



Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems

August 31, 2022

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I. Foreword

In an Op-ed late last year, Deputy Secretary of Defense Kathleen Hicks acknowledged, “Racial disparities in the military justice system have been a problem for far too long.” She went on to pledge, “[W]e are going to work hard to fix it . . . [t]he men and women who risk their lives in defense of the United States deserve better.”¹ Earlier this year, Deputy Secretary Hicks established and personally charged the members of this Internal Review Team (IRT) to identify the root causes of racial disparities in the Department of Defense (DoD) investigative and military justice systems and provide actionable recommendations to address them.

The IRT began its efforts with the somber recognition that racial disparities have existed and continue to exist in our military, and that our investigative and military justice systems are far from immune. Disparities in these systems degrade Service member trust and unit cohesion, and pose a marked threat to the readiness and sustainment of the force. The IRT carried out its work with full awareness of the urgency of these issues and a profound understanding of the need for real and meaningful progress in addressing them. In particular, our personal engagements with Service members across the United States illuminated the problems before us and confirmed the importance of our task. After intensive study and deliberation, we offer our analyses and recommendations in the report that follows.

We, the members of the IRT on Racial Disparities in the Investigative and Military Justice Systems, know there are no easy answers. But we believe our recommendations—which coalesce around the need for more effective training and education, increased Service member protections, and additional oversight and transparency—can serve as a blueprint for a more inclusive, fair, and just military and bring us closer to redeeming the promise of equality on which our Nation was founded. We urge Service members and leaders at all levels, and across all components, to join us in reaffirming a commitment to our people, our mission, and the hard work ahead.

Very respectfully,

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¹ Kathleen H. Hicks, *Addressing racial disparities in the military justice system*, The Hill, Sep. 1, 2021, <https://thehill.com/opinion/national-security/570464-addressing-racial-disparities-in-the-military-justice-system/>.

II. Overview

On May 3, 2022, Deputy Secretary of Defense Kathleen Hicks established the Internal Review Team (IRT) on Racial Disparities in the Investigative and Military Justice Systems.² The IRT was charged to employ qualitative and quantitative assessments to identify racial disparities in the investigative and military justice systems of the DoD and to provide actionable recommendations to the Deputy Secretary of Defense to establish or improve strategies, programs, policies, processes, outreach, partnerships, and resourcing to address those disparities.³ The IRT officially began its review on June 1, 2022.

To accomplish the goals outlined in the IRT Charter, the Deputy Secretary appointed a core group of executive-level subject matter experts from across the Military Services, with command experience as well as experience in the fields of criminal investigations; military justice; and diversity, inclusion and equity, to serve on the IRT.⁴ Over a period of three months, the IRT gathered input from key stakeholders across DoD, the Military Departments and Services, and external organizations. In particular, the IRT sought views and perspectives from the individuals who would be most impacted by its findings and recommendations: enlisted Service members and officers in the field.

On August 24, 2022, the IRT presented Deputy Secretary Hicks with its recommendations addressing three broad areas: training and education, Service member protections, and oversight and transparency.⁵ These three categories of recommendations are of equal importance and fundamentally interconnected; they are designed to wholistically address racial disparities in the investigative and military justice systems.

² Deputy Secretary of Defense Memorandum, *Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems*, May 3, 2022 (Appendix D) [hereinafter IRT Establishment Memo].

³ Deputy Secretary of Defense, *Charter, Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems*, June 28, 2022 (Appendix E) [hereinafter IRT Charter].

⁴ See Appendix F for biographies of IRT Members.

⁵ See Appendix K for the briefing provided by the IRT to the Deputy Secretary of Defense and the Deputy's Workforce Council on August 24, 2022.

Two key external factors will hold sway over the success of the IRT recommendations in achieving their essential purpose. First, the actions recommended to address disparities in the investigative and military justice systems will not come cheaply or easily. These initiatives must be fully funded and supported by all stakeholders. Second, as the DoD implements these changes, it also must seize the narrative—publicly acknowledging that these disparities exist and continually telling the force, key stakeholders, and the public what the DoD is doing to address disparities, and why. Additionally, as it moves forward, DoD must regularly seek, consider, and incorporate Service member feedback, input, and contributions.

The IRT reached its findings based upon qualitative and quantitative analysis. In addition, the IRT developed 17 key recommendations for DoD action. Highlights of these recommendations are presented in section VIII of this report; more detailed information about each recommendation is set forth in Appendices A through C.

III. Strategic Context

There is no more consequential time than today to address issues of racial disparity in the armed forces. Casualties continue to mount in Russia’s war on Ukraine, and fallout from the war and resulting sanctions imposed by the United States and its Allies is spreading throughout Europe. China is threatening Taiwan, and Chinese leaders boast that by the 2049 centennial of the founding of Communist China, China will displace the United States as the number one world power.

At a time when the U.S. military must be at peak readiness, the Services find themselves in the midst of a recruiting crisis: as of the writing of this report, the Army has reached only 59 percent of its recruiting goal for this fiscal year; the Marine Corps has called 2022 “arguably the most challenging recruiting year since the inception of the all-volunteer force;”⁶ the Air Force and

⁶ *Military and Civilian Personnel Programs in the Department of Defense in Review of the Defense Authorization Request for Fiscal Year 2023 and the Future Years Defense Program: Hearing Before the Subcomm. on Personnel of the S. Comm. on Armed Services, 117th Congress, 48-49 (2022)* (statement of Lieutenant General David Ottignon, Deputy Commandant for Manpower and Reserve Affairs, United States Marine Corps).

Space Force are competing with a growing commercial aviation and space industry for highly skilled talent; and the Navy has requested a reduction in end strength of more than 1300 Sailors,⁷ due to “headwinds” in the recruiting landscape.⁸

Unfortunately, there is no relief in sight. The pool of young people who are physically and educationally qualified to join the military continues to shrink, from 29 percent in 2016 to 23 percent in 2022.⁹ Even more troubling, according to the Department’s Joint Advertising Market Research and Studies office, today less than two percent of the Nation’s youth are both eligible to serve and have a propensity to do so.¹⁰ Although many factors affect the shrinking recruiting pool, DoD cannot discount the impact that perceptions of racial disparities have on its recruiting efforts.¹¹

In 1948, President Truman issued Executive Order (EO) 9981, committing the United States to integrating its armed forces. The Order stated, “[I]t is essential that there be maintained in the armed services of the United States the highest standards of democracy, with equality of treatment and opportunity for all those who serve in our country's defense . . . without regard to race, color, religion or national origin.”¹² The integration of America’s military proved to be a

⁷ Heather Mongilio, “Navy predicts challenging future recruiting environment, on target to hit retention goals.” USNI News, May 16, 2022, <https://news.usni.org/2022/05/16/navy-predicts-challenging-future-recruiting-environment-on-target-to-hit-retention-goals>.

