

Report of Racial Disparities in the Military Justice System

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I. EXECUTIVE SUMMARY

On June 7, 2017, Protect Our Defenders (POD), an advocacy group for the military sexual assault survivors, issued a study that concluded that there are racial disparities in the military justice system. The POD report was based on data obtained from each branch of Service, through the Freedom of Information Act (FOIA). The data obtained through this request was limited in scope and had some inconsistencies in terms of content, format, and detail. The data obtained from each Service branch provided summary information regarding the number of Non-Judicial Punishments (NJP) administered, number of Summary, Special, and General Courts-Martials (CM) referred by Commanders, and number of convictions for a 10-year period from 2006 to 2015. The dataset was broken down by Race and Hispanic Ethnicity and whether the individuals were officers or enlisted.

The POD report drew several conclusions from their data. They concluded that through their work they have witnessed what appeared to be indications of racial disparities in the military justice system. Their main conclusion was that “for every year reported and across all Service branches, black Service members were substantially more likely than white Service members to face military justice or disciplinary action, and that these disparities failed to improve or even increased in recent years¹.”

The purposes of this study, were 1) to independently examine the conclusions drawn from the POD report regarding apparent racial disparities in the military justice system; 2) to conduct an independent analysis of the justice system using data the Office of Diversity Management and Equal Opportunity (ODMEO) obtained from each Service branch; and, lastly, 3) to recommend data elements for future evaluations. The data obtained by ODMEO from the Service branches covered a three year period from the time period of fiscal year 2014 through fiscal year 2016.

Our examination of the POD report reveals the following:

- 1) The summary data made available to POD through the FOIA process showed inconsistencies in how the Services record, maintain, and report this information.
- 2) The data provided to the POD was incomplete in terms of representing the entire process of the military justice system, and, from this data, one cannot draw conclusions regarding the state of the entire process based on this information.
- 3) The data provided in the POD report regarding NJP and CM referrals and convictions did not include key variables (e.g., charges, sentences, defendant record) necessary to truly draw a comparison between race, Service branch, and officers vs. enlisted.

¹Christiansen & Tsilker, 2017

- 4) The analysis conducted by the POD used averages, ratios, and descriptive statistics and not more valid approaches to complex problems with discrete outcomes such as logistic regression, where more confidence in results and measures of model fit can be obtained.

Our analyses of the independently obtained data found:

- 1) The data made available to ODMEEO from the Service branches again showed inconsistencies in how the Services record, maintain, and report this information, and did not match for corresponding years the data POD obtained through FOIA.
- 2) The data provided to ODMEEO was incomplete in terms of representing the entire process of the military justice system; and from this data one cannot draw conclusions regarding the state of the entire process based on this information.
- 3) The data provided to ODMEEO did not include key variables (e.g., charges, sentences, defendant record) necessary to truly draw a comparison between race, Service branch, and officers vs. enlisted.
- 4) Overall, our analyses supported the POD findings in that it showed Black Enlisted Service Members (SMs) face higher rates of disciplinary action (referred to NJP or CM) than White SMs, but, at the same time, had the lowest conviction rates across Services.
- 5) Results reflected that American Indian and Alaskan Native (AIAN) SMs had the highest rates of NJPs of any group.
- 6) Asian Pacific Islanders (API) have the lowest rate of disciplinary action overall.
- 7) Rates of disciplinary action for officers are profoundly lower than that of enlisted SMs, but for officers, meaningful conclusion could not be drawn beyond examining relative rates across race/ethnicity.

Key Recommendations

- 1) The Department must collect, track, maintain, report, and review key military justice system data from arrest to release from custody. This data should not be in summary format and be centered and maintained around each case in a standardized format DoD-wide.
- 2) Periodically review data and evaluate the military judicial process using Logistical Regression and other more rigorous methods in order to have increased confidence in results that are defensible and actionable at a process level.
- 3) Ensure that there are mechanisms across the process in place to receive results and make process changes based on those results beginning with Commanders.

- 4) Ensure policy, programs, and practices are reviewed regularly in order to assure alignment of intent to practice and maintain program agility for adjustment as needed.
- 5) This report also provides a list of recommended data elements for tracking and evaluation of the military judicial system.

II. INTRODUCTION

BACKGROUND

The United States military deploys worldwide, often on short notice, with large numbers of Service members (SMs) and unique disciplinary requirements. Since many American criminal laws are not applicable outside of the United States, it is important to have a system of criminal justice in place wherever SMs are deployed. As such, the military Services need a flexible, separate, military justice system capable of operating in times of peace or conflict, under the same standards at home or abroad.

Two major authorities govern the United States military justice system, the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial (MCM). The executive orders of the President that implement the UCMJ are issued in the MCM. Unlike the procedural rules of civil courts, the MCM covers the operation of the entire courts-martial system, from the initial steps to be taken before trial to the completion of the case. It deals fully with the various crimes and offenses, the evidence procedures used in cases, and the sentences that can be imposed.

THE MILITARY JUSTICE SYSTEM

REPORTING AND INVESTIGATION

Military commanders are responsible for maintaining law and order within their units; therefore, they are the first point of contact once a crime has occurred. Once notified, the commander has to decide how to resolve charges by referring to the MCM. The commanding officer may conduct the inquiry, may appoint another member in the command, or, in serious cases, may request assistance from civilian or military criminal investigative agencies².

