5-14(d).
[73] *Id.*
[74] *Id.* para. 5-14(a).
[75] *Id.* para. 5-14(d).
[76] *See id.* para. 5-14.
[77] *Id.* para. 5-14(a)(1)–(5).

Significantly, separation for other physical conditions does not require the use of the DA Form 7771; instead, an appropriate medical provider must diagnose the Soldier with the condition, determine that the diagnosis "interfere[s] with assignment to or performance of duty," annotate this finding in the DD Forms 2808 and 2807-1, and forward them to the command team.[78] Once the command receives the diagnosis, the commander counsels the Soldier "concerning [their] deficiencies" and affords the Soldier "ample opportunity to overcome those deficiencies."[79]

C. Naval Military Personnel Manual 1900-120

The Department of the Navy differs markedly from the Department of the Army when processing Sailors and Marines for separation due to CCnCPD. The Department of the Navy promulgated Naval Military Personnel Manual (MILPERSMAN) 1900-120 as its regulation for separating Sailors and Marines with physical or behavioral health CCnCPD.[80] Similar to AR 635-200, behavioral health CCnCPD separations require "an authorized mental health provider" to diagnose the Sailor or Marine and to conclude "that the disorder does not constitute a disability, and is so severe that the member's ability to function effectively in the military environment is significantly impaired."[81]

Unique to MILPERSMAN 1900-120 is the ability of "[c]ommanding officers, . . . based on a written opinion of appropriate medical providers, [to] determine if the [non-disabling medical] condition warrants an opportunity to overcome the medical condition and the resulting negative impact on performance."[82] MILPERSMAN 1900-120 includes "asthmas or allergies" as appropriate for such a determination.[83]

MILPERSMAN 1900-120 further notes that for "command-initiated" CCnCPD separations (i.e., involuntary separations), the counseling requirement, required under DoDI 1332.14, may be waived when "an appropriate medical provider finds that the condition precludes the

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[78] *Id.* paras. 1-33(h), 5-14(a).
[79] *Id.* para. 5-14(j).
[80] U.S. DEP'T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL 1900-120, SEPARATION BY REASON OF CONVENIENCE OF THE GOVERNMENT – MEDICAL CONDITIONS NOT AMOUNTING TO A DISABILITY para. 1(a) (9 Nov. 2018) [hereinafter MILPERSMAN 1900-120].
[81] *Id.* para. 1(b).
[82] *Id.* para. 1(c).
[83] *Id.*

member from overcoming deficiencies."[84] This common-sense provision is not explicitly present in AR 635-200, which, as discussed above, mandates counseling.[85]

MILPERSMAN 1900-120's most significant departure from AR 635-200, however, is the clear delineation of both "command-initiated request[s]" and "Service member-initiated request[s]" for administrative separation.[86] Addressing command-initiated separations first, the regulation mandates certain procedural hurdles, including: formal notification "via NAVPERS 1070/613 Administrative Remarks entry"; notification "of medical resources (if applicable) that may assist in the member's retention"; "reasonable time to . . . overcome deficiencies . . . [or] an appropriate medical provider find[ing] that the condition precludes the member from overcoming deficiencies"; and "[d]ocumentation . . . as necessary to establish that the behavior is persistent, interferes with assignment to or performance of duty and has continued after the member was counseled and afforded an opportunity to overcome the deficiencies."[87] This command-initiated separation roughly tracks AR 635-200's involuntary separation requirements for CCnCPD, except for the medical or behavioral health provider waiver of the "reasonable time to . . . overcome deficiencies."[88]

For Service member-initiated requests, Sailors and Marines may request voluntary separation with the recommendation of their physician or behavioral health provider, but "only after all medical avenues of relief have been exhausted" (a provision not explicitly present in AR 635-200, paragraph 5-14).[89] MILPERSMAN 1900-120 does not elaborate on the meaning of "exhausted" medical treatment options. A practical reading of the text, however, requires the physician or behavioral health provider to document that the Sailor or Marine failed to respond to treatment for their condition and that further treatment is unlikely to result in a Sailor or Marine who can fulfill their service obligation.[90]

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[84] *Id.* para. 1(g)(1).
[85] *See* AR 635-200, *supra* note 2.
[86] *See* MILPERSMAN 1900-120, *supra* note 80, para. 1(g).
[87] *Id.* para. 1(g)(1).
[88] *See id.*
[89] *Id.* para. 1(g)(2).
[90] *See id.*

MILPERSMAN 1900-120 does add a procedural hurdle absent from AR 635-200: a flag medical officer must review separations for personality disorder.[91] In addition, MILPERSMAN 1900-120 explicitly requires assessment for potential referral to a medical evaluation board (MEB), which AR 635-200 accomplishes through the general medical screening requirements.[92]

D. Department of the Air Force Instruction 36-3211

Unlike the Department of the Navy, the Department of the Air Force's regulatory guidance for separating Airmen with CCnCPD closely tracks the Army's interpretation of DoDI 1332.14.[93] Of note, and unlike AR 635-200,[94] Department of the Air Force Instruction (DAFI) 36-3211 states that "documentation from the member's supervisory chain" must accompany any separation for CCnCPD in the Air Force, and requires the squadron commander "ensure" the Airman is appropriately counseled.[95] As with the overarching guidance in DoDI 1332.14[96] and the Navy's service-specific guidance,[97] the Air Force[98] does not further delineate adjustment disorders as the Army does.[99]

E. Processing Separations Under the Current Iteration of AR 635-200

As discussed above, the plain language and implementation of AR 635-200, paragraph 5-14, involve a non-linear process with the potential administrative separation bouncing back and forth between the chain of command, the behavioral health provider, the command legal team, and the separating Soldier. There is, however, a better way to process these separations: empowering the medical or behavioral health provider to complete the counseling requirements of AR 635-200. In addition, medical and behavioral health providers may be empowered to determine, using their medical expertise, whether a Soldier can overcome the physical or mental condition that resulted in the command referring the Soldier for

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[91] *Id.* para. 1(j)(1).
[92] *Id.* para. 1(i); *see also* AR 635-200, *supra* note 2, sec. VI ("Medical Processing").
[93] *See* U.S. DEP'T OF AIR FORCE, INSTR. 36-3211, MILITARY SEPARATIONS para. 7.11 (24 June 2022) (C1, 20 Nov. 2023) [hereinafter DAFI 36-3211].
[94] *See* AR 635-200, *supra* note 2.
[95] DAFI 36-3211, *supra* note 93, paras. 7.11.1.2, 7.11.2.2.
[96] *See* DODI 1332.14, *supra* note 1, encl. 3, para. 3(a)(8).
[97] *See* MILPERSMAN 1900-120, *supra* note 80.
[98] *See* DAFI 36-3211, *supra* note 93, para. 7.11.
[99] *See* AR 635-200, *supra* note 2, para. 5-14(a)(6).

evaluation and possible separation under AR 635-200, paragraph 5-14. Finally, as written, AR 635-200 authorizes general court-martial convening authorities (GCMCAs) to promulgate a policy letter providing for voluntary CCnCPD separations.

1. Counseling

The first improvement concerns the counseling requirement, which the medical or behavioral health provider can and should complete instead of the commander. As discussed above, separating a Soldier for CCnCPD merely requires that "the Soldier has been counseled formally, in writing, concerning deficiencies [and] . . . that the condition does not qualify as a disability."[100] AR 635-200, paragraph 5-14, does not require the commander or even a member of the chain of command complete this counseling requirement.[101] In fact, AR 635-200, paragraph 1-17, discusses counseling generally, and it notes that "commanders will ensure that adequate counseling and rehabilitative measures are taken before initiating separation proceedings" and elaborates that "the commander will ensure that a responsible official formally notifies the Soldier of his or her deficiencies," although AR 635-200 does not define a "responsible official."[102] Other requirements in paragraph 1-17 germane to this point include the need for a minimum of one formal counseling session before initiating separation, as well as the need to document counseling sessions in writing.[103]

Because the medical or behavioral health provider may serve as a "responsible official" as contemplated in AR 635-200, paragraph 1-17, the medical or behavioral health provider should do so, as they are better equipped to assess the impact of a medical condition on the Soldier's performance of the duties of their military occupational specialty. Incorporating the commander or chain of command into this process is not logical; the commander has already referred the Soldier for assessment by a medical or behavioral health provider who has rendered an appropriate medical diagnosis of CCnCPD. It is unnecessary for the commander, who has already had their suspicions of a medical or behavioral health condition confirmed, to counsel the Soldier. Further, the medical or behavioral health provider is best situated to explain the deficiencies to the

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[100] *Id.* para. 5-14(j).
[101] *See id.* para. 5-14.
[102] *Id.* para. 1-17(a)-(b).
[103] *Id.* para. 1-17(b).

Soldier, as well as suggest strategies to overcome those deficiencies. In the same counseling, the medical or behavioral health provider may notify the Soldier that their CCnCPD are not a disability.[104] This scheme meets the minimum requirement that the commander "ensure" counseling by a "responsible official."[105] As long as the counseling is in writing, the medical or behavioral health provider may accomplish it in memorandum format or with a standard DA Form 4856, Developmental Counseling Form.[106]

In the field, passing the action back and forth creates the opportunity for the procedural ball to be dropped, leaving the Soldier suffering from the physical or behavioral health condition languishing in the formation. Stated another way, allowing the medical or behavioral health provider to counsel the Soldier reduces friction in an already convoluted process.

Finally, empowering the medical or behavioral health provider to conduct these counseling sessions does not disempower the commander. It is still a command decision to refer the Soldier to a medical or behavioral health provider in accordance with AR 635-200, paragraph 5-14, as well as to initiate separation.

2. Inability to Overcome the Deficiency

In addition to placing the medical or behavioral health provider in the figurative driver's seat to counsel the Soldier, the health provider may issue a written opinion to expeditiously separate Soldiers suffering from CCnCPD. As discussed above, Soldiers must be "afforded ample opportunity to overcome those deficiencies" associated with their CCnCPD, although what exactly "ample opportunity" means is up for debate.[107] A plain reading of AR 635-200 is to provide the Soldier "ample opportunity" in the form of time, with further discretion between the commander and their legal advisor. Questions of what constitutes adequate progress furthers the regulation's vagueness.

However, a practical solution to satisfying this requirement may be found in MILPERSMAN 1900-120, which authorizes the behavioral health or medical provider to opine on the ability, or lack thereof, of a

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[104] *See id.* para. 5-14(j).
[105] *See id.* para. 1-17.
[106] *See id.*; U.S. Dep't of Army, DA Form 4856, Developmental Counseling Form (01 Mar. 2023).
[107] *See id.* para. 5-14(j); *supra* Section titled "Adjustment Disorder."

Sailor or Marine to overcome CCnCPD.[108] If a Soldier in the. Army expresses their unwillingness to improve, the medical or behavioral health provider may add language to their counseling statement or to the DA Form 3822 that the Soldier is unwilling to overcome their CCnCPD deficiency. Similarly, the medical or behavioral health provider may include a statement that it is medically impossible for the Soldier to improve and recommend the Soldier for separation under paragraph 5-14 if it is medically demonstrable that the Soldier cannot overcome their physical or behavioral health condition.

F. Reading in a Voluntary Separation

The final improvement to processing AR 635-200, paragraph 5-14, separations is to read in a voluntary separation provision for CCnCPD by promulgating policies at the GCMCA level. The following outlines the legal and regulatory underpinnings, the minimum regulatory requirements to separate a Soldier who requests voluntary separation, and practical considerations for administering voluntary separations.

1. Regulatory Underpinnings

Absent express guidance in AR 635-200, a voluntary separation may only be read into the regulation if supported by the law and regulation. As discussed above, the Secretary of Defense promulgated DoDI 1332.14, which contains policies and procedures for separating Service members for the convenience of the Government, including CCnCPD.[109] DoDI 1332.14 contemplates both voluntary and involuntary separations,[110] and AR 635-200, paragraph 5-2, states that "[t]his chapter . . . contains policies and procedures for voluntary and involuntary separations for the convenience of the Government."[111] The Army only delineated involuntary separations in AR 635-200, paragraph 5-14, whereas the Navy, in MILPERSMAN 1900-120, clearly defined both voluntary and involuntary administrative procedures to separate Sailors and Marines with CCnCPD.[112]

In the absence of detailed guidance, Army commanders may further regulate their formation, regardless of the echelon of command. An

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[108] MILPERSMAN 1900-120, *supra* note 80, para. 1(g)(1).
[109] DoDI 1332.14, *supra* note 1, encl. 3.
[110] *See id.* encl. 3, para. 3(a)(8)(f).
[111] AR 635-200, *supra* note 2, para. 5-2.
[112] *See* MILPERSMAN 1900-120, *supra* note 80, para. 1(g).

example of such regulation is the common practice of signing a policy letter addressing open-door requests in finer detail than what is outlined in AR 600-20.[113] Similarly, the GCMCA may promulgate regulatory guidance within their jurisdiction to further regulate processing administrative separations. GCMCAs may issue policy letters setting forth the circumstances under which a Soldier can request voluntary separation from the Army, so long as the policy letter articulates the minimum statutory, DoD, and Army-level requirements to separate a Soldier.

2. Minimum Requirements for a Voluntary Separation for CCnCPD

If it is possible by regulation for a Soldier to voluntarily separate from the Army, the next step is to determine what baseline requirements must be completed before separation. Some requirements are common to all administrative separations, regardless of voluntariness. All Soldiers separating must obtain a Separation History and Physical Examination (SHPE)[114] and complete SFL-TAP.[115] Soldiers must complete a DA Form 3822 for any behavioral-health-related separation but not for physical condition separations under AR 635-200, paragraph 5-14.[116]

Although 10 U.S.C. §§ 1145 and 1177 do not require a medical evaluation for every Service member separating from active duty, DoDI 6040.46 requires that virtually every Service member separating from active duty complete a SHPE using DD Forms 2807-1 and 2808.[117] The Army implements this guidance in AR 40-501, mandating that "all [Regular Army] and [Reserve Component] Soldiers separating from [active duty] after serving for 180 days or more, or over 30 days in support of contingency operations, . . . complete a [SHPE]."[118] In addition, AR 600-81 mandates "all eligible Soldiers will participate in SFL-TAP transition services" and defines "eligible Soldiers" as virtually any Soldier who served on active duty.[119]

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[113] *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-2 (24 July 2020).
[114] *See* AR 635-200, *supra* note 2, para. 1-33; U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS para. 3-37 (27 June 2019) [hereinafter AR 40-501].
[115] AR 600-81, *supra* note 68, para. 7-2.
[116] AR 635-200, *supra* note 2, para. 5-14(d).
[117] U.S. DEP'T OF DEF., INSTR. 6040.46, THE SEPARATION HISTORY AND PHYSICAL EXAMINATION (SHPE) FOR THE DOD SEPARATION HEALTH ASSESSMENT (SHA) PROGRAM secs. 1.2.a., 3.1(a) tbl.1, 3.2(c) (14 Apr. 2016).
[118] AR 40-501, *supra* note 114, para. 3-37(b).
[119] AR 600-81, *supra* note 68, para. 4-3; *see also id.* para. 7-2.

AR 635-200 further mandates "mental status evaluations," using the DA Form 3822, for Soldiers separating in lieu of trial by court-martial and for unsatisfactory performance, misconduct, adjustment disorder, personality disorder, and other mental condition separations.[120] However, purely physical condition separations do not require DA Form 3822.[121]

DA Form 3822 is vital for documenting several items for Soldiers separating due to behavioral health conditions. Before requesting voluntary separation, a behavioral health provider must diagnose the Soldier with a qualifying behavioral health condition appropriate for separation under AR 635-200, chapter 5. Thus, the behavioral health provider serves as a gatekeeper to the process, determining whether to refer the Soldier to the IDES due to an acute disability[122] or whether the Soldier is a candidate for separation due to CCnCPD. The behavioral health provider should document specific findings just as they would document findings to support an involuntary separation if the behavioral health provider "concludes that the disorder is so severe that the [Service] member's ability to function effectively in the military environment is significantly impaired" and that the Soldier is not an appropriate candidate for processing under the IDES.[123] For adjustment disorder,[124] the provider must determine that: (1) there have been "one or more incidents of acute adjustment disorder," (2) the Soldier "does not respond to behavioral health treatment or refuses treatment when one or more treatment modalities have been afforded or attempted," and (3) "[t]he condition will continue to interfere with assignment to or performance of duty even with treatment."[125] For personality disorders and other mental conditions not amounting to a disability,[126] no specific findings are required, only the corroboration of the installation director of psychological health.[127] Behavioral health providers, in assessing "significant impairment," must document "specific deficiencies" to "establish that the behavior is persistent [and] interferes with assignment to or performance of duty," and

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[120] AR 635-200, *supra* note 2, paras. 1-33(b), 5-14(d), 10-3(c)(2).
[121] *See id.* para. 5-14(d).
[122] *See supra* Section titled "Disability Separations."
[123] DoDI 1332.14, *supra* note 1, encl. 3, para. 3(a)(8)(c)(1).
[124] *See supra* Section titled "Adjustment Disorder."
[125] AR 635-200, *supra* note 2, para. 5-14(a)(6)(a).
[126] *See supra* Sections titled "Personality Disorder" and "Other Mental Conditions Not Amounting to a Disability."
[127] *See* AR 635-200, *supra* note 2, paras. 5-14(a)(7), 5-14(d).

they can capture these in the "Further Comments" section of the DA Form 3822 or in a separate memorandum.[128]

Once the behavioral health provider diagnoses a Soldier and determines that they are an appropriate candidate for separation under AR 635-200, chapter 5, the behavioral health provider could, as discussed above, counsel the Soldier "concerning deficiencies and . . . that the condition does not qualify as a disability."[129] During this same counseling session, the behavioral health provider could also notify the Soldier of their ability to request voluntary separation under AR 635-200, chapter 5, as well as the chain of command's ability to initiate involuntary separation.[130]

DoDI 1332.14 does not merely address behavioral health conditions;[131] it also addresses physical conditions not amounting to a disability, such as airsickness and enuresis (or bedwetting, as it's more commonly known), as highlighted in AR 635-200, paragraph 5-14.[132] Such Soldiers must be diagnosed by a medical provider with a qualifying physical condition, and the medical provider must determine that the physical condition "interfere[s] with assignment to or performance of duty," as documented on a DD Form 2807-1, DD Form 2808, memorandum for record, or another applicable form.[133] With this appropriately documented diagnosis, the Soldier may then request voluntary separation under AR 635-200, chapter 5, as further defined in a command policy letter.

3. Policy Letters to Administer Voluntary Separations for CCnCPD

First, any policy letter should require that the Soldier requesting voluntary separation affirmatively waive the requirement for formal counseling by the commander. The policy letter should also include, as an enclosure, a template for Soldiers to request voluntary separation. DoDI 1332.14 requires that, for physical CCnCPD, "[s]eparation processing will not be initiated until the enlisted Service member has been formally counseled on their deficiencies and has been given an opportunity to

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[128] *See* DoDI 1332.14, *supra* note 1, encl. 3, para. 3(a)(8)(c)(1)(b).
[129] *See* AR 635-200, *supra* note 2, para. 5-14(j).
[130] *See* DoDI 1332.14, *supra* note 11, encl. 3, para. 3(a)(8)(c)(1).
[131] *See id.* encl. 3, para. 3(a)(8)(c).
[132] *See id.* encl. 3, para. 3(a)(8)(a); AR 635-200, *supra* note 2, para. 5-14(a)(1), (5).
[133] *See* AR 635-200, *supra* note 2, para. 5-14(a).

correct those deficiencies." [134] A virtually identical counseling requirement exists for behavioral health-related separations in DoDI 1332.14,[135] and both of these provisions are echoed in AR 635-200.[136] At first blush, it appears that this provision means someone in a position of authority must counsel the Soldier and give the Soldier an opportunity to overcome their deficiencies, but a careful reading reveals that this requirement may be sidestepped when the Soldier requests voluntary separation.[137] AR 635-200, in implementing the general guidance in DoDI 1332.14, is clear that commanders cannot initiate separation prior to taking "adequate counseling and rehabilitative measures," but the door for the Army to implement the guidance differently and permit Soldiers to request voluntary separation without adequate counseling and rehabilitative measures is wide open.[138]

For an example of how this is accomplished, the Navy authorizes Sailors and Marines to submit requests for voluntary separation and even provides a template for the Sailor or Marine to complete.[139] The Navy's template, however, does not address that, absent the Sailor or Marine requesting voluntary discharge, the Sailor or Marine would be entitled to formal counseling and an opportunity to attempt to overcome their deficiency.[140] Accordingly, any template should include language in which the Soldier affirmatively waives their administrative right to formal counseling on deficiencies, as required in DoDI 1332.14.

The policy letter should also include language in which the Soldier acknowledges that their CCnCPD is not a disability to comply with DoDI 1332.14's second requirement of counseling the Soldier that the condition is not a disability.[141] Again, the template in MILPERSMAN 1900-120 serves as an example. The template is a good starting point, as it states, in pertinent part, "I request separation based on the medical condition for which my attending physician believes to exist, but does not amount to a disability per current Navy guidance."[142] This language may be improved,

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[134] DoDI 1332.14, *supra* note 11, encl. 3, para. 3(a)(8)(a)(1).
[135] *See id.* encl. 3, para. 3(a)(8)(c)(2).
[136] *See* AR 635-200, *supra* note 2, para. 1-17.
[137] *See* DoDI 1332.14, *supra* note 1, encl. 3, para. 3(a)(8)(a)(1).
[138] *See* AR 635-200, *supra* note 2, para. 1-17(a).
[139] MILPERSMAN 1900-120, *supra* note 80, para. 1(g)(2), exhibit 2.
[140] *See id.* exhibit 2.
[141] DoDI 1332.14, *supra* note 1, encl. 3, para. 3(a)(8)(a)(2).
[142] MILPERSMAN 1900-120, *supra* note 80, exhibit 2.

however, by citing the Army's regulation governing what qualifies as a medical disability.[143]

The third and final DoDI requirement in the request for voluntary separation is the Soldier certifying whether they "served or are currently serving in imminent danger pay areas," "made an unrestricted report of sexual or assault[, or] . . . self-disclosed that they are the victim of a sex-related offense, an intimate partner violence-related offense, or a spousal-abuse related offense during service."[144] The example in MILPERSMAN 1900-120 omits a discussion of such statuses.[145] This is problematic as Soldiers with qualifying statuses require review by TSG.[146]

Appendix A combines these points into a template command policy letter for promulgation at the GCMCA level. Appendix B, the enclosure to Appendix A, contains a template request for voluntary separation, incorporating a statement that the Soldier's condition does not amount to a disability, an affirmative waiver of the right to be counseled, the opportunity to correct their deficiencies, and the status certifications that may require elevation to TSG.

III. Rewriting AR 635-200, Paragraph 5-14

The process of separating Soldiers for CCnCPD risks missteps. These issues, collectively, put Soldiers with mental disorders at risk of disciplinary issues or, at worst, potential harm to themselves or others. It is within the power of the Army to do better. By rewriting AR 635-200, paragraph 5-14, and incorporating the Navy's best practices, in addition to their "lessons learned," the Army can better process administrative separations for Soldiers with CCnCPD. The Army can streamline the process by codifying behavioral health and medical provider-led counseling and opine. With these two addendums, plus clear regulatory language establishing a voluntary separation, AR 635-200, paragraph 5-14, would be decidedly improved.

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[143] *See* AR 40-501, *supra* note 114, ch. 3.
[144] DoDI 1332.14, *supra* note 1, encl. 3, para. 3.a.(8)(c)(4)–(5).
[145] *See* MILPERSMAN 1900-120, *supra* note 80, exhibit 2.
[146] *See* DoDI 1332.14, *supra* note 1, encl. 3, para. 3(a)(8)(c)(4)–(5).

A. Streamlining the Involuntary Separation Process

Improvements begin with streamlining and defining the process. The current method is analogous to a game of ultimate frisbee, a series of tosses in which the chain of command, the behavioral health provider, and the command legal team all have an opportunity to drop the frisbee. Unwritten in AR 635-200, paragraph 5-14, is the behavioral health provider's implied task to pass the frisbee and notify the chain of command when they believe a Soldier is suffering from CCnCPD and separation is appropriate. The company commander must then catch the pass, counsel the Soldier, and conduct follow-up counseling as necessary. The command legal advisor can set a pick for the company commander by providing clear guidance on the contents of the counseling statement. Once the counseling is complete, the company command team must forward the packet to the legal team, which assembles the separation file. Then, in the case of a mental CCnCPD, the legal team must again pass the frisbee back to the behavioral health provider to certify their review of the separation packet for conditions that require TSG's review. Finally, the behavioral health provider passes the frisbee to the company commander in the end zone for initiation. At any point in this process, behavioral health and medical provider-led counseling, as well as the behavioral health and medical provider opine, can help avoid failures or delays.

1. Behavioral Health and Medical Provider-Led Counseling

The first key to streamlining this process and shortening the ultimate frisbee field is to empower the behavioral health or medical provider and systemize it in AR 635-200, paragraph 5-14. As discussed above, once the behavioral health or medical provider diagnoses a Soldier with CCnCPD that "interfere with assignment to or performance of duty," they can and should counsel the Soldier on several items. For all CCnCPD, the provider should notify the Soldier of the diagnosis and counsel the Soldier that the diagnosis does not amount to a disability requiring referral to the IDES. Further, the behavioral health provider, in consultation with the company command team, should cite specific deficiencies in the Soldier's duties or assignments that must be remedied, lest the Soldier face involuntary separation under AR 635-200, paragraph 5-14. During this same counseling session, the behavioral health provider should notify the Soldier of their ability to request voluntary separation. If the Soldier does not request voluntary separation, the behavioral health provider may follow up with the Soldier to determine if the Soldier has overcome their specific deficiencies.

The current iteration of AR 635-200, paragraph 5-14, does not specify a timeline for Soldiers to overcome these deficiencies, instead relying on the vague phrase "ample opportunity" to set a time limit.[147] The "ample opportunity" of AR 635-200, paragraph 5-14, should be replaced in favor of DoDI 1332.14's presumably less-rigorous "an opportunity" standard.[148] Accordingly, when incorporating the "an opportunity" standard, the timeline should reflect a reasonable opportunity, which Appendix C proposes to be thirty calendar days—an entire month for the Soldier to overcome or demonstrate progress towards overcoming their deficiencies.

However, simply empowering the behavioral health provider without adjusting the administrative process is insufficient. A corollary step to behavioral-health-led counseling is to revise the DA Form 7771. This form, mandated in the latest version of AR 635-200, is a new document that designates the behavioral health provider as the protector of the involuntary separation process. Thrusting the behavioral health provider into this role is inconsistent with the way all other administrative separations are conducted under AR 635-200, in which the command legal advisor advises the chain of command on whether the separation packet is complete, and then the Soldier is allowed to seek guidance from military counsel.[149] With the advent of the DA Form 7771, it is insufficient for the command legal team to review the Soldier's separation file and determine whether the evidence requires TSG's endorsement before separation; rather, the behavioral health provider must review the complete file and provide their determination as to whether TSG review is required.

Given the oddity of inserting the behavioral health provider into the equation immediately before the initiation of administrative separation, the DA Form 7771 should be revised and completed by the behavioral health provider in their follow-up counseling with the Soldier once the provider determines the Soldier had an opportunity to overcome their specific deficiencies and failed to do so. At that time, a revised DA Form 7771 could screen the Soldier for the factors outlined in the current DA Form 7771's section III, which require review by TSG.[150]

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[147] *See* AR 635-200, *supra* note 2, para. 5-14(j).
[148] *See id.*; DoDI 1332.14, *supra* note 1, encl. 3, para. 3(a)(8)(a)(1), (c)(1)(b).
[149] *See* AR 635-200, *supra* note 2, para. 2-2(c)(1).
[150] AR 635-200, *supra* note 22, para. 5-14(e), (m) (including Soldiers who have ever been deployed to an imminent danger pay area or been a victim of a sex-related, intimate partner violence-related, or spousal-abuse offense during service in the Army).

With these screening questions complete, the behavioral health provider may contact the chain of command and recommend separation under AR 635-200, paragraph 5-14. If the Soldier recommended for involuntary separation requires review by TSG and the Soldier's chain of command directs involuntary separation, then the behavioral health provider may notify the chain of command and advise them on using the medical technical chain of command to seek TSG's endorsement. Otherwise, this leaves the ill-equipped company command team to determine how to obtain TSG concurrence to involuntarily separate the Soldier. This common-sense revision complies with the direction of DoDI 1332.14, which mandates that TSG of the relevant military department endorses a separation.[151]

Empowering the behavioral health provider in the text of AR 635-200, paragraph 5-14, to counsel Soldiers with CCnCPD and screen them for TSG review, however, is not enough. More must be done to delineate the process so that the chain of command, the behavioral health provider, the command legal advisor, and the Soldier understand "who's on first."[152]

2. Behavioral Health Provider Opinion to Override Necessity for Rehabilitative Counseling

Taking a page from the Department of the Navy would further streamline the process, where MILPERSMAN 1900-120 authorizes commanders to rely on medical providers' guidance to determine if the CCnCPD "warrants an opportunity to overcome the medical condition and the resulting negative impact on performance."[153] Similarly, in the Army, if either a behavioral health or medical provider opines, to a preponderance of the evidence standard, that a Soldier will not overcome a deficiency or deficiencies associated with their behavioral health or medical diagnosis, a behavioral health or medical provider should be able to override this requirement based on their medical expertise.

With this expert medical opinion, the chain of command could elect to initiate involuntary separation and determine that this opinion satisfies the "an opportunity" standard in DoDI 1332.14. Once complete, the

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[151] DoDI 1332.14, *supra* note 11, encl. 3, para. 3(a)(8)(c)(4)–(5).

[152] Bud Abbott and Lou Costello performed this famous comedy sketch various times throughout their careers. *See, e.g.*, THE NAUGHTY NINETIES (Universal Films 1945).

[153] MILPERSMAN 1900-120, *supra* note 80, para. 1(c).

behavioral health or medical provider may note this determination in their counseling statement with the Soldier and notify them that the behavioral health or medical provider is forwarding relevant portions of their file to the chain of command to consider initiating involuntary separation. By explicitly permitting the behavioral health or medical provider to opine on the ability to overcome the CCnCPD and by further empowering behavioral health and medical providers to counsel Soldiers before initiation of involuntary separation for a CCnCPD, the entire involuntary separation process will operate more efficiently.

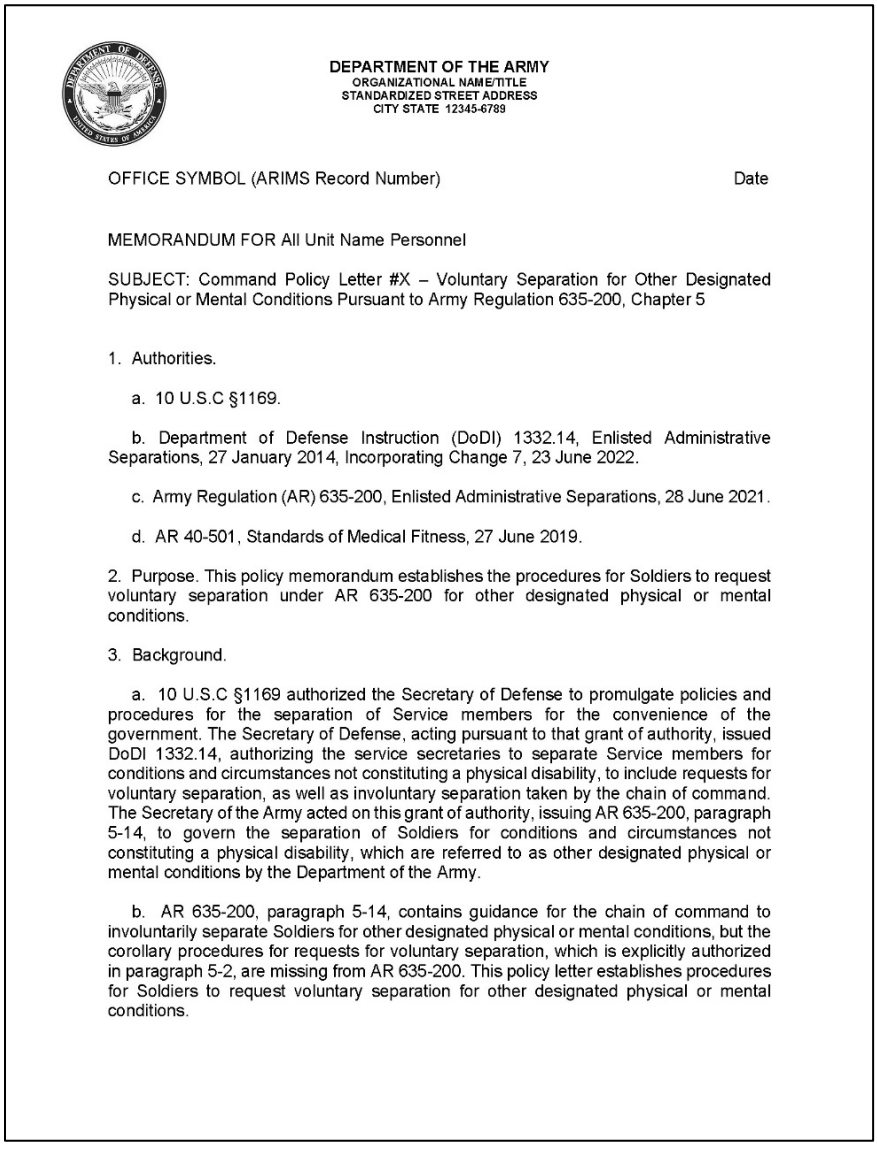
B. Codifying the Voluntary Separation

The third and final key to re-writing AR 635-200, paragraph 5-14, is establishing a clear voluntary separation option for Soldiers with CCnCPD. As discussed above, a voluntary separation option already exists in chapter 5 of AR 635-200 for Soldiers with CCnCPD, but plain language that defines when and how to request a voluntary separation does not exist. The policy letter and accompanying template mentioned above are ad hoc remedies that may lead to inconsistencies from jurisdiction to jurisdiction throughout the Army. The better remedy is to promulgate regulatory guidance for Soldiers to submit voluntary requests. Accordingly, Appendix C, paragraph n, codifies the guidance delineated in the proposed policy letter in Appendix A, creating a uniform approach for Soldiers to request voluntary separation for CCnCPD. The request for voluntary separation in Appendix B may be included as a figure, referenced in paragraph 5-14, and immediately following paragraph 5-14 for the ease of the Soldier with CCnCPD to request voluntary separation.

IV. Conclusion

The individuals who join the U.S. Army run the gamut of mental wellness and resilience, but not every Soldier who joins can mentally cope with military life due to behavioral health conditions or circumstances. AR 635-200 should empower leaders to address the needs of these Soldiers by being as clear and straightforward as possible. This process has real-world consequences for individuals; either the temporary remedies to improve how the Army addresses CCnCPD administrative separations under the current iteration of AR 635-200, paragraph 5-14, or the proposed rewrite of the paragraph will put both Soldiers and their leaders on more solid footing as they navigate the process.

APPENDIX A



DEPARTMENT OF THE ARMY
ORGANIZATIONAL NAME/TITLE
STANDARDIZED STREET ADDRESS
CITY STATE 12345-6789

OFFICE SYMBOL (ARIMS Record Number) Date

MEMORANDUM FOR All Unit Name Personnel

SUBJECT: Command Policy Letter #X – Voluntary Separation for Other Designated Physical or Mental Conditions Pursuant to Army Regulation 635-200, Chapter 5

1. Authorities.

a. 10 U.S.C §1169.

b. Department of Defense Instruction (DoDI) 1332.14, Enlisted Administrative Separations, 27 January 2014, Incorporating Change 7, 23 June 2022.

c. Army Regulation (AR) 635-200, Enlisted Administrative Separations, 28 June 2021.

d. AR 40-501, Standards of Medical Fitness, 27 June 2019.

2. Purpose. This policy memorandum establishes the procedures for Soldiers to request voluntary separation under AR 635-200 for other designated physical or mental conditions.

3. Background.

a. 10 U.S.C §1169 authorized the Secretary of Defense to promulgate policies and procedures for the separation of Service members for the convenience of the government. The Secretary of Defense, acting pursuant to that grant of authority, issued DoDI 1332.14, authorizing the service secretaries to separate Service members for conditions and circumstances not constituting a physical disability, to include requests for voluntary separation, as well as involuntary separation taken by the chain of command. The Secretary of the Army acted on this grant of authority, issuing AR 635-200, paragraph 5-14, to govern the separation of Soldiers for conditions and circumstances not constituting a physical disability, which are referred to as other designated physical or mental conditions by the Department of the Army.

b. AR 635-200, paragraph 5-14, contains guidance for the chain of command to involuntarily separate Soldiers for other designated physical or mental conditions, but the corollary procedures for requests for voluntary separation, which is explicitly authorized in paragraph 5-2, are missing from AR 635-200. This policy letter establishes procedures for Soldiers to request voluntary separation for other designated physical or mental conditions.

SUBJECT: Request for Voluntary Separation for Other Designated Physical or Mental Conditions Pursuant to Army Regulation 635-200, Chapter 5

4. Policy.

a. Qualifying Diagnosis.

(1) Prior to requesting voluntary separation for other designated physical conditions, the Soldier must have a qualifying diagnosis from a medical provider, documented on a DD Form 2807-1, DD Form 2808, other applicable form, or memorandum for record. In the applicable section of the relevant form, or in a separate memorandum for record, the medical provider will document how the diagnosis interferes with the Soldier's assignment to or performance of duty.

