EMPANELING "FAIR AND IMPARTIAL" MEMBERS: THE CASE FOR INCLUSION OF AN IMPLICIT BIAS INSTRUCTION AT COURTS-MARTIAL

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TABLE OF CONTENTS

I. INTRODUCTION 334
II. BACKGROUND 335
A. FIFTY YEARS OF DOCUMENTED RESEARCH POINTING TO RACIAL BIAS 335
1. Post-World War II: Racial Integration of the Armed Forces .....
2. The Twenty-First Century: Racial Disparity Persists in the Military 336
III. ISSUE 340
A. DEFINING IMPLICIT BIAS 340

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B. RECOGNIZING THE IMPLICIT BIAS PROBLEM IN THE MILITARY 341
C. AN IMPLICIT BIAS INSTRUCTION IS THE SIMPLEST SOLUTION 344
IV. ANALYSIS 345
A. SERVICEMEMBERS' RIGHT TO A FAIR AND IMPARTIAL MEMBERS' PANEL 345
B. IMPLIED BIAS IS ALREADY PART OF VOIR DIRE 348
C. IMPLICIT BIAS INSTRUCTIONS ARE INCREASINGLY BEING USED IN CIVILIAN COURTS 351
D. EXISTING INSTRUCTIONS ALLOW FOR SEAMLESS INTEGRATION 358
E. THREE WAYS AN IMPLICIT BIAS INSTRUCTION CAN BECOME STANDARD AT COURTS-MARTIAL 360
1. Rules for Court-Martial Already Allow for It .. 360
2. It Can be Included in the Military Judges' Benchbook 361
3. Congress or the President Can Mandate Its Inclusion 362
F. OTHER BIASES HAVE SIMILARLY BEEN ADDRESSED ... 362
V. CONCLUSION 365

I. INTRODUCTION

On the first page of the Rules for Courts-Martial (R.C.M.) lies the simply stated intent for the more than two hundred pages to follow: "to provide for the *just determination of every proceeding* relating to trial by court-martial" and the demand that "these rules shall be construed to secure simplicity in procedure, [and] fairness in administration."[2] But decades of research and reports have shown that the military justice system is far from unbiased in the disposition of criminal cases of servicemembers. Studies from a multitude of sources have repeatedly quantified and warned against serious racial disparities in the military justice system. Yet practical solutions to address these disparities in a timely manner remain frustratingly elusive, and military leaders have only recently come to accept the role of bias — either intentional or implicit — and its effect on the military writ large, let alone the military justice system.

While data collection, research, education, and training are all part of a long-term solution for the armed forces as a whole, there is a simpler and more expedient course of action that can be implemented today in any court-

[2] MANUAL FOR CTS.-MARTIAL U.S., RULE 102 (2019) (emphasis added).

martial to ward off the prejudicial effects of bias in the courtroom: an implicit bias instruction, given by the military judge to court-martial panel members to ward off the adverse effects of prejudices that the members may not be aware they even have. Such a tool is increasingly being used by civilian courts — federal and state, criminal and civil — to address bias and ensure that defendants have a better chance at the "fair and impartial" jury the Constitution requires.[3] The inclusion of an implicit bias instruction is a simple procedural addition that benefits the military justice system as a whole — it is a straightforward, frontal attack on the myriad of biases that only serve to hinder the fair administration of military justice and the goal of providing a just determination in every case.

II. BACKGROUND

A. FIFTY YEARS OF DOCUMENTED RESEARCH POINTING TO RACIAL BIAS

1. Post-World War II: Racial Integration of the Armed Forces

Despite the implementation of affirmative policies to combat racial discrimination, the military has mirrored the broader American experience as a nation and has struggled with racial tensions brewing just under the surface, emerging only when the statistics of criminal justice are closely studied.

Shortly after World War II ended, and after witnessing a rise in racial violence and tensions, President Harry Truman wanted to end discriminatory practices across the United States leading to this unrest.[4] In 1948, he ordered the full racial integration of the military in the hope that the armed forces could serve as an example to the nation on the merits of desegregation.[5] However, echoing the sentiment of a segment of society at the time, uniformed leadership balked and "advocated for maintaining the status quo," even though a presidentially-appointed civilian committee tasked with reviewing the military's policies and procedures "to understand the potential impact of integration on military efficiency" contradicted the

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[3] U.S. CONST. amend. XI.

[4] KRISTY N. KAMARCK, CONG. RSCH. SERV., R44321, DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED SERVICES: BACKGROUND AND ISSUES FOR CONGRESS, 13-14 (2019) (In December 1946, the President's Committee on Civil Rights was created by Executive Order to review rights for all American citizens. In its report, the Committee specifically made recommendations for the military, to include full racial integration and a complete ban on racial discrimination).

[5] Establishing the President's Committee on Equality or Treatment and Opportunity in the Armed Services, Exec. Order No. 9,981, 13 Fed. Reg. 4131 (July 28, 1948).

military's claims and was "convinced that a policy of equality of treatment and opportunity will make for a better Army, Navy, and Air Force."[6] The services dragged their feet in implementing President Truman's order — full integration of active duty units was not achieved until 1954, and some reserve units remained segregated into the early 1960s.[7]

As a result, racial tensions would continue to simmer in the ranks well into the late 1960s and early 1970s, when the civil rights movement at home and America's increasing involvement in the Vietnam conflict abroad would bring racial discrimination back to the forefront of the military's collective consciousness, especially in the realm of military justice.[8] Concerned with how apparent or actual racial discrimination was adversely affecting the administration of the military justice system, the Secretary of Defense Melvin R. Laird established the Task Force on the Administration of Military Justice in the Armed Forces to investigate, among other things, the "impact of factors contributing to disparity in punishment rates between racially identifiable groups; . . . racial patterns or practices in initiation of charges against individuals; and recommend[ed] changes to enhance equal opportunity for servicemembers."[9] That task force concluded it was not only explicit racial prejudice, but also widespread unintentional bias that caused the "the military system [to] discriminate against its members on the basis of race and ethnic background."[10]

2. The Twenty-First Century: Racial Disparity Persists in the Military

Fast forward to the twenty-first century and the military is still faced with discernable racial discrimination in the military justice system, which has yet to be effectively addressed. In 2016, Protect our Defenders ("POD"), a national human rights organization, made a Freedom of Information Act (FOIA) request from each of the services to review previously unpublished data from 2006 to 2015 to "examine whether and to what extent there are racial and ethnic disparities within military disciplinary and justice

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[6] KAMARCK, *supra* note 4, at 14 (quoting PRESIDENT'S COMM. ON EQUAL. TREATMENT AND OPPORTUNITY IN THE ARMED SERV., FREEDOM TO SERVE: EQUALITY OF TREATMENT AND OPPORTUNITY IN THE ARMED SERVICES 68 (Nat'l Archives and Rec. Admin. 1950)).

[7] *Id.* at 15 (citing MORRIS J. MACGREGOR, JR., INTEGRATION OF THE ARMED FORCES 1940—1965 441 (Ctr. Milt. Hist. U.S. Army, 1981)).

[8] *Id.* at 15-18.

[9] *Id.* at 18 (quoting U.S. DEP'T OF DEF., REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES (1972)).

[10] *Id.* at 19 ("The discrimination is sometimes purposive; more often, it is not. Indeed, it often occurs against the dictates not only of policy, but in the face of determined efforts of commanders, staff personnel and dedicated service men and women.").

system."[11] A year later, the group published their report that eerily echoed the same conclusion the task force had made forty-five years earlier, warning against the presence of inherent bias and "[t]he persistence of racial disparities within military justice and disciplinary proceedings, particularly among black servicemembers as compared to white servicemembers. . . ."[12] The study quantified that conclusion with collected data that showed "for every year reported and across all service branches, black servicemembers were substantially more likely than white servicemembers to face military justice or disciplinary action, and these disparities failed to improve or even increased in recent years."[13]

Congress took notice of the independent group's report, but still appeared apprehensive to believe that such a problem still existed, instead calling the information incomplete due to "differences in the way in which the military services collect and maintain data on this subject."[14] Begrudgingly conceding that "racial disparities *may* exist in the military justice system," Congress ordered the United States Government Accountability Office (GAO) not only to review how the services collect racial and gender data connected with military justice, but also to provide data analysis to evaluate "whether there is a racial disparity in the prosecution of cases under the Uniform Code of Military Justice. . . ."[15] Besides the perception of faulty data, Congress' hesitation may also have been fueled by an earlier report issued by the GAO in 1995 (the "1995 GAO Report"), when elected officials similarly "expressed concern that inequality of treatment and opportunity is a problem in the military and requested . . . [assistance] in determining the scope and nature of the problem."[16] In response to that query to investigate possible discrimination in the Department of Defense (DOD), the GAO did not conduct an independent inquiry, but inexplicably only conducted a cursory review of seventy-two studies "done, sponsored, or commissioned" by the DOD itself

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[11] Don Christensen & Yelena Tsilker, *Racial Disparities in Military Justice: Findings of Substantial and Persistent Racial Disparities Within the United States Military Justice System*, PROTECT OUR DEFENDERS i (May 5, 2017), https://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf [https://perma.cc/9EPV-298Q].

[12] *Id.* at 15.

[13] *Id.* at i (indicating that "depending on the service and type of disciplinary or justice action, black service members were at least 1.29 times and as much as 2.61 times more likely than white service members to have an action taken against them in an average year.").

[14] H.R. REP. NO. 115-200, at 126 (2017).

[15] *Id.* (emphasis added).