⁸ Thomas Gnau, “Facing headwinds, military recruiters seek to make cultural connections.” Stars & Stripes, Dayton Daily News, June 11, 2022, https://www.stripes.com/branches/air_force/2022-06-11/facing-headwinds-military-recruiters-cultural-connections-6307276.html; Courtney Kube and Molly Boigon, “Every branch of the military is struggling to make its 2022 recruiting goals, officials say.” NBC News Online, July 22, 2022, <https://www.nbcnews.com/news/military/every-branch-us-military-struggling-meet-2022-recruiting-goals-officia-rcna35078>.

⁹ *Posture of the Department of the Army in Review of the Defense Authorization Request for Fiscal Year 2023 and the Future Years Defense Program: Hearing Before the S. Comm. on Armed Services*, 117th Congress, 22 (2022) (response by Army Chief of Staff, General James McConville, to question from Ranking Member James Inhofe).

¹⁰ Office of People Analytics, Fall 2021 Propensity Update (DOPSR 22-S-2520) (2022).

¹¹ Department of Defense, Office of People Analytics (OPA), Joint Advertising Market Research & Studies, *Briefing to the IRT on the State of the Recruiting Market* (July 2022) [hereinafter, *OPA State of the Recruiting Market*] (noting that 70% of young adults aged 17-35 who responded to a 2021 Ad Tracking Reserve Study reported that it was “fairly important” or “very important” to them to work for an organization committed to racial/ethnic equality).

¹² U.S. President, Executive Order 9981, *Establishing the President’s Committee on Equality of Treatment and Opportunity in the Armed Forces* (1948).

watershed moment that influenced the national civil rights movement that followed,¹³ and established the U.S. military as a diverse force that is stronger and more capable because of that diversity.

Yet almost 75 years later, the Services continue to struggle with racial disparities in the military.¹⁴ Racial disparities have been shown to have far-ranging impacts on military promotions and leadership assignment processing.¹⁵ The IRT's review is focused on the racial disparities that continue to exist in DoD's investigative and military justice systems.

Our examination of the numerous reports written over the past 50 years about racial disparity in the armed forces yielded a consistent fact: overall, a very small percentage of Service members become involved with the military justice system during their service.¹⁶ According to the Services' Reports on Racial and Ethnic Demographics in the Military Justice System for Fiscal Year (FY) 2021¹⁷ and other annual reports required under Article 146a of the Uniform Code of

¹³ See, e.g., the story of Rosa Parks, who worked as a seamstress in lodging at Maxwell Field (now Maxwell Air Force Base, Alabama) in the 1940s. "On Maxwell Field, Mrs. Parks and her husband Raymond, who worked at the military barbershop, experienced integrated public spaces and transportation while suffering segregation in the local community." On December 1, 1955, Mrs. Parks was arrested after refusing to give up her seat on a city bus in protest of segregated transportation in Montgomery, Alabama. Her courage sparked the Montgomery bus boycott and the national Civil Rights Movement. "In her memoir, Mrs. Parks stated, 'You might just say Maxwell opened my eyes up. It was an alternative to the ugly policies of Jim Crow,'" <https://www.maxwell.af.mil/News/Display/Article/2432360/maxwell-memorializes-rosa-parks-secaf-pays-tribute-to-civil-rights-leader/>

¹⁴ See, e.g., U.S. Government Accountability Office, *Military Justice: DoD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities*, GAO-19-344 (2019) [hereinafter 2019 GAO Report]; The Inspector General, Department of the Air Force, *Report of Inquiry, Independent Racial Disparity Review* (S8918P) (2020) [hereinafter AF IG 2020 Racial Disparity Review]; and CNA, *Exploring Racial, Ethnic, and Gender Disparities in the Military Justice System* (2022) [hereinafter CNA, *Exploring Racial Disparities*].

¹⁵ AF IG 2020 Racial Disparity Review, *supra* note 14, at 59-74 (promotions), 80-88 (leadership assignments).

¹⁶ See, e.g., Military Leadership Diversity Commission, *From Representation to Inclusion: Diversity Leadership for the 21st-Century Military*, 105 (2011); Department of the Air Force, *Report on Racial and Ethnic Demographics in the Military Justice System for Fiscal Year 2021* (2022) [hereinafter Air Force 549G Report]; Headquarters, United States Army, *U.S. Army Report on Racial and Ethnic Demographics in the Military Justice System for Fiscal Year 2021* (2022) [hereinafter Army 549G Report]; The Office of the Judge Advocate General, U.S. Navy Pentagon, *U.S. Navy Report on Racial and Ethnic Demographics in the Military Justice System for Fiscal Year 2021* (2022) [hereinafter Navy 549G Report]; and, Department of the Navy, *U.S. Marine Corps Report on Racial and Ethnic Demographics in the Military Justice System for Fiscal Year 2021* (2022) [hereinafter USMC 549G Report]. See also, Appendix M for the inaugural FY 2021 549G Reports submitted by each of the Military Services.

¹⁷ Army 549G Report, *supra* note 16; Navy 549G Report, *supra* note 16; Air Force 459G Report, *supra* note 16; USMC 549G Report, *supra* note 16 (Appendix M).

Military Justice (UCMJ),¹⁸ approximately 2.7% of all military personnel are subject to criminal investigations, 3.8% receive nonjudicial punishment, and an even smaller number, less than 1%, face court-martial.¹⁹ Even though these adverse actions are taken against a relatively small percentage of our Service members, such actions have a strategic impact, both within and outside of the DoD. Racial disparities in these highly visible processes affect unit cohesion, perceptions of fairness, and trust in the system.

People are the DoD's most valuable resource. Addressing racial disparities across the DoD allows the Services to better compete for talent in the 21st century. The Services understand the importance of attracting and maintaining a diverse force. Diversity of thought, experience, and perspectives is critical to innovation and to maintaining DoD's competitive advantage. To recruit and retain a diverse, all-volunteer force, the DoD must be a model employer while also establishing safe and secure communities where Service members and their families can flourish. We must never forget that it is not our technology or sophisticated weapon systems that make our military the best and most powerful in the world. Rather, our greatest strength lies in our Soldiers, Sailors, Airmen, Marines, and Guardians. An investment in our people is the very best investment in readiness our military can make.

Racial disparities impact unit cohesion, and Service member perceptions of fairness and trust in the system. Racial disparities in the investigative and military justice systems influence Service members' desire to serve and their willingness to recommend service to others.²⁰ We live in an age in which every Service member is a potential social media influencer; each member's experiences and perceptions can have a powerful effect, for better or worse, on the Services' recruiting efforts.²¹

¹⁸ In accordance with Article 146a, Uniform Code of Military Justice (UCMJ) (10 U.S. C. § 946a), the Service Judge Advocates General and the SJA to the Commandant of the Marine Corps (CMC) provide annual reports on military justice for each fiscal year to the Committees on Armed Services of the Senate and House of Representatives. Copies of the reports are available on the Joint Service Committee website at <https://jsc.defense.gov/Annual-Reports/> [hereinafter 146a Reports].