(2) Prior to requesting voluntary separation of other designated mental conditions, the Soldier must have a qualifying diagnosis from a behavioral health provider, as documented on a DA Form 3822. In the "Further Comments" section, the behavioral health provider will document specific, persistent deficiencies affecting the ability of the Soldier to function effectively in the military environment.

b. Request for Voluntary Separation. Once appropriately diagnosed with a qualifying physical or mental condition, the Soldier may submit a request for voluntary separation, using the Enclosure to this memorandum as a template. Paragraphs (1) through (5) below outline the minimum requirements to request voluntary separation. Failure to comply with all requirements outlined in paragraphs (1) through (5) below will result in the request being returned to the requestor. In order to request voluntary separation, Soldiers will:

(1) Acknowledge that their condition does not amount to a disability in accordance with AR 40-501. Soldiers with a diagnosis that amounts to a disability must be referred to the Integrated Disability Evaluation System and may not be processed for separation under AR 635-200 for other designated physical or mental conditions.

(2) Affirmatively waive their right to be counseled on deficiencies tied to the Soldiers' physical or mental condition. Soldiers will not be considered for voluntary separation unless they affirmatively waive this right.

(3) Indicate whether they have served or are currently serving in an imminent danger pay area.

(4) Indicate whether they have filed an unrestricted report of sexual assault.

(5) Indicate whether they have self-disclosed that they are the victim of a sex-related offense, an intimate partner violence-related offense, or a spousal abuse offense during service.

2

SUBJECT: Request for Voluntary Separation for Other Designated Physical or Mental Conditions Pursuant to Army Regulation 635-200, Chapter 5

5. Point of contact for this memorandum is the Chief of Justice, Office of the Staff Judge Advocate, Unit, at XXX-XXX-XXXX or first.mi.last.mil@army.mil.

Encl

FIRST MI. LAST
Major General, USA
Commanding

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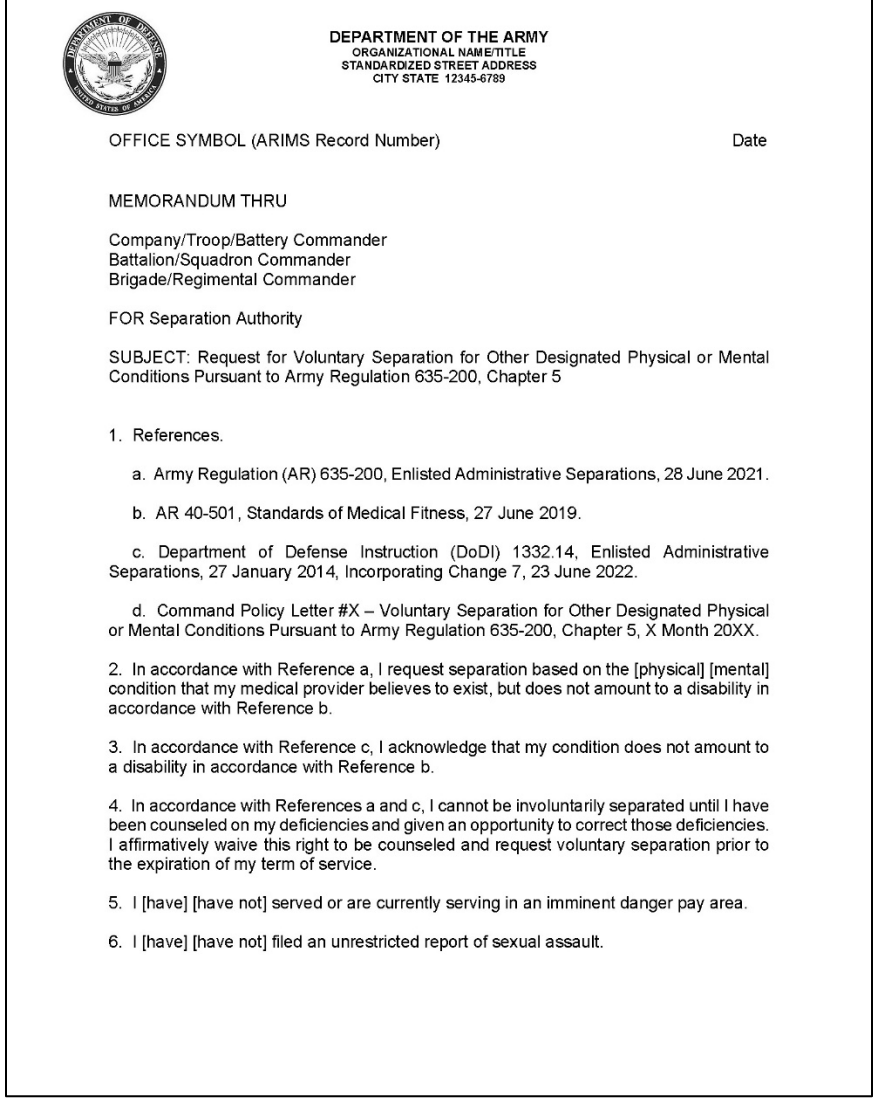
APPENDIX B



DEPARTMENT OF THE ARMY
ORGANIZATIONAL NAME/TITLE
STANDARDIZED STREET ADDRESS
CITY STATE 12345-6789

OFFICE SYMBOL (ARIMS Record Number) Date

MEMORANDUM THRU

Company/Troop/Battery Commander
Battalion/Squadron Commander
Brigade/Regimental Commander

FOR Separation Authority

SUBJECT: Request for Voluntary Separation for Other Designated Physical or Mental Conditions Pursuant to Army Regulation 635-200, Chapter 5

1. References.

a. Army Regulation (AR) 635-200, Enlisted Administrative Separations, 28 June 2021.

b. AR 40-501, Standards of Medical Fitness, 27 June 2019.

c. Department of Defense Instruction (DoDI) 1332.14, Enlisted Administrative Separations, 27 January 2014, Incorporating Change 7, 23 June 2022.

d. Command Policy Letter #X – Voluntary Separation for Other Designated Physical or Mental Conditions Pursuant to Army Regulation 635-200, Chapter 5, X Month 20XX.

2. In accordance with Reference a, I request separation based on the [physical] [mental] condition that my medical provider believes to exist, but does not amount to a disability in accordance with Reference b.

3. In accordance with Reference c, I acknowledge that my condition does not amount to a disability in accordance with Reference b.

4. In accordance with References a and c, I cannot be involuntarily separated until I have been counseled on my deficiencies and given an opportunity to correct those deficiencies. I affirmatively waive this right to be counseled and request voluntary separation prior to the expiration of my term of service.

5. I [have] [have not] served or are currently serving in an imminent danger pay area.

6. I [have] [have not] filed an unrestricted report of sexual assault.

SUBJECT: Request for Voluntary Separation for Other Designated Physical or Mental Conditions Pursuant to Army Regulation 635-200, Chapter 5

7. I [have] [have not] self-disclosed that I am the victim of a sex-related offense, an intimate partner violence-related offense, or a spousal abuse offense during service.

8. Point of contact is the undersigned at XXX-XXX-XXXX or first.mi.last.mil@army.mil.

FIRST MI. LAST
RNK, U.S. Army
Position

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Appendix C

The proposed additional language to AR 635-200 is both bolded and italicized below. Suggested deletions are presented as strikethrough text.

5–14. Other designated physical or mental conditions

a. Excluding conditions appropriate for separation under paragraph 5 – 10, commanders specified in paragraph 1 – 20 may initiate separation under this paragraph on the basis of other physical or mental conditions not amounting to disability (see DoDI 1332.18, AR 40 – 501, and AR 635 – 40) that interfere with assignment to or performance of duty. Such physical or mental conditions may include, but are not limited to:

(1) Airsickness, motion, and/or travel sickness.

(2) Phobic fear of air, sea, and submarine modes of transportation.

(3) Attention-Deficit/Hyperactivity Disorder.

(4) Sleepwalking.

(5) Enuresis.

(6) Adjustment Disorder (except Chronic Adjustment Disorder).

(a) Soldiers recommended for separation under this paragraph based upon a diagnosis of adjustment disorder must meet the following criteria***, as documented by a behavioral health provider in both the medical record and in formal, written counseling statements with the Soldier (as discussed in paragraph j below)***: Soldier experiences one or more incident(s) of acute adjustment disorder and does not respond to behavioral health treatment (or refuses treatment) when one or more treatment modalities have been offered and/or attempted. ***If t***~~t~~he condition ~~must~~ continues to interfere with assignment to or performance of duty even with treatment, ***Soldiers will be afforded an opportunity to overcome those deficiencies, as discussed in paragraph j below.***

(b) Duration of adjustment disorder episode must be less than 6 months when separation procedures are initiated. The provider must clearly document in the medical record how the condition interferes with assignment to or performance of duty.

(c) When an episode of adjustment disorder has persisted for longer than 6 months and continues to interfere with assignment to or performance of duty, the Soldier must be referred to the Integrated Disability Evaluation System.

(7) Personality disorder. A personality disorder is an enduring pattern of inner experience and behavior that deviates markedly from cultural expectations, is pervasive and inflexible, is stable over time and leads to clinically significant distress or impairment in functioning. The onset of personality disorder typically occurs in adolescence or early adulthood and may manifest as an inability to adapt to the military environment as opposed to an inability to perform the requirements of specific jobs or tasks (though both may be present in some cases). Observed behavior of specific conditions should be documented in appropriate counseling or personnel records, and should establish that the behavior is persistent, interferes with assignment to or performance of duty, and has continued after the Soldier was counseled and afforded an opportunity to overcome ~~the mental condition~~ ***those deficiencies, as discussed in paragraph j below.***

(8) Other Mental Conditions. In addition to adjustment disorder and personality disorder, other mental conditions, as defined in the Diagnostic and Statistical Manual of Mental Disorders, current edition, exist that do not amount to a disability as defined in DoDI 1332.18, AR 40–501, and AR 635–40. When a Soldier is diagnosed with such a condition that does not amount to a disability, and the condition interferes with the Soldier's assignment to or performance of duty,

Appendix C

the Soldier will be afforded an opportunity to overcome those deficiencies, as discussed in paragraph j below.

(9) Other Physical Conditions. In addition to the physical conditions outlined in paragraph a(1)–(5) above, other physical conditions may exist that do not amount to a disability as defined in DoDI 1332.18, AR 40–501, and AR 635–40. When a Soldier is diagnosed with such a condition that does not amount to a disability, and the condition interferes with the Soldier's assignment to or performance of duty, the Soldier will be afforded an opportunity to overcome those deficiencies, as discussed in paragraph j below.

b. When a commander is concerned that a Soldier may have a physical or mental condition that interferes with assignment to or performance of duty, the commander will refer the Soldier for a medical examination and/or mental status evaluation in accordance with DoDI 1332.14 and DoDI 6490.04. Mental status evaluations are only required for separation on the basis of mental disorders (not physical conditions), including personality disorders, not amounting to a disability.

c. The evaluation will assess whether PTSD, TBI, depression, sexual assault, and other behavioral health conditions may be contributing factors to the basis for administrative separation.

d. The behavioral health provider will document in the electronic medical record the specific diagnostic criteria for the condition used as the basis for the Soldier's separation action in accordance with the most current edition of the Diagnostic and Statistical Manual of Mental Disorders. A statement indicating that the Soldier's disorder is of sufficient severity to interfere with the Soldier's ability to function in the military must be included. The diagnosis must be established by a privileged mental health provider as defined in DoDI 6490.04. The installation Director of Psychological Health (DPH), or designee, will corroborate the diagnosis and sign the DA Form 3822 (Report of Mental Status Evaluation).

(1) In accordance with paragraph 1 – 33, Soldiers will not be processed for administrative separation under this paragraph if PTSD, TBI, and/or other co-morbid behavioral health conditions are significant contributing factors to the basis for separation, but will instead be evaluated under DES in accordance with AR 635 – 40.

(2) In accordance with paragraph 1 – 34, Soldiers determined to have a medical condition that may not meet medical fitness standards for retention under AR 40 – 501 will be evaluated under DES. Processing under DES takes precedence over administrative separation under this chapter.

(3) In accordance with AR 600 – 85, Soldiers who present with symptoms consistent with alcohol and/or drug use disorder must be referred for further evaluation and treatment.

(4) In accordance with AR 608 – 18, in cases where a mandated referral to the Family Advocacy Program is required based on the Soldier's clinical presentation, documentation must be submitted in order to confirm that a referral was made.

e. In the case of Soldiers who have served or are currently serving in an imminent danger pay area, the installation DPH will corroborate the diagnosis and forward to the Office of The Surgeon General (OTSG), Behavioral Health Division (DASG – HSZ) for final review. OTSG will ensure healthcare provider compliance with the requirements in paragraphs 5–14d(1) through 5–14d(4) and provide a memorandum to the installation DPH. The OTSG review will
be included in the separation packet. Soldiers who have never served in an imminent danger pay area do not require review by OTSG.

f. ***For mental condition separations listed in paragraph a(6)-(8) above,*** ~~T~~the separation action must include the DA Form 7771 (Enlisted Behavioral-Health Related Administrative Separation

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Screening Checklist). ***A behavioral health provider will complete the DA Form 7771 prior to forwarding the chain of command for review and consideration of initiation of elimination, as discussed in paragraph j below.***

g. Commanders will not take action prescribed in this chapter in lieu of disciplinary action solely to spare a Soldier who may have committed acts of misconduct for which punishment may be imposed under the UCMJ.

h. Separation under this paragraph on the basis of other physical or mental conditions not amounting to a disability is authorized only if the condition is so severe that the Soldier's ability to function effectively in the military environment is significantly impaired. Separation under this paragraph is not appropriate when separation is warranted under chapters 4, 5, 7, 9, 10, 11, 13, 14, or 18, of this regulation; AR 380 – 67; or AR 635 – 40.

i. Nothing in this paragraph precludes separation of a Soldier who has such a condition for other reasons authorized by this regulation.

j. Separation processing may not be initiated under this paragraph until the Soldier has been counseled formally, in writing, ***by a behavioral health or medical provider*** concerning ***their*** deficiencies and has been afforded ~~ample~~ ***an*** opportunity, ***usually 30 calendar days***, to ***demonstrate progress in overcoming, or*** overcome ***entirely***, those deficiencies as reflected in appropriate counseling or personnel records (see para 1–17). The Soldier will also be counseled, in writing, that the condition does not qualify as a disability. ***Figures X through X below are template counseling statements that behavioral health and medical providers may employ.*** Additionally, applicable counseling statements that support separation will be included as part of the separation action and will be uploaded by the TC into IPERMS prior to the administrative separation of the Soldier.

(1) Prior to counseling the Soldier, the behavioral health or medical provider will consult with the chain of command to identify the Soldier's specific deficiencies as they relate to assignment to or performance of duty as it relates to the Soldier's behavioral health or medical diagnosis and afford the Soldier an opportunity to overcome those deficiencies.

(2) If the Soldier fails to overcome those deficiencies, as determined by the behavioral health or medical provider in consultation with the chain of command, the behavioral health or medical provider will forward a copy of the written counseling statements, along with supporting medical documentation, to include a DA Form 3822, DA Form 7771, DD Form 2807-1, and DD Form 2808, as applicable, to the chain of command for review and consideration of initiation of elimination.

(3) Alternatively, if, prior to counseling the Soldier, the behavioral health or medical provider assesses that a mental or physical condition not amounting to a disability cannot be overcome, the behavioral health or medical provider may issue a written opinion documenting this fact to the chain of command. Once issued, the behavioral health or medical provider will counsel the Soldier, notifying the Soldier of the behavioral health or medical provider's opinion, as well as the behavioral health or medical provider's forwarding of the counseling statement, and relevant supporting medical documentation discussed in paragraph j(2) above, to the chain of command for review and consideration of initiation of elimination.

k. When it has been determined that separation under this paragraph is appropriate, the unit commander will take the actions specified in the notification procedure in this regulation under chapter 2, section I; or the administrative board procedure in chapter 2, section II, as applicable.

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l. Separation authority is as follows:
(1) Separation authority for Soldiers separated under this paragraph who are, or have been, deployed to an area designated as an imminent danger pay area, or Soldiers who filed an unrestricted report of sexual assault within 24 months of initiation of separation, is the GCMCA. This authority may not be delegated but may be exercised by a general officer serving as the acting GCMCA. In cases where the sexual assault results in a mental health condition not amounting to a physical disability, and the Soldier is being discharged based solely on such condition, the separation will be per paragraph 5–14l(3).
(2) Separation authority for Soldiers who have been the victim of a sex-related offense, an intimate partner violence-related offense, or a spousal-abuse offense during service in the Army is the GCMCA. This delegation may not be further delegated. Specific instruction for these separation actions are contained in paragraph 5–14m.
(3) Separation authority for Soldiers separated under this paragraph for a physical condition not expressly listed in paragraph 5–14a(1) through 5–14a(7) is the GCMCA. For Soldiers in an entry-level status, this authority may be delegated in writing to the SPCMCA. For separation under this paragraph, for a condition not expressly listed in paragraph 5–14a(1) through 5–14a(7), the separation authority will include a statement that the requirements of this paragraph have been complied with.
(4) In all other cases, the separation authority is the SPCMCA.
m. Before a member of the Armed Forces who was the victim of a sex-related offense, an intimate partner violence related offense, or a spousal-abuse offense during service in the Army (whether or not such offense was committed by another member of the Armed Forces), and who has a mental health condition not amounting to a physical disability, is separated, discharged, or released from the Army based solely on such condition, the diagnosis of such condition must be corroborated by a competent mental healthcare professional at the peer level or a higher level of the healthcare professional making the diagnosis and endorsed by TSG. The endorsement by TSG may not be delegated.
(1) Narrative reason for separation if mental health condition present. If the narrative reason for separation, discharge, or release from the Armed Forces of a member of the Armed Forces is a mental health condition that is not a disability, the appropriate narrative reason for the separation, discharge, or release will be a condition, not a disability, or Secretarial plenary authority under chapter 15.
(2) Definitions. In this section only, the following definitions apply:
(a) Intimate partner violence-related offense. An offense under UCMJ, Art. 128 or UCMJ, Art. 130 or an offense under State law for conduct identical or substantially similar to UCMJ, Art. 128 or UCMJ, Art. 130.
(b) Sex-related offense. An offense under UCMJ, Art. 120 or UCMJ, Art. 120b or an offense under state law for conduct identical or substantially similar to UCMJ, Art. 120 or UCMJ, Art. 120b.
(c) Spousal-abuse offense. An offense under UCMJ, Art. 128 or an offense under state law for conduct identical or substantially similar to UCMJ, Art. 128.
n. For characterization or description of service, see paragraph 5–1.
o. Voluntary Separation.
(1) Qualifying Diagnosis. Prior to requesting voluntary separation, Soldiers must be diagnosed with a qualifying physical or mental condition, as outlined in paragraph a above.

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(a) A medical provider will document a qualifying physical condition on a DD Form 2807-1, DD Form 2808, other applicable form, or memorandum for record. In the applicable section of the relevant form, or in a separate memorandum for record, the medical provider will document how the diagnosis interferes with assignment to or performance of duty by the affected Soldier.
(b) A behavioral health provider will document a qualifying mental condition on a DA Form 3822. In the "Further Comments" section, the behavioral health provider will document how the diagnosis interferes with assignment to or performance of duty by the affected Soldier.
(2) Request for Voluntary Separation. Once appropriately diagnosed with a qualifying physical or mental condition, the Soldier may submit a request for voluntary separation, using Figure X as a template. Paragraphs (a) through (e) below outline the minimum requirements to request voluntary separation. Failure to comply with all requirements outlined in paragraphs (a) through (e) below will result in the request being returned to the requestor. In order to request voluntary separation, Soldiers will:
(a) Acknowledge that their condition does not amount to a disability in accordance with AR 40-501. Soldiers with a physical or mental condition that amounts to a disability must be referred to the Integrated Disability Evaluation System, and may not be processed for separation under AR 635-200 for other designated physical or mental conditions.
(b) Affirmatively waive their right to be counseled on deficiencies tied to the Soldiers' physical or mental condition. Soldiers will not be considered for voluntary separation unless they affirmatively waive this right.
(c) Indicate whether they have served or are currently serving in an imminent danger pay area.
(d) Indicate whether they have filed an unrestricted report of sexual assault.
(e) Indicate whether they have self-disclosed that they are the victim of a sex-related offense, an intimate partner violence-related offense, or a spousal abuse offense during service.

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THE DAMS THAT DAMN US: HOW THE WATER WARS BEGIN

MAJOR KYLE F. HOFFMANN*

> *The system becomes unsettled either if a state considers that it is so militarily dominant that it can disregard its neighbors, or if a state concludes that their interests are so compromised by the existing situation that even a military defeat is better than continuing the present situation without challenge*.[1]

I. Introduction

A freshwater river flows through Country A and into Country B. Country B and its lower riparian neighbors agree on how to reasonably and equitably use the river—for irrigation, fishing, and drinking water. Country A has historically used the river in the same manner, doing so without a treaty or formal agreement with Country B. Yet over the past twenty years, and in response to climate change, Country A has dammed the river to harness its hydroelectric power and diverted it to irrigate drier regions. Country B is feeling the effect. Their river has dried up, the fish are fewer and smaller, and the country is suffering a drought, in significant part due to the damming of their lifeblood river.

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* Judge Advocate, United States Army. Presently assigned as Brigade Judge Advocate, 513th Military Intelligence Brigade (Theater), Fort Eisenhower, Georgia. LL.M., 2023, The Judge Advocate General's Legal Center and School, U.S. Army; J.D., 2014, Washington & Lee University School of Law; B.A., 2010, University of Mary Washington. Previous assignments include Student, 71st Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia; Battalion Judge Advocate, 3rd Battalion, 1st Special Forces Group (Airborne), Joint Base Lewis-McChord, Washington, 2020–2022; Special Victim's Counsel, Fort Gregg-Adams, Virginia, 2018-2020; Operational Law Attorney, Special Operations Joint Task Force – Afghanistan, Bagram, Afghanistan, 2017-2018; Trial Counsel, Division Artillery, 1st Cavalry Division, Fort Hood, Texas, 2015-2017; Legal Assistance Attorney, 1st Cavalry Division, Fort Hood, Texas, 2015. Member of the Bar of Virginia.

[1] Joseph W. Dellapenna, *The Berlin Rules on Water Resources: The New Paradigm for International Water Law*, *in* WORLD ENVIRONMENTAL AND WATER RESOURCE CONGRESS 2006: EXAMINING THE CONFLUENCE OF ENVIRONMENTAL AND WATER CONCERNS 3 (Randall Graham ed., 2006).

Country A does not believe it is doing anything wrong; it is their sovereign right to use their river as they see fit, and besides, climate change has exacerbated Country A's need for both hydroelectric power and clean drinking water. Country B wants Country A to use the river equitably, reasonably, and without doing significant harm to County B's own interests. Country A ignores Country B, does not agree to arbitration, and does not recognize the jurisdiction of any international bodies to rule on the matter. Neither judgment nor arbitration decision will end the drought, provide more fish, or water crops in Country B. At what point can Country B destroy the dams in Country A to set the freshwater river flowing again?

As climate change increases the risk of drought and the scarcity of fresh water, upper riparian states will seek to secure their portion of transboundary watercourses for their own use.[2] The combination of climate change and actions by upper riparians will intensify fresh water scarcity issues in lower riparians.[3] If an upper riparian damming a transboundary river exacerbates drought in lower riparian states, what recourses do those lower states have? If Country A is China—a powerful country with a strong view of sovereignty that is intent on damming the transboundary Mekong River—at what point can those lower riparian countries resort to force?[4]

This article will explain that the instruments in place for water-sharing agreements will fail, that resorting to force will be the last remaining consideration for lower riparians, and that the international community will need to act quickly to restore the balance of power over transboundary watercourses. Within the context of China's damming of the Mekong and

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[2] OFF. DIR. NAT'L INTEL., GLOBAL WATER SECURITY, INTELLIGENCE COMMUNITY ASSESSMENT, ICA 2012-08 (Feb. 2, 2012).

[3] *Id.*; *see also* David Michel, *What Causes Water Conflict?*, CTR. FOR STRATEGIC & INT'L STUDS. (Nov. 8, 2024), https://www.csis.org/analysis/what-causes-water-conflict.

[4] "The Mekong River is 4300 kilometers long and runs through or forms the borders of China, Myanmar, Laos, Thailand, Cambodia, and Vietnam. Its headwaters originate high in China's Qinghai-Tibetan Plateau, and more than half of its entire length passes through China. In China, it is called the Lancang Jiang or Lancang River." BRIAN EYLER, THE LAST DAYS OF THE MIGHTY MEKONG 4 (2019). "Despite its length, China's portion of the Mekong contributes on average less than twenty percent of all the water in the Mekong Basin." *Id.* at 6. "More than sixty-six million people live in the Mekong Basin. This number includes most of the population of Laos and Cambodia, one-third of Thailand's sixty-five million, and one-fifth of Vietnam's ninety million people." *Id.*

the likelihood of conflict, this article will examine: (1) the legal regimes for transboundary watercourses, (2) how China will justify their actions, and (3) whether the unilateral damming of a transboundary river is an internationally wrongful act. This article will further argue that the lower riparians will inevitably consider using force due to the failure of the current legal regime to provide them equitable and reasonable use of the river. Lastly, this article will argue the international community must resist lowering the armed attack threshold and must pressure China to comply with its customary international law obligations.

II. Background

The United States and the international community have recognized the growing impact water disputes will play in the near future. The 2022 U.S. National Defense Strategy,[5] the 2024 Annual Threat Assessment of the U.S. Intelligence Community,[6] and the U.S. Intelligence Council[7] all warn of increased likelihood of transboundary conflict over water due to climate change. The United Nations (U.N.) recently stated that "[h]uman-induced climate change is the largest, most pervasive threat to the natural environment and societies the world has ever experienced."[8]

Further, conflict over freshwater is inevitable: there are 276 transboundary basins overlaying 148 countries in the world.[9] As such, water utilization by one riparian always affects co-riparians within the same basin.[10]

There have been conflicts over transboundary watercourses in the recent past. The Six-Day War between Israel and its neighbors was

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[5] U.S. DEP'T OF DEF., 2022 NATIONAL DEFENSE STRATEGY 6 (Oct. 27, 2022).

[6] OFF. DIR. NAT'L INTEL., ANNUAL THREAT ASSESSMENT OF U.S. INTELLIGENCE COMMUNITY 6 (Feb. 5, 2024).

[7] OFF. DIR. NAT'L INTEL, NAT'L INTEL. COUNCIL, NATIONAL INTELLIGENCE ESTIMATE: CLIMATE CHANGE AND INTERNATIONAL RESPONSES INCREASING CHALLENGES TO US NATIONAL SECURITY THROUGH 2040, at 10 (Oct. 21, 2022) [hereinafter NATIONAL INTELLIGENCE ESTIMATE].

[8] Press Release, U.N. Human Rights Office of the High Commissioner, Climate Change the Greatest Threat the World has Ever Faced, UN Expert Warns, U.N. Press Release A/77/226 (Oct. 21, 2022).

[9] Mark Giordano et al., *A Review of the Evolution and State of Transboundary Freshwater Treaties*, 13 INT'L ENV'T AGREEMENTS: POL., L. & ECON., no. 2, 2013, at 2.

[10] CHRISTINA LEB, COOPERATION IN THE LAW OF TRANSBOUNDARY WATER RESOURCES 17-18 (2013).

fomented in part by plans to divert transboundary water.[11] After a breakdown in discussions between Israel, Jordan, Lebanon, and Syria in 1955 over the use of the resources in the Jordan River Basin, Israel and the Arab States sought independent plans to divert the river and its tributaries for irrigation purposes.[12] The Arab States believed Israel's plan was to divert the river in order to irrigate the demilitarized zone of the Negev to expand their population and control into that area.[13] In response, the Arab States sought to divert the Jordan River's tributaries, which would have reduced or halted transboundary flow into Israel.[14] In March and May 1965, Israel fired rockets across the border into Syria, destroying their diversion equipment, which Syria replied to with artillery.[15] After two incidents of sabotage by Syria where Israelis were killed by mines, in July 1966, Israel sent warplanes into Syria to destroy diversion equipment and the anti-aircraft guns protecting them. Soldiers and civilians died.[16]

In *International Waters: Identifying Basins at Risk*, researchers reviewing conflicts over international freshwater resources from 1948-1999 found that indicators for conflict were: (1) rapid or extreme change to physical or institutional systems within a basin (especially the density of dams on a river) and (2) the absence of transboundary institutional mechanisms able to manage the effects of that change.[17] Essentially, conflict was more likely if there was substantial dam building without a treaty to govern those changes.[18]

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[11] Moshe Shemesh, *Prelude to the Six-Day War: The Arab-Israeli Struggle over Water Resources*, 9 ISR. STUD. 1, 1 (2004).
[12] *Id.* at 3-5.
[13] *Id.* at 6-7.
[14] *Id.* at 15-16.
[15] *Id.* at 27-28.
[16] *Id.* at 33-34.
[17] Aaron T. Wolf et al., *International Water: Identifying Basins at Risk*, 5 WATER POL. 29, 44 (2003); *see also* Shim Yoffe, Aaron Wolf & Mark Giordano, *Conflict and Cooperation over International Freshwater Resources: Indicators of Basins at Risk*, 39 J. OF AM. WATER RES. ASS'N 1109, 1123 (2003).
[18] Shira Yoffe et al., *Geography of International Water Conflict and Cooperation: Data Sets and Applications*, 40 WATER RES. RSCH, no. 5, 2004, at 8. "[W]ater events [are defined] as instances of conflict and cooperation that occur within an international river basin; involve the nations riparian to that basin; and concern freshwater as a scarce or consumable resource (e.g., water quality, water quantity) or as a quantity to be managed

The *International Waters* study found that the Mekong basin was at risk for conflict.[19] The Mekong runs from China along the Thailand-Laos border into Cambodia and exits into the South China Sea through Vietnam.[20] China does not have a water-sharing treaty with the lower Mekong riparians[21] and is unlikely to agree to one.[22] Dam development on the Mekong has increased exponentially since that study was published.[23] This suggests the Mekong basin is even more at risk for conflict than previously assessed.[24]

If an increase in dam density is an indicator for conflict, China is expediting the likelihood of conflict. Since the early 1990s, China has been damming parts of the Mekong, but the main river remained unaltered largely due to cooperation between the four members of the Mekong River Commission (MRC)—Laos, Thailand, Cambodia, and Vietnam—which agreed to a water-sharing treaty in 1995.[25] The MRC oversees management of the Mekong River, but does not have enforcement

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(e.g., flooding or flood control, water levels for navigational purposes)." *Id.* at 3. *See also* Yoffe, *supra* note 17, at 1124; Thomas Bernauer & Tobias Böhmelt, *Basins at Risk: Predicting International River Basin Conflict and Cooperation*, 14 GLOB. ENV'T POL. 116, 133 (2014).

[19] Yoffe et al., *supra* note 18, at 1121.

[20] EYLER, *supra* note 4.

[21] *See infra* section III.D.

[22] Ariel Dinar et al., *Why are There so Few Basin-Wide Treaties? Economics and Politics of Coalition Formation in Multilateral International River Basins*, 44 WATER INT'L, 463, 465 (2019).

[23] Wei Jing Ang et al., *Dams in the Mekong: A Comprehensive Database, Spatiotemporal Distribution, and Hydropower Potentials*, EARTH SYST. SCI. DATA, 16, 1209, 1216 (2024).

[24] *See* Yoffe et al., *supra* note 17, at 1113. However, the study found that just 21 of the 1831 total water events (just over one percent) between 1948-1999 were categorized as extensive war acts, which were those "causing deaths, dislocations, or [involved] high strategic cost." *Id.* tbl.1. *But see* NATIONAL INTELLIGENCE ESTIMATE, *supra* note 7; *see also* CHINA AND TRANSBOUNDARY WATER POLITICS IN ASIA (Hongzhou Zhang & Mingjiang Li eds., 2019).

[25] Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, Apr. 5, 1995, 2069 U.N.T.S. 3; *see also* Stefan Lovgren, *Southeast Asia May Be Building Too Many Dams Too Fast*, NAT'L GEOGRAPHIC (Aug. 23, 2018), https://www.nationalgeographic.com/environment/article/news-southeast-asia-building-dams-floods-climate-change.

power.[26] China has never been a member of the MRC.[27] As such, although member states have a notification and consultation requirement before building dams, China does not have a treaty-based consultation requirement with the lower riparians.[28] Over the past several years, China has constructed eleven hydropower dams—of which two are large storage dams[29]—along the mainstream in the upper Mekong basin.[30] There are currently "745 dams complete or under construction on the mainstream and tributaries of the Mekong Basin," and "nearly every tributary in every country of the Mekong is now blocked by a dam."[31]

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[26] *See* Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, *supra* note 25, ch. IV and arts. 34-35.

[27] Rémy Kinna & Alistair Rieu-Clarke, *The Governance Regime of the Mekong River Basin: Can the Global Water Conventions Strengthen the 1995 Mekong Agreement?*, 2.1 INT'L WATER L. 1, 22 (2017). The PRC does have a data-sharing agreement with the Mekong River Commission, and has varying degrees of relationships with the four member countries, including via the Lancang-Mekong Cooperation Mechanism. *See* Ren Junlin, Peng Ziqian & Pan Xue, *New Transboundary Water Resources Cooperation for Greater Mekong Subregion: the Lancang-Mekong Cooperation*, 23 WATER POL'Y 684, 690 (2021) ("Although the MRC focuses on water resources, especially on the development, utilization, and protection of transboundary water resources, China and Myanmar have not joined as members, but have only participated in a limited way as observers.").

[28] *See* Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, *supra* note 25, art. 26; Frauke Urban et al., *Transboundary River Management in Southeast Asia*, *in* CHINA AND TRANSBOUNDARY WATER POLITICS IN ASIA 43, 60 (Hongzhou Zhang & Mingjiang Li eds., 2019).

[29] These dams can store as much water as the Chesapeake Bay. Brian Eyler & Courtney Weatherby, *How China Turned Off the Tap on the Mekong River*, STIMSON CTR. (Apr. 13, 2020), https://www.stimson.org/2020/new-evidence-how-china-turned-off-the-mekong-tap/.

[30] Hydropower dams, which in theory recycle their water, can reduce the amount of water in the river in two ways. First, reservoirs produce high evaporation rates which consumes water. Second, water is over-utilized while the dam is filled, which means the river flow is reduced, at least temporarily. The downriver effects of this can be devastating. The filling of the Ataturk Dam reservoir, located on the Turkish part of the Euphrates River which flows into Syria, "took more than four years," and the "[r]educed flow and temporary stoppage of the river's flow led to failed harvests and interrupted water services in Syria." LEB, *supra* note 10, at 18.

[31] Brian Eyler & Courtney Weatherby, *All Dams Map of the Mekong Basin*, STIMSON CTR. (May 7, 2024), https://www.stimson.org/2024/all-dams-map-of-the-mekong-basin.

Climate change increases the need for freshwater storage and water appropriation through infrastructure,[32] thus increasing the risk of conflict over water. Climate change has led to an increase in the intensity and duration of heatwaves in China.[33] China suffered a heatwave during summer 2022 which reached sustained temperatures of 104 degrees Fahrenheit, and dried up lakes and rivers.[34] This drought in China arrived after a sustained period of heavy rainfall in the spring.[35] If these climate trends continue, it will likely cause China to further develop freshwater storage and diversion, to the inevitable detriment of the lower riparians. Further, China imports large amounts of hydropower from its downstream neighbors.[36] Given the threats from climate change, it will continue to seek greater independence via its own hydropower development.[37] Finally, climate change and increasing demand for water have put additional stress on China's groundwater resources. Given these resources were already

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[32] Paolo D'Odorico, Jampel Dell'Angelo, & Maria Cristina Rulli, *Appropriation Pathways of Water Grabbing*, WORLD DEV., Sept. 2024, at 1, 1-12.

[33] Ning An & Zhiyan Zuo, *Changing Structures of Summertime Heatwaves over China During 1961–2017*, 64 SCI. CHINA: EARTH SCIS. 1242, 1252 (2021); *see also* Christian Shepherd & Ian Livingston, *China's Summer Heat Wave is Breaking All Records*, WASH. POST (Aug 24, 2022, 11:20 AM), https://www.washingtonpost.com/world/2022/08/24/china-drought-heat-wave-climate-change/; *see also* John Kemp, *Beset by Drought, China Turned to Coal to Keep Lights On*, REUTERS (July 21, 2023, 12:51 PM), https://www.reuters.com/business/energy/beset-by-drought-china-turned-coal-keep-lights-kemp-2023-07-21/.

[34] Dennis Wong & Han Huang, *China's Record Heatwave, Worst Drought In Decades*, S. CHINA MORNING POST (Aug. 31, 2022), https://multimedia.scmp.com/infographics/news/china/article/3190803/china-drought/index.html; *see also* Shepherd, *supra* note 33; *see also* Keith Bradsher & Joy Dong, *China's Record Drought Is Drying Rivers and Feeding Its Coal Habit*, N.Y. TIMES (Aug. 26, 2022), https://www.nytimes.com/2022/08/26/business/economy/china-drought-economy-climate.html.

[35] *China Gears Up for Disasters as Flood Season Enters 'Critical Period,'* REUTERS (July 8, 2022, 2:19 AM), https://www.reuters.com/world/china/china-tells-regional-officials-ready-disasters-after-months-torrential-rain-2022-07-08/.