DISCIPLINARY OPTIONS

After the investigation is complete, the commanding officer has the authority to impose disciplinary actions under Article 15 of the UCMJ. Such proceedings are referred to as non-judicial punishment (NJP), the most common type of proceeding under the military justice system. NJPs serve as a means for commanding officers to administratively discipline SMs without a Courts-Martial (CM). Punishments under an NJP offense are limited to confinement on diminished rations, restriction to certain specified limits, arrest in quarters, correctional custody, extra duties, forfeiture of pay, detention of pay, reduction in grade, or possibly administrative separation. The extent of the punishments depends on the grade of the officer imposing the punishment, the grade

² Headquarters Marine Corps, 2006

of the accused, and whether or not the accused is attached to or embarked on a vessel. Disciplinary actions under Article 15 do not result in a criminal record and are used as punishment for less severe offenses.

Except aboard a ship at sea, SMs do not have to agree to NJP proceedings and can turn down the Article 15 to request trial by CM. The commander can also choose to prefer (or press) charges and elect a CM disciplinary action instead of an NJP. The three types of CM in which SMs may be tried are summary, special, and general.

- Trial by summary court-martial provides a simplified procedure for the resolution of charges involving minor incidents of misconduct. The summary CM consists of one officer who, depending upon Service policies and practice, is a judge advocate (a military attorney). The maximum punishment a summary CM may impose is considerably less than a special or general CM. The accused must consent to be tried by a summary CM.
- A special court-martial is the intermediate court level that consists of a military judge, trial counsel (prosecutor), defense counsel, and a minimum of three officers sitting as a panel of court members or jury. An enlisted accused may request a court composed of at least one-third enlisted personnel. An accused, officer or enlisted, may also request trial by judge alone. Regardless of the offenses involved, a special CM sentence is limited to no more than twelve months confinement (or a lesser amount if the offenses have a lower maximum), forfeiture of two-third's basic pay per month for six months, a bad-conduct discharge (for enlisted personnel), and certain lesser punishments. An officer accused in a special CM cannot be dismissed from the service or confined.
- A general court-martial is the most serious level of courts-martial. It consists of a military judge, trial counsel, defense counsel, and at least five court members. An enlisted accused may request a court composed of at least one-third enlisted personnel. Unless the case is one in which the death sentence could be adjudged, an officer or enlisted accused may also request trial by judge alone. In a general CM, the maximum punishment is that established for each offense under the MCM, and may include death (for certain offenses), confinement, a dishonorable or bad-conduct discharge for enlisted personnel, a dismissal for officers, or a number of other lesser forms of punishment. Unless waived by the accused, a pretrial investigation under Article 32, UCMJ, must be conducted before a case may be referred to a general CM.

PRE-TRIAL PROCEEDINGS

The military justice system provides the accused SMs rights and due process. The SM has the right against self-incrimination, the right to be informed of the suspected offenses before any questioning begins, and the right to free military counsel. Should there be enough probable cause, the commander will also decide if the SM is confined or restricted prior to trial. While confined or

restricted, the SM does not have to post bail and will continue to receive their regular pay without loss of employment.

Soon before the trial begins, the military judge may hold informal pretrial conferences to discuss coordination and proceedings of trial. The judge also holds pretrial hearings to settle any contested legal or procedural issues such as hearing witness testimonies, taking more evidence, hearing arguments, etc. Next, there is an arraignment, where the accused SM is notified of the charges and offered a plea. Should the SM plead innocent, the CM Panel is assembled of officers and enlisted personnel. Both the prosecution and the defense have the opportunity to ask questions in order to ensure that the panel is impartial.

TRIAL

The trial begins with the proceeding called, “Trial on Merits,” where both the prosecution and defense present admissible evidence, to include witnesses, in accordance with the Military Rules of Evidence (MRE). After the presentation and cross-examination, both sides make closing arguments. The burden of proof is to establish guilt “beyond a reasonable doubt.” The Panel will proceed to deliberations and voting. There must be a two-thirds vote for the accused to be found guilty of any charges. Should the SM be found guilty, sentencing takes place immediately. The CM Panel also decides the sentence. A punishment of death requires a unanimous vote and imprisonment of more than 10 years to life requires a three-fourths vote.

POST-TRIAL PROCEEDINGS

After trial, the record of trial proceedings is prepared by the court reporter. The prosecutor and defense counsel reviews it for corrections, and the military judge will authenticate it for accuracy. The judge then decides the effective dates of punishments, to include demerits, confinements, and dismissals. Depending on the severity of the CM, there is a convening authority that reviews the entire case and has the discretion to alter any outcome of charges or sentences. The automatic appellate court review process begins after the actions of the convening authority. The Court of Criminal Appeals is composed of military judges. Under Article 66 of the UCMJ, the Court may only affirm findings of guilty and the sentence, or any of its parts, which it finds correct in law and fact. It may correct errors and reduce excessive sentences, but may not alter a “not guilty” finding to “guilty,” nor increase the severity of sentence.

III. METHODOLOGY

The current dataset involves three years (2014-2016) of data obtained by the Office of Diversity Management and Equal Opportunity (ODMEO) from the U.S. Army, Navy, Marine Corps, and Air Force. The data provides a summary of SMs who have entered into the military justice system. Included in this dataset are information on NJP, CM trial and conviction rates, SM race/ethnicity, and enlisted versus officer status.

Analysts examined the report provided by POD, and worked to create similar indices that would identify and highlight differences among racial groups regarding military disciplinary actions. Since, POD worked from different data, a perfect one-to-one comparison was not possible.

Analysts developed tables and graphs (see Section III) illustrating racial disparity based on service, race/ethnic group, and type of judicial event. In line with work conducted by POD, we provide heat maps that show where the highest and lowest levels lie across each branch of Service. We created four tables illustrating 1) Disciplinary Action, 2) Non-Judicial Punishment Imposed, 3) Courts-Martial Referral Rate (Tried), and 4) Courts-Martial Conviction Rate.

