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By analyzing instances of racially-charged civil unrest through the lens of the United States' involvement in armed conflict, this thesis seeks to demonstrate a pattern of armed conflict, followed by civil unrest, and chased by studies concerning race relations. In doing so, it finds that the DoD has been studying race relations, particularly as it relates to discipline and military justice, for decades. Taking all the available military data and comparing it to relevant civilian data, the DoD has sufficient information to determine racial bias does exist in the military justice system. Moreover, the DoD is uniquely poised to combat racial bias in military justice because it has the requisite structure, resources, and the professional ethic to enact change. Accordingly, this thesis calls the DoD to action in combating racial bias in military justice beginning today.

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MASTER OF MILITARY STUDIES

**A RACE TO JUSTICE:
MAKING A CASE FOR CHALLENGING RACIAL BIAS IN MILITARY JUSTICE**

SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF MILITARY STUDIES

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AY 2020-21

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Executive Summary

Title: A Race to Justice: Making a Case for Challenging Racial Bias in Military Justice

Author: Major K. S. Chan, U.S. Marine Corps

Thesis: The Department of Defense (DoD) has sufficient information to determine racial bias exists in the military justice system and should take action to begin combating it before becoming entangled in the next armed conflict.

Discussion: By analyzing instances of racially-charged civil unrest through the lens of the United States' involvement in armed conflict, this thesis seeks to demonstrate a pattern of armed conflict, followed by civil unrest, and chased by studies concerning race relations. In doing so, it finds that the DoD has been studying race relations, particularly as it relates to discipline and military justice, for decades. More than fifty years' worth of data paints a consistent picture of racial disparity in the military justice system, despite changing societal norms with respect to race relations. When compared to relevant civilian data in the criminal justice system, evidence suggests racial bias is driven by the highly discretionary nature of the military justice system and the amount of discretion placed in a single individual—the commander. While recognizing the concern of inequality in justice systems apply to multiple racial and ethnic groups, this thesis focuses on the disparate treatment of African-Americans, primarily due to the lack of data on other races over the same period of time. In doing so, it addresses the two primary counterarguments to the idea that racial bias does exist, namely: (1) African-Americans commit more crimes; and (2) African-Americans commit more egregious crimes, before addressing concerns that the DoD needs to conduct more studies before taking action. This thesis concludes by recommending a three-pillared approach to addressing racial bias now, rather than waiting for the results of additional studies.

Conclusion: Taking all the available military data and comparing it to relevant civilian data, the DoD has sufficient information to determine racial bias does exist in the military justice system. While further research into implicit bias and other potential causes is necessary, the DoD must begin taking action to combat racial disparity in the military justice system before its involvement in the next armed conflict puts the issue on the backburner yet again. Due to the nature and structure of the military, the DoD is uniquely poised to do so because it has the requisite resources and the professional ethic to enact change. Accordingly, this thesis calls the DoD to action in combating racial bias in military justice beginning today.

DISCLAIMER

THE OPINIONS AND CONCLUSIONS EXPRESSED HEREIN ARE THOSE OF THE INDIVIDUAL STUDENT AUTHOR AND DO NOT NECESSARILY REPRESENT THE VIEWS OF EITHER THE MARINE CORPS COMMAND AND STAFF COLLEGE OR ANY OTHER GOVERNMENTAL AGENCY. REFERENCES TO THIS STUDY SHOULD INCLUDE THE FOREGOING STATEMENT.

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Table of Contents

I. DISCLAIMER iii

II. PREFACE v

III. INTRODUCTION 1

IV. A BRIEF HISTORY OF RACE, CRIME, AND ARMED CONFLICT 3

V. RACIAL BIAS IN MILITARY JUSTICE 18

 A. What can the DoD learn from the data it already has? 19

 1. The DoD has long failed to give this issue the attention it deserves 19

 2. Perceptions of racism in the military justice system continue to exist 20

 3. The consistency in military-specific data establishes some level of racial bias in implementing discipline 21

 B. How do civilian studies inform the conversation? 24

 1. Discretion points tend to drive racial disparity in the criminal justice system 24

 2. Discretion in the military justice system is primarily held by the commander 27

 C. Counterarguments 30

 1. Rebutting the notion African-Americans commit more crimes 30

 2. Rebutting the notion African-Americans commit more egregious crimes 32

 3. Responding to calls for the DoD to study the issue more before taking action 34

VI. POISED FOR ACTION 37

VII. RECOMMENDATIONS 41

 A. Own it 41

 B. Take corrective action 42

 C. Build trust 48

VII. CONCLUSION 49

IX. BIBLIOGRAPHY 50

X. APPENDIX A: A Chronological Look at Government Studies on Race and Justice 60

Preface

In late May of 2020, the world, tucked away in their homes hiding from a global pandemic, watched an African-American man plead for his life on their television screens as a Caucasian police officer knelt on his neck until the man lost consciousness and eventually his life. While not the first, nor the last incident of its kind, it followed a series of similarly disturbing events that drove the American public to their feet. Despite a deadly virus sweeping the globe, Americans of all races, ages, and backgrounds took the streets to demand change—among the changes, criminal justice reform.

Just three weeks later, the House Armed Services Committee's Subcommittee on Military Personnel held a hearing to address the results of the Government Accountability Office's (GAO) recent study into racial disparities in the military justice system. Although the GAO report did not expressly say it, members of Congress and the armed services' senior judge advocates did—the military justice system has a problem. This was certainly not the first time I thought about race in the context of criminal and military justice, but it was the first time I felt as though I had the experience, the information, and the obligation to pursue change.

When I first took on this thesis topic, I did not expect to find obvious racial bias. I predicted the evidence would circumstantially point to it, but leave me wanting something more concrete. After having served as a military prosecutor for several years, I had personally handled or supervised hundreds of military justice cases with very little concern of racial bias infiltrating the system. But to my surprise, the more I read, the more data I found. Each study into the military's discipline rates referenced earlier studies with similar results. I kept digging, only to find the Department of Defense (DoD) has been studying this issue for decades, but with a noticeable dip during periods of armed conflict and rises following civil unrest. As I researched

further into U.S. history, the link between armed conflict, civil unrest, and studies grew stronger, until a visible pattern developed: following entry into armed conflict the U.S. saw increased civil unrest—seemingly driven by the contrast between fighting for human rights abroad while tolerating inequality at home—which were followed by studies to address rising public concern. While these studies were arguably well-intentioned and worked to suppress the public outcry, they rarely resulted in significant change. The number of studies eventually grew so staggering I was forced to limit my in-depth research to just DoD studies. Even doing so, the patterns in the data remained apparent and revealed an indisputable truth: racial disparity in the military justice system is as old and enduring as the system itself. Despite the changes in societal norms and the evolution of a more progressive DoD, one constant has undermined true progress—a bias that appears unconscious and reinforced by decades of fortifying an unfair association between African-Americans and crime.

In this context, the words of Representative Jackie Speier during that June hearing seem poignant now:

We must commit ourselves to ensure that the military treats service members of color equally and justly. We will not solve this problem by hiding it or denying it. We will not solve this problem pretending it is solely the result of uncontrollable societal problems by pretending that our actions do not contribute to the continuation of injustice by refusing to seek change because we are so comfortable and confident in the way things have always been done.

With a new administration in place—one vocally dedicated to equality, diversity, and inclusion—and our first minority Secretary of Defense confirmed, the time for change is now. This thesis serves as a call to action for the senior leaders in the DoD. As we close in on a century since desegregation of the military, racial equality can no longer be a goal—it must become a fact. Addressing racial bias in the military justice system is but one of many steps the DoD must take in pursuit of making equality a reality.

I would like to sincerely thank Dr. Jill Goldenziel, Dr. Lauren Mackenzie, Major Andrea Hunwick, U.S. Air Force, and my husband, Jason, for their continued support and guidance in producing this thesis, and all those who continue to pursue the fight for equality every day.

*It is the human face—a face of color—of the racial injustice of the United States criminal justice system that is the most compelling reason for reform.*¹

I. INTRODUCTION

Emblazoned across the marble façade of the United States Supreme Court, a single phrase reads: “Equal Justice Under Law.” Despite its display above the pillared gateway to justice, decades’ worth of data has established that this phrase is more easily chiseled into stone than put into action. Today, racial minorities make up approximately 28% of the United States’ population, specifically: 14.2% African-Americans and 6.8% Asians,² while the remaining 7% fall into one of the many other racial categories.³ Across all races, those of Hispanic ethnicity make up approximately 18.4% of the population.⁴ Yet, in spite of their small proportion of the population, African-Americans are consistently overrepresented throughout the criminal justice process: from traffic stops to arrests,⁵ convictions,⁶ incarceration,⁷ sentences to the death

¹ THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 13 (2018).

² This paper will use the terms Caucasian, African-American, Asian, and Hispanic in lieu of skin color (e.g. white, black, etc.). While the author recognizes that not all people of a certain skin color identify as part of the associated classification (e.g. not all persons considered “black” identify as African-American), the author has chosen these classifications specifically to avoid classifying some by color and others by race or ethnicity.

³ U.S. CENSUS BUREAU, SELECTED POPULATION PROFILE IN THE UNITED STATES: 2019 AMERICAN COMMUNITY SURVEY, <https://data.census.gov/cedsci/table?q=United%20States&t=-00%20-%20All%20available%20races&g=0100000US&tid=ACSSPP1Y2019.S0201> (last visited Oct. 31, 2020) (Caucasians comprise 72%).

⁴ *Id.*

⁵ See Robert Wolf, *Race, Bias, and Problem-Solving Courts*, 21 NAT’L BLACK L. J. 27, 31-32 (2009) (describing multiple studies that have identified racial disparities in traffic stops); David A. Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 560-69 (1997) (providing examples of racially discriminatory traffic stop programs); U.S. DEP’T OF JUST., FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, TABLE 43A: ARRESTS BY RACE AND ETHNICITY (2019) [hereinafter “FBI, UCR 2019”] (27% of all reported arrests were of African-Americans).

⁶ U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., NCJ 215646, FELONY SENTENCES IN STATE COURTS, 2004, 38 (2007) [hereinafter DOJ, STATE FELONIES] (African-Americans made up 38% of state court felony convictions); U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., NCJ 243777, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009, 7 (2013) [hereinafter DOJ, FELONY DEFENDANTS 2009] (45% of felony defendants were African-American); U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., NCJ 251772, FEDERAL JUSTICE STATISTICS, 2016 – STATISTICAL TABLES 25 (2020) [hereinafter DOJ, FELONY STATISTICS 2016] (21.6% of convicted offenders were African-American).

⁷ U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., NCJ 255115, PRISONERS IN 2019, 15 (2020) [hereinafter DOJ, PRISONERS IN 2019] (finding that despite “the imprisonment rate of [African-American] residents [being at its]

penalty,⁸ and even exoneration.⁹ Although less-often studied, Hispanics often experience similarly disparate treatment.¹⁰ Conversely, Caucasians and Asians tend to be underrepresented in the same categories.¹¹ When examined closely with historical context, these facts tell a daunting story: more than half a century after the Civil Rights Movement, the United States (U.S.) still struggles with parity amongst races in the criminal justice system.

Unfortunately, this reality is not limited to the civilian criminal justice system. In 2017, a report from Protect Our Defenders exposed the U.S. military's similarly dismal statistics with respect to race in the military justice system.¹² At the direction of Congress, the Government Accountability Office (GAO) conducted its own study.¹³ After more than a year reviewing data

lowest rate in 30 years[,]” 32.8% of prisoners were African-American). “While the imprisonment rate of [African-American] males was 5.7 times the rate of [Caucasian] males, the imprisonment rate of [African-American] females was 1.7 times the rate of [Caucasian] females.” *Id.* at 16. “[African-American] males ages 18 to 19 were 12 times as likely to be imprisoned as [Caucasian] males of the same ages” *Id.*

⁸ U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., CAPITAL PUNISHMENT, 2018 – STATISTICAL TABLES 12 (2020) [hereinafter DOJ, CAPITAL PUNISHMENT] (finding 41.6% of prisoners under sentence of death in the U.S. were African-American).

⁹ SAMUEL R. GROSS, ET AL., NATIONAL REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES (2017) (As of October 2016, African-Americans accounted for 47% of exonerations listed in the National Registry of Exonerations and approximately “1,900 additional innocent defendants framed and convicted of crimes in 15 large-scale police scandals.”). *See also DNA Exonerations in the United States*, THE INNOCENCE PROJECT, <https://innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Aug. 29, 2020) (60% of DNA exonerees to date have been African-Americans).

¹⁰ *See generally* THE SENTENCING PROJECT, *supra* note 1 (describing similar disparity among Hispanics throughout the criminal justice process); DOJ, FELONY DEFENDANTS 2009, *supra* note 6 at 7 (finding 24% of felony defendants were Hispanic); DOJ, FELONY STATISTICS 2016, *supra* note 6 at 25 (finding 54.9% of convicted offenders were Hispanic).

¹¹ *See* FBI, UCR 2019, *supra* note 5 (Caucasians made up 69% of all arrests and Asian-Americans made up 1.2%); DOJ, STATE FELONIES, *supra* note 6 at 2 (Caucasians made up 59% of state felons); DOJ, FELONY DEFENDANTS 2009, *supra* note 6 at 7 (30% of felony defendants were Caucasian); DOJ, PRISONERS IN 2019, *supra* note 7 at 15 (30% of inmates were Caucasian); DOJ, CAPITAL PUNISHMENT, *supra* note 8 at 12 (55% of prisoners under sentence of death were Caucasian); DEP’T OF JUST., BUREAU OF JUST. STAT., RACE AND HISPANIC ORIGIN OF VICTIMS AND OFFENDERS, 2012-15, 15 (2017) (finding only .2% of reported violent offenders were Asian).

¹² *See* DON CHRISTENSEN AND YELENA TSILKER, PROTECT OUR DEFENDERS, RACIAL DISPARITIES IN MILITARY JUSTICE (2017).

¹³ *See* H.R. REP. NO. 115-200 at 126-27 (2017) (“Therefore, not later than January 30, 2019, the committee directs the Comptroller General of the United States to submit a report to the Armed Services Committee of the House of Representatives containing the following components: (1) how the military services record and maintain the race and gender of service members convicted of violations of the Uniform Code of Military Justice; (2) the reason for any differences in collection and maintenance of this data among the military services; (3) recommendations to improve the collection of this data; (4) data and analysis to assist the committee in determining whether there is a racial disparity in the prosecution of cases under the Uniform Code of Military Justice; and (5) any other matters the

from all services, the GAO came to two important conclusions: (1) the services failed to “collect and maintain consistent data” regarding race and ethnicity; and (2) racial disparities exist in the military justice system.¹⁴ This report, however, is subject to one major caveat: racial disparities in data do not *alone* “establish whether unlawful discrimination has occurred.”¹⁵

This paper will argue, by exploring decades of research into the civilian and military justice systems, that the GAO report does, in fact, show racial bias plays a role in the military justice system. Accordingly, the Department of Defense (DoD) has sufficient information to determine racial bias exists in the military justice system and should take action to begin combating it before becoming entangled in the next armed conflict. This paper will begin by providing a historical review of the relationship between civil unrest motivated by racial equality as it relates to American participation in armed conflict, and the studies on race relations that followed. In doing so, it will demonstrate how the DoD is seemingly stuck in a never-ending loop of well-intended research—interrupted by armed conflict—and resurrected with civil unrest, only to start over without ever adopting meaningful change. It will then evaluate the existence of racial bias in the military justice system by examining these studies and comparing the results to relevant data from the civilian criminal justice system. With this background established, the remaining discussion will address why the DoD is well-poised to implement change and will recommend a three-pillared approach to do so starting now.

II. A BRIEF HISTORY OF RACE, CRIME, AND ARMED CONFLICT

When President Lincoln signed the Emancipation Proclamation in 1863, he had no way of knowing that more than half the number of African-American men and women he attempted

Comptroller General believes are relevant to this issue.”).

¹⁴ U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-344, MILITARY JUSTICE: DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL AND GENDER DISPARITIES 22, 38 (2019).

¹⁵ *Id.* at 68.

to free would be in the U.S. corrections system a century and a half later.¹⁶ This stark reality is the consequence of centuries of discriminatory practices, many unintentional. This story, however, is not limited to African-Americans. Racial and ethnic minorities have long endured discrimination in varying forms. However, for purposes of this paper, the focus will center on discrimination against African-Americans given the breadth of the available data. This section begins by describing how Caucasians developed criminality into a mechanism of control over African-Americans during the Reconstruction Era, thereby founding the long-lasting association between race and crime. In the following segments, it will recount a cyclical story of post-conflict unrest related to racial inequality and the responsive studies that have resulted in too little action too late.

Reconstruction: Setting the Stage for Racism

Following the Union's victory in the Civil War, the nation entered the Reconstruction Era—a period when the U.S. worked through the political, social, and economic struggles associated with the readmission of the former Confederate States, while simultaneously attempting to rectify the costs of slavery on its African-American population.¹⁷ During this period, the U.S. ratified the 13th and 14th Amendments to the U.S. Constitution, abolishing

¹⁶ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS*, 271 n.7 (2010). According to the 1860 Census, there were 3,953,760 slaves in the United States (U.S.) (a vast majority of which lived in Confederate states). U.S. BUREAU OF THE CENSUS, *POPULATION OF THE UNITED STATES IN 1860*, ix (1864), <https://www2.census.gov/library/publications/decennial/1860/population/1860a-02.pdf> (last visited Mar. 27, 2021). At the end of 2016, the total correctional population was 6,613,500 persons. U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS, NCJ 251211, *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016*, 2 (2018). African Americans made up 38% of the parole population (or 332,415 persons) and 28% of the probation population (or 1,028,473 persons) in 2016. U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS, NCJ 251148, *PROBATION AND PAROLE IN THE UNITED STATES, 2016*, 17, 22 (2018). Another 487,300 African Americans were actively serving a prison sentence in 2016, while 254,800 were confined in local jails. U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS, NCJ 251149, *PRISONERS IN 2016*, 5 (2018); U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS, *JAIL INMATES IN 2016* (2018). In total, approximately 2,102,988 African Americans were in the correctional system at the end of 2016 (or 53% of the slave population in 1860).

¹⁷ ERIC FONER, *ENCYCLOPÆDIA BRITANNICA, RECONSTRUCTION* (2020).

slavery and promising “equal protection of the laws” to its citizens—race notwithstanding.¹⁸

Congress subsequently passed the Civil Rights Act of 1875, prohibiting racial discrimination in public places and jury selection, while re-affirming the “equality of all men before the law.”¹⁹

Despite these basic guarantees, racism flourished and set the stage for continued discrimination into the 21st Century.

Seeking to reverse advances in civil rights and preserve the racial hierarchy, the southern states instituted a system known today as “Jim Crow laws.”²⁰ This system not only legalized racial segregation, it imposed vagrancy and loitering laws aimed at incarcerating African-Americans.²¹ As African-Americans found their way into a criminal justice system for minor crimes and false allegations, they continually faced all-Caucasian juries in courtrooms dominated by Caucasian men, virtually assuring their conviction in the antebellum South.²² At the same time, they found little relief in the system’s ability to provide justice for the African-American victim.²³ Supported by the Supreme Court’s ruling that the Constitution did not prohibit *an individual actor* from depriving a person of “life, liberty, or property without due process[,]” Caucasian-on-African-American violence spread with little recourse in the courts.²⁴ The

¹⁸ U.S. CONST. amend. XIII, § 1 (“except as punishment for crime”); U.S. CONST. amend. XIV § 1.