[36] David Devlaeminck, *Revisiting the Substantive Rules of the Law of International Watercourses: An Analysis Through the Lens of Reciprocity and the Interests of China*, 20 WATER POL'Y 323, 332 (2018).

[37] The PRC leads the world in hydroelectric dam energy production, and with the decrease in water levels, PRC has reverted back to a reliance on coal power plants. Keith Bradsher & Clifford Krauss, *China Is Burning More Coal, a Growing Climate Challenge*, N.Y. TIMES (Nov. 3, 2022), https://www.nytimes.com/2022/11/03/business/energy-environment/china-coal-natural-gas.html.

severely stressed due to increases in demand for irrigation, China is increasingly diverting fresh water from the south to the north.[38]

Climate change and the acceleration in large-scale dam construction has caused numerous problems on the Mekong, including floods and droughts accompanied by crop loss and the destabilization of the ecological system of the Mekong.[39] Experts expect droughts and disruptions to the water flow of the Mekong to become more common, and warn that it could lead to the collapse of the entire ecosystem.[40] At risk are the world's largest inland fisheries, which provide food security and livelihoods for sixty million people in the lower Mekong basin and provide twenty percent of the world's freshwater fish catch.[41]

These ecological disasters have already begun. China's damming of the Mekong caused a devastating drought in Laos and the lower riparians in 2019, which caused death, destroyed crops, and severely affected the ecological balance of the river.[42] The Mekong was wetter than usual

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[38] UNITED NATIONS EDUC., SCI. & CULTURAL ORG., THE UNITED NATIONS WORLD WATER DEVELOPMENT REPORT 2020: WATER AND CLIMATE CHANGE 142 (2020); *see also South-to-North Water Diversion Project*, WATER TECH., https://www.water-technology.net/projects/south_north/ (last visited July 23, 2024).

[39] Yadu Pokhrel et al., *A Review of the Integrated Effects of Changing Climate, Land Use, and Dams on Mekong River Hydrology*, 10 WATER 266, 267 (2018).

[40] Stefan Lovgren, *Mekong River at Its Lowest in 100 Years, Threatening Food Supply*, NAT'L GEOGRAPHIC (July 31, 2019), https://www.nationalgeographic.com/environment/article/mekong-river-lowest-levels-100-years-food-shortages; *see also* Lovgren, *supra* note 25.

[41] Brian Eyler, *Science Shows Chinese Dams Are Devastating the Mekong*, FOREIGN POL'Y (Apr. 22, 2020, 12:56 PM), https://foreignpolicy.com/2020/04/22/science-shows-chinese-dams-devastating-mekong-river/; *see* Tom Fawthrop, *Dams and Climate Change Kill the Mekong*, YALE GLOB. ONLINE (Nov. 28, 2019), https://archive-yaleglobal.yale.edu/content/dams-and-climate-change-kill-mekong.

[42] Alan Basist & Claude Williams, *Monitoring the Quantity of Water Flowing Through the Mekong Basin Through Natural (Unimpeded) Conditions*, SUSTAINABLE INFRASTRUCTURE P'SHIP (Apr. 13, 2020) https://www.pactworld.org/library/monitoring-quantity-water-flowing-through-upper-mekong-basin-under-natural-unimpeded; *see* Kay Johnson, *Chinese Dams Held Back Mekong Waters During Drought, Study Finds*, REUTERS (Apr. 13, 2020, (8:11 AM), https://www.reuters.com/article/us-mekong-river/chinese-dams-held-back-mekong-waters-during-drought-study-finds-idUSKCN21V0U7/. From 2019 to 2020, Thailand, Cambodia, and Vietnam suffered through the worst drought in their history. *See* Eyler & Weatherby, *supra* note 29; *see also* Lovgren, *supra* note 40; Hoang Nam, *Mekong Delta Struggles to Find Freshwater as Drought, Salt Intrusion Continue*,

during the drought, yet China dammed nearly all upper Mekong wet season flow.[43] But for China's damming of the Mekong, "portions of the Mekong along the Thai-Laos border would have experienced significantly higher flows from July 2019 to the end of the year instead of suffering through severe drought conditions."[44] Incredibly, China's actions "came after [China] 's upstream dams released nearly all of their water between January and June 2019 to produce an unprecedented amount of hydropower for sale to markets in [China]."[45] China's use of the shared river for profit caused the lower riparians to suffer their worst drought in decades.[46] This drought in China has continued into 2024, indicating that these are not temporary issues.[47]

The likelihood of conflict will continue to increase as the damaging effects of China's damming of the Mekong are further exacerbated by climate change. This article will next review current transboundary watercourse law and what recourses may be available to the Mekong's lower riparian states in the event China's actions continue to escalate.

III. Transboundary Watercourse Legal Regimes

There is no universally-accepted U.N. Convention on the law of transboundary watercourses.[48] Customary international law has largely filled the gaps, but the basis for conflict generally stems from competing visions of sovereignty over transboundary water.[49] Because of the ubiquity of transboundary basins,[50] much of the history of transboundary watercourse law developed to balance sovereignty and the desire to

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VNEXPRESS (Mar. 21, 2020, 11:39 PM), https://e.vnexpress.net/news/news/mekong-delta-struggles-to-find-freshwater-as-drought-salt-intrusion-continue-4071219.html.

[43] Eyler & Weatherby, *supra* note 29; *see also* Eyler, *supra* note 41.

[44] Eyler & Weatherby, *supra* note 29.

[45] *Id.*; *see also* Eyler, *supra* note 41.

[46] Basist & Williams, *supra* note 42; Eyler & Weatherby, *supra* note 29.

[47] Richard Bernstein, *China's Mekong Plans Threaten Disaster for Countries Downstream*, FOREIGN POL'Y (Sept. 27, 2017), https://foreignpolicy.com/2017/09/27/chinas-mekong-plans-threaten-disaster-for-countries-downstream/; *see* John Kemp, *China's Hydro Generators Wait for the Rains to Come*, REUTERS (June 18, 2024), https://www.reuters.com/markets/commodities/chinas-hydropower-generation-surges-coal-ebbs-kemp-2024-06-18.

[48] Giordano et al., *supra* note 9.

[49] Dellapenna, *supra* note 1, at 269.

[50] Giordano et al., *supra* note 9, at 2.

promote cooperation and avoid conflict.[51] The principles of transboundary watercourse law are likely considered customary international law, although whether China recognizes it as such, is a separate issue.

A. Theories of Sovereignty in Transboundary Watercourse Law

There have been four historical theories of sovereignty related to transboundary watercourses: the Harmon doctrine of territorial sovereignty ("no restraint on a state's use of waters in its territory");[52] Sovereign Equality ("a state is entitled to the flow of the waters undiminished in quantity and unchanged in quality unless it consents otherwise");[53] Prior Appropriation ("existing uses cannot be adversely affected by subsequent uses");[54] and Limited Territorial Sovereignty and the obligation to do No Significant Harm ("each co-basin state is entitled to a reasonable and equitable share of the beneficial uses of the waters" so long as they do not cause significant harm to co-riparians).[55] Each is likely to be cited in some form during any discussion over the Mekong River.

1. The Harmon Doctrine

The Harmon Doctrine is an extension of the axiom that a state is sovereign within its territory.[56] Under this theory, the upper riparian "could do virtually as it pleased with the portion of an international watercourse within its territory,"[57] which has been reflected as "the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty."[58] While the Harmon Doctrine is widely-

[51] LAURENCE BOISSON DE CHAZOURNES, FRESH WATER IN INTERNATIONAL LAW 3 (2013); ITZCHAK KORNFIELD, TRANSBOUNDARY WATER DISPUTES 49 (2019).
[52] Charles B. Bourne, *The International Law Association's Contribution to International Water Resources Law*, 36 NAT. RES. J. 155, 156 (1996); *see also* Tamar Meshel, *The Harmon Doctrine is Dead, Long Live the Harmon Doctrine!*, 63 VA. J. OF INT'L L. 3 (2022).
[53] Bourne, *supra* note 52; *see also* KORNFIELD, *supra* note 51, at 57.
[54] Bourne, *supra* note 52; *see also* John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV. 355, 379 (2005).
[55] Bourne, *supra* note 52; *see also* KORNFIELD, *supra* note 51, at 61.
[56] Stephen C. McCaffrey, *The Harmon Doctrine One Hundred Years Later: Buried, Not Praised*, 36 NAT. RES. J. 965, 981 (1996).
[57] *Id.* at 967.
[58] G.A. Res. 626 (VII) (Dec. 21, 1952); *see also* LEB, *supra* note 10, at 44.

rejected, it is often the argument made by upper riparians[59] and reflects China's position on the Mekong.[60]

The Harmon Doctrine is based upon an opinion by U.S. Attorney General Judson Harmon during an 1890s dispute between the United States and Mexico over the diversion of the Rio Grande by upstream American farmers.[61] In response to a query by the Secretary of State on the relevant international law, Attorney General Harmon stated "[t]he fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its own territory."[62] Quoting Chief Justice John Marshall, he expanded:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validly from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.[63]

Attorney General Harmon analyzed the Rio Grande issue under this principle, stating:

> [T]hat the Rio Grande lacks sufficient water to permit its use by the inhabitants of both countries does not entitle Mexico to impose restrictions of the USA which would hamper the development of the latter's territory or deprive its inhabitants of an advantage with which nature had

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[59] Joseph W. Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, 1 INT. J. GLOB. ENV'T ISSUES 264, 269 (2001).
[60] *See* infra section III.D.
[61] KORNFIELD, *supra* note 51, at 44-45.
[62] McCaffrey, *supra* note 56, at 981.
[63] KORNFIELD, *supra* note 51, at 4; *see also* McCaffrey, *supra* note 56, at 981-82 (*citing* 21 Op. Att'y Gen. 274, 281-82 (1895) (*quoting* Schooner Exchange v. McFadden, 11 U.S. 116 (1812))).

> endowed it and which is situated entirely within its territory. To admit such a principle would be completely contrary to the principle that USA exercises full sovereignty over its natural territory.[64]

Harmon's theory was not applied as both countries referred the problem to their joint Boundary Water Commission to find each country's "legal and equitable rights and interests in said water."[65] In fact, the U.S. State Department concluded that the United States had never considered the Harmon Doctrine to be anything more than special pleading and repudiated the Doctrine.[66] The theory was also rejected in later Supreme Court cases and U.S. treaties, and it has been disfavored in international courts and tribunals.[67]

Despite this rejection,[68] its simple premise makes it suitable for non-legal, public affairs arguments as to why an upper riparian state should control its waters. The similarity of the Harmon Doctrine to arguments made by China in discussions over transboundary water and other issues[69] is an interesting insight into the historical, and cyclical nature of how water wars could begin.

2. Sovereign Equality

The principle of Sovereign Equality is that "any act potentially altering either the quantity or quality of the water reaching [a lower riparian] constitute[s] an infringement of *its* territorial integrity."[70] While it has been rejected in practice, this theory—usually proffered by the lower riparian—provides the counterargument to the Harmon Doctrine. The two competing theories therefore provide a basis for understanding the currently accepted theory of sovereignty underpinning customary international law of transboundary watercourses—limited territorial sovereignty.[71]

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[64] KORNFIELD, *supra* note 51, at 56.
[65] McCaffrey, *supra* note 56, at 986.
[66] Dellapenna, *supra* note 59, at 270.
[67] KORNFIELD, *supra* note 51, at 45-46; *see also* McCaffrey, *supra* note 56, at 1006-07.
[68] KORNFIELD, *supra* note 51, at 46.
[69] *See infra* sections III.B.2, III.D, IV.E.
[70] BOISSON DE CHAZOURNES, *supra* note 51, at 26 (emphasis added).
[71] *See infra* section III.A.4.

A famous use of the sovereign equality theory was the Spanish argument in the Lake Lanoux Arbitration in 1957. Spain and France were arguing over France's plan to divert (yet fully replace) the waters of a tributary of Lake Lanoux in the Pyrenees,[72] which had been the subject of an 1866 treaty between the two countries, and whose waters flowed into Spain. Although the arbitration principally concerned the interpretation of the treaty, the Lake Lanoux tribunal considered customary international law principles.[73] The Spanish argument was one of sovereign equality: that even outside the terms of the treaty, upper riparian France could not alter the flow of the transboundary watercourses without prior *agreement* with lower riparian Spain, even if all of the diverted water was replaced.[74] That is, Country A could do nothing with the river within its territory without the consent of Country B even if it ultimately had no effect on Country B's water. As the tribunal stated, this interpretation "would imply either the general paralysis of the exercise of State jurisdiction whenever there is a dispute, or the submission of all disputes, of whatever nature, to the authority of a third party; international practice does not support either the one or the other of these consequences."[75]

The principle of sovereign equality necessarily infringes on the sovereignty of the upper riparian—that is, the upper riparian can no longer use its territory as it sees fit. This would prevent any action by upper riparians and its absolutist nature is more of an argumentative position than a statement of law. The Lake Lanoux tribunal rejected "such an absolute rule of construction," stating that "[t]erritorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin, but only before such obligations."[76] The tribunal ultimately decided France had taken every step necessary to ensure the rights of Spain had been heard and considered in good faith, and could continue the project.[77]

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[72] Lake Lanoux Arbitration (Fr. v. Spain), 12 R.I.A.A. 281 (Perm. Ct. Arb.1957), at 1, http://leap.unep.org/sites/default/files/court-case/COU-143747E.pdf [hereinafter Lake Lanoux Arbitration].
[73] *Id.* at 25.
[74] *Id.* at 20.
[75] *Id.* at 27.
[76] *Id.* at 16.
[77] *Id.* at 34-35.

3. Prior Appropriation

The doctrine of prior appropriation is similar to that of sovereign equality, and is based on a 'first in time, first in right' principle: the earliest beneficial use of the water has the greater right to it.[78] There are three elements to this principle: "(1) intent to apply the water to beneficial use, (2) an actual diversion of water from a natural source of surface water, and (3) application of the water to a beneficial use within a reasonable time."[79] Primarily used in the American West, this principle was initially used by gold rush miners, who recognized that those who came before them to a water source had a greater right to it.[80]

In an international context, this principle is similar to sovereign equality with the added buttress of reliance. For example, if a lower riparian state developed their irrigation infrastructure and requirements faster than an upper riparian state, under the prior appropriation principle the upper riparian's future development would be stunted, since any impact on the water's flow would infringe on the prior beneficial use—and more senior claim—of the lower riparian. If the lower riparian used a specific volume of water before the upper riparian had developed their uses of it, under this principle the upper riparian would not be able to alter the quality of water reaching the lower state. As with the sovereign equality principle, this necessarily infringes on the sovereignty of upper riparians.

The use of the Nile River provides an example of this argument being used by lower riparians. Ethiopia, an upper riparian, built the Grand Ethiopian Renaissance Dam (GERD) to harness the hydroelectric power of the Nile.[81] As identified in a recent article, "although [eighty-five percent] of Nile waters originate in Ethiopia, nearly all consumptive use

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[78] Irwin v. Phillips, 5 Cal. 140, 147 (1855).

[79] DAVID H. GETCHES, SANDRA B. ZELLMER & ADELL L. AMOS, WATER LAW IN A NUTSHELL 71 (5th ed. 2015); *see also* Kait Schilling, *Addressing the Prior Appropriation Doctrine in the Shadow of Climate Change and the Paris Climate Agreement*, 8 SEATTLE J. ENV'T L 97, 98 (2018).

[80] Douglas R. Littlefield, *Water Rights During the California Gold Rush: Conflicts over Economic Points of View*, 14 W. HIST. Q. 415, 416 (1983).

[81] Max Bearak & Sudarsan Raghavan, *Africa's Largest Dam Powers Dreams of Prosperity in Ethiopia—and Fears of Hunger in Egypt*, WASH. POST (Oct. 15, 2020, 1:29 PM), https://www.washingtonpost.com/world/interactive/2020/grand-ethiopian-renaissance-dam-egypt-nile/.

occurs downstream in Egypt and Sudan." [82] Egypt, as the furthest downstream, contributes no water to the Nile. However, Egypt has relied on water from the Nile for thousands of years, and the GERD will have a significant effect on the amount of water that reaches Egypt and Sudan.[83] Egypt has claimed rights over the upstream use of the Nile based on British colonial era treaties that guaranteed it a portion of the Nile's flow.[84] Over the past several decades Egypt has claimed that "[e]ach riparian country has the full right to maintain the status quo of rivers flowing on its territory." [85] Without an enforcement mechanism over those upper riparians, however, Egypt has been disregarded, and discussions between the Egyption and Ethiopian governments have been fruitless—Ethiopia built the GERD and it is being filled.[86] Egyptian leaders from Anwar Sadat to Abdel Fatah al-Sissi have threatened war over Ethiopia's use and damming of the Nile.[87] Climate change is exacerbating drought and raising tensions over water, and arguments over prior use are degenerating into threats of armed conflict.

4. Limited Territorial Sovereignty & No Significant Harm

The current favored international water allocation theory is based on the principle of Limited Territorial Sovereignty and the obligation to do No Significant Harm. The principle of limited territorial sovereignty over shared watercourses is largely considered to be a principle of customary international law and is articulated in many of the international and bi-lateral treaties on the uses of transboundary watercourses.[88]

Under this principle, a riparian sovereign can use the waters within its territory equitably and reasonably so long as that use does not cause

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[82] Kevin G. Wheeler et al., *Understanding and Managing New Risks on the Nile with the Grand Ethiopian Renaissance Dam*, 11 NATURE COMMC'N, no. 1, 2020, at 2.
[83] *Id.*; Bearak & Raghavan, *supra* note 81.
[84] Wheeler et al., *supra* note 82, at 2.
[85] KORNFIELD, *supra* note 51, at 60.
[86] Bearak & Raghavan, *supra* note 81.
[87] Olivier Caslin & Hossam Rabie, *Is a War Between Egypt and Ethiopia Brewing On the Nile?*, AFR. REP. (May 6, 2021, 6:37 PM), https://www.theafricareport.com/85672/is-a-war-between-egypt-and-ethiopia-brewing-on-the-nile/; *Egypt Says Talks Over Grand Ethiopian Renaissance Dam Have Failed -Statement*, REUTERS (Dec. 20, 2023), https://www.reuters.com/world/africa/egypt-says-talks-over-grand-ethiopian-renaissance-dam-have-failed-statement-2023-12-19/.
[88] LEB, *supra* note 10, at 50.

significant harm with the uses of its co-riparians.[89] This equitable principle is an attempt at compromise between the absolutist theories of sovereignty articulated above. An upper riparian may use their river as they see fit, but only if it does not significantly harm co-riparians. Alternately, a lower riparian cannot object to the use of the watercourse by the upper riparian if it does not interfere with their use and does not cause them *significant* harm. This allows for restricted use of water by a sovereign but within negotiable bounds of equity. Justice Oliver Wendell Holmes articulated the competing values in *New Jersey v. New York* regarding the diversion of the Delaware River for drinking water purposes:

> A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be. The different traditions and practices in different parts of the country may lead to varying results, but the effort always is to secure an equitable apportionment without quibbling over formulas.[90]

This principle was applied by the International Court of Justice (ICJ) in the *Case Concerning the Gabčíkovo-Nagymaros Project* dispute between Hungary and Slovakia in 1997.[91] After Hungary appeared to withdraw from a water sharing treaty with Czechoslovakia, Czechoslovakia unilaterally constructed a dam which appropriated "between 80 and 90 percent of the waters of the Danube before returning

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[89] KORNFIELD, *supra* note 51, at 62; *see also* LEB, *supra* note 10, at 50; *see also* Salman M. A. Salman, *The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law*, 23 INT'L J. OF WATER RES. DEV. 619 (2007).

[90] New Jersey v. New York, 283 U.S. 336, 342-43 (1931); *see also* KORNFIELD, *supra* note 51, at 63.

[91] Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7 (Sept. 25).

them to the main bed of the river."[92] The Court found that despite Hungary's apparent withdrawal from a treaty, Czechoslovakia "unilaterally assum[ed] control of a shared resource . . . . thereby depriving Hungary of its right to an *equitable* and *reasonable* share of the natural resources of the Danube,"[93] and found that Czechoslovakia was not entitled to unilaterally dam the transboundary Danube in that manner.[94] The Court has reiterated this principle several times.[95]

The counterbalancing obligation to do no significant harm in international watercourse law stems from the 1927 Constitutional Law Court of Germany case *Württemberg and Prussia v. Baden* (the Donauversinkung case).[96] In that case, Württemberg and Baden were German states separated by the Danube. There was natural seepage from the river through the limestone, after which the water reemerged in the basin of the Rhine, which favored Baden. Württemberg and Prussia brought suit against Baden alleging that Baden had exacerbated the seepage loss, which at times dried up the Danube almost completely. Baden alleged that Württemberg had taken actions that reduced the seepage loss to Baden's detriment. In 1927, the Court declared as a matter of international law that "no State may substantially impair the natural use of the flow of such river by its neighbor,"[97] requiring that both states had to maintain the river's natural flow. But the Court went beyond the "duty not to injure the interests of other members of the international community"

> The application of this principle is governed by the circumstances of each particular case. The interests of the States in question must be weighed in an equitable manner against one another. One must consider not only the absolute injury caused to the neighbouring State, but also

[92] *Id.* ¶¶ 33, 61, 78.
[93] *Id.* ¶ 85 (emphasis added).
[94] *Id*. ¶ 87.
[95] *See*, *e.g.*, Pulp Mills on the River Uruguay Case (Arg. v. Uru.), Judgment, 2010 I.C.J. 14 (Apr. 20); *see also* Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Judgment, 2015 I.C.J. 665 (Dec. 16).
[96] Württemberg & Prussia v. Baden (Donauversinkung case) (1927), *in* INTERNATIONAL ENVIRONMENTAL LAW REPORTS, VOLUME 1 EARLY DECISIONS (Robb ed., 1999).
[97] *Id*.

> the relation of the advantage gained by one to the injury caused to the other.[98]

This principle of no significant harm is often seen as a counterweight to the principle of limited territorial sovereignty, although its prominence in articulations of customary international law has been controversial at times. The two principles, acting in concert, have been established as the preeminent theory of sovereignty underpinning customary international law.

B. Attempts to Codify Customary International Law of Transboundary Watercourses

International transboundary watercourse law developed significantly in the second half of the twentieth century in the forms of treaties and international agreements. The International Law Association's (ILA) 1966 Helsinki Rules, the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, and the ILA's 2004 Berlin Rules all build upon one another, documenting and developing the law of transboundary watercourses over the decades.[99] Most importantly, the obligation to do no harm has been elevated from one of several factors to consider in determining what is a reasonable and equitable use, to a principle of equal prominence.[100]

1. The Helsinki Rules on the Uses of the Waters of International Rivers

The Helsinki Rules on the Uses of the Waters of International Rivers[101] was an ILA attempt to codify a standard of sovereignty for all transboundary watercourses and thereby affect customary international law. Although the Helsinki Rules are not a treaty and had neither an enforcement mechanism nor authority, they are important for how customary international law of transboundary watercourses developed.

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[98] *Id*.

[99] The United Nations Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes is an important document, but not relevant to this article.

[100] Tamar Meshel, *Swimming Against the Current: Revisiting the Principles of International Water Law in the Resolution of Fresh Water Disputes*, 61(1) HARV. INT'L L. J. 135, 140 (2020).

[101] Int'l Law Ass'n, *The Helsinki Rules on the Uses of the Waters of International Rivers*, Report of the Fifty-Second Conference (1966) [hereinafter *Helsinki Rules*].

By the middle of the 1950s, there were several ongoing transboundary water disputes, including between France and Spain in the Lake Lanoux Arbitration, India and Pakistan over the Indus, Egypt and Sudan over the Nile, Israel and its neighbors over the Jordan, and between the United States and Canada over the Columbia.[102] At that time, however, there were no rules of international law applicable to these disputes, only the four theories of sovereignty in varying degrees of acceptance.[103] Because there was no consensus on how to handle the legal disputes, the ILA formed a committee in 1954 to develop a common understanding of the state of the law of transboundary watercourses.[104]

After several conferences debating which of the principles of sovereignty should be codified,[105] the Report of the Committee to the 1966 Helsinki Conference listed thirty-seven articles over seven chapters. These were adopted by the Conference as the Helsinki Rules.[106]

The Rules, unenforceable but intended to reflect customary international law,[107] state as its principal rule in Article IV that, "[e]ach basin State is entitled, within its territory, to a *reasonable* and *equitable* share in the beneficial uses of the waters of an international drainage basin."[108] Article V lists eleven "relevant factors" that are to be considered holistically to determine "what is a reasonable and equitable share," including "the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State."[109] The commentary to Article X clarifies, "Certainly, a diversion of water that denies a co-basin State an equitable share is in violation of international law."[110]

This constituted a settling of the scholarly legal debate that "the principle of equitable utilization of the waters of an international drainage basin is the dominant theory of law,"[111] and indicated "a middle ground

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[102] Bourne, *supra* note 55, at 156.
[103] *Id*.
[104] *See* Int'l Law Ass'n, *Statement of Principles, Report of the Forty-Seventh Conference* (1956).
[105] *See* Bourne, *supra* note 55, at 159-66; Salmon, *supra* note 89, at 628.
[106] *Helsinki Rules*, *supra* note 101.
[107] Dellapenna, *supra* note 59, at 273.
[108] *Helsinki Rules*, *supra* note 101, art. IV (emphasis added).
[109] *Id.* art. V.
[110] *Id.* art. X, Comment; *see* Bourne, *supra* note 55, at 162-65.
[111] Bourne, *supra* note 55, at 165.

between the two extremes" of prior appropriation and territorial sovereignty.[112] The Helsinki Rules established the principle of reasonable and equitable utilization as the "cardinal rule of international water law," and "placed the obligation not to cause harm as one of the elements for determining such reasonable and equitable utilization."[113]

The principles were accepted as customary international law soon after publication, and were reflected in numerous treaties and court decisions, further solidifying their status as "the single most authoritative and widely quoted set of rules for regulating the use and protection of international watercourses."[114] Although the Helsinki Rules are not legally binding, they were the foremost recitation of the principles of customary international law with regard to transboundary watercourses until the U.N. Convention on the Law of the Non-Navigational Uses of International Watercourses was issued in 1997.

2. The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses

Although the Helsinki Rules were an accepted articulation of customary international law, the unenforceability of the rules, the nature of customary international law, and the nature of the ILA as a promulgating body meant they would remain guidance. As Professor Joseph Dellapenna wrote: "Relying upon an informal legal system alone to legitimate and limit claims to use shared water resources is inherently unstable."[115]

In 1970, the U.N. saw the need to codify these customary international law principles in a treaty, and the General Assembly called upon the International Law Commission to prepare a set of "draft articles" on the "non-navigational uses of international watercourses."[116] As a result of this effort, the General Assembly approved the Convention on the Law of Non-Navigational Uses of International Watercourses in May 1997.[117]

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[112] *Helsinki Rules*, *supra* note 101, art. VIII, Comment; *see* Bourne *supra* note 55, at 166.
[113] Salman, *supra* note 89, at 630.
[114] *Id.*; *see* Bourne, *supra* note 55, at 215.
[115] Dellapenna, *supra* note 1.
[116] *Id.*
[117] Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, 29999 U.N.T.S. 77 [hereinafter U.N. Watercourses Convention].

As a U.N. treaty, it is the most prominent international watercourse legal standard. However, as of 2024, only 39 states are party to the Convention.[118] China has rejected the principles (described below), and the only East Asian country who has ratified it is Vietnam.[119] The United States voted in favor at General Assembly without reservation,[120] but is not a signatory to the Convention.[121] Yet insofar as they reflect customary international law, the Watercourses Convention's principles are relevant to future arbitration between co-riparians and discussion of whether violation of these principles are an internationally wrongful act.

The first of the General Principles of the Watercourses Convention is stated in Article 5, *Equitable and Reasonable Utilization and Participation*:

> Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.[122]

As with the Helsinki Rules, the Convention provided seven factors to be "considered together and a conclusion reached on the basis of the whole" to determine what is a reasonable and equitable use.[123] The factors to be considered are:

> (a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
>
> (b) The social and economic needs of the watercourse States concerned;

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[118] *Id*. at 79.
[119] *Id*.
[120] U.N. GAOR, 51st Sess., 99th plen. mtg, at 7-8, U.N. Doc. A/51/PV.99 (May 21, 1997).
[121] U.N. Watercourses Convention, *supra* note 117.
[122] *Id*. art. 5.
[123] *Id*. art. 6.

> (c) The population dependent on the watercourse in each watercourse State;
>
> (d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
>
> (e) Existing and potential uses of the watercourse;[124]
>
> (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect; and
>
> (g) The availability of alternatives, of comparable value, to a particular planned or existing use.[125]

None of these factors outweigh any others, although Article 10 indicates special regard is to be given to "the requirements of vital human needs."[126]

The development by this convention, which was accompanied by some controversy in the International Law Commission and in the General Assembly, was over the relation of the rule of equitable utilization to the obligation to do no harm.[127] This obligation was articulated in Article 7 (immediately after the equitable utilization rule of Article 5 and the relevant factors in Article 6) as the *Obligation Not to Cause Significant Harm*. Article 7 states: "Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States" and that states shall, when such harm does occur in the absence of an agreement to the harmful use, "take all appropriate measures… in consultation with the affected State, to eliminate or mitigate such harm

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[124] A reflection of prior appropriation as a factor to determine reasonable and equitable use. Stephen C. McCaffrey, *Non-Navigational Uses of International Watercourses*, U.N. AUDIOVISUAL LIB. OF INT'L L. (June 30, 2008), https://legal.un.org/avl/ls/McCaffrey_IW.html#.

[125] U.N. Watercourses Convention, *supra* note 117, art. 6.

[126] *Id*. art. 10.

[127] Devlaeminck, *supra* note 36, at 324.

and, where appropriate, to discuss the question of compensation."[128] As one of the Special Rapporteurs wrote: "[t]he emphasis on prevention is important, since it is often difficult to stop or modify an activity once it has begun, and it can be very complicated and expensive, if indeed it is possible, to remedy harm once caused."[129]

The obligation to do no significant harm,[130] elevated in the Watercourses Convention to complement the principle of equitable utilization, creates a standard of review for actions that a harmed state can raise to its neighbor and international adjudicative bodies. If Country B believes it has sustained significant harm due to Country A's use of an international watercourse, it can raise the issue with Country A. Articles 5, 6 and 7 direct that follow-on negotiations should reach a solution that is equitable and reasonable with regard to the uses of the transboundary watercourse and benefits both Country A and Country B.

These principles work together. Equitable and reasonable use, without the no significant harm obligation, could allow an upper riparian to assert absolute territorial sovereignty.[131] The obligation to do no significant harm without the equitable and reasonable use principle could lead to absolute sovereign equality.[132] In practice, upper riparians favor equitable and reasonable use whereas lower riparians favor the obligation to not cause significant harm, both perceiving these rules to provide protection for their uses.[133] Consequently both principles must be articulated together.

The Watercourses Convention also provides means of dispute resolution. Under Article 33, the Convention states that if the parties cannot negotiate, they can seek assistance by a third party or can "agree to submit the dispute to arbitration or to the International Court of Justice."[134]

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[128] U.N. Watercourses Convention, *supra* note 117, art. 7; *c.f.*, Section IV.C (language mirrors that of Consequences for Internationally Wrongful Acts).
[129] McCaffrey, *supra* note 124.
[130] *See infra* Section III.A.4.
[131] Francesco Sindico, *National Sovereignty Versus Transboundary Water Cooperation: Can You See International Law Reflected in the Water?*, 115 AM. J. INT'L L. UNBOUND 178 (2021).
[132] *Id*.
[133] Devlaeminck, *supra* note 36, at 324.
[134] U.N. Watercourses Convention, *supra* note 117, art. 33. The timeline outlined in Article 33 could take up to nine months to appoint a fact-finder, and relies on the consent of the

While the dispute resolution clauses are not binding on non-signatories, the ICJ could be the adjudicative body for dispute resolution for the Mekong hypothetical, as explained below.

The Convention was adopted in Resolution 51/229 in May 1997 by a vote of 103 states in favor, three against, and twenty-seven abstentions.[135] China, Turkey, and Burundi voted against the Resolution. In its statement, China representative objected to the major clauses of the articles, the view of territorial sovereignty, the balance of responsibilities between upper and lower riparians, and the fact-finding requirement in the mandatory procedures for dispute settlement.[136] China representative stated:

> Territorial sovereignty is a basic principle of international law. A watercourse State enjoys indisputable territorial sovereignty over those parts of international watercourses that flow through its territory. It is incomprehensible and regrettable that the draft Convention does not affirm this principle.[137]

Despite the 1997 vote, the Watercourses Convention entered into force in 2014 after the ratification by its thirty-fifth State.[138] The issue hindering wider acceptance seems to be between upper riparians believing the obligation to do no significant harm in Article 7 favors lower riparians, and lower riparians believing the principles in Articles 5 and 6 to use transboundary watercourses equitably and reasonably—which does not mean that each state is entitled to an *equal* share—as favoring upper riparians.[139] As a U.N.-promulgated document, it is the legal standard with

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parties to "to have access to their respective territory and to inspect any facilities, plant, equipment, construction or natural feature relevant for the purpose of its inquiry." *Id*.

[135] U.N. GAOR, 51st Sess., 99th plen. mtg, at 7-8, U.N. Doc. A/51/PV.99 (May 21, 1997).

[136] *Id.*; *see also* Devlaeminck, *supra* note 36, at 328 ("When before the General Assembly, China was one of three states to vote against the resolution stating that: (1) it did not represent general agreement by all countries; (2) it did not reflect a state's sovereignty over the parts of a watercourse that flow through a state's territory; (3) citing its preference to choose the method of dispute settlement; and (4) reaffirming its belief that provisions regarding rights and obligations of states contain an 'obvious imbalance between those of States on the upper reaches of an international watercourse and those of States on the lower reaches.'").

[137] U.N. GAOR, 51st Sess., 99th plen. mtg, at 6, U.N. Doc. A/51/PV.99 (May 21, 1997).

[138] U.N. Watercourses Convention, *supra* note 118.

[139] Devlaeminck, *supra* note 36, at 324.

the most support and is the closest articulation to customary international law on the subject of transboundary watercourses.

C. Current State of Transboundary Watercourse Law[140]

Despite the U.N. attempt to create a worldwide understanding of the use of transboundary watercourses, its acceptance was limited. China voted against the measure and Paraguay and Venezuela are the only countries from North, Central, or South America that are signatories. While the United States voted in favor of the Convention, it is not a signatory.[141] There have been other successful regional or bilateral watercourse agreements which reflect the principles of equitable and reasonable use and the obligation to do no significant harm—primarily the United Nations Economic Commission for Europe (UNECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes[142]—and attempts at regional cooperation, such as the Amazon Cooperation Treaty,[143] the Nile River Basin Cooperative Agreement,[144] and the Canada-U.S. Boundary Waters Treaty.[145] There are additional multi- and bi-lateral treaties covering most of the international basins, but no universal or consistent coverage of all transboundary watercourses.[146]

In 2004, the ILA published the Berlin Rules to "express rules of law as they presently [stand] and, to a small extent, rules not yet binding legal obligations but which…are emerging as rules of customary international

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[140] Sindico, *supra* note 131; LEB, *supra* note 10; GABRIEL ECKSTEIN, INTERNATIONAL LAW OF TRANSBOUNDARY GROUNDWATER RESOURCES (1st ed. 2017).

[141] U.N. GAOR, 51st Sess., 99th plen. mtg, at 7-8, U.N. Doc. A/51/PV.99 (May 21, 1997).

[142] U.N. Economic Commission for Europe, Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Oct. 6, 1996, 1936 U.N.T.S. 269 [hereinafter UNECE Watercourse Convention].

[143] Treaty for Amazonian Cooperation, July 3, 1978, 1202 U.N.T.S. 51.

[144] Agreement on the Nile River Basin Cooperative Framework, May 14, 2010, NILE BASIN INITIATIVE, https://nilebasin.org/sites/default/files/attachments/CFA%20-%20English%20FrenchVersion.pdf.

[145] Treaty Between the United States and Great Britain Relating to Boundary Waters between the United States and Canada, U.K.-U.S., Jan. 11, 1909, 36 Stat. 2448, T.S. 548.

[146] Gabriel Eckstein, *The Status of the UN Watercourses Convention: Does it Still Hold Water?*, 36 INT'L J. WATER RES. DEV. 429, 26 (2020); Sindico, *supra* note 131, at 180; ECKSTEIN, *supra* note 140.

law"[147] and to place emphasis on environmental aspects of water law.[148] The significant update of the Berlin Rules was putting both principles in the same rule (including in the inverse). Basin States must "manage the waters of an international drainage basin in an equitable and reasonable manner having due regard for the obligation not to cause significant harm to other basin States."[149] As with the Helsinki Rules, the Berlin Rules reflect a scholarly view, but not necessarily that of states.[150]

Given the lack of comprehensive international treaty law, transboundary watercourse conflicts and "the resolution of the tension between national sovereignty and transboundary water cooperation will often be left to customary international law."[151] Customary international law takes effect due to consistent State practice out of a sense of legal obligation.[152] Principles of customary international law apply to all states[153] unless a state has "actively, unambiguously and consistently" objected to the principle of customary law "while it is in process of becoming one, and before [the principle] has crystallized into a defined and generally accepted rule of law."[154] These states are known as "persistent objectors."[155] Even when a customary international law principle exists, a state that has objected persistently since its inception cannot have that rule invoked against it.[156]

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[147] Int'l Law Ass'n, *The Berlin Rules on Water Resources,* at 4 (2004), https://www.internationalwaterlaw.org/documents/intldocs/ILA/ILA_Berlin_Rules-2004.pdf [hereinafter *Berlin Rules*].