[16] U.S. GOV'T ACCOUNTABILITY OFF., GAO/NSIAD-95-103, EQUAL OPPORTUNITY: DOD STUDIES ON DISCRIMINATION IN THE MILITARY 1 (1995).

over a twenty-year period.[17] In its summary, the 1995 GAO Report found contradictory findings from the DOD's own research — a general observation from the GAO report was that some of the studies it reviewed showed that "[Black people] and women tended to hold negative perceptions regarding equal opportunity in the military" and "when compared to their white counterparts, black servicemembers were overrepresented in courts-martial with respect to certain types of offenses," yet other "studies done in the 1970s and 1980s showed no disparities in discipline rates between . . . [Black and White people] and found no evidence that minority groups received courts-martial or nonjudicial punishments out of proportion to certain types of violations."[18]

Unlike the fundamentally flawed methodology leading to conflicting conclusions in the 1995 GAO Report, the GAO in 2019 (the "2019 GAO Report") conducted a thorough analysis of data over a five-year period and confirmed the independent 2017 Protect Our Defender's report ("POD Report")[19], concluding that "[r]acial and gender disparities exist in investigations, disciplinary actions, and punishment of servicemembers in the military justice system. . . ."[20] Specifically, the 2019 GAO Report found that "black, Hispanic, and male servicemembers were more likely than white and female servicemembers . . . to be tried in general and special courts-martial" across four of the five services.[21] However, the report also concluded that "race and gender were not statistically significant factors in the likelihood of conviction in general or special courts-martial for most [military] services, and minority servicemembers were either less likely to receive a more severe punishment than white servicemembers or there was no difference among racial groups. . . ."[22]

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[17] *Id.* ("[The GAO] summarized but did not evaluate the [DOD] studies and, if applicable, determined the status of any recommendations.").

[18] *Id.* at 1-2, 5.

[19] Christensen & Tsilker, *supra* note 11.

[20] 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 38 (2019) (using data from fiscal years 2013-2017 and analyzing "military services' investigations, military justice, and personnel databases to determine the extent to which racial and gender groups were the subjects of recorded investigations, tried in courts-martial, and subject to nonjudicial punishments at higher or lower rates than each racial and gender group's proportion of the overall service populations.").

[21] *Id.* The study included data from the Army, Navy, Marine Corps, and Air Force, but did not include the Coast Guard that adjudicated only a small number of cases during that timeframe, nor the Space Force, which was established in Dec. 2019. *Id.*

[22] *Id.* at GAO Highlights.

Concurrently, the DOD conducted its own independent study into the findings of the POD Report[23] and attempted to compare it to three years of data compiled by the Office of Diversity Management and Equal Opportunity.[24] This analysis showed "a statistically significant difference between black and white [servicemembers] regarding likelihood" to face both court-martial and non-judicial punishment (NJP), and "supported the [POD Report] findings in that it showed black enlisted servicemembers face higher rates of disciplinary action . . . than white servicemembers, but, at the same time, had the lowest conviction rates across services."[25] Specifically, the study found that "black servicemembers are 36.6% more likely to face court-martial than [White people] across all branches" and "about 50% more likely than white [servicemembers] to experience NJP."[26] Yet, even if the face of those significant numbers, the report would not conclude "that differences in race alone reveal an institutionalized bias in the military justice system . . . [because] more data needs to be collected and analyzed to determine if and where biases exist in the military justice system and what factors, including race are contributing to differences in military justice among [servicemembers]."[27]

On the whole, the studies conducted in response to the POD Report validated its finding of racial discrepancies in the military justice system. Nevertheless, what was seemingly ignored was the correlation between the ostensibly benign conviction and punishment statistics with the clear racial disparities of minority servicemembers being subjected to discipline in the military justice system in the first place. As the POD Report concluded when specifically looking at the Navy's data, "because black sailors were initially referred at higher rates, they remain disproportionately impacted by the military justice system."[28] This is especially telling when considered in the context that a servicemember is rarely found not guilty at nonjudicial punishment and the conviction rate at courts-martial is "consistently high among enlisted servicemembers" across the services at 84% to 96%.[29]

While the problem has been well-documented, solutions differ—more data is already being collected and training across the force is a must, but

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[23] Christensen & Tsilker, *supra* note 11.

[24] DEF. EQUAL OPPORTUNITY MGMT. INST., REP. NO. 21-06, REPORT OF RACIAL DISPARITIES IN THE MILITARY JUSTICE SYSTEM, TECH. 4 (2019).

[25] *Id.* at 5, 17.

[26] *Id.* at 17.

[27] *Id.*

[28] Christensen & Tsilker, *supra* note 11, at ii.

[29] DEF. EQUAL OPPORTUNITY MGMT. INST., *supra* note 24, at 13.

what can the military justice system do right now to address these disparities?

III. ISSUE

A. DEFINING IMPLICIT BIAS

As a starting point, the military justice system needs to recognize and commit to effectively addressing the prevalence of implicit bias in the courtroom, just as the larger military complex as a whole has begun to take action against its harmful effects in the ranks.

Servicemembers are trained annually on explicit biases and should be well-versed in what is impermissible conduct towards a particular group, especially "discrimination on the basis of race, color, national origin, religion, sex (including pregnancy), gender identity, or sexual orientation."[30] But few servicemembers are trained on the definition or are even aware of the existence of implicit biases and how they affect their everyday lives. Implicit bias, otherwise known as unintentional or unconscious bias, is best described as "attitudes or stereotypes that affect our understanding, decision making, and behavior, without our even realizing it."[31] These preconceived notions "are likely formed by schemas or associations in the brain that link two ideas together (i.e. a group of people with a trait), and these associations likely form through a combination of early experiences, affective experiences, and learned cultural biases."[32]

At its core, what is critical about understanding implicit bias is that *it affects everyone* because of "the universal truth that all people observe and experience things through the lens of their own personal experience. At the same time, we are shaped by our environment, and our norms and mores are formed on the basis of these societal constructs."[33] Not only do servicemembers bring with them personal experiences from their childhood and their hometown, but the constructs that shape their outlook are further magnified in the hierarchal organizational structure of the military, where

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[30] *DoD Instruction 1350.02: DoD Military Equal Opportunity Program*, DOD (Sept. 4, 2020) https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/135002p.pdf [https://perma.cc/24Z5-MYY4].

[31] Jerry Kang et al., *Implicit Bias in the Courtroom,* 59 UCLA L. REV. 1124, 1126 (2012).

[32] Caisa Royer et al., *Defining Implicit Bias*, CORNELL U. L. SCH., https://courses2.cit.cornell.edu/sociallaw/student_projects/Definingbias.html [perma.cc/M65W-JLTR].

[33] Judge Bernice B. Donald & Sarah E. Redfield, *Framing the Discussion*, *in* ENHANCING JUSTICE, REDUCING BIAS 5-6 (Sarah E. Redfield ed., 2017).

rank, job specialty, and even service branch carries with them generalized stereotypes and broad misconceptions. A myriad of research and studies over the past thirty years has "provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects."[34] As such, an increasing number of books have been written on the topic, with more being published every year.[35] Different professions have also taken on the topic to begin to discuss how to deal with the problem in their particular fields.[36]

B. RECOGNIZING THE IMPLICIT BIAS PROBLEM IN THE MILITARY

The military has been talking about unintentional bias for at least the last decade, but has not been primarily focused on the context of race. In 2014, after Secretary of Defense Leon Panetta ordered the integration of women into all combat roles and units, the Marine Corps provided unconscious bias training tools to its commanders to ease the transition.[37] Then, in 2016, President Barack Obama instructed all federal agencies, including the military, to expand mandatory training on unconscious bias, but only for those in "senior leadership and management positions."[38] But after the public outrage that followed the murder of George Floyd at the hands of Minnesota police officer Derek Chauvin in the summer of 2020, the military seemed finally ready to take on the latent biases in the entire military system. Publicly admitting that "[t]he prejudice and bias that exist within our force are not always transparent," Secretary of Defense Mark

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[34] Kang et al., *supra* note 31, at 1126.

[35] *E.g.*, DANIEL KAHNEMAN, THINKING, FAST AND SLOW (Farrar, Straus and Giroux 1st ed., 2011); MAHZARIN R. BANAJI, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (Delacorte Press 2016); PAMELA FULLER & MARK MURPHY WITH ANNE CHOW, THE LEADER'S GUIDE TO UNCONSCIOUS BIAS: HOW TO REFRAME BIAS, CULTIVATE CONNECTIONS, AND CREATE HIGH-PERFORMING TEAMS (2020); PRAGYA AGARWAL, SWAY: UNRAVELLING UNCONSCIOUS BIAS (2021).

[36] *E.g.*, Donald & Redfield, *supra* note 33; AUGUSTUS A. WHITE III WITH DAVID CHANOFF, SEEING PATIENTS: UNCONSCIOUS BIAS IN HEALTH CARE (2011); TRACEY A. BENSON ET AL., UNCONSCIOUS BIAS IN SCHOOLS: A DEVELOPMENTAL APPROACH TO EXPLORING RACE AND RACISM (2019); MARGET AVOLA, CONFIRMATION BIAS IN TECHNOLOGY: HOW TO COUNTER BIAS IN TECHNOLOGY (2021).

[37] KRISTY N. KAMARCK, CONG. RSCH. SERV.,R40275, WOMEN IN COMBAT: ISSUES FOR CONGRESS13-14 (2016) (citing Memorandum from the Chairman of the Joint Chiefs of Staff to the Sec'y of Def., Women in the Service Implementation (Jan. 9, 2013)); U.S. Marine Corps Admin. Message 589/14, 121939Z Nov. 14, Dir., Manpower Plans and Pol'y Div., Subject: Announcement of Change to Assignment Policy (the training was not mandatory—left to the commander's discretion, unclear how many units completed some or all of the training).