Each table provides weighted indices after combing data provided from 2014-2016. The method for developing each table is provided below, along with useful information regarding interpretation and caveats of the data and methods.

TABLE 1. DISCIPLINARY ACTION INDEX

We defined Disciplinary Action as the combination of either receiving CM or NJP. Data were broken down by race, if the event was for enlisted or officer, and by year. In this table, we added the total number of NJPs and CMs from 2014-2016 and divided this total by the population of each race and Hispanic ethnicity within their respective Service branch. These data were also broken down regarding enlisted and officer status. The formula below provided the proportion of Service members who belong to a particular racial/ethnic group and received some form of disciplinary action (NJP or CM) in their Service.

$$\text{Disciplinary Action Index: } \frac{NJP + \text{Courts-Martial}}{\text{Population}}$$

We then combined the total number of SMs across branches to create weighted totals for each racial/ethnic group (Combined Service column). Because branch and race/ethnic group populations are not equivalent, these weighted indices account for the relative population size of each Service and represent Discipline Action Indices for the DoD overall.

Lastly, we used a heat map to show which groups appear to receive more (or fewer) disciplinary actions than their peers in other racial/ethnic groups based on weighted indices. Heat maps use color to illustrate the range of values within a table, often using strong/bright colors to show high and low values, but these values and color coding are not based on any significance

testing and should be interpreted with caution. In Table 1, bright red is used to indicate the highest levels of disciplinary action, whereas dark green indicates the lowest. Each column (e.g., Enlisted & Army) provides its own heat map, as rates are not easily comparable between enlisted and officer groups, or across service branches. For example, in the Marines, Hispanic Enlisted SMs were the most likely to face disciplinary action (9.82%) whereas Asians and Pacific Islanders (API) were the least likely (2.29%). Across (combined) all Service branches however, American Indians and Alaskan Natives (AIAN) were the most likely to face disciplinary actions (8.18%), followed closely by Black SMs (8.03%), whereas Hispanics were the least likely (2.86%).

TABLE 2. NON-JUDICIAL PUNISHMENT IMPOSED RATE

Similar to Table 1, Table 2 provides indices on NJP; however, CMs are not included. Table 2 provides the rates at which SMs in each branch faced NJPs when broken down by race/ethnicity and if SMs were enlisted or officers. As with Table 1, years 2014-2016 are collapsed, combined Service columns are provided, and a heat map illustrates lower and higher rates of NJP. The combined Service weighted index is also included, similar to Table 1.

$$\text{Non-Judicial Punishment Index: } \frac{NJP}{Population}$$

TABLE 3. COURTS-MARTIAL REFERRAL RATE (TRIED)

In Table 3, indices provided show the rate at which SMs within a respective racial/ethnic group faced CM relative to the population of their racial/ethnic group. Because the number of CM referral is low, rates are similarly low. Using the table’s heat mapping, relative differences among these low numbers are still highlighted. Caution should be used in deriving meaning from these differences. For example, in the Combined Service column, AIAN officers (0.12%) faced CM at a rate three times (300%) higher than White Enlisted SMs (0.04%), yet there were only five AIAN officers who faced CM across all Services. Heat mapping are useful to quickly highlight relative differences, but closer examination is still needed before conclusions can be drawn.

$$\text{Courts-Martial Referral Rate: } \frac{Courts-Martial Trial}{Population}$$

TABLE 4. COURTS-MARTIAL CONVICTION RATE

Conviction rates in Table 4 show the proportion of SMs who faced courts-martial and were found guilty of at least one charge. In line with Tables 1-3, data were collapsed across 2014-2016, and are presented by race/ethnicity, enlisted and officer status, and Service branch. Because some groups had zero CM within a Service branch (e.g., AIAN in Navy) no rate could be calculated.

$$\text{Courts-Martial Conviction Rate: } \frac{Courts-Martial Conviction}{Courts-Martial Trial}$$

EXTENDING MILITARY JUSTICE ANALYSES: LOGISTIC REGRESSION

Logistic regression is a form of analysis that is used when investigating datasets with categorical outcomes. Logistic regression is a commonly used statistical process for evaluating the likelihood of events and has been used when investigating racial disparity in the civilian court systems for decades.³ This analysis is relevant both to this report and to future investigations of the military justice system. When faced a military discipline, SMs may face no punishment, NJP, or various forms of courts-martial, all of these outcomes are categories of possible outcomes. Even when found guilty, the form of punishment received by SMs are often categories of events (e.g., loss of rank, separation, imprisonment) and knowing the probability of these events based on one's characteristics or history is useful for identifying if disparities exist between groups based on race, gender, or other information. Logistic regression allows for the investigation of the relationship of both categorical predictor variables (such as race, education, and gender) and continuous predictor variables (such as years in service or age) with a categorical outcome variable, such as being courts-martialed ("Yes" =1) or not being courts-martialed ("No" = 0). Through this analysis, researchers can better understand if and to what extent information (age, race, and gender) can be used to predict that an event such as an NJP or a CM will take place given a series of known pieces of information. Multiple pieces of information can also be used in tandem (e.g., race and gender) to identify if smaller groups (e.g., AIAN male enlisted SMs) are at increased risk for facing military discipline. Further, this analysis can help inform leaders of the relative importance of each variable so that they can take actions with the most accurate information possible.