¹⁹ Civil Rights Act of 1875, 18 Stat. 335–337 (Sections 1 and 2 held as unconstitutional in *The Civil Rights Cases*, 109 U.S. 3 (1883); Sections 3 and 4 were repealed in 1948).

²⁰ See ALEXANDER, *supra* note 16 at 39.

²¹ See *id.* at 40. See also EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3d ed., 2017) [hereinafter “EQUAL JUSTICE INITIATIVE”].

²² See EQUAL JUSTICE INITIATIVE, *supra* note 21. See also Anonymous, *Trumping the Race Card: Permitting Criminal Defendants to Remain Anonymous and Absent From Trial to Eliminate Jury Racial Bias*, 18 GEO. J. LEGAL ETHICS 1151, 1153-54 (2005) (outlining a history of discrimination in jury selection and ensuing Supreme Court jurisprudence on jury selection).

²³ See generally EQUAL JUSTICE INITIATIVE, *supra* note 21 (describing a history of Caucasian-on-African-American violence that went virtually unpunished until the 20th Century).

²⁴ *United States v. Cruikshank*, 92 U.S. 542, 554 (1876). “As a result [of *Cruikshank*], the Enforcement Act was a dead letter: African Americans in the South were to be left at the mercy of [Caucasian] terrorists, so long as the terrorists were private actors. The response was immediate. Enforcement Act trials in most of the Southern states had been halted pending the Supreme Court appeal.” EQUAL JUSTICE INITIATIVE, *supra* note 21. See also PRESIDENT’S COMM. ON CIVIL RIGHTS, *TO SECURE THESE RIGHTS* 29 (1947) (finding “[i]n certain states, the

implementation of laws designed to incarcerate African-Americans, coupled with a diminishing desire to prosecute Caucasian-on-African-American violence, saw the demographic balance of the prison population shift.²⁵ The mass incarceration of African-Americans quickly turned into a second bout at slavery as southern states engaged in “convict leasing”—the practice of profiting off of the labor of prisoners.²⁶ At long last, the African-American problem had been solved: criminalization.²⁷ Where the system took too long, mob justice took over, often resulting in lynching, burning, or other forms of public execution.²⁸ Between active and unpunished terrorizing from white supremacists and the oppressive Jim Crow regime, African-Americans quickly found themselves at the mercy of a racist criminal justice system and sought refuge in the north.²⁹

World War I: The African-American Veteran

As World War I kicked off, nearly half a million African-Americans began moving north from the southern states in what has since been deemed “The Great Migration.”³⁰ In the aftermath of World War I, with the economy on the decline and jobs already in short supply, a

[Caucasian] population can threaten and do violence to the minority member with little or no fear of legal reprisal.”).

²⁵ See ALEXANDER, *supra* note 16 at 40; Heather Ann Thompson, *The Racial History of Criminal Justice in America*, 16 DU BOIS REV. 221, 223 (2019) (“In Alabama, for example, the state’s prison population was only 1% [African-American] in 1850 . . . by the late 1880s, it was a full 85%.”).

²⁶ See ALEXANDER, *supra* note 16 at 40; EQUAL JUSTICE INITIATIVE, *supra* note 21.

²⁷ See ALEXANDER, *supra* note 16 at 40 (“The criminal justice system was strategically employed to force African Americans back into a system of extreme repression and control, a tactic that would continue to prove successful for generations to come.”); Thompson, *supra* note 25 at 223 (“Significantly the 13th amendment that outlawed slavery also included an exception for anyone convicted of a crime and, by filling penal institutions and prison farms with [African-Americans], [Caucasians] could once again force [African-Americans] to labor for no remuneration.”).

²⁸ See EQUAL JUSTICE INITIATIVE, *supra* note 21. See also ELIZABETH DALE, *CRIMINAL JUSTICE IN THE UNITED STATES, 1789-1939*, 97-103 (2011) (describing the Supreme Court’s efforts and difficulty in overcoming mob and popular justice).

²⁹ See ALEXANDER, *supra* note 16 at 39-40 (citing DOUGLAS BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* (2008)).

³⁰ THE NAT’L WORLD WAR I MUSEUM & MEMORIAL, *Red Summer: The Race Riots of 1919*, <https://www.theworldwar.org/learn/wwi/red-summer> (last visited Dec. 6, 2020) [hereinafter “WWI MUSEUM”].

mass demobilization of the military led to concerns of an unemployment crisis.³¹ Fueled by the Red Scare and fears of Bolshevism, the crisis turned violent when Caucasian veterans returned to find their pre-war jobs filled by African-Americans and immigrants.³² While Congress set out to limit immigration,³³ Caucasian civilians and veterans embarked on indiscriminate killings and attacks on African-Americans—particularly veterans, whose service prompted a renewed vision of racial equality and an ability to defend their communities.³⁴ The violence led to a string of race riots across the country, now-known as “The Red Summer,”³⁵ followed by the deaths of up to 300 people, mostly African-Americans, in what has since been deemed the “Tulsa Race Massacre.”³⁶ The rising threat to the U.S.’s racial caste system by the African-American service member quickly resulted in targeted discrimination, abuse, and even violence amongst the ranks.³⁷ It also manifested itself in a systematic depiction of African-Americans as violent

³¹ See E. Jay Howenstine, Jr., *Demobilization After the First World War*, 58 Q. J. OF ECON. 91, 96 (1943).

³² See WWI MUSEUM, *supra* note 30.

³³ See e.g., Emergency Quota Act, Pub. L. No. 67-5, 42 Stat. 5 (1921); Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924).

³⁴ EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: TARGETING BLACK VETERANS* 22-23 (2017), [hereinafter “EJI”]. “No one was more at risk of experiencing violence and targeted racial terror than black veterans who had proven their valor and courage as soldiers during the Civil War, World War I, and World War II. Because of their military service, black veterans were seen as a particular threat to Jim Crow and racial subordination. Thousands of black veterans were assaulted, threatened, abused, or lynched following military service.” *Id.* at 4.

³⁵ *Id.* at 20-25.

³⁶ See Chris M. Messer, et al., *The Destruction of Black Wall Street: Tulsa’s 1921 Riot and the Eradication of Accumulated Wealth*, 77 AM. J. ECON. & SOCIO. 789, 804 (2018). See also Kendrick Marshall, *Tulsa Race Massacre: For years it was called a riot. Not anymore. Here’s how it changed.*, TULSA WORLD (May 31, 2020), https://tulsa-world.com/news/local/racemassacre/tulsa-race-massacre-for-years-it-was-called-a-riot-not-anymore-heres-how-it/article_47d28f77-2a7e-5b79-bf5f-bdfc4d6f976f.html; 1921 TULSA RACE MASSACRE CENTENNIAL COMMISSION, *About*, <https://www.tulsa2021.org/about> (last visited Mar. 21, 2020).

³⁷ EJI, *supra* note 34 at 9, 12 (“The success of African Americans as trained soldiers challenged the idea that black people were only fit for servitude, and undermined a central tenet of white supremacy. With their military training, black soldiers ‘represented both a viable alternative source of community leadership and a direct physical threat to white supremacy when they came home.’”). The Fort Sam Houston riots were a particularly noteworthy example of how racism in the military played out during this time period. In August of 1917, sixty-three African-American enlisted men protested “police brutality and *Jim Crow* ordinances.” MICKEY R. DANSBY, ET AL., *Introduction to Part 4: Justice and Race in the United States* in *MANAGING DIVERSITY IN THE MILITARY* 395 (2001). The protests turned to riots, ultimately resulting in eighteen fatalities. *Id.* Within days, the protestors were “tried[;]” thirteen were sentenced to death and “forty-one were sentenced to life with hard labor.” *Id.* These events led to criticism of the military justice system and were ultimately the impetus behind the development of the Uniform Code of Military Justice in 1950. *Id.*

criminals, despite African-American crime rates largely trending downward.³⁸

World War II: The Emergence of Civil Rights

Despite continued segregation, assignment to menial jobs, and sustained abuse, as the U.S. prepared to enter World War II, African-Americans saw another opportunity to use their service as a mechanism to advance racial equality.³⁹ The “Double V” campaign—a call for victory against oppression abroad *and* at home—became something of a battle cry for African-Americans.⁴⁰ While the services began making policy changes in the spirit of racial equality, they were slow to implement desegregation and only allowed African-Americans the opportunity to serve in long sought after combat roles as casualties mounted.⁴¹ Yet, upon returning home from war, African-American veterans were greeted with the same hostility, violence, and oppression they just defeated in Europe.⁴² While racially-motivated attacks triggered racial clashes at home during the course of the war, the post-war attacks on African-American veterans were a clear signal that their service had only re-ignited racial tensions.⁴³

As it settled into another post-war era, the U.S. had to grapple with this hypocrisy, if for nothing else but its standing on the international stage.⁴⁴ In a post-World War II era, where

³⁸ See Jeffrey S. Adler, *Less Crime, More Punishment: Violence, Race, and Criminal Justice in Early Twentieth-Century America*, 102 J. OF AM. HIST. 34, 42-43 (2015).

³⁹ See EJI, *supra* note 34 at 34-36 (“By 1945, more than 1.2 million [African] Americans were serving in uniform.”).

⁴⁰ *Id.* at 34.

⁴¹ Phillip McGuire, *Desegregation of the Armed Forces: Black Leadership, Protest, and World War II*, 68 J. NEGRO HIST. 147, 155 (1983) (changes included permitting African-Americans to commission as officer, prohibiting racial epithets, and providing integrated training opportunities); EJI, *supra* note 34 at 36. Notably, African-Americans had to volunteer for combat roles and often had to give up their status as noncommissioned officers due to integration with Caucasian service members. PRESIDENT’S COMM. ON CIVIL RIGHTS, *supra* note 24 at 83.

⁴² See EJI, *supra* note 34 at 44 (“The discrimination, violence, and inhumanity black veterans faced when they returned home from World War II illustrated the continuing chasm between the ideals that the United States claimed to fight for abroad and the treatment of its citizens at home . . .”). See also Richard M. Dalfume, *The Fahy Committee and Desegregation of the Armed Forces*, 31 THE HISTORIAN 1, 1 (1968).

⁴³ See EJI, *supra* note 34 at 40-44 (Describing “unrelenting onslaught of racial attacks,” as the precursor to 1943 riots and providing numerous examples of violence toward African-American veterans following the war).

⁴⁴ See Dalfume, *supra* note 42 at 1 (“The hypocrisy involved in claiming to be the defender of world democracy against a racist aggressor, while at the same time segregating the armed forces along racial lines, was a convenient

human rights dominated international discourse, the domestic civil rights movement emerged.⁴⁵ In 1946, President Truman established the President's Committee on Civil Rights due to rising racial violence.⁴⁶ In its report, *To Secure These Rights*, the Committee found "different standards of justice" for racial minorities, stating "the judicial process itself does not give [them] full and equal justice."⁴⁷ The Committee also acknowledged the military's improvements in race relations as a result of integration in small doses during the war.⁴⁸ Seeing the military as a model for the nation, it recommended full desegregation of the armed services, asserting "the time for action is now."⁴⁹

In response, President Truman issued Executive Order 9981 in 1948, mandating the "equality of treatment and opportunity for all persons in the armed services without regard to race," and establishing The President's Committee on Equality of Treatment and Opportunity in the Armed Forces.⁵⁰ In its 1950 report, the Committee rejected the services' concerns of "get[ting ahead of the country]" and concluded that racial segregation and a "separate but equal" policy led to manpower inefficiencies and discrimination.⁵¹

The Korean War: The Civil Rights Movement Begins

Although the Army and Marine Corps continued to push back against desegregation, as

symbol of the divergence between the creed and the practice of [Caucasain] Americans."); THOMAS BORSTELMANN, *THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA* 45-46 (2001).

⁴⁵ See BORSTELMANN, *supra* note 44 at 46.

⁴⁶ Exec. Order No. 9808, 11 Fed. Reg. 14153 (Dec. 7, 1946); KRISTY N. KAMARCK, CONG. RSCH. SERV., R44321, *DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED SERVICES: BACKGROUND AND ISSUES FOR CONGRESS* 13 (2019).

⁴⁷ PRESIDENT'S COMM. ON CIVIL RIGHTS, *supra* note 24 at 28-29.

⁴⁸ *Id.* at 82-84.

⁴⁹ *Id.* at 162-63 ("The injustice of calling men to fight for freedom while subjecting them to humiliating discrimination within the fighting forces is at once apparent."). "Practically, [discrimination] costs lives and money in the inefficient use of human resources. Perhaps most important of all, we are not making use of one of the most effective techniques for educating the public to the practicability of American ideals as a way of life." *Id.* at 47-48.

⁵⁰ Exec. Order No. 9981, 13 Fed. Reg. 4313 (Jul. 28, 1948); KAMARCK, *supra* note 46 at 14.

⁵¹ PRESIDENT'S COMM. ON EQUAL TREATMENT & OPPORTUNITY IN THE ARMED FORCES, *FREEDOM TO SERVE: EQUALITY IN TREATMENT AND OPPORTUNITY IN THE ARMED FORCES* 12 (1950); Dalfiume, *supra* note 42 at 19.

the nation entered the Korean War, combat losses, manpower requirements, and resource scarcity necessitated integration.⁵² By the end of the war, most active duty units were desegregated, setting the stage for racial integration across the country.⁵³ Integration, however, did not equate to non-discrimination. Throughout the conflict, African-Americans were court-martialed disproportionately to their Caucasian counterparts, and on average, received stiffer sentences.⁵⁴ Despite valorous conduct on the battlefields of Korea—once again serving as the face of democratic values abroad—African-American veterans had yet to achieve their “Double V.” Only now, discrimination was beginning to take a new form.

While the U.S.’s focus on Korea slowed social reform at home, racial equality resumed its place in the foreground of domestic politics as the nation returned to a post-war society.⁵⁵ Emboldened by the Supreme Court’s 1954 decision in *Brown v. Board of Education*,⁵⁶ and the passage of the Civil Rights Acts of 1957 and 1960, the Civil Rights Movement was finally making headway.⁵⁷ Sit-ins and peaceful protests were underway across the nation, yet were often countered with violence.⁵⁸

Out of concern over continued discrimination in the military, President Kennedy established The President’s Committee on Equal Opportunity in the Armed Forces in 1962 in an effort to increase the effectiveness of current policies and procedures related to equality, and to

⁵² Dalfiume, *supra* note 42 at 2, 17-18 (describing the Army’s compromise in lieu of full desegregation); BORSTELMANN, *supra* note 44 at 81; KAMARCK, *supra* note 46 at 14-15.

⁵³ KAMARCK, *supra* note 46 at 15; Dalfiume, *supra* note 42 at 19-20.

⁵⁴ BORSTELMANN, *supra* note 44 at 81.

⁵⁵ See BORSTELMANN, *supra* note 44 at 60-61, 85.

⁵⁶ *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that racial segregation in public schools violated the U.S. Constitution).

⁵⁷ Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 89 (1960).

⁵⁸ BETTYE COLLIER-THOMAS AND V.P. FRANKLIN, *MY SOUL IS A WITNESS: A CHRONOLOGY OF THE CIVIL RIGHTS ERA, 1954-1965*, xiv (1999); CLAYBORNE CARSON, *ENCYCLOPÆDIA BRITANNICA, AMERICAN CIVIL RIGHTS MOVEMENT* (2020).

improve the equality of opportunity for members.⁵⁹ In June of 1963, the Committee published its report finding although policies were not facially discriminatory, the services were still lacking in the equal treatment of African-American service members, and in some cases still actively discriminating against them in practice.⁶⁰ Notably, the Committee found that it was unable to conduct thorough research into several aspects of racial equality due to the services' failure to maintain data related to race—a theme that will continue to present day.⁶¹

The Vietnam War: The Rise of Law and Order

As the U.S. slowly marched toward entry into the Vietnam War, the Civil Rights Movement earned two of its biggest victories: The Civil Rights Act of 1964 and the Voting Rights Act of 1965.⁶² But as the Civil Rights Movement raged on, so too did crime rates.⁶³ And it did not take long for the two to be associated together.⁶⁴ With new statutory guarantees of equality and the U.S.'s entry into Vietnam, focus on civil rights slowed again and a new emphasis on crime took root domestically.⁶⁵ By 1968, with the assassination of Dr. Martin Luther King, Jr., the Civil Rights Movement was replaced by a national call for law and order as a wave of violent protests fell across the nation, re-affirming the association of African-

⁵⁹ See PRESIDENT'S COMM. ON EQUAL OPPORTUNITY IN THE ARMED FORCES, EQUALITY OF TREATMENT & OPPORTUNITY FOR NEGRO MILITARY PERSONNEL STATIONED WITHIN THE UNITED STATES 1 (1963); KAMARCK, *supra* note 46 at 15.

⁶⁰ KAMARCK, *supra* note 46 at 15-16. See generally PRESIDENT'S COMM. ON EQUAL OPPORTUNITY IN THE ARMED FORCES *supra* note 59.

⁶¹ PRESIDENT'S COMM. ON EQUAL OPPORTUNITY IN THE ARMED FORCES, *supra* note 59 at 90-91.

⁶² Civil Rights Act of 1964, Pub. L. No. 88-353, 78 Stat. 241 (1964); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

⁶³ See PRESIDENT'S COMM. ON L. ENF'T & ADMIN. JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 23 (1967) [hereinafter THE CHALLENGE OF CRIME IN A FREE SOCIETY].

⁶⁴ See Thompson, *supra* note 25 at 228 ("a 'new doctrine' has emerged and the idea that 'civil rights demonstrations amount to violence and created a climate of lawlessness' had become gospel to large segments of the American voting public."); MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S 3 (2005).

⁶⁵ See FLAMM, *supra* note 64 at 143.

Americans with violent crime in the minds of many.⁶⁶

Not surprisingly, these tensions spilled over into the military. Despite yet another instance of African-Americans fighting to bring democracy to an oppressed people—another people of color no less—a series of violent, racially-charged incidents aboard military installations forced the armed forces to re-address race within the ranks.⁶⁷ In 1971, the DoD established the Race Relations Education Board (now the Defense Equal Opportunity Management Institute (DEOMI)) and conducted a series of studies about race, discrimination, and race relations—in fact, 72 separate studies between 1974 and 1994.⁶⁸ These studies established three relevant themes: African-Americans were over-represented at court-martial; racial minorities perceived a lack of equal opportunity in the armed forces; and “racial harmony” training was effective in dealing with racial tensions.⁶⁹

Studies, however, were not limited to the military. In an effort to address crime rates, riots, and reports of police brutality, President Johnson established The President’s Commission on Law Enforcement and Administration of Justice.⁷⁰ Although focused on crime and not race, the Commission’s report acknowledged staggering differences in arrest rates between races, finding “race is almost as important as that of sex in determining whether a person is likely to be arrested and imprisoned for an offense. . . .”⁷¹ These concerns were echoed in a 1970 DoD

⁶⁶ *See id.* at 142.

⁶⁷ KAMARCK, *supra* note 46 at 18. *See also Amnesty: Hearings on H.R. 236, H.R. 674, H.R. 2167, H.R. 3100, H.R. 5195, H.R. 10979, H.R. 10980, H.R. 13001, H. Con. Res. 144, and H. Con. Res. 385 Before the Subcomm. on Courts, Civ. Liberties, & the Admin. of Just. of the H.R. Comm. on the Judiciary, 93rd Cong. 773 (1974) [hereinafter “Subcomm. on Courts, Civ. Liberties, & the Admin. of Just.”] (“As early as 1976, Martin Luther King, Jr. said, ‘We are taking the young black men who have been crippled by our society and sending them 8,000 miles away to guarantee liberties in Southeast Asia which they had not found in Southwest Georgia and East Harlem.’”)*

⁶⁸ KAMARCK, *supra* note 46 at 18; U.S. GOV’T ACCOUNTABILITY OFF., GAO/NSIAD-95-103, EQUAL OPPORTUNITY: DOD STUDIES ON DISCRIMINATION IN THE MILITARY 2 (1995) [hereinafter “EO STUDIES”].