[38] Presidential Memorandum, Promoting Diversity and Inclusion in the National Security Workforce, 81 Fed. Reg. 69993, 69996 (2016).

Esper directed the development of unconscious bias training across the military life cycle, from new recruits to senior officers.[39]

Indeed, if military leaders are ready to accept the basic premise that all human beings have implicit bias, then they must also accept that no trial — civilian or military, criminal or civil—is free from the effects of unintentional bias.[40] In that context, studies have shown that jury members not only have implicit biases, but it affects their "evaluation of evidence; recall of facts; and the forming of decision and judgments, including judgments of guilt."[41] For instance, research specifically into the DOD's Sexual Assault Prevention and Response (SAPR) program and its "pervasive influence" on the military justice system suggests that the "expectations reinforced by the zealous promotion" and frequency of the training, and not even the training itself, "may create rigid heuristics of institutional expectations, which may bias the deliberation of facts in a legal proceeding."[42] As such, the justice system can no longer subscribe to the fallacy of a "blank slate" juror who can "compartmentalize or 'set aside'" their biases they most likely are not even aware they have, and then limit "their decisions solely on the evidence presented at the trial [because] [w]e know humans do not work like this. Their gender, race, class, and political ideologies all play a part in shaping their perceptions and attitudes of other people."[43]

But little has been done to address unconscious bias in the military justice system, and only recently have judge advocates begun to call for

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[39] Memorandum from Mark T. Esper, Sec'y of Def., Immediate Actions to Address Diversity, Inclusion, and Equal Opportunity in the Military Services (July 14, 2020), https://media.defense.gov/2020/Jul/15/2002457268/-1/-1/1/Immediate Actions to Address Diversity_Inclusion_Equal_Opportunity_in_Military_Services.pdf [https://perma.cc/NHG4-UH74].

[40] Chad Schmucker & Joseph Sawyer, *Decision Making, Implicit Bias, and Judges: Is This Blindfold Really Working, in* ENHANCING JUSTICE, REDUCING BIAS 1 (Sarah E. Redfield ed., 2017); *see also* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 154-59 (2010).

[41] Colin Miller, *The Constitutional Right to an Implicit Bias Jury Instruction*, 59 AM. CRIM. L. REV. 349, 352 (2022) (quoting Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 867 (2016)).

[42] Karl Umbrasas, *Panel Bias During Sexual Assault Courts-Martial*, 48 J. AM. ACAD. PSYCHIATRY & L. 350, 350, 353 (2020).

[43] Richard Gabriel et al., *Redefining Bias in Criminal Justice*, 36 CRIM. JUST. MAG. 18 (2021); Pragya Agarwal, *Voices: No Trial is Free from Bias—That Includes the Acquittal of Kyle Rittenhouse*, YAHOO! NEWS (Nov. 23, 2021), https://news.yahoo.com/voices-no-trial-free-bias-120135851.html [https://perma.cc/4C5U-KJJS].

recognition of implicit bias in courts-martial.[44] While implicit bias has long been identified as a factor in continued discrimination in the military and the DOD has taken steps to begin to address implicit bias in the ranks, there has been no commensurate focus on taking action in the military justice system—an area that statistically has shown consistent racial disparities for more than fifty years.[45]

At a hearing before the House Armed Services Military Personnel Subcommittee in July 2020, the ranking judge advocates from each military branch at least acknowledged the role of implicit bias in the disparity problem in the military justice system and promised swift action to begin to address it.[46] In addition to recommending military-wide training on unconscious bias in a "holistic approach," the top-ranking military attorneys reiterated the importance of the entire judge advocate community to be trained to identify and mitigate implicit bias, and acknowledged that military trial judges have already participated in, and will continue to attend, annual training on unconscious bias:

> The fact that disciplinary racial disparity in the aggregate has persisted despite the adoption of significant institutional changes demonstrates the complex and challenging nature of the issue, symptomatic or indicative of one of many symptoms. The problem is daunting and complex, but that should not stop us from asking and exploring what we can do in military justice and the disciplinary process to serve as part of the solution set.[47]

But in August 2021, the GAO published a follow-up to its 2019 investigation and found that while steps had been taken to rectify the issue of collecting consistent data across the services about race, ethnicity, and

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[44] *See, e.g.*, Sharif Calfee, *Implicit Bias Affects Military Justice*, NAVAL PROC. MAG., Apr. 2019 (advocated for increased training on implicit bias for commanders and judge advocates, as well as an increase of collection and dissemination of data); Jodie L. Grimm, *In Pursuit of Racial Justice: Strategies to Combat Implicit Racial Bias in the Military Justice System*, A.B.A. CRIM. JUST. MAG., Oct. 20, 2021, at 12 (advocated for training and judge advocate intervention before trial and during voir dire).

[45] DEP'T OF DEF., REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES (1972); Christensen & Tsilker, *supra* note 11.; 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 38 (2019).

[46] *Racial Disparity in the Military Justice System—How to Fix the Culture: Hearing Before the H. Armed Serv. Subcomm. On Mil. Pers., H. Armed Serv.*, 116th Cong. (2020) [hereinafter *Racial Disparity*] (statements of Lieutenant General Charles N. Pede, U.S. Army; Vice Admiral John G. Hannink, U.S. Navy; Lieutenant General Jeffrey A. Rockwell, U.S. Air Force; and Major General Daniel J. Lecce, U.S. Marine Corps).

[47] *Id.* (regarding statement of Rockwell).

gender across the spectrum of military justice, the DOD still "had not comprehensively evaluated the causes of racial or gender disparities in the military justice system," or taken *any steps* to address them appropriately.[48]

The racial disparity seen in servicemembers being subjected to the military justice system is just one symptom of a larger malady — if the military is truly admitting the existence of unintentional bias across the armed services, and that bias presumably affects each and every servicemember and impacts their decision-making, then it reasonably follows that each court-martial panel is affected by these biases and they should be addressed accordingly. Recent legislation to amend the military justice system is primarily aimed at the referral decision to "remove the potential for bias" — either actual or perceived — by commanders before a case even sees the inside of a courtroom.[49] Yet, if the leading judge advocates across the services want to make the military justice system part of a comprehensive solution, then the focus cannot be solely on potential bias that occurs only *before* a court-martial; on the contrary, it must necessarily include measures to address the implicit bias of servicemembers who make-up a members panel *during* a court-martial, regardless of how a case ended up there.[50]

C. AN IMPLICIT BIAS INSTRUCTION IS THE SIMPLEST SOLUTION

Because implicit bias, by its very nature, afflicts an individual unknowingly, the only solution to deal with it is head-on — we can only "take steps to neutralize and control [implicit] bias if we recognize its existence and consciously struggle to negate its influence."[51] Accordingly, the simplest solution to address implicit bias at courts-martial is to address it directly with the members in the form of an instruction from the military judge. The verbiage of a standard instruction should be included in Military

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[48] U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-105000, MILITARY JUSTICE: DOD AND COAST GUARD IMPROVED COLLECTION AND REPORTING OF DEMOGRAPHIC AND NONJUDICIAL PUNISHMENT DATA, BUT NEED TO STUDY CAUSES OF DISPARITIES, at 1-2, 5 (2021).

[49] KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RSCH. SERV., R44944, MILITARY SEXUAL ASSAULT: A FRAMEWORK FOR CONGRESSIONAL OVERSIGHT 62 (2021); National Defense Authorization Act for Fiscal Year 2022, S. 2792, 117th Cong. § 531 (2021).

[50] Barry K. Robinson & Edgar Chen, *Déjà Vu All Over Again: Racial Disparity in the Military Justice System*, JUST SECURITY (Sept. 14, 2020), https://www.justsecurity.org/72424/de ja-vu-all-over-again-racial-disparity-inthe-military-justice-system/ [https://perma.cc/T5BN-HWVR] (quoting *Racial Disparity*, *supra* note 46 (regarding Lieutenant General Pede's testimony, discussing implicit bias and that "the Army is intensively focusing its attention to the 'left of the allegation,' i.e. determining why there is an overrepresentation coming to the investigative system, or 'left of the disposition decision to send someone to trial.'")).

[51] Theodore McKee, *Preface, in* ENHANCING JUSTICE, REDUCING BIAS (Sarah E. Redfield, ed., 2017) *in* ENHANCING JUSTICE, REDUCING BIAS vii (Sarah E. Redfield ed., 2017).

Judges' Benchbook to be used by judge advocates across the services and in every contested court-martial with members. Such an instruction from the military judge educating the members on implicit bias will bring the unconscious into the cognizant. By "[e]ducating the panel on mechanisms of bias and offering debiasing techniques," the onus will be placed on each individual member to recognize and then mitigate their own biases—biases that they may never reveal to the judge or the parties otherwise.[52]

The recent legislative reforms to the military justice system or the other changes proposed by the Pentagon to address the disparities in the military justice system not only do not address a court-martial once it has been convened, but could take months, if not years, to implement.[53] An implicit bias instruction could be implemented tomorrow, with no need for additional data collection, legislation, or cost. Moreover, the military justice system has historically attacked biases through similar actions on court-martial procedure in its continuing commitment to due process and providing a servicemember accused of a crime his Constitutional and regulatory right to a fair and impartial members panel at court-martial.[54]

IV. ANALYSIS

A. SERVICEMEMBERS' RIGHT TO A FAIR AND IMPARTIAL MEMBERS' PANEL

Even though military members' Constitutional rights are curtailed while in the service, they do not lose all protection—in fact, the military justice system often provides equal, if not more due process procedural rights than an accused may enjoy in the civilian system. One of these important safeguards is the right to trial by an impartial jury, and an implicit

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[52] Umbrasas, *supra* note 42, at 356. The use of a behavioral psychology expert specifically at sexual assault trials may be helpful to "explain the reinforcement, punishment, and observational learning that occurs in the military institution related to SAPR policy." *Id.*

[53] Rebecca Kheel, *Senators Say They Won't Wait 9 Years for Pentagon to Make Planned Sexual Assault Reforms*, MILIT. (Oct. 26, 2021), https://www.military.com/dailynews/2021/10/26/senators-say-theywont-wait-9- years-pentagon-makeplanned-sexual-assault-reforms.html [https://perma.cc/5SLW-9JGV]. An independent DOD commission was created to "study new ways to tackle the pervasive issue of sexual assault in the military" and recommended removing the disposition decision for sexual assaults and other cases from the military chain of command, mirroring a similar provision in the FY22 NDAA. KAMARCK & TORREON *supra* note 49. The Pentagon said implementing the recommendations could take at least nine years to implement, while legislators demand that the reform take effect within six months.