It is vital to understand that the use of logistic regression with the current data is only a first step towards investigating and understanding potential differences in military justice. Currently, the data made available is inconsistent and does not allow for taking full advantage of the power of logistic regression and other more sophisticated analyses. However, results from using this approach on the current data set can provide more confidence when compared to the approach used by POD. The following processes discussed show a path to gaining more and better information that will inform leader decisions regarding the military justice processes and practices. However, findings from these processes and data should not be seen as comprehensive or definitive. More data (see Recommendations) will greatly improve the ability of future analyses to identify potential issues that hinder the DoD's ability to provide a fair and consistent justice system.

DATA TRANSFORMATION

Each Service branch reported counts on SM race/ethnicity, branch, enlisted vs. officer status, CM referral to trial, conviction rate, and NJP imposed by year (e.g., 235 white enlisted Service members who were tried in courts-martial and convicted in 2016). In order to conduct logistic regression, the data were transformed to represent each individual SM/observation provided. Using R statistical software, the "expand" function was used from the package "vcdExtra." Through this function we reverse engineered a dataset in which each SM was

³ For examples of logistic regression use when evaluating the role of race the in civilian justice system see: Baldus, Woodworth, Zuckerman, & Weiner, 1997; Doerner & Demuth, 2010; Leiber & Peck, 2015

represented by a single row with the following characteristics acting as columns: Service branch, year of record, race, CM tried, CM convicted, and NJP imposed. The total population for each branch broken-down by race/ethnicity was also provided by each service. This allowed us to create a dataset that represented all branches from 2014-2016 and included SMs who did not face a CM trial or an NJP. Because the data included three years (2014, 2015, and 2016), the total number of Service member observations represented in the dataset created was 3,233,129 (approximately 1 million observations per year).

INITIAL CONSIDERATIONS PRIOR TO ANALYSIS

Because the rates for officer NJPs and CMs were very low, at times as low as zero for some groups, we focused exclusively on enlisted personnel for our logistic regression analysis in this report. Additionally, rates for conviction with CMs were so consistently high among enlisted SMs (84% - 96%) across Service branches that we determined analysis would provide the most meaningful information when focused on the relationship of race on NJP and CM referrals rather than CM convictions. Because data were not provided on Navy on NJPs, we do not include the Navy in the following NJP analysis. We considered adopting PODs NJP data; however, the data reported to POD included two NJP data sets in which either race and year, or rank were included. Because of the data format provided to POD, we could not recreate Navy NJP data that differentiated SMs by race, year, and enlisted versus officer status. Lastly, the most impactful takeaway provided by POD's report is the stated disparity between White and Black SMs. Specifically, POD reported "black service members were substantially more likely than white service members to face military justice or disciplinary action⁴". For this reason, our analysis focuses on NJP and CM trial referrals specifically with regard to differences between White and Black SMs.

LOGISTIC REGRESSION ANALYSES

In line with considerations above, we conducted two logistic regression analyses. The first analyses (results in Table 5) included only Black and White SMs across all branches and years (N=2,369,897). Using R statistical software's "glm" function, we ran a logistic regression model to compare the influence of race (white or black) on the likelihood that a SM may face CM. The "glm" function in R provides estimates that correspond to the log of the odds that a SM would face a CM if they are a Black Enlisted SM. In line with common practice, we also obtained the odds ratio – as most find this provides a more straight forward interpretation. The odds ratio in Table 5 represents the odds that Black SM face a CM relative to White SM. For example, an odds ratio of 1 indicates that each race is equally likely (1:1 odds), whereas an odds ratio of 2 would mean Black SMs are twice as likely (2:1 odds) to face CM as White SMs.

Our second analyses (Table 6) investigated the role of race in predicting SMs' likelihood to face an NJP. Because we did not have Navy NJP data, the Navy was not included in the analysis and all Navy observations were excluded. Following our first analyses, we also obtained the odds ratios. Similar to analysis 1, the odds ratio indicates the odds that a Black SM would face NJP relative to a White SM (e.g., .5:1 half as likely, 1:1 equally likely, 2:1 twice as likely).

⁴ Christiansen & Tsilker, 2017 (Emphasis by POD)

IV. RESULTS

The following section provides the results of all analyses conducted in the previous section, II. Methodology. Tables 1 through Table 4 provide heat maps that highlight differences between racial and ethnic groups with regard to military discipline and conviction rates. Below each table a short summary of findings and important caveats are described. Two additional tables (Table 5 and Table 6) are provided in Appendix A, and provide added information regarding the results of the logistic regression analyses.

DISCIPLINARY ACTION

Table 1. Disciplinary Action Index

	ARMY		AIR FORCE		MARINES		NAVY		Combined Service (Weighted)	
	Officer	Enlisted	Officer	Enlisted	Officer	Enlisted	Officer	Enlisted	Officer	Enlisted
BLACK	0.37%	10.51%	0.51%	2.91%	0.74%	6.45%	N/A	N/A	0.43%	8.03%
WHITE	0.20%	8.53%	0.29%	1.86%	0.21%	4.49%	N/A	N/A	0.24%	5.51%
AIAN	0.37%	11.88%	0.14%	4.01%	0.36%	5.61%	N/A	N/A	0.32%	8.18%
API	0.18%	4.57%	0.51%	1.44%	0.28%	2.29%	N/A	N/A	0.29%	3.39%
HISPANIC	0.10%	0.21%	0.26%	1.24%	0.24%	9.82%	N/A	N/A	0.17%	2.86%
OTHER	0.75%	19.65%	0.29%	2.35%	0.09%	3.25%	N/A	N/A	0.40%	5.22%
Combined Race (Weighted)	0.23%	7.68%	0.31%	1.95%	0.24%	5.59%	N/A	N/A	0.20%	5.49%

Note: N = 2,431,126; N/A = Data Not Provided

The Disciplinary Action Index indicates the proportion of individuals within any group who experienced either NJP or were referred to CM trial. One immediate take away from Table 1 is that officers appear to face discipline at a fraction of the rate of enlisted personnel. The proportion of officers who face discipline, as well as the absolute number of officers, are so low that it may not be useful to draw conclusions from most differences between racial groups or Services. For example, black officers have the highest Disciplinary Action Index for the Marines, yet faced only 21 instances of military discipline from 2014-2016 combined. Whereas we do not recommend ignoring these relative differences, one should interpret their significance with caution when faced with a very low number of events and conduct more thorough analyses before making conclusions.