⁶⁹ EO STUDIES, *supra* note 68 at 2-3.

⁷⁰ April D. Fernandes & Robert D. Crutchfield, *Race, Crime, and Criminal Justice*, 17 CRIMINOLOGY & PUB. POL’Y 397, 399 (2018).

⁷¹ THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 63 at 44.

report finding African-Americans were twice as likely as Caucasian service members to be subject to non-judicial punishment (NJP) or court-martial.⁷² The Secretary of Defense thereafter established the Task Force on the Administration of Military Justice to determine “the nature and extent of racial discrimination in the administration of military justice.”⁷³

In its 1972 report, the Task Force found both “intentional and systemic” racism in the military justice system.⁷⁴ Specifically, African-Americans were overrepresented at NJP and court-martial, but had similar acquittal rates and received comparable sentences to their Caucasian counterparts.⁷⁵ The report identified the lack of minority leaders to serve as role models as a contributing factor to minority criminality, and a possible impediment to preventing racial bias in the administration of discipline.⁷⁶ The Task Force also highlighted inconsistencies in demographic data collection across the services and recommended a uniform system of collection.⁷⁷ The GAO reiterated concerns about data collection and perceptions of racism the following year.⁷⁸ In the wake of the Task Force’s findings, the Services conducted follow-on studies of their respective disciplinary systems with consistent results:

- In 1974, although the Navy was unable to assess racial bias in imposing NJP due to a lack

⁷² See CASE K. TONG & CATHY A. JAGGARS, DEF. EQUAL OPPORTUNITY MGMT. INST., PHASE 1 REPORT: AN INVESTIGATION INTO THE DISPARITY OF JUDICIAL AND NON-JUDICIAL PUNISHMENT RATES FOR BLACK MALES IN THE ARMED SERVICES, APPX A 3 (1992) (citing U.S. Dep’t of Def., Off. of Assistant Sec’y of Def., Manpower & Reserve Affairs, Special Assistant for Pol’y Stud., Racial Discrimination: An Analysis of Serviceman Opinions (1970)).

⁷³ KAMARCK, *supra* note 46 at 18.

⁷⁴ DEP’T OF DEF., REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES, VOL. 1, 1-2 (1972) [hereinafter “MJ TASK FORCE”] (defining intentional as “the policy of military authority or action of an individual or group of individuals which is intended to have a negative effect on minority individuals without having such an effect on others[;]” and systemic as “neutral practices or policies which disproportionately impact harmfully or negatively on minorities.”).

⁷⁵ *Id.* at 27-28, 30-31 (While representing just 11.5% of the armed forces population, 34.3% of servicemembers tried at court-martial were African-American. Although the report found sentences between races comparable, African-Americans were more likely to receive a punitive discharge.).

⁷⁶ See *id.* at 57, 63-65.

⁷⁷ *Id.* at 117.

⁷⁸ U.S. GEN. ACCT. OFF., B-178300, STATUS OF EQUAL OPPORTUNITY IN THE MILITARY DEPARTMENTS 18-19 (1973).

of data, it did find that an “overwhelming majority of [African Americans]” and a large percentage of Caucasians perceived discrimination in the military justice system.⁷⁹ A 1976 Air Force study echoed these perception concerns.⁸⁰

- A 1977 Air Force study found African-Americans were 1.3 times more likely to receive NJP and 1.9 times more likely to be subject to court-martial than Caucasians.⁸¹
- A 1978 Army study determined African-Americans were disproportionately subject to NJP and received involuntarily discharges with undesirable characterizations more often, despite self-reporting fewer violations of the law than Caucasians in an anonymous survey.⁸²
- In 1979, Human Sciences Research published a five-volume report on the Army’s disciplinary system finding African-Americans were overrepresented in: arrests, military prison populations, NJPs, and conviction at court-martial.⁸³

Despite these findings and similar results in additional studies conducted throughout the 1980s, little changed in the years following.⁸⁴

The Gulf War: Developing Diversity

In 1991, the nation went back to war—this time in the Persian Gulf—with the stated intent of liberating Kuwait.⁸⁵ Re-igniting “the struggle for African-American empowerment,” the Gulf War was the latest expression of the U.S.’s failure to bring equality to its own citizens

⁷⁹ PATRICA J. THOMAS, ET AL., NAVY PERS. RESEARCH & DEV. CTR., NPRDC-TR74-22, PERCEPTIONS OF DISCRIMINATION IN NON-JUDICIAL PUNISHMENT 5 (1974).

⁸⁰ WILLIAM E. BEUSSE & EARL A. WALLER, AIR FORCE HUM. RES. LAB., AFHRL-TR-75-54, PERCEPTIONS OF EQUAL OPPORTUNITY AND RACE RELATIONS AMONG MILITARY PERSONNEL 5-7 (1976).

⁸¹ See TONG & JAGGARS, *supra* note 72 at APPX A, 7 (citing WILLIAM E. BEUSSE, AIR FORCE HUM. RES. LAB., AFHRL-TR-75-21, FACTORS RELATED TO THE INCIDENCE OF DISCIPLINARY ACTIONS AMONG ENLISTED PERSONNEL (1977)).

⁸² ROLAND J. HART, U.S. ARMY RSCH. INST. FOR THE BEHAVIORAL & SOC. SCI., ARI-RM-77-30, THE RELATIONSHIP BETWEEN PERCEIVED OFFENSE AND ACTUAL DISCIPLINE RATES IN THE MILITARY 5-9 (1978).

⁸³ See TONG & JAGGARS, *supra* note 72 at APPX A, 7-8.

⁸⁴ See Appendix A.

⁸⁵ President George H. W. Bush, Address to the Nation on the Invasion of Iraq (Jan. 16, 1991).

before concerning itself with the rights of others.⁸⁶ Coincidentally, just days after the Gulf War concluded, an African-American man named Rodney King was the subject of severe police brutality caught on video.⁸⁷ The publication of the video saw the return of civil unrest.⁸⁸ And when the police officers were ultimately acquitted by a jury without African-American representation, riots broke out across Los Angeles, requiring the employment of thousands of Soldiers and Marines to quell the unrest.⁸⁹ Shortly thereafter, the U.S. saw a surge of studies related to race and crime.⁹⁰ Two of which, DoD studies no less, are particularly relevant today:

- A 1992 DEOMI study found African-Americans were 2.2 times more likely to be convicted at court-martial and 1.7 times more likely to receive NJP than Caucasian service members.⁹¹ The report conceded that while the total number of NJPs and courts-martial were decreasing, the disparity between races was increasing.⁹²
- A 1992 Navy Study determined African-Americans were overrepresented at NJP and although not statistically significant, made up 59% of summary courts-martial and 36% of special courts-martial subjects.⁹³ The report did not find any disparity in punishment or offenses, except that African-Americans were accused of significantly more “insubordination” offenses.⁹⁴

The primary difference between the studies of the 1970s and those of the early 1990s lie in the conclusions for disparity. While researchers from the 1970s hesitated to directly attribute

⁸⁶ See Henry J. Richardson III, *The Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT’L L. 42, 42, 53 (1993).

⁸⁷ JEFF WALLENFELDT, ENCYCLOPÆDIA BRITANNICA, LOS ANGELES RIOTS OF 1992 (2020).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See e.g., BESIKI KUTATELADZE, ET AL., VERA INST. JUST., DO RACE AND ETHNICITY MATTER IN PROSECUTION: A REVIEW OF EMPIRICAL STUDIES 5 (2012) [hereinafter VERA INST. JUST.] (reviewing of 34 empirical studies).

⁹¹ MARTIN R. WALKER, DEF. EQUAL OPPORTUNITY MGMT. INST., AD-A274-555, AN ANALYSIS OF DISCIPLINE RATES AMONG RACIAL/ETHNIC GROUPS IN THE U.S. MILITARY: FISCAL YEARS 1987-1991, 19 (1992).

⁹² *Id.* at 20.

⁹³ AMY L. CULBERTSON & PAUL MAGNUSON, NAVY PERS. RSCH & DEV. CTR, NPRDC-TR-92-17, AN INVESTIGATION INTO EQUITY IN NAVY DISCIPLINE 8, 19 (1992).

⁹⁴ *Id.* at 8-14.

disparities in discipline rates to racial bias, those of the 1990s preferred to attribute increased disparities to declining Caucasian crime, submitting that there was no cause for concern because civilian disparities were worse.⁹⁵

The War on Terrorism: Enough is Enough

As the U.S. moved into the first years of the 21st Century, the appointment and election of key African-American leaders brought a new hope to the fight for racial justice.⁹⁶ But even these leaders struggled bring about real, lasting change. Following the attacks on September 11, 2001, the U.S. declared a War on Terrorism.⁹⁷ This war marshaled a renewed sense of racism.⁹⁸ But for once, African-Americans were not the most feared, nor most racially-profiled race.⁹⁹ However, as the war effectively came to a close in the 2010s,¹⁰⁰ race relations returned to their rightful post-war spotlight. In 2013, the Black Lives Matter movement formed following the acquittal of a man who killed an unarmed African-American teen walking home.¹⁰¹ Since then, myriad protests against police brutality and African-American deaths at the hands of law

⁹⁵ See TONG & JAGGARS, *supra* note 72 at 4 (“We also found that although the disparity of punishment rates in the military can be considered high, it is much less than that in the civilian section. The ratio of civilian [African-American]/[Caucasian] rates of incarceration is 4 to 1, while the military’s is 2 to 1 and declining.”); WALKER, *supra* note 91 at 20. Although the results of the DEOMI study paralleled the findings of the 1972 Task Force, this report concluded that the disparity in courts-martial was merely the result of a decrease in the number of courts-martial and convictions for Caucasian servicemembers, and that the higher over-representation of African-Americans at court-martial than at NJP indicated that African-Americans tended to be more involved in more serious offenses. Finally, it determined that because the commander has more discretion over NJP than court-martial, the fact that there are fewer NJPs than courts-martial indicates a lack of racial bias in the system. *Id.*

⁹⁶ Examples include the appointment of General (Ret.) Colin Powell as Secretary of State, Condoleezza Rice as National Security Advisor, and eventually Barack Obama as President of the United States.

⁹⁷ Ivo H. Daadler & James M. Lindsay, *Nasty, Brutish and Long: America’s War on Terrorism*, BROOKINGS INST. (Dec. 1, 2001), <https://www.brookings.edu/articles/nasty-brutish-and-long-americas-war-on-terrorism/>.

⁹⁸ See Cassidy Pitt, *U.S. Patriot Act and Racial Profiling: Are There Consequences of Discrimination?*, 25 MICH. SOCIO. REV. 53, 54 (2011).

⁹⁹ *Id.* at 53-54.

¹⁰⁰ Presidential Statement on the End of the Combat Mission in Afghanistan, DAILY COMP. PRES. DOC. 957 (Dec. 28, 2014) (“[O]ur combat mission in Afghanistan is ending, and the longest war in American history is coming to a responsible end. . . . [the U.S.] will maintain a limited military presence in Afghanistan to train, advise and assist Afghan forces and conduct counterterrorism operations . . .”).

¹⁰¹ Black Lives Matter, *About*, <https://blacklivesmatter.com/about/> (last visited Dec. 16, 2020).

enforcement have driven race relations back into the national conversation.¹⁰² But it was not until 2020 when a series of African-American deaths at the hands of Caucasian law enforcement set the movement ablaze.¹⁰³ A wave of protests crashed across the country, some devolving into riots.¹⁰⁴ Demands for justice and criminal justice reform rivaled news of a pandemic ravaging the globe.¹⁰⁵

But even before the protests and riots of 2020, the Military Leadership Diversity Commission (MLDC) found in 2011 that African-Americans were court-martialed at a rate of 5.35 per thousand, while Caucasians were court-martialed at a rate of 3.28 per thousand.¹⁰⁶ In 2017, a report by Protect Our Defenders came to similar conclusions, finding “across all service branches, [African-American] service members were substantially more likely than [Caucasian] service members to face military justice or disciplinary action.”¹⁰⁷ This prompted the Air Force Judge Advocate General’s Corps to conduct internal reviews of disciplinary data between 1999 and 2019, which determined African-Americans were 1.74 times more likely to receive NJP and 1.6 times more likely to be subject to court-martial than Caucasian members.¹⁰⁸ The Air Force Inspector General conducted its own assessment and determined that within the Air Force,

¹⁰² Aleem Maqbool, *Black Lives Matter: From social media post to global movement*, BBC NEWS (Jul. 9, 2020), <https://www.bbc.com/news/world-us-canada-53273381>.

¹⁰³ An African-American man out on a jog was hunted down by a former police officer and his son; another African-American man died at the hands of law enforcement; and an African-American woman was killed during the execution of a no-knock warrant on her home. Deneen L. Brown, *‘It was a modern-day lynching’: Violent deaths reflect a brutal American legacy*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.com/history/2020/06/history-of-lynching-violent-deaths-reflect-brutal-american-legacy/#close> (last visited Dec. 16, 2020).

¹⁰⁴ Harmeet Kaur, *About 93% of racial justice protests in the US have been peaceful, a new report finds*, CNN NEWS (Sep. 4, 2020, 6:45 PM), <https://www.cnn.com/2020/09/04/us/blm-protests-peaceful-report-trnd/index.html>.

¹⁰⁵ Larry Buchanan, Quoc Trung Bui, & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, THE NEW YORK TIMES (Jul. 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

¹⁰⁶ MIL. LEADERSHIP DIVERSITY COMM’N, FROM REPRESENTATION TO INCLUSION: DIVERSITY LEADERSHIP FOR THE 21ST CENTURY MILITARY 104-06 (2011) [hereinafter “MLDC”].

¹⁰⁷ CHRISTENSEN, *supra* note 12 at i.

¹⁰⁸ DEP’T OF AIR FORCE, INSPECTOR GENERAL, REPORT OF INQUIRY S8918P, INDEPENDENT RACIAL DISPARITY REVIEW 8 (2020) [hereinafter INDEPENDENT RACIAL DISPARITY REVIEW].

African-Americans were: twice as likely to be arrested, 74% more likely to receive NJP (an increasing disparity), twice as likely to be involuntarily discharged for misconduct, and 60% more likely to be subject to court-martial (an increasing disparity).¹⁰⁹

In June 2020, Congress held hearings on the findings of a GAO report reaching similar conclusions, demanding answers from the senior judge advocates in each branch.¹¹⁰ In her opening remarks, Chairwoman, Representative Jackie Speier called for change, stating: “I hope that all our military leaders in the room are prepared to acknowledge the need for a reckoning, and prepared further to institute bold measures to fix the inherent bias in the military justice system[.]”¹¹¹

III. RACIAL BIAS IN MILITARY JUSTICE

Although not perfect, a striking pattern emerges when considering historical racially charged civil unrest through the lens of armed conflict: unrest tends to follow in the shadows of armed conflict and the response consistently includes the study of barriers to equality.¹¹² Thus, if history tells us anything, it is that action must be more than continued study and it must happen before the U.S. enters the next armed conflict. But in recognizing this fact, two questions stand out: (1) What can the DoD learn from the data it already has?; and (2) How do civilian studies inform the conversation? This section will take these questions in turn and address common counterarguments, thereby establishing that the DoD has sufficient information to begin combating racial bias, and perceptions thereof, now.

¹⁰⁹ *Id.* at 6, 16, 20.

¹¹⁰ “*Racial Disparity in the Military Justice System – How to Fix the Culture*”: Hearing before the Subcomm. on Mil. Pers., H. Armed Serv. Comm., 116th Cong. (2020).

¹¹¹ *Id.* (statement of Chairwoman Representative Jackie Speier).

¹¹² See *infra* Section II. Certainly, the U.S.’s involvement in armed conflict is not the sole factor in civil unrest, nor racial disparity in criminal justice. The author merely seeks to draw out the linkages between armed conflict, unrest, and crime. For a historical review on policies that have had an adverse impact on racial minorities in the criminal justice system, see generally Thompson, *supra* note 25.

A. What can the DoD learn from the data it already has?

The studies described thus far only scratch the surface of those conducted since the desegregation of the armed forces. Appendix A not only provides a more graphic depiction of armed conflict, followed by unrest, and chased by studies of inequality, it describes the findings of these studies with disturbing consistency. While they have looked at differing aspects of the military's disciplinary system from administrative action to non-judicial and judicial punishments, one fact weaves through each study: African-Americans are overrepresented in the disciplinary process.

In 2019, the GAO found that this has not changed. Specifically, on average, an African-American service member is more than twice as likely to be subject to an investigation, 1.59 times more likely to receive NJP, and 1.8 times more likely to be tried by court-martial than their Caucasian counterparts.¹¹³ These results, on their own, are disturbing. But taken in context with the results of studies from the preceding 50 years, there can be little doubt about what they represent: consistency—not just in the application of the disciplinary process, but the perception of racial bias in the system and the failure to ameliorate data concerns in order to study it. Taking these in reverse order below, the military's indifference to the need for consistent, comparable demographic data is but a symptom of a disease that has facilitated the perception of racial bias and has allowed racial bias to permeate the military justice system. Each of these factors merit prompt attention.

1. The DoD has long failed to give this issue the attention it deserves.

The GAO's determination that the services maintained inconsistent demographic data

¹¹³ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 14 at 41, 43, 53 (averaged across services who provided data; NJP data is limited to Air Force and Marine Corps). Notably, when subject to a recorded investigation, African-Americans were nearly just as likely to be subject to court-martial (only 1.08 times more likely based on the average, and less likely in three of four services).

should come as no surprise.¹¹⁴ This concern was first highlighted by the 1963 President’s Committee on Equal Opportunity in the Armed Forces, reiterated by 1972 Task Force, echoed again by the GAO in 1973, and raised at the DoD Military Equal Opportunity Conference in 1989.¹¹⁵ In 1997, the Office of Management and Budget finally directed standardized racial and ethnic classifications across the U.S. Government,¹¹⁶ and yet, a 2011 MLDC report on diversity revealed the services’ data *still* “did not use consistent race/ethnicity categories.”¹¹⁷ The failure to correct this deficiency not only tells a troubling story of indifference, it has undoubtedly prevented the DoD from thoroughly studying and addressing racial disparity in the military justice system.

2. Perceptions of racism in the military justice system continue to exist.

More importantly, the continuing perceptions of racism in the military justice system are cause for concern regardless of whether bias exists. In study after study across the decades, racial minorities expressed beliefs that the military justice system was racially biased.¹¹⁸ In fact, in many instances even Caucasian service members articulated concerns of bias.¹¹⁹ Sadly, the

¹¹⁴ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 14 at 22.

¹¹⁵ PRESIDENT’S COMM. ON EQUAL OPPORTUNITY IN THE ARMED FORCES, *supra* note 59 at 90-91; MJ TASK FORCE, *supra* note 74 at 117; U.S. GEN. ACCT. OFF., *supra* note 78 at 18-19; TONG & JAGGARS, *supra* note 72 at Appx A 10.

¹¹⁶ U.S. OFF. OF MGMT. & BUDGET, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (Oct. 30, 1997).

¹¹⁷ MLDC, *supra* note 106 at 105-06.