¹⁹ The percentage of criminal investigations includes only those investigations that are tracked and recorded in Service databases and reports. Notably, this percentage does not include command directed investigations. Data was obtained from the Military Services FY 2021 549G and 146a Reports. The Defense Manpower Data Center supplied FY 2021 population data.

²⁰ OPA *State of the Recruiting Market*, *supra* note 11.

²¹ See, USMC OCS Blog, <https://officercandidatesschool.com/2021/10/19/military-social-influencers-are-trending/>.

Racial disparities also degrade the American public’s perception of, and trust in, the military as an institution. Many parents today, including those who are active-duty Service members, discourage their sons and daughters from serving in the military.²² Racial disparities in investigations, administrative separations, nonjudicial punishment, and courts-martial not only create a perception that these systems are “unfair,” they also contribute to the loss of talent today and poison the recruiting well for tomorrow.

These disparities are real and their impacts are untenable in both the short- and long-terms. The time has come for the DoD to sharpen its focus on addressing them. Making military service a fair and inclusive experience for all Service members is critically important work. The DoD’s future success in competition, crisis, and combat depends on taking action now to address these disparities—once and for all.

IV. Efforts to Date

The IRT reviewed numerous studies, reports, and research on, or related to, racial disparities in the investigative and military justice systems. These studies, reports, and research were generated by DoD and its components, other government agencies, federally funded research and development centers (FFRDCs), and private sector organizations.

One of the first comprehensive studies of racial disparities in the military justice system, the 1972 Task Force on the Administration of Military Justice in the Armed Forces,²³ concluded that although the military was at the forefront of desegregation in the United States, both intentional and systemic discrimination existed in the military justice system.

²² See, e.g., OPA *State of the Recruiting Market*, *supra* note 11; Military Family Advisory Network, *2021 Military Family Support Programming Survey* (2022).

²³ Department of Defense, *Report of the Task Force on the Administration of Military Justice in the Armed Forces, Vol. I* (1972) [hereinafter 1972 Report].

In 1992, the Defense Equal Opportunity Management Institute (DEOMI) found that Black Service members were 2.2 times more likely to receive courts-martial convictions than White Service members, and 1.7 times more likely to receive nonjudicial punishment.²⁴ DEOMI recommended follow-on research and suggested “practical procedures” to isolate and identify areas of the military justice process where inequities could be occurring.²⁵

Recent studies and reports have applied current statistical analyses to assess racial, ethnic, and gender disparities in the military justice system and across military personnel systems. In a 2019 study, the Government Accountability Office (GAO) found “that Black, Hispanic, and male service-members were more likely than White or female members to be the subjects of investigations...and to be tried by general and special courts-martial in all of the military services when controlling for attributes such as rank and education.”²⁶ GAO made 11 recommendations, including that DoD improve the breadth and consistency of data collection, and that the Secretary of Defense evaluate the root causes of the disparities GAO identified and undertake to address them. The DoD and the Military Services concurred with GAO’s recommendations.

The following year, the Air Force Inspector General completed a comprehensive review of racial disparity across the Air Force, including disparities in the investigative and military justice systems.²⁷ The study incorporated data analysis, surveys, individual interviews and Focus Group sessions. The review confirmed the existence of “racial disparity for black servicemembers in . . . apprehensions, criminal investigations, military justice, [and] administrative separations”²⁸ The Inspector General recommended that the Air Force office with ownership over each domain in which disparities were identified take action to identify the root causes of such

²⁴ Defense Equal Opportunity Management Institute, *Phase I Report: An Investigation into the Disparity of Judicial and Non-Judicial Punishment Rates of Black Males in the Armed Forces*, 2 (1992) [hereinafter *DEOMI Phase I Report*].

²⁵ *Id.* at 5-7.

²⁶ 2019 GAO Report, *supra* note 14, at “What GAO Found.”

²⁷ AF IG 2020 *Racial Disparity Review*, *supra* note 14.

²⁸ *Id.* at 3.

disparities and develop plans to address them. Air Force efforts to implement these recommendations are ongoing and reported regularly.²⁹

In August 2022, the Army provided the IRT its Holistic Evaluation and Assessment of Racial Disparity in the Military Justice System (HEARD) Report, commissioned by the Secretary of the Army in the summer of 2020 in response to the 2019 GAO Report.³⁰ This assessment was part of a larger Army effort to address racial disparities across the Service. The HEARD Report focused its data analysis on identifying the overrepresentation of a race or ethnic group as compared to the group's baseline end strength at stages along a "military justice timeline."³¹ The intent of the analysis was "to identify where racial disparities existed, where racial disparities were exacerbated and where racial disparities were alleviated."³² The HEARD Report found indications of racial disparities throughout the military justice process, and across several other Army programs. The Report also attempted to assess Soldiers' perceptions of the military justice process. The report made six specific findings and recommendations, including to: improve data and data transparency; ensure appropriate Equal Opportunity training at every level of military education; conduct annual assessments of progress in addressing racial disparities; and address the underrepresentation of Black Soldiers in the Military Police (MPs), U.S. Army Criminal Investigation Division (CID), and U.S. Army Judge Advocate General's (JAG) Corps.³³

In recent years, the U.S. Congress has also become increasingly interested in racial disparities in the military investigative and justice systems. The GAO study referenced above was undertaken in response to a 2017 request from the House Armed Services Committee.³⁴ After GAO's report was published in May of 2019, Congress responded at once, enacting Section 540I of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020, calling for the Secretary of Defense to assess racial, ethnic and gender disparities in the military justice

²⁹ See, e.g., The Inspector General, Department of the Air Force, *Assessment Report, Independent Racial Disparity Review Six-Month Assessment* (S8918P) (2021).

³⁰ Department of the Army, *Holistic Evaluation and Assessment of Racial Disparity in Military Justice* (2022) [hereinafter *HEARD Report*].

³¹ *Id.* at iv.

³² *Id.*

³³ *Id.* at iv-v.

³⁴ See, e.g., H.R. Rep No. 115-200, at 126-127 (2017).

system.³⁵ The Office of the Director of Force Resiliency in the Office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)) contracted with the Center for Naval Analyses (CNA), an FFRDC, to conduct the required assessment.³⁶ Together, the CNA study and this IRT are components of the Secretary of Defense's response to section 540I. In addition, in section 549F of the FY 2022 NDAA, Congress directed each Military Department to assess racial disparities in military justice and discipline processes, as well as in military personnel policies.³⁷ This provision requires the Secretary of each Military Department to submit this assessment to the Congressional Armed Services Committees and to the Comptroller General of the United States. Each Secretary's submission must include recommendations for statutory and regulatory changes to address racial disparities.

