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

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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)