¹¹⁸ TONG & JAGGARS, *supra* note 72 at Appx A 3 (citing U.S. Dep’t of Def., Off. of Assistant Sec’y of Def., Manpower & Reserve Affairs, Special Assistant for Pol’y Stud., Racial Discrimination: An Analysis of Serviceman Opinions (1970)); H.R. CONG. BLACK CAUCUS, 92ND CONG., REPORT ON RACISM IN THE MILITARY – OUR MEN ABROAD, 117 CONG. REC. 41,854 (Nov. 17, 1971); MJ TASK FORCE, *supra* note 74 at 130; U.S. GEN. ACCT. OFF., *supra* note 78 at 18-19; THOMAS, *supra* note 79 at 13-18; BEUSSE & WALLER, *supra* note 80 at 5, 7; Hart, *supra* note 82 at 9-14; PAUL ROSENFELD, ET AL., NAVY PERS. RSCH & DEV. CTR, NPRDC-TR-92-14, ASSESSMENT OF EQUAL OPPORTUNITY CLIMATE: RESULTS OF THE 1989 NAVY-WIDE SURVEY 33-34 (1989); INDEPENDENT RACIAL DISPARITY REVIEW, *supra* note 108 at 4, 91-99, 110-11.

¹¹⁹ THOMAS, *supra* note 79 at 15, 20 (More than 40% of Caucasian Sailors surveyed felt there was some level of discriminatory practice in the discipline of African-Americans. 60 Caucasian sailors provided examples of discrimination they observed on ship, to include harsher punishments); ROSENFELD, ET AL., *supra* note 118 at 33-34 (nearly 30% of Caucasian enlisted service members expressed concern with race playing a role in punishment); INDEPENDENT RACIAL DISPARITY REVIEW, *supra* note 108 at 91-99 (Although significantly lower than their African-

Air Force Inspector General’s 2020 survey of service members establishes that these perceptions remain today, albeit to a lesser extent—a fact that can be just as, if not more, corrosive than bias itself.¹²⁰

Notably, these studies also communicate the value of diversity in the workplace. Surveys revealed minority members felt their supervisors were less supportive, less likely to give them the benefit of the doubt, and less likely to provide meaningful mentorship in the development of their careers.¹²¹ Contrast these concerns with a 1998 study that found commands with a greater percentage of African-American service members saw less disparity in NJP rates.¹²² The latter study attributed these results to “positive role models” and “a strong social support network.”¹²³ Thus, even if the data’s consistency is insufficient to convince readers that the system harbors some amount of racial bias, the perception problem alone merits attention to diversity concerns.

3. The consistency in military-specific data establishes some level of racial bias in implementing discipline.

Turning to the data, while the GAO’s most recent figures *alone* do not establish racial bias, when considered in context with mounting data gathered since 1970, two arguments in support of bias surface: (1) the disparity has remained consistent over five decades despite changing attitudes toward racial equality; and (2) the disparity is more prevalent when the case is

American peers, 7-15% of Caucasian Airmen still believe their leadership displays racial bias in the provision of NJPs and courts-martial.).

¹²⁰ INDEPENDENT RACIAL DISPARITY REVIEW, *supra* note 108 at 90-99. Notably, concerns about bias were most prevalent amongst general officer and senior enlisted African-Americans. This may be attributable to the relative size of these populations but may also be informed by their lengthier careers and experience. *Id.* See also MJ TASK FORCE, *supra* note 74 at 3 (“[T]he perceptions of unfairness are as corrosive an influence on the attitudes of servicemen toward the military justice system as actual unfairness . . .”).

¹²¹ THOMAS, *supra* note 79 at 13, 18-19; INDEPENDENT RACIAL DISPARITY REVIEW, *supra* note 108 at 92, 99. Although recent survey results indicate positive trends in supervisor relationships, minorities still express less satisfaction than Caucasian members. However, minorities express far greater satisfaction with mentors, particularly informal mentors, who also tend to be racially aligned. See OFFICE OF PEOPLE ANALYTICS, OPA REPORT NO. 2018-022, 2017 WORKPLACE AND EQUAL OPPORTUNITY SURVEY OF ACTIVE DUTY MEMBERS: TABULATIONS OF RESPONSES 40-51, 58-87, 94-95 (2018).

¹²² CULBERTSON & MAGNUSSON, *supra* note 93 at 4.

¹²³ *Id.*

solely in the hands of the commander. As to the former, there has been a generally positive upward trend in racial attitudes of Americans, particularly among Caucasians, since the end of World War II.¹²⁴ Despite this trend, the disciplinary data from the military between 1970 and 2020 has seen little change in disparity rates—in fact, some evidence even suggests it is increasing.¹²⁵ Specifically, since 1970, the DoD and outside agencies have addressed military disciplinary rates in at least 25 publications, to include research across the DoD as a whole and into the individual services.¹²⁶ No less than 23 studies identified racial disparity in some aspect of the disciplinary system, 18 of which found that African-Americans were overrepresented at NJP, court-martial, and/or administrative separation.¹²⁷ This consistency is particularly noteworthy in light of the 1972 Task Force’s finding that both systemic and *intentional* discrimination existed in the military justice system.¹²⁸ It seems improbable that as racial attitudes improved and presumably intentional discrimination decreased, the disparity would remain constant—much less growing—absent an underlying cause.

While the sheer volume and consistency of the data is valuable, the varied approaches

¹²⁴ See MARIA KRYSAN & SARAH MOBERG, UNIVERSITY OF ILLINOIS INSTITUTE OF GOVERNMENT AND PUBLIC AFFAIRS, TRENDS IN RACIAL ATTITUDES (2016), <https://igpa.uillinois.edu/programs/racial-attitudes>. This trend, however, has leveled-out over the last decade. MARIA KRYSAN & SARAH MOBERG, UNIVERSITY OF ILLINOIS INSTITUTE OF GOVERNMENT AND PUBLIC AFFAIRS, A PORTRAIT OF AFRICAN AMERICAN AND WHITE RACIAL ATTITUDES 2 (2016).

¹²⁵ See Appendix A. For studies evidencing increasing disparity rates, *see e.g.*, WALKER, *supra* note 91 at 20; INDEPENDENT RACIAL DISPARITY REVIEW, *supra* note 108 at 6. These concerns are reinforced by the findings of a 2017 survey of nearly 1.3 active duty members wherein 31.2% of African-Americans believed they had been subject to racial harassment or discrimination *in the past 12 months*, an increase from 18% surveyed in 2013. OFFICE OF PEOPLE ANALYTICS, *supra* note 121 at 186; OFFICE OF PEOPLE ANALYTICS, DMDC REPORT NO. 2013-046, 2013 WORKPLACE AND EQUAL OPPORTUNITY SURVEY OF ACTIVE DUTY MEMBERS: TABULATIONS OF RESPONSES 318 (2013).

¹²⁶ See Appendix A.

¹²⁷ *Id.*

¹²⁸ MJ TASK FORCE, *supra* note 74 at 2, 21 (“intentional discrimination, though not condoned, is frequently practiced by some commanders . . .”).

and mechanisms of analysis make direct comparison of the studies difficult.¹²⁹ However, in light of its scale and analytical approach, the 1972 Task Force on Military Justice report makes for an appropriate comparison to the GAO’s 2019 report. Interestingly, both reports found that although there was a disparity between races in who was subject to NJP or court-martial, this disparity *did not exist* or was *not* statistically significant once the service member went through the court-martial process.¹³⁰ The consistency in this data across nearly fifty years is too conspicuous to be a mere coincidence. Moreover, the fact that it holds true across services with varying rates of diversity, offenses, and courts-martial makes coincidence unlikely. The one constant, however, across the services is the decision-maker: the commander.¹³¹ This individual—typically a Caucasian male—not only identifies cases for disciplinary action, s/he determines the forum of disciplinary proceedings.¹³² That some form of implicit racial bias pervades the decision-making process is more likely than the sheer coincidence of such consistency in the data. This is compounded by the GAO’s findings that the racial disparity at court-martial shrank considerably when only analyzing cases preceded by a law enforcement investigation—a factor mitigating commander discretion—and that the disparity was greater at NJP than at court-martial across all services—the forum with the most commander discretion

¹²⁹ Because the studies express disparities in different ways, it is difficult to conduct a direct comparison between them. The key takeaway is that regardless of the mathematical expression of disparity, the result consistently reflects *a disparity* across racial lines.

¹³⁰ MJ TASK FORCE, *supra* note 74 at 27-28, 30-32; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 14 at 38-39.

¹³¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306(a) (2019) [hereinafter “MCM”] (“Each commander has discretion to dispose of offenses by members of that command.”). Notably, the immediate commander is not always the “convening authority,” a term used for the officer given ultimate decision-making authority over a court-martial, but it often is. For sake of consistency in terms throughout this paper, the term commander has been used even where technically the term “convening authority” may be more appropriate.

¹³² MIL. LEADERSHIP DIVERSITY COMM’N, RECENT COMMAND SELECTION OUTCOMES FOR FEMALE AND MINORITY OFFICERS (2010) (“. . . men and non-minorities made up at least 80 percent of the population of officers selected for O-5 or O-6 command.”); MCM, R.C.M. 306(c)(1)-(5) (actions may include: no action, administrative action, nonjudicial punishment, dismissal of charges, referral of charges, or forwarding of charges to a superior authority).

and least oversight.¹³³ What is more likely, and consistent with the preceding argument, is that the racial bias is playing some role in determining who to discipline and the appropriate disciplinary forum. When this information is coupled with civilian data, the argument in favor of bias becomes even more apparent.

B. How do civilian studies inform the conversation?

Scholars generally agree that there is no single cause of racial disparity in the criminal justice system.¹³⁴ In fact, they have linked disparate results to everything from socio-economic status, to access to resources, to policing programs, to drug laws and sentencing guidelines.¹³⁵ Together, these factors build a complex web that has proven difficult to untangle. But they have little to do with the military justice system. In fact, the military ensures consistent pay; provides food, housing, and even education; and guarantees equal access to defense counsel, regardless of financial resources.¹³⁶ Moreover, the military does not have sentencing guidelines, low-income neighborhoods to police, or racially motivated drug laws. Accordingly, it is more valuable to look at civilian studies focused on the internal threat—the justice process itself—vice external influences.

1. Discretion points tend to drive racial disparity in the criminal justice system.

Studies into the civilian criminal justice system have found that “[r]acial and ethnic

¹³³ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 14 at 44-45. GAO did not account for command investigations, however, law enforcement generally conducts investigations unless the offense is minor or a purely military offense. Accordingly, the disparity here indicates that commanders are sending more African-Americans to court-martial for offenses that do not necessitate a law enforcement investigation. These offenses also tend to be more discretionary in nature (i.e. insubordination and disrespect offenses).

¹³⁴ See THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 6 (2d ed. 2008) [hereinafter “REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM”].

¹³⁵ *Id.* at 5-9.

¹³⁶ See CHRISTENSEN, *supra* note 12 at ii (describing the military’s ability to “control” many of the factors associated with disparity in the civilian criminal justice system).

disparities show up in one form or another at virtually every stage of the justice process.”¹³⁷ Research has identified that these “stages” all include some measure of discretion. Since “[c]ommon sense dictates that the cultural background and life experiences of the arresting officer, prosecutor, defense attorney, judge, court staff, and others involved in the case . . . play a role[.]” civilian scholars have shifted toward studying individual bias of those exercising this discretion.¹³⁸ Study after study has since turned on the discretion given to police officers in stopping, searching, and making arrests; prosecutors in bringing charges, requesting bail, negotiating plea agreements, and requesting appropriate sentences; and judges in setting bail and determining sentences.¹³⁹ The DoD, however, has not taken a critical look at the military justice decision-makers and how their discretion impacts disparity data, thus it only has comparative civilian data to rely on.

Unfortunately, the studies on discretion in the civilian criminal justice system tell an expected story: Caucasians get more beneficial treatment at discretionary points.¹⁴⁰ Police are more likely to stop and search an African-American driver.¹⁴¹ Police are more likely to stop and frisk an African-American, despite data suggesting Caucasians “are more likely to be in the

¹³⁷ Wolf, *supra* note 5 at 31.

¹³⁸ Wolf, *supra* note 5 at 34-35.

¹³⁹ See generally Margaret Bull Kovera, *Racial Disparities in the Criminal Justice System: Prevalence, Causes, and a Search for Solutions*, 75 J. SOC. ISSUES 1139 (2019) (providing an in-depth review of the results of numerous studies across each stage of the criminal justice process); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998) (articulating the various stages at which police and prosecutors, exercise discretion and how it can have a racially disparate impact); VERA INST. JUST., *supra* note 90 (conducting a meta-analysis on studies related to prosecutorial discretion points).

¹⁴⁰ See *infra* notes 140-148 and accompanying text.

¹⁴¹ See THE SENTENCING PROJECT, *supra* note 1 at 5 (“[P]olice are more likely to stop [African-American] and Hispanic drivers for discretionary reasons Once pulled over, [African-American] and Hispanic drivers were three times as likely as [Caucasians] to be searched.”); Kovera, *supra* note 139 at 1140-41 (citing multiple studies on the disparity of traffic stops); Wolf, *supra* note 5 at 31-32 (citing multiple studies on the disparity of traffic stops); Davis, *supra* note 139 at 27-30 (discussing the abuse of pretextual stops to stop motorists in a discriminatory manner).

possession of contraband than are people of color.”¹⁴² Police are more likely to arrest an African-American than a Caucasian offender, even when controlling for offense.¹⁴³ African-Americans are more likely to be subject to pretrial detention, have higher bail rates imposed, and to be outright denied bail than Caucasian arrestees with similar offenses and criminal histories.¹⁴⁴ Prosecutors are more likely to bring charges with mandatory minimum sentences against African-Americans, are more likely to drop the most aggravating charge in plea negotiations with Caucasians, and are more likely to offer noncustodial pleas and community service to Caucasians.¹⁴⁵ Prosecutors are also more likely to challenge African-American venirepersons.¹⁴⁶ Prosecutors are more likely to request the death penalty for African-Americans, particularly if

¹⁴² Kovera, *supra* note 139 at 1141-42 (“[A]n analysis of all stop and frisk incidents in New York City over a 15-month period showed that even after controlling for variability in precincts and estimates of racial disparities in crime participation, [African-Americans] and Hispanics were more likely to be stopped by police than were [Caucasians]. The NYPD’s stop-and-frisk policy has been held unconstitutional because of its racially biased implementation.”).

¹⁴³ See THE SENTENCING PROJECT, *supra* note 1 at 4 (“[African-Americans] were 3.7 times more likely to be arrested for marijuana possession than [Caucasians] in 2010, even though their rate of marijuana usage was comparable.”); Kovera, *supra* note 139 at 1143-44 (“The police also differentially arrest people of different races for the same offenses. In 2017, [African-Americans] were eight times more likely to be arrested for marijuana possession in New York City than were [Caucasians]....”).

¹⁴⁴ See Cynthia E. Jones, “Give Us Free”: *Addressing Racial Disparities in Bail Determinations*, 16 J. LEGIS. & PUB. POL’Y 919, 938 (2013) (“Criminologists and researchers have published over twenty five studies documenting racial disparities in bail determinations”); Kovera, *supra* note 139 at 1145 (citing multiple studies about disparity in pretrial detention decisions).

¹⁴⁵ See Carlos Berdejó, *Criminalizing Race*, 59 B. C. L. REV. 1187, 1191, 1214-20 (2018) (suggesting that race is used as a proxy for anticipated recidivism in cases with no criminal history); Sonja B. Starr & Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L. J. 2, 7 (2013) (finding prosecutors were twice as likely to charge African-Americans with offenses carrying a mandatory minimum sentence); Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 736 (2012) (citing 3 additional studies that suggested prosecutorial discretion in charging offenses with mandatory minimums led to disparities); Charles Crawford, et al., *Race, Racial Threat, and Sentencing of Habitual Offenders*, 36 CRIMINOLOGY 481, 496 (1998) (“[African-American] defendants are [up to] 69% more likely to be [charged under habitual offender laws] than non[-African-Americans], after controlling for prior record, crime seriousness, and other significant predictors of that outcome.”); Kovera, *supra* note 139 at 1145-46 (citing multiple studies on plea negotiation disparities).

¹⁴⁶ See Kovera, *supra* note 139 at 1149-50 (which can have a significant impact since at least one study has shown “the presence of a single [African-American] venireperson in the jury pool effectively eliminated the racial disparity in convictions”).

the victim is Caucasian.¹⁴⁷ Once convicted, judges sentence African-Americans to incarceration more frequently and for longer periods than Caucasians.¹⁴⁸ And once incarcerated, African-Americans are more likely to be punished for discretionary offenses inside the correctional facility and more likely to have their parole revoked for technical violations.¹⁴⁹ These decision points individually demonstrate measurable disparity, but when considered in the aggregate, the result is an astounding inequality that is not explained merely by offense rates—that in 2019, African-Americans adults were imprisoned at rate 5.7 times that of Caucasian adults, despite a 23% decrease in imprisonment rate for African-Americans over the preceding decade.¹⁵⁰

2. Discretion in the military justice system is primarily held by the commander.

While the military has its own law enforcement, prosecutors, and judges who each have discretionary roles in the system, the military places nearly every major discretionary decision in the hands of the commander. In fact, the commander can initiate investigations, determines whether or not to institute pretrial restraint, decides if discipline is appropriate, determines the forum for discipline, approves of the charges and creates the court-martial through a process called referral, makes decisions related to plea agreements, hires the experts, produces the

¹⁴⁷ VERA INST. JUST., *supra* note 90 at 8; Kovera, *supra* note 139 at 1146.

¹⁴⁸ Berdejó, *supra* note 145 at 1194, 1208-13 (citing multiple studies coming to these conclusions).

¹⁴⁹ THE SENTENCING PROJECT, *supra* note 1 at 9; KENDRA BRADNER & VINCENT SCHIRALDI, COLUMBIA UNIVERSITY JUSTICE LAB, RACIAL INEQUITIES IN NEW YORK PAROLE SUPERVISION 3-6, 10 (2020) (describing multiple studies finding racial disparity in the parole system); Beth Huebner & Timothy S. Bynum, *The Role of Race and Ethnicity in Parole Decisions*, 46 CRIMINOLOGY 907, 925-26 (2008) (finding African-Americans “spend longer awaiting parole[.]” which is “consistent with existing studies that suggest that race may be used as a cue for dangerousness and risk when the decision is made . . .”); REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM *supra* note 134 at 18-19.

¹⁵⁰ See DOJ, PRISONERS IN 2019, *supra* note 7 at 10, 16 (“[African-American] males ages 18 to 19 were 12 times as likely to be imprisoned as [Caucasian] males of the same ages . . .”). See also Kovera, *supra* note 139 at 1144 (“Although racial disparities in arrests account for between 70% and 75% of the racial disparities in incarceration, decisions made after arrest by judges and attorneys regarding postarrest detention, plea deals, charged crimes, and sentencing also contribute to differential incarceration of [African-American] and [Caucasian] offenders.”); REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM *supra* note 134 at 2 (discussing “the cumulative nature of racial disparities”); THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 10 (2015) (describing how “disparities snowball as individuals traverse the criminal justice system.”).

witnesses, picks the jury pool, selects the venue, acts on the sentence, and grants clemency.¹⁵¹

The sheer breadth of discretion placed in a single individual,¹⁵² coupled with civilian data suggesting discretion can be driven by bias, and military justice data indicating the disparity decreased substantially once in the court-martial system and under the purview of judge advocates, leads to the common sense conclusion that racial bias is playing a role in the decision to discipline and the choice of disciplinary forum (NJP v. court-martial).