[148] DANTE A. CAPONERA & MARCELLA NANNI, PRINCIPLES OF WATER LAW AND ADMINISTRATION 70 (3rd ed. 2019).

[149] *Berlin Rules*, *supra* note 147, arts. 12, 16.

[150] The Berlin Rules are unlikely to have an effect on the Mekong dispute.

[151] Sindico, *supra* note 131, at 178.

[152] North Sea Continental Shelf (Ger. v. Den. / Ger. v. Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20).

[153] *See also* Patrick Dumberry, *Incoherent and Ineffective: The Concept of Persistent Objector Revisited*, 59 INT'L & COMPAR. L. Q. 779, 780 (2010).

[154] *Id.* at 781.

[155] Report of the Int'l Law Comm'n, Seventy-Third Session, at 14, U.N. Doc. A/77/10 (2022). That objection is only recognized if the principle in question is not considered jus cogens, or a peremptory norm of international law. This article does not conclude the transboundary water principles are jus cogens.

[156] Colombian-Peruvian Asylum Case (Colom. v. Peru), Judgment, 1950 I.C.J. 266, at 276 (Nov. 20).

The principle of equitable and reasonable use and the obligation to do no significant harm are likely customary international law.[157]As outlined above, both principles have been articulated in some form in international court decisions, the U.N. Watercourses Convention, the ILA's Helsinki Rules and the Berlin Rules, the UNECE Watercourses Convention, and various multi- and bilateral treaties covering transboundary watercourses over the past seventy-five years.[158]

Some procedural steps are likely to be considered customary international law as well. The requirement to notify co-riparians of planned uses of transboundary watercourses was defined in the Lake Lanoux case[159] and has been codified in many treaties since.[160] As a principle, co-riparians "generally accept that they have a duty to provide prior notification of planned measures that may have a significant adverse effect upon co-riparians."[161]

Although these principles of watercourse law are generally considered customary international law, China tends to have a stronger view of state sovereignty, and therefore may not consider themselves bound by these principles.

D. China's View of Transboundary Watercourse Law

Given the statement by China's representative at the signing of the Watercourses Convention, China will likely argue that it is sovereign within its territory, and the principles as stated in the U.N. Convention are not applicable to it.[162] China is not party to an overall watercourse treaty

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[157] *See* Sindico, *supra* note 131, at 180-82.

[158] Dispute Over the Status and Use of the Waters of the Silala (Chile v. Bol.), Judgment, 2022 I.C.J 614 (Dec. 1); Gabčíkovo-Nagymaros Project, *supra* note 91; Pulp Mills on the River Uruguay Case, *supra* note 95; Certain Activities Carried Out by Nicaragua in the Border Area, *supra* note 95; UNECE Watercourse Convention, *supra* note 117.

[159] Lake Lanoux Arbitration, *supra* note 72, at 15 ("A State wishing to do that which will affect an international watercourse cannot decide whether another State's interest will be affected; the other State is the sole judge of that and has the right to information on the proposals.").

[160] Mara Tignino, *Prior Notification and Water Rights*, 115 AM. J. INT'L L. UNBOUND, 189, 189 (2021).

[161] *Id.*

[162] *See* U.N. GAOR, 51st Sess., 99th plen. mtg, at 6-7, U.N. Doc. A/51/PV.99 (May 21, 1997).

with its co-riparians,[163] although those states have an agreement between themselves (Mekong River Commission). Their agreements with the individual states of the Mekong River Commission in this context are generally of a data-sharing nature.[164] China is "party to approximately fifty treaties that govern or are related to its transboundary waters."[165] Therefore, customary international law governs China's responsibilities to its Mekong co-riparians, to the extent that PRC has not disavowed the principles.

Since China voted against the Watercourses Convention and disavowed the theory of limited territorial sovereignty articulated therein, China may argue (1) the Watercourses Convention does not apply to it because it is not signatory and it objected to it at the time; (2) its principles are not customary international law; and (3) even if they are customary international law, China is a persistent objector and thus is not bound by it.

Arguments that the reasonable and equitable use principle and obligation to do no significant harm do not apply to China should fail. In China's bilateral watercourse treaties with the non-Mekong River Commission countries, they *do* endorse the principle to reasonably and equitably use transboundary rivers (although with less specificity in the factors than the Watercourses Convention),[166] and, at least where it is

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[163] *See* Dinar et al., *supra* note 22, at 469-70.

[164] Huiping Chen et al., *Exploring China's Transboundary Water Treaty Practice Through the Prism of the UN Watercourses Convention*, 38(2) WATER INT'L 217, 219 (2013); *see also* Devlaeminck, *supra* note 36, at 327 ("Given that China is primarily an upstream country with a strong stance on state sovereignty and a preference for bilateral agreements with its riparian neighbors, reciprocity will arguably play a strong role in its transboundary water cooperation, and thus it is not surprising that it would strive for greater balance in these provisions. China is party to approximately 50 treaties that govern or are related to its transboundary waters.").

[165] Devlaeminck, *supra* note 36, at 327.

[166] Chen et al., *supra* note 164, at 220 (citing the Agreement on Protection and Utilization of Transboundary Waters between PRC and Mongolia, China.-Mong., Apr. 29, 1994, LEX-FAOC017921; Agreement between the Government of the Republic of Kazakhstan and the Government of the People's Republic of China Concerning Cooperation in Use and Protection of Transboundary Rivers, China-Kaz., Sept. 12, 2001, LEX-FAOC065815; and Agreement Between the Government of the People's Republic of China and the Government of the Russian Federation Concerning Reasonable Use and Protection of Transboundary Waters, China-Russ., Jan. 29, 2008, LEX-FAOC094367).

downstream to Mongolia, endorse the obligation not to do harm.[167] While these principles do not exist in treaties with the Mekong River Commission states, China's endorsement of these principles and obligations undercut any potential persistent objector argument.

However, even if customary international law is the basis for holding China accountable for transboundary watercourse issues, it is unclear what forum would hear a complaint about China's alleged violations. If there is a disagreement over a proposed transboundary project and the parties cannot resolve the issue under the principles of equitable and reasonable use and the obligation to do no significant harm, countries generally resort to application to an international body.[168] Many treaties set up their own adjudicative bodies or river commissions, while others—including the Watercourses Convention—resort to the ICJ if the parties cannot resolve the issue. There are no adjudicative bodies specified in the bi-lateral agreements between China and the lower Mekong states. Further, since China is not signatory to the Watercourses Convention, there is no obvious avenue for dispute resolution.

While the ICJ may appear to be the most obvious forum to resolve a transboundary issue, as described below, there are significant barriers for lower Mekong states holding China accountable in the ICJ, especially given the ICJ's voluntary jurisdiction.[169] While the lower riparian states' recourse is unclear, the process, at least initially, would likely follow the procedure of Internationally Wrongful Acts.

IV. Is Damming a Transboundary Watercourse an Internationally Wrongful Act?

The history of the Articles on Responsibility of States for Internationally Wrongful Acts indicates both their importance and their

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[167] Art. 4 provides that "[a]ny development or use of transboundary waters should follow the principle of fairness and equability without impeding any reasonable use of transboundary waters." Agreement between the Government of the People's Republic of China and the Government of Mongolia on the Protection and Utilization of Transboundary Waters, China-Mong., Apr. 29, 1994, UN ENVIRONMENT PROGRAMME LAW AND ENVIRONMENT ASSISTANCE PLATFORM, https://faolex.fao.org/docs/pdf/bi-17921.pdf; *see* Chen et al., *supra* note 164, at 220.

[168] KORNFELD, *supra* note 51, at 42.

[169] *Rules of Court (1978),* INT'L. CT. JUST., art. 38, para. 5, https://www.icj-cij.org/rules (last visited Nov. 13, 2024).

limits. In 1948, the U.N. General Assembly established the International Law Commission (ILC), and selected the law of State Responsibility as one of the first topics to be analyzed and codified by the new legal body.[170] After several draft articles over the decades, the General Assembly "took note" of the Draft Articles on Responsibility of States for Internationally Wrongful Acts on 12 December 2001 with U.N. General Resolution 56/83, and "commend[ed] them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action."[171] The General Assembly brought attention to the Articles again in 2004,[172] 2007,[173] and 2010[174] with pledges to further examine whether the articles should be the basis of a convention on State Responsibility.

There is not yet such a convention on State Responsibility. According to the U.N.'s official history on the Articles, "[a]lthough some delegations have pressed for a diplomatic conference to consider the Articles, others have preferred to maintain their status as an ILC text approved *ad referendum* by the General Assembly."[175]

The fifty-nine articles published on the law of State Responsibility sought to dictate the basic rules of international law for how states interact with each other, what constitutes a violation of an obligation toward another state, and the remedies for such violations.[176] The Articles termed these violations "internationally wrongful acts."

A. Internationally Wrongful Acts and the *Gabčíkovo-Nagymaros Project*

Pursuant to Article 2 of the Articles of Responsibility of States for Internationally Wrongful Acts, "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a

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[170] James Crawford, Articles on Responsibility of States for Internationally Wrongful Acts 1 (2012) (U.N. Audiovisual Library of International Law).
[171] *Id.*; G.A. Res. 56/83 (Jan. 28, 2002).
[172] Crawford, *supra* note 170; G.A. Res. 59/35 (Dec. 2, 2004).
[173] Crawford, *supra* note 170; G.A. Res. 62/61 (Dec. 6, 2007).
[174] Crawford, *supra* note 170; G.A. Res. 65/19 (Dec. 6, 2010).
[175] Crawford, *supra* note 170, at 2; *see also* Press Release, General Assembly, Legal Committee Delegates Differ on Applying Rules for State Responsibility: Convention Needed, or Customary Law Adequate?, U.N. Press Release GA/L/3395 (Oct. 19, 2010), https://press.un.org/en/2010/gal3395.doc.htm.
[176] ROBERT KOLB, THE INTERNATIONAL LAW OF STATE RESPONSIBILITY 15 (2017).

breach of an international obligation of the State."[177] Article 12 clarifies that "[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."[178] This reflects that "[i]nternational practice shows that the obligation breached flows from agreements, customary rules, general principles of law, unilateral undertakings, acquiescence and estoppels, or international judgments, and so on."[179] Therefore, a state's violation of a customary international law principle or obligation can be considered an internationally wrongful act (IWA).[180]

The *Gabčíkovo-Nagymaros Project* case is an IWA case similar to the Mekong hypothetical. In 1977, Hungary and Czechoslovakia signed a treaty to construct dams along the Danube, which served as the border between the two countries for approximately eighty-eight miles .[181] The purpose of the treaty was to use "the natural resources of the Bratislava-Budapest section of the Danube River for the development of water resources, energy, transport, agriculture," and particularly to develop hydroelectricity and manage flooding.[182]

The treaty called for building two series of locks; one at Gabčíkovo (in Czechoslovak territory) with an adjacent hydroelectric powerplant and the other at Nagymaros (in Hungarian territory) with another hydroelectric powerplant, to constitute "a single and indivisible operational system of works."[183] The costs and benefits were to be borne equally, with locks at Gabčíkovo and Nagymaros "jointly owned" by the contracting parties "in equal measure," although each to be managed by the state on whose territory they were located.[184]

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[177] Int'l Law Comm'n, *Responsibility of States for Internationally Wrongful Acts*, art. 2 (2001), *as adopted by* G.A. Res. 56/83 (Jan. 28, 2002) [hereinafter IWA].
[178] *Id*. art. 12.
[179] KOLB, *supra* note 176, at 25.
[180] This article does not delve into issues of attribution, as the PRC's dam development is state-run.
[181] Gabčíkovo-Nagymaros Project, *supra* note 91, ¶¶ 15-16. Although this case involved a bi-lateral treaty, much of the language stems from the law of state responsibility rather than the law of treaties.
[182] *Id.* ¶ 15.
[183] *Id.* ¶ 18.
[184] *Id.*

Work began in 1978, but due to domestic political pressure concerning both economic viability and ecological impact, the Hungarian Government decided in 1989 to suspend the work at Nagymaros.[185] In response, Czechoslovakia began "Variant C," which involved the *unilateral* diversion of the Danube by Czechoslovakia on its territory, and included the construction of an overflow dam and a levee linking that dam to the south bank of a canal.[186] In 1991, Czechoslovakia began work on this project over the objections of the Hungarian Government, and by 1992 had prepared the Danube to be closed and started damming the river.[187] The ICJ found that "the operation of Variant C led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 percent of the waters of the Danube before returning them to the main bed of the river."[188]

After diplomatic discussions and countermeasures, in 1994 Hungary and Slovakia[189] submitted the matter to the International Court of Justice (ICJ). In the meantime, Slovakia's filling of the overflow dam had led to a major reduction in the flow and in the level of the downstream waters in the Danube, to the detriment of Hungary.[190]

Hungary maintained that they had not withdrawn from the treaty itself, but instead justified their conduct by relying on a "state of ecological necessity."[191] The ecological concern was over potential flooding, reduced water levels in the Danube, the quality of the drinking water after development, and damage to flora and fauna.[192]

Despite the treaty between the two countries, the ICJ considered the principles reflected in the draft Articles of Responsibility of States for Internationally Wrongful Acts (as submitted to the U.N. in 1991) as reflecting customary international law, stating: "when a State has

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[185] *Id.* ¶ 22.
[186] *Id.* ¶ 23.
[187] *Id.*
[188] *Id.* ¶ 78.
[189] In 1992, Czechoslovakia became Slovakia and the Czech Republic, with the relevant portion of the treaty occurring in Slovakia. The ICJ found that Slovakia succeeded from Czechoslovakia and the treaty was binding on Slovakia. *Id.* ¶ 123.
[190] *Id.* ¶ 25.
[191] *Id.* ¶ 40. Further analysis on the invocation of necessity as a circumstance precluding wrongfulness below.
[192] *Id.*

committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect."[193]

The ICJ found Hungary's invocation of necessity was improper, and therefore they had no right to violate the terms of the treaty—the source of *their* international obligation. This violation of the treaty was considered an internationally wrongful act. The ICJ also found that Czechoslovakia's unilateral damming in Variant C constituted an internationally wrongful act as a violation of customary international law, the source of *their* obligation.[194] As a consequence, the ICJ found that, in accordance with Article 5 of the Watercourses Convention, Hungary and Slovakia should run Variant C jointly by using the Danube in an equitable and reasonable manner.[195] Both countries were entitled to reparations.

As stated in the case, the customary international law principles of transboundary watercourses—reasonable and equitable use and the obligation to do no significant harm—are considered international obligations of the state under IWA Article 2. The unilateral damming of a transboundary watercourse that causes significant harm to a lower riparian is likely a breach of those obligations. However, getting an offending state to acknowledge and rectify that obligation, or a court to enforce the IWA process, will be challenging.

There is no judicial enforcement mechanism created by or articulated in the Articles of Responsibility of States. The enforcement mechanisms

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[193] *Id.* ¶ 47. The ICJ considered the law of State responsibility distinct from the law of treaties, specifically from the Vienna Convention of the Law of Treaties (1969). The ICJ stated:

> A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility. . . .It is moreover well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect.

Id.

[194] *Id*. ¶ 110.

[195] *Id*. ¶¶ 146-47.

are between states and assume diplomacy and good faith.[196] An injured state invokes the responsibility of the offending state by giving notice of its claim to that state, and may specify in particular "the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing," and "what form reparation should take."[197] An offending state, however, can claim that it should not be held responsible by citing one of six "circumstances precluding wrongfulness."[198]

B. Circumstances Precluding Wrongfulness for Internationally Wrongful Acts

The Articles spell out six "circumstances precluding wrongfulness" to "erase the [internationally wrongful act], and as a further consequence, the duty to make reparation and the faculty to take [countermeasures]."[199] The circumstances precluding wrongfulness are: consent, self-defense, force majeure, distress, necessity, and countermeasures. As the commentary to the Articles states:

> Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility. They have nothing to do with questions of the jurisdiction of a court or tribunal over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation.[200]

In the Mekong hypothetical, if the lower Mekong states specified to China that China's damming of the Mekong violated China's customary international law obligations, China may argue that their own climate change impacts necessitated their damming, and therefore they should not be held responsible for the injuries to the lower riparians. China will likely argue one of three circumstances precluding wrongfulness allows them to avoid responsibility: necessity, distress, and force majeure.

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[196] *See* KOLB, *supra* note 176, at 5.
[197] IWA, *supra* note 177, art. 43.
[198] *See id*. arts. 20-25.
[199] KOLB, *supra* note 176, at 110.
[200] Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentary*, ch. V ¶ (7) (2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [hereinafter IWA Commentary].

1. Necessity

Under Article 25 of the Articles of Responsibility of States, necessity may not be invoked by the offending state unless the violative act: "(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."[201] Necessity has been invoked to preclude the wrongfulness of acts contrary to both customary law and treaty obligations, and "has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population."[202]

Case law supports a strict reading of the circumstances allowing an invocation of necessity. In *Gabčíkovo-Nagymaros Project*, the Court stated "necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met."[203] Thus, the test was that the invocation of necessity:

> [M]ust have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril;" the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity." Those conditions reflect customary international law.[204]

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[201] IWA, *supra* note 177, art. 25.
[202] IWA Commentary, *supra* note 200, art. 25, ¶ 14.
[203] Gabčíkovo-Nagymaros Project, *supra* note 91, ¶ 52.
[204] *Id.* ¶ 52. That the ICJ reiterated that this test represented customary international law will be important to the PRC's inevitable argument that there is no convention regarding state responsibility.

Further, environmental concerns can be an essential interest of the State. The ICJ found in *Gabčíkovo-Nagymaros Project*, citing its earlier advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*:

> [T]he environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.[205]

If climate change continues to severely impact China, they can argue in good faith that securing fresh water is an essential interest of the state; drought and starvation of its citizens, along with the increase in unlivable heat conditions, will lead to a grave and imminent peril; and that using sovereign freshwater resources is the "only means" of safeguarding the interest.

In *Gabčíkovo-Nagymaros Project*, however, Hungary could not convince the ICJ of their invocation of necessity. Although environmental concerns are an essential interest of the state, the Court found that "'extremely grave and imminent' peril must 'have been a threat to the interest at the actual time'" and Hungary's concern was merely the "apprehension of a possible 'peril.'"[206] The Court also found that despite valid concerns about the quality of drinking water, Hungary "had means available to it, other than the suspension and abandonment of the works, of responding to that situation."[207] Thus the claim of necessity in that case failed on multiple fronts, and Hungary was found to have no justification for not continuing its legal obligation to Slovakia.[208]

China's argument of necessity will similarly fail. First, damming the Mekong "seriously impairs the essential interest" of the lower riparians, as they have interest in the fresh water—it provides food to sixty million

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[205] *Id*. ¶ 53 (*citing* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C J. Reports 241, ¶ 29 (July 8, 1996)).
[206] *Id*. ¶ 54.
[207] *Id*. ¶ 55.
[208] *Id*. ¶ 57.

people and the entire ecological system is at risk. Second, the peril of mass drought in China may not yet be imminent and may be too attenuated—just as the future damage to the Danube was considered too attenuated. Third, damming and diverting the Mekong may not be the "only means" of safeguarding available fresh water for China. Lastly, all circumstances precluding wrongfulness must be temporary; China's large-scale dam building project is not temporary.[209]

Further, an argument against China's position lies in the second part of the necessity definition, which is that "necessity may not be invoked by a State as a ground for precluding wrongfulness if . . . .the State has contributed to the situation of necessity." [210] If China's actions "contributed to the situation of necessity" by their greenhouse gas emissions and thereby aggravated the climate issues they claim are causing them to dam the Mekong, the invocation of necessity may be inappropriate.[211]

Both China and lower riparians will find support for their position in the *Gabčíkovo-Nagymaros Project* case. However, the defense of necessity has been argued in arbitration and Courts several times over the last two centuries and it is firmly established as a principle of customary international law.[212] As such, if the opportunity arises, China will likely claim that damming and diverting the Mekong was necessary, although that argument should fail under the standard set in *Gabčíkovo-Nagymaros Project* case.

2. Distress

China may also claim distress as a "circumstance precluding wrongfulness" for its damming of the Mekong. Under Article 24:

> The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving

[209] IWA Commentary, *supra* note 200, pt. 3, ch. II(4), pt. 1, ch. V(4).
[210] IWA, *supra* note 177, art. 25.
[211] Keith Bradsher & Clifford Krauss, *China Is Burning More Coal, a Growing Climate Challenge*, N.Y. TIMES (Nov. 3, 2022), https://www.nytimes.com/2022/11/03/business/energy-environment/china-coal-natural-gas.html.
[212] *See* IWA Commentary, *supra* note 200, art. 25, ¶¶ 1-21.

> the author's life or the lives of other persons entrusted to the author's care.[213]

However, this defense does not apply if the situation of distress is due, either alone or in combination with other factors, to the conduct of the state invoking it or the act in question is likely to create a comparable or greater peril.[214]

Distress is most often claimed in situations involving the violation of sovereignty, where the immediate concern is saving people's lives, irrespective of their nationality.[215] As such, distress is generally argued for individual actions or for a limited group of people, as statewide emergencies are covered by the claim of necessity.[216]

China, however, will likely use distress language to preclude their responsibility. China can make the argument that the fresh water damming and diversion will save the lives of their people, even if it violates the sovereign interests of the lower riparians. Their citizens are "entrusted to [their] care," and thus the state's obligation to save the lives of its citizens—in China's argument—is greater than the state's customary international law obligation to not do significant harm to the lower riparians. As the Lake Lanoux Arbitration stated, "[t]erritorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin, but only before such obligations."[217] China has the presumption of territorial sovereignty, but it bends to customary international law.

As strong as these arguments are, China is hampered by the second part of Article 24, which states that distress is not applicable if the situation is due, "either alone or in combination with other factors, to the conduct of the State invoking it" or if "the act in question is likely to create a comparable or greater peril."[218] The lower riparians can argue that the situation of distress is due to China's ecological conduct, which "in combination with other factors" is a cause of the heatwaves and droughts

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[213] IWA, *supra* note 177, art. 24.
[214] *Id*. art. 24, ¶ 2.
[215] *See* IWA Commentary, *supra* note 200, art. 24, ¶¶ 2-4.
[216] *Id*. art. 24, ¶ 7.
[217] Lake Lanoux Arbitration, *supra* note 72, at 16.
[218] IWA, *supra* note 177, art. 24.

that are causing the issues. China emits more manmade greenhouse gases than the United States, Europe, and Japan combined, which has exacerbated the climate issues.[219] Further, the lower riparians will argue that damming the Mekong is "likely to create a comparable or greater peril." The 2019 drought in Laos is the harbinger. To the lower riparians, the Mekong drying up is a greater peril not just to the lower riparians, but to the global food supply chain.

3. Force Majeure

The last potential argument for China's violation of its obligation to do no significant harm to the lower riparians is under Article 23, Force Majeure. Under that article, the violative act "is precluded if the act is due to force majeure".[220] The article and the commentary then clarify (1) "the act in question must be brought about by an irresistible force or an unforeseen event;" (2) "which is beyond the control of the State concerned;" and (3) "which makes it materially impossible in the circumstances to perform the obligation."[221]

Climate change is likely not force majeure as the Articles of Responsibility of States foresaw its use. "Force majeure differs from a situation of distress (art. 24) or necessity (art. 25) because the conduct of the State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice."[222] Force majeure is commonly invoked to account for a violation of territorial sovereignty due to the loss of control of an aircraft or ship due to an unforeseen technical issue, or for a state's claim of the impossibility of honoring contract obligations due to an "extremely strained economic situation."[223]

It is unlikely that China can make an argument that force majeure caused them to build the dams. While there may not have been other obvious solutions to the issue, the act of damming or diverting the Mekong was not involuntary and involved an element of free choice. That climate change is beyond the control of the state, however, means China may use

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[219] Bradsher & Krauss, *supra* note 211.
[220] IWA, *supra* note 177, art. 23.
[221] *Id.*; IWA Commentary, *supra* note 200, art. 23, ¶ 2.
[222] IWA Commentary, *supra* note 200, art. 23, ¶ 1.
[223] KOLB, *supra* note 176, at 123.

force majeure language to make their necessity and distress arguments. In doing so, China will attempt to avoid the consequences of an internationally wrongful act.

All of these arguments regress into a balancing act between the state's responsibility to its own citizens and its responsibility to its neighboring states. Further, it results in a weighing of the right of China to have fresh water against those lower riparian states to the same water.

These claims, therefore, become a rehashing of the 100-year-old debate over the sovereignty of transboundary watercourses. While customary international law has settled on the two overarching principles of reasonable and equitable use and the obligation to do no significant harm, the value of those principles, and their underlying compromise over sovereignty, will be pushed to their limit when one state has to weigh the lives of its neighbors' citizens over its own.

C. Consequences of an Internationally Wrongful Act

If a state accepts that it has committed an IWA—rather than trying to preclude the wrongfulness of its acts—it may face consequences. As the scholar Robert Kolb wrote:

> There are two main consequences of an IWA: first, the duty of the wrongdoing party to make reparation; and second, residually, the faculty of the aggrieved party to take [countermeasures]. The first tells the responsible State what it must do; the second tells the aggrieved State what it could do.[224]

First, an offending state has the duty to cease its breach of the international obligation, which should be done upon notification.[225] Once the IWA has ceased, an offending state that accepts fault can remedy the situation via reparations in several ways: restitution, compensation, and satisfaction, either singly or in combination.[226]

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[224] *Id.* at 148.
[225] IWA, *supra* note 177, art. 30.
[226] *Id*. arts. 31, 34.

1. Restitution

Restitution is the obligation to "re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation." [227] Restitution is an attempt to "wipe out" the consequences of the IWA.[228] "Restitution may take the form of material restoration or return of territory, persons or property. . . .or some combination of them."[229] In some cases, however, it may not be possible to restore the injured state to the situation before it existed.[230] In those cases, restitution may be accompanied by compensation.

2. Compensation

Compensation is reparations for the financial losses from the injury. It is the obligation to compensate for the damage caused by the IWA, if such damage is not made good by restitution, and "shall cover any financially assessable damage including loss of profits insofar as it is established."[231] To be compensable, these material damages must have been proximately caused by the act or omission of the offending State.[232] While restitution is the principal obligation, compensation is available "to fill in any gaps so as to ensure full reparation for damage suffered."[233]

In the *Gabčíkovo-Nagymaros Project* case, the ICJ declared: "It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it."[234] The Court

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[227] *Id*. art. 35.
[228] IWA Commentary, *supra* note 200, art. 31, ¶ 2 (quoting The Factory at Chorzów (Ger. v. Pol), Judgment, 1928 P.C.I.J. 47 (Sept. 13) which stated that "the essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.").
[229] *Id*. art. 35, ¶ 5.
[230] *See* McCaffrey, *supra* note 124.
[231] IWA, *supra* note 177, art. 36.
[232] IWA Commentary, *supra* note 200, art. 31, ¶¶ 5, 7.
[233] *Id*. art. 36, ¶ 3.
[234] Gabčíkovo-Nagymaros Project, *supra* note 91, ¶ 152.

found "Hungary shall compensate Slovakia for the damage sustained by [Slovakia] on account of the suspension and abandonment by Hungary of works for which it was responsible" and that "Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the 'provisional solution' [Variant C] by Czechoslovakia and its maintenance in service by Slovakia."[235] Although the Court did not decide on specific amounts, it did suggest that "compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims."[236]

Compensation for ecological damages is possible. The U.N. assessed Iraq's liability "for any direct loss, damage—including environmental damage and the depletion of natural resources. . . . as a result of its unlawful invasion and occupation of Kuwait."[237] In environmental IWA cases, "[d]amage to such environmental values (bio-diversity, amenity, etc.—sometimes referred to as 'non-use values') is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify."[238]

3. Satisfaction

Lastly, satisfaction is the obligation to give moral redress for the injury caused by that act *if* it cannot be made good by restitution or compensation. This may consist of an acknowledgment of the breach, an expression of regret, or a formal apology, but which cannot humiliate the responsible State.[239] Satisfaction "is the remedy for those injuries, not financially assessable, which amount to an affront to that State."[240] "One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal."[241] Because of the counter-IWAs in the *Gabčíkovo-Nagymaros Project* case, no satisfaction was ordered.

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[235] *Id*. ¶ 155(2)D.
[236] *Id*. ¶ 153.
[237] S.C. Res. 687, ¶ 16 (Apr. 3, 1991).
[238] IWA Commentary, *supra* note 200, art. 36, ¶ 15.
[239] IWA, *supra* note 177, art. 37.
[240] IWA Commentary, *supra* note 200, art. 37, ¶ 3.
[241] *Id*. art. 37, ¶ 6.

Consequently, in response to notification of a state's breach of an obligation, the offending state should cease the act, pay the injured state to bring them back to pre-breach status, pay for additional damage, and, if necessary, apologize in some form for their breach.

If a state's entire ecological and economic system has been destroyed by the damming of a transboundary river, these actions may not suffice. As climate change makes water scarcer, it will be exceedingly difficult for the international community or the courts to understand the real and "non-use value" of fresh water. Even if damages for ecological concerns are possible, it may be impossible to satisfy the loss of a lifeblood river. The offending state may also offer rationale for their actions which may limit their state responsibility. Further, if a state refuses to acknowledge their obligation to remedy via restitution, compensation, or satisfaction, the injured state can resort to countermeasures.

D. Countermeasures

Countermeasures are the method of self-help authorized by the Articles, and are "taken by an injured state to induce the responsible state to comply with its obligations" in the event the offending state has not accepted responsibility.[242] In fact, countermeasures "may be regarded as synonymous with non-forcible reprisals."[243] A countermeasure is itself a breach of an obligation but is justified because it responds "within certain strict legal limits to the previous breach of an obligation by the other State."[244]

Countermeasures are an injured state's ability to withhold an obligation owed to the state responsible for the injury.[245] However, a countermeasure must meet certain conditions: they must respond to a previous IWA, the injured state must call upon the offending state to discontinue its wrongful act or make reparations, the injured state must notify the offending state of its intent to take countermeasures, and the countermeasure must be proportional to the injury suffered "taking into account the rights in question."[246] Once the administrative steps are

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[242] IWA Commentary, *supra* note 200, ch. II, ¶ 2; *see* KOLB, *supra* note 176, at 121.
[243] KOLB, *supra* note 176, at 175 (citing OMER Y. ELEGAB, THE LEGALITY OF NON-FORCIBLE COUNTERMEASURES IN INTERNATIONAL LAW 4 (1988)).
[244] *Id*.
[245] IWA Commentary, *supra* note 200, art. 49, ¶ 6.
[246] Gabčíkovo-Nagymaros Project, *supra* note 91, ¶¶ 83-85; IWA, *supra* note 177, art. 52.

complete, the injured state can withhold performance of one of its obligations owed to the offending state. For example, in response to a violation of U.N. Convention on the Law of the Sea by State A within State B's territorial seas, State B may close its territorial seas to State A until State A desists its offending act.[247]

In the *Gabčíkovo-Nagymaros Project* case, Czechoslovakia framed their "Variant C" unilateral damming of the Danube as a countermeasure to Hungary's failure to continue the joint project. The ICJ found that because Czechoslovakia unilaterally assumed control of a shared resource, "thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube," the countermeasure failed to be proportionate in response to Hungary's actions.[248]

Restrictions on the ability of an injured state to take countermeasures may limit its effect on the offending state if there is a significant power imbalance.[249] Countermeasures shall not affect "(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian character prohibiting reprisals; (d) other obligations under peremptory norms of general international law."[250] As such, countermeasures must be peaceful, and it is only because countermeasures are a response to an IWA and do not involve force that countermeasures are not reprisals.[251]

However, countermeasures are a "function of power."[252] The ability to take meaningful countermeasures depends largely on equal power dynamics. Whereas self-defense is a forcible self-help measure that

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[247] Michael N. Schmitt, *Responding to Malicious or Hostile Actions Under International Law*, ARTICLES OF WAR (Apr. 26, 2022), https://lieber.westpoint.edu/white-paper-responding-malicious-hostile-actions-international-law/.
[248] Gabčíkovo-Nagymaros Project, *supra* note 91, ¶ 85.
[249] KOLB, *supra* note 176, at 178-83.
[250] IWA, *supra* note 177, art. 50.
[251] KOLB, *supra* note 176, at 174, 175; MARTIN DAWIDOWICZ, THIRD-PARTY COUNTERMEASURES IN INTERNATIONAL LAW 18-19, 28 (2017).
[252] KOLB, *supra* note 176, at 177 ("Further, CM are bluntly a function of power. Powerful States may easily resort to CM. Even the mere threat to apply CM can in such cases suffice for obtaining the desired result. Less powerful States will hardly succeed with CM, especially against a more powerful State. The application of the law here depends ultimately on a political fact, i.e. the power involved.").

applies in response to an "armed attack"—and is thus about military power—countermeasures are non-forcible self-help measures in response to any breach of an obligation owed to that state.[253] Countermeasures therefore are a balance between the damage done to the injured state and the ability of the injured state to respond proportionately enough to re-set the legal balance.[254] As Professor Joseph Dellapenna stated with regards to the informal legal regime prior to the Watercourses Convention:

> The system becomes unsettled either if a state considers that it is so militarily dominant that it can disregard its neighbors, or if a state concludes that their interests are so compromised by the existing situation that even a military defeat is better than continuing the present situation without challenge.[255]

Along the Mekong, China has the power. They are economically dominant over the lower Mekong states,[256] and whether the lower Mekong states have the ability to influence China's decision-making in the long term is debatable.[257] As such, unilateral or collective countermeasures by the lower Mekong states may not affect China's continued dam building. Emphasis by the broader international community may be required to affect change.

The next option, if countermeasures are ineffective, would be for the lower riparians to take China to a judicial or administrative body to enforce the customary international law principles of IWAs. Getting heard, and getting a result, is significantly more difficult.

E. A Judgment Will Have No Effect on China

If China does not respond to the lower Mekong states, all of the above is moot if there is no judicial body to adjudicate and enforce the rights of the lower riparians. If China and lower riparians were signatories to the

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[253] *Id*. at 177, 121.
[254] *See* DAWIDOWICZ, *supra* note 251, at 19-20.
[255] Dellapenna, *supra* note 1.
[256] JONATHAN STROMSETH, BROOKINGS INST., COMPETING WITH CHINA IN SOUTHEAST ASIA: THE ECONOMIC IMPERATIVE 3 (2020).
[257] Shuxian Luo, *Provocation Without Escalation: Coping with a Darker Gray Zone*, BROOKINGS INST. (June 20, 2022), https://www.brookings.edu/articles/provocation-without-escalation-coping-with-a-darker-gray-zone/.

Watercourses Convention, the International Court of Justice (ICJ) is the mandatory Court for dispute resolution (if no arbitration or settlement occurs). Even if China was a member of the Mekong River Commission, that agreement has no reference to an external body, no internal dispute resolution mechanism, and no enforcement power.[258] If there is to be any judicial relief for the lower riparians, they will likely need to appeal to the ICJ for jurisdiction.

Whereas access to the ICJ is available for all U.N. member states (which includes all of the relevant Mekong states), the ICJ has jurisdiction over contentious cases between states which have consented to the ICJ settling that dispute. [259] Contentious jurisdiction consent may be established by unilateral declarations, in treaties, or through special agreements.[260] The ICJ, however, cannot resolve disputes for a state that does not consent to its jurisdiction.[261]

There is no indication that China would consent to a dispute submission from any of the lower riparians, either through a unilateral declaration or special agreement. In that case, the only available method for getting a case into the ICJ is through a mandatory contentious jurisdiction clause in a treaty to which China is already a signatory.

The lower riparians may have an avenue to contentious jurisdiction via the 1992 United Nations Framework Convention on Climate Change (hereinafter Climate Change Convention). [262] China, Cambodia, Laos, Thailand, and Vietnam are all signatories to the Climate Change Convention, which has the ICJ as a mandatory adjudicative body.[263] The Convention states that Parties may declare, in respect of any dispute concerning the interpretation or application of the Convention, that they

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[258] *See* Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, *supra* note 25, art. 4 ("cooperate on the basis of sovereign equality and territorial integrity in the utilization of the water resources of the Mekong Basin.").

[259] *How the Court Works*, INT'L CT. JUST., https://www.icj-cij.org/how-the-court-works (last visited Mar. 17, 2023).

[260] *Id*.

[261] *Id*.

[262] U.N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter Climate Change Convention].

[263] *Status of Treaties, U.N. Framework Convention on Climate Change*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVII/XXVII-7.en.pdf (last visited July 11, 2024).

"[recognize] as compulsory ipso facto and without special agreement, in relation to any Party accepting the same obligation: (a) Submission of the dispute to the International Court of Justice, and/or (b) Arbitration in accordance with procedures to be adopted by the Conference of the Parties. . . ."[264] As such, China may be treaty-bound to accept mandatory jurisdiction of the ICJ or arbitration for disputes that arise under the Climate Change Convention.

The Climate Change Convention has language that relates to the exploitation of resources and international water rights. The Convention acknowledges the balance between sovereignty and duty to other states within its preamble:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[265]

Further, within Article 4, Commitments, the Parties agree to "[c]ooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods."[266] There have been no contentious cases under Article 4 of the Climate Change Convention at the ICJ, although the ICJ intends on releasing an advisory opinion on the responsibility of states to address climate change next year.[267]

The Climate Change Convention may be an avenue for ICJ jurisdiction if the lower riparians submit the dispute to the ICJ under the mandatory jurisdiction clause of the Convention under Article 14, and the

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[264] Climate Change Convention, *supra* note 262, art. 14.
[265] *Id.* pmbl.
[266] *Id.* art. 4(1)(e).
[267] Obligations of States in Respect of Climate Change, Request for Advisory Opinion, Order 187 (Dec. 15, 2023), https://www.icj-cij.org/node/203376.