Among the combined Services, both Blacks and AIAN appear to be more likely to face disciplinary actions than other Service members among enlisted SMs. Whereas Hispanics appear to face the highest levels of discipline in the Marines, both the Army and Air Force indicated they face some of the lowest levels of discipline relative to other groups. It should be noted, that changes

in the way in which Hispanic declaration is collected in the Army may influence if a SM is categorized in this group, potentially explaining the exceptionally low rates within the Army for disciplinary actions.

NON-JUDICIAL PUNISHMENT

Table 2. Non-Judicial Punishment Imposed Rate

	ARMY		AIR FORCE		MARINES		NAVY		Combined Service (Weighted)	
	Officer	Enlisted	Officer	Enlisted	Officer	Enlisted	Officer	Enlisted	Officer	Enlisted
BLACK	0.29%	10.26%	0.42%	2.61%	0.65%	5.95%	N/A	N/A	0.34%	7.73%
WHITE	0.16%	8.41%	0.24%	1.67%	0.19%	4.14%	N/A	N/A	0.19%	5.29%
AIAN	0.21%	11.70%	0.00%	3.59%	0.18%	3.75%	N/A	N/A	0.16%	7.88%
API	0.12%	4.45%	0.46%	1.30%	0.28%	2.09%	N/A	N/A	0.24%	3.26%
HISPANIC	0.03%	0.12%	0.19%	1.07%	0.21%	9.32%	N/A	N/A	0.10%	2.71%
OTHER	0.71%	19.03%	0.27%	2.08%	0.04%	2.09%	N/A	N/A	0.37%	4.71%
Combined Race (Weighted)	0.18%	7.51%	0.26%	1.74%	0.21%	5.23%	N/A	N/A	0.21%	5.24%

Note: N = 2,431,126; N/A = Data not provided

Table 2 excludes CM data to highlight differences in NJP only. Because there are substantially more NJPs than CM, similar patterns emerge as in Table 1. Blacks and AIANs continue to have the highest rates overall, whereas API and Hispanics appear to receive fewer NJPs relative to other racial/ethnic groups. Because of the increased frequency of NJPs, these data potentially provide a stronger picture of where biases may exist in the military justice system than would CM data.

COURTS-MARTIAL

Table 3. Courts-Martial Referral Rate (Tried)

	ARMY		AIR FORCE		MARINES		NAVY		Combined Service (Weighted)	
	Officer	Enlisted	Officer	Enlisted	Officer	Enlisted	Officer	Enlisted	Officer	Enlisted
BLACK	0.08%	0.25%	0.09%	0.30%	0.09%	0.50%	0.02%	0.09%	0.07%	0.25%
WHITE	0.04%	0.15%	0.05%	0.19%	0.02%	0.36%	0.01%	0.06%	0.04%	0.18%
AIAN	0.16%	0.20%	0.14%	0.43%	0.18%	0.41%	0.00%	0.03%	0.12%	0.16%
API	0.06%	0.11%	0.06%	0.13%	0.00%	0.20%	0.00%	0.05%	0.04%	0.10%
HISPANIC	0.07%	0.08%	0.07%	0.16%	0.04%	0.24%	0.02%	0.06%	0.05%	0.12%

OTHER	0.04%	0.78%	0.02%	0.26%	0.04%	1.15%	0.09%	0.32%	0.05%	0.41%
Combined Race (Weighted)	0.05%	0.17%	0.05%	0.21%	0.03%	0.37%	0.02%	0.09%	0.04%	0.19%

Note: N = 3,233,129

CM referral rates are substantially lower than NJP rates and make it difficult to draw meaningful conclusions regarding differences in branch and race given the current data. For example, in the Marines AIAN officers show the highest rates of CM in any Service; however, only one AIAN officer faced CM in 2015, a single occurrence across all three years. The low number of AIAN officers in the Marines makes a single courts-martial appear more meaningful than it likely is. Only Hispanic enlisted Marines surpassed a rate of 1% (1.15%). Across all Services collectively, rates were low with only Black Service members (0.25%) and those in the “Other” race category (0.41%) having a rate above one-fifth of one percent (0.2%). That being considered, some different patterns emerge when only viewing CM data. For instance, AIANs seem to face fewer relative CMs than whites while being the most likely group to face an NJP. This finding may in part be due to the inclusion of the Navy’s data, which had exceptionally low rates for AIANs. One pattern that seems consistent is that Black SMs face higher rates of punishment than most groups. This finding is in line with PODs report and warrants further investigation.