This conclusion is reinforced by research suggesting people tend to “identify with those who look and act like them. Thus, [decision-makers] may be more receptive to [alternative] options for defendants with whom they feel some connection.”¹⁵³ Studies on diversity in the workplace have reached similar results about the unconscious “connection” between employers

¹⁵¹ See MCM, R.C.M. 303 (“Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.”); MCM, R.C.M. 304-305 (discussing the commander’s role in pretrial restraint and confinement); MCM, R.C.M. 306 (granting the commander the authority to dispose of cases unless such authority is withheld by a superior commander); MCM, R.C.M. 401-404, 407, 601(b) (providing the commander the ability to dismiss charges or refer them to court-martial); MCM, R.C.M. 705 (granting the convening authority the authority to enter into plea agreements with the accused); MCM, R.C.M. 703(d) (requests for expert witnesses must be approved by the convening authority); MCM, R.C.M. 703(c)(2) (the Government is charged with producing defense witnesses); MCM, R.C.M. 502(a)(1), 503(a)(1) (describing how the convening authority selects members); MCM, R.C.M. 906(b)(11) discussion (“When it is necessary to change the place of trial, the choice of places to which the court-martial will be transferred will be left to the convening authority”); MCM, R.C.M. 1102-1103, 1107-1110 (discussing various actions the commander may take with respect to the results of trial). Again, the term commander is used for consistency, but the term “convening authority” would normally be more appropriate for actions occurring within the military justice system.

¹⁵² A 1973 Army study highlighted similar concerns about the authority resident in the commander. See P.G. NORDLIE & J.A. THOMAS, U.S. ARMY RSCH. INST. FOR BEHAVIORAL & SOC. SCI., ARI 73-2, RACE RELATIONS AND EQUAL OPPORTUNITY IN THE ARMY 32-33(1973).

¹⁵³ REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 134 at 9. The social identity theory posits that one’s self-esteem is positively impacted by evaluating the individual’s own social group positively and other social groups negatively. See Jan E. Stets & Peter J. Burke, *Identity Theory and Social Identity Theory*, 63 SOC. PSYCH. Q. 225, 225 (2000). Unlike social identity theory, which sees a person aligning with individuals with whom s/he holds common social identification (i.e. race), the identity theory focuses on a person’s individual association with their specific role. *Id.* Group- and role-based identities, while separate, cannot be easily disentangled and thus, should be analyzed in light of one another. *Id.* at 228. While group-based identities are not unique to the military, their intersection with role-based identities levied by the hierarchical structure of the military, coupled with the internal ability to discipline and exact “justice” is. The general homogeneity of the military hierarchy may exacerbate any effect the group- and role-based identities have on decision-making in the disciplinary system. See *generally id.* (discussing the intersection of social identity theory and identity theory).

and potential employees when it comes to hiring and firing rates.¹⁵⁴ As a result, the primarily Caucasian, male commanders, who are less likely to “connect” with young, African-American men and women, may unwittingly make disciplinary decisions that result in racial disparities. This is not to suggest racial bias is limited to the commander—far from it. The individuals investigating crimes and the judge advocates advising the commander, negotiating plea agreements, representing the accused, and ruling on evidentiary issues are just as likely to come to the table with their own biases; in fact, civilian data indicates just that.¹⁵⁵ However, the fact that racially disparate results all but disappear when a military prosecutor takes the case, is indicative of a bias primarily left of the system.¹⁵⁶ This is also not to suggest discretion is entirely dangerous. Discretion in the system is often necessary for efficiency and equity.¹⁵⁷ But, as civilian research indicates, it can also be a driver of inequality if it is not adequately monitored and supervised.

In sum, empirical studies tell the DoD that the problem is not resident in one specific person or policy; it is complex and difficult to untangle. However, a consistent theme weaving through both criminal justice and military justice systems is the amount of unchecked discretion.

¹⁵⁴ See JOHN MORGAN & FELIX VÁRDY, INTERNATIONAL MONETARY FUND, IMF WP/06/237, DIVERSITY IN THE WORKPLACE 4, 22 (2006) (finding a “communication mismatch” due to differing backgrounds between the employer and potential minority employee was a factor in a disparity in hiring rates, and that the firing of minorities always exceeded that of majority candidates).

¹⁵⁵ See REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 134 at 9. Notably, while demographics of the judge advocate community are more difficult to come by, the Army reported in 2019 that less than 1% of its active judge advocate community was African-American. Taking African-Americans, Native Americans, Asians, and Hispanics together, the Army judge advocate community had a racial/ethnic diversity rate of 1.6%. See Memorandum from the U.S. Dep’t of Def. Joint Serv. Comm. on Mil. Just. to Off. of Gen. Couns., subject: Reports of the Services on Military Justice for Fiscal Year 2019, 10 (May 6, 2020) [hereinafter FY19 Military Justice Report]. These statistics are only slightly better than those from 1972, where African-Americans constituted less than 1% of military attorneys. H.R. CONG. BLACK CAUCUS, 92ND CONG., REPORT ON RACISM IN THE MILITARY – A NEW SYSTEM FOR REWARDS AND PUNISHMENTS, 118 CONG. REC. 36,584 (Oct. 14, 1972).

¹⁵⁶ Meaning the bias apparently resonates in the decision to send a subject into the court-martial end of the military justice system—a decision entirely owned by the commander. See “*Racial Disparity in the Military Justice System – How to Fix the Culture*”: Hearing before the Subcomm. on Mil. Pers., H. Armed Serv. Comm., 116th Cong. (2020) (statement of Brenda S. Farrell, Director Defense Capabilities and Management) (explaining disparities are greater at the beginning of the military justice process than at the end).

¹⁵⁷ REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 134 at 11.

While civilian studies help to make sense of the consistency in the DoD's data, they also provide valuable evidence to rebut common counterarguments.

C. Counterarguments

To be sure, the military justice figures do not discount the argument that African-Americans could be committing more crimes or more egregious crimes, thus resulting in higher rates of disciplinary action. However, there are a number of facts that rebut these arguments—many of which have already been discussed.

1. Rebutting the notion African Americans commit more crimes.

First and foremost, studies show that Americans significantly overestimate the number of crimes and the type of crimes committed by racial minorities.¹⁵⁸ As discussed in Section II *supra*, the U.S. bore witness to the development of an association between African-Americans and crime, starting as early as the Reconstruction Era.¹⁵⁹ Studies have since established that not only do Americans strongly associate racial minorities with crime, particularly Caucasians, they significantly overestimate African-American participation in crime.¹⁶⁰ Data further suggests that Caucasians “who more strongly associate crime with people of color” are also “more likely to support punitive criminal justice policies,” creating a possible explanation as to why punitive action disparately impacts African-American service members.¹⁶¹ Meanwhile, although African-Americans are steadily overrepresented in the military justice system, amongst the two largest studies there was no statistically significant disparity in conviction rates, indicating

¹⁵⁸ THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 13 (2014) [hereinafter “RACE & PUNISHMENT”].

¹⁵⁹ *See id.* at 21-26 (describing sources of this association).

¹⁶⁰ *Id.* at 13-14. In a 2010 survey, Caucasian respondents tended to overestimate African-American participation in crime by 20-30%. *Id.* at 13. A 2000 study found Caucasians believed African-Americans to be more “violence-prone” than Hispanics, which was higher still than their perception of Caucasians’ propensity for violence. *Id.* at 13-14.

¹⁶¹ *Id.* at 18.

African-American service members are acquitted of crimes more often.¹⁶² Another DoD study echoed these results, finding “more charges against [African-Americans] were dismissed” because they “were unfounded . . . or could not be proven[.]”¹⁶³

Moreover, empirical studies into the civilian criminal justice system also do not support the notion that African Americans commit more crimes.¹⁶⁴ In fact, even assuming *arguendo* the demographic make-up of the criminal justice system is an accurate depiction of crime, there is substantial evidence to suggest a discriminatory impact exists in the system, as discussed in Section III.B.1 *supra*.¹⁶⁵ However, given that crimes often go unreported to police and that the only cases tracked are those where an arrest was made, it’s impossible to know exactly how many offenses were committed and by which race—particularly in light of evidence that African-Americans are disproportionately arrested.¹⁶⁶ Civilian studies have also found that in cases where infractions are more discretionary (i.e. prison guard determinations, parole/probation revocations) disparities tend to increase.¹⁶⁷ Other factors like shooter bias,¹⁶⁸ exoneration data,¹⁶⁹

¹⁶² See *supra* note 129 and accompanying text. Specifically, the 1972 Task Force found that in the Army, African-Americans were acquitted 47.8% of the time compared to a 22% acquittal rate for Caucasians. See MJ TASK FORCE, *supra* note 74 at 31.

¹⁶³ THOMAS, *supra* note 79 at 10.

¹⁶⁴ REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 134 at 6.

¹⁶⁵ See Section III.B.1 and accompanying citations.

¹⁶⁶ See REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 134 at 5-6; Davis, *supra* note 139 at 27 (“Because police officers are not required to make an arrest when they observe conduct creating probable cause, their discretion may result in the failure to detain or arrest [Caucasians] who commit acts for which their African-American counterparts would often be detained or arrested.”). See also *supra* note 142 and accompanying text.

¹⁶⁷ See THE SENTENCING PROJECT, *supra* note 1 at 9. See *supra* note 146 and accompanying text.

¹⁶⁸ See Kovera, *supra* note 139 at 1143 (“A meta-analysis of 42 studies investigating shooter bias confirmed that participants were more likely to shoot unarmed [African-American] than [Caucasian] men and were more likely to fail to shoot armed [Caucasian] than [African-American] men.”).

¹⁶⁹ See Kovera, *supra* note 139 at 1147 (“Innocent [African-American] people are 3.5 times more likely than innocent [Caucasian] people to be convicted of sexual assault, 7 times more likely to be convicted of murder, and 12 times more likely to be convicted of drug crimes. Among exonerations for sexual assault because of eyewitness misidentification, one half of the cases involved a [Caucasian] women misidentifying [an African-American] man . . . Indeed it is well documented that [Caucasian] witnesses are more likely to misidentify [African-American] and Hispanic perpetrators than [Caucasian] perpetrators.”) (Internal citations omitted).

and drug use trends,¹⁷⁰ further discount the notion that African-Americans simply commit more crimes. As a matter of fact, studies show “[b]eing more phenotypically African in appearance (e.g., darker skin, wider nose, and thicker lips)—as opposed to expressing a moral European facial phenotype” leads to disparate treatment in the criminal justice system.¹⁷¹ Finally, the disparity is not limited to offenders. There is also a notable disparity in the treatment of minority victims.¹⁷² Specifically, despite higher rates of victimization, minority victims are less likely to see their cases pursued, less likely to have their case result in a conviction, and less likely to see their offender sentenced to the death penalty.¹⁷³

2. Rebutting the notion African Americans commit more egregious crimes.

Regarding the nature of the offenses in question, this argument fails to recognize that the disparities remained when controlling for offense type both in the 1972 Task Force and 2019 GAO studies.¹⁷⁴ The GAO’s findings that “minority servicemembers were either less likely to receive a more severe punishment . . . compared to [Caucasian] servicemembers, or there were no statistically significant difference in punishments among racial groups,” further indicates African-Americans do not commit more egregious offenses.¹⁷⁵ Similarly, a study into charging

¹⁷⁰ See Wolf, *supra* note 5 at 34 (“Ninety percent of defendants facing drug charges in federal courts are minorities . . . despite the fact that studies suggest [Caucasians] use drugs at greater rates than minorities.”).

¹⁷¹ Kovera, *supra* note 139 at 1146. See also RACE & PUNISHMENT, *supra* note 158 at 15 (Research showed jurors were more willing to accept ambiguous evidence as indicative of guilt the darker the skin tone of the defendant.).

¹⁷² David C. Baldus, et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984-2005)*, 101 J. CRIM. L. & CRIMINOLOGY 1227, 1299 n. 201, 1300 (2012) (finding a disparity in the likelihood a criminal defendant would receive the death penalty based on the race of the victim); VERA INST. JUST., *supra* note 90 at 8 (five studies found “cases with minority victims were treated more leniently.”); DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, & DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017, 108 (2020) [hereinafter “DAC-IPAD REPORT”] (finding a Caucasian victim of a penetrative sexual offense more likely to see charges preferred against the suspect than a non-Caucasian victim).

¹⁷³ See DEP’T OF JUST., BUREAU OF JUST. STAT., NCJ 255113, CRIMINAL VICTIMIZATION, 2019, 11 (2020); RACE & PUNISHMENT, *supra* note 158 at 10-11; VERA INST. JUST., *supra* note 90 at 8-9.

¹⁷⁴ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 14 at 5, 45, 57; MJ TASK FORCE, *supra* note 74 at 26.

¹⁷⁵ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 14 at 39. The 1972 Task Force also found no statistically significant disparity with the exception of punitive discharges, and the 1992 Navy study found no disparity in

capital crimes and sentencing service members to death found that even when adjusting for “non-racial case characteristics,” statistically significant disparities between African-Americans and Caucasians continued to exist.¹⁷⁶ Civilian statistics on incarceration also show that the disparity in incarceration rates holds true regardless of the severity of offense.¹⁷⁷

Civilian studies have also recognized the role of prosecutorial discretion in charging offenses with mandatory minimums.¹⁷⁸ One such study found that prosecutors are twice as likely to bring charges that carry a mandatory minimum sentence against an African-American defendant than a Caucasian defendant, even after controlling for arrest offense, criminal history, and other pre-charge characteristics.¹⁷⁹ Other studies have found that Caucasians are substantially more likely to have their most serious charged dropped or reduced in plea bargaining than African-Americans, suggesting the disparity is not in the offense, but in the disposition of the offense.¹⁸⁰ Most importantly, civilian research has established that as the egregiousness of the crime decreases, the racial disparity actually increases.¹⁸¹ These findings are corroborated by multiple military studies finding that African-Americans actually tend to be overrepresented in military specific offenses or discharges related to “insubordination,” “attitude,” “motivation,” and “confrontation.”¹⁸²

sentences awarded at NJP. MJ TASK FORCE, *supra* note 74 at 31-32; CULBERTSON & MAGNUSSON, *supra* note 93 at 11-13.

¹⁷⁶ See Baldus, *supra* note 172 at 1272-73, 1300.

¹⁷⁷ See THE SENTENCING PROJECT, *supra* note 1 at 7 (56% of those imprisoned for drug offenses were African-American or Hispanic, while 63% of those serving life or “virtual life” sentences were African-American or Hispanic).

¹⁷⁸ Fischman & Schanzenbach, *supra* note 145 at 736 (citing 3 additional studies that suggested prosecutorial discretion in charging offenses with mandatory minimums led to disparities).

¹⁷⁹ Starr & Rehaví, *supra* note 145 at 7.

¹⁸⁰ Berdejó, *supra* note 145 at 1191.

¹⁸¹ RACE & PUNISHMENT, *supra* note 158 at 21.

¹⁸² See CULBERTSON & MAGNUSSON, *supra* note 93 at 8-9; MJ TASK FORCE, *supra* note 74 at 34-35, 64; THOMAS, *supra* note 79 at vii (1974); *Subcomm. on Courts, Civ. Liberties, & the Admin. of Just.*, *supra* note 67 at 775 (African-Americans “received punishment at double the rate of [Caucasians] for disrespect, disobedience, insubordination, ‘provoking gestures,’ and assaults.”). *But see* WALKER, *supra* note 91 at vii (citing to a 1979 study

3. Responding to calls for the DoD to study the issue more before taking action.

Although not a counterargument *per se*, there is little doubt many will argue for further study before taking action. The DoD absolutely needs to continue studying causes of racial disparity in military justice. However, the notion that that the DoD has insufficient information to begin taking corrective action now is disingenuous. Beyond the fact that the DoD has ample data to work from, as discussed in Sections II and III.A. *supra*, history speaks to need to take action before concerns of racial disparity lose priority to another armed conflict. Moreover, the persistent desire to “study the issue” has set the DoD on an unending cycle of studying problems, not solving them.

Those that would argue against action before further study fail to appreciate the impact of two key factors: (1) further study will take years, during which time racial and ethnic minorities will continue to be subject to disparate treatment; and (2) further study is still unlikely to result in clear answers regarding causation. Taking these issues in turn, the former hearkens back to the DoD’s failure to collect and maintain consistent demographic data, as previously discussed.¹⁸³ At present, the DoD does not have the requisite data to study underlying causes of racial disparity, and has only recently implemented procedures to collect more precise data.¹⁸⁴ With collection newly underway and a dwindling number of cases that proceed through court-martial

that found African-American service members were overrepresented in the commission of violent crimes); DEF. EQUAL OPPORTUNITY MGMT. INST., DIFFERENCES BETWEEN BLACK AND WHITE MILITARY OFFENDERS: A STUDY OF SOCIOECONOMIC, FAMILIAL, PERSONALITY, AND MILITARY CHARACTERISTICS OF INMATES AT THE U.S. DISCIPLINARY BARRACKS AT FORT LEAVENWORTH, RSP 93-2, 4 (1993) (finding African-Americans “tend to be arrested and incarcerated more often for violent crimes”).

¹⁸³ See *supra* Section III.A.1.

¹⁸⁴ See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §5504 (codified at 10 U.S.C. §940a) (requiring implementation of standardized case management and data collection by December 23, 2020); National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, §540I (requiring the DoD to “record the race, ethnicity, and gender of the victim and accused” in each court-martial). See *e.g.*, Marine Administrative Message, 707/20, 231605Z Nov 20, Commandant, Marine Corps, subject: Military Justice Demographic Data (requiring reporting of demographic data beginning in Fiscal Year 2021).

each year, it will arguably take multiple years to gather sufficient data and analyze the results in order to produce actionable information.¹⁸⁵ Even armed with information, the DoD will still have to implement measures to act on it, a process that could itself take substantial time to realize change. Furthermore, results are subject to the quality of the data put into the system, which leads to the second concern.¹⁸⁶

During the life of a disciplinary case, countless discretionary points require study. These include the myriad decisions made by the commander between an allegation and final disposition, but also include the discretion exercised by judge advocates in developing investigations, drafting charges, negotiating terms of plea agreements, making tactical trial decisions, challenging panel members, and requesting sentences upon conviction, to name but a few. Not only will it be incredibly difficult to ensure documentation of each of these decisions, but the best way to assess the reasoning behind the decisions is to ask the decision-makers themselves. However, due to confidentiality and ethical requirements, many of those individuals will not be able to provide the requisite information for quality study. Moreover, those individuals exercising discretion are disincentivized by societal norms to provide any feedback

¹⁸⁵ In Fiscal Year 2019 (FY19), across all five services, the DoD prosecuted 1,556 general and special courts-martial. *See generally* FY19 Military Justice Report, *supra* note 155. This number represents a continuing decrease in the number of courts-martial annually, and an approximately 75% decrease since 2007 alone. *See* Geoff Ziezulewicz, *UCMJ Crackdown: Why Mattis thinks commanders have gone soft on misconduct*, MilitaryTimes, (Sept. 10, 2018), https://www.militarytimes.com/news/your-military/2018/09/10/ucmj-crackdown-why-mattis-thinks-commanders-have-gone-soft-on-misconduct/?utm_source=twitter.com&utm_campaign=Socialflow%20AIR&utm_medium=social&fbclid=IwAR1bewiZHEw3rPdO07llWdS26Wg5ujeQsWCOXAQoa714e3YbCPchvdwGfaY (citing a 70% decrease between 2007 and 2017).