In addition to the Air Force Inspector General's reports and the Army's HEARD Report, the Navy initiated its Task Force ONE Navy (TFN1) effort in July of 2020 to evaluate issues in both society and the military that detract from Navy readiness. TFN1 published its final report, comprising 56 recommendations, including the implementation of Effects-Based Diversity, Equity, and Inclusion, in February 2021.³⁸

Section 549G of the FY 2022 NDAA, directs the Secretary of each Military Department to submit annually to the Secretary of Defense, a report on racial, ethnic, and sex demographics in the military justice system during the prior year.³⁹ The Secretary of Defense must then submit these reports to the Congressional Armed Services Committees by April 30th of each year. The reports are required to include statistics on UCMJ offenses and other disciplinary actions during the prior year, including the number of offenses investigated; number of administrative actions; number of nonjudicial punishments imposed; and number of charges preferred and referred to court-martial. All data is to be disaggregated by demographic categories related to the principal actor and victim, and the type of action. The first set of reports was submitted this past year;

³⁵ National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 540I, 113 Stat. 1369 (2019) .

³⁶ CNA, *Exploring Racial Disparities*, *supra* note 14, at Abstract.

³⁷ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 549F, 135 Stat. 1726-7 (2021).

³⁸ Department of the Navy, *Task Force One Navy (TFN1) & Diversity, Equity & Inclusion (DEI) Update Briefing to the IRT* (June 2022).

³⁹ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 549G, 135 Stat. 1727-8 (2021) (codified at 10 U.S.C. § 486).

however, each Service interpreted the requirements differently, using different criteria and methods to report the required information.⁴⁰ In addition, for some categories of information, not all Services collect adequate data to capture all actions. For example, administrative separations are captured, but only the Air Force collects and reports data on letters of counseling and reprimand.⁴¹ In a similar vein, professional investigations are captured and reported but command-directed investigations are not.⁴² These differences and omissions preclude analysis of all outcomes, as well as direct comparisons and meaningful analysis of outcomes across the Services.

Article 146a of the UCMJ was enacted as part of the Military Justice Act of 2016 and requires the Court of Appeals for the Armed Forces to submit an annual report on completed and pending cases before the Court.⁴³ As well, the Service Judge Advocates General and the Staff Judge Advocate (SJA) to the Commandant of the Marine Corps are required to submit annual reports. The Service reports must include data on pending cases, the timeliness of the appellate review process, the circumstances surrounding reversed general and special court-martial cases, the ability of judge advocates to perform their duties, and the adequacy of resources available for certain military justice functions.⁴⁴ These reports must be submitted to the Congressional Armed Services Committees, the Secretary of Defense, and the Secretaries of the Military Departments by December 31st each year.⁴⁵ The 146a reports contain some information similar to the reports

⁴⁰ *E.g.*, the Army reported the number of courts-martial based on “individuals arraigned” and “offenses arraigned,” and the total number of Service members “found guilty” and “found not guilty,” as well as the number of offenses in which each such finding was entered. The Navy, Air Force, and Marine Corps reported the number of individuals against whom court-martial charges were preferred and referred, the number of individuals with convictions and acquittals, and the total number of offenses preferred, referred, as to which a conviction or acquittal resulted. The Army also reported the Hispanic ethnic category as a “race,” with no further breakdown. The other Military Services disaggregated Service members and offenses by ethnic category: Hispanic or Latino, Not Hispanic or Latino, and unknown.

⁴¹ The Army, Navy, and Marine Corps reported only administrative separation actions grounded in misconduct. But the Air Force reported administrative separations for misconduct, as well as administrative letters of counseling, admonition, and reprimand that had been memorialized in written form.

⁴² *See also*, 2019 GAO Report, *supra* note 14, at 16 n.32; CNA, *Exploring Racial Disparities*, *supra* note 14, at 48 n.b.

⁴³ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114–328, § 5522, 130 Stat. 2964 (2016), amended by the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, § 542(d), 134 Stat. 3612 (2021) (codified at 10 U.S.C. § 946a).

⁴⁴ 10 U.S.C. § 946a(b). Before the passage of the 2016 Military Justice Act these requirements were set forth in Article 146, UCMJ. The NDAA for FY 2020, § 540I, specified that these data must include court-martial counts by the race, ethnicity, and gender of both accused offenders and victims.

⁴⁵ 10 U.S.C. § 946a(b)-(c).

required by section 549G of the FY 2022 NDAA, but again, reporting formats and content differ across the Services and between the 146a and 549G reporting requirements.

To respond to Congressional direction in section 540I of the FY 2020 NDAA, CNA conducted a detailed quantitative analysis of investigative and military justice data for FYs 2014-2020. The analysis concluded that across all Services, Black enlisted personnel were more likely than White enlisted personnel to be investigated and be involved in nonjudicial punishment and courts-martial in some way.⁴⁶ The CNA analysis showing unequal outcomes for Black Service members is consistent with the 2019 GAO Report, the 2020 Air Force Racial Disparity Review, and the Services' 2021 reports to Congress on racial and ethnic demographics in the military justice system.⁴⁷

Of note, CNA went on to document that Black enlisted personnel were no more likely—and in many cases, were less likely—than their White counterparts to be found guilty at court-martial.⁴⁸ CNA's analysis controlled for a number of factors, including the Service member's home of record, receipt of an enlistment waiver, and education—meaning that none of these factors contributed to this finding.⁴⁹ CNA's findings were generally consistent with the 2019 GAO Report.⁵⁰

The Air Force was the only Service that produced for CNA analysis specific data regarding courts-martial preceded by a command investigation or other unknown type of investigation, in addition to the professional investigation data provided by all Services. Based on its analysis of this additional data, CNA built on its finding that overall, Black enlisted personnel were less

⁴⁶ CNA, *Exploring Racial Disparities*, *supra* note 14, at iii.

⁴⁷ CNA, *Exploring Racial Disparities*, *supra* note 14; CNA, *How to Use Administrative Data to Measure and Interpret Racial, Ethnic, and Gender Disparities in Military Justice Outcomes* (2022) [hereinafter CNA, *How to Use Administrative Data*]; Service 549G Reports, *supra* note 16. Note that CNA was unable to consider nonjudicial punishment data from the Navy in its study because the Navy did not track or report demographic data for nonjudicial punishment actions during this period. However, the Navy began to collect this information as of 2021.

⁴⁸ CNA, *Exploring Racial Disparities*, *supra* note 14, at iii. The CNA report indicated that this outcome was true “in many cases” because the analysis of USMC data showed no statistically significant difference between Black and White enlisted members in regard to the likelihood of being found guilty following a court-martial. *Id.* at 78.

⁴⁹ *Id.* at 34-35.