Table 4. Courts-Martial Conviction Rate

	ARMY		AIR FORCE		MARINES		NAVY		Combined Service (Weighted)	
	Officer	Enlisted	Officer	Enlisted	Officer	Enlisted	Officer	Enlisted	Officer	Enlisted
BLACK	86.67%	84.73%	90.00%	79.10%	100.00%	93.38%	50.00%	81.25%	86.67%	84.67%
WHITE	84.09%	89.24%	82.19%	84.50%	81.82%	96.47%	82.35%	88.93%	85.87%	90.42%
AIAN	66.67%	95.00%	100.00%	84.62%	100.00%	100.00%	***	50.00%	80.00%	90.63%
API	72.73%	81.69%	80.00%	78.95%	***	91.67%	***	95.83%	75.00%	85.21%
HISPANIC	92.86%	93.20%	87.50%	81.42%	100.00%	93.64%	100.00%	79.73%	96.00%	88.44%
OTHER	66.67%	83.78%	100.00%	88.68%	100.00%	95.56%	50.00%	86.96%	76.92%	88.91%
Combined Race (Weighted)	83.89%	87.57%	83.84%	83.07%	89.47%	95.52%	72.41%	85.87%	83.11%	88.57%

Note: N = 6387; *** indicates that calculating a rate is not possible because there were no courts-martials.

Conviction rates are high in all Services and for all races. Whereas there are concerns regarding the rate at which Black SMs face disciplinary action relative to Whites, Black SMs appear to have the lowest conviction rate overall for enlisted members. Again, low rates of CM among officers hinder the interpretation of these data. Similar to CM referral rates, it is difficult to indicate if these differences in conviction rates are meaningful without additional information – especially with regard to officer data. Lastly, it is unclear if high conviction rates are an indication

of bias in the court system, or if low conviction rates may be an indication of bias in the pre-trial system. More information is needed still before the DoD can act with confidence on claims of institutionalized discrimination in the military justice system.

RACE AS A PREDICTOR OF CM OR NJP

Results (See Appendix A: Table 5) shows that there is a statistically significant difference between Black and White SMs regarding likelihood to face CM. The odds ratio indicates that for every one White SM who faces CM about 1.366 Black SMs face CM, meaning black SMs are 36.6% more likely to face CM than Whites across all branches. These findings are in line with those of POD, though they illustrate potentially smaller differences between racial groups overall than those found by POD. Without more information however, it is not possible to know why these differences exist.

More data is still needed (see Recommendations section for potential data to collect moving forward) to understand what factors play a role in the likelihood that a SM may face CM. Education, gender, waivers, rank, promotion ratings, and other factors beyond using race alone may offer a much clearer picture of which SM are likely to face CM. Isolating the impact of race when controlling for these factors is especially important before drawing conclusions. Analyses of these proposed data will provide useful insights regarding how the DoD can identify and intervene where/if group differences exist in the military justice system.

In line with courts-martial findings, results (See Appendix A: Table 6) indicate that there is a statistically significant difference between black and white SMs regarding likelihood to face NJP. The odds ratio provided supports PODs argument that there are differences between Black and White SMs regarding NJP. Black SMs were about 50% more likely than White SMs to experience NJP. This difference is noteworthy; however, more information is still needed to conclusively indicate why these differences exist and what role other variables may play in the likelihood that a SM will face NJP.

Given the available data and current findings, we cannot conclude that differences in race alone reveal an institutionalized bias in the military justice system. Similar to predicting whether a SM will receive a promotion or if a unit will successfully accomplish a mission, multiple factors often contribute to whether a SM will face some form of disciplinary action. Recognizing that differences currently exist between racial groups regarding CM and NJPs is an important first step in ensuring that the military justice system is fair to all. However, moving forward, more data needs to be collected and analyzed to determine if and where biases exist in the military justice system and what factors, including race, are contributing to differences in military justice among SMs. Logistic regression and other more sophisticated analyses allow researchers to control the impact of other factors (e.g., promotion recommendations, prior

waivers, etc.) in order to both isolate the impact of race specifically, and to identify what factors best predict the likelihood of facing military discipline. Additionally, these analyses can allow better identification of potential biases so that leaders can recognize not only if and where biases exist, but how they manifest (e.g., form of punishment) and who may be at most risk (e.g., black male enlisted infantry in a particular branch).

We recommend regular and more complete data collections across all Services in order to fully assess what biases may exist in the U.S. military justice system. These analyses will allow leaders to identify what other factors play a meaningful role in the likelihood that SMs will face disciplinary action. Through these more complete data and analyses, leaders will be better positioned to meet the needs of their units, and work toward the most fair military justice system possible.

LIMITATIONS

The results of this data can only serve as a preliminary insight to the trend of racial disparity within the military justice system regarding NJPs and CMs. Major limitations to the confidence of analyses are as follows:

- Dataset does not include other variables that may affect racial disparity.
 - Gender, Age, Rank, Education, Unit Commanders, Military Environments, Promotion Ratings, etc.
 - The role of race in predicting NJP and courts-martial cannot be properly isolated without additional information.
- Data set does not include variables that reflect key enablers and outcomes that reflect the totality of the military judicial process (e.g., charges, sentence, background).
- Inconsistency in data
 - Missing data could be a result of incomplete or inconsistent data collection.
 - All NJP data are imposed and does not include all NJPs initiated.
 - Navy NJP data were not available for analysis.
 - Army Hispanic NJP data is comparatively low due to the change of “Hispanic” option in surveys to more specific nationalities in 2003.
 - “Hispanic” is an ethnicity, and not all Services ensure that it is exclusive to other race options.
 - There is potential overlap in other race groups with “Hispanic,” meaning that some multiple observations represent the same individual.
 - In 2015, our data indicated that zero AIANs (N =3185) received CM. This seems highly unlikely, as in 2014, there were 98 reported NJPs, and in 2016, there were

133 NJPs reported. This is likely an error; however, we were not informed of the data as missing and we treated the count as accurate.