[54] *See* United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001); MANUAL FOR CTS.-MARTIAL, U.S. RULE 912 (2019).

bias instruction can only serve to ensure that servicemembers receive the full benefit of this guarantee.

Article III of the Constitution requires that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," while the Sixth Amendment provides that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."[55] But neither provision applies per se to servicemembers tried in the military justice system because courts-martial are legislatively created by Congress under Article I of the Constitution, and not under Article III.[56] Moreover, by its very text, the Fifth Amendment excludes "cases arising in the land or naval force, or in the militia" from the right to a grand jury indictment. However, that does not mean that servicemembers do not enjoy procedural due process — in fact, "the procedural protections afforded to a servicemember are '*virtually the same'* as those given in a civilian criminal proceeding, whether state or federal."[57] Accordingly, a servicemember's Fifth Amendment right to due process has been statutorily granted through Congress, which has explicitly provided for a "closely-resembled right to be tried by a fair and impartial panel of their fellow Service Members" at court-martial through provisions of the Uniform Code of Military Justice (UCMJ).[58]

10 U.S.C. § 825 of the UCMJ is the mechanism by which a servicemember should receive a fair and impartial court-martial members panel, which is considered "the most fundamental protection that an accused service member has from unfounded or unprovable charges."[59] Nevertheless, a military accused has no Sixth Amendment right to trial by jury of randomly selected peers, nor is there a requirement for a court-martial panel to be comprised of a representative cross-section of the military population, to include every economic, racial or ethnic class or persons of all military grades.[60] Instead, § 825 requires a convening authority to select members to serve on a court-martial that "in his opinion,

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[55] U.S. CONST. art. III, § 2, cl. 3.; U.S. CONST. amend. VI.

[56] Congress uses its enumerated powers under U.S. CONST. art. I, § 8 "[t]o make Rules for the Government and Regulation of the land and naval forces," in conjunction with the Necessary and Proper clause to form specialized tribunals, including courts-martial.

[57] Ortiz v. United States, 138 S. Ct. 2165, 2174-75 (2018) (emphasis added).

[58] United States v. Begani, 79 M.J. 767, 784 (N.M. Ct. Crim. App. 2020), *aff'd*, 81 M.J. 273 (C.A.A.F. 2021) (citing United States v. Dowty, 60 M.J. 163, 169 (C.A.A.F. 2004)); United States v. Witham, 47 M.J. 297, 301 (C.A.A.F. 1997).

[59] *Dowty*, 60 M.J. at 170 (quoting United States v. Smith, 27 M.J. 242, 252 (C.A.A.F. 1988) (Cox, J., concurring).

[60] *Ex parte* Quirin, 317 U.S. 1, 39-40 (1942); United States v. Hodge, 26 M.J. 596 (A.C.M.R. 1988), *aff'd*, 29 M.J. 304 (C.M.A. 1989).

are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

On its face, this methodology carries an obvious risk of bias by a convening authority who has been given broad authority and duty to hand-select members and influence the venire. However, a convening authority's power is not plenary. For instance, the highest military court of criminal appeals has recognized that a convening authority might show bias based on rank and, accordingly, has ruled that while the inclusion of certain genders or races in a venire is allowed, rank cannot be used as a mechanism for the deliberate and systematic exclusion or inclusion of otherwise qualified members.[61] On the other hand, a convening authority may seek to have a court-martial members panel reflect a cross-section of the military community similar to a civilian court. In that instance, the Court of Appeals for the Armed Forces (C.A.A.F.) has reiterated that it is the exclusion of personnel based on certain characteristics, such as race and gender, that is prohibited, not their inclusion.[62] However, "stacking" the panel with certain members in an attempt to influence the outcome of a case and achieve a particular result and not based on § 825 criteria, is impermissible.[63] Moreover, recognizing the fundamental difference between the experiences and accompanying biases of officers and enlisted, § 825 also allows enlisted members to elect a panel of at least one-third enlisted members instead of being tried solely by officers.[64]

Yet it is important to note that just like diversity does not necessarily equate inclusion, neither does a fair and impartial panel in composition equate to an unbiased panel in practice.[65] The provisions of 10 U.S.C. § 825 and the courts' analysis of them is primarily geared towards ensuring a panel appears to be fair at the outset of the court-martial, but "the Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also

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[61] United States v. Daigle, 50 C.M.R. 655 (C.M.A. 1975).

[62] United States v. Crawford, 35 C.M.R. 3 (C.M.A. 1964).

[63] *See* United States v. Smith, 27 M.J. 242 (C.A.A.F. 1988) (holding that it was improper for a convening authority to have an unofficial policy of ensuring two "hardcore" females were part of the venire on all sexual assault cases); *see also* United States v. Lewis, 46 M.J. 338 (C.M.A. 1997); United States v. Riesbeck, 77 M.J. 154 (C.A.A.F. 2018).

[64] 10 U.S.C. § 825.

[65] *See* Janice Gassam Asare, *McKinsey's New Report Finds That Diversity Does Not Equal Inclusion*, FORBES (May 19, 2020, 5:34 PM EDT), https://www.forbes.com/sites/janicegassam/2020/05/19/mckinseys-new-report-finds-that-diversity-does-not-equal-inclusion/?sh=4c105f257066 [https://perma.cc/458Q-ZKQR] ("Even where companies are more diverse, many appear as yet unable to cultivate work environments which effectively promote inclusive leadership and accountability among managers, equality and fairness of opportunity, and openness and freedom of bias and discrimination.").

their *conduct during the trial proceedings and the subsequent deliberations*."[66] It is only in addressing these solemn duties and the members' innate biases that will invariably affect them that the military will, in its own parlance, effectively "concentrate fires" at the critical heart of the Constitutional guarantee:

> The right to trial by fair and impartial members . . . is the cornerstone of the military justice system (citation omitted). Denial of a full and fair opportunity to exercise this right creates an appearance of injustice which permeates the remainder of the court-martial. When such a perception is fostered or perpetuated by military authorities through ignorance or deceit, it substantially undermines the public's confidence in the integrity of the court-martial proceedings.[67]

Whether a civilian or servicemember is facing trial, there is a clear right to have their case heard and adjudged by an impartial jury or panel of members. While there is not a specifically enumerated constitutional right to an implicit bias instruction, its utility can at least assist judges in ensuring implicit bias does not impede the fair administration of justice.[68]

B. IMPLIED BIAS IS ALREADY PART OF VOIR DIRE

It is not unprecedented for military courts to address bias in several facets of the court-martial process. At the outset, and although the system for selecting the venire is wholly different from civilian criminal trials, potential jury members are still subjected to voir dire by both the military judge and counsel in order to ensure their impartiality and the convening authority's compliance with § 825 requirements.[69] As such, "[t]he purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the members' sincerity, and to adjudicate the members' ability to sit as part of a fair and impartial panel."[70] Again, like other Constitutional rights, an accused at court-martial has no Fifth Amendment due process

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[66] United States v. Lambert, 55 M.J. 293, 295 (C.A.A.F. 2001) (emphasis added).

[67] United States v. Hilow, 32 M.J. 439, 442-43 (C.A.A.F. 1991) (citations omitted); *see* U.S. DEP'T OF THE ARMY, FM 3-21.8, THE INFANTRY RIFLE PLATOON AND SQUAD, at 2-2 (2007) (effectively massing direct and indirect fires "of all available resources at critical points and times" is "essential to success in close combat.").

[68] *See* Miller, *supra* note 41 (arguing that the Supreme Court should recognize a Sixth Amendment right to an implicit bias instruction, for the same reasons that it found a Fifth Amendment right to a "no adverse inference" jury instruction to prevent jurors from making assumption about an accused's invocation of his Fifth Amendment right to remain silent).

[69] 10 U.S.C. § 841; MANUAL FOR CTS.-MARTIAL U.S. RULE 912 (2019).

[70] United States v. Bragg, 66 M.J. 325, 327 (C.A.A.F. 2008).

right to peremptory challenges, but does have a statutory right 10 U.S.C. § 841 for one peremptory challenge and an unlimited number of challenges for cause.[71]

As part of that process, R.C.M. 912 and the courts have given military judges broad discretion and control to ensure a thorough voir dire is conducted.[72] In fact, the Criminal Law Deskbook that is produced "as a resource for Judge Advocates . . . for both training and actual practice in UCMJ proceedings" actually encourages military judges to consider that conducting a comprehensive and liberal voir dire may "save cases on appeal."[73] Appropriately, a military judge is required to consider both actual and implied bias when analyzing challenges for cause, and should look at the totality of circumstances when determining if implied bias is present.[74]

Implied bias in voir dire is the direct corollary of the implicit bias that we seek to eliminate at trial on the merits. Although the two words are synonyms of one another, how they differ in the judicial system is strictly from a point of view: implied bias is adjudged by the court and "is viewed objectively, through the eyes of the public. Implied bias exists if an objective observer would have substantial doubt about the fairness of the accused's court-martial panel."[75] In other words, a person may not actually have an actual bias at all, but because "most people in the same position as the court member would be prejudiced" based on the member's answers in voir dire, the perception may cast a veil of unfairness on the member and the proceedings.[76] On the other hand, implicit bias is more internalized in an individual, and because there is no awareness of the bias, the prejudice may likely show no external signs that would lead to scrutiny by a judge or members of the public.

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[71] United States v. Martinez-Salazar*,* 528 U. S. 304 (2000).

[72] *See* United States v. Jefferson, 44 M.J. 312, 322 (C.A.A.F. 1996) (holding that "the judge abused his ample discretion by failing to allow counsel to reopen the *voir dire* to ensure impartial court members"); *see also* United States v. Clay, 64 M.J. 274, 276 (C.A.A.F. 2007) (stating that "the trial judiciary has the primary responsibility of preventing both the reality and the appearance of bias involving potential court members" and that "implied bias and the liberal grant mandate also recognize that the interests of justice are best served by addressing potential member issues at the outset of judicial proceedings. . .").

[73] CRIM. L. DEP'T, JUDGE ADVOCATE. GEN.'S LEGAL CTR. & SCH., U.S. ARMY CRIMINAL LAW DESKBOOK: PRACTICING MILITARY JUSTICE, 18-9 (2019) [hereinafter DESKBOOK] (citing United States v. Dowty, 60 M.J. 163, 163 (C.A.A.F. 2004); *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003)).

[74] U.S. DEP'T OF THE ARMY PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, § 2-5-3 (2020) [hereinafter BENCHBOOK] (citing United States v. Strand, 59 M.J. 455, 459 (C.A.A.F. 2004)).

[75] *Id.* (quoting United States v. Warden, 51 M.J. 78, 80 (1999) (citations and quotation marks omitted)).

[76] BENCHBOOK, *supra* note 74, § 2-5-3 (citing United States v. Napolitano, 53 M.J. 162 (C.A.A.F. 2000)).

Herein lies the challenge of assessing the biases of potential members and the misconception that the implied bias standard at voir dire is enough to ensure a truly fair and impartial jury. During voir dire, the military judge questions specifically ask whether each member can be fair, impartial, and open-minded and directs members that "if you know of any matter that you feel might affect your impartiality to sit as a court member, you must disclose that matter when asked to do so."[77] Despite these instructions of the military judge, even explicit biases for members are often hard to ascertain, and the Criminal Law Deskbook warns judge advocates how difficult this task is:

> The problem is that panel members, like most human beings, will not say socially unacceptable things in public. Many psychological studies have shown that when people are put in group settings, they generally will say what they think the group expects them to say. If you ask panel members who are sitting in a formal court-room in their [branch] Service Uniform and who might themselves be a field-grade officer and whose boss might also be on the panel, "Do you look at pornography," don't expect a lot of hands to go up. If you ask, "Would you be concerned if your daughter dated outside of your race," don't expect a lot of hands to go up. To get responses that will accurately tell you whether a panel member might have a bias or belief that will impact your case, you need to ask those questions in a safe place—written individual voir dire . . . . You will need to identify what experiences, biases, and beliefs exist that might impact how your panel members will solve the problem in your case.[78]

The next question is what if the member is not aware of their own biases? How is a counsel supposed to ask questions to truly identify unconscious biases? If the warning from the Criminal Law Deskbook is valid, then a judge advocate may not be able to accurately ascertain potential members' explicit biases unless they are disclosed in writing, let alone the stereotypes and prejudices that could be hiding in their subconscious and will not be revealed regardless if they are answering verbally or in writing. A better practice would be for the judge to educate them on implicit bias and how to engage in self-awareness to detect the potential bias, and then put the question to themselves: do I have a bias that

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[77] *Id.* at § 2-5.

[78] DESKBOOK, *supra* note 73, at 18-36.

I'm applying to this case? Am I using stereotypes or preconceived notions about a person's race, gender, rank, military occupational specialty, etc. to make decisions in this case?

C. IMPLICIT BIAS INSTRUCTIONS ARE INCREASINGLY BEING USED IN CIVILIAN COURTS

To find a solution to the "Gordian knot" that is the demonstrative disparities in the military justice system, leaders would be wise to look at the example set by our civilian counterparts and their approach to effectively addressing latent biases in the criminal justice system.[79] Indeed, as the Task Force concluded fifty years ago, the problem at hand does not distinctly belong to either group, as "the military does not stand apart from the society it serves and is not immune from the forces at work in that society. As long as there is racial discrimination in American society . . . there will be racial discrimination in the military."[80] The common enemy is not only explicit biases, but the unintentional biases that are invariably a part of every criminal case, whether civilian or military. And, as previously discussed, while there are fundamental differences between the military justice system and the civilian criminal justice systems across the country, the former often takes cues from the latter, especially when it comes to constitutional issues.[81]

As the topic of implicit bias has risen to prominence, legal scholars continue to discuss and analyze, as well as develop ways in which legal practitioners can mitigate the phenomenon's effect on the justice system.[82] For more than a decade, the American Bar Association has focused on reducing bias across the legal spectrum and created a toolbox of various

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[79] "Gordian Knot" is a proverbial term often used to describe a complicated problem than can only be solved by a bold, and usually simple, solution. See Bennett, *supra* note 40.

[80] Robinson & Chen, *supra* note 50 (citing DEP'T OF DEF., REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES (1972)).

[81] *See, e.g.*, United States v. Witham, 47 M.J. 297, 300-01 (C.A.A.F. 1997). C.A.A.F. follows the precedent set by Batson v. Kentucky, 476 U. S. 79 (1986) and its progeny prohibiting racial or gender discrimination in peremptory challenges, even though a military accused has no Sixth Amendment right to trial by jury because it is a right to equal protection that is part of Fifth Amendment guarantee of due process, and therefore "applies to courts-martial, just as it does to civilian juries."

[82] *E.g.*, Bennett, *supra* note 40; Kang et al., *supra* note 31; Miller, *supra* note 41; Donald & Redfield, *supra* note 33; *Implicit Bias Initiative Toolbox*, AMERICAN BAR ASSOCIATION (Apr. 10, 2020) https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox/ [https://perma.cc/F97Y-2RAU] [hereinafter *Toolbox*].

resources, including suggested voir dire questions and a proposed implicit bias instruction.[83] In practice, an increasing number of judges in civilian criminal courts have started using an implicit bias jury instruction or series of instructions as an additional measure to safeguard an accused's Sixth Amendment right to an impartial jury.[84]

Perhaps the most comprehensive discussion and implementation of implicit bias mitigation in the courtroom can be seen in the work of former District Judge Mark W. Bennett. While on the bench in the United States District Court for the Northern District of Iowa, Judge Bennett subscribed to the "early and often" methodology to address implicit bias with members.[85] In addition to spending approximately twenty-five minutes to educate potential members on implicit bias during jury selection, Judge Bennett would also ask each selected juror to take a pledge to "not decide this case based on biases," and delivered a dedicated implicit bias instruction before opening statements in both criminal and civil cases:

> Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make

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[83] *Toolbox*, *supra* note 82, at 17-22. The ABA's proposed instruction states:

> Our system of justice depends on judges like me and jurors like you being able and willing to make careful and fair decisions. Scientists studying the way our brains work have shown that, for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even those these quick responses may not be what we consciously think, they could influence how we judge people or even how we remember or evaluate the evidence.
>
> Scientists have taught us some ways to be more careful in our thinking that I ask you to use as you consider the evidence in this case:
>
> - Take time the time you need to test what might be reflexive unconscious responses and to reflect carefully and consciously about the evidence.
> - Focus on individual facts, don't jump to conclusions that may have been influenced by unintended stereotypes or associations.
> - Try taking another perspective. Ask yourself if your opinion of the parties or witnesses or of the case would be different if the people participating looked different or if they belong to a different group?
> - You must each reach your own conclusions about this case individually, but should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours. Working together will help achieve a fair result. *Id.*

[84] Miller, *supra* note 41, at 357 (citing Jennifer K. Elek & Paula Hannaford-Agor, *Can Explicit Instructions Reduce Expressions of Implicit Bias? New Questions Following a Test of a Specialized Jury Instruction* 4 NAT'L CTR. FOR STATE CTS. 2014).

[85] Kang et al., *supra* note 31, at 1181-82.

> important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.[86]

The most famous implicit bias instruction to date was issued before the jury's deliberations in the criminal trial of Derek Chauvin, the former Minneapolis police officer who was eventually convicted of murder in the death of George Floyd in May 2020.[87] But implicit bias instructions are not

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[86] *Id.* at 1182-83 n.250. Judge Bennett's pre-voir dire presentation includes using a clip from the ABC television program *What Would You Do?*, a show "that uses hidden cameras to capture bystanders' reactions to a variety of staged situations," and allows potential jurors to "immediately see how implicit biases can affect what they see and hear." VladCantSleep, *What Would You Do?*, YOUTUBE (May 7, 2010) https://www.youtube.com/watch?v=ge7i60GuNRg [https://perma.cc/KCN4-RACS].

[87] Jury Instructions at 12, Minnesota v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct., Apr. 19, 2021), https://mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12646/JuryInstructions04192021.pdf [https://perma.cc/54KB-J527].

> We all have feelings, assumptions, perceptions, fears, and stereotypes about others. Some biases we are aware of and others we might not be fully aware of, which is why they are called "implicit" or "unconscious biases." No matter how unbiased we think we are, our brains are hardwired to make unconscious decisions. We look at others, and filter what they say, through the lens of our own personal experience and background. Because we all do this, we often see life— and evaluate evidence— in a way that tends to favor people who are like ourselves or who have had life experiences like our own. We can also have biases about people like ourselves. One common example is the automatic association of male with career and female with family. Bias can affect our thoughts, how we remember what we see and hear, whom we believe or disbelieve, and how we make important decisions. As jurors you are being asked to make an important decision in this case. You must:
>
> 1. Take the time you need to reflect carefully and thoughtfully about the evidence.
>
> 2. Think about why you are making the decision you are making and examine it for bias. Reconsider your first impressions of the people and the evidence in this case. If the people involved in this case were from different backgrounds, for example, richer or poorer, more or less educated, older or younger, or of different gender, gender identity, race, religion, or sexual orientation, would you still view them, and the evidence, the same way?

limited to high profile criminal cases where race is at issue — several federal district courts and state courts have also begun to include unconscious bias in their jury instructions, and not just for criminal cases. For instance, the United States District Court, Western District of Washington, requires juries to be shown a video on unconscious bias "in every case," as well as the delivery of instructions incorporating unconscious bias language throughout the conduct of the trial— prior to jury selection, before opening statement, as part of the witness credibility instruction, and during closing instructions.[88] In Massachusetts, the justice

> 3. Listen to one another. You must carefully evaluate the evidence and resist and help each other resist any urge to reach verdict influenced by bias for or against any party or witness. Each of you have different backgrounds and will be viewing this case in light of your own insights, assumptions, and biases. Listening to different perspectives may help you to better identify the possible effects these hidden biases may have on decision-making.
> 4. Resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or unconscious biases.
> The law demands that you make a fair decision, based solely on the evidence, your individual evaluations of that evidence, your reason and common sense, and these instructions.

[88] *Unconscious Bias Juror Video*, U.S. DIST. CT. W. DIST. WASH. (last visited Feb. 10, 2023) https://www.wawd.uscourts.gov/jury/unconscious-bias [https://perma.cc/7U5E-3NMU] (adapting model criminal and civil instructions from the MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS (9th Cir. 2021), https://www.ce9.uscourts.gov/jury-instructions/ [https://perma.cc/GW9N-TPFQ]):

> *Preliminary Instruction to be Given to the Entire Panel Before Jury Selection*:
> It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender of the [plaintiff,] defendant, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial. Accordingly, during this voir dire and jury selection process, I [the lawyers] may ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias.
> *Preliminary Instructions to be Given Before Opening Statements (repeated in Closing Instructions)*
> Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. . . .You must decide this case solely on the evidence and the law before you and must not be influence by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.
> *Credibility of Witnesses*:
> In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything

of the state's supreme court approved model jury instructions on implicit bias to be "given at all criminal and civil trials, during the preliminary charge following empanelment and during the final charge prior to deliberations."[89] In California civil trials, judges use a post-voir dire, pretrial

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> a witness says, or part of it, or none of it. . . . You must avoid bias, conscious or unconscious, based on the witness's race, color, religious beliefs, national origin, sexual orientation, gender identify, or gender in your determination of credibility.

[89] Mass. Sup. Jud. Ct., *Model Jury –Instruction– Be Fair (Implicit Bias) Preliminary Charge* (2021), https://www.mass.gov/doc/sjc-model-jury-instructions-on-implicit-bias-preliminary-charge-pdf-sept-29-2021/download [https://perma.cc/HF92-CVUY].

> *Preliminary Charge*:
> Our system of justice depends on judges like me and jurors like you being able and willing to make careful and fair decisions. All people deserve fair and equal treatment in our system of justice, regardless of their race, national origin, religion, age, ability, gender, sexual orientation, education, income level, or any other personal characteristic. You have agreed to be fair. I am sure that you want to be fair, but that is not always easy.
> One difficulty comes from our own built-in expectations and assumptions. They exist even if we are not aware of them and even if we believe we do not have them. Some of you may have heard this called "implicit" bias and that is what I'm talking about. We judges have the same problem, so let me share a few strategies that we have found useful.
> First, slow down; do not rush to any decisions. Hasty decisions are the most likely to reflect stereotypes or hidden biases.
> Second, keep an open mind. Avoid drawing conclusions until the end of the case, when you and your fellow jurors deliberate. Remember that when you deliberate, you will have all the evidence and all the time you need to make a careful decision. So, there truly is no need to start making your mind up before then.
> Third, you should listen closely to all the witnesses. That is the best way to ensure that you decide this case based on the evidence and the law, instead of upon unsupported assumptions.
> Fourth, as you listen to testimony about the people involved in this case, consider them as individuals, rather than as members of a particular group.
> Finally, I might ask myself: Would I view the evidence differently if the people were from different groups, such as different racial, ethnic, or gender identity groups?
> At the end of the case, I will remind you of these strategies and ask you to focus on the evidence instead of any unsupported assumptions you may have. All we ask is that you, individually and as a group, do your best to resolve this case based upon the evidence and law, without sympathy, bias, or prejudice, to the best of your ability as human beings.
> *Final Charge*:
> Let's turn to another important issue that I raised with you at the beginning of this trial.
> [Repeats first two paragraphs from preliminary charge]
> Second, as you start to draw conclusions, consider what evidence, if any, supports the conclusions you are drawing and whether any evidence casts doubt on those conclusions. Double check whether you are actually using unsupported assumptions instead of the evidence.

bias instruction.[90] Not only are implicit bias instructions increasingly being given in courts, but preliminary research has begun to show the efficacy of such instructions. In 2014, the National Center for State Courts (NCSC) tested implicit bias instructions in a simulated environment with inconclusive results.[91] But just a few years later in Dallas's 116th[th] Civil District Court, Judge Tonya Parker formed a task force and conducted a first-of-its-kind study on the impact of implicit bias on actual civil juries in real-time.[92] After a limited sample size, Judge Parker's project showed multiple positive results from a specialized implicit bias instruction:

> Third, as you think about the people involved in this case, consider them as individuals, rather than as members of a particular group.
> Fourth, I might ask myself: Would I view the evidence differently if the people were from different groups, such as different racial, ethnic, or gender identity groups?
> Fifth, listen to your fellow jurors. They may have different points of view. If so, they may help you determine whether you are focusing on the facts or making assumptions, perhaps based on stereotypes. Of course, your fellow jurors could be influenced by their own unstated assumptions, so don't be shy or hesitate to speak up. You should participate actively, particularly if you think the other jurors are overlooking or undervaluing evidence you find important. In fact, when you explain your thoughts out loud to other jurors, you are also helping yourself to focus on the evidence, instead of assumptions.
> If you use these strategies, then you will do your part to reach a decision that is as fair as humanly possible. That is your responsibility as jurors.

[90] JUD. COUNCIL OF CALIFORNIA CIV. JURY INSTRUCTIONS NO. 113 (2021).

> Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases. Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions. As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against parties or witnesses because of their disability, gender, gender identity, gender expression, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status, or [*insert any other impermissible form of bias*]. Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

[91] ELEK & HANNAFORD-AGOR, *supra* note 84. While the study found that "the instruction did not appear to significantly influence juror verdict preference, confidence, or sentence severity," the authors admittedly "were unable to replicate . . . the traditional baseline pattern of juror bias observed in other similar studies . . . which prevented a complete test of the value of the instructional intervention." *Id.*

[92] Kathy Wise, *Groundbreaking Implicit Bias Project Takes Shape in Dallas County Civil Courts*, D MAGAZINE (Jan. 16, 2020, 10:56 AM),

- 94% of jurors reported that they consciously thought about the implicit bias instruction at some point during the trial;
- 91% of jurors responded that they had a conscious thought about the implicit bias instruction as they listened to and received evidence;
- 54% reported that the implicit bias instruction influenced how they individually processed the evidence and how they thought about the case.[93]

Moreover, the initial feedback from Judge Parker's inclusion of an implicit bias instruction "did not create a meaningful difference in the time juries spent deliberating."[94]

Drawing on these examples, a comparable instruction could easily be adapted for use at courts-martial to address implicit bias both generally and concerning specific nuances in the military justice system:

> You have previously been instructed that in weighing and evaluating evidence, you are expected to use your own common sense and your knowledge of human nature and the ways of the world. However, in doing so you should be cognizant of the fact that no matter how unbiased we think we are, our brains are hardwired to make unconscious decisions and judgments. For instance, you may subconsciously assign certain attributes to a specific MOS, make unintended assumptions about personnel of certain ranks, or have unintentionally formed views based on training you have received or personal experiences you have had.
>
> At the outset of this court-martial, you swore or affirmed to faithfully and impartially determine whether the accused is guilty or not guilty based solely on the evidence presented here in court. I remind you now of that duty and charge each and every one of you to slowly and carefully reflect on the evidence presented in this case and thoughtfully examine your decisions for any bias. You must not be biased in favor of or against any witness or party because of their race, color, national origin, religion, sex, gender identity, or sexual orientation, and you must not be influenced by any personal likes or dislikes,

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https://www.dmagazine.com/frontburner/2020/01/dallas-county-implicit-bias-civil-court-pilot/ [https://perma.cc/U5RH-76X9].

[93] Virtual Interview with Tonya Parker, Judge, 116th Civil District Court (Oct. 22, 2021).

[94] Wise, *supra* note 92.

> opinions, prejudices, sympathy, or biases, including unconscious bias, of these or any other characteristics.

As more and more civilian jurisdictions begin to use these instructions regularly, court records will become replete with new and diverse examples of jury instructions for uniform jurists to draw inspiration from and craft an appropriately tailored instruction for use during courts-martial. But as the suggested text above shows, the content of such an implicit bias instruction does not need to be complex or lengthy — it only needs to clearly address the issue.

D. EXISTING INSTRUCTIONS ALLOW FOR SEAMLESS INTEGRATION

Other strategies for attacking the military justice disparity problem rely heavily on staff judge advocates to educate and advise commanders making disposition decisions, or on counsel to hopefully flush out a member's experiences that may suggest implicit bias in voir dire—both actions that still occur before the commencement of the trial on the merits.[95] While both should be standard, so too should an instruction that directly addresses implicit bias, and could easily be tied into the standard suite of instructions that are already given by the military judge.

First, the preliminary instructions given at the opening of a contested court-martial before voir dire already contain a bevy of language that already alludes to the dangers of implicit bias, without expressly addressing it. At the proceeding's onset, members are sworn to an oath to "faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by court-martial, the case of the accused now before this court?"[96] Then, in a long opening salvo of instructions, the military judge clarifies their responsibility "to ensure this trial is conducted in a fair, orderly, and impartial manner according to the law."[97] They reiterate the significance of instructions that come from the bench, and remind the members that "it is of vital importance that you keep an open mind until all the evidence has been presented and the instructions have been given."[98] Finally, in several sentences in regards to witnesses, the military judge imbues the potential members with the duty that is incumbent upon each of them, stating "the final determination as to the weight of evidence and the credibility of the witnesses in this case rests solely upon you."[99]

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[95] Grimm, *supra* note 44, at 18.
[96] BENCHBOOK, *supra* note 74, § 2-5.
[97] *Id.*
[98] *Id.*
[99] *Id.*

Second, after the presentation of the case on the merits, R.C.M. 920(b) requires the military judge to give prefatory instructions on findings, otherwise known as charging instructions, either before or after closing arguments by counsel, or at both times.[100] In this litany of instructions, the military judge again reiterates the duties of the court, stating "my duty is to instruct you on the law. Your duty is to determine the facts, apply the law to the facts, and determine whether the accused is guilty or not guilty."[101] The military judge also repeats the presumption of innocence, and the definition and burden of reasonable doubt, before empowering the members with another direction that requires each member's introspection:

> Bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating evidence, you are expected to use your own common sense and your knowledge of human nature and the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence. . . . The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you.[102]

Each of these segments provide an opportunity to include an instruction that unequivocally addresses implicit bias and could closely mirror the instructions that are already being used in civilian courts. For example, military members have a strong sense of commitment and duty that often requires sacrificing one's own interests — as such, the military judge's explanation of duty in the preliminary instructions immediately after the oath would be an ideal place to introduce and educate the members about the concept of implicit bias and ensure it is given the gravitas it deserves.[103] Moreover, the repetition of the duties in the prefatory instructions would only serve to reinforce the concept and each individual member's responsibility to combat it.

The closing instruction that informs members that they are expected to use their own common sense and their knowledge of the ways of the world is another appropriate area to discuss implicit biases with members. While individuals will have an understanding about human nature, they may not be aware of their own biases that affect their own personal view of how the

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[100] *Id.* at § 2-5-9.

[101] *Id.*

[102] BENCHBOOK, *supra* note 74, § 2-5-12.

[103] *The Army Values*, U.S. ARMY, https://www.army.mil/values/ [https://perma.cc/3J6R-P3LF] ("Doing your duty means more than carrying out your assigned tasks. . . . You fulfill your obligations as part of your unit ever time your resist the temptation to take shortcuts that might undermine the integrity of the final product.").

world works, and how those preferences or prejudices may affect how they evaluate information and make decisions.

E. THREE WAYS AN IMPLICIT BIAS INSTRUCTION CAN BECOME STANDARD AT COURTS-MARTIAL

1. Rules for Court-Martial Already Allow for It

The most direct way to start incorporating implicit bias instructions into courts-martial is either for the military judge to give them *sua sponte*, or for counsel to request them and for military judges to liberally grant such motions to include a novel instruction. Again, the UCMJ and the R.C.M. not only already allow for this kind of inclusion in the areas suggested, but also infer the judge may have to use instructions to address bias in one of its many forms.

R.C.M. 913(a) says that "the military judge may give such preliminary instructions as may be appropriate," and those instructions "may include a description of the duties of members, procedures to be followed in the court-martial, and other appropriate matters."[104] Correspondingly, instructions on findings is found in R.C.M. 920(e), which is the embodiment of 10 U.S.C. § 851(c) and also provides a list of additional requirements for specific and enumerated instructions to be given prior to the members deliberating.[105] R.C.M. 920(e)(7) specifically allows for "such other explanations,

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[104] MANUAL FOR CTS.-MARTIAL U.S. RULE 913, discussion (2019).

[105] 10 U.S.C. § 851 requires that:

> "before a vote is taken on the findings, the military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them — (1) that the accused must be presumed innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt; (2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted; (3) that, if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and (4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States."

R.C.M. 920(c) encompasses the required instructions from Article 51, and adds:

> "instructions on findings shall include: (1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty; (2) A description of the elements of each lesser included offense in issue, unless trial of a lesser included offense is barred by the statute of limitations (Article 43) and the accused refuses to waive the bar; (3) A description of any special defense under R.C.M. 916 in issue; (4)A direction that only matters properly before the court-martial may be considered; . . . (6) Directions on the procedures under R.C.M. 921 for deliberations and voting."

descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua sponte*, should be given." Moreover, the discussion to R.C.M. 920(e) states that "the military judge should . . . make clear that the members must exercise their independent judgment as to the facts" and primes the reader to prepare that the judge will need to intervene to ensure that members do not infer anything from a plea of guilty to one offense, the absence of an accused from trial, and especially that "no adverse inferences may be drawn from an accused's failure to testify."[106]

2. It Can be Included in the Military Judges' Benchbook

The inclusion of an implicit bias instruction certainly fits under the rubric currently provided for both R.C.M. 913 and 920. Yet, some judges may be hesitant to incorporate verbiage about implicit bias until the language and placement of the instruction is standardized in the Military Judges' Benchbook — "a supplement to the Uniform Code of Military Justice" that is published by the Army (but used by military judges of all branches) and "sets forth pattern instructions and *suggested* procedures" for trial by courts-martial.[107] Indeed, the addition of an implicit bias instruction as a standard instruction in the Benchbook would provide some protection to ensure its actual inclusion at court-martial — C.A.A.F. has held that if a military judge deviates significantly from the standard instructions, or refuses to give a standard instruction requested by either party, then they have a duty to explain their reasoning on the record.[108] But the Benchbook is not a binding authority:

> While military judges are encouraged not to significantly deviate from the standard instructions found in the Military Judges' Benchbook, the standard instructions are not sacrosanct. In the military justice system, military judges are required to tailor the instructions to the particular facts and issues in a case. When tailoring instructions to a specific case, they may be obliged to deviate from the standard Military Judges' Benchbook instructions.[109]

Thus, while a standard instruction printed in the Benchbook may appease concerns from military judges about granting a novel instruction, it

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[106] 10 U.S.C. § 851; *see* MIL. R. EVID. 301(f).

[107] BENCHBOOK, *supra* note 74, at i, iv (emphasis added).

[108] United States v. Rush, 51 M.J. 605, 609 (A. Ct. Crim. App. 1999), *aff'd* 54 M.J. 313 (C. A. A. F. 2001) (citing MANUAL FOR CTS.-MARTIAL, U.S. RULE 1005(c) (2019)).

[109] United States v. Staton, 68 M.J. 569, 572 (A.F. Ct. Crim. App. 2009) (citing *Rush*, 51 M. J. at 609) (quotation marks and citations omitted).

still does not guarantee that any instruction makes the cut in the final version of instructions used at court-martial.

3. Congress or the President Can Mandate its Inclusion

A third option to ensure the inclusion of an implicit bias instruction in the military justice system would be for the President or Congress to mandate it. Article 36, UCMJ, gives the President the authority to prescribe "pretrial, trial, and post-trial procedures" for courts-martial and "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." This broad authority, "limited only by the requirement that the rules be consistent with the Constitution or other laws," has previously been used by the President to effectuate changes to the military justice system through Executive Order.[110] Congress, too, has the power to mandate the inclusion of an implicit bias instruction — the Constitution granted the enumerated power to "make rules for the Government and Regulation of the land and naval forces" to Congress, and it is well-settled law that Congress can declare "the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the part is the in the military or naval service."[111] To that end, Congress can statutorily amend § 851(c) of the UCMJ to include an additional required instruction for implicit bias.

F. OTHER BIASES HAVE SIMILARLY BEEN ADDRESSED

While a legislative directive from Congress may eventually be required, military practitioners might be less obstinate about the inclusion of an implicit bias instruction after looking at the mechanisms already employed by the military justice system to combat the scourge of bias, whether explicit or implicit, in its proceedings. Ironically, there may be an explicit bias about the term "implicit bias" — quite often, the assumption is biases are bad and always carry a negative connotation, or that unintentional bias usually only serves to prejudice the accused, whether it is in a

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[110] United States v. Kelson, 3 M.J. 139, 141 (C.M.A. 1977); *see, e.g.*, United States v. Brown, 72 M.J. 359 (C.A.A.F. 2013) (stating that a military judge allowed a witness attendant to accompany a child on the witness stand — a common practice outside of the military justice system and the CAAF held that the military judge did not abuse his discretion pursuant to 10 U.S.C. § 836 and R.C.M. 801, because the President has directed that military judges "exercise reasonable control over the proceedings to promote the purpose of these rules"); *see also List of Historical Executive Orders*, JOINT SERV. COMM. ON MILT. JUST., https://jsc.defense.gov/Military-Law/Executive-Orders/ [https://perma.cc/36G2-3TDE] (last visited Feb. 10, 2023).

[111] U.S. CONST. art 1, § 8, cl. 14.; Ex Parte Milligan, 71 U.S. 2 (1866).

prosecutorial decision to charge or in a jury member's decision on the case's merits.[112] However, biases can also carry a positive connection to a characteristic of another person or group, and can serve in an accused's favor.

In the military justice system, that very kind of bias is invited in the form of a recognized and frequently used legal defense.[113] Similar to Federal Rule of Evidence 404, character evidence at court-martial cannot be used as propensity evidence, and is limited to pertinent traits of the defendant or victim in a criminal case.[114] However, for more than seventy-five years, the Military Rules of Evidence (M.R.E.) considered good military character as a pertinent trait to *any* crime charged under the UCMJ and allowed an accused's to introduce evidence *in a case on the merits* "that highlights his good military character in an effort to convince members of the court-martial panel that he did not commit the crime of which he is accused."[115] It is known as the "good soldier defense," and is "intended to provide the basis for an inference that the accused is too professional a soldier to have committed the offense with which he is charged."[116] In other words, it invites irrelevant evidence and implicit bias into the minds of the fact-finder — whether that be a judge or a members panel — in order to sow the seeds of reasonable doubt.[117]

In practice, it disproportionately favors higher ranking officers "whose long and impressive military records can overwhelm the testimony of lesser ranking or civilian accusers."[118] This leads to the proverbial phenomenon of

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[112] *See, e.g.,* Royer et al., *supra* note 32, (discussing how implicit biases cause disparate sentencing for defendants based on race and how implicit "biases in judges can affect their judgment and treatment of a defendant); *see also* L. Song Richardson, Book Note, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom,* 126 YALE L. J. 862 (2017) (reviewing NICOLE VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (Stanford Univ. Press, 2016)) (discussing how courts in Cook County, Illinois, are "transformed from central sites of due process into central sites of racialized punishment" that treats all people of color—regardless if they are defendant or not—as a criminal).

[113] *See* Randall D. Katz & Lawrence D. Sloan, *In Defense of the Good Soldier Defense*, 170 MIL. L. REV. 117, 119 (2001) ("[A]lthough the good soldier defense is not an affirmative defense, the accused may rely solely on good character evidence for his defense.").

[114] FED. R. EVID. 404; MIL. R. EVID. 404.

[115] MIL. R. EVID. 404; Katz & Sloan, *supra* note 113, at 117.

[116] Katz & Sloan, *supra* note 113, at 118.

[117] *See* Mark Thompson, *Curbing Different Spanks for Different Ranks*, TIME (Dec. 8, 2013), https://swampland.time.com/2013/12/08/curbing-different-spanks-for-different-ranks/[https://perma.cc/J3BU-YZE7] (quoting Eugene Fidell) ("How is it relevant that a soldier accused of some violent crime happens to have been a terrific master sergeant? . . . That's putting a thumb on the scale that shouldn't be there.").

[118] Elizabeth Lutes Hillman, Note, *The Good Soldier Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L. J. 879, 906 (1999).

"different spanks for different ranks," which not only erodes public confidence in the military justice system, but disproportionately affects racial minorities who hold relatively fewer high ranking positions across all of the services.[119] But inequality is not just between ranks; the imbalance of this evidence is "amplified and apparent in victim-based offenses, namely sexual offenses"— an area that has been a point of contention in Congress for more than a decade.[120] The introduction of good military character evidence only served to "bolster the accused" without the accused even testifying, while providing "no comparable means of bolstering the reputation of a victim with character evidence . . . except when a character trait (e.g. truthfulness) is first attacked by the defense at trial."[121]

Recognizing this lopsided effect of M.R.E. 404, and as a part of continuing legislative action to "remove potential sources of bias," the rule was significantly curtailed in 2015.[122] The current version of the rule does not completely remove general military character evidence from every court-martial, but bars it from being used to show the probability of innocence for several enumerated crimes and "any other offense in which [it] is not relevant to any element of an offense for which the accused has been charged."[123]

Another area where the military justice system has ostensibly taken actions to limit the bias faced by a military accused is by requiring the

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[119] *See* DEP'T OF DEF. BD. ON DIVERSITY AND INCLUSION REP., RECOMMENDATIONS TO IMPROVE RACIAL AND ETHNIC DIVERSITY AND INCLUSION IN THE U.S. MILITARY 9 (2020) (finding "across the Services, racial and ethnic minorities are underrepresented at the senior noncommissioned officer and general and flag officer grades compared with their representation in the lower grades."); *see also* Thompson, *supra* note 117; Stephen Losey, *'Different Spanks for Different Ranks': Lawmaker Questions Lack of Courts-Martial for Air Force Generals*, AIR FORCE TIMES (Feb. 21, 2018), https://www.airforcetimes.com/news/y our-air-force/2018/02/21/differentspanks-for-different-ranks-lawmakerquestions-lack-of-courts-martial-for-airforce-generals/ [https://perma.cc/4GNU-PJCV].

[120] Rory T. Thibault, *The Good Soldier Defense is Dead. Long Live the Good Solider Defense: The Challenge of Eliminating Military Character Evidence in Courts-Martial*, 2015 Army Law. 19, 32; *see* KAMARCK & TORREON, *supra* note 49.

[121] Thibault, *supra* note 120, at 32.

[122] KAMARCK & TORREON, *supra* note 49, at 60; Exec. Order No. 13696, 80 Fed. Reg. 35783 (June 22, 2015); Pandemic and All-Hazards Preparedness Reauthorization Act of 2013, Pub. L. No. 113-66, § 536 (2013).

[123] MIL. R. EVID. 404(a) now mandates that good military character evidence is specifically inadmissible for the following Articles of the UCMJ: 105 (Forgery), 120 (Rape and Sexual Assault), 120a (Mails: Deposit of Obscene Matter), 120b (Rape and Sexual Assault of a Child), 120c (Other Sexual Misconduct), 121 (Larceny and Wrongful Appropriation), 121a (Fraudulent use of Credit Cards, Debit Cards, and Other Access Devices), 121b (False Pretenses to Obtain Services); 122 (Robbery), 123a (Making, Drawing, or Uttering Check, Draft, or Order Without Sufficient Funds), 124 (Frauds Against the United States); 126 (Arson), 127 (Extortion), 129 (Burglary), 130 (Stalking), and 131 (Perjury).

servicemember to appear in uniform. Court rules consistently require the accused to not only appear in dress uniform, but with "the insignia of grade and may wear any decorations, emblems, or ribbons to which entitled."[124] This is especially important when a servicemember has been placed in pre-trial confinement — not only are brig jumpsuits or equivalent attire strictly prohibited, as well as "any tag or symbol that identifies that person as being in custody while in open court," but also the government is charged with the responsibility of taking action to "prevent the members from seeing the accused in restraints while the accused or members are transiting the building" to and from the court.[125]

To that end, truly mitigating the effects of implicit bias is a team sport, and "all stakeholders in the civil and criminal justice systems must work diligently to enhance fairness by reducing bias."[126] Defense counsel must zealously advocate for their clients and continue to raise the issue of implicit bias at trial on the merits. Trial counsel, as a representative of the United States, must seek justice with due regard for fairness and rights of victims, witnesses, and the accused, which necessarily includes a commitment to eliminate implicit biases for all involved. And finally, judges must ensure an impartial trial and attempt to eliminate bias or prejudice that may impede on the fairness of the proceedings.[127]

V. CONCLUSION

What the armed forces cannot afford to do is nothing. After fifty years of futility, the military still appears to be struggling with where to start when it comes to addressing the racial disparity in the military justice system. Uniformed leadership has at least identified one of the root causes: unconscious bias. However, if the military is prepared to address implicit bias that it now seems ready to admit affects all servicemembers, then it must necessarily address it throughout the stages of the court-martial process and not just in the referral of cases before the start of litigation.

If truth dies in darkness, then we must take whatever steps are necessary to bring it into the light; but thus far, a meaningful discussion about the existence of implicit bias and the effect it may have on a court-martial members panel has yet to be a common occurrence in the sanctum

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[124] Rule 14.2, 10 (UNIF. R. OF PRAC. BEFORE NAVY AND MARINE CORPS COURTS-MARTIAL 2021).

[125] *Id.* at 14.2, 14.3e

[126] Donald & Redfield, *supra* note 33, at 10.

[127] STANDARDS FOR CRIM. JUST., PROSECUTION FUNCTION § 3-1.6, 3-1.9 (Am. Bar Ass'n, 4th ed., 2017); STANDARDS FOR CRIM. JUST., FUNCTIONS OF THE TRIAL JUDGE. § 6-1.6 (Am. Bar Ass'n, 2000).

of the military courtroom. The implied bias mechanism in voir dire alone is simply insufficient to address latent biases that exist during the entirety of court-martial proceedings. The identified clear and present danger is implicit bias, and the most direct and straightforward steps should be taken to target the threat and mitigate its harmful effects. As a result, an implicit bias instruction should be included in the panoply of instructions that are currently given at courts-martial and already directly or indirectly address biases in court-martial members. It is the simplest solution to the otherwise complex problem of racial disparity in the military justice system — an implicit bias instruction's inclusion will only further facilitate the stated goal and a servicemember's right to a fair and impartial members' panel.