⁵⁰ *See generally*, 2019 GAO Report, *supra* note 14. However, GAO did not find statistically significant differences in court-martial conviction rates. *Id.* at 58.

likely than their White counterparts to be found guilty at courts-martial, and further concluded that Black enlisted personnel were significantly less likely to be found guilty when the court-martial was preceded by a command-directed investigation as compared to a court-martial preceded by an investigation conducted by a professional law enforcement organization (i.e., Air Force Office of Special Investigations (AFOSI) special agents or security forces investigators).⁵¹ The CNA report observed that “[t]his result suggests that there was something fundamentally different about the cases brought against Black versus White Airmen and could, thus, constitute evidence of bias at an earlier point in the [military justice system] process.”⁵² CNA recommended further investigation of these outcomes.

Few significant ethnic disparities in military justice system outcomes were identified in CNA’s study. Across Services and for most outcomes, Hispanic and non-Hispanic enlisted personnel experienced modeled outcomes at very similar rates.⁵³

Several common findings and recommendation across prior reports and studies informed the IRT’s findings and recommendations. First and foremost, each of the prior efforts was definitive in identifying racial disparities across the investigative and military justice systems. Next, all prior efforts recommended improved data collection, including the collection of more and better demographic data for all participants in the process, data for more phases of the process, more consistent categories and data fields across Services, and the tracking of cases and personnel from start to finish through the investigative and justice process.

Although some of the reforms proposed by prior efforts have been addressed, many remain unaddressed, or only partially addressed. For example, although the DoD has made incremental progress in improving data collection, that progress has been slow and often hampered by inconsistent collection criteria and processes across the Services. It was not until Congress

⁵¹ CNA, *Exploring Racial Disparities*, *supra* note 14, at 48.

⁵² *Id.* at 49.

⁵³ *Id.* at iii.

required more data collection in 2020 that most of the Services made incremental improvements in this regard.⁵⁴

Many of the IRT's recommendations, discussed in Section VIII, below, echo the recommendations listed in the prior reports and studies referenced above.

V. IRT Outreach

Briefings. The IRT received 18 formal briefings from the Office of the Secretary of Defense (OSD) and the Military Services on a broad range of topics, including military justice, the Military Equal Opportunity (MEO) program, and training development and implementation. These briefings ensured the IRT had the most complete picture of efforts ongoing across the Department, on which to base its findings and recommendations. The IRT also conducted background interviews with DoD subject matter experts.

Focus Groups. In addition to briefings, the IRT visited eight military installations across the United States and conducted 33 focus group discussions with more than 500 Service members across all Services. The focus groups were divided into four categories: junior enlisted leaders, senior noncommissioned officers, junior officers, and field grade officers. Focus group participants provided their views and perceptions regarding how the investigative and military justice systems are being executed at each installation.⁵⁵

The IRT found that focus group responses to data about racial disparities in the investigative and military justice systems generally differed between enlisted and officer groups. However, several major themes—common among all focus groups and consistent with key themes from

⁵⁴ See, e.g., NDAA for FY 2020, § 540I (specifying that data collected in regard to courts-martial and included in military justice reports must include the race, ethnicity, and gender of both accused offenders and victims). See also National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 540G, 113 Stat. 1368-9 (2019) (requiring the Secretary of Defense to establish and provide to the Congressional Armed Services Committees a plan among the military departments to standardize the collection and presentation of information on matters within their military justice systems. It was only at this time that the Navy began collecting and reporting nonjudicial punishment data, for example. The Air Force began to collect data on adverse administrative actions, including administrative separations and letters of counseling and reprimand.

⁵⁵ See Appendix H, IRT Focus Groups.

previous reports and studies—emerged from focus group discussions. First, many junior enlisted members expressed the perception that their supervisors operate without meaningful oversight from the chain of command.⁵⁶ These junior Service members also believed that being “liked” or “disliked” by superiors improperly influences the outcome of disciplinary decisions.⁵⁷ There was also a common perception, regardless of rank or branch of Service, that policies and regulations are not consistently enforced across units, installations, and Services. Service members who participated in the sessions also uniformly believed that cultural competency, specifically, learning how to understand and interact with people from different racial, ethnic, and social backgrounds, is important, but is not currently treated as a force readiness priority. Finally, with the exception of the field grade officers, focus group participants generally felt that guidance and training for more junior leaders in the chain of command who exercise discretion in the military justice system, especially first-line enlisted supervisors and junior officers, was too limited.⁵⁸

Listening Session. The IRT sponsored a virtual listening session on July 27, 2022. The IRT published notice of the listening session in the Federal Register to invite public interest and affinity groups to speak on matters of interest to the IRT. The IRT also sent invitations to several public interest and affinity groups that work or interact regularly with DoD to speak on relevant matters. Three groups provided oral presentations at the session: the Warrior Society/Society of American Indian Government Employees (SAIGE), the National Academy of Public Administration (NAPA), and the National Institute of Military Justice (NIMJ).⁵⁹ NAPA and NIMJ also submitted written matters for the IRT’s consideration. These presentations and written matters provided valuable feedback and input the IRT used to inform its findings and recommendations.

Requests for Information. The IRT issued requests for information and data production requests to organizations across DoD to fill information gaps in prior studies and to inform the IRT’s

⁵⁶ See, Appendix H, IRT Focus Groups.

⁵⁷ See, Appendix H, IRT Focus Groups.

⁵⁸ See, Appendix H, IRT Focus Groups.

⁵⁹ See, Appendix I, Virtual Listening Session Presentations.

review.⁶⁰ The IRT synthesized the results of prior reports cited above, along with the requested information and data, and leveraged its own quantitative and qualitative research to inform its findings and recommendations.

VI. Scope of the IRT Review

For purposes of the IRT’s review and this report, DoD investigations are deemed to encompass the full range of investigations to which a Service member may be subject, including command inquiries, administrative investigations, investigation by military police or security forces, investigation by a Military Criminal Investigative Organization (MCIO), and the investigation of a Service member by a local, state, or federal civilian law enforcement organization or agency.⁶¹

In many prior studies, disparities associated with “investigations” were not addressed at all, or were limited primarily to investigations conducted by MCIO special agents or military police or security force investigators, which are the only investigations documented in official Service databases.⁶² However, during its 2019 review, GAO traced completed courts-martial back to their investigations of origin. GAO found significant differences in acquittal rates between cases tried following a professional investigation, as compared to those that were not the result of a professional investigation.⁶³

A lack of documentation, tracking, or data regarding other types of investigations to which a Service member could be subject continues to limit the Services’ ability to glean insights regarding non-professional investigations. Many of these non-professional investigations are command-directed investigations, such as Air Force Command-Directed Investigations (CDIs),⁶⁴

⁶⁰ See Appendix J, Responses Received to IRT Requests for Information (RFIs).