- Coast Guard does not collect NJP and CM data.
- Less comprehensive data analysis methods
 - Can yield more confident results if there was enough data to run logistical regression with significance testing

V. CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

Our examination of the POD report reveals the following:

- 1) The summary data made available to POD through the FOIA process showed inconsistencies in how the Services record, maintain, and report this information.
- 2) The data provided to the POD was incomplete in terms of representing the entire process of the Military justice system; and from this data one cannot draw conclusions regarding the state of the entire process based on this information.
- 3) The data provided in the POD report regarding NJP, and CM referrals and convictions did not include key variables (e.g., charges, sentences, defendant record) necessary to truly draw a comparison between race, Service branch, and officers versus enlisted.
- 4) The analysis conducted by the POD used averages, ratios, and descriptive statistics and not more valid approaches to complex problems with discrete outcomes such as logistic regression where more confidence in results and measures of model fit can be obtained.

Our analyses of the independently obtained data found:

- 1) The data made available to ODMEEO from the Service branches again showed inconsistencies in how the Services record, maintain, and report this information, and did not match for corresponding years the data POD obtained through FOIA.
- 2) The data provided to ODMEEO was incomplete in terms of representing the entire process of the Military justice system; and from this data one cannot draw conclusions regarding the state of the entire process based on this information.
- 3) The data provided to ODMEEO did not include key variables (e.g., charges, sentences, defendant record) necessary to truly draw a comparison between race, Service branch, and officers vs. enlisted.
- 4) Logistical regression results tended to support POD's conclusion that a difference exists between white and black SMs regarding both the likelihood to face CM or NJP. Overall, Black enlisted SMs were 37% (Appendix A: Table 5) more likely to face CM and 50% (Appendix A: Table 6) more likely to face NJP than Whites. However, the isolation of race alone as a predictor of these key outcomes provides a largely incomplete analyses of the military justice system and provides no information on why these differences exist.

- 5) It is unclear if high conviction rates are an indication of bias in the court system, or if low conviction rates may be an indication of bias in the pre-trial system. More information is still before the DoD can act with confidence on claims of institutionalized discrimination in the military justice system.
- 6) AIAN appear to face the highest rates of NJP overall among enlisted SMs. Specifically, they had the highest rates of any named racial/ethnic group in the Army and Air Force. This result is different from POD's findings and warrants additional investigation.
- 7) It is clear that officers are far less likely to face either NJP or CM than enlisted SMs.

RECOMMENDATIONS

- I. In addition to reviewing investigation and prosecution phases of the military justice process, the Department must collect, track, maintain, report, and review key military justice system data from arrest to release from custody. This data should not be in summary format, but should be centered and maintained around each case in a standardized format and compiled DoD-wide.

A non-exhaustive list of variables to improve analyses are as follow:

- Variables within the Military Justice System
 - Number of Open Cases, Dismissed Cases, and Closed Cases
 - Number of First Time/Repeat Offenders in Administrative, NJP, Judicial Actions
 - Number of Notifications to Courts-Martial Convening Authority (CMCA) within specified reporting period
 - Number of Retaliations – related cases for Admin, NJP, Judicial Actions
 - Time for NJP/CM Action from start to completion
- Variables per Individual Cases
 - Commander, Prosecution, Defense, Investigators, Judge, Jury
 - Rank, Race, Gender, Education, Experience, Work Load
 - Victim, Accused
 - Race, Gender, Rank, Prior Unfavorable Information File (UIF) Record, Work Status, Education, Proportion Recommendation History
 - Accused Rights to Due Process Followed?
 - Free Military Counsel or Paid Civilian Attorney
 - Nature of Complaint
 - Type of Charges
 - Existence of a plea bargain/plea offered

- Type of Disciplinary Action
 - Severity of action
 - Type of Sentence
 - Length of sentence
- II. Periodically review data and evaluate the military judicial process using Logistical Regression and other more rigorous methods in order to have increased confidence in results that are defensible and actionable at a process level.
- III. Ensure that there are mechanisms across the process in place to receive results and agile enough to make changes based on those results beginning with Commanders.
- IV. Ensure policy, programs, and practices are reviewed regularly in order to assure alignment of intent to practice and maintain program agility to make adjustments as needed.

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APPENDIX A: LOGISTIC REGRESSION RESULTS – RACE AS A PREDICTOR

Table 5. Race as a Predictor of Likelihood to be Referred to Courts-Martial

Predictor	β	SE β	df	p	e^β (Odds Ratio)	95% CI	
						LB	UB
Constant	-6.318	0.018	1	< 0.000	0.002	0.001	0.002
Race (1 = Black, 0 = White)	0.312	0.032	1	< 0.000	1.366	1.283	1.453

Note: N=2,369,897; Likelihood Ratio Test $\chi^2 = 92.285$, p = 0.000; McFadden's Pseudo R² = 0.001; Cox and Snell Pseudo R² = 0.000

Table 6. Race as a Predictor of Likelihood to Face Non-Judicial Punishment

Predictor	β	SE β	df	p	e^β (Odds Ratio)	95% CI	
						LB	UB
Constant	-2.884	0.004	1	< 0.000	0.056	0.056	0.056
Race (1 = Black, 0 = White)	0.405	0.007	1	< 0.000	1.499	1.479	1.519

Note: N = 1,850,024; Likelihood Ratio Test $\chi^2 = 3430.3$, p = 0.000; McFadden's Pseudo R² = 0.004; Cox and Snell Pseudo R² = 0.001

Table 5 and Table 6 above provide additional information from the results of the logistic regression analyses discussed in the Methods and Results sections. Each table provides summarized output, including the contribution of race to predicting the likelihood a SM will face a CM (Table 5) or NJP (Table 6). Odds ratios may be interpreted as the proportion of black SMs who will face a CM or NJP relative to white SMs. The 95% confidence intervals (95% CI) provide the lower and upper bounds of the odds ratio, indicating the range that we can say the true odds ratio likely falls. Because both regressions outputs have lower bounds above 1 (i.e., 1 to 1 odds), we can determine that there is likely a difference between blacks and whites regarding the likelihood to face courts-martial or NJP. In addition, pseudo R² indices are provided. Pseudo R² cannot be interpreted in the same manner as R² in traditional OLS regression, and tend to be interpreted as indicators of explained variability and improvement over the null model (i.e., model with no predictors). Low values indicate that a model with race alone does not appear to add a substantial improvement over a model with no predictors and does not explain a substantial portion of variability in the dependent variables. However, one should be cautious with interpreting common logistic regression indicators such as McFadden's pseudo R² or Cox and Snell's pseudo R² when analyzing rare events data such as courts-martials or NJPs.