¹⁸⁶ The FBI's Uniform Crime Report similarly is subject to the quality of data input but drives countless studies on policing. *See* JOHN V. PEPPER & CAROLE V. PETRIE, MEASUREMENT PROBLEMS IN CRIMINAL JUSTICE RESEARCH 2-3 (2003) (describing how FBI Uniform Crime Report data is subject to arrest—a discretionary decision on the part of the officer—and jurisdictional differences, which can skew data); REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 134 at 5 (explaining the limitations of FBI data). Unfortunately, like arrests, the only data available will be what is entered into the system, the quality of which can vary by person or even law office. Moreover, the reality of a prosecutor tracking every discretionary decision is minimal, which adversely affects the veracity of the data. It will be incumbent on the military to police itself in maintaining thorough, accurate data—something it already has a poor track record of.

which might suggest racial bias played a role in their decisions.¹⁸⁷ Thus, in a societal climate where racial bias is unacceptable and responses are likely to take on race-neutral justifications, it is unlikely that even close study of these discretion points will tell the whole story, regardless of how hard the DoD looks. This, however, should not prevent the DoD from studying these discretionary decisions much like the studies of the civilian criminal justice system. Rather, the DoD should recognize that such research will take years to develop, not in the least due to the DoD's continued lack of consistency in racial data and the need to evaluate incomplete data.

The DoD, however, does not have years to wait to act on this information. Failure to take action has proven time and again to result in continued disparity, a matter that will: (1) foster mistrust of the military justice system and those who administer it;¹⁸⁸ (2) harm recruiting and retention efforts;¹⁸⁹ (3) slow efforts at reaching much needed diversity amongst leadership positions;¹⁹⁰ (4) exacerbate systemic inequities derived from convictions, a matter at odds with the DoD's stated intent of returning service members to society as better citizens;¹⁹¹ (5) continue

¹⁸⁷ See e.g., Kovera, *supra* note 139 at 1149-53 (explaining how attorneys may develop race-neutral justifications when confronted with challenges to using race in their decision-making processes). See also Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1028-31 (1988) (describing how ignorance, fear, and denial have prevented people from recognizing their own racial bias); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987) (“When an individual experiences conflict between racist ideas and societal ethic that condemns those ideas, the mind excludes his racism from consciousness.”).

¹⁸⁸ REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM *supra* note 134 at 1. See also *supra* Section III.A.2.

¹⁸⁹ See Bishop Garrison, *Challenges to Improving Racial Representation in the Military*, CENTER FOR NEW AMERICAN SECURITY (Aug. 12, 2020), <https://www.cnas.org/publications/commentary/challenges-to-improving-racial-representation-in-the-military>. See also Susan Bryant, et al., *From Citizen Soldier to Secular Saint: The Societal Implications of Military Exceptionalism*, 4 TEX. NAT’L SEC. REV. (forthcoming Spring 2021) (finding that among officers surveyed, African-Americans were the least likely demographic to recommend military service to a young person close to them (55.79%)).

¹⁹⁰ See Garrison, *supra* note 189.

¹⁹¹ See THE SENTENCING PROJECT, *supra* note 1 at 9-11 (describing how criminal convictions create barriers to meaningful participation in society). See e.g., Press Briefing, General Robert Neller, Commandant of the Marine Corps (March 10, 2017), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1110404/departments-of-defense-press-briefing-by-gen-neller-in-the-pentagon-briefing-room/> (“... we return better citizens back to our nation.”).

to hurt the U.S.’s standing on the international stage with respect to human rights issues;¹⁹² and (6) jeopardize the military’s relationship with the American people,¹⁹³ among other unintended consequences. Furthermore, “[i]f unwarranted racial disparities can be reduced, the justice system will gain credibility and serve a more effective role in preventing and responding to crime,” which directly impacts good order and discipline.¹⁹⁴ But all these considerations aside, failure to act means failure to ensure equal treatment of those who volunteered to serve their nation—a nation that values, and quite literally fights for, equality and justice abroad.

For the time being, the DoD can assume the causes identified in comparable civilian data, namely implicit bias, discretion, and lack of oversight, also permeate the military justice system. Using the information yielded from decades of study—both civilian and military—the DoD *can* make a difference in combating racial bias before the first causation study even gets off the ground. Or more importantly, before racial justice takes a backseat to the next armed conflict.

IV. POISED FOR ACTION

The end result is thus: post-conflict civil unrest related to racial equality is answered with studies that bear out the same results decade after decade—African-Americans are overrepresented in the military justice system; the DoD has failed to collect and maintain the demographic data necessary to study the underlying causes of racial disparity; and perceptions of racism in the disciplinary system persist. Although none of these problems are easy to resolve, the DoD is poised to lead a national conversation about racial disparities and justice by taking

¹⁹² See e.g., Press Release, United Nations Human Rights Officer of the High Commissioner, U.N. experts condemn modern-day racial terror lynchings in US and call for systemic reform and justice, U.N. Press Release (Jun. 5, 2020).

¹⁹³ Steven A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 157 (1992) (“The military justice system not only must be fair and impartial, but also must be perceived as being fair and impartial. Without a positive public opinion of the military justice system, the armed forces, in general, will not enjoy a positive public opinion; without a positive public opinion of the armed forces, the national will suffers; and, without a strong national will, the United States cannot expect to succeed in protracted war.”).

¹⁹⁴ REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM *supra* note 134 at 1.

purposeful action now.

With data going back to World War II, to include more than twenty studies addressing these exact issues since 1970, the DoD has a clear picture of consistent racial disparity in the military justice system. Moreover, it is well established from relevant civilian data that racial bias pervades the discretionary points of the civilian justice system. While the DoD has not specifically studied whether racial bias plays a role in the discretionary aspects of military justice, it is fair to say that in light of the parallels between the systems and the amount of discretion placed in a single individual with little oversight, the process is certainly ripe for abuse. Fortunately for the DoD, its structure, access to resources, and well-honed professional ethic create an environment conducive to change from within.

While the military prides itself on the notion of decentralized command, the long-standing hierarchical structure of the military is well-suited for ensuring oversight and accountability. The DoD not only controls access to its data, it controls who is given the authority to exercise discretion in military justice through promotion, selection, and certification processes, what kind of discretion these individuals are given, and how they are trained to use their given discretion.¹⁹⁵ But such control is not to be taken for granted. In recent years, the DoD has faced renewed calls for changes to the military justice system to reduce commander discretion due to concerns about the handling of certain sexual offenses.¹⁹⁶ With rising concerns

¹⁹⁵ Subject to the limitations of statutorily-imposed authorities found in the Uniform Code of Military Justice. *See* THOMAS, *supra* note 79 at 1 (“[T]he military, through its command structure, has greater control over factors that influence the administration of justice and provides for great uniformity of treatment than is possible in the civilian sector. The, the virtual elimination of unfair practices in the reporting, trying and sentencing of offenders in within the realm of reason without sacrificing discipline.”).

¹⁹⁶ *See e.g.*, National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, §540F (requiring the Secretary of Defense to study the “feasibility and advisability of an alternative military justice system” whereby referral and referral decisions are made by a senior judge advocate with significant criminal litigation experience). Following the results of the aforementioned study, The Military Justice Improvement and Increasing Prevention Act was introduced in the Senate on April 29, 2021. *See* S. 1520, 117th Cong. (2021). Notably, this is not the first time

of racial bias permeating the system, failure to take corrective action could frustrate efforts to retain military justice authority within the chain of command. Rather than merely defending the notion of retaining commander authority in the administration of military justice as a means to ensure good order and discipline,¹⁹⁷ the DoD should use the benefits of this structure to improve the fair provision of military justice.

Notably, any such action would require resourcing. As the largest agency in the U.S. Government,¹⁹⁸ the DoD employs the expertise of more than 12,000 civilian and military attorneys,¹⁹⁹ and regularly receives support from outside experts in military and criminal justice.²⁰⁰ Moreover, as the most well-resourced agency in the Executive branch, and with Congress's implied willingness to allocate more resources if necessary, the DoD has access to the requisite resources—both money and manpower—to effect meaningful change. Coupled with its relatively small portion of the federal criminal caseload,²⁰¹ the DoD's hierarchical structure, access to employed and outside expertise, and ability to allocate resources make the DoD well-suited to tackle racial disparity in its justice system.

More importantly, the military has the professional ethic to deliver change. The

there have been calls to remove the commander from the military justice system. A 1946 report issued by the War Department's Advisory Committee on Military Justice recommended "That the system of military justice be divorced from command." U.S. WAR DEP'T, ADVISORY COMM. ON MIL. JUST., THE ADMINISTRATION OF MILITARY JUSTICE: A SUMMARY OF CONSTRUCTIVE CRITICISMS RECEIVED BY THE WAR DEPARTMENT'S ADVISORY COMMITTEE ON MILITARY JUSTICE 4 (1946).

¹⁹⁷ See JOINT SERV. COMM. ON MIL. JUST., REPORT OF THE JOINT SERVICE SUBCOMMITTEE PROSECUTORIAL AUTHORITY STUDY 18-19 (Sept. 2, 2020).

¹⁹⁸ The White House, *Our Government: The Executive Branch*, <https://www.whitehouse.gov/about-the-white-house/our-government/the-executive-branch/>.

¹⁹⁹ Paul C. Ney Jr., *Charney Lecture: The Rule of Law in International Security Affairs: A U.S. Defense Department Perspective*, 52 VAND. J. TRANSNAT'L L. 773, 786 (2019).

²⁰⁰ See e.g., MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS 88 (2015) (describing the appointment of several civilians, to include former judges, former DoD attorneys, and other who served as advisors to the MJRG); DAC-IPAD REPORT, *supra* note 172 at Appendix C (identifying members of the Committee).

²⁰¹ 1,556 courts-martial in FY19 compared to 90,473 criminal filings in U.S. district courts in 2019. See generally FY19 Military Justice Report, *supra* note 155; U.S. Courts, *Federal Judicial Caseload Statistics 2019*, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019>.

professional military ethic “is the core of moral principles, values, and beliefs at the center of the [military’s] culture ‘that distinguishes practitioners from the society they serve while supporting and enhancing that society.’”²⁰² The profession of arms is thus imbued with both internal and external professional obligations—internally to the culture and community, and externally to the American people. Both, importantly, are driven by trust—the trust of the individuals to the right and left; the trust of subordinates and superiors; and the trust of the American people.²⁰³ The military has achieved and maintained this trust through the application of its organizational principles, values, and beliefs—integrity, courage, humility, commitment, honor—to name a few particularly relevant to this conversation. The military professional is thus expected and trained to have the requisite competence, augmented by the courage, character, and compassion to make a lawful, moral decision in the face of fear. Moreover, s/he demonstrates fidelity to the Constitution and selfless service of the nation, reaffirming the trust of the people.

Two of the most important factors in driving change are developing a sense of urgency and creating a coalition for change.²⁰⁴ Neither of these factors are achievable without individuals who genuinely desire change. Thanks to sustained efforts at fostering this professional ethic, there is no shortage of DoD professionals who believe in and seek equality.²⁰⁵ By harnessing this portion of the population to create a coalition and developing a sense of urgency among them, the DoD can inspire the remainder of the force to seek change, reminding those adverse to

²⁰² DON M. SNIDER, ET AL., THE ARMY’S PROFESSIONAL MILITARY ETHIC IN AN ERA OF PERSISTENT CONFLICT 3 (Oct. 2009).

²⁰³ See Martin L. Cook, *Moral Foundations of Military Service*, 30 PARAMETERS 117, 127-29 (2000) (discussing how trust plays a pivotal role in the foundation of ethics in the military).

²⁰⁴ John P. Kotter, *Leading Change: Why Transformation Efforts Fail*, HARV. BUS. REV. 59, 60-63 (May-June 1995).

²⁰⁵ See generally OFFICE OF PEOPLE ANALYTICS, *supra* note 121. A 2017 survey revealed 65% of service members agree the military is paying the correct amount of attention to racial/ethnic harassment and discrimination. *Id.* at 266. Among surveyed service members, 83% agree with the services’ diversity efforts, while 75% say those efforts positively affect the service. *Id.* at 320-23. Of those surveyed, 82% believe diversity is important to building a quality force, 80% believe diversity benefits everyone, and 75% are personally committed to diversity. *Id.* at 322-27.

the cause that their professional ethic—their devotion to one another and the nation—necessitates action.

The DoD has the capability to effect real change today. Further study is necessary, but the DoD must stop waiting for the perfect answer and start taking action where it is needed. Course corrections are inherent to any battle, but fighting the battle necessitates moving beyond the planning phase. Given its structure, resources, and professional ethic, the DoD is not only well-poised to make meaningful change, it has the ability to set the nation on a course toward equal justice, much as it did with desegregation.

V. RECOMMENDATIONS

As the civilian criminal justice studies indicate, there is no easy solution to the complex web that produces racial disparity.²⁰⁶ However, given that some of the most nuanced drivers of inequality and disparity in the criminal justice system do not apply to the military justice system, and that the military justice is relatively small and malleable by comparison to the civilian system, real change is feasible. Change, nevertheless, will require a thoughtful approach to develop the requisite sense of urgency and ensure buy-in. This paper thus proposes a three-pillared plan that the DoD can implement now while it continues to study specific causes of racial disparity: (1) own it; (2) take corrective action; and (3) build trust.

A. Own it.

As the adage goes: the first step to fixing a problem is acknowledging that you have one. In order to achieve its egalitarian aims, the DoD must begin by taking ownership of its history and the disparate impact it has had on a substantial portion of its force. Without ownership—without truly acknowledging the failures that have led to these disparities—the DoD will not be

²⁰⁶ See REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM *supra* note 134 at 62.

able to accomplish racial equality in any arena, particularly in military justice. Contrary to potential counterarguments, owning this aspect of history and dedicating to change, is not to assert that service members are racist, prejudiced, or any other distorted mischaracterization. On the contrary, it is an acknowledgment of how each member of the force comes to it with their own experiences, which drive implicit biases. It is an understanding that individual implicit biases can lead to systemic results. It is an acceptance of the need to address organizational shortcomings in pursuit of both justice and justness. And it is a recognition of the challenges a substantial portion of the force faces on a daily basis, but often does not speak of.

B. Take corrective action.

Once the DoD has taken ownership, it must begin addressing the problem in a timely fashion in order to develop a sense of urgency. As previously discussed, without specific research on causation, major military justice overhauls would be ill-advised. But this does not mean the DoD should wait for the results of years of study on causation. The DoD instead, should act on the information it already has access to: (1) implicit bias training and cultural awareness training can mitigate the effects of bias—even if by merely starting conversations and increasing awareness;²⁰⁷ (2) diversity, particularly among leadership, can improve decision making and reduce disparities;²⁰⁸ (3) discretion requires oversight;²⁰⁹ and (4) there is a need for

²⁰⁷ See EO STUDIES, *supra* note 68 at 1, 4, 26 (describing the effectiveness of “racial harmony” training in the Army); INDEPENDENT RACIAL DISPARITY REVIEW, *supra* note 108 at 108 (Service members themselves recommended requiring cultural and bias training to “ensure a fair and equitable military discipline process”); Robert J. Smith, *Keynote Address: Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 HAWAII L. REV. 295, 300-3, 312 (2015) (The author discusses the effectiveness of implicit bias training, noting that while it can be effective, it generally has temporal limitations. He also posits, “Even if implicit bias training does not significantly reduce implicit bias, or if reduced implicit biases do not translate into significant reductions in disparate outcomes, the trainings themselves are still valuable as a palatable entryway into discussing disparities and the need for reform.”); Patrica G. Devine, et al., *Long-term reduction in implicit race bias: A prejudice habit-breaking intervention*, 48 J. EXPERIMENTAL SOC. PSYCH. 1267, 1276 (2012) (arguing that a “habit-breaking” methodology can lead to enduring reductions in implicit bias). *But see* Kovera, *supra* note 139 at 1153 (articulating concerns with the ability to reduce implicit bias through training).

²⁰⁸ See *supra* Section III.A.2. (discussing how diversity in leadership can impact disparity rates and perceptions

more information on the specific causes of disparity.²¹⁰

While this paper analyzed the likely bias emanating from the primary discretion-holder—the commander—it does not suggest that only commanders are in need of training. As the civilian data has so aptly recognized, every person in the justice process brings individual biases to the table: law enforcement, prosecutors, defense attorneys, judges, and others. When these individuals harbor similar implicit biases, the aggregation of their decisions can result in disparate outcomes.²¹¹ Thus, it is incumbent on the DoD to ensure all persons in the justice process are adequately trained to identify their biases, to recognize the biases of other decision-makers before they materialize, to understand the implication of biases, and most importantly, to combat them. In reality, this means training the whole force. As a hierarchical organization, even the most junior members are being trained for leadership roles and research shows that countering bias takes a sustained effort, one that the DoD should introduce early on.²¹²

Furthermore, training cannot be limited to implicit bias training; it must be expanded to introduce service members to different cultures in order to prevent cultural misunderstandings

thereof). *See also supra* note 76 and accompanying text; Juliet Bourke & Bernadette Dillon, *The Diversity & Inclusion Revolution: Eight Powerful Truths*, 22 DELOITTE REV. (2018), 82, 84-87 (finding inclusive leadership over diverse teams directly resulted in increased team performance, decision-making quality, and collaboration). There is also a body of social science research related to the “contact hypothesis” or “intergroup contact theory,” which posits that increasing interactions with diverse populations reduces prejudice and bias. *See* Thomas F. Pettigrew, *Future directions for intergroup contact theory and research*, 32 INT’L J. INTERCULTURAL REL. 187, 188 (2008).

²⁰⁹ *See* INDEPENDENT RACIAL DISPARITY REVIEW, *supra* note 108 at 16, 123 (identifying lack of oversight as a concern and recommending more oversight in diversity and inclusion matters); MJ TASK FORCE, *supra* note 74 at 117, 119, 121 (making recommendations for oversight and periodic review of military justice matters); REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM *supra* note 134 at 9, 15, 59 (This manual provides policy recommendation for reducing racial disparity in the criminal justice system. One common recommendation is to implementing oversight mechanisms to guard against racial bias.).

²¹⁰ *See* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 14 at 39 (the services lack comprehensive study of causation).

²¹¹ *See supra* Section III.B.1; STEPHEN B. KNOUSE, DEF. EQUAL OPPORTUNITY MGMT. INST., RSP 93-2, DIFFERENCES BETWEEN BLACK AND WHITE MILITARY OFFENDERS: A STUDY OF SOCIOECONOMIC, FAMILIAL, PERSONALITY, AND MILITARY CHARACTERISTICS OF INMATES AT THE U.S. DISCIPLINARY BARRACKS AT FORT LEAVENWORTH 4 (1993) (“bias may result in an ‘accumulated disadvantaged status’ where initial differential treatment may become magnified as the individual moves through the [military] justice process.”).

²¹² *See* Devine, et al., *supra* note 207 at 1276.

that drive biases.²¹³ This information is not new to the DoD; DEOMI studies from as far back as the Vietnam War have shown that these training events can have a positive impact on the force.²¹⁴

That said, training alone will not suffice. As Vice Admiral John Hannink, U.S. Navy, stated during the aforementioned Congressional hearings, the military has an “unconscious bias against unconscious bias training.”²¹⁵ While profound, it may be more apt to suggest the military has a *conscious* bias against unconscious bias training. This is precisely why leadership is so important in securing buy-in and achieving measurable results. Harnessing the professional ethic of service members in messaging the import of this cause is vital to its success. Crucially, it cannot be just minority leaders and/or civilian leaders championing change; it must come from the heterosexual, Caucasian, Christian, cisgender male commander-types—those who can shift the message from a fight against the Caucasian man, to a fight *with* the Caucasian man to achieve racial equality. Service members inherently want to be victorious, but in order to fight they must have a cause and must not see themselves a victim of that cause.