ICJ recognizes China is in violation of Article 4 and the language in the preamble to "not cause damage to the environment of other States." The ICJ can consider both the terms of the Convention and relevant customary international law.[268] Once at the ICJ, the Court may find an IWA by China against the lower states.[269]

However, there is no guarantee China will accept ICJ jurisdiction, as they recently ignored a mandatory jurisdiction provision in a different U.N. Convention. In the South China Sea Arbitration, the Philippines relied on the mandatory jurisdiction clause of the U.N. Convention of the Law of the Sea (UNCLOS) to bring a dispute before the tribunal regarding China's maritime rights and actions within the South China Sea.[270] China "consistently rejected the Philippines' recourse to arbitration and adhered to a position of neither accepting nor participating in these proceedings."[271] China considered "non-participation in the arbitration to be its lawful right" under UNCLOS, and did not send a delegation or submit documentation recognizing the jurisdiction of the body.[272] When the results of the tribunal favored the Philippines on every major point, the Ministry of Foreign Affairs of China "solemnly declare[d] that the award is null and void and has no binding force. China neither accepts nor recognizes it."[273] Since the arbitral ruling, it is unclear whether China is in

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[268] Statute of the International Court of Justice, art. 38, June 26, 1945, 33 U.N.T.S. 993.
[269] *See* Obligations of States in Respect of Climate Change, Request for Advisory Opinion, Order 187 (Dec. 15, 2023), https://www.icj-cij.org/node/203376; *see also* Jake Spring, *Climate Court Cases that Could Set Precedents Around the World*, REUTERS, (May 29, 2024, 6:17AM), https://www.reuters.com/sustainability/climate-energy/climate-court-cases-that-could-set-new-precedents-around-world-2024-05-21; *see also* Stephen L. Kass, *Suing the United States for Climate Change Impacts*, N.Y.L.J. (Sept. 25, 2020), https://www.clm.com/suing-the-united-states-for-climate-change-impacts.
[270] South China Sea Arbitration (Phil. v. China), Award, Case No. 2013-19, ¶ 4 (Perm. Ct. Arb. 2016).
[271] *Id*. ¶ 11.
[272] *Id*. ¶¶ 11, 13.
[273] Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (July 12, 2016, 5:12 PM), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201607/t20160712_679470.html.

"stealthy compliance" with the ruling, or continuing military developments and delaying any agreement on the South China Sea.[274]

As the South China Sea Arbitration indicates, China has previously ignored mandatory jurisdiction of an international tribunal and disregarded their binding determination,[275] so the possibility of justice for the lower riparians in a Court for China's internationally wrongful acts are limited. Even if the Climate Change Convention provided an avenue, there is no reason to believe China will alter their behavior and stop damming the Mekong.

Therefore, if countermeasures and an international judgment do not pressure China into complying with their obligations under customary international law, the lower riparians may consider whether forcible measures would be more effective.

V. Can Aggrieved Lower Riparians Respond with Force?

Article 2(4) of the U.N. Charter states "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[276] There are two relevant exceptions to this prohibition in the U.N. Charter: authorization by the Security Council in response to an act of aggression, breach of the peace, or threat to the peace, and the inherent right of self-defense in response to an armed attack.[277] Neither exception permits the lower Mekong states to use force against China.

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[274] Mark Raymond & David A. Welch, *What's Really Going on in the South China Sea?*, 41(2) J. CURRENT SE. ASIAN AFF. 214, 222 (2022).

[275] The PRC has participated as a third party in disputes in the ICJ since the Philippines v. China Arbitration, including in March 2018 when the PRC submitted a statement in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion)*, ICJ, Written Statement of the People's Republic of China, March 1, 2018. The PRC also regularly participates in the mandatory procedures of the World Trade Organization Dispute Settlement Body as the complainant, the defendant and as a third party. *See* CONGYAN CAI, THE RISE OF CHINA AND INTERNATIONAL LAW 288-292 (2019).

[276] U.N. Charter art. 2, ¶ 4.

[277] U.N. Charter arts. 39, 51.

A. Damming a Transboundary Watercourse is Not Likely to Lead to an Authorization by the Security Council of an Armed Response

The U.N. Security Council has the power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression."[278] It takes an affirmative vote by nine of fifteen Security Council members to declare this, including the concurrence or abstention of the permanent members: the United States, United Kingdom, France, Russia, and China.[279] An affirmative vote permits the U.N. and injured state several options, including armed force.

If the Security Council were to vote on the Mekong hypothetical, it is very unlikely China will concur or abstain in a vote regarding whether their actions constitute a threat to the peace, breach of the peace, or act of aggression. Even if the hypothetical were shifted to another transboundary dispute, the damming of a transboundary watercourse does not meet the precedential threshold of either.

Damming is not an act of aggression. G.A. Resolution 3314 defines an act of aggression as: "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations . . . ."[280] All of the examples provided in the Resolution involve the use of the armed forces of a state or acts of armed force against another state.[281] Further, all thirty-four Security Council resolutions regarding aggression reference the state's use of armed attacks, incursions, occupations, military attacks, bombings or air raids.[282]

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[278] U.N. Charter art. 39.

[279] U.N. Charter art. 27, ¶ 3. The other ten non-permanent Members of the Security Council are elected for two-year terms by the General Assembly. *Id*. art. 23, ¶ 2. Once a State is adjudged to have threatened the peace, breached the peace, or committed an act of aggression, the U.N. can initiate sanctions and other forcing mechanisms against the offending State under Articles 41-49.

[280] G.A. Res. 3314 (XXIX), Annex, art. 1 (Dec. 14, 1974).

[281] *Id.* Annex, art. 3.

[282] Nicolaos Strapatsas, *The Practice of the Security Council Regarding the Concept of Aggression*, *in* THE CRIME OF AGGRESSION: A COMMENTARY 178, 181, 186 (Claus Kreß & Stefan Barriga eds., 2016).

Damming is not a breach of the peace. The Security Council has declared a breach of the peace explicitly only a handful of times.[283] These involve either significant uses of armed force that are indistinguishable from acts of aggression, or domestic issues so egregious that the Security Council overcomes its reluctance to interfere in domestic matters, such as South African apartheid or Iraq's non-compliance regarding weapons of mass destruction.[284] The Mekong hypothetical does not involve the "use of armed force by a state," and does not obviously rise to the level of prior resolutions on domestic matters.

Further, damming is not a threat to the peace, although the U.N. has considered the impact of climate change on peace and security. According to the U.N., "the range of situations which the Security Council determined as giving rise to threats to the peace includes country-specific situations such as inter- or intra-State conflicts or internal conflicts with a regional or sub-regional dimension," such as the genocides in Rwanda and Kosovo, and "potential or generic threats as threats to international peace and security, such as terrorist acts, the proliferation of weapons of mass destruction and the proliferation and illicit trafficking of small arms and light weapons."[285]

The Security Council in recent years has discussed climate change's effect on peace.[286] In 2011, the U.N. Secretary-General released a report

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[283] Including the North Korean invasion of South Korea (S.C. Res. 82 (June 25, 1950)), the policies of apartheid in South Africa (S.C. Res. 311 (Feb. 4, 1972)), the Iraq invasion of Kuwait (S.C. Res. 660 (Aug. 2, 1990); S.C. Res. 678 (Nov. 29, 1990)), and Iraq's failure to cooperate with United Nations to inspect for weapons of mass destruction, (S.C. Res. 1441 (Nov. 8, 2002)), among a few other incidents.

[284] *See* U.N. Charter art. 2, ¶ 7.

[285] *FAQ*, UNITED NATIONS SEC. COUNCIL, https://www.un.org/securitycouncil/content/faq (last visited Mar. 17, 2023). The Security Council has labelled suppressive or genocidal acts (including in Somalia (S.C. Res. 733 (Jan 23,1992)); Yugoslavia (S.C. Res. 713 (Sept. 25, 1991)); Bosnia and Herzegovina (S.C. Res. 836 (June 4, 1993)); Rwanda (S.C. Res. 918 (May 17,1994)); Kosovo (S.C. Res. 1199 (Sept. 23, 1998)) and global concerns such as "international terrorism" (S.C. Res. 1373 (Sept. 28, 2001)) and the "proliferation of nuclear, chemical and biological weapons" (S.C. Res. 1540 (Apr. 28, 2004)) as threats to the peace. In 2020, the Security Council acknowledged the "COVID-19 pandemic is likely to endanger the maintenance of international peace and security," which mirrors the "threat to" language in prior Resolutions. S.C. Res. 2532 (July 1, 2020).

[286] U.N. President of the S.C., Letter dated July 28, 2020 from the President of the Security Council to the Secretary-General and the Permanent Representatives of the members of the Security Council, U.N. Doc. S/2020/751 (July 30, 2020).

entitled *Climate Change and its Possible Security Implications*, which identified climate change as a threat multiplier which may manifest "in the form of localized conflicts or spill over into the international arena in the form of rising tensions or even resource wars."[287] In 2011, the President of the Security Council acknowledged "that possible adverse effects of climate change may, in the long run, aggravate certain existing threats to international peace and security."[288] The U.N. held high-level debates in July 2020,[289] February 2021,[290] and September 2021[291] regarding climate change and security.[292] While there are several resolutions that recognize the impact of climate change on security,[293] there are no Security Council resolutions declaring a state's domestic action—whose effects are exacerbated by climate change—as a threat to the peace.

Consequently, there has not previously been a finding that unilateral damming of a transboundary watercourse is an act of aggression, breach of the peace, or threat to the peace, and the Mekong hypothetical does not meet any precedential threshold. Even if the Mekong damming is considered a threat to international peace and security, there is no realistic version of events where all five permanent members concur or abstain for the resolution. The remaining option for a state to legally respond with force is in self-defense, and only if the damming of a transboundary watercourse amounts to an armed attack.

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[287] U.N. Secretary-General, *Climate Change and its Possible Security Implications*, ¶ 16, U.N. Doc. A/64/350 (Sept. 11, 2009).

[288] U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2011/15 (July 20, 2011).

[289] Permanent Rep. of Germany to the U.N., Letter dated July 18, 2020 from the Permanent Rep. of Germany to the United Nations addressed to the Secretary-General, U.N. Doc. S/2020/725 (July 20, 2020).

[290] U.N., *Climate and Security – Security Council Debate, 23 February 2021*, YOUTUBE (Feb. 23, 2021), https://www.youtube.com/watch?v=T0ZV7vV6Mdc.

[291] Press Release, Security Council, Differences Emerge over Appropriate Forum for Discussing Climate Change, as Delegates Hold Debate on Links between Global Crisis, Security, U.N. Press Release SC/14644 (Sept. 23, 2021).

[292] In December 2021, Russia vetoed and the PRC abstained a Security Council resolution on integrating climate related security risk as a central component of U.N. conflict prevention strategies. S.C. Draft Res. S/2021/990 (Dec. 13, 2021).

[293] *See*, *e.g.*, S.C. Res. 2349 (Mar. 31, 2017) (linking the "adverse effect of climate change . . . on the stability of the [Lake Chad Basin] Region" to "violence by terrorist groups Boko Haram and [ISIL]").

B. Self-Defense is Not Permitted in Response to Damming a Transboundary Watercourse

It is unlikely the U.N. Security Council would declare unilateral damming of a transboundary watercourse a violation of Article 2(4) given the novelty and real-world political concerns of the permanent members. Therefore, the next option for the lower riparians is to determine whether damming allows them to respond in self-defense. The U.N. Charter does not "impair the inherent right of individual or collective self-[defense] if an armed attack occurs against a Member of the United Nations."[294] Historic practice confirms "an armed attack is by no means the only form of aggression, of imperilling [sic] a state's rights so that it may be compelled to resort to the exercise of a right of self-[defense]."[295]

There have been uses of force and threats of force in self-defense over transboundary water issues in the past. As described above, Israel flew planes into Syria in 1965 and destroyed diversion equipment and killed soldiers.[296] In response to potential upper riparian development on the Nile, Egyptian President Anwar Sadat declared that "[a]ny action that would endanger the waters of the Blue Nile will be faced with a firm reaction…even if that action should lead to war."[297] In 2016, the foreign affairs advisor to the Pakistani Prime Minister stated that if India unilaterally revoked the Indus Water Treaty between India and Pakistan, it could be considered an "act of war."[298]

There are instances when using water could be an armed attack. Armies throughout history used water as a weapon—they flooded their enemies, burst dikes, poisoned wells, and dammed rivers.[299] Despite

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[294] U.N. Charter art. 51.

[295] D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 192 (1958).

[296] Shemesh, *supra* note 11, at 34.

[297] KORNFELD, *supra* note 51, at 60.

[298] Manav Bhatnagar, *Reconsidering the Indus Waters Treaty*, 22(2) TUL. ENV'T L. J. 271, 271 (2009); Drazen Jorgic & Tommy Wilkes, *Pakistan Warns of 'Water War' With India if Decades-Old Treaty Violated*, REUTERS (Sept. 27, 2016), https://www.reuters.com/article/idUSKCN11X1ON/.

[299] Charlotte Grech-Madin, *Water and Warfare: The Evolution and Operation of the Water Taboo*, 45(4) INT'L SEC. 84, 89 (2021) Researcher Charlotte Grech-Madin classifies water weaponization based on two actions: deprivation—"the reduction or complete denial of water needed for basic subsistence"—and inundation—"the rapid release of a large

historical use, weaponization of water in armed conflict has been prohibited,[300] and its current use has been universally denounced.[301] In the last decade, ISIS withheld water as a tool of compliance,[302] Turkey disrupted water flow into Syria,[303] and Russian forces destroyed a dam in southern Ukraine.[304] While these occurred during armed conflicts, China's actions have the same cause and effect on the lower Mekong states. Yet effects alone, even those caused by a prohibited weapon of armed conflict, does not elevate domestic acts into armed attacks.

A state using force to respond to the incidental effects of domestic acts would be a substantial shift in the definition of armed attack and the inherent right of self-defense—even if those effects are an existential threat. The cyber operations paradigm provides an example of an effects-based analysis for whether a state's actions reach the level of an armed attack.

Under the U.S. view, a state attacking a civilian population with water via a cyber operation can be an armed attack. As articulated by Harold Hongju Koh, "[c]yber activities that proximately result in death, injury, or significant destruction would likely be viewed as a use of force" within

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quantity of water through destroying storage infrastructure or opening floodgates." *Id.*; *see also* CAPONERA ET AL., *supra* note 148, at 297; Peter Schwartzstein, *The History of Poisoning the Well*, SMITHSONIAN MAG. (Feb. 13, 2019), https://www.smithsonianmag.com/history/history-well-poisoning-180971471/.

[300] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 56, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] ("Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population."); *see* Grech-Madin, *supra* note 299, at 90.

[301] Grech-Madin, *supra* note 299, at 90; Ben Waldman & Michel Paradis, *The Biden Administration Faces a Reckoning Decades in the Making Over the United States' Use of Air Power and Civilian Harm*, LAWFARE (Feb. 23, 2022), https://www.lawfaremedia.org/article/biden-administration-faces-reckoning-decades-making-over-united-states-use-air-power-and-civilian.

[302] Schwartzstein, *supra* note 299.

[303] Grech-Madin, *supra* note 299, at 118.

[304] Chloe Sorvino, *Water Emerges as Weapon of War in Ukraine and Beyond*, FORBES (Apr. 27, 2022), https://www.forbes.com/sites/chloesorvino/2022/04/27/water-emerges-as-weapon-of-war-in-ukraine-and-beyond/.

the meaning of Article 2(4).[305] In considering whether a cyber operation constitutes a use of force, Koh cited several non-exhaustive factors to be considered, including: the context of the event, the actor perpetrating the action, the target and location, state *intent*, and "whether the direct physical injury and property damage resulting from the cyber event looks like that which would be considered a use of force if produced by kinetic weapons."[306] One of the examples Koh cited as a cyber action that would be considered a use of force is "operations that open a dam above a populated area causing destruction."[307]

The 2019 drought in Laos and the lower riparians is worth considering under the Koh factors. The damming and use of the abundant wet season flow occurred while China is an ascendant global power amid the region most susceptible to climate change. The intermittent droughts and floods destroyed crops, damaged millions of dollars of property, and resulted in death along the lifeblood river of four states.[308] China's damming was the proximate cause of those injuries.[309] The effects were similar to those of kinetic force: "death, injury, [and] significant destruction." Had a state cyber operation caused these effects, the United States would likely consider these actions a use of force under the Koh standard.

Extrapolating the U.S. view on cyber operations to the Mekong hypothetical, China's damming of a transboundary watercourse appears to be a use of force, but it is missing a key factor: state *intent*. During armed conflict between Country A and Country B, a wayward missile shot by Country A toward Country B but which accidentally diverts course into Country C is generally not considered an armed attack on Country C.[310] Country C would be entitled to damages from Country A, but would not be able to respond in self-defense.[311] Absent intent, an accidental or incidental effect by one state which causes damages to another is an

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[305] Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Keynote Address at USCYBERCOM Inter-Agency Legal Conference (Sept. 18, 2012).
[306] *Id*.
[307] *Id*.
[308] Eyler, *supra* note 41; Lovgren, *supra* note 25; Eyler & Weatherby, *supra* note 29.
[309] Eyler & Weatherby, *supra* note 29.
[310] Solon Solomon, *Can Oblique Intent Trigger an Armed Attack and Activate Article 5 of NATO?*, LAWFARE (Nov. 17, 2022), https://www.lawfaremedia.org/article/can-oblique-intent-trigger-armed-attack-and-activate-article-5-nato.
[311] *Id*.

internationally wrongful act, but not an armed attack.[312] Given that armed attacks are historically committed by a state's armed forces under state control, intent can generally be presumed.[313] Declaring an armed attack due to incidental effects of *domestic* acts would be a significant lowering of the intent threshold for self-defense.[314]

Further, as Professor Craig Martin explained, any movement to "relax the [jus ad bellum] regime should be resisted"[315] in response to climate change's increased threat to national security.[316] Lowering the threshold for self-defense "would introduce such ambiguity into the triggering mechanism for the use of force that it would excessively increase the risk of a radically higher incidence of international armed conflict." [317] Reframing incidental effects of domestic acts, even those that result in environmental harm to neighbors, as an armed attack would increase the risk of conflict over transboundary watercourses.[318]

Even if forcible measures were available to the lower riparians, they would be prohibited from striking the dams under Additional Protocol I (AP I). AP I prohibits making "objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works" the "object of reprisals."[319] Therefore, even if force was permitted in self-defense, making the dams the object of a reprisal violates international law.

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[312] *Id*.

[313] Although dicta, in Oil Platforms, Iran v U.S., Judgment, 2003 I.C.J. 161 (Nov 6.) indicated an attack must have been carried out with the specific intent of harming a specific state before that state can respond in self-defense, that theory is not supported by state practice or international law. William H. Taft, IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. OF INT'L L. 295, 302 (2004).

[314] *See* Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT'L L. 79, 85 (2013); *but see also* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS, 343-44 (Michael N. Schmitt ed., 2d ed. 2017) ("The majority of the International Group of Experts was of the view that intention is irrelevant in qualifying an operation as an armed attack and that only the scale and effects matter.").

[315] Craig Martin, *Atmospheric Intervention? The Climate Change Crisis and the Jus ad Bellum Regime*, 45(S) COLUM. J. OF ENV'T L. 331, 416 (2020).

[316] *Id*. at 376.

[317] *Id*. at 400.

[318] *Id*. at 401.

[319] Additional Protocol I, *supra* note 300, art. 54(4).

Further, forcible measures in self-defense which are too attenuated from an armed attack—even from an existential threat—may be viewed as an unlawful use of force. In 1981, Israel believed Iraq's completion of the Osirak nuclear reactor, which may have allowed Saddam Hussein to obtain nuclear weapons, constituted a threat to its existence.[320] In response, Israeli warplanes destroyed the reactor before it was operational under a theory of anticipatory self-defense.[321] The Security Council declared Israel's actions an "armed attack" and a "premeditated and unprecedented act of aggression in violation of the Charter of the United Nations and the norms of international conduct, which constitute[d] a new and dangerous escalation in the threat to international peace and security."[322] The Security Council found Iraq was entitled to "appropriate redress for the destruction,"[323] including "prompt and adequate compensation for the material damage and loss of life suffered."[324]

Consequently, the lower Mekong states may believe they are facing an existential threat, but that is not the end of the analysis. Force has never been authorized in self-defense for domestic actions which are not a use of force or an armed attack. Absent state intent to "proximately [cause] death, injury, or significant destruction," unilateral damming or diverting the Mekong cannot rise to the level of an armed attack. As such, any use of force by the lower riparians to attempt to coerce China would be illegal.

VI. Conclusion

One need not assume bad faith on the part of any actor for the Mekong hypothetical to develop. China is damming and diverting the Mekong to water arid regions, providing affordable electricity, and reducing their climate impacts caused by greenhouse gases. In a vacuum, these would be positive acts. Instead, these acts are causing significant harm—and potential ecological disasters—in Laos, Thailand, Cambodia, and Vietnam.

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[320] Donald G. Boudreau, *The Bombing of the Osirak Reactor*, 10(2) INT'L J. ON WORLD PEACE 21, 23 (1993); Strapatsas, *supra* note 282, at 193.
[321] Boudreau, *supra* note 320, at 24; Strapatsas, *supra* note 282, at 193.
[322] S.C. Res 36/27, ¶¶ 1, 2 (Nov. 13, 1981).
[323] S.C. Res. 487, ¶ 6 (June 19, 1981).
[324] S.C. Res 36/27, *supra* note 323, ¶ 6.

The requirement to use a transboundary watercourse in a reasonable and equitable manner and the obligation to do no significant harm are customary international law principles. The unilateral damming or diverting of a transboundary river violates these principles. Violations of customary international law principles can be the basis for internationally wrongful acts. Because China is violating these principles, it is therefore committing internationally wrongful acts against the lower Mekong states.

China should be held responsible for its internationally wrongful acts. However, the reparations available to the lower riparians may not be able to "wipe out" the permanent damage to the environment and ecology of the Mekong. There may not be a solution that will make the lower riparians whole again.

If China does not accept responsibility and offer reparations, countermeasures are available to the lower riparians. Countermeasures, however, are acts of political strength, and are therefore unlikely to force the powerful PRC into compliance.

The lower riparians may seek a judicial avenue to order China to comply with its obligations. That plan will fail for several reasons. China will likely not agree to the jurisdiction of any court. Even where they agreed to a mandatory body in UNCLOS, China refused to participate or recognize adverse findings. There is no indication China will comply with the ruling of an international court.

Appeals to the U.N. Security Council will likely go unheard. Lower Mekong states may consider resorting to force in self-defense. To the Mekong states, a "river. . . . offers a necessity of life that must be rationed among those who have power over it," and although some have "the physical power to cut off all of the water within its jurisdiction. . . . the exercise of such a power. . . . could not be tolerated."[325] The current damming effects may feel like an armed attack to the lower riparians. However, despite effects comparable to weaponizations of water in armed conflict and cyber operations that constitute a use of force, the incidental effect of domestic acts will likely not be considered an armed attack, and therefore cannot merit force in self-defense.

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[325] New Jersey v. New York, 283 U.S. 336, 342 (1931).

As in the 1950s, there are transboundary water disputes across the globe catalyzed by climate change. How the international community reacts will determine whether the wars over water begin. The international community must restore the balance along the Mekong soon, "since it is often difficult to stop or modify an activity once it has begun, and it can be very complicated and expensive, if indeed it is possible, to remedy harm once caused."[326]

The international community has two options: garner widespread support for the watercourses convention, or pressure China into a more robust agreement with its lower riparian neighbors based on the customary international law principles. As seen after the Phillippines Arbitration, the international community responds to a State's failure to abide by a convention or treaty with condemnation, but are less forceful in their responses for a violation of customary international law. The international community is naïve for relying on customary international law, good faith, or China changing its view of sovereignty to resolve transboundary water disputes. The current system is untenable in a manner that may lead to armed conflict.

Without international community intervention, if the lower Mekong states cannot obtain equitable and reasonable use of the Mekong through peaceful means they may resort to an illegal use of force to get the river flowing again. If there are no consequences to China for committing an internationally wrongful act and ignoring customary international law, the international community should expect a reversion to the pre-Watercourse Convention legal regime. As it was when competing theories of sovereignty caused conflict, the "system becomes unsettled either if a state considers that it is so militarily dominant that it can disregard its neighbors, or if a state concludes that their interests are so compromised by the existing situation that even a military defeat is better than continuing the present situation without challenge."[327] For now, China is disregarding its neighbors, and without a rebalancing of the system through international community intervention, the water wars are inevitable.

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[326] McCaffrey, *supra* note 124.
[327] Dellapenna, *supra* note 1.

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THE PROCEDURAL DUE PROCESS CONCERNS OF THE ARMY FAMILY ADVOCACY PROGRAM CASE REVIEW COMMITTEE

ERHAN BEDESTANI*

Introduction

Beginning in the early 1980s, the U.S. Army created the Army Family Advocacy Program (FAP). The program was designed to reduce incidents of child abuse and domestic violence in military families.[1] A specific component of the FAP program is the Incident Determination Committee (IDC). The IDC decides, through a process outlined in Army Regulation (AR) 608-18, if there has been an incident of emotional, physical, or child abuse involving a Service member.[2]

Very little is discussed or known about the IDC process outside the U.S. Army. There are accounts of Service members who insist they are innocent of any wrongdoing and that they are the ones who have become

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[1] Major Toby Curto, *The Case Review Committee: Purpose, Players, and Pitfalls*, ARMY LAW., Sept., 2010, at 45-46 (2010).

[2] U.S. DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM, paras. 2-3, 2-4, 2-5. (13 Sept. 2011) [hereinafter AR 608-18].

victims of false accusations of child abuse or domestic violence as a result of the IDC's lack of procedural due process.[3] In an effort to highlight specific due process issues within the IDC, this article will compare the IDC hearing process to the Title IX[4] sexual assault and sexual harassment hearing process used by universities between 2011 and 2020, which this article will refer to as the Dear Colleague Letter (DCL) period.[5]

In 2011, the Department of Education's (DoE) Office of Civil Rights (OCR) authored what is commonly referred to as the DCL.[6] The DCL significantly influenced the conduct of campus hearings held to determine if a student had been the victim of sexual assault or harassment by another student or faculty member.[7] In 2014, the DoE OCR published a more detailed follow-up to the DCL titled *Questions and Answers on Title IX and Sexual Violence*, which provided additional guidance and more directly influenced the conduct of campus sexual assault and harassment hearings.[8] The Title IX hearings during the DCL period came under significant criticism by think tanks, legal scholars, and courts.[9] The Title IX hearing process continues to fuel a debate between victim advocates

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[3] *See generally* Paul Schwennesen, *Victimized by the Administrative State? A U.S. Army Star Chamber*, HUFFINGTON POST (Feb. 29, 2016, 2:56 PM), https://www.huffpost.com/entry/victimized-by-the-adminis_b_9342096 (last visited Jan. 23, 2024) (explaining the author's first-hand experience with the U.S. Army FAP CRC process as the result of what he vehemently states was a false accusation of child abuse lodged so that the accusation could be "laundered through an extra-legal administrative process that turns imagination into reality," and then used in civil family court to his child custody determination).

[4] Education Amendments Act of 1972, 20 U.S.C. §§ 1681 - 1688 (2018).

[5] Dep't of Educ., Dear Colleague Letter, Apr. 4, 2011 [hereinafter The Dear Colleague Letter]; The Dear Colleague Letter (DCL) period, for the purposes of this paper, refers to the timeframe following the publication of the DCL by the Department of Education's Office of Civil Rights on April 4, 2011, and May 6, 2020 when new Title IX hearing rules were published under the then-Secretary of Education Betsy Devos.

[6] R. SHEP MELNICK, THE TRANSFORMATION OF TITLE IX 197 (2018).

[7] *See generally* R. Shep Melnick, *Analyzing the Department of Education's final Title IX Rules on Sexual Misconduct*, BROOKINGS (June 11, 2020), https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/ (last visited Jan. 28, 2024).

[8] *See generally* OFF. OF CIV. RTS., U.S., DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014) [hereinafter U.S. DEP'T OF EDUC. Q&A], https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (last visited Jan. 28, 2024) (memo has since been rescinded by the Department of Education and is cited in this piece merely for historical purposes). *See also* MELNICK, *supra* note 6, at 151.

[9] *See, e.g.,* BROOKINGS, *supra* note 7.

and civil libertarians.[10] Civil libertarians have often argued that the effort to support alleged victims has eroded essential legal protections for alleged offenders.[11] The first Trump administration oversaw a substantial notice and comment rulemaking period, which resulted in changes to the Title IX hearing process, garnering support from those who insisted they had been victims of an unfair system.[12] The debate continues regarding how much procedural due process to afford.[13]

The U.S. Army FAP IDC process significantly resembles the Title IX hearing process during the DCL period. Law professors and legal scholars with a focus on individual civil rights welcomed the changes imposed by the DoE in May 2020 during the tenure of Secretary Betsy Devos in the first Trump administration.[14] The Devos-era Title IX hearing process changes, in the form of additional procedural due process, can serve as a template for how to rectify significant procedural due process issues inherent in the Army FAP IDC.[15]

In comparing specific periods of the Title IX hearing process to the IDC hearing process, this article highlights that the IDC violates procedural due process rights of the accused. Without the same visibility

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[10] *See id.*

[11] *See generally* BROOKINGS, *supra* note 7 *(*explaining the regulatory effort by the Department of Education's Office of Civil Rights, through its 2011 Dear Colleague Letter, was criticized by civil libertarians, law professors, and the American Bar Association).

[12] *See generally* 34 C.F.R. § 106 (2020) (the implemented rule by the Department of Education (DOE) implementing extensive changes to the DLC processes in operation during the previous administration). *See also* Teresa Watanabe, *Students Accused of Misconduct Get Stronger Protections Under New Federal Rules*, L.A. TIMES (May 6, 2020), https://www.latimes.com/california/story/2020-05-06/students-accused-of-sexual-misconduct-get-stronger-protections-under-new-federal-rules (last visited on 24 Jan. 2024).

[13] 34 C.F.R. § 106. *See generally* Suzanne Eckes, R. Shep Melnick, & Kimberly J. Robinson, *Reactions to the Biden Administration's Proposed Title IX Changes from Education Law Scholars,* BROOKINGS (June. 30, 2022), https://www.brookings.edu/blog/brown-center-chalkboard/2022/06/30/reactions-to-the-biden-administrations-proposed-title-ix-changes-from-education-law-scholars/ (last visited 28 Jan. 2024).

[14] *See* Laura Meckler, *Devos Set to Bolster Rights of Accused in Title IX cases*, WASH. POST, Nov. 15, 2018, at A2; Shep Melnick, *Analyzing the Department of Education's Final Title IX Rules on Sexual Misconduct*, BROOKINGS (June 11, 2020*),* https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/ (last visited Nov. 27, 2024).

[15] *See infra* app. 1 tbl.1.

or rigorous debate surrounding the Title IX hearing process, the FAP IDC is doomed to continue this trend. The U.S. Army FAP IDC must be modified by instituting additional due process protections for the accused or divest from the process of substantiating a claim. It is better that the IDC leave a finding of guilt or innocence to be determined through the combined work of a civilian and military law enforcement criminal investigation and hearing or a strictly civilian-led criminal investigation and hearing.

As author R. Shep Melnick states in his 2018 book, *The Transformation of Title IX*, "recognizing the seriousness of these problems, though, does not require us to accept the adequacy of the solutions offered. . ."[16] The Constitution and specific Supreme Court rulings require that an individual's liberty interest is protected in a FAP IDC hearing.[17] This article highlights procedural due process concerns resident in the FAP IDC.

The inadequacy of the U.S. Army FAP IDC procedures warrants review and change. There is no telling how many Service members have been negatively impacted by the FAP IDC process since its inception in 1981.[18] A considerable number of service members go before the IDC process annually, heightening these due process concerns.[19] Between 2014 and 2023, there were 141,344 domestic abuse reports brought before the FAP IDC. Of those, 70,130 were determined to meet the criteria for abuse.[20] The Department of Defense (DoD) does not keep records of how

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[16] *See* MELNICK, *supra* note 6, at 23 (arguing that the issues which the CRC and Title IX hearings deal with are serious and must be addressed, but not at the expense of due process).
[17] *See* Vitek v. Jones, 445 U.S. 480 (1980); Board of Regents v. Roth, 408 U.S. 564 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); *see also* Mathews v. Eldridge, 424 U.S. 319 (1976) (this combination of cases establishes the parameters by which a liberty interest claim is evaluated to include the necessary amount of procedural due process afforded in relation to the identified interest).
[18] *See, e.g.,* Curto, *supra* note 1, at 46.
[19] *See* U.S. DEP'T OF DEF., REPORT ON CHILD ABUSE AND NEGLECT AND DOMESTIC ABUSE IN THE MILITARY FOR FISCAL YEAR 2023, at 11-12 (2023) [hereinafter REPORT ON DOMESTIC ABUSE FY2021]. Reports of domestic abuse, which includes physical, emotional, and sexual, have steadily declined from 20,389 in 2012 to 15,214 in 2023, while percentage of cases which met criteria for domestic physical abuse have risen from 45% in 2012 to nearly 68% in 2023. *Id.* Of the 7,957 met criteria incidents throughout the DoD, the 2023 DoD report lists 68% as physical abuse, 25.83% as emotional abuse, and 6.56 as sexual abuse. *Id.*
[20] *Id.* at 23.

many Service members are separated from the Army in subsequent administrative or punitive military hearings in which the FAP IDC finding is the singular or contributing item used to render a discharge decision. Given the large number of IDCs conducted each year and the significant liberty and property interest inherent in a military career that ends in good standing, it is imperative that IDC due process concerns are addressed and rectified.[21]

The following article is comprised of four parts. Part one, the prologue, explains how the Supreme Court determines if there has been a violation of procedural due process and, if so, the appropriate amount of due process required based on the interest.[22] It also examines how administrative law overlays constitutional law when agencies implement quasi-judicial-like structures, which adjudicate accusations of abuse.

Part two will provide a history of the U.S. Army FAP program and delve into how the FAP IDC decides whether a claim is substantiated or not. It will also include a review of FAP annual assessments conducted by the DoD from 2001-2003. These three annual reviews identified significant procedural due process concerns with the FAP IDC adjudication process. Lastly, it will describe the specific FAP IDC

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[21] *See Types of Discharge and What They Mean for Veterans,* LAW FOR VETERANS, https://lawforveterans.org/work/84-discharge-and-retirement/497-military-discharge (last visited Feb. 1, 2024) (explaining the various types of discharges in the military, administrative and punitive, both which can be initiated following an allegation of abuse substantiated with a meet criteria finding in a FAP CRC, because per AR 608-18 section 4-4 military commanders "should consider CRC recommendations . . . when taking or recommending disciplinary and administrative actions against Soldiers"); Rachel Hartmen, *How Much Will I Receive When I Retire From the Military?* (Dec. 9, 2022), https://money.usnews.com/money/retirement/baby-boomers/articles/how-much-will-i-receive-when-i-retire-from-the-military (last visited 1 Feb. 2024) (explaining the various entitlements and benefits to include but not limited to retirement pay, medical benefits, and disability benefits, that come from military service ranging from a few years to several decades); Mario Franke, Administrative Discharge Status Can Affect Benefits (Nov. 24, 2021) (previously available on the Ft. Bliss website) (on file with author) (explaining the impact negatively characterized discharges have on eligibility for Veterans Administration benefits and on the Veterans subsequent civilian life.).

[22] *See* JESSE CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS 615 (13th ed. 2019).

procedural due process concerns and the impact a substantiated claim of abuse, domestic or child, has on a Servicemember.

Part three will describe the Title IX sexual assault and harassment hearing process on college campuses during the DCL period and compare it with the changed process instituted under Betsy Devos during the first Trump administration. The Devos-era changes offered increased procedural due process and serve as a model for a revised FAP IDC.

Part four, the conclusion, will provide recommendations to address the FAP IDC procedural due process issues informed by the former DoE Secretary Devos-era changes to the Title IX hearing process.

I. Prologue: Procedural Due Process and Chevron Deference.

A. Procedural Due Process

Before delving into the procedural due process issues inherent in the FAP IDC, it is essential to understand what procedural due process the Constitution affords citizens and the deference courts have historically provided federal agencies regarding how they conduct administrative adjudication. The Fifth and Fourteenth Amendments of the Constitution states that no person is to be "deprived of life, liberty, or property without due process of law."[23] In a number of cases between 1972 and 1980 related to the withdrawal or termination of government benefits, plaintiffs asserted they were deprived of either liberty or property interest without due process.[24] These cases helped define the current parameters of a liberty and property interest claim.

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[23] *See* U.S. CONST. amends. V, XIV.