APPENDIX B: RACIAL DISPARITY DATA RECEIVED FROM ODMEO

Table 7. 2014 NJP and CM Data by Service Branch, Race/Ethnicity, and Officer/Enlisted Rank

2014 ENLISTED	ARMY						AIR FORCE						MARINES						NAVY					
	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER
Tried	248	387	8	35	49	21	132	308	5	8	65	33	130	507	8	20	100	46	33	45	1	10	31	77
Convicted	205	349	8	29	48	18	113	269	5	7	52	31	112	468	8	17	85	40	30	41	0	10	25	66
NJP Imposed	9569	21330	430	1045	94	715	1137	2933	40	143	483	323	1153	4901	133	127	6271	90	0	0	0	0	0	0
Race Population	93469	227633	3434	21582	56883	3518	38066	152989	1020	8858	36345	12824	18149	106544	1516	5826	30795	4147	45711	126451	7566	16095	45012	26324

2014 OFFICER	ARMY						AIR FORCE						MARINES						NAVY					
	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER
Tried	10	35	0	5	6	0	3	28	0	2	3	1	1	5	0	0	0	0	0	5	0	0	1	5
Convicted	8	29	0	3	6	0	3	19	0	1	3	1	1	3	0	0	0	0	0	4	0	0	1	1
NJP Imposed	48	159	1	7	2	19	11	131	0	20	12	10	10	31	1	3	4	2	0	0	0	0	0	0
Race Population	12498	68620	623	5829	7014	2713	3578	48172	245	2882	3828	3354	1085	15758	146	676	1701	1548	4165	40592	357	2670	3904	2752

Table 8. 2015 NJP and CM Data by Service Branch, Race/Ethnicity, and Officer/Enlisted Rank

2015 ENLISTED	ARMY						AIR FORCE						MARINES						NAVY					
	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER
Tried	219	344	7	17	50	28	101	269	6	15	50	47	79	315	9	11	68	34	53	116	1	10	31	74
Convicted	189	303	7	15	46	22	78	222	4	12	43	41	79	315	9	11	68	34	44	103	1	9	25	63
NJP Imposed	9720	17412	424	1016	86	658	959	2509	34	135	415	279	995	4100	0	116	1469	71	0	0	0	0	0	0
Race Population	91977	213508	3365	22328	57986	3163	39745	150921	1027	10736	40144	13799	17826	101671	3185	5847	32054	3887	46572	128093	6730	16408	44847	26478

2015 OFFICER	ARMY						AIR FORCE						MARINES						NAVY					
	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER
Tried	13	29	2	3	6	1	5	21	0	1	4	0	1	2	1	0	2	2	0	5	0	0	1	2
Convicted	13	25	1	3	5	1	4	21	0	1	3	0	1	2	1	0	2	2	0	4	0	0	1	2
NJP Imposed	25	83	1	10	2	24	15	108	0	14	7	8	8	34	0	1	7	0	0	0	0	0	0	0
Race Population	11819	66786	643	5829	6985	2548	3500	46572	242	2893	3893	3608	1058	15450	250	710	1756	1529	4093	40038	358	2714	4032	2971

Table 9. 2016 NJP and CM Data by Service Branch, Race/Ethnicity, and Officer/Enlisted Rank

2016 ENLISTED	ARMY						AIR FORCE						MARINES						NAVY					
	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER
Tried	214	263	5	19	48	25	121	294	2	15	68	26	63	284	8	5	68	55	42	83	4	4	12	102
Convicted	183	235	4	14	43	22	89	245	2	11	54	22	63	284	8	5	68	55	30	73	2	4	9	91
NJP Imposed	8926	15271	328	912	30	442	942	2158	35	109	338	232	1063	3745	98	127	1286	85	0	0	0	0	0	0
Race Population	89532	201017	3304	22866	59202	2857	38801	150609	992	10147	38649	13555	18031	99536	1463	6066	34007	3725	46073	126973	5956	16546	44286	25882

2016 OFFICER	ARMY						AIR FORCE						MARINES						NAVY					
	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER	BLACK	WHITE	AIAN	API	HISPANIC	OTHER
Tried	7	24	1	3	2	2	2	24	1	2	1	1	1	4	0	0	0	0	2	7	0	0	0	1
Convicted	5	20	1	2	2	1	2	20	1	2	1	1	1	4	0	0	0	0	1	6	0	0	0	1
NJP Imposed	29	74	2	4	2	11	18	99	0	6	3	11	3	23	0	2	0	0	0	0	0	0	0	0
Race Population	11260	65041	615	5850	6976	2387	3472	46153	248	3010	3987	3794	1107	15231	152	763	1863	1557	4126	39803	370	2828	4186	3072

* Not all Services provided initiated NJP data. Data is for NJPs imposed only
 * No NJP data for the Navy