The DoD can better achieve its desired results if it makes a focused effort to ensure diversity amongst its disciplinary decision-makers. It should start by encouraging a least one

²¹³ See REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM *supra* note 134 at 12 (recommending “cultural competency training” for law enforcement to reduce racial disparity in the criminal justice system). This recommendation echoes that of the 1972 Task Force encouraging cultural awareness training. See MJ TASK FORCE, *supra* note 74 at 113, 115-16. In fact, members of the U.S. Air Force explicitly recommended culture and bias training as a mechanism to promote fairness in the military justice system. See INDEPENDENT RACIAL DISPARITY REVIEW, *supra* note 108 at 108.

²¹⁴ See EO STUDIES, *supra* note 68 at 26 (A 1978 study found that “Enlisted soldier serving under commanders from the experimental [racial harmony] training group reported that their commanders implemented more policies to ensure racial harmony and that their commanders were more effective in dealing with racial problems.”).

²¹⁵ “*Racial Disparity in the Military Justice System – How to Fix the Culture*”: Hearing before the Subcomm. on Mil. Pers., H. Armed Serv. Comm., 116th Cong. (2020) (statement of Vice Admiral John G. Hannink, U.S. Navy, Judge Advocate General of the Navy). To combat this bias against training, it is imperative that training not be computer-based, nor a mere PowerPoint slide presentation. Nor should the training be the same for all service members. Rather, the DoD should look to internal organizations (i.e. DEOMI) and external experts (i.e. National Consortium on Racial and Ethnic Fairness in the Courts) to develop age and role appropriate training materials.

point of diversity on each command team (race, ethnicity, gender, etc.), particularly in organizations lacking diversity amongst its junior ranks. The DoD must also continue to identify mechanisms for recruitment, retention, and promotion amongst the same minority populations to ensure diversity amongst the lowest levels of leadership. As discussed in Section III.A.2. *supra*, studies have shown that low-level supervisors have an outsized impact on good order and discipline and diversity amongst them can reduce racial disparities in discipline.²¹⁶ These efforts must also be extended to the judge advocate community. While there is a shortage of data on the current make-up of the judge advocate population, the little information available is reminiscent of Reconstruction Era courtrooms dominated by Caucasian men.²¹⁷ By encouraging diversity at all levels of the disciplinary chain, the DoD stands to encourage informal oversight of its military justice system.

Informal oversight, however, cannot replace formal oversight mechanisms. The DoD must immediately implement measures to track race, ethnicity, and other demographics consistently across the services at *all* disciplinary forums. This decades-old recommendation cannot be ignored any longer. Moreover, the DoD must implement mechanisms to track and monitor discretion points in the military justice system. While seemingly unwieldy, such measures can make the difference between retaining command authority over discipline and losing it, a factor even less compelling than fighting racial injustice. Only then will the DoD be armed to study specific causes of disparity. Some relevant areas of study should then include and address the following:

- Military occupational specialties: Do certain military occupational specialties have

²¹⁶ See *supra* notes 121-123 and accompanying text.

²¹⁷ See FY19 Military Justice Report, *supra* note 155 (reporting that less than 1% of Army judge advocates were African-American and only 1.6% of the community was racially or ethnically diverse in 2019).

higher rates of disparity? If so, is there a connection between the disparity rate and the diversity rate in those specialties?

- **Offense-specific:** Studies show that minorities tend to be punished more for insubordination and military-specific offenses.²¹⁸ The DoD should study this further to identify causes of insubordination, to include the potential role of cultural misunderstanding and perception. This research could very well lead to findings about race relations in the military writ large that could impact military justice.
- **Convening Authority / Commander:** To what extent do disparities change depending on the level of the commander making disciplinary decisions (i.e. O-5, O-6, flag officer)? The higher in rank, the more likely the decision-maker is removed from daily interaction with the offender. Similarly, the higher in rank, the more access the commander has to staff judge advocate advice and the more oversight in place. What, if any, impact do these factors have?
- **Allegations:** Is there a disparity in the reporting of offenses by race or ethnicity? If so, what, if anything, can be gleaned from victim demographics?
- **Command investigations:** To what extent are command investigations—investigations conducted by non-law enforcement—subject to racial bias and disparate outcomes? How does this effect the commander’s decision to take disciplinary action and select the appropriate forum for discipline?
- **Administrative actions:** If there is a visible disparity in the provision of NJP and courts-martial, one could expect an even higher disparity in administrative actions due to the heightened discretion at lower leadership levels with minimal oversight. To what extent

²¹⁸ See CULBERTSON & MAGNUSSON, *supra* note 93 at 8-14.

does this hold true?

- Charging: Civilian studies found significant disparity in charging strategies, which appear to be race related.²¹⁹ The DoD should assess the extent to which prosecutors are bringing heavier charges or negotiating away heavier charges in a disparate fashion. The military should also evaluate those cases prosecutors are non-recommending for court-martial, and the extent to which commanders heed such advice.
- Plea agreements: Much like civilian studies, the DoD needs to study the equity of plea agreements between races and ethnicities. This should include plea agreements and pre-preferred agreements that result in alternative dispositions (non-court-martial disposition).
- Pretrial restraint: Previous military studies and civilian studies indicate a racial disparity in the decision to impose pretrial restraint or pretrial confinement.²²⁰ The DoD should study the decision to impose restraint, the likelihood of release during the initial review officer hearing, and the correlation between confinement and accepting plea agreements.
- Defense counsel: While the military cannot study the advice defense counsel are giving to their clients due to attorney-client privilege, it can study the extent to which defense counsel negotiate plea agreements, file offensive motions in support of their client's case, and try cases to verdict based on race. By contrast, most NJP cases do not incur attorney-client privilege. Thus, the military should consider whether heightened NJP rates among minorities are somehow related to defense counsel recommendations to accept NJP.
- Recidivism: While conducting studies into any of the aforementioned topics, the DoD should assess the extent to which recidivism plays a role in the decision to discipline any

²¹⁹ See *supra* notes 178-180 and accompanying text.

²²⁰ See MJ TASK FORCE, *supra* note 74 at 28-29; Kovera, *supra* note 139 at 1145.

member at court-martial, as it may have an impact on the context of racial disparity.

- Perceptions: As previously discussed, perception can be just as corrosive as reality.

Thus, it is vital that the DoD regularly check the pulse of its service members through surveys on their perceptions of racial disparity.

While these recommended areas of study certainly do not run the gamut of discretion points in the military justice system, they offer to provide valuable insight into the specific causes of racial disparity within it. By addressing these areas of concern now, rather than waiting for further research, the DoD will be well on its way to building trust amongst the force and the American public in its justice system.

C. Build trust.

Taking ownership is the DoD's first step to building trust across the force. But building trust requires more than words. By instituting measurable steps to address implicit bias, addressing long-standing issues with demographic data collection, and initiating studies into the above-listed areas of concern, coupled with a vocal publication and support of these actions by *military* leadership, the DoD can begin to build trust from within to combat not only perceptions of racial bias, but the implicit biases that drive disparity. Importantly, the DoD must look at the pursuit of equality much like the pursuit of democracy—as never ending. Even after finding measurable success, the DoD should continue to voluntarily partake in regular study of its disciplinary data and servicemember perceptions. Justice must be transparent, not only for justice's sake, but to ensure the U.S. military is holding up its end of the bargain to its members and the American public it represents. By concurrently addressing diversity amongst leadership, the DoD stands to combat decades of mistrust and set an example for the nation to follow.

VI. CONCLUSION

Today, “more [African American] men are barred from voting than when the 15th Amendment was ratified.”²²¹ This is the inevitable result of discriminatory policies and practices in the U.S.’s criminal justice system.²²² But these concerns are not limited to the civilian criminal justice system. Decades of data has identified a remarkably consistent trend in the overrepresentation of racial minorities, specifically African-Americans, in the military justice system.²²³ While causation is less clear, the consistency of this data, coupled with relevant civilian research supports the argument that the military justice system has been and continues to be subject to racial bias. The DoD must continue to collect and study data in order to identify specific causes, but need not wait for such data to begin taking action to address undertones of racial bias. By establishing a three-pillared plan structured on ownership, corrective action, and building trust, the DoD can make measurable progress in reducing racial bias and the corrosive effects of the perception of racial bias. But doing so cannot wait. History has established that failures to correct racial inequality has resulted in a cycle of unrest surrounding armed conflict.²²⁴ In 2021, the DoD has sufficient information, the requisite resources, and the professional ethic to enact change. If the DoD does not take action now, it will once again succumb to the requirements of armed conflict and fail to address racial inequality. And while the DoD cannot prevent post-conflict civil unrest amongst civilians, it can certainly establish a pathway for equality that its civilian counterparts can look upon, much as it has done in the past. Echoing the words of the President’s Committee on Civil Rights, “the time for action is now.”²²⁵

²²¹ Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1047 (2010).

²²² See generally, Butler, *supra* note 221; ALEXANDER, *supra* note 16; Thompson, *supra* note 25.

²²³ See *supra* Sections II & III; Appendix A.

²²⁴ See *supra* Section II.

²²⁵ PRESIDENT’S COMM. ON CIVIL RIGHTS, *supra* note 24 at 162-63.

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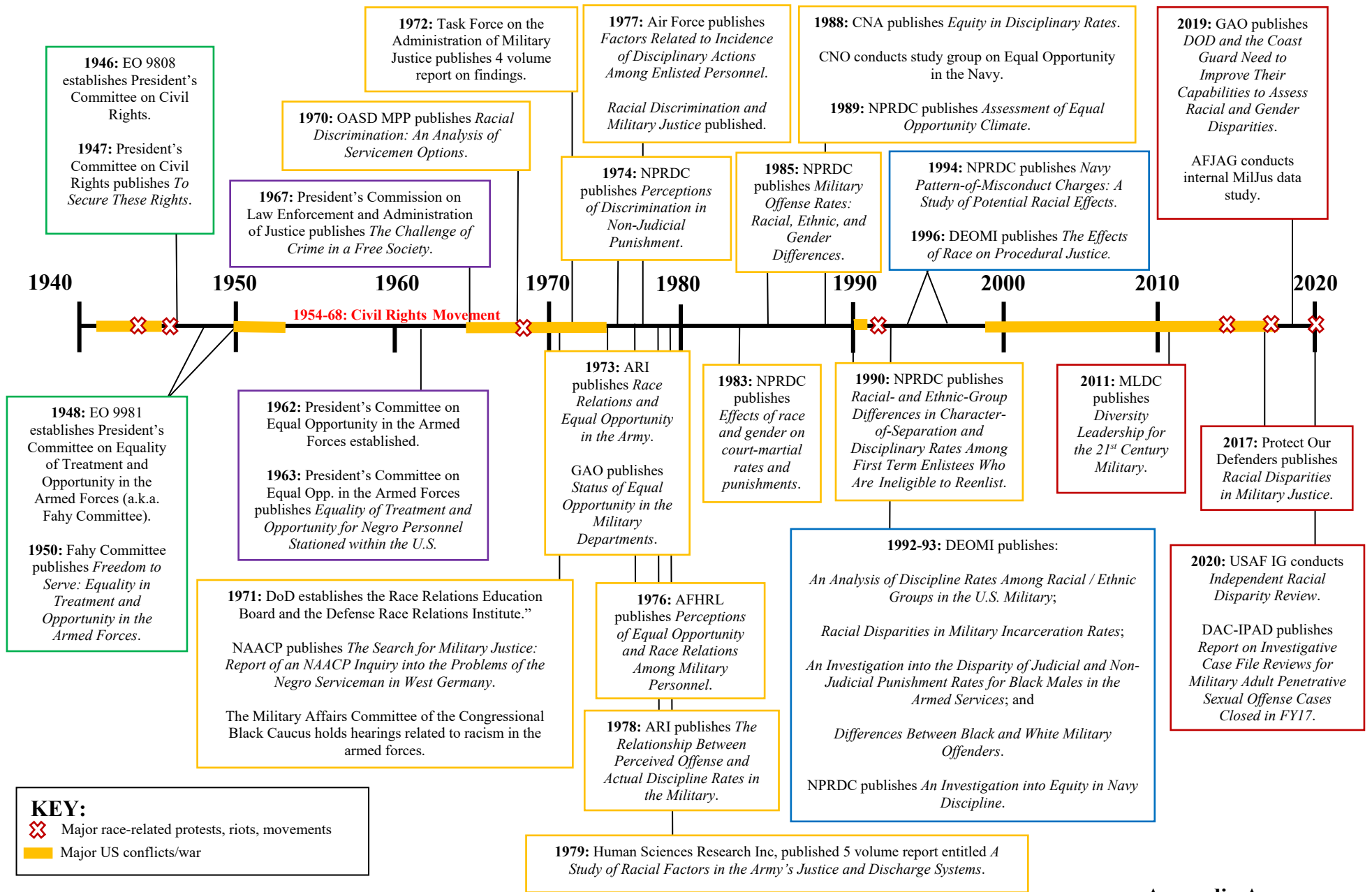
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60
 1974-1994: DoD conducts 72 different studies related to equal opportunity in the armed forces.

A Chronological Look at Government Studies on Race and Justice

1947: The President's Committee on Civil Rights publishes its report *To Secure These Rights*, finding that the justice process does not give minorities "full and equal justice." The report calls for the desegregation of the armed forces. PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 28-29 (1947).

1950: The President's Committee on Equality of Treatment and Opportunity in the Armed Forces publishes its report, *Freedom to Serve: Equality in Treatment and Opportunity in the Armed Forces*, finding that racial segregation led to manpower inefficiencies and discrimination. The report calls for the desegregation of the armed forces. PRESIDENT'S COMM. ON EQUAL TREATMENT & OPPORTUNITY IN THE ARMED FORCES, FREEDOM TO SERVE: EQUALITY IN TREATMENT AND OPPORTUNITY IN THE ARMED FORCES 67 (1950).

1963: The President's Committee on Equal Opportunity in the Armed Forces publishes its report, *Equality of Treatment and Opportunity for Negro Military Personnel Stationed Within the United States*, finding that although policies were not facially discriminatory, the services still lacked equal treatment of African-Americans and in some cases actively discriminated against them. The report also calls for improved maintenance of racial data. KRISTY N. KAMARCK, CONG. RSCH. SERV., R44321, DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED SERVICES: BACKGROUND AND ISSUES FOR CONGRESS 15-16 (2019); PRESIDENT'S COMM. ON EQUAL OPPORTUNITY IN THE ARMED FORCES, EQUALITY OF TREATMENT AND OPPORTUNITY FOR NEGRO MILITARY PERSONNEL STATIONED WITHIN THE UNITED STATES 90-91 (1963).

1967: The President's Commission on Law Enforcement and Administration of Justice publishes its report *The Challenge of Crime in a Free Society*, finding "race is almost as important as that of sex in determining whether a person is likely to be arrested and imprisoned for an offense." PRESIDENT'S COMM. ON L. ENF'T & ADMIN. JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 23 (1967).

1970: The Office of the Assistant Secretary of Defense, Maintenance and Policy Programs (OASD MPP) publishes *Racial Discrimination: An Analysis of Servicemen Opinions*, finding African-Americans "were twice as likely as [Caucasians] to have [received NJP] or court-martial punishment[.]" which created a perception of racial discrimination. CASE K. TONG & CATHY A. JAGGARS, DEF. EQUAL OPPORTUNITY MGMT. INST., PHASE 1 REPORT: AN INVESTIGATION INTO THE DISPARITY OF JUDICIAL AND NON-JUDICIAL PUNISHMENT RATES FOR BLACK MALES IN THE ARMED SERVICES, APPX A 3 (1992) (citing U.S. Dep't of Def., Off. of Assistant Sec'y of Def., Manpower & Reserve Affairs, Special Assistant for Pol'y Stud., Racial Discrimination: An Analysis of Serviceman Opinions (1970)).

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1971: The Defense Equal Opportunity Management Institute is established (originally named the Defense Race Relations Institute). KRISTY N. KAMARCK, CONG. RSCH. SERV., R44321, DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED SERVICES: BACKGROUND AND ISSUES FOR CONGRESS 18 (2019).

1971: The National Association for the Advancement of Colored People (NAACP) publishes *The Search for Military Justice: Report of an NAACP Inquiry into the Problems of the Negro Serviceman in West Germany*, finding African-Americans are overrepresented in confinement facilities; made up more than 60% of those convicted of “willful disobedience;” and “received punishment at double the rate of [Caucasians] for disrespect, disobedience, insubordination, ‘provoking gestures,’ and assaults.” *Amnesty: Hearings on H.R. 236, H.R. 674, H.R. 2167, H.R. 3100, H.R. 5195, H.R. 10979, H.R. 10980, H.R. 13001, H. Con. Res. 144, and H. Con. Res. 385 Before the Subcomm. on Courts, Civ. Liberties, & the Admin. of Just. of the H.R. Comm. on the Judiciary*, 93rd Cong. 774-75 (1974) (citing NATHANIEL R. JONES, ET AL., THE SEARCH FOR MILITARY JUSTICE: REPORT OF AN NAACP INQUIRY INTO THE PROBLEM OF THE NEGRO SERVICEMAN IN WEST GERMANY, NAACP SPECIAL CONTRIBUTION FUND (New York: 1971)).

1971: The Congressional Black Caucus holds hearings on racism in the armed forces and publishes a report entitled *A Report on Racism in the Military – Our Men Abroad*. The Caucus found African-Americans stationed in North Atlantic Treaty Organization (NATO) countries in Europe were overrepresented at court-martial and in pretrial confinement, among other concerns, and highlighted the widespread perception amongst African-Americans of racial bias in the military justice system. H.R. CONG. BLACK CAUCUS, 92ND CONG., REPORT ON RACISM IN THE MILITARY – OUR MEN ABROAD, 117 CONG. REC. 41,854 (Nov. 17, 1971).

1971-72: The Military Affairs Committee of the Congressional Black Caucus publishes a report entitled *Racism in the Military: A New System for Rewards and Punishments*. The report articulates concerns of discretion leading to the overrepresentation of African-Americans in the provision of NJP, court-martial, and pretrial confinement. The Caucus recommended the establishment of an Assistant Secretary of Defense for Civil Rights. H.R. CONG. BLACK CAUCUS, 92ND CONG., REPORT ON RACISM IN THE MILITARY – A NEW SYSTEM FOR REWARDS AND PUNISHMENTS, 118 CONG. REC. 36,582 - 36,596 (Oct. 14, 1972).

1972: The Task Force on the Administration of Military Justice publishes a four-volume report, finding:

- Intentional and systemic racism in the military justice system;
- African Americans received written counselings less than Caucasian counterparts for the same offenses;
- African Americans were significantly overrepresented at non-judicial punishment;
- African Americans were significantly overrepresented at court-martial;
- African Americans were acquitted at rates comparable to Caucasian counterparts;

A Chronological Look at Government Studies on Race and Justice

- African Americans received comparable punishments to Caucasian counterparts, except that they received disproportionately high punitive discharges;
- Perceptions of racism in the military justice process were corrosive; and
- The services did not maintain a uniform system of demographic data.

U.S. DEP'T OF DEF., REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES, VOL. I-IV (1972).