[24] *See generally* Vitek v. Jones, 445 U.S. 480, 496 (1980) (holding that a prisoner facing involuntary transfer to a mental hospital must be afforded counsel, notice and a hearing before such transfer). *See* Board of Regents v. Roth, 408 U.S. 564, 566 (1972) (holding that a professor who was not rehired at the end of a one-year term contract was not owed procedural due process in the form of a pre-termination hearing); Bishop v. Wood, 426 U.S. 341, 349 (1976) (holding that a police officer was not owed a pre-termination hearing); Goldberg v. Kelly, 397, U.S. 254, 270 (1970) (holding that due process clause of the 14th amendment requires an evidentiary hearing before a recipient of certain government benefits can be deprived of such benefits); Mathews v. Eldridge, 424 U.S. 319, 341-45 (1976) (holding that the amount of due process was flexible and required a

In *Regents v. Roth*, 408 U.S. 564 (1972), assistant professor David Roth was not rehired following a year of employment and requested a hearing before Wisconsin State University made a termination decision.[25] After the university refused, Roth claimed that this was a violation of his 14th Amendment right to due process. The Court determined the university never created a property interest because Professor Roth's employment was specifically set to terminate, with no guarantee of renewal.[26] Professor Roth also argued he had suffered reputational harm, a liberty interest violation. The Court found that whatever harm may have occurred, it "did not…. seriously damage his standing and associations in his community."[27] In his majority opinion, Justice Stewart stated, "[w]here a person's good name, reputation, honor, and integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential."[28]

In *Perry v. Sinderman*, 408 U.S. 593 (1972), university professor Robert Sinderman had been employed under a series of one-year contracts from 1965 to 1969 at Odessa Junior College.[29] The college terminated his employment contract without giving an official reason.[30] In contrast to *Regents v. Roth*, Odessa College, in its faculty guide, stated, "The administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory…"[31] The Court held that because of this statement in the faculty guide, Professor Sinderman had a "legitimate claim of entitlement to continued employment absent sufficient cause" and was entitled to a "hearing at his request, where he could be informed of the grounds for his non-retention and challenge their sufficiency."[32]

In *Bishop v. Wood*, 426 U.S. 341 (1976), a former police officer argued that his discharge from the police force constituted a violation of

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weighting of a person's private interest, the risk of depriving them of their property interest versus adding safeguards, and the government interest).

[25] Board of Regents v. Roth, 408 U.S. 564, at 566-67.

[26] *Id.* at 578.

[27] *See id.* at 573.

[28] *See id*.

[29] Perry v. Sinderman, 408 U.S. 593, 594-95 (1972).

[30] *Id*.

[31] *See id.* at 600.

[32] *Id*. at 603.

his right to due process.[33] The officer asserted he "had a constitutional right to a pre-termination hearing" because he was a "permanent employee."[34] The Court upheld the Court of Appeals' interpretation of the state law; the officer's employment was at the "will and pleasure" of the city, so no pre-termination hearing was required.[35] As with *Regents v. Roth*, the Court deemed there was no reputational harm due to termination by an at-will employer.[36]

In 1980, *Vitek v. Jones*, 445 U.S. 40 (1980), the Court found a liberty interest, when it decided that transferring a state prisoner to a mental hospital, "must be accompanied by appropriate procedural protections."[37] These due process protections included the following: written notice to the prisoner that a transfer is being considered; a hearing in which the evidence relied upon for the transfer is disclosed to the prisoner; an opportunity for the prisoner to be heard in person; an opportunity for witness testimony and cross-examination of witnesses; the appointment of an independent decisionmaker; a written statement by the factfinder as to the evidence relied upon and reasons for transferring the inmate; and ensuring availability of legal counsel.[38]

These cases established that some procedural due process is due if the government substantially interferes with a property or liberty interest. *Vitek v. Jones* added that liberty interest includes protection from "unjustified intrusions on personal security."[39] *Bishop v. Wood* added that for reputational harm to rise to the level of a liberty interest violation, the harm must manifest itself in the form of tangible interests, such as adversely impacted employment opportunities.[40]

Assessing how much procedural due process a person is afforded, particularly when the presence of a liberty or property interest has been determined, necessitates the application of the *Mathews v. Eldridge*, 424 U.S. 319 (1976) three-part test. In *Mathews v. Eldridge*, the Supreme

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[33] Bishop v. Wood, 426 U.S. 341, 349 (1976).
[34] *See id*. at 343.
[35] *Id*. at 346.
[36] *Id.* at 348.
[37] *See* Vitek v. Jones, 445 U.S. 480, 492 (1980).
[38] *Id*. at 494-95
[39] *See id*. at 492.
[40] Bishop v. Wood, 426 U.S. 341, 348 (1976).

Court heard a case regarding the level of due process a person was entitled to before their social security disability benefits were denied.[41] Justice Powell, in his majority opinion, articulated the three-part test based on the context that "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances . . . [it] is flexible and calls for such procedural protections as the particular situation demands."[42] Justice Powell specified that,

> due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[43]

The respondent in the case was denied an evidentiary hearing prior to any decision to terminate his disability payments, and such a hearing was not required by the administrative procedures prescribed.[44]

While *Mathews v. Eldridge* established a balancing test in which government interest is a factor, *Goldberg v Kelly*, 397 U.S. 254 (1970) emphasized the importance of an individual's right to a hearing before termination of welfare benefits. Because welfare "provides the means to obtain essential food, clothing, housing, and medical care," only a pre-termination hearing provides the due process owed to the welfare recipient.[45] *Mathews v. Eldridge* dealt with social security disability benefits, where the removal of the benefit did not represent an existential

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[41] Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (Justice Powel citing to Cafeteria Workers v McElroy, 367 U.S. 886, 895 (1961) and Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).
[42] *See id*. at 334.
[43] *Id*. at 335.
[44] *Id*. at 325.
[45] Goldberg v Kelly, 397 U.S. 254, 264 (1970).

threat to the impacted party, as did the discontinuation of the welfare benefits to the impacted party in *Goldberg v Kelly*.

Another case specific to a university setting and a student is *Bd. of Curators of Univ. of Mo. v Horowitz*, 435 U.S. 78, 79 (1978). In this case, a medical student was dismissed from medical school for failure to meet the academic requirements, and she requested a formal hearing before the university's formal decision-making body.[46] The Court ruled that dismissal for grades "bear[s] little resemblance to the judicial and administrative fact-finding proceedings… [it] [has] traditionally attached a full-hearing requirement."[47] The student's request was denied.

B. May Chevron Deference Rest in Peace: Deference by the Court to Agency Interpretation of Statutes Until Now

In *Chevron, U.S.A., Inc. v Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Court described the process by which it "reviews an agency's construction of [a] statute which it administers."[48] The Court first asks if Congress "has directly spoken to the precise question at issue."[49] If Congress has, the agency is to "give effect to the unambiguously expressed intent of Congress."[50] In the event Congress has not addressed the precise question, the Court then asks whether the agency's interpretation is "based on a permissible construction of the statute."[51] The Court assesses that "if Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation [and] such regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[52] *Chevron* established the significant deference the Supreme Court afforded agencies in developing regulations from statutes.

On June 28, 2024, *Chevron* was overturned with the Court's ruling in *Loper Bright Enterprises v Raimondo,* 144 S. Ct. 2244 (2024).[53] The

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[46] Bd. Of Curators of Univ. of Mo. v Horowitz, 435 U.S. 78 (1978).
[47] *Id*. at 89.
[48] *See* Chevron, U.S.A. Inc. v Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).
[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] *Id*. at 844.
[53] Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

doctrine had come under increased pressure, led by Justices Gorsuch and Kavanaugh, who often highlighted issues with deference to agency interpretation and "how agencies abuse *Chevron* to justify overarching actions."[54] In *Loper Bright Enterprises,* the Court explicitly states that statutory ambiguities are not "implicit delegations to agencies."[55]

As we delve into the Family Advocacy Program, an agency created body, we start with Public Law 106-65, National Defense Authorization Act (NDAA) for Fiscal Year 2000,[56] which ordered a review of the FAP. NDAA 2000, Section 591 required a review of the program, and Section 593 stated the Secretary of Defense shall prescribe "standard guidelines on the factors for commanders to consider policies for responses to domestic violence by a person subject to the Uniform Code of Military Justice (UCMJ) and when determining appropriate actions for such allegations that are so substantiated."[57] From this statute, the DoD authored a directive, an instruction, and three manuals, which together comprise the DoD's administrative framework for FAP and the FAP IDC. It is important to note that Congress *did not* mandate the DoD to create a FAP IDC. Section 593 of the 2000 NDAA is the limit of Congress' guidance and intent. The development of the FAP IDC arose out of the DoD's interpretation of Public Law 106-65, Section 593 of the 2000 NDAA.[58]

II. Family Advocacy Program (FAP) and the Case Review Committee (IDC)

A. History and description of the Army Family Advocacy Program

By the late 1970s, the issue of domestic violence was being studied by the General Accounting Office as Congress sought to better understand the size and scale of domestic violence in military families.[59] Originally

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[54] *See* Brittany Webb, *The Waning Future of Judicial Deference*, LEGIS. & POL'Y (Apr. 8, 2019), http://www.legislationandpolicy.com/4074/the-waning-future-of-judicial-deference.
[55] *Loper Bright Enterprises*, 144 S. Ct. at 2250.
[56] National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512 (1999).
[57] *See id.* §§ 591-94.
[58] *Id*.
[59] *Id*.

created in 1975 as the Army Child Advocacy Program, the program was renamed the Army Family Advocacy Program in 1981.[60] Six years following the 2000 NDA, the DoD created an overarching FAP under Title 10, U.S. Code 1058.[61] DoD Directive (DoDD) 5124.10 assigned the Assistant Secretary of Defense for Manpower and Reserve Affairs (ASD(M&RA)) responsibility to develop and oversee policy related to family advocacy.[62] DoD instruction (DoDI) 6400.01 "establishes policy, assigns responsibilities, and prescribes procedures for FAP to address child abuse and neglect, domestic abuse, and problematic sexual behavior in children and youth."[63] DoDI 6400.01 directs Secretaries of each of the military departments to "establish policy and guidance on the development of FAPs within their [service] departments" as per U.S. Code Title 10 section 1058 (10 U.S.C §1058).[64] Each branch of the U.S. military administers its own FAP program. DoD 6400.1, published first in 1981, then reissued in 1986 and 1992, with its most current version published in 2019, establishes a policy that is "not intended to and does not create any rights, substantive or procedural, enforceable by any victim, witness, suspect, accused, or other person in any matter, civil or criminal."[65]

B. The U.S. Army Family Advocacy Program Incident Determination Committee

10 U.S.C. §1058(b) states a "multi-disciplinary family advocacy committee" reviews an allegation of abuse and recommends appropriate action a commander may take.[66] DoDI 6400.01 operates alongside three DoD manuals (DoDM) responsible for different aspects of FAP.[67] Of the

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[60] Curto, *supra* note 1, at 46.
[61] 10 U.S.C. § 1058.
[62] U.S. DEP'T OF DEF., DIR. 5124.10, ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER AND RESERVE AFFAIRS (ASD(M&RA)) para. 4 (14 Mar. 2018) [hereinafter DODD 5124.20].
[63] *See* U.S. DEP'T OF DEF., INSTR. 6400.01, FAMILY ADVOCACY PROGRAM 1 (1 May 2019) [hereinafter DODI 6400.01].
[64] *Id*. para. 2.4.
[65] *See* United States v. Bown, 40 M.J. 625, 632-33, (N-M. Ct. Crim. App. 1994) (explaining the history of the DoD Family Advocacy Program and the courts review of what the FAP rights are created for one accused of child or domestic abuse).
[66] 10 U.S.C. § 1058.
[67] U.S. DEP'T OF DEF., INSTR. 6400.01, FAMILY ADVOCACY PROGRAM (FAP) (1 May 2019) [hereinafter DoDI 6400.01]; *see also* U.S. DEP'T OF DEF., 6400.01, VOLUME 1 FAMILY

three manuals, DoDM 6400.01 volume 3 specifically describes a body known as the Incident Determination Committee (IDC), which determines if an accusation of child or domestic abuse is substantiated or not.[68] Adding to the general confusion surrounding this program is an inconsistency in terms. In the Army the committee that determined whether an allegation of abuse was substantiated was referred to as a Case Review Committee (CRC). However, in October 2022, Army Directive 2021-26 called for a transition from the term CRC to an IDC.[69] AR 608-18 has not been updated to reflect this change. Though there is a slight variation in the composition and number of voting members between the two, the CRC and now newly termed IDC are virtually synonymous and exhibit the same procedural due process concerns.[70] "The complex nature of the cases, the seriousness of the subject matter, and need to balance Solider rights and family protection make case substantiation a contentious aspect of the CRC process. . . . case substantiation has significant ramifications and consequences to Soldiers."[71] This quasi-judicial body presents procedural due process issues identified nearly two decades ago in a series of three annual reviews conducted by the Defense Task Force on Domestic Violence (DTFDV) mandated by Congress in the 2000 NDAA.[72] The DTFDV's stated goal was to "provide the Secretary of Defense recommendations …. useful in enhancing existing programs

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ADVOCACY PROGRAM (FAP) FAP STANDARDS MANUAL (22 July 2019) [hereinafter DoDM 6400.01, vol. 1]; U.S. DEP'T OF DEF., 6400.01, VOLUME 2 FAMILY ADVOCACY PROGRAM (FAP): CHILD ABUSE AND DOMESTIC ABUSE INCIDENT REPORTING SYSTEM MANUAL (11 Aug. 2016) [hereinafter DoDM 6400.01, vol. 2]; U.S. DEP'T OF DEF., 6400.01, VOLUME 3 FAMILY ADVOCACY PROGRAM: CLINICAL CASE STAFF MEETING AND INCIDENT DETERMINATION COMMITTEE MANUAL (11 Aug. 2016) [hereinafter DoDM 6400.01, vol. 3].

[68] DoDM 6400.01, vol. 3 *supra* note 67; U.S. DEP'T OF ARMY, DIR. 2021-26, FAMILY ADVOCACY PROGRAM INCIDENT DETERMINATION COMMITTEE AND CLINICAL CASE STAFF MEETING (11 May 2021) [hereinafter AD 2021-06].

[69] AR 608-18, *supra* note 2, at 13, 63, 85; *see* AD 2021-26, *supra* note 68 (explaining that the CRC, effective October 22, 2022, will be termed an Incident Determination Committee (IDC)); *infra* app. 1 tbl.2 (comparison of Army Family Advocacy Program (FAP) Case Review Committee (CRC) and FAP Incident Determination Committee (IDC), which was effective October 22, 2022).

[70] *See infra* app. 1 tbl.2 (comparison of Army FAP CRC and ARMY FAP IDC).

[71] *See* Curto, *supra* note 1, at 52.

[72] JACK W. KLIMP & ARTHUR R. MILLER, DEFENSE TASK FORCE ON DOMESTIC VIOLENCE: INITIAL REPORT 1 (2001) *see* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, §§ 591-54, 113 Stat. 512, 639-44 (1999).

for preventing and responding to domestic violence, and where appropriate, to suggest new approaches to addressing the issue."[73]

C. DoD Annual Defense Task Force on Domestic Violence (DTFDV) Reports (2001-2003) and the DTFDV identification of due process concerns in the IDC

Although allegations of domestic violence or child abuse can be adjudicated through criminal prosecution under the UCMJ or local civilian legal jurisdiction, the Army FAP program also investigates and adjudicates allegations of emotional and physical abuse through a separate, independent system culminating in a final hearing known as an IDC.[74] As there is no specific UCMJ or state criminal code charge for emotional abuse, the Army FAP IDC will take an emotional abuse allegation under review and administer a decision of substantiated or unsubstantiated.[75] A consistent and prevalent point in each of the DTFDV reports from 2001 to 2003 was that the committee hearing, which at the time of the report was called CRC, "is a clinical body incapable of investigating criminality."[76] The 2002 report stated the problem inherent within the CRC is that it operates both as an "adjudicative and clinical body [and] these purposes may be inconsistent with each other."[77] Key findings from the second annual report suggested that the CRC, a body not designed to determine guilt or innocence, had become precisely that.[78] Claims of abuse substantiated in a CRC have significant implications for the Service members involved.[79] However, the CRC does not provide

[73] *See* KLIMP, *supra* note 72, at 2.
[74] AR 608-18, *supra* note 2, at 13, 63, 85 (explaining that the Army's FAP CRC, in addition to domestic violence of a physical nature, will review allegations and render a decision on emotional abuse allegations as well (emotional abuse is not a charge in the UCMJ)); *see* UCMJ art. 128b (2019) (explaining UCMJ crime of domestic violence, which became a specific offense under the UCMJ in 2018, while prior to 2018 a domestic violence offender under the UCMJ would face charges to include assault, rape, or maiming); UCMJ art. 119b (2019) (explaining the UCMJ offense for child abuse); VA. CODE ANN. § 18.2-57.2 (West 2014) (providing an example of state law for assault and battery against a family or household member); VA. CODE ANN. §18.2-371.1 (West 2023) (providing an example of state law for child abuse).
[75] *Id.*
[76] *See* KLIMP, *supra* note 72, at 2.
[77] *See* DEFENSE TASK FORCE ON DOMESTIC VIOLENCE: SECOND ANNUAL REPORT 141-43 (2002) [hereinafter THE SECOND DOMESTIC VIOLENCE (DV) TASK FORCE].
[78] *Id.* at 142.
[79] *See* Curto *supra* note 1, at 50, 52.

similar due process protections one would be afforded if charged with the same crime in a civilian legal jurisdiction or a military court.[80]

> Originally, the CRC was intended to be a case management body focused on clinical intervention in abuse cases. The Task Force has concluded, however, that over time the lines between clinical intervention and command judicial action have become blurred. . . Substantiation is often equated with a finding of guilt or innocence, so the CRC is too often viewed as a "legal body." This has resulted in issues being raised about due process for offenders, the need to appear before the CRC to "defend" oneself, the need to have an attorney, etc. The role of the CRC as strictly a clinical body has been compromised.[81]

Because of the concern expressed in the first two DTFDV reports, the third report recommended the then CRC no longer have a role in substantiating claims of abuse and be replaced with a Domestic Violence Assessment and Intervention Team (DVAIT) whose focus would be on victim treatment.[82] The DVAIT was envisioned to be a multidisciplinary team like the CRC. However, unlike the CRC, the DVAIT would not substantiate allegations and instead focus on assisting victim advocates with safety plans for victims, determining an offender's suitability for intervention, and devising intervention plans for offenders when feasible.

The Task Force stated in its inaugural 2001 report that the "current [CRC] system does not insist on evidence" when determining whether or not there was an act of abuse.[83] By the third report, the DTFDV had identified a solution; divesting FAP of the investigative process and focusing on alleged victim treatment and counseling through the use of the DVAIT.[84] The Defense Task Force on Domestic Violence recommended the "DVAIT concentrate on the needs of victims…[and] leave

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[80] *Infra* app. 1 tbl. 1.
[81] THE SECOND DV TASK FORCE, *supra* note 77, at 142.
DEF. TASK FORCE ON DOMESTIC VIOLENCE, THIRD ANNUAL REPORT OF THE DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, at vii (2003) [hereinafter THE THIRD DV TASK FORCE].
[83] KLIMP, *supra* note 72, at 51.
[84] THE THIRD DV TASK FORCE, *supra* note 82, at 54, 113.

commanders and law enforcement personnel to assess the criminality of actions and determine the proper adjudication of cases."[85] This recommendation was submitted but never adopted by the DoD and thus never incorporated into the individual military services FAP programs.[86]

When Army Directive 2021-26 was published in October 2022, it reduced the number of voting members on the panel from a CRC of nine to an IDC of seven and also changed the composition of the members; however, both are effectively the same body and exhibit the same procedural due process issues.[87] Another significant change was that the FAP case manager (who is charged with investigating the accusation by speaking with both the alleged victim and alleged offender) has been removed as a voting member.[88] However, the directive does not describe what role the FAP case manager plays other than to serve as a "non-voting IDC member" who "[has] relevant information that can inform the IDC during the determination process."[89] Regardless of whether termed a CRC or IDC, the composition of both bodies and their quasi-judicial role fail to incorporate the recommendations made nearly two decades ago during each of the three annual DVAITs, meaning the same issue of due process discussed in the 2001 through 2003 DVAIT reports remain.

D. Army FAP IDC Procedural Due Process Concerns

At the determination meeting of an Army FAP IDC, the accuser and the accused are absent. Neither party is allowed to have legal representation at the determination meeting.[90] There is no cross-examination of the parties.[91] In fact, AR 608-18 explicitly states, "There

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[85] *See* Curto, *supra* note 11, at 52.
[86] THE THIRD DV TASK FORCE, *supra* note 82, at vii.
[87] AR 608-18, *supra* note 2, paras. 2-3(b), 2-5 (defining the composition of the Case Review Committee and how it is administered when reviewing an allegation of child or domestic abuse); *see* U.S. DEP'T OF ARMY, DIR. 2021-26, FAMILY ADVOCACY INCIDENT DETERMINATION COMMITTEE AND CLINICAL CASE STAFF MEETING (July 12, 2021) [hereinafter AD 2021-26]; *infra* app. 1 tbl.2 (comparison of Army FAP CRC and ARMY FAP IDC which was effective October 22, 2022).
[88] AD 2021-26, *supra* note 87, at 3.
[89] *Id.*
[90] AR 608-18, *supra* note 2, paras. 2-3(b), 2-5 (defining the composition of the Case Review Committee and how it is administered when reviewing an allegation of child or domestic abuse).
[91] *Id.*

is no right for Soldiers or Family members to be present at CRC meetings while their cases are being discussed."[92] Army Directive 2021-26 denies their attendance as well.[93]

In reviewing and determining whether to substantiate an allegation of abuse, the IDC uses a preponderance of information standard.[94] As per AR 608-18, para. 2-6, the case manager interviews all individuals involved. They then give the IDC panel an evaluation of the data gathered from their interviews with both the alleged victim and the alleged offender.[95] The number of case manager interview sessions prior to an IDC decision can vary and is case-dependent. The person accused of abuse does not know the specific details of the accusation, nor do they ever get to see what the case manager submits as the evidence file to the IDC.

No guidance is provided in the regulation as to "which evidence amounts to a greater weight than other evidence," which is troubling when there are non-legal personnel attempting to make a decision based on the preponderance of information standard.[96] The case determination is recorded, but a complete record of the IDC in a "play by play" account is not provided to parties as one would see with a courtroom transcript.[97] The case determination is the only output an alleged offender will see once the panel makes its determination. Once a determination is made, requesting reconsideration is difficult. The respondent must successfully argue that

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[92] *See* AR 608-18, *supra* note 2, para. 3-19.
[93] AD 2021-26, *supra* note 87, at 2.
[94] AR 608-18, *supra* note 2, para. 2-6(b); *see also* AD 2021-26 *supra* note 87, at 2; U.S. DEP'T OF DEF., MANUAL 6400.01 vol. 3, FAMILY ADVOCACY PROGRAM 38 (1 May 2019) (defining preponderance of information as "The information that supports the report as meeting the relevant criteria that define abuse or neglect . . . the voting member need not be certain that the information meet the criterion but may note to "concur" if he or she is only 51 percent sure that is does (i.e., he or she may vote to "concur" even if there is reasonable doubt) as long as the voting member finds that given the information, the abuse or neglect is more likely than not to meet criteria").
[95] Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1946); *see also* 5 U.S.C. § 554(d) (1946) (addressing "separation of functions" in which an agency employee engaged in the investigation or prosecution of a case from supervising the presiding officer or participating or advising in the decision in that or a factually related case). This means the case manager's role in the FAP CRC was a violation of APA §554(d) and that Army Directive 2021-26 rectifies this violation with the IDC.
[96] *See* Curto, *supra* note 1, at 51.
[97] AR 608-18, *supra* note 2, sec. II, terms 108.

"The [IDC] did not have all relevant information when it made its finding" or "[that] the [IDC] did not follow published DA Policy" contained in regulation AR 608-18.[98] How, then, can an alleged victim or alleged offender successfully seek a reconsideration using either of the two reasons described without a record of the hearing or the evidentiary file used in the IDC?

However, the IDC itself may request a reconsideration, and its members *have* all been present at the hearing.[99] The case manager presents their findings and recommendations to the IDC. The IDC is not a public meeting, and membership is limited.[100] Panel members vote following a brief presentation by the case manager. For a quorum, two-thirds of the members, including the chairperson, must be present.[101] Substantiating an allegation requires a majority vote, and no unanimous decision is required.[102] If a reconsideration is granted, all accusations under determination during the initial hearing are again brought before the next IDC, even if specific allegations were found to be unsubstantiated during the initial hearing.[103] This means that to appeal one finding, the alleged offender must go before the IDC on all allegations again. This directly contradicts the U.S. Constitution's Fifth Amendment, which prohibits double jeopardy.[104]

The Army has a vested interest in preserving the health and welfare of its Service members and their Families. Victims of domestic violence in the form of physical and/or emotional abuse must be protected. The FAP can help with treating the trauma Service members along with spouses and children of Service members may suffer in the form of emotional and or physical abuse within a family or intimate partner dynamic. At the same time, we must be aware that alleged offenders have a right to due process protections, particularly given the significant impact an IDC substantiated finding can have on one's liberty and property interest.

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[98] *Id*. paras. 2-6(a)(1), 2-6(a)(2); AD 2021-26, *supra* note 87, at 7.
[99] AR 608-18, *supra* note 2, paras. 2-6(a)(1), 2-6(a)(2).
[100] *Id*. para. 2-3(b); *infra* app. 1 tbl.2.
[101] AR 608-18, *supra* note 2, para. 2-4; *see* AD 2021-26, *supra* note 87, at 6.
[102] AR 608-18, *supra* note 2, para. 2-4.
[103] *Id*. paras. 2-6(a)(1), 2-6(a)(2).
[104] *See* U.S. CONST. amend. V.

E. Liberty and Property Interests

From a property standpoint, a Service member with a substantiated allegation of physical abuse (child, spouse, or intimate partner) is very likely to be discharged with a negative characterization of service, which could mean losing pay, retirement pay, as well as disability and educational benefits.[105] In addition to the obvious property interest, a Service member's reputation is significantly impacted by their characterization of service. A discharge as the result of administrative or punitive action following a substantiated FAP allegation will impact a Soldier's continued service in the military or the ability to earn a living following service.[106]

This naturally impacts the Service member's ability to support their family financially. Veterans Administration benefits such as health care and post-military education benefits are reserved for those with an honorable and, in some circumstances, a general characterization of service.[107] The consequences of an IDC substantiated finding, specifically for physical and emotional abuse, can be long-lasting and represent a deprivation of liberty and property interest in those cases where the IDC finding is erroneous.

Service members may be dismissed from military service because of a substantiated physical abuse finding at an IDC. Even an accusation the IDC does not substantiate is retained in a central Army database known as the Army Central Registry (ACR) for 25 years after the end of the calendar year in which the determination was made.[108] AR 608-18 describes IDC findings as "clinical decisions, not criminal determinations," however an IDC "finding identifying an alleged offender may cause a commander or supervisor to pursue administrative or disciplinary measures against that

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[105] Jill Harness & Peter Liss, *Can You be Convicted of Domestic Violence and Still be in the Military*?, VISTA CRIMINAL LAW (May 4, 2018), https://vistacriminallaw.com/how-will-a-domestic-violence-charge-affect-your-time-in-the-military/ (last visited Mar. 8, 2024); *see also* Report on Domestic Abuse FY2021, *supra* note 19.

[106] Harness & Liss**,** *supra* note 105. *See generally* REPORT ON DOMESTIC ABUSE FY2021, *supra* note 19.

[107] *VA Expands Access to Care and Benefits for Some Former Service Members Who Did Not Receive an Honorable or General Discharge,* VETERANS ADMIN., news.va.gov/press-room/va-rule-amending-regulations-determinations/ (last visited Nov. 30, 2024).

[108] AR 608-18, *supra* note 2, para. 5-3(a).

individual, who is then entitled to the full range of due process rights afforded in those proceedings."[109]

The IDC is complex, and the stakes are high.[110] Service members have lost their security clearance for voluntarily attending FAP counseling not even associated with an IDC decision.[111] A FAP allegation stigmatizes Service members, and attending an IDC can lead to additional stigmatization if there are follow on disciplinary actions that rely significantly on a IDC finding.[112] Additionally, IDC records are accessible by other DoD entities and agencies at the federal, state, and local levels.[113] This can lead to issues with continued service in the military and employment outside the military. For those discharged as a result of an IDC finding or prosecuted under the UCMJ as a result of an IDC finding, post-military employment is difficult to attain.[114]

Anecdotal evidence shows that IDC findings are being used in family court proceedings. There are cases of Service members encountering IDC determinations in follow-on administrative or disciplinary actions and being unable to attack the merits of the determination.[115] IDC determinations are not intended to be part of court proceedings, but claims from Service members reinforce that IDC rulings make their way into civil court. In family law proceedings, any specter of domestic violence impacts parenting plans, alimony, and child support payments.[116] In extreme cases, Service members have reported to this author they were isolated from their

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[109] *See* AR 608-18, *supra* note 2, para. 3-19(b)(2).
[110] *See* Curto, *supra* note 1, at 53.
[111] *See* Valles-Prieto v. United States, 159 Fed. Cl. 611, 613 (2022).
[112] *See* Weaver v. United States, 46 Fed. Cl. 69, 70-2 (2000) (explaining the issue of procedural due process violations during the conduct of a CRC hearing and that the flawed hearing process and incorrect determination of substantiated sexual abuse of his two step-daughters then resulted in his administrative discharge from the Navy with an other than honorable discharge); *False Accusations at the Incident Determination Committee,* KING MIL. L., https:kingmilitarylaw.com/false-accusations-at-the-incident-detrmination -committee/ (last visited Nov. 30, 2024).
[113] AR 608-18, *supra* note 2, paras. 6-4 - 6-5.
[114] *See* Jennifer McDermott, *Discharged Veterans Work to End Employment Discrimination*, CHRISTIAN SCI. MONITOR (May 25, 2018), https://www.csmonitor.com/ USA/Justice/2018/0525/Discharged-veterans-work-to-end-employment-discrimination.
[115] *See Weaver, supra* note 112, at 1, 9.
[116] *The Impact of Domestic Violence on Divorce and Child Custody*, RODIER FAMILY LAW (Sept. 19, 2024), https://www.rodierfamilylaw.com/news/2024/09/the-impact-of-domestic -violence-on-divorce-and-child-custody/.

children through emergency injunctions supported by a substantiated IDC allegation provided to the court.[117] This issue requires DoD review because such instances represent a violation of the existing FAP Army Regulation.

Amongst Service members, there are stories of colleagues who felt there was no way out other than to take their own lives, unable to handle the double impact on career and family that comes from an IDC determination that substantiates an allegation. FAP will benefit from the recommendations made over two decades ago by the DoD's own review process, specifically the need to replace the IDC and focus on clinical findings versus the quasi-legal finding of guilt or innocence.[118]

These are unintended but very real consequences that are a direct result of the lack of due process in the current IDC process. An erroneous finding can be debilitating for the wrongfully accused.[119] Though a Service member can seek a reconsideration of the finding, the same IDC reviews the case; thus, the due process issues from the first hearing are present in the second. A third and final hearing is possible, and if granted, the new IDC policy calls for that hearing to take place at another installation to ensure some degree of impartiality.[120] Regardless of which stage in the process an IDC is conducted, whether the initial review or reconsideration process, this article asserts that each IDC exhibits the following seven fatal flaws:

- Lack of Neutrality: A single case manager gathers information. This same case manager meets with the alleged victim and alleged offender and then presents their findings to IDC panel members. The IDC, as per Army Directive 2021-26, now limits the FAP case manager to a non-voting member role on

[117] *See* AR 608-18, *supra* note 2, para. 3-19(b) (stating that IDC findings "may not be used outside of FAP as the sole basis for denying a person an opportunity for employment or taking adverse actions").
[118] THE THIRD DV TASK FORCE, *supra* note 82, at vii, 113.
[119] KING MILITARY LAW, *supra* note 112.
[120] AD 2021-26, *supra* note 87, at 8.

the IDC, but their findings are presented to the seven-person IDC panel.[121]

- Preponderance of Information Standard: similar to a preponderance of the evidence standard[122]

- Key parties prohibited from attending: The alleged victim and alleged offender are prohibited from attending the IDC.[123]

- Counsel prohibited from attending: Counsel for the alleged victim and alleged offender are prohibited from attending the IDC[124]

- No cross-examination[125]

- Lack of Transparency: Proceedings are not public, and only limited meeting notes are created to account for basic administrative data and final IDC determination. There is no complete record of the committee meeting.[126]

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[121] *Id.* at 3; *see* AR 608-18, *supra* note 2, sec. II, terms 108 (explaining the definition of a case manager to be "the individual who coordinates all of the health, social and other services on behalf of the client or group of clients and monitors the progress of clients through the sequence of the treatment program"). There is no mention of the case manager being trained in any form of legal procedure to include but not limited to rules of evidence or procedural due process. It is this author's assertion that placing the same case manager in charge of interviewing both alleged victim and alleged offender places too much discretion in the case manager as opposed an alternative which would allow legal counsel for both to argue the facts before the panel.

[122] U.S. DEP'T OF DEF., 6400.01, FAMILY ADVOCACY PROGRAM vol. 3, at 38 (1 May 2019) The DoD defines preponderance of information as the "information that supports the report as meeting the relevant criteria that define abuse or neglect . . . . The voting member need not be certain that the information meet the criterion but may note to 'concur' if he or she is only 51 percent sure that is does (i.e., he or she may vote to 'concur' even if there is reasonable doubt) as long as the voting member finds that given the information, the abuse or neglect is more likely than not to meet criteria." *Id.*

[123] AR 608-18, *supra* note 2, para. 3-19(b).

[124] *Id*. para. 3-19(b).

[125] *Id*. paras. 2-3(b)(1), 3-19(b) (explaining that fact finding is a process conducted by the IDC, but there is no adversarial process or counsel for parties present).

[126] *Id*. paras. 2-3(b)(1), 3-19(b).

- Majority vote required: A substantiated finding requires a majority vote as opposed to a unanimous or two-thirds vote.[127]

Both alleged victims and alleged offenders have an interest in fair proceedings that effectively adjudicate physical and emotional abuse accusations. The IDC also fails victims. The military commander has the discretion to "concur, veto, or delay the recommendations" of the IDC, and instead of being handled in criminal proceedings, a majority of spouse abuse cases are handled by administrative means.[128]

It is more likely than not that commanders take an IDC determination seriously, and an IDC determination significantly influences follow-on military criminal or administrative separation actions. Would it not be in the best interest of all parties that the full protections, transparency, and weight of a criminal investigation and proceeding take place instead of a sub-optimal IDC process, especially given the significant implications for the parties involved? The IDC in its current form continues to deny the "fundamental requisite of due process of law…the opportunity to be heard" at a hearing "at a meaningful time and in a meaningful manner," especially where a potential substantiated finding can rest on "incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases."[129]

With the end of *Chevron* deference, would the IDC process survive if brought under the scrutiny of the Supreme Court? The IDC is a DoD-created process. Congress does not mention a CRC or IDC requirement in section 591 of NDAA 2000, instead only requesting that the Secretary of Defense prescribe "standard guidelines for commanders to consider when seeking to substantiate allegations of domestic violence by a person subject to the Uniform Code of Military Justice and when determining appropriate actions for such allegations that are so substantiated."[130]

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[127] *Id*. para. 2-4*r*.
[128] Christine Hansen, *A Considerable Service: An Advocate's Introduction to Domestic Violence and the Military*, DOMESTIC VIOLENCE REP., Apr./May 2001, at 1, 4.
[129] *See id.*
[130] *See* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, §§ 591-54, 113 Stat. 512, 639-44 (1999).

III. Procedural Due Process in Title IX hearings

A. Review of Procedural Due Process Issues Associated with Title IX Hearings in the DCL Period of 2011-2020.

Title IX refers to Title IX of the Education Amendments of 1972, which "prohibit[s] discrimination on the basis of sex in education programs or activities by recipients of federal financial assistance."[131] Title IX hearings, which review allegations of sexual assault or sexual harassment on college campuses, have also come under scrutiny since the 2011 DCL," which was penned by the DoE OCR on April 4, 2011.[132] During President Obama's administration, DoE OCR sought to, with the DCL, to expand and clarify Title IX requirements "pertaining to sexual harassment [and] sexual violence," perpetrated at schools, colleges, and universities.[133] The Supreme Court decision in *Davis v. Monroe Cty. Bd. of Educ.* in 1999 held that an educational institution that is the recipient of federal government funds is liable for a private Title IX damages action if it is indifferent to the known acts of sexual harassment or assault.[134]

The *Davis v. Monroe Cty. Bd. of Educ.* decision built on the 1998 *Gebser v. Lago Vista Indep. Sch. Dist.* ruling, which dealt with sexual harassment of a student by a teacher.[135] The Dear Colleague Letter expanded the scope of Title IX sexual assault or harassment hearings to include requiring schools to investigate claims "regardless of where they occurred" and clarified that a "school's Title IX investigation is different from any law enforcement investigation."[136] The DCL was followed by a more detailed "blueprint for colleges and universities. . . to protect students from sexual harassment and assault."[137]

Conceptually and in practice, this means a law enforcement investigation can occur before, after, or concurrent with a school's Title

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[131] *See id.*
[132] Josh Moody, *What Biden's Title IX Rules Mean for Due Process*., INSIDE HIGHER ED, (June 30, 2022), https://www.insidehighered.com/news/2022/06/30/new-title-ix-rules-raise-concerns-accused.
[133] The Dear Colleague Letter, *supra* note 5.
[134] Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 652 (1999).
[135] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).
[136] *See* The Dear Colleague Letter, *supra* note 5, at 4.
[137] *See* TRANSFORMATION OF TITLE IX, *supra* note 66, at 197 (citing U.S. DEP'T OF EDUC. Q&A, *supra* note 8).

