



NIMJ WRITTEN FEEDBACK SUBMISSION TO “DOD INTERNAL REVIEW TEAM ON RACIAL DISPARITIES IN THE INVESTIGATIVE AND MILITARY JUSTICE SYSTEM,” PER FEDERAL REGISTER NOTICE OF VIRTUAL LISTENING SESSION, NOTICE DATE JULY 20, 2022; FEDERAL REGISTER DOCUMENT CITATION 87 FR 43253, PAGE 43253-43255  
TOTAL NUMBER OF PAGES: 7 INCLUDING COVER





**admin@nimj.org**  
**<https://www.nimj.org>**

July 27, 2022

### **Statement For DoD Racial Disparities Internal Review Team**

The U.S. military is not immune from racial discrimination and the [corrosiveness](#) of racial animus; the military is part of and reflects the society from which it is drawn. Furthermore, it is an institution that has long operated relatively separate from the larger American society—with unique military rules, regulations, and customs. These unique features of military law allow [racial inequality](#) to manifest. The military has long been granted significant deference by both the Supreme Court and Congress, and this has at times shielded military decision-making from necessary scrutiny. Values of equality and fairness represent basic human rights and American values, and we must work toward advancing them within the military.

Below, we offer brief reflections on how to better attain equal protection of the laws within the U.S. Armed Forces in the military justice and disciplinary arena. The below comments are based on experience gained from many years of the study and teaching of criminal procedure and criminal law, both civilian and military. They are also deeply informed by practical military experience in the military justice and disciplinary realms, both in the military and as civilians.

#### ***Discretion***

Unconstrained official discretion is known to be a major enabler of racial bias. Simply put, the greater the opportunity for choice, the greater the opportunity for cognitive as well as overt biases to influence judgment. Many legal doctrines recognize this phenomenon and work to limit it. For example, the Constitution requires that warrants be based on probable cause and issued by neutral judges independent from law enforcement; moreover, the Supreme Court has required individualized suspicion of criminality based on articulable, objective factors before law enforcement can detain any person. As the infamous NYC “stop and frisk” policies have shown, though, racial and other biases often continue to operate if discretion is only minimally contained with vague standards, and when transparency and oversight are lacking.

Applied to the military justice and disciplinary arenas, a finding in a recent September, 2021 Department of the Air Force Inspector General (DAF/IG) [report](#) demonstrates this basic dynamic: the greater the discretion, the greater the influence of biases, and the greater the need for clear standards, transparency, oversight, and meaningful accountability. This example centers on the fact that military criminal law includes offenses that involve uniquely large grants of discretion. Some involve wide discretion in substance, regarding what type of conduct is sufficiently harmful to constitute the offense (such as conduct unbecoming an officer); some are discretionary in the sense of commonality of occurrence (being late to work is a crime that is committed by practically every service member at some point, but Black service members are disciplined for it [more often](#) than their white colleagues); and some offenses carry both dangers.

For a prime example, the so-called “general article” of the Uniform Code of Military Justice (UCMJ), Article 134, criminalizes conduct that is either prejudicial to good order and discipline or service discrediting; the vast discretion involved in determining whether particular conduct warrants a criminal response provides significant opportunities for cognitive and other biases to operate. A closely related example is the unique military crime of failure to obey and/or dereliction of duty, Article 92, UCMJ; the wide range of discretion involved regarding what constitutes dereliction, or serious enough disobedience to prosecute, provides rich ground for cognitive and other biases to produce racially disparate results. A December 2020 DAF/IG report concluded that “[B]lack service members were 74% more likely to receive Article 15s and 60% more likely to face courts-martial than white service members” in the Air Force; unpacking the leading offenses charged in these fora is revealing.

Demonstrating the dangers of unguided discretion is the DAF/IG September 2021 assessment report’s finding that the military crimes involving the greatest level of discretion are those punished in the most racially disparate manner. The report’s [data](#) demonstrates that failure to obey an order or regulation / dereliction of duty (Art. 92); being late to work (Art. 86); the general article (Art. 134); and false official statement (Art. 107) were the top four leading offenses constituting the racially-disparate non-judicial punishments in the assessed period (a similar breakdown for courts-martial was not included). In a similar vein, the same [report](#) highlights the large racial disparity in investigations and substantiations of sexual harassment complaints; as with the above crimes, the significance of discretion is notable. The rather vague standards regarding what constitutes sexual harassment gives more power to decision-makers to utilize judgment when deciding whom, what and how to investigate; this judgment brings with it greater space for cognitive and other biases to operate.

Exacerbating the discretion inherent in these offenses themselves are two key military environmental factors: the fact that, even after last year's legislative changes take effect, the decision to prosecute many crimes in the military will still be made by largely unchecked senior officers who wield great power in the military's hierarchical organizational structure, within an environment that offers other tools besides prosecution with which to respond to alleged misconduct (in addition to doing nothing at all). Military commanders – non-lawyer officers – wield their vast authority to dispose of alleged misconduct unconstrained by the guardrails of legal education, professional codes of ethics, or meaningful oversight – coupled with little transparency, little uniformity and little to no accountability for the exercise of this duty. Furthermore, military commanders possess numerous options – punitive, non-punitive and administrative – with which to dispose of alleged misconduct within their military units, with near plenary discretion to choose amongst such tools or to do nothing at all. The long and unique military menu of discretionary options for responding to allegations of misconduct provides significant opportunity for the operation of cognitive and other bias.