1973: The U.S. Army Research Institute for Behavioral and Social Sciences (ARI) publishes *Race Relations and Equal Opportunity in the Army*, describing recent complaints about the military justice system, particularly the amount of authority and discretion placed in the commander, and highlighting the findings of the 1972 Task Force on the Administration of Military Justice. P.G. NORDLIE & J.A. THOMAS, U.S. ARMY RSCH. INST. FOR BEHAVIORAL & SOC. SCI., ARI 73-2, RACE RELATIONS AND EQUAL OPPORTUNITY IN THE ARMY 29-46 (1973).

1973: The General Accounting Office (now-Government Accountability Office) publishes *Status of Equal Opportunity in the Military Departments*, finding a perception of racism in the military justice process amongst African Americans and a lack of record-keeping on demographic data to permit analysis. U.S. GEN. ACCT. OFF., STATUS OF EQUAL OPPORTUNITY IN THE MILITARY DEPARTMENTS, B-178300, 18-19 (1973).

1974 – 1994: DEOMI conducts 72 separate studies on race relations and equal opportunity in the military. U.S. GEN. ACCT. OFF., EQUAL OPPORTUNITY: DOD STUDIES ON DISCRIMINATION IN THE MILITARY, GAO/NSAID-95-103, 1 (1995).

1974: The Navy Personnel Research and Development Center publishes *Perceptions of Discrimination in Non-Judicial Punishment*, finding no statistically significant disparity in the imposition of NJP or the punishment received. The study recognized, however, that there was no way of knowing how many cases were handled without going to NJP. The study also found high levels of perceived racism in the imposition of NJP. PATRICA J. THOMAS, ET AL., NAVY PERS. RSCH & DEV. CTR., NPRDC-TR74-22, PERCEPTIONS OF DISCRIMINATION IN NON-JUDICIAL PUNISHMENT viii (1974).

1974: The Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House of Representative's Committee on the Judiciary held hearings to determine whether or not to grant amnesty following the Vietnam War. During these hearings, the Subcommittee received evidence from the ACLU about the overrepresentation of African-Americans in the military justice system. This evidence specifically included the findings from the 1972 Task Force on the Administration of Military Justice and the 1971 NAACP report from West Germany. *Amnesty: Hearings on H.R. 236, H.R. 674, H.R. 2167, H.R. 3100, H.R. 5195, H.R. 10979, H.R.*

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10980, H.R. 13001, H. Con. Res. 144, and H. Con. Res. 385 Before the Subcomm. on Courts, Civ. Liberties, & the Admin. of Just. of the H.R. Comm. on the Judiciary, 93rd Cong. 773 (1974).

1976: The Air Force Human Resources Laboratory publishes *Perceptions of Equal Opportunity and Race Relations Among Military Personnel*, finding that racial minorities perceived inequality in the application of military justice. WILLIAM E. BEUSSE & EARL A. WALLER, AIR FORCE HUM. RES. LAB., AFHRL-TR-75-54, PERCEPTIONS OF EQUAL OPPORTUNITY AND RACE RELATIONS AMONG MILITARY PERSONNEL 5-7 (1976).

1977: Ronald W. Perry publishes *Racial Discrimination and Military Justice*, finding higher incarceration rates for African Americans, but no difference in sentence length when controlling by offense type. CASE K. TONG & CATHY A. JAGGARS, DEF. EQUAL OPPORTUNITY MGMT. INST., PHASE I REPORT: AN INVESTIGATION INTO THE DISPARITY OF JUDICIAL AND NON-JUDICIAL PUNISHMENT RATES FOR BLACK MALES IN THE ARMED SERVICES, APPX A 6-7 (1992) (citing RONALD W. PERRY, RACIAL DISCRIMINATION AND MILITARY JUSTICE (1977)).

1977: The U.S. Air Force publishes *Factors Related to Incidence of Disciplinary Actions Among Enlisted Personnel*, finding African-Americans are 1.5 times more likely to receive non-punitive action; 1.3 times more likely to receive non-judicial punishment; and 1.9 times more likely to be subject to court-martial than Caucasians. CASE K. TONG & CATHY A. JAGGARS, DEF. EQUAL OPPORTUNITY MGMT. INST., PHASE I REPORT: AN INVESTIGATION INTO THE DISPARITY OF JUDICIAL AND NON-JUDICIAL PUNISHMENT RATES FOR BLACK MALES IN THE ARMED SERVICES, APPX A 7 (1992) (citing WILLIAM E. BEUSSE, AIR FORCE HUM. RES. LAB., AFHRL-TR-75-21, FACTORS RELATED TO THE INCIDENCE OF DISCIPLINARY ACTIONS AMONG ENLISTED PERSONNEL (1977)).

1978: The Army Research Institute for Behavioral and Social Sciences publishes *The Relationship Between Perceived Offense and Actual Discipline Rates in the Military*, finding African Americans received a disproportionate number of non-judicial punishments and involuntary discharges with an undesirable characterization of service, despite self-reporting fewer violations of the law than Caucasians self-reported in an anonymous survey. ROLAND J. HART, U.S. ARMY RSCH. INST. FOR THE BEHAVIORAL & SOC. SCI., ARI-RM-77-30, THE RELATIONSHIP BETWEEN PERCEIVED OFFENSE AND ACTUAL DISCIPLINE RATES IN THE MILITARY (1978).

1979: The Human Sciences Research Inc, publishes a five-volume report entitled *A Study of Racial Factors in the Army's Justice and Discharge Systems*. "Major findings and conclusions included:

- (1) [African-Americans] were overrepresented in military arrests from 1974-78, although amount of overrepresentation declined from 1975-78;
- (2) [African-Americans] were overrepresented in the military prison population from 1974-78, although the amount of overrepresentation declined from 1975;

A Chronological Look at Government Studies on Race and Justice

- (3) [African-Americans] were underrepresented in drug arrests but overrepresented in arrests for violent crimes;
- (4) [African-Americans] received Article 15s at higher rate than [Caucasians];
- (5) No relationship between seriousness of offense and severity of punishment for [African-American]Article 15s, but there was for [Caucasians];
- (6) [African-Americans] are overrepresented among those found guilty of court-martial of crimes against persons;
- (7) [Caucasians] received a greater proportion of paroles than [African-Americans].”

CASE K. TONG & CATHY A. JAGGARS, DEF. EQUAL OPPORTUNITY MGMT. INST., PHASE 1 REPORT: AN INVESTIGATION INTO THE DISPARITY OF JUDICIAL AND NON-JUDICIAL PUNISHMENT RATES FOR BLACK MALES IN THE ARMED SERVICES, APPX A 7-8 (1992) (citations omitted).

1983: The Navy Personnel Research and Development Center publishes *Effects of race and gender on court-martial rates and punishments*, “examining court-martial rates and types of punishments awarded to [African Americans] and [Caucasians]. The analyses found no difference in the number of offenders or offenses committed, but did find that in five comparisons, ‘...offenses of minority personnel resulted in harsher sentences than did [Caucasian] offenses.’” NAVY PERS. RSCH & DEV. CTR, AN INVESTIGATION INTO EQUITY IN NAVY DISCIPLINE, NPRDC-TR-92-17, 4 (1992) (citing S. CONWAY, NAVY PERS. RSCH & DEV. CTR., NPRDCSR-83-20, EFFECTS OF RACE AND GENDER ON COURT-MARTIAL RATES AND PUNISHMENTS (1983)).

1985: The Navy Personnel Research and Development Center publishes *Military Offense Rates: Racial, Ethnic, and Gender Differences*, finding that African-Americans received non-judicial punishment more often than Caucasians, but not courts-martial. The study attributed higher NJP rates to higher involvement in crime. SUSAN L. POLAN & PATRICIA J. THOMAS, NAVY PERS. RSCH & DEV. CTR, MPL TECH. NOTE 86-2, MILITARY OFFENSE RATES: RACIAL, ETHNIC, AND GENDER DIFFERENCES (1985).

1988: The Center for Naval Analyses publishes *Equity in Disciplinary Rates*, examining “equity of discipline after the Marine Corps Affirmative Action Plan assessment consistently found an overrepresentation of minorities among marines receiving UCMJ punishments.” It found “commands with higher number of [African-American] marines had NJP rates for [African-Americans] that more closely resembled the NJP rates for [Caucasians] in the same command.” The report also found issues with the consistency in maintenance of disciplinary data. AMY L. CULBERTSON & PAUL MAGNUSSON, NAVY PERS. RSCH & DEV. CTR, NPRDC-TR-92-17, AN INVESTIGATION INTO EQUITY IN NAVY DISCIPLINE 4-5 (1992) (citing G. E. HORNE, CTR. FOR NAVAL ANALYSES, CRM 88-26, EQUITY IN DISCIPLINARY RATES (1988)).

1988: The Chief of Naval Operations (CNO) Study Group on Equal Opportunity in the Navy found “higher rates of other-than-honorable (OTH) and judicial separations received by [African-Americans] and Hispanics compared to [Caucasians].” AMY L.

A Chronological Look at Government Studies on Race and Justice

CULBERTSON & PAUL MAGNUSSON, NAVY PERS. RSCH & DEV. CTR, NPRDC-TR-92-17, AN INVESTIGATION INTO EQUITY IN NAVY DISCIPLINE 5 (1992) (citing CHIEF OF NAVAL OPERATIONS, CNO STUDY GROUP ON EQUAL OPPORTUNITY IN THE NAVY (1988)).

1989: The Navy Personnel Research and Development Center publishes *Assessment of Equal Opportunity Climate: Results of the 1989 Navy-wide Survey*, finding African-Americans were significantly less likely to believe the disciplinary system was fairly applied across races. Notably, nearly 30% of Caucasian enlisted service members and approximately 24% of all Caucasian service members expressed concern about the impact of race on punishment. PAUL ROSENFELD, ET AL., NAVY PERS. RSCH & DEV. CTR, NPRDC-TR-92-14, ASSESSMENT OF EQUAL OPPORTUNITY CLIMATE: RESULTS OF THE 1989 NAVY-WIDE SURVEY 33 (1989).

1989: The DoD Military Equal Opportunity Conference finds “no DOD-wide standardized system of reporting and retrieving information exists to determine the basis for disparities in military disciplinary rates.” CASE K. TONG & CATHY A. JAGGARS, DEF. EQUAL OPPORTUNITY MGMT. INST., PHASE I REPORT: AN INVESTIGATION INTO THE DISPARITY OF JUDICIAL AND NON-JUDICIAL PUNISHMENT RATES FOR BLACK MALES IN THE ARMED SERVICES, APPX A 10 (1992).

1990: The Navy Personnel Research and Development Center publishes *Racial- and Ethnic-Group Differences in Character-of-Separation and Disciplinary Rates Among First Term Enlistees Who Are Ineligible to Reenlist*. The report analyzed the causes of higher rates of other-than-honorable and judicial separations amongst African-Americans and Hispanics, and determined that rates were consistent with increased rates of African-Americans in the disciplinary system. NAVY PERS. RSCH & DEV. CTR., RACIAL- AND ETHNIC-GROUP DIFFERENCES IN CHARACTER-OF-SEPARATION AND DISCIPLINARY RATES AMONG FIRST TERM ENLISTEES WHO ARE INELIGIBLE TO REENLIST, TN-91-1 (1990).

1992: DEOMI conducts an *Analysis of Discipline Rates Among Racial/Ethnic Groups in the U.S. Military*, finding:

- The number of NJPs decreased by 47% over 5 years;
- Despite the decrease, the overrepresentation of African-Americans at NJP remained at approx. 50%;
- African-Americans were 1.7x more likely to receive NJP than Caucasian counterparts;
- The number of courts-martial decreased by 52% over 5 years;
- In those 5 years, the overrepresentation of African Americans at court-martial increased from 36% to 74%; and
- African Americans were 2.2x more likely to be convicted at court-martial.

MARTIN R. WALKER, DEF. EQUAL OPPORTUNITY MGMT. INST., AD-A274-555, AN ANALYSIS OF DISCIPLINE RATES AMONG RACIAL/ETHNIC GROUPS IN THE U.S. MILITARY: FISCAL YEARS 1987-1991, vi-vii, 3, 10, 12, 19 (1992).

A Chronological Look at Government Studies on Race and Justice

1992: The Navy Personnel Research and Development Center conducts *An Investigation Into Equity in Navy Discipline*, finding African-Americans are overrepresented in NJP cases, but that there was no statistically significant difference in punishment. It further found no statistical difference in the type of offenses between races with the exception of significantly more African-Americans receiving NJP for “insubordination.” While the report did not find statistically significant differences at court-martial, it found African Americans made up 59% of SCMs and 36% of SPCMs. AMY L. CULBERTSON & PAUL MAGNUSON, NAVY PERS. RSCH & DEV. CTR, NPRDC-TR-92-17, AN INVESTIGATION INTO EQUITY IN NAVY DISCIPLINE 8-14, 19 (1992).

1992: DEOMI publishes *Phase 1 Report: An Investigation into the Disparity of Judicial and Non-Judicial Punishment Rates for Black Males in the Armed Services*, finding a growing disparity between the judicial and non-judicial punishment rates of African-Americans and Caucasians, but attributing it to a faster decrease in Caucasian punishment rates than African-American punishment rates. CASE K. TONG & CATHY A. JAGGARS, DEF. EQUAL OPPORTUNITY MGMT. INST., PHASE 1 REPORT: AN INVESTIGATION INTO THE DISPARITY OF JUDICIAL AND NON-JUDICIAL PUNISHMENT RATES FOR BLACK MALES IN THE ARMED SERVICES 4 (1992).

1992: DEOMI publishes *Racial Disparities in Military Incarceration Rates – An Overview and Research Strategy*, discussing possible areas of further study to identify causal factors of racial disparity in military justice. M.R. DANSBY, DEF. EQUAL OPPORTUNITY MGMT. INST., RACIAL DISPARITIES IN MILITARY INCARCERATION RATES – AN OVERVIEW AND RESEARCH STRATEGY (1992).

1993: DEOMI published *Differences Between Black and White Military Offenders: A Study of Socioeconomic, Familial, Personality, and Military Characteristics of Inmates at the U.S. Disciplinary Barracks at Fort Leavenworth*, finding “no significant differences between [African American] and [Caucasian] inmates on age, socioeconomic status, education level, birth order, military grade, prior civilian problems, military occupational specialty, or length of sentence.” However, the study did find African-Americans were more likely to come from families with a single parent or divorced parents, had a higher number of prior disciplinary issues, and were more likely to be incarcerated for violent crime. STEPHEN B. KNOUSE, DEF. EQUAL OPPORTUNITY MGMT. INST., RSP 93-2, DIFFERENCES BETWEEN BLACK AND WHITE MILITARY OFFENDERS: A STUDY OF SOCIOECONOMIC, FAMILIAL, PERSONALITY, AND MILITARY CHARACTERISTICS OF INMATES AT THE U.S. DISCIPLINARY BARRACKS AT FORT LEAVENWORTH vii (1993).

1994: The Navy Personnel Research and Development Center publishes *Navy Pattern-of-Misconduct Discharges: A Study of Potential Racial Effects*, stating although the study did not find *consistent* evidence to suggest race affected the number of disciplinary actions before discharge, the speed of initiating a discharge, nor the character of separation, it did find that African-Americans were subjected to disciplinary action more often for insubordinate conduct and assault offenses. The report suggested the subjective nature of insubordination offenses warranted additional investigation. JACK E. EDWARDS & CAROL E. NEWELL, NAVY PERS. RSCH & DEV. CTR, NPRDC-TR-94-11, NAVY PATTERN-OF-MISCONDUCT DISCHARGES: A STUDY OF POTENTIAL RACIAL EFFECTS vii (1994).

A Chronological Look at Government Studies on Race and Justice

1994: The Department of Defense Inspector General publishes a *Review of Military Department Investigation of Allegations of Discrimination by Military Personnel*, finding 86% of investigations into allegations of discrimination “found sufficient evidence to support conclusions drawn.” U.S. GEN. ACCT. OFF., EQUAL OPPORTUNITY: DOD STUDIES ON DISCRIMINATION IN THE MILITARY, GAO/NSAID-95-103, 10 (1995).

1996: DEOMI publishes *The Effects of Race on Procedural Justice: The Case of the Uniform Code of Military Justice*, finding that for non-sex crimes, African-Americans spent more time in the military justice process than Caucasians, but significantly less time in the process than Caucasians for sex crimes. DAN LANDIS, ET AL., DEF. EQUAL OPPORTUNITY MGMT. INST., THE EFFECTS OF RACE ON PROCEDURAL JUSTICE: THE CASE OF THE UNIFORM CODE OF MILITARY JUSTICE 9, 11-12 (1996).

2011: Military Leadership Diversity Commission (MLDC) publishes *From Representation to Inclusion: Diversity Leadership for the 21st Century Military*, finding African Americans were court-martialed at a much higher rate across all services. While Caucasians were court-martialed at a rate of 3.28 per thousand, African Americans were court-martialed at a rate of 5.35 per thousand. The report further identified concerns in the consistency of racial data maintained between services. MIL. LEADERSHIP DIVERSITY COMM’N, FROM REPRESENTATION TO INCLUSION: DIVERSITY LEADERSHIP FOR THE 21ST CENTURY MILITARY 104-06 (2011).

2017: Protect Our Defenders publishes *Racial Disparities in Military Justice*, finding African-Americans “were at least 1.29 times and As much as 2.61 times more likely than [Caucasian] service members to have [a disciplinary] action taken against them” between 2006 and 2015. DON CHRISTENSEN AND YELENA TSILKER, PROTECT OUR DEFENDERS, RACIAL DISPARITIES IN MILITARY JUSTICE i-ii (2017).

2019: The GAO publishes *DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities*, finding that despite there being requirements for demographic data collection, the services do not collect and maintain consistent information related to race and gender, which inhibits the ability to study disparity. It also found:

- African Americans were an average of 2.03 times more likely to be subject to an investigation across the services;
- African Americans were more likely to be subject to NJP and SCM in the USAF and USMC;
- African Americans were an average of 1.87 times more likely to be subject to court-martial across the services;
- Race was not a statistically significant factor in the likelihood of conviction or sentence.

U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-344, MILITARY JUSTICE: DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL AND GENDER DISPARITIES 28, 39-49 (2019).

A Chronological Look at Government Studies on Race and Justice

2019: The U.S. Air Force Judge Advocate General conducts a study of USAF military justice data and determines that for every year between 1999 and 2019, African Americans were more likely to be subject to NJP and court-martial. On average, they were 1.74x more likely to be subject to NJP and 1.6x more likely to be subject to court-martial. DEP'T OF AIR FORCE, INSPECTOR GENERAL, INDEPENDENT RACIAL DISPARITY REVIEW, REPORT OF INQUIRY S8918P, 8 (2020).

2020: The U.S. Air Force Inspector General conducts an *Independent Review of Discipline Rates* from 2012 to 2020 and finds:

- African Americans were 2 times more likely to be arrested;
- African Americans were 1.6 times more likely to be the subject of an OSI investigation;
- African Americans were 74% more likely to be subject to NJP;
- African Americans were 2 times as likely to be involuntarily discharged;
- African Americans were 60% more likely to be subject to court-martial;
- Significant perceptions of racism related to mentorship, administrative disciplinary actions; and UCMJ disciplinary actions.

DEP'T OF AIR FORCE, INSPECTOR GENERAL, INDEPENDENT RACIAL DISPARITY REVIEW, REPORT OF INQUIRY S8918P, 6, 16, 20, 91-99 (2020).

2020: DAC-IPAD publishes its *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in FY17*, finding 26% of subjects in sexual assault cases were African American, despite being only 17% of the military population. The report also found that cases involving Caucasian victims were more likely to be referred to court-martial. DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, AND DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, REPORT ON INVESTIGATIVE CASE FILE REVIEW FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017, 76, 108 (2020).