IX investigation and each investigation may have a different result.[138] A student can be found innocent of sexual assault in a criminal investigation yet guilty at a Title IX hearing. R. Shep Melnick of the Brookings Institution reported that "between 2012 and 2016, countersuits filed by male students convicted of misconduct under the new federal mandates quickly multiplied, raising significant questions about the fairness of colleges' investigations."[139] Critics of the DCL include Nadine Strossen, former ACLU President, who at the 2015 Harlan lecture at Harvard stated:

> By threatening to pull federal funds, the OCR has forced schools, even well-endowed schools such as Harvard, to adopt sexual misconduct policies that violate many civil liberties, as denounced by an admirable, remarkable open letter that 28 members of the Harvard Law School faculty published last fall, with the signers including distinguished female professors who are lifelong feminist scholars and women's rights advocates.[140]

The DCL specifically states, "police investigations may be useful for fact-gathering; but because standards for criminal investigations are different, police investigations are not determinative of whether sexual

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[138] *See generally* Khan v. Yale Univ., 27 F.4th 805 (2d Cir. 2022). This case involves Saifullah Khan, a Yale University student who was criminally charged in 2015 with sexual assault by the State of Connecticut and was acquitted of all criminal charges. *Id.* at 1. Yale University found that he violated its Sexual Misconduct Policy through a Title IX hearing process using the preponderance standard of proof. *Id.*

[139] *See* THE TRANSFORMATION OF TITLE IX, *supra* note 6, at 152. Author and Professor Melnik writes,

> Between 2012 and 2016, federal and state courts issued fifty-one decisions in such cases. Over half found deficiencies in the school's disciplinary process. In other cases, judges found accused students' cases strong enough to allow discovery to proceed. According to a 2017 report issued by the National Center for Higher Education Risk Management, the leading consulting group offering legal advice to colleges on the topic, "Never before have colleges been losing more cases than they are winning, but this is the trend now" . . . . A federal district court in Massachusetts described the process used by Brandeis University in a sexual harassment case as "closer to Salem 1692, than Boston 2015."

Id.

[140] Nadine Strossen & John Marshall Harlan II, *Nadine Strossen: "Free Expression: An Endangered Species on Campus?" Transcript* (Nov. 5, 2015), https://shorensteincenter.org/nadine-strossen-free-expression-an-endangered-species-on-campus-transcript.

harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation."[141] A synopsis of how Title IX hearings have been conducted during and after the DCL period is described in Table 1, Appendix 1 of this article.

Title IX hearings during the DCL period significantly resembled the IDC process described in Part Two of this article. They used a single investigator model to fact-find and present in what was a closed hearing.[142] The alleged victim and alleged offender were not required to be present, and counsel for each party is not required, though if the school permits attorneys, it must do so equally for both parties. The DCL period rules also recommended universities make arrangements, when requested, to keep the alleged victim and alleged offender in separate spaces during the hearing in the event they want to be present.[143] Cross-examinations were discouraged, though some universities would allow parties to submit questions to a third party who would then determine whether or not they could be asked.[144] In *Khan v. Yale U.*, the difference in the results of a criminal proceeding and a Title IX hearing is stark because, though acquitted of criminal charges, Khan was expelled from Yale University following the Title IX hearing.[145]

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[141] *See* The Dear Colleague Letter, *supra* note 5, at 10.

[142] BROOKINGS, *supra* note 7, at 3 (explaining single investigator model means the individual appointed by the university to conduct the investigation also determines guilt or innocence).

[143] The Dear Colleague Letter, *supra* note 5, at 31. *See generally* U.S. DEP'T OF EDUC. Q&A, *supra* note 8 (since rescinded) (explaining on page 30, section F-5, the hearing process that a university may use to include presence of parties, recommendations on using closed circuit television, or other means to avoid placing alleged victim and alleged offender in the same physical hearing, and on page 31, section F-6, discouraging cross examination, and also on page 26, section F-1, allowing for universities to impose restrictions on use of lawyers at the hearings).

[144] The Dear Colleague Letter, *supra* note 5, at 31; *see also* U.S. DEP'T OF EDUC. Q&A, *supra* note 8 (explaining on page 31, section F-6, that "OCR does not require that a school allow cross examination of witnesses, including the parties, if they testify at the hearing").

[145] Khan v. Yale Univ., 27 F.4th 805 (2d Cir. 2022) (Circuit Court Judge Reena Raggi stating student Khan and alleged victim had both testified in each other's presence, under oath, and subject to cross examination at trial, but not under oath or subject to cross examination at the university Title IX hearing). Circuit Court Judge Reena Raggi, while recounting Yale's Sexual Misconduct Policy in section 3 of the 2nd Circuit Court Decision,

The debate regarding Title IX hearings centered on the procedural due process offered the accuser and accused, which changed significantly between the Obama and Trump administrations.[146] There was a shift in focus towards a process more in line with criminal proceedings and highlight that due process afforded to parties can vary significantly in an administrative hearing.[147] Due process protections are critically important in Title IX hearings because, in the wake of the DCL, colleges seemed to adopt the attitude that it is "better that ten innocents suffer than that one guilty student escape."[148] Key changes regarding the Title IX hearing process between the Obama and first Trump administrations are listed in Table 1, Appendix 1.

In summary, the Devos era changes under the first Trump administration resulted in discarding the single investigator model, ensuring that hearings were live, that both parties and their legal counsel were present, and that cross-examination took place.[149] Additionally, Devos-era changes included requiring schools choose between using a preponderance of the evidence standard or the higher clear and convincing standard, but requiring that whichever standard was chosen it be the one applied to all cases.[150] When we compare the Devos-era changes to the seven fatal procedural due process flaws exhibited by the IDC, the Devos changes addressed the following flaws by eliminating the single investigator model, allowing for the university to select a higher burden of proof standard, allowing for a live hearing in which both alleged offender and alleged victim are present, allowing for parties to have counsel

noted that the university misconduct policy calls for "upon filing of formal sexual misconduct complaint" the appointment of an impartial fact finder to investigate the allegation and to present to a five member panel that determines if there has been a violation and if so what discipline to administer. *Id.* at 815. There is "no requirement that statements made or evidence submitted by the fact finder . . . be sworn or otherwise satisfy any rules of reliability." *Id.* The fact finder report is provided to the hearing panel to allow them to question the parties at the hearing, but the parties do "not appear jointly before the panel," unless they agree to. *Id.* Any questions a party may want to ask the other are first made to the panel as a proposal and it is the discretion of the panel "what questions to ask." *Id.*

[146] *See* app. 1 tbl.2.

[147] *Id.*

[148] KC JOHNSON AND STUART TAYLOR, JR., THE CAMPUS RAPE FRENZY 15 (2018).

[149] *See* app. 1 tbl.2.

[150] *See* app. 1 tbl.1.

present, allowing for cross examination by counsels of the alleged victim and alleged offender during the live hearing.

IV. Conclusion

Based on the review of the U.S. Army FAP IDC process and the changes to the Title IX hearing process since the 2011 DCL letter, the following recommendations can be made to rectify the procedural due process infractions in the FAP IDC. These recommendations fall into one of three areas: A) Education, B) Policy, and C) Legal.

A. Education

Outside of the military, there is little to no discussion about the FAP IDC process. While the Title IX hearing process has benefited from robust debate and research, which led to its modification, the FAP IDC has stayed nearly identical with the exception of the slight variation in the composition and number of voting members on the IDC. This directed article, when shared with military Service members, members of both the House and Senate Armed Services Committee, and Veterans Service Organizations (VSO), can help inform them about how the IDC violates a Service member's procedural due process by comparing it to another quasi-judicial body in the form of Title IX proceedings during the Obama and Trump administrations. The issue is not understood because it has not been researched or reported on.

B. Policy

Education can set the foundation for policy change. Once informed of the issue, VSOs and impacted Service members can advocate for the DoD, and specifically the Department of the Army, to issue an update to Army Directive 2021-26 and AR 608-18 that takes into account the protections identical to the Devos-era procedural due process protections added to Title IX hearings. Alternatively, the DoD may be presented with the option to divest from the CRC/IDC process as was called for by the Defense Task Force on Domestic Violence (DTFDV) nearly two decades before.[151] At a minimum, the DoD would benefit from

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[151] *See* KLIMP, *supra* note 72; THE SECOND DV TASK FORCE, *supra* note 77; THE THIRD DV TASK FORCE, *supra* note 82.

reconvening a multidisciplinary panel, similar to the DTFDV, comprised of civil and military legal experts, victim advocate groups, and civil libertarians, to review the IDC process and recommend changes.

C. Legal

With increased education and policy advocacy, it may be easier to seek out and find test cases of impacted Service members who had their property and liberty interests deprived as a result of the FAP IDC. Such cases would be those where a FAP IDC finding was the singular or most contributing factor of their discharge from service, and the resulting discharge severely impacted the former Service member's ability to seek subsequent employment and/or claim post-military service entitlements as a result of their IDC finding initiated discharge. Such a case would need to be brought before a federal court and eventually to the Supreme Court to determine what the Court deems adequate procedural due process for an administrative hearing such as the FAP IDC.

The Court should apply the three-part balancing test as defined in *Mathews v. Eldridge* to assess how much procedural due process one is to be afforded.[152] An argument can be made in favor of the impacted Service member in each part of the three-part test. First, the private interest of the servicemember is exceptionally high, given the effect of the official action; second, the risk of erroneous deprivation of the Service members career, benefits, and ability to find post service employment through the current FAP CRC/IDC process can be argued as high, and the probable value would be high if additional or substitute procedural safeguards similar or exactly like those used by the DoE Secretary Devos for Title IX hearings were applied; and finally, the Government has great interest in ensuring that it places procedural due process upfront at the point of inception, which can be done with little to no additional administrative or fiscal burden.[153]

In conclusion, the Army FAP IDC process warrants significant review by legal scholars, victim advocates, civil libertarians, DoD and

[152] Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).
[153] *Id*. at 335.

Department of Army Officials, and elected leaders to both the House of Representatives and Senate. Currently, it operates as a quasi-judicial body rendering decisions which significantly impact the liberty and property interest of Service members without the proper due process protections for the interest at stake.

Table 1 Appendix 1: Title IX College Sexual Assault Hearing Process Comparison Between President Obama and First President Trump Administration.

Administration and Timeframe	Investigator Type	Type of Hearing: Live or Closed	Cross-examination: Yes or No	Evidentiary standard	Additional due process points
President Obama 2011-2018[1]	Single investigator model with authority to determine guilt or innocence[2]	Closed	Strongly discourages cross examination and recommends parties submit questions to a hearing panel to ask on their behalf. [3] When requested school should make arrangements so that complainant and alleged perpetrator do not have to be present in same room at the same time.[4]	Preponderance of the evidence	Interim restrictions against accused permitted in the form of not creating burden on the complainant. Examples of this include removing the alleged perpetrator for a residence hall or classes, which are in common with the complainant.[5]
President Trump May 6, 2020[6]	single investigator model not authorized[7]	Live[8]	Yes[9]	Choice between Preponderance of Evidence or Clear and Convincing, with selection the standard for all cases on that college/university campus.[10]	Schools must follow a grievance process before disciplinary sanctions against respondent.[11] Investigator training materials maintained on open source website.[12]

[1] Russlynn Ali, *Dear Colleague Letter*. U.S. Dep't of Educ. at 1, April 4, 2011; Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*. U.S. Dep't of Educ., April 29, 2014.
[2] R. Shep Melnik, *Analyzing the Department of Education's final Title IX rules on sexual misconduct*. Brookings, June 11, 2020, at 3. (explaining single investigator model means the individual appointed by the university to conduct the investigation also determines guilt or innocence.)
[3] Russlynn Ali, *Dear Colleague Letter*. U.S. Dep't of Educ. at 31, April 4, 2011; Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*. U.S. Dep't of Educ., April 29, 2014.
[4] *Id.* at 30.
[5] *Id.* at 33.
[6] U.S. Dep't of Educ., *Summary of Major Provisions of the Department of Education's Title IX Final Rule*. May 6, 2020.
[7] *Id.* at 8.
[8] *Id.* at 6. (explaining requirement for "live hearing with cross examination."
[9] *Id.*; R. Shep Melnik, *Analyzing the Department of Education's final Title IX rules on sexual misconduct.*, Brookings, June 11, 2020.
[10] U.S. Dep't of Educ., *Summary of Major Provisions of the Department of Education's Title IX Final Rule*. at 8, May 6, 2020.
[11] *Id.* at 3.
[12] *Id.* at 5.

Appendix 1 Table 2.
Army Case Review Committee (CRC) and newly phased in Incident Determination Committee (IDC) effective October 22, 2022.

Timeframe CRC[1]	Investigator Type	Type of Hearing: Live or Closed	Cross examination: Yes or No	Evidentiary Standard	Voting Members	Additional Due Process Concerns
1981 to Oct 2022	Single Investigator Model	Closed	No	Preponderance of Information	1. Chair is the Chief of FAP 2. Physician 3. Chaplain 4. CID 5. ASAP Director 6. Provost Marshall representative 7. Staff Judge Advocate representative 8. FAP Manager 9. Case Manager *(*IDC adds and makes the chair the installation commander, removes the Case Manager, Chaplain, ASAP director, and CID as voting members and adds as voting members the Senior Enlisted Advisor to the Installation Commander and the unit commander of the alleged offender.*)	-Counsel and parties prohibited from hearing -no record of hearing notes kept or provided -majority vote required and case manager who is the principal investigator is a voting member -Request for reconsideration results in alleged offender to be subject to all allegations in reconsideration hearing even if certain allegations were found to be unsubstantiated.
Timeframe IDC[2]						
Oct 2022 to present	Single Investigator Model	Closed	No	Preponderance of Information	1. Chair is the Installation Commander 2. Senior Enlisted Advisor to Installation Commander 3. Staff Judge Advocate representative 4. Provost Marshall Representative 5. FAP Chief / Clinical Director 6. Health Care provider from the forensic healthcare program on the installation (*similar to physician in CRC*) 7. Unit commander of the alleged offender	-Counsel and parties prohibited from hearing -no record of hearing notes kept or provided -majority vote required and case manager who is the principal investigator is a voting member -Request for reconsideration results in alleged offender to be subject to all allegations in reconsideration hearing even if certain allegations were found to be unsubstantiated. -Role of case manager left ambiguous -FAP Chief may invite additional NON-voting members to the IDC to inform it.

[1] *See generally* U.S. DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM (Sept. 13, 2011)
[2] *See generally* ARMY DIR 2021-26 FAMILY ADVOCACY INCIDENT DETERMINATION COMMITTEE AND CLINICAL CASE STAFF MEETING (Jul. 12, 2021)

THE FOURTH THOMAS J. ROMIG LECTURE ON PRINCIPLED LEGAL PRACTICE*

CALVIN M. LEDERER †

I think of myself as a practical lawyer, so let me begin with the end in mind. What is principled legal practice?

Drawing on many definitions, I discern that to be "principled" means to have strong beliefs or convictions that are morally upright, to distinguish between right and wrong, and to behave in a manner consistent with those ideals. Adding in the element of legal practice, I further discern that principled legal practice means that a lawyer's beliefs—strongly held and consistently adhered to—should be plausibly within the broadest reasonable construction of existing law[1] and that the lawyer's conduct in

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[1] Compare this formulation with Rule 11(b)(2) of the Federal Rules of Civil Procedure, which requires that legal contentions represented to the court "are warranted by existing law or by a nonfrivolous argument for extending. modifying, or reversing existing law or for establishing new law." FED. R. CIV. P. 11(b)(2). The Advisory Committee's Notes relate:

> Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-heart" justification for patently frivolous arguments.

pursuing those beliefs should conform with the law and professional rules and norms.

That definition aligns generally with the Army Judge Advocate General's Corps definition of "Principled counsel," which is "professional advice on law and policy grounded in the Army Ethic and enduring respect for the Rule of Law, effectively communicated with appropriate candor and moral courage, that influences informed decisions."[2]

The balance of my presentation is to elaborate on the concept, share principles developed in my current legal practice, and discuss two historical, high-profile examples where principled legal practice was challenged. Since today is the anniversary of the September 11 attacks, the first example is the post-9/11 response of the Office of Legal Counsel at the Department of Justice that set the course for the executive branch. The second is the internment of Japanese Americans in World War II.

Last year, an American Bar Association standard instructed law schools to provide opportunities to develop "a professional identity."[3] "Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society," and

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> However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

FED. R. CIV. P. 11 advistory committee's note to 1993 amendment. *See, e.g., In re* Sargent, 136 F.3d 349, 352 (4th Cir. 1998), *cert. denied sub nom.,* Cox v. Sargent, 525 U.S. 854 (1998) ("An assertion of law violates Rule 11(b)(2) when, applying a standard of objective reasonableness, it can be said that 'a reasonable attorney in like circumstances could [not have] believe[d] his actions to be . . . legally justified.' A legal contention is unjustified when 'a reasonable attorney would recognize [it] as frivolous.' Put differently, a legal position violates Rule 11 if it 'has 'absolutely no chance of success under the existing precedent.'" (citations omitted)).

[2] DEP'T. OF THE ARMY, FIELD MANUAL 3-84, LEGAL SUPPORT TO OPERATIONS 1-1 (1 Sep. 2023). Principled counsel is a component of the mission statement to "provide principled counsel and premier legal services, as committed members and leaders in the legal and Army professions, in support of a ready, globally responsive, and regionally engaged Army." *Cf.* U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 3-2 (24 Jan 2017).

[3] ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022-2023, Standard 303(b) (AM. BAR ASS'N 2022).

"embraces the values and guiding principles that are foundational to your legal practice."[4]

As judge advocates and attorneys, we have much in common that guides us. Our professional identity is partly the product of armed service and professional culture, norms, ethical and legal principles, and black letter law. That creates a baseline professional identity. I have observed over a long time that judge advocates, across all the armed services, display a remarkably similar apparent professional identity. But we are all individuals, and those commonalities do not fully define our individual professional identity.

What are your individual values that drive your words, actions, and decisions? Law and rules are where we all are comfortable to go to guide us. However, exploring your personal values and personal guiding principles requires going into a murky place that we may occasionally visit but seldom dwell.

The sum of this is your professional identity, which becomes crucial when you face a professional crisis that may compel you to define a line in the sand you will not cross or, perhaps, cross and enter uncertain and dangerous terrain.

Principled legal practice means observing and following black letter law and principles of jurisprudence. There are rules that provide right and left limits to legal practice, principally the Model Rules of Professional Conduct.[5] The Preamble of the Rules[6] tells us to resolve conflicting

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[4] *Id.* at Interpretation 303-5. Provided in its entirety: "Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society. The development of professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice." *Id.*

[5] MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2020). The Services have substantially adopted the rules. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (28 June 2018); U.S. DEP'T OF NAVY, JAG INSTR 5803.1D, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL, Sec. 3, R. 3.8 (1 May 2012), (C1, 20 Jan. 2015) (*see* 32 C.F.R. Part 776); U.S. DEP'T OF AIR FORCE, INSTR. 51-110, PROFESSIONAL RESPONSIBILITY PROGRAM (11 Dec. 2018); U.S. COAST GUARD, COMDTINST M5800.1, COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM (1 June 2005).

[6] MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020). The Preamble reviews several core principles, including: zealous representation under the rules of the adversary system; negotiating to seek an advantageous result consistent with honest dealing; keeping in confidence information relating to representation except as required or permitted by

responsibilities by our "moral judgment guided by the basic principles underlying the rules,"[7] and that moral judgments should be "guided by personal conscience and the approbation of professional peers."[8]

Consider the notion that moral judgments should be guided, in part, by the approbation of professional peers. I perceive that this means that our professional conduct should align with the collective values and norms shared by our peers, thereby meriting their respect.

Those of us who counsel commanders and other principals are "advisors," and under Rule 2.1, advisors are required to "exercise independent professional judgment and render candid advice."[9] The commentary explains that "a client is entitled to straightforward advice expressing the lawyer's honest assessment" and a lawyer "should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."[10] This is critical to principled practice, and we will encounter it again later in my remarks. Complementing that is Rule 1.1, which states, "competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[11] This may seem to be self-evident to you, but it will come up again when we consider the post-9/11 practice of the Office of Legal Counsel.

In the Coast Guard, we introduce to every new judge advocate seven principles to guide legal practice.[12] These principles are different from the joint and armed service doctrines on legal support, which tell us what we

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rules or law; using legal process for legitimate purposes and not to harass or intimidate; respecting the legal system and those who serve it, upholding legal process when challenging official action; and improving the law, public understanding and confidence, access to the legal system, the administration of justice and quality of service rendered by the profession. *Id.*

[7] *Id. See also* MODEL RULES OF PRO. RESP. r. 2.1 (AM. BAR ASS'N 2020). This states that legal advice "may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant." *Id.*

[8] MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020).

[9] *Id.*

[10] MODEL RULES OF PRO. RESP. r. 2.1 cmt. (AM. BAR ASS'N 2020).

[11] *Id.* r. 1.1.

[12] U.S. Coast Guard, Principles of Legal Practice Linked to Principles of Coast Guard Operations (2023), https://www.uscg.mil/Portals/0/Headquarters/Legal/Home_doc/CGJAG%20Guiding%20Principles%202023.pdf?ver=X5zehGPZ2YS5digSqx2IBQ%3d%3d [hereinafter Coast Guard Principles of Legal Practice].

do functionally and how we organize to do it.[13] Our principles of practice are linked to the seven Principles of Coast Guard Operations[14] that have evolved from the unique nature of our eleven statutory missions,[15] whose scope includes national defense, saving lives, incident and crisis management, law enforcement, environmental and industry regulation, facilitating maritime commerce, and maritime governance.

1. Clear Objective: *Understand the mission, context, and the task at hand. Drive to a desired and desirable outcome that enables mission execution and is consistent with the Constitution, law, and policy.*

The greatest strength of judge advocates, across all services, is our appreciation for the military mission and our focus on legal advice that supports legally executable missions. This principle emphasizes not just the desired outcome, which is the client's objective, but also what outcome is desirable—that is, the consistency of the desired outcome with broader interests of the service, the Constitution, and the Nation. Assessing what

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[13] JOINT CHIEFS OF STAFF, JOINT PUB. 3-84, LEGAL SUPPORT (2 Aug. 2016); U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO OPERATIONS (8 June 2020); U.S MARINE CORPS, ORDER 5800.16-VI, LEGAL SUPPORT AND ADMINISTRATION MANUAL (20 Feb. 2018); U.S DEP'T OF AIR FORCE, DOCTRINE PUB. 3-84, LEGAL SUPPORT TO OPERATIONS (24 Jan. 2020). In the Coast Guard, Principles for the Delivery of Legal Services comprise organizational doctrine and to some degree echo the principles that guide individual practice. Coast Guard Principles of Legal Practice*, supra* note 12. These principles are organized under two overarching principles: "We serve to support Coast Guard missions and people" and "We all share responsibility for the delivery legal services." *Id.* Under the first are these four principles: (1) Provide every leader with a lawyer, ethical advisor, and counselor; (2) Identify issues and provide risk-based options to achieve mission success while flexibly applying and preserving Coast Guard authorities; (3) Drive to desired and desirable outcomes within the letter and spirit of the law; promote the principles of Coast Guard operations; and (4) Be active and not passive: deliver services that are on time, right, and precise and that are anticipatory, innovative, and responsive. *Id.* Under the second are these principles: (1) We are one team; there is no wrong legal office to call; (2) Services are aligned and consistent, and integrated across subject matter and commands; (3) We work together to ensure justice and fairness; we demand in each other candor, collegiality, ethical conduct, and personal accountability; and (4) CGJAG leaders communicate directly with one another regardless of rank or position to protect Coast Guard and public interests; (5) CGJAG applies resources without geographic or organizational limitation to support mission execution; and (6) Every counsel will have a senior counsel; we seek review of work product from a superior, peer or subordinate counsel when we can; we will act deliberately and decisively when senior counsel is unavailable. *Id.*

[14] U.S. COAST GUARD, PUB 1, DOCTRINE FOR THE U.S. COAST GUARD 73-75 (Feb. 2014).

[15] 6 U.S.C. § 648.

is desirable means thinking beyond the immediate mission need, implicates uncertain assumptions and possible outcomes, involves the lawyer's role as counselor and legal advisor, and may take the lawyer to the edge of the lawyer's core expertise.[16]

2. Effective Presence: *Be active and prepared. Provide precise, actionable, and correct legal advice or counsel when and where it is needed most. Seek physical presence at the point of decision and "take the pen" when it will advance the mission.*

Being active and not passive means speaking up, particularly when others are rash or overlook opportunities or constraints. "Taking the pen" often facilitates and expedites effective decision-making, where the lawyer takes care not to abandon the role of counselor and legal advisor.

3. Unity of Effort: *Integrate and respect the authorities, capabilities, and perspectives of partners, assembling and relying on diverse legal teams and collaboration.*

4. On-Scene Initiative: *Act deliberately and decisively when remote senior counsel is unavailable.*

I suspect many of you can relate to this from your deployed experiences. One of our Principles for the Delivery of Legal Services is to provide every lawyer with a senior counsel, but that counsel may not always be available. We have confidence in our judge advocates in all grades and will support them when they must act independently, which we know will occur regularly, particularly during contingency response.

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[16] *See* Charles J. Dunlap, Jr., *A Tale of Two Judges: A Judge Advocate's Reflections on Judge Gonzales's Apologia*, 49 TEX. TECH. L. REV. 893, 897 (2010) ("[Judge advocates] conceive themselves much as Harold Koh, Legal Adviser to the U.S. State Department, envisions the role of his lawyers—that is, as counselors for their government clients, who 'also serve as a conscience for the U.S. Government with regard to international law.' A State Department lawyer, he says, 'offers opinions on both the wisdom and morality of proposed international actions.' Similarly, experience demonstrates that both military and civilian leaders 'expect judge advocates to discuss nonlegal factors along with technical legal advice' in their opinions." (citations omitted)).

5. Flexibility: *Adjust past experience, knowledge, and abilities to the contingency at hand. Remember that swift linear or parallel change in the character and demands of a response is the rule and not the exception.*

6. Managed Risk: *Provide advice and options based on the best facts and law available, accepting legal risk to achieve the mission without placing people or the Service in jeopardy. Remember that the decision maker, not the attorney, decides with a sound understanding of the risks.*

Experienced lawyers know there are seldom definitive answers to legal questions in the text of law and regulations.[17] We propose our best assessment linked to risk, and we should define the nature of risk with specificity and quantify it.

7. Restraint: *Relentlessly seek to enable to mission execution, but always provide an accurate and honest appraisal of applicable law – even if it may constrain operations. Respect the civil liberties and dignity of Americans and others; preserve and protect Coast Guard foundational legal authorities.*[18]

We view restraint in all these respects as perhaps the most important of these principles to guide our practice at all times.

Principles of practice are useful in our day-to-day practice, but high-stakes issues challenge our individual foundational principles—and determine whether we respond in a principled way. Let's look at lawyers under pressure, beginning with the post-9/11 period.

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[17] *But cf.* Milan Markovic, *Advising Clients After Critical Legal Studies and the Torture Memos*, 114 W. VA. L. REV. 109, 148-49 (2011) (discussing the "indeterminacy thesis" that most, if not all, legal rules can be interpreted in a variety of ways).

[18] The Coast Guard has numerous authorities, some of which provide expansive authority, that are challenged from time to time in litigation. Among the most foundational and wide-ranging authorities is 14 U.S.C. § 522, which dates to §§ 31and 64 of the Act of August 4, 1790, ch. XXXV, and today provides in § 522(a): "The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance . . . ." This authority, which includes powers of arrest and seizure, is a principal basis for boarding vessels and detention of persons.

The Office of Legal Counsel Torture Memos After 9/11

The Office of Legal Counsel (OLC) exercises the Attorney General's authority to advise the President and executive agencies.[19] The OLC feels its responsibilities heavily because while some opinions may be tested in court, most won't, and its opinions comprise controlling law for the executive branch. The two dozen or so OLC lawyers come from the most prestigious law schools and OLC lawyers go on to impactful positions in government, including the Supreme Court.[20]After September 11, the Bush-era OLC was at the apex of a legal establishment shifting to a wartime footing.

One of the reasons it is appropriate to discuss OLC's post-9/11 practice today is that the genesis of the foundation of the Romig chair was the controversy over the Department of Defense (DoD) interrogation policy 20 years ago. This was inextricably linked to OLC interpretation. There is no better example of principled legal practice than the stand against that policy by Major General Romig, the other Judge Advocates General, the Staff Judge Advocate to the Commandant, and others like Navy General Counsel Alberto Mora—the first Romig lecturer.[21] I recommend to you Mr. Mora's 2019 lecture, in which he articulately sets forth the moral, policy, and systemic implications of the DoD policy.

The second reason is that the context was crisis, and you will likely face crisis in the future.

The third reason is that the OLC sits atop the legal hierarchy of the executive branch, both literally and figuratively, and it should be the paradigm of how government lawyers should ordinarily practice. Assessing OLC's work against neutral principles of legal practice can be helpful to us as we consider how we practice.

The work we'll talk about was produced from 2001 to 2003. The principal actor is Deputy Assistant Attorney General John Yoo, who came to the Office of Legal Counsel from Berkeley Law School and returned

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[19] 28 C.F.R. § 0.25 (2022).

[20] Chief Justice William H. Rehnquist and Justice Antonin G. Scalia served as Assistant Attorney General for the Office of Legal Counsel under Presidents Nixon (1969-1971) and Ford (1974-1977), respectively. Attorneys General Nicholas Katzenbach and William P. Barr served as Assistant Attorney General under Presidents Kennedy (1961-1962) and George H. W. Bush (1989-1990), respectively.

[21] A. Mora, *The First Thomas J. Romig Lecture in Principled Legal Practice*, 227 MIL. L. REV. 433 (2019).

there after he resigned in May 2003.[22] Yoo reported to Assistant Attorney General Jay Bybee, who joined OLC in November 2001 and served there until he resigned in March 2003 to become a judge on the U.S. Court of Appeals for the Ninth Circuit.[23]

Bybee figures significantly in the story, but this is more about Professor Yoo. As John Yoo has related, he was known at the time—and since—for his work on the historical understanding of the Constitution's war powers.[24] He was the OLC expert on foreign policy and national security issues and has been described even by a critic as indispensable after 9/11.[25]

Over the eighteen months following 9/11, the OLC was prolific.[26] Much of this advice was classified—at least initially. Yoo was the author or driving force behind most of this work.

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[22] OFF. OF PRO. RESP., DEP'T OF JUSTICE, REPORT, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 25-27 (July 29, 2009) [hereinafter OPR REPORT].

[23] *Id.* at 25.

[24] *Id.* at 26.

[25] JACK GOLDSMITH, THE TERROR PRESIDENCY 167-68 (2007) [hereinafter THE TERROR PRESIDENCY]. Former Assistant Attorney General Jack Goldsmith said, "Yoo was indispensable after 9/11; few people had the knowledge, intelligence, and energy to craft the dozens of terrorism related opinions he wrote." *Id.*

[26] *See generally,* OLC FOIA ELECTRONIC READING ROOM, https://www.justice.gov/olc/olc-foia-electronic-reading-room (last visited Jan. 23, 2025); Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. to Att'y Gen., subject: Constitutionality of Expanded Electronic Surveillance Techniques Against Terrorists (Nov. 2, 2001); Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. and Special Counsel, Off. of Legal Counsel, to Counsel to the President, subject: Treaties and Laws Applicable to the Conflict in Afghanistan and to the Treatment of Persons Captured by U.S. Armed Forces in that Conflict (Nov. 30, 2001); Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. to Gen. Counsel, Dep't of Def., subject: Possible Criminal Charges Against American Citizen Who Was a Member of the al Qaeda Terrorist Organization or the Taliban Militia (Dec. 21, 2001); Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. to Gen. Counsel, Dep't of Def., subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002); Memorandum from Jay S. Bybee, Assistant Att'y Gen. to Counsel to the President and Gen. Counsel, Dep't of Def., subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002); Memorandum from Jay S. Bybee, Assistant Att'y Gen. to Deputy Att'y Gen., subject: Memorandum From Alberto Gonzales to the President on the Application of the Geneva Convention to Al Qaeda and the Taliban (Jan. 26, 2002); Memorandum from Jay S. Bybee, Assistant Att'y Gen. to Counsel to the President, subject: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 (Feb. 7, 2002); Memorandum from Jay S. Bybee, Assistant Att'y Gen.

In an opinion two weeks after 9/11,[27] Yoo declared that the President had the broadest discretion in responding to things like the 9/11 attacks, telling the White House, "The power of the President is at its zenith under the Constitution when the President is directing military operations of the armed forces, because the power of Commander in Chief is assigned solely to the President."[28]

Here are some of the conclusions in subsequent opinions:

- The President could deploy the military domestically against terrorists operating within the United States.[29]

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to Gen. Counsel, Dep't of Def., subject: Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan (Feb. 26, 2002); Memorandum from Jay S. Bybee, Assistant Att'y Gen. to Gen. Counsel, Dep't of Def., subject: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations (Mar. 13, 2002). *See* OPR REPORT, *supra* note 22, at 118; Memorandum from Deputy Assistant Att'y Gen., Off. of Legal Counsel, to Assistant Att'y Gen., Off. of Legis. Aff., subject: Swift Justice Authorization Act (Apr. 8, 2002); Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Counsel, to the Att'y Gen., subject: Determination of Enemy Belligerency and Military Detention (June 8, 2002); Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Off. of Legal Counsel, to Assistant Att'y. Gen., Off. of Legis. Aff., subject: Applicability of 18 U.S.C § 4001(a) to Military Detention of United States Citizen (June 27, 2002); Letter from John Yoo, Deputy Assistant Att'y Gen., Off. of Legal Counsel, to John Rizzo, Acting Gen. Counsel, Cent. Intel. Agency (July 13, 2002), https://www.justice.gov/sites/default/files /olc/legacy/2009/08/24/letter-rizzo2002.pdf.

[27] President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188 (2001).

[28] While reciting that the President had exceptionally broad power to take military action based on his constitutional Commander-in-Chief authority, the opinion also relied on the additional authority conferred by Congress in the Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing "all necessary and appropriate force" against any person, organization, or State suspected of involvement, and to deploy military force preemptively against terrorist organizations or States that harbored or supported them whether or not linked to the specific terrorist incidents of September 11), and also the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548).

[29] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., and Robert J. Delahunty, Special Counsel, Off. of Legal Counsel for Alberto Gonzales, Counsel to the President and William J. Haynes II, Gen. Counsel, Dep't of Def., subject: Authority for Use of Military Force to Combat Terrorist Activities *Within the United States* (Oct. 23, 2001) (emphasis added). The opinion stated that the President had "ample constitutional and statutory authority to deploy the military against international or foreign terrorists operating within the United States," notwithstanding the Posse Comitatus Act, 18 U.S.C. § 1385, the Insurrection Act, 10 U.S.C. §§ 331-335, and the Fourth Amendment, U.S. CONST. amend. IV.

- The President had broad discretion to authorize warrantless electronic surveillance advice.[30]
- The Geneva Conventions[31] did not apply to al-Qaeda[32] or the Taliban.[33]
- Military members were not subject to prosecution under the War Crimes Act, which criminalizes grave breaches of the Geneva Conventions.[34]

Three memos in 2002 and 2003 would later be called the "Torture Memos."

Interrogation was a novel issue for the OLC, prompted by the Central Intelligence Agency's (CIA) capture of al-Qaeda's Abu Zubaydah in Pakistan. Bybee signed the two August 2002 memos that addressed CIA

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[30] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. to Att'y Gen., subject: Constitutionality of Expanded Electronic Surveillance Techniques Against Terrorists (Nov. 2, 2001).

[31] *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

[32] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. and Special Counsel, Off. of Legal Counsel, to Counsel to the President, subject: Treaties and Laws Applicable to the Conflict in Afghanistan and to the Treatment of Persons Captured by U.S. Armed Forces in that Conflict (Nov. 30, 2001).

[33] *Id.* In January 2002, two months after joining Office of Legal Counsel, Jay Bybee signed an opinion reiterating most of the earlier Yoo opinion plus additional views, including the conclusion that departures from the standard of treatment in Common Article 3 could "be justified by some basic doctrines of legal excuse" such as national self-defense, and offered additional rationale why the third Geneva Convention Relative to the Treatment of Prisoners of War would not apply to the Taliban. Memorandum from John C. Yoo Deputy Assistant Att'y Gen. to Gen. Counsel, Dep't of Def., subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002).

[34] Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, subject: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A(Aug. 1, 2002). *See* War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (codified at 18 U.S.C. § 2441). Grave breaches include torture or inhumane treatment, or willfully causing great suffering or serious injury to body or health. *See* Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Off. of Legal Counsel, to Assistant Att'y. Gen., Off. of Legis. Aff., subject: Applicability of 18 U.S.C § 4001(a) to Military Detention of United States Citizen (June 27, 2002).

interrogation,[35] but John Yoo principally authored them.[36] Yoo signed the March 2003 memo that addressed military interrogation.

The first Bybee memo narrowly defined torture in the criminal statute[37] that implements the Convention Against Torture.[38] The statute makes criminal acts specifically intended to inflict severe physical or mental pain or suffering.[39] The Bybee memo asserted that physical pain must be of an intensity that accompanies serious physical injury such as death or organ failure, and mental pain requires suffering not just at the moment of infliction but also lasting psychological harm, such as those seen in mental disorders. This opinion, which John Yoo referred to in email traffic as the "bad things opinion,"[40] added that prosecution for interrogations undertaken pursuant to Commander-in-Chief powers may be unconstitutional because "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."[41] The opinion also concluded that necessity or self-defense could eliminate any criminal liability.