⁶¹ *IRT Charter*, *supra* note 3, at 2.

⁶² See, e.g., 1972 Report, *supra* note 23 and DEOMI *Phase I Report*, *supra* note 24 (investigations not addressed); 2019 GAO Report, *supra* note 14, at 5 (noting that most of GAO’s analysis *does not* include investigations that were recorded in databases not used by the military criminal investigative organizations, or investigations performed by other military law enforcement entities or command investigations) (emphasis added).

⁶³ 2019 GAO Report, *supra* note 14, at Figure 3 and accompanying text.

⁶⁴ Department of the Air Force, Air Force Manual 1-101, *Commander Directed Investigations* (2021).

or investigations conducted under Army Regulation 15-6⁶⁵ or the Navy's JAGMAN,⁶⁶ none of which were tracked consistently by the Services.

For purposes of the IRT's review and this report, the military justice system was deemed to encompass the full range of corrective, adverse administrative, disciplinary, and judicial actions to which a Service member may be subject, including "no action," informal counseling, formal counseling, a letter of reprimand, administrative elimination/separation from the Service, nonjudicial punishment, or court-martial.

In most prior studies, the definition of the "military justice system" was limited to nonjudicial punishment and courts-martial.⁶⁷ In those prior efforts, this limitation was pragmatic and due in major part to the lack of data associated with other corrective, adverse administrative, and disciplinary actions to which a Service member could be subject.

The IRT's Charter established the requirement to address the "root causes" of racial disparities in the investigative and military justice systems.⁶⁸ However, as with all past reports and studies also charged with this task, the IRT's ability to conduct a root cause analysis was hindered by both a lack of data, and by a lack of consistency across Services in the data that was collected.⁶⁹ Without the ability to track cases and demographic data for all participants in all phases of the investigative and military justice processes, from accusation to final disposition, and to compare how similar cases are processed, DoD is left with aggregate numbers showing disparities, but with little insight into precisely where in these processes the disparities are happening or why. In addition, as the GAO and CNA reports noted, DoD has not established criteria that specify when data indicating possible disparities should be reviewed, and has not issued guidance on what

⁶⁵ Department of the Army, Army Regulation 15-6, *Procedures for Administrative Investigations and Boards of Officers* (2016).

⁶⁶ Department of the Navy, Naval Justice School, *JAGMAN Investigations Handbook* (2016).

⁶⁷ See, e.g., DEOMI *Phase I Report*, *supra* note 24; 2019 GAO Report, *supra* note 14.

⁶⁸ *IRT Charter*, *supra* note 3.

⁶⁹ See, e.g., 2019 GAO Report, *supra* note 14; AF IG 2020 *Racial Disparity Review*, *supra* note 14; Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, *Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military* (2020); CNA, *Exploring Racial Disparities*, *supra* note 14.

steps to take to conduct such a review, if needed.⁷⁰ Even though the IRT was unable to conclusively establish the root causes for racial disparities in the investigative and military justice systems, we implore the DoD not to wait for perfect data or a mathematically certain root cause analysis to start taking action. There is abundant data and information as to where disparities exist, and the IRT proposes actionable recommendations to address these disparities.

VII. IRT Findings

DoD has made laudable strides toward achieving equal opportunity for all Service members. The IRT's findings in no way diminish the progress that has been made. But the nature of the mission articulated by the Deputy Secretary of Defense in the IRT Charter called for the IRT to look at DoD with a critical eye and for all members of the IRT to apply their personal experiences and judgment in reaching findings. Thus, the IRT's findings and recommendations are necessarily critical. With this in mind, the IRT's findings are as follows:

(1) Significant racial disparities exist across the investigative and military justice systems. This key finding is fully supported by prior reports and studies, current data, and the qualitative insights gained during the IRT's discovery and analysis.

(2) The greatest disparities exist along the continuum where there is significant discretion and limited oversight or procedural protections. Early in its research, the IRT focused on the commanding officer as the key discretionary actor in the investigative and military justice systems. Commanding officers issue nonjudicial punishment, approve administrative discharges, and as to those with convening authority, convene courts-martial.⁷¹ However, a Service member's history does not begin with nonjudicial punishment or a court-martial. The IRT's research, as well as analysis by the IRT, GAO, CNA, and others, clearly indicate that racial

⁷⁰ 2019 GAO Report, *supra* note 14, at 36. The FY 2020 NDAA § 540I, requires the Secretary of Defense to issue guidance to establish criteria to determine when data indicating possible racial, ethnic, or gender disparities in the military justice process should be reviewed. The CNA report was commissioned, in part, to provide data to assist DoD in defining appropriate criteria. CNA, *Exploring Racial Disparities*, *supra* note 14, at i.

⁷¹ *See, e.g.*, 10 U.S.C. § 815: Commanding officer's non-judicial punishment; 10 U.S.C. § 822 (enumerating those commanding officers who may convene general courts-martial).

disparities appear far earlier, in more routine and seemingly unremarkable contexts, and certainly prior to the initiation of a formal investigation or nonjudicial punishment.⁷² To better understand and explore this phenomenon, the IRT developed a visual depiction of the “continuum” that combined milestones in the early stages of a Service member’s career with milestones in the investigative and military justice systems.⁷³ Although commanding officers do play an important role, as the IRT gathered additional information and conducted more in depth analysis and field interviews, it gained a greater appreciation for the scores of other discretionary actors—a term the IRT used to describe individuals who make discretionary decisions that affect the Service members’ progress along the continuum—who make decisions and take actions that can significantly impact Service members’ careers.⁷⁴

The role of discretionary actors in the early stages of a Service member’s military experience is particularly noteworthy. First-line supervisors, senior enlisted leaders, and junior officers—all of whom are subordinate to their commanding officers—encounter the new Service member as he or she first enters the Service, teach the Service member about the norms and culture of the Service, and exercise significant discretion in how to respond to misconduct and performance deficiencies exhibited by young and inexperienced enlisted members who are still adapting to the expectations of military service. These leaders determine whether or not a Service member attends schools, whether or not they are included in unit activities, and ultimately whether they are put on a path to inclusion or separation.⁷⁵

These first-line supervisors, senior enlisted leaders, and junior officers also help shape how a commanding officer receives information and recommendations for action.⁷⁶ It is often these early discretionary decisions made by these junior leaders that move a young Service member

⁷² See, e.g., 1972 Report, *supra* note 23, at 68; CNA, *Exploring Racial Disparities*, *supra* note 14, at 51, 114; HEARD Report, *supra* note 30, at v. See also, National Institute of Military Justice, *Statement for DoD Racial Disparities Internal Review Team 1* (2022); and Appendix I, IRT Virtual Listening Session Presentations.

⁷³ See Appendix L, Service member Continuum.