Furthermore, a commander's prosecutorial dispositional decision regarding how to respond to a given allegation of misconduct is often weighted by earlier actions taken at much lower levels of military control. This is significant, given that the discretion dynamic is operative at those lower levels to an even greater degree than at the prosecutorial level; there is less transparency plus fewer safeguards such as clear standards governing the use of administrative measures (such as letters of counseling or reprimand). Significant documented racial disparity exists in the utilization of these administrative actions, and these actions then [contribute](#) to the racial disparities found in administrative separations based on misconduct, as well as influence decisions to prosecute. That is, the operation of cognitive bias within the wide latitude provided in administrative actions has a cascading effect, hence stronger safeguards to include improved transparency and oversight are necessary at these levels, as the numbers demonstrate that the extant protections are inadequate.

These are simply a few examples (another important one being the initial decision to investigate alleged misconduct, as well as what process to use for said investigation) that demonstrate that the greater the discretionary decision-making space, the greater the need for procedural mechanisms to shield against cognitive, as well as other, biases. Add together (1) commanders' wide expanse of essentially unfettered dispositional power over misconduct plus their significant discretion regarding initial investigatory tools (for certain offenses), with (2) the wide range of disciplinary and prosecutorial options available to commanders (unavailable to any civilian district attorney or Department of Justice attorney), with (3) military offenses, such as dereliction of duty and being late to work that

by nature involve unusually high levels of discretionary judgment (compared to typical civilian crimes), and the result is the perfect condition for the operation of cognitive and other biases. The ultimate consequence is that the U.S. military today suffers from a combined military justice and disciplinary system that prosecutes, punishes, disciplines, and involuntary discharges Black service members (and other minorities, such as [Native Americans](#)) at higher rates than whites; this is detrimental to national security and demands remedial action.

### ***The Guardrails: Standards, Transparency, Oversight, & Accountability***

This contribution's primary recommendation is for the Department of Defense to identify all areas of discretion resident within the military justice and disciplinary arena, coupled with the tailoring and installation of appropriate procedural safeguards to mitigate the omnipresent influence of biases on these discretionary nodes. The Air Force, in its series of DAF/IG reports and assessments, has already identified many such relevant spaces; such analyses should be replicated across all the services, and tailored to each service's particular disciplinary process idiosyncrasies (on that latter point, DOD should establish a working group to standardize the imposition of administrative measures across the Department, given the huge impact such deceptively minor actions are having on the health of the Armed Forces, particularly regarding racial disparities and the widely-shared [perception](#) of their unfair and uneven use).

Given that the broad military justice and disciplinary arena is unique, and operates within a specialized hierarchical organization, the discretionary nodes requiring safeguards include some that are similarly distinctive from civilian systems, such as choice of investigative tools, the option to impose administrative action, etc. However, appropriate mitigation measures for countering the operation of bias within these nodes should follow basic principles that have shown to reduce arbitrary influence within analogous discretionary spaces. Once all discretionary nodes are identified within the military's disciplinary and military justice processes, the services (mandated by DOD) should follow proven principles of effectiveness regarding mitigation measures. The guiding principles are fundamental: clear standards, transparency of action, oversight, and accountability.

More discrete ameliorative procedures flow from such principles, such as:

- a mandate to track administrative actions (including separations) by racial and ethnic demographic;
- requirements for written justification, separate from the corrective or punitive action itself, outlining reasons why that tool was chosen in that particular situation—for aggregation in databases shared across services;

- requirements for “fresh looks” involving internal reviews (a second set of eyes) prior to taking any formal action regarding offenses known to produce racially disparate results;
- clearer standards governing the appropriateness of investigative mechanisms for particular types of alleged misconduct;
- a more robust prosecutorial standard for courts-martial beyond probable cause (specifically, sufficient admissible evidence to convict);
- the standardization and elevation of the level of certainty to beyond reasonable doubt for non-judicial punishment (Article 15, UCMJ);
- the creation of procedural mechanisms to assess performance of disciplinary (including military justice) duties within existing performance evaluations; and
- the vesting of all military prosecutorial decisions (to refer court-martial charges), particularly courts-martial involving military-unique crimes, given their broad discretionary nature, in experienced military lawyers independent from the accused’s chain of command (in the alternative, require external review, by the newly-mandated independent special prosecutors, of all prosecutorial decisions involving crimes most linked to racially-disparate results, regardless of court-martial level).

A few final words are necessary regarding the guiding principles of clear standards, transparency of action, oversight, and accountability to improve decision-making in the military justice and disciplinary arena. Formal accountability (meaning appropriate consequences, such as input into performance evaluations and required consideration in follow-on assignment decisions) is required to ensure that military discipline better aligns with DOD’s and the Constitution’s values of equality and fairness, devoid of preferential and disparate treatment based on race, ethnicity, gender religion, politics, etc. Accountability requires oversight, which requires data. Oversight (the active management and consideration) of everything from disciplinary counseling letters to courts-martial requires full transparency into who is getting what action, why, and who is not getting what actions, and why. Traditionally, the services have not robustly tracked minor administrative measures, never-mind per demographic; however the Air Force, for example, is now doing so—and so should all the services. Establishing tracking mechanisms, as well as processes for critically analyzing the resulting data and feeding it back into accountability measures (such as performance reports) will contribute to the mitigation of cognitive and other biases within the military justice and disciplinary arena.

NIMJ is happy to provide further explanation and clarification of any of the above recommendations. We hope that efforts such as this current review of racial

disparities in the military justice and disciplinary arena will help avoid injustice in the future. Thank you.

The Board of Directors  
National Institute of Military Justice