A second, classified, Bybee opinion, based on the first, posed no legal objection to specified interrogation techniques proposed by the CIA.[42]

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[35] Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, subject: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, at 35, 39 (Aug. 1, 2002).

[36] OPR REPORT, *supra* note 22, at 1.

[37] Pub. L. No. 103-236, 108 Stat. 463, § 506 (1994) (codified at 18 U.S.C. §§ 2340-2340A).

[38] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 U.N.T.S. 85, S. Treaty Doc. No. 100-20 (1988).

[39] Under the Act, severe mental pain or suffering means prolonged mental harm caused by or resulting from, among other things, the intentional infliction or threatened infliction of severe physical pain or suffering, or the threat of imminent death. Pub. L. No. 103-236, 108 Stat. 463, § 506 (1994) (codified at 18 U.S.C. §§ 2340-2340A).

[40] OPR REPORT, *supra* note 22, at 45.

[41] Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, subject: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, at 35 (Aug. 1, 2002).

[42] Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Counsel, to John Rizzo, Acting Gen. Counsel, Cent. Intel. Agency, subject: Interrogation of al Qaeda Operative (Aug. 1, 2002).

The March 2003 Yoo memo to the DoD[43] addressed military interrogations of unlawful combatants, echoing the earlier opinions.[44]

What was the aftermath? In June 2004, the first August 2002 Torture Memo was leaked to the press,[45] and a furor erupted in the media, in Congress, internationally, and in the legal profession. Later that month, Justice Department officials met with reporters to tell them the memo had been withdrawn.[46]

The key player in withdrawal was Jack Goldsmith, who replaced Bybee as Assistant Attorney General in October 2003.[47] Goldsmith rolled

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[43] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Off. of Legal Counsel, to William J. Haynes, II, subject: Military Interrogation of Unlawful Combatants Held Outside the United States (Mar. 14, 2003).

[44] The opinion declared that the War Crimes Act of 1996, 18 U.S.C. § 2441, did not apply to military personnel because Common Article 3 of the Geneva Conventions did not apply to al-Qaeda or the Taliban, as the OLC had earlier opined. The opinion also restated the proposition that interrogations conducted on Presidential authority superseded the restrictions in the law anyhow. *Id.*

[45] OPR REPORT, *supra* note 22, at 1.

[46] *Id.* at 123. Before the 2002 Bybee memo became public, Assistant Attorney General Jack Goldsmith told the Department of Defense (DoD) in December 2003 not to rely on the Yoo memorandum. Goldsmith advised that twenty-four interrogation techniques approved by the Secretary of Defense in April 2003 for use with al-Qaeda and Taliban detainees at Guantanamo Bay Naval Base were authorized in accordance with limitations and safeguards authorized by the Secretary, notwithstanding withdrawal of the 2003 Yoo memo. THE TERROR PRESIDENCY, *supra* note 25, at 152-55. The 2002 Bybee memo was formally withdrawn after Goldsmith resigned: Letter from Daniel B. Levin, Acting Assistant Att'y Gen., Off. of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def., subject: Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003), (Feb. 4, 2005). The Bybee memorandum was formally withdrawn in December 2004. Memorandum from Daniel B. Levin, Acting Assistant Att'y Gen., Off. of Legal Counsel, to the Deputy Att'y Gen., subject: Legal Standards Applicable under 18 U.S.C. § 2340-2340A (Dec. 30, 2004).

[47] Goldsmith, a law professor since 1994, joined the DoD Office of General Counsel (OGC) and worked on international law issues from September 2002 until July 2003. OPR REPORT, *supra* note 22, at 27. He was solicited by DoD General Counsel Haynes to join OGC as Special Counsel, having heard about him from John Yoo. Goldsmith described himself as a conservative intellectual and "new sovereigntist" "skeptical about the creeping influence of international law on American law." THE TERROR PRESIDENCY, *supra* note 25, at 20-21. When Bybee was nominated for the Judiciary, White House allies, including White House Counsel Alberto Gonzales and the Vice President's Counsel, David Addington, advocated for John Yoo to replace Bybee. Attorney General John Ashcroft, who had "uneven relations" with the White House objected, and Goldsmith became the alternative. *Id.* at 22-25. He resigned in July 2004. OPR REPORT, *supra* note 22, at 27.

back several opinions,[48] including the 2003 Yoo memo on military interrogation.[49] The Department of Justice (DOJ) later limited seven additional memoranda and, in particular, rolled back the 2002 Yoo opinion that the armed forces could be employed domestically to combat terrorism.[50]

Congress enacted the Detainee Treatment Act of 2005, prohibiting cruel, inhuman, or degrading treatment.[51] In 2006, the Supreme Court decided that Common Article 3 of the Geneva Conventions which prohibits outrages upon personal dignity, in particular humiliating and degrading treatment, applied to al-Qaeda.[52] In 2007, President Bush signed an Executive Order acknowledging the Detainee Treatment Act, specifying that Common Article 3 applies to CIA interrogations but authorizing the CIA to continue its interrogation program.[53]

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[48] *E.g.,* Goldsmith withdrew a Yoo memorandum on warrantless National Security Agency electronic surveillance. OPR REPORT, *supra* note 22, at 28.

[49] *Id*. at 112.

[50] *Id.* at 28. The direction cautioned against "relying in any respect" on the memo. *Id.*

[51] 42 U.S.C. § 2000dd. The law was enacted in both the Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, sec. 1003, 119 Stat. 2680, 2739 (2005), and the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3474 (2006). The law defined these terms in the context of the Fifth, Eighth, and Fourteenth Amendments. The law also required DoD compliance with the Army Field Manual on Intelligence Interrogation and provided a defense to prosecution when a person, consistent with ordinary sense and understanding, would not know interrogation or detention practices were unlawful. The President issued a signing statement that he would implement the limits on interrogation "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in . . . protecting the American people from further terrorist attacks." Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2006, WEEKLY COMP. PRES. DOC. 23 (Jan. 6, 2006).

[52] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[53] Exec. Order No. 13440, 72 Fed. Reg. 40707 (July 20, 2007). In 2002, President Bush determined that the Geneva Conventions would apply to "our present conflict with the Taliban" although he determined he had the authority under the Constitution "to suspend Geneva as between the United States and Afghanistan." Memorandum from the President, to the Vice President, et al., subject: Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002). He further concluded that Taliban detainees as unlawful combatants did not qualify as prisoners of war, and, because the conventions did not apply to al-Qaeda, those detainees also did not qualify. *Id.* He nevertheless reaffirmed the earlier order of the Secretary of Defense (contained in Memorandum for the Chairman of the Joint Chiefs of Staff, dated Jan. 19, 2002) that "the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the

President Obama revoked the Bush executive order and directed the executive branch not to rely on any interpretation of the law governing interrogation—in other words, all the OLC opinions on the subject.[54] The Obama-era OLC also repudiated the post-9/11 opinions with respect to "the allocation of authorities between the President and Congress in matters of war and national security."[55] In 2009, the Department of Justice (DOJ) Office of Professional Responsibility (OPR) ended a five-year investigation, concluding in a not-quite 300-page report that John Yoo committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice. OPR concluded that Jay Bybee committed professional misconduct when he acted in reckless disregard of the same duty.[56] As I will discuss later, in 2010, Associate Deputy Attorney

principles of Geneva." *Id.* Between 2005 and 2007, the OLC issued several opinions to shore up the legal rationale advanced in the earlier memos but approved the continuing interrogation program and, with modification, enhanced interrogation techniques. *See* OPR REPORT, *supra* note 22, at 7-9; *see also* Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Off. of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intel. Agency, subject: Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees (May 10, 2005); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Off. of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intel. Agency, subject: Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Off. of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intel. Agency, subject: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Off. of Legal Counsel, to John A. Rizzo, Acting Gen. Counsel, Cent. Intel. Agency, subject: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques That May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees (July 20, 2007).

[54] Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

[55] Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., subject: Status of Certain Office of Legal Counsel Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 (Jan. 15, 2009) [hereinafter the Bradbury Memo].

[56] OPR REPORT, *supra* note 22, at 11.

General David Margolis overturned the finding of misconduct but was critical of their work.[57]

Let's look at the OLC work in context. That context includes the environment in which the OLC found itself at the time, how the issues came to the OLC, the influence of pre-existing legal beliefs, and the role played by the attorneys involved.

First, let's examine the environment in which the OLC produced its body of work. These opinions were rendered in an "extraordinary historical context," when "policy makers, fearing that additional catastrophic terrorist attacks were imminent, strived to employ all lawful means to protect the Nation."[58] Attorneys "confronted novel and complex legal questions in a time of great danger and under extraordinary time pressure."[59] Jack Goldsmith believed fear of a new attack was the primary explanation for the August 2002 Bybee torture opinion: "Fear explains when Office of Legal Counsel pushed the envelope."[60] There was also evidence that American lives were particularly at risk at the time the torture memos were issued.[61]

It is in these kinds of circumstances when principled legal practice is challenged most. The OLC had to provide actionable timely legal advice. That is, advice that was right and precise and that was the result of dispassionate, reasoned, and thorough analysis. This can be tough in a crisis when pressure is great and time may be short.[62] Moreover, the gravity of the issues was profound. The greater the threat, the stronger the

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[57] Memorandum from David Margolis, Associate Deputy Att'y Gen., to the Att'y Gen. and the Deputy Att'y Gen., subject: Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (Jan. 5, 2010) [hereinafter the Margolis Memo].

[58] The Bradbury Memo, *supra* note 55. Jack Goldsmith related, "It is hard to overstate the impact that the incessant waves of threat reports have on the judgment of people inside the executive branch who are responsible for protecting American lives"; he quotes former Deputy Attorney General James Comey who, referring to the drumbeat of threat reporting, said, "imagine a threat so severe it becomes an obsession." THE TERROR PRESIDENCY, *supra* note 25, at 72.

[59] The Bradbury Memo, *supra* note 55, at 1.

[60] THE TERROR PRESIDENCY, *supra* note 25, at 165-66.

[61] The Margolis Memo, *supra* note 57, at 16.

[62] In the case of The Torture Memos, Yoo said he "did not feel time pressure to complete the memoranda," although "there was some time pressure towards the end because the decision to prepare the classified memorandum (addressing specific techniques as opposed to general advice) was made 'late in the game.'" OPR REPORT, *supra* note 22, at 43.

desire to drive to a desired outcome, and that can undermine principled analysis.

Second, consider how the issues came to the lawyers. A typical submission to OLC has two features: specific facts and a well-defined legal issue, and the resulting OLC opinion is typically narrowly tailored to the issues raised in the submission. Principled legal practice is most at risk when facts, legal issues, or both are not precise. And why is that? First, it risks an imprecise legal response. Second, it opens the door to broad analysis that would be unnecessary if you are responding to a narrow question, potentially leading to client extrapolation to factual circumstances you fail to recognize or contemplate. Former Deputy Assistant Attorney General Steven Bradbury and other critics have observed that several of the opinions diverged from the OLC's more typical practice of responding to discrete issues of law submitted by agencies and sought to address broader issues involving hypothetical scenarios that a nation in danger faced.[63]

Issues often don't come to you and me well-defined—and one of our tasks is to define the issue for analysis. Issue definition is crucial because it drives the scope of our analysis. Related to task definition is getting the facts on which the legal issue is based. A significant basis for the enhanced interrogation policy and the legal reviews of the policy was purported lessons learned from military SERE training—that is, training to Survive, Evade, Resist, and Escape. A substantial criticism has been that this factual predicate was inaccurate and inapposite and that the CIA did not follow the SERE protocol in any event.[64]

Third, consider how pre-existing legal beliefs influenced analysis. Critics assail the extent of John Yoo's views of Commander-in-Chief

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[63] *See, e.g.*, The Bradbury Memo, *supra* note 55 ("In the months following 9/11, attorneys in the OLC and in the Intelligence Community confronted novel and complex legal questions in a time of great danger and under extraordinary time pressure. Perhaps reflecting this context, several of the opinions identified below do not address specific and concrete policy proposals, but rather address in general terms the broad contours of legal issues potentially raised in the uncertain aftermath of the 9/11 attacks. Thus, several of these opinions represent a departure from this Office's preferred practice of rendering formal opinions addressed to particular policy proposals and not undertaking a general survey of a broad area of the law or addressing general or amorphous hypothetical scenarios involving difficult questions of law.").

[64] *See* S. REP. NO. 113-288, at 19, 21,50, 60-64, 496 (2014).

primacy[65] as extreme and wrong. Steven Bradbury observed that part of the problem with Yoo's exposition of Presidential authority was "his entrenched scholarly view of the issue" and his "deeply ingrained view of the operative principles."[66] The result arguably is that Yoo's prior scholarship may have skewed analysis beyond what even aggressive proponents of Presidential power found acceptable. I mentioned earlier that one principle of legal practice is to adjust past experience and knowledge to the issue at hand. I suspect that John Yoo acted with intention in this regard, but his example offers us a cautionary note.

A fourth and related issue is whether the OLC attorneys were faithful to their roles as dispassionate advisors and counselors. Our clients typically value our role as honest brokers and our predisposition to support the mission, but doing so through reasoned, dispassionate legal analysis.

Controversy over the Bush-era OLC's work led nineteen former OLC leaders and attorneys to publish *Principles to Guide the Office of Legal Counsel*.[67] The first principle is: "When providing legal advice to guide contemplated executive branch action, Office of Legal Counsel should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies."[68] This echoes the seven principles I mentioned earlier. The first OLC principle continues, "The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients'

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[65] *See* J. YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH (2009).

[66] OPR REPORT, *supra* note 22, at 122.

[67] Dawn E. Johnson, *Guidelines for the President's Legal Advisors (Including Principles to Guide the Office of Legal Counsel)*, 81 INDIANA L.J. 1345 (May 2006). These attorneys served in the Clinton years, with some having served in the Reagan years too. That notwithstanding, the OPR Report, and the Margolis Memo cite to these Principles, and Jack Goldsmith refers to them as well, observing that the OLC "has developed powerful cultural norms about the importance of providing the president with detached, apolitical legal advice." THE TERROR PRESIDENCY, *supra* note 25, at 33. In addition to the first principle recited in the text, guidance in the nine other principles, useful in assessing the post-9/11 OLC work and potentially useful for other practice settings, is: "advice should be thorough and forthright, and it should reflect all legal constraints" (principle 2); "legal analyses, and [OLC's] processes for reaching legal determinations, should not simply mirror those of the Federal courts, but also should reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office" (principle 4), "whenever time and circumstances permit, Office of Legal Counsel should *see*k the views of all affected agencies and components of the Department of Justice before rendering final advice" (principle 8). Johnson, *supra* note 67, at 1350-53.

[68] *Id.* at 1349-50.

desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action." [69]

Most of us regularly advocate for our client's desired actions. Still, we must preserve a distinct separation between our roles as counselor and advisor on the one hand, when we provide dispassionate, reasoned, and thorough legal advice, and the role we may play at other times as an advocate on Capitol Hill or with other agencies.

Jack Goldsmith has said that legal advice to the President is not like a private attorney's advocacy of a client position, nor is it like a neutral ruling of the court, but "something inevitably, and uncomfortably, in between."[70] He observed that when he considered a proposed White House action legally problematic, especially in national security matters, he would "try to suggest ways to achieve its goals through alternative and legally available means."[71] That's familiar, isn't it? It bears repeating that the imperative to find a legally supportable means to execute a desired—and desirable—mission outcome is among the greatest strengths of military lawyers.

A corollary to the caution about the advocacy model is the fundamental principle that the decision maker, not the attorney, decides. Implicit in that principle is the idea that you should not become the decision-maker yourself. Crossing that line threatens to compromise the objectivity of our legal analysis.

Jameel Jaffer is a human rights lawyer active in national security and international humanitarian law matters, including the Guantanamo cases. In one interview, he implied that John Yoo may have departed from

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[69] The OLC has since published its own internal guidelines. The guidelines effective in the Bush administration were less principles and more process. *See* Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., to Attorneys of the Off., Off. of Legal Counsel, subject: Best Practices for Office of Legal Counsel Opinions (May 16, 2005). That said, the Bradbury memo recites that "OLC has earned a reputation for giving candid, independent, and principled advice—even when that advice may be inconsistent with the desires of policymakers." The Obama-era OLC adopted guidelines similar to those in the text. Memorandum from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Counsel, to Attorneys of the Office, subject: Best Practices for Office of Legal Counsel Legal Advice and Written Opinions (July 16, 2010) (a June 9, 2022 addendum to the memo concerns transparency of Office of Legal Counsel opinions in light of changes to Freedom of Information Act law and policy).

[70] THE TERROR PRESIDENCY, *supra* note 25, at 35. He cites Supreme Court Justice and former Attorney General Robert Jackson who said that the President should receive "the benefit of a reasonable doubt as to the law." *Id*.

[71] *Id.*

his lawyer role, saying, "I don't think that it's accurate to characterize these memos as legal advice. I think that John Yoo was a player, a central player, in authorizing torture."[72] Others have expressed a similar sentiment. In the same interview segment, Professor Yoo implied he did not think he crossed the line from his role as counselor and advisor.[73]

Blurring that line is one of the greatest dangers we face in ensuring principled legal practice.

Another of the principles to guide the OLC is to seek other executive branch views when time and circumstances permit; that principle aligns with the principle I recited earlier, which is to work in legal teams and collaborate. That did not happen here but could have,[74] to the detriment of the outcome.

Another question is whether the 9/11 OLC work product was competent. Jack Goldsmith concluded that the March 2003 Yoo memo on military interrogation was "deeply flawed" and a "blank check" for new interrogation techniques.[75] Goldsmith later described that memo and the Bybee memo as "riddled with error," that key portions were "plainly wrong," and that they were a "one-sided effort to eliminate any hurdles posed by the torture law."[76]

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[72] *Torture Memo Authors Cleared, Debate Continues*, NPR (Feb. 23, 2010, 1:00 pm), https://www.npr.org/templates/story/story.php?storyId=124007547. More recently, Mr. Jaffer offered a critique of OLC practice and process in *Judging in Secret*, THE N. Y. REV., (Apr. 23, 2023), https://www.nybooks.com/articles/2023/04/20/judging-in-secret-office-of-legal-counsel-jameel-jaffer/.

[73] NPR, *supra* note 72.

[74] Lack of coordination was deliberate, eschewing potentially essential views of other agencies with significant equities like the State Department. Instead, circulation was to a very limited group that was reportedly a practice of White House Counsel Alberto Gonzales. Jack Goldsmith related that while this was ostensibly to avoid leaks, "I eventually came to believe that it was done to control outcomes in the opinions and minimize resistance to them." THE TERROR PRESIDENCY, *supra* note 25, at 167, 206. *See also* Dunlap, *supra* note 16, at 899-900 (referring to avoiding collaboration with military lawyers). The lack of coordination was not apparently traceable to lack of time either. *See* OPR REPORT, *supra* note 22.

[75] OPR REPORT, *supra* note 22, at 112. Deputy Attorney General Comey also told Attorney General Ashcroft that the opinion was "deeply flawed." THE TERROR PRESIDENCY, *supra* note 25, at 160.

[76] OPR REPORT, *supra* note 22, at 160. Later Attorney General Michael Mukasey called the Bybee Memo "a slovenly mistake." *Id.* Goldsmith concluded that the Bybee memo contained "numerous overbroad and unnecessary assertions of the Commander in Chief power vis-a-vis statutes, treaties and constitutional constraints, and fail[ed] adequately to

I mentioned earlier the professional responsibility investigation of Yoo and Bybee. While he overturned the misconduct finding based on his analysis of internal Justice Department guidelines, Associate Deputy Attorney General David Margolis was also critical of the quality of the legal work. Among other criticisms, he concluded that Bybee's discussion of the Commander-in-Chief power was "decidedly one-sided and conclusory" and did not disclose that the posture taken "is the subject of considerable dispute."[77] These criticisms are a significant indictment of their competence.

This all leads to the overarching question: did John Yoo engage in principled legal practice? Recall the definition I offered earlier: principled legal practice means having strong beliefs plausibly within the broadest reasonable construction of existing law and behaving consistently with them while conforming with professional rules and norms.

David Margolis concluded his review by saying, "I fear that John Yoo's loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power while speaking for an institutional client. These memoranda suggest that he failed to appreciate the enormous responsibility that comes with the authority to issue institutional decisions that carried the authoritative weight of the Department of Justice."[78]

John Yoo certainly held a strong belief in expansive Presidential authority to meet a perceived existential threat and acted consistently with that belief. Were his beliefs plausibly within the broadest reasonable construction of existing law?

Many if not most reviewing officials and commentators, but certainly not all, have concluded that Yoo's absolutist view of Presidential power exceeded any reasonable view and were similarly critical of his construction of statutes and application of legal doctrines like necessity

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consider the precise nature of any potential interference with that power, the countervailing congressional authority to regulate the matters in question, and the case law concerning the balance of authority between Congress and the President." *Id.* at 117-18. Goldsmith cited Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38, 41-46 (1952) (Jackson, J., concurring), in respect of the balance of power between the President and Congress, that nowhere was cited in the OLC opinions. He also observed that the Torture Statute does apply to the military. OPR REPORT, *supra* note 22, at 117-18.

[77] Margolis Memo, *supra* note 57, at 45. He also observed that none of the witnesses told OPR that the position was anything less than aggressive.

[78] Margolis Memo, *supra* note 57, at 67.

and self-defense.[79] While he may have acted in good faith while serving in a critical role,[80] his critics would likely conclude that he departed from principled legal practice.

In contrast, consider Jack Goldsmith. Here was another law professor, well-regarded in conservative legal circles, solicited by the Bush-era DoD General Counsel to become his special counsel and worked on many post-9/11 issues.[81] He and Yoo were academic associates and friends.[82] But when he became Assistant Attorney General and studied the OLC body of work, he set out to reverse or constrain them, overcoming enormous internal opposition to force the withdrawal of the principal Torture Memo. And then he resigned.[83] This is an example of principled legal practice.

When David Margolis was handed the difficult mission of reviewing the professional responsibility investigation into Yoo and Bybee, he was a 45-year career attorney serving at the time in the Obama Administration, which had already repudiated John Yoo's work. He had reviewed professional responsibility findings by the OPR on behalf of the Deputy Attorney General for 17 years. His 69-page decision to reject the misconduct findings based on his analysis of the Justice Department's professional responsibility standard, while being severely critical of both

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[79] In assessing the OLC products during this period, consider also that the Bush Administration did not entirely repudiate everything that Yoo wrote, even after the post 9/11 OLC body of work became public. And neither did the Obama-era OLC in 2009, stating that its purpose was just "to confirm that certain propositions stated in several opinions . . . in 2001-2003 respecting the allocation of authorities between the President and Congress in matters of war and national security do not reflect the current views of this Office." The Bradbury Memo, *supra* note 55, at 131. Jack Goldsmith observed that while the Clinton-era OLC sought to moderate the aggressive conception of Presidential power they perceived was espoused by the Reagan-era OLC, it issued a number of opinions espousing Presidential authority allowed disregard of conflicting statutes, approved the CIA's original rendition program, and unilateral military force in Bosnia and Haiti, and also in Kosovo, notwithstanding a tie vote in the House of Representatives that failed to approve use of force there. THE TERROR PRESIDENCY, *supra* note 25, at 36-37 (footnotes omitted).

[80] THE TERROR PRESIDENCY, *supra* note 20, at 167-68.

[81] *Id.* at 20-21.

[82] *Id.* at 21.

[83] In addition to personal reasons, Goldsmith relates that "important people inside the administration had come to question my fortitude for the job and my reliability. . . . Many of the men and women who were asked to act on the edges of the law had lost faith in me . . . . In light of all I had been through and done, I did not see how I could get that faith back. And so I quit." *Id.* at 160-62.

attorneys, resulted in withering criticism that he likely expected.[84] From my perspective, this is another example of principled legal practice, although some others might disagree.

The actions of both Goldsmith and Margolis exemplified independent professional judgment and candid advice expected of attorneys.

The Final Report on World War II Civilian Relocation and Internment

Let's look at one other historical example. In the history of the post-9/11 interrogation policy, military lawyers were heroes. Military and other government lawyers were not heroes in the World War II evacuation and internment of over 125,000 Japanese Americans and others of Japanese descent. A Commission created by Congress found that these actions were prompted by "race prejudice, war hysteria, and a failure of political leadership."[85]

A February 1942 Executive Order[86] authorized the Secretary of War and his designated commanders to create military areas from which people could be evacuated or excluded, or where restrictions could be imposed. Although the order was race-neutral, exclusion and internment would fall almost exclusively on those of Japanese descent. The following month, Congress criminalized violations of these orders.[87]

Major General Allen W. Gullion was Judge Advocate General from 1937 to November 30, 1941, when he became Provost Marshal General and, after December 7, 1941, reportedly the most persistent advocate of

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[84] *See, e.g.*, Scott Horton, *The Margolis Memo,* HARPERS MAGAZINE (Feb. 24, 2010), https://harpers.org/2010/02/the-margolis-memo/; David Luban, *David Margolis is Wrong,* SLATE (Feb. 20, 2010), https://slate.com/news-and-politics/2010/02/john-yoo-and-jay-bybee-shouldn-t-be-home-free.html.

[85] COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 18 (1982) (quoted in Korematsu v. United States, 584 F. Supp. 1406, 1416-17 (N.D. Cal. 1984)).

[86] Exec. Order No. 9066, 7 Fed. Reg. 1497 (Feb. 19, 1942). *See* 50 U.S.C. § 21 (enacted in 1918, the Alien Enemies Act authorizes apprehension, restraint, and removal of alien enemies upon Presidential proclamation); Presidential Proclamations 2524, 6 Fed. Reg. 6321 (Dec. 10, 1941) (Japanese not naturalized), 2525, 6 Fed. Reg. 6323 (Dec. 8, 1941) (Germans not naturalized), 2526, 6 Fed. Reg. 6324 (Dec. 9, 1941) (Italians not naturalized). The order also authorized the Secretary to provide transportation, shelter, and care for persons excluded from these military areas, providing the basis for later establishment of relocation camps.

[87] Act of March 21, 1942, 56 Stat. 173 (codified in 18 U.S.C. § 97a).

evacuation, exclusion, and internment.[88] A Reserve officer and lawyer, Karl R. Bendetsen, detailed to the Office of The Judge Advocate General for a time after activation, became a principal assistant to Gullion[89] and played an outsized role in urging and executing the evacuation of Japanese from the West Coast, and in particular asserted that *Nisei*—Japanese Americans—were a more significant security threat than alien Japanese.[90]

Lieutenant General John L. DeWitt, the West Coast commander, established two military areas spanning the coast. He issued orders at the urging of Bendetsen and Gullion, excluding Japanese Americans from these areas. Most would later be interned in ten remote relocation camps in the interior.[91]

The Supreme Court affirmed convictions of Japanese Americans based on DeWitt's orders in several cases, principal among them convictions in the State of Washington of Gordon Hirabayashi[92] and Fred Korematsu in California.[93]

In April 1943, a few days before the *Hirabayashi* brief was due, attorney Edward J. Ennis reported to Solicitor General Charles Fahy that an intelligence report concluded that a selective evacuation of 10,000 Japanese Americans at most "was not only sufficient but preferable,"[94] and

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[88] PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES 49 (1983).

[89] *See Karl Bendetsen Oral History, October 24, 1972*, HARRY S. TRUMAN LIB. MUSEUM, at 7-8, 28-29, https://www.trumanlibrary.gov/library/oral-histories/bendet1 (last visited Jan. 23, 2025).

[90] Regarding Karl Bendetsen's role in the evacuation generally, see IRONS, *supra* note 88. Bendetsen related that he was detailed to the Western Defense Command and General DeWitt placed him in command of the Wartime Civil Control Administration that executed the evacuation, resulting in his promotion from major to colonel on February 1, 1942. *See* IRONS, *supra* note 88, at 63-66, 74-78. Secretary of War Henry L. Stimson apparently espoused the same view that the Nisei were a greater threat than aliens. JOHN E. SCHMITZ, ENEMIES AMONG US 141 (2021).

[91] Exec. Order No. 9102, 7 Fed. Reg. 2165 (Mar. 18, 1942), established the civilian War Relocation Authority in the Executive Office of the President that would carry out the internment.

[92] Hirabayashi v. United States, 320 U.S. 81 (1943).

[93] Korematsu v. United States, 323 U.S. 214 (1944).

[94] Ennis told Fahy: "we must consider most carefully what our obligation to the Court is in view of the facts that the responsible Intelligence agency regarded a selective evacuation as not only sufficient but preferable." IRONS, *supra* note 88, at 204. By agreement, the Office of Naval Intelligence was responsible for intelligence concerning Japanese issues. The information was originally contained in a ten-page memorandum entitled, "Report on

urged informing the Court, since not doing so could be viewed as suppression of evidence. The Government would then be "forced to argue that individual selective evacuation would have been impractical and insufficient when we have positive knowledge that the only intelligence agency responsible for advising General DeWitt gave him advice directly to the contrary." The brief was never changed. That failure is entirely on the Solicitor General.

Around the same time, Ennis asked the Judge Advocate General, Major General Myron Cramer, for any other documents relevant to the military orders.[95] Cramer said he was aware of a report from General DeWitt and referred Ennis to DeWitt's Staff Judge Advocate, Colonel Joel F. Watson. Colonel Watson told Ennis in late April that the report "was being rushed off the press and would be available."[96] In fact, the over 600-page report had already been signed by DeWitt, printed, bound, and delivered on the same day they talked to Assistant Secretary of War McCloy,[97] but it would not reach the Solicitor General until after its release in a revised version in January 1944, more than seven months after the Court decided *Hirabayashi* and another case.

Without the DeWitt Report, the *Hirabayashi* brief asserted that evacuation was necessary because DeWitt faced the "virtually impossible task of promptly segregating the potentially disloyal from the loyal" among the Japanese Americans.[98]

DeWitt's report would have undermined the Government's position because he said, "an exact separation of the 'sheep from the goats' was unfeasible," and not because there was insufficient time to distinguish the loyal from the disloyal. Assistant Secretary McCloy, a Harvard-trained

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Japanese Question" (Jan. 26, 1942), authored principally by Lieutenant Commander Kenneth D. Ringle. IRONS, *supra* note 88, at 202-04. At the time, Ennis headed the Alien Enemy Control Unit in the Department of Justice. He left the Department after World War II and later served as President of the American Civil Liberties Union from 1969 to 1976. *Id.*

[95] *Id.* at 206.

[96] *Id. See also* Memorandum from Edward J. Ennis, Director, Dep't of Justice Alien Enemy Control Unit, to Herbert Wechsler (Sept. 30, 1944), reproduced in Korematsu v. United States, 584 F. Supp. 1406, 1420-21 (N.D. Cal. 1984).

[97] IRONS, *supra* note 88, at 206-07.

[98] *Id.* at 211.

lawyer, apparently recognized the adverse impact of the language that indicated racial animus as a motivating factor and wanted it dropped.[99]

Colonel Bendetsen and an Army judge advocate captain on McCloy's staff erased any trace of the 1943 final report and made the revisions, producing a new report.[100] DeWitt signed the revised report, which asserted that the evacuation was impelled by military necessity.[101] General Marshall endorsed the revised DeWitt report in July 1943. The Justice Department was unaware that the report it received months later after the *Hirabayashi* decision was not the report originally signed by DeWitt. The Solicitor General's choice to ignore a known intelligence report and the War Department's suppression of the original DeWitt report resulted in defective assertions to the Court in *Hirabayashi* and the companion case.[102]

The convictions were affirmed.

In March 1944, the Supreme Court granted certiorari in *Korematsu*. By then, the Solicitor General had DeWitt's revised and sanitized Final Report. Unchanged in the revised DeWitt report was the assertion that military necessity was based substantially on the interception of numerous illicit radio transmissions, presumably from spies and saboteurs.[103] That assertion was completely at odds with a communication from the Federal Communications Commission to the Attorney General in April 1944, a month after the Supreme Court agreed to hear the *Korematsu* case, that General DeWitt knew before the evacuation orders that no radio

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[99] *Id.* at 208-09. By contrast, the United Kingdom conducted individual loyalty hearings involving more than one hundred thousand enemy aliens in a few months. Conceding that time would have been otherwise sufficient to inquire into loyalty was at odds with prior legal argument in the 9th Circuit. *Id.*

[100] *Id.* at 210-11. The galley proofs, drafts, and memorandums relating to the original report were burned. *Id.*

[101] HEADQUARTERS W. DEF. COMMAND AND FOURTH ARMY, OFF. OF THE COMMANDING GEN., PRESIDIO OF SAN FRANCISCO, CALIFORNIA, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942, at vii (1943) [hereinafter FINAL REPORT] ("The continued presence of a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion along a frontier vulnerable to attack constituted a menace which had to be dealt with. Their loyalties were unknown and time was of the essence.").

[102] Hirabayashi v. United States, 320 U.S. 81 (1943); *see also* Yasui v. United States, 320 U.S. 115 (1943).

[103] FINAL REPORT, *supra* note 101, at 4, 8.

transmissions were determined to be illicit.[104] Solicitor General Fahy's staff warned him that the alleged illicit radio transmissions were "among the most important factors making evacuation necessary."[105]

Rather than forthrightly identifying the evidentiary conflict, the Solicitor General decided, after considerable internal discussion, to do no more than insert a footnote in the brief and, after multiple drafts, avoid any reference to the DeWitt report. Instead, they stated that the Government relied only on the facts recited in the brief itself.[106] Korematsu's conviction was affirmed.

Fundamental to the Court's decisions was its conclusion that the military orders were a legitimate exercise of the President's war powers to prevent espionage and sabotage and that it could not "reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained."[107] In other words, the Court's decision rested fundamentally on assumptions that undisclosed evidence in the government's hands undermined.

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[104] IRONS, *supra* note 79, at 282–83. The Federal Communications Commission (FCC) reported that Dewitt had been personally informed before he recommended evacuation and afterward that hundreds of reports of unlawful or unidentified radio transmissions were "wholly inaccurate;" FCC investigations showed in each case there was no radio transmission or that it was legitimate. *Id.*

[105] *Id.* at 285.

[106] The footnote went through three iterations. Korematsu v. United States, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984). First, referring principally to radio transmissions, the draft said, "the recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, in conflict with information in the possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not asks [sic] the Court to take judicial notice of the recital of those facts contained in the Report." *Id.* at 1417-18. The second draft said that the recital in the report conflicted with "the views" of the Department – as opposed to information in the Department's possession. *Id.* The final footnote omitted any reference to the conflict and said only, "We have specifically recited in this brief the facts relating to the justification for the evacuation, . . . and we rely upon the Final Report only to the extent that it relates to such facts." *Id.* Objections by Assistant Secretary of War McCloy resulted in Solicitor General Fahy dropping the signal that the government's evidence was not wholly reliable. IRONS, *supra* note 88.

[107] 320 U.S. at 99, *cited and quoted in* Korematsu v. United States, 323 U.S. 214, 218 (1944).

Forty years later, the convictions were dismissed,[108] in part because "the government knowingly withheld information from the courts" on the issue of military necessity.[109]

Concluding Thoughts

While John Yoo may have provided extreme and perhaps erroneous advice in good faith to address a perceived existential crisis after 9/11,[110] the actions of the Army and Department of Justice Attorneys in World War II are indefensible.

What are the lessons learned? Don't lie or obfuscate to the court? Get the facts right in the first place? Don't destroy or falsify documents? Easy enough.

But consider what you would do in similar high-stakes circumstances when superiors, both non-lawyers and supervising lawyers, seek to drive undesirable results. What *will* you do?

At the beginning of the hour, I referred to the Model Rules that call on us to exercise moral judgment. Let me return there in the context of the two case studies—how might morality and personal conscience figure in them? The prohibition against torture is *jus cogens*—which is to say that torture violates a norm accepted and recognized by the international community. Prohibition against racial discrimination may not be *jus cogens,* but it is abhorrent within American society, and the United States has ratified an international convention to eliminate it.[111] What would morality and personal conscience dictate for you when confronted with the issues we've discussed today? I'll leave you to ponder that the next time you're running up Observatory Hill.[112]

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[108] Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).
[109] *Id.* at 1417.
[110] Other examples of attorney general opinions later widely criticized and repudiated were Lincoln Attorney General Edward Bates' justification for suspending the writ of habeas corpus and Franklin Roosevelt Attorney General Robert Jackson's opinion legitimating the destroyers-for-bases deal. THE TERROR PRESIDENCY, *supra* note 25, at 168, 198-99.
[111] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, ratified with reservations, June 24, 1994.
[112] For readers unfamiliar with The Judge Advocate General's Legal Center and School, some student physical readiness routines include running routes through Charlottesville, Virginia, which include a steep route up to and around the University of Virginia's McCormick Observatory.

As I close, you may wonder, am I an exemplar of the principled practice of law? I'm a practical lawyer. I think I adhere to the principles of practice I espouse to our new judge advocates. I surely drive to outcomes desired by the decision maker when there is a legal path to them, but I do not hesitate to articulate other outcomes that may be desirable because they better enable the mission or are more consistent with law and policy. Have I been a principled practitioner in all instances—I cannot claim that categorically, but I believe that I have been mostly successful in doing so for one fundamental reason. The Model Rules tell us to be guided by the approbation of professional peers. What that means to me is to seek and be guided by the views of the judge advocates and other lawyers with whom I work. They have kept me centered and principled. Lawyers like Tom Romig, with whom I served long before he was a general, and, more recently, many generations of Coast Guard judge advocates, particularly junior officers with whom I've collaborated and from whom I've learned. If you look around you, your peers, subordinates, and superiors are your guarantee of principled legal practice.

Thank you.