⁷⁴ See Appendix H, IRT Focus Groups. See also, 1972 Report, *supra* note 23, at 68 (noting the perception that “[t]he role of the senior NCO in the chain of command—and the way the commanding officer backs him up—allows him to control the military justice system. It is he who has the discretion to report or not report an offense. He makes that judgment largely on the basis of factors, including his own racial attitudes, other than those of necessary discipline or justice.”).

⁷⁵ See Appendix H, IRT Focus Groups.

⁷⁶ See Appendix H, IRT Focus Groups.

from the training and development phase of military service into the investigative and military justice systems.

Once a Service member enters the investigative and military justice systems, a new set of discretionary actors emerge, among them, military police and security forces, professional criminal investigators, administrative investigating officers, judge advocates, and many others. These discretionary actors advise, influence, and inform commanding officers, and thus they too play a significant role in deciding if and how a Service member moves through each sequential step of these systems toward court-martial. Even without involving the commanding officer, these actors have the ability to take independent actions that can, for better or worse, affect Service members throughout their military careers and long after.

Analyzing disparities using this continuum provided the IRT a valuable tool to identify potential causes of disparity throughout a Service member's career, focused the scope of the IRT's consideration on subjects not fully considered in prior reports, and allowed the members of the IRT to develop findings and recommendations based not only on data, but on their professional observations and understanding of the realities of military structure and culture.

(3) Service members, particularly junior leaders, have not received sufficient training and education to execute their roles in the investigative and military justice systems. This lack of training and education has profound negative impacts on the ability of Service members at all levels to effectively execute their roles in these systems.

(4) Inadequate protections exist for Service members subject to investigative processes, adverse administrative actions, and nonjudicial punishment. Data consistently shows that where more due process is provided and Service members have greater protections, racial disparities decrease. It is where there are fewer process protections and a lack of consistency in protections accorded across the Services, such as in command investigations, adverse administrative actions, and even nonjudicial punishment, that disparities are more prevalent.

(5) Effective oversight and transparency cannot be accomplished using current data collection methods. Inadequate data collection, lack of analysis, and lack of feedback for all participants, at all critical nodes in the investigative and military justice systems, impede oversight and transparency. Without complete and consistent data collection, commanding officers do not have an accurate sight-picture of investigative and military justice outcomes across their organizations. As a result, commanding officers are unable to make data-informed decisions and take data-informed corrective actions to address anomalies. Across all of the Services, and at every rank and role, Service members want to understand what is happening in their units.⁷⁷ Under current conditions, they are, at best, left with little more than numbers on spreadsheets generated locally. Such incomplete data is not helpful in providing an understanding of where problems may lie in an organization, or how to solve them.

Finally, these findings are all influenced by external factors. Commanding officers, unit leaders, law enforcement, legal professionals, and other key stakeholders, simply do not have the money, personnel, training, or time to focus on the matters that most impact disparities in the investigative and military justice systems. With so many other competing interests, addressing racial disparities, and the contributory circumstances and practices, just has not been treated as a priority.

VIII. Key Recommendations

The IRT's recommendations address three broad areas: training and education, Service member protections, and oversight and transparency. The specific recommendations are grouped in these categories and set forth below. A detailed discussion of each recommendation can be found in Appendices A through C.

Training and Education.⁷⁸

⁷⁷ See Appendix H, IRT Focus Groups.

⁷⁸ See Appendix A for a detailed discussion of the Training and Education recommendations.

The IRT chose training and education as its first recommendation because prior studies pointed to a potential lack of meaningful training to help guide junior leaders' discretionary decisions about whether to develop, discipline, or investigate a Service member. The feedback received from the IRT's focus groups illuminated and amplified this challenge. First- and second-line leaders make initial decisions about addressing Service member misconduct and performance matters.⁷⁹ It is at these early stages of the process that the IRT and other recent reports saw the greatest disparities.

In making its recommendations for modified training and education rather than additional training, the IRT was cognizant of the feedback it received from focus group sessions and the Workforce Management Group. Specifically, there are limited hours in each day and new training mandates come at the expense of competing priorities. The IRT contends that addressing racial disparities in the investigative, adverse administrative, and military justice systems is a strategic priority that directly impacts readiness; thus, addressing racial disparities is an operational imperative. Allowing disparities to persist unaddressed will have an adverse impact on personnel readiness today and severely degrade Service member trust and unit cohesion going forward. The IRT's recommended enhancements in training and education must be regarded as a DoD priority, both to maintain operational readiness today and compete for the talent necessary to prevail in future competition and conflict.

(1) Develop cultural core competencies to anchor training and education for officers, enlisted, and civilian personnel across their career life cycles and at all levels in the Department. People are the DoD's most valuable resource.⁸⁰ DoD's path to success in today's environment relies on understanding and reinforcing the connections between people, mission, and culture.

It is imperative that the Services adopt cultural core competencies to anchor and improve training and education for all personnel across all career paths. Cultural core competencies include understanding the different viewpoints of Service members from different cultures, regions,

⁷⁹ See Appendix H, IRT Focus Groups.

⁸⁰ Remarks of the Deputy Secretary of Defense, Kathleen Hicks, at the Reagan Defense Forum, May 11, 2022, <https://www.defense.gov/News/News-Stories/Article/Article/3027771/within-fy23-budget-request-three-approaches-help-dod-meet-defense-strategy/>.

ances, and generations. Once DoD codifies these core competencies, the Services must improve current training and education to better develop them in leaders at all levels.

(2) Train and educate leaders at all levels to enhance their proficiency in talent management, improve their understanding of human behavior, and increase their acumen in interpersonal communications. Leaders at all levels must receive effective training to enhance their talent management skills, with a particular focus on how performance counseling differs from misconduct counseling. Junior leaders told the IRT that, while they were trained on the mechanics of filling out counseling paperwork, they lacked a deeper understanding of when and how to use performance counseling to leverage a Service member's talents. As well, these leaders expressed a need for training and guidance in how to think more holistically about whether proceeding down a disciplinary path is necessary and appropriate.⁸¹ The IRT believes that in most instances, it is far better to spend leadership time growing and developing Service members, as opposed to assembling a paper trail to administratively punish or separate them. Again, the IRT recommends the Services tailor existing training to address these needs.

(3) Establish and implement enhanced legal training and education tailored to Service members at all levels who make discretionary decisions, with a focus on first-line supervisors. The DoD must also tailor legal training and education for Service members who make discretionary decisions across the continuum, with a priority on junior leaders, whose decisions early in the process have a significant cascading effect that can set the Service member on an irreversible path, either towards improvement and inclusion, or discipline and discharge.

For example, the IRT perceives the Senior Officer Legal Orientation, or SOLO, provided to senior commanders to be exemplary. We therefore recommend that the Service Judge Advocates General and the SJA to the Commandant of the Marine Corps develop similar training and make it available to junior and mid-level leaders—those who make the decisions that ultimately lead to adverse administrative actions, nonjudicial punishment, or courts-martial. Although the commanding officer makes the final decision, it is the junior leaders who put the paperwork on the senior leader's desk.

⁸¹ See Appendix H, IRT Focus Groups.

(4) Develop and mandate appropriate training for all military police investigators (MPI) and for investigating officers (IOs) who conduct command-directed investigations. OSD and the Services must also look to improve and standardize the training and education provided to their military police investigators, as well as for those appointed as IOs for administrative or command-directed investigations. Training for administrative IOs takes on particular importance because these individuals generally lack background in the standards and procedures for conducting fair and impartial investigations.⁸²

Service Member Protections.⁸³

(5) Adopt modern policing practices, such as the use of body-worn cameras and recording suspect interviews, to improve professionalism, oversight, and protections for officers and the public. Adopt modern policing practices, such as the use of body-worn cameras, recording suspect interviews, and instituting duty to intervene standards and requirements, to include the duty to intervene when officers and agents observe possibly disparate or other improper treatment.⁸⁴ Doing so will improve professionalism, oversight, and protections for officers, and the Service members and members of the public with whom they are engaging.

(6) Provide all Service members subject to nonjudicial punishment with a right to counsel. When a Service member is at risk of losing liberty or property through nonjudicial punishment,⁸⁵

⁸² See, Appendix H, IRT Focus Groups.

⁸³ See Appendix B for a detailed discussion of the Service Member Protections recommendations.

⁸⁴ See, e.g., U.S. President, Executive Order 14074, *Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety* (2022); International Association of Chiefs of Police, *Bias-Free Policing* (2021); International Association of Chiefs of Police, *Peer Bystander Intervention in Law Enforcement Agencies* (2020); Georgetown Law, *Active Bystanderism for Law Enforcement (ABLE) Project, Model ABLE Policy* (2021), <https://www.law.georgetown.edu/cics/able/>.

⁸⁵ The maximum punishment in nonjudicial punishment proceedings depends on the rank of the Service member and of the commanding officer imposing punishment. Whether the Service member is “attached to or embarked in a vessel” also affects punishment.” Potential punishments include up to 3 days confinement, 30 days correctional custody, forfeiture of one-half of 1 month’s pay per month for 2 months; 60 days of restriction (45 if accompanied by extra duty), 45 days of extra duty, and reduction in grade. For enlisted Service members in grades E-1 to E-4, a field grade commanding officer with promotion authority can impose nonjudicial punishment that includes reduction to the grade of E-1. For example, in 2022, the reduction of a Service member with more than two years in service, to the grade of E-1 would reduce that member’s base pay from \$2,515.80 per month to \$1,833.30. See <https://www.dfas.mil/MilitaryMembers/payentitlements/Pay-Tables/Basic-Pay/EM/>.

the member should have an appropriate opportunity to consult legal counsel. Currently, policies and procedures regarding the right to counsel for Service members facing potential nonjudicial punishment vary across the Military Services. Although the law authorizes the Secretary of each Military Department to promulgate regulations implementing Article 15 of the UCMJ,⁸⁶ Service members across all Services should be afforded substantially similar legal protections. Different protections and unequal rights to counsel when facing nonjudicial punishment can foster disparate outcomes.⁸⁷

(7) Update the “vessel exception,” and restrict its use to operationally necessary circumstances. Normally, nonjudicial punishment cannot be imposed on a Service member “if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment.”⁸⁸ However, the statute provides for an exception: Service members who are “attached to or embarked in a vessel” are denied the right to demand trial by court-martial and must accept nonjudicial punishment proceedings.⁸⁹ Additionally, if the Service member is attached to or embarked in a vessel, the commanding officer has authority to impose enhanced punishments, including confinement.⁹⁰ This exception is implemented through Presidential, Military Department, and Service regulations.⁹¹ Part V, Nonjudicial Punishment Procedure, Manual for Courts-Martial (2019), paragraph 3, explains that a person is “attached to” or “embarked in” a vessel, if the Service member is “assigned or attached to the vessel, is on board for passage, or is assigned or attached to an embarked [unit].” The IRT recommends limiting the scope of the vessel exception so that it does not apply to ships that are in “dry dock” or long-term overhaul. The IRT found that when a ship is not afloat, availability of counsel and the ability to pursue the right to a trial by court-martial generally is not limited by the austerity of the open seas or the exigences of active operations. The IRT also recommends a review of the application

⁸⁶ “Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, . . .” 10 U.S.C. § 815(a).

⁸⁷ See Appendix I, IRT Virtual Listening Session Presentations.

⁸⁸ 10 U.S.C. § 815(a), Commanding Officer’s non-judicial punishment.

⁸⁹ 10 U.S.C. § 815(a). “A person is ‘attached to or embarked in’ a vessel, if, at the time nonjudicial punishment is imposed, that person is assigned or attached to the vessel, is on board for passage, or is assigned or attached to an embarked [unit]. . . .” *Id.* See also, Dwight H. Sullivan, *Overhauling the Vessel Exception*, 43 Naval L. Rev. 57 (1996).

⁹⁰ When the vessel exception is invoked, commanding officers may impose 3 days or 7 days of confinement, depending on the grade of the imposing commander, in addition to other possible punishments that deprive the Service member of liberty or property, 10 U.S.C. § 815(b)(2).

⁹¹ 10 U.S.C. §§ 815(e), 866.

of the vessel exception to a ship that is underway. In all but the most austere operational environments, modern technology could provide Service members an opportunity to exercise their rights to demand trial by court-martial and the ability to consult with counsel, without undue mission disruption. In sum, the IRT recommends that DoD proscribe invocation of the vessel exception for nonjudicial punishment imposed ashore, and allow its application only when operationally necessary, taking into account modern communications capabilities.

(8) Provide Service members with the right to legal representation at Summary Courts-Martial (SCM). Currently, no statutory or regulatory right to representation by military counsel provided by the Service exists at SCM. For the same reasons underpinning the IRT's recommendation that the Services provide a meaningful right to counsel in proceedings under provisions of Article 15, UCMJ, it recommends providing an accused Service member the right to representation by military counsel at SCM. The existing right to representation by civilian counsel, at a Service member's own expense, should be maintained. Although a finding of guilty at SCM does not constitute a criminal conviction,⁹² the SCM forum allows for the imposition of punishments that may, in some cases be more severe than those available in nonjudicial punishment proceedings, most notably, the imposition of confinement. Additionally, guilty findings at SCM could result in criminal indexing under Federal law, or Military Department or Service policy.

(9) Prohibit a Commanding Officer in the Accused's chain of command from serving as the Summary Court-Martial Officer (SCMO).⁹³ Both statute and the Rules for Court-Martial allow for the summary court-martial convening authority (SCMCA) to serve also as the SCMO when a unit has only one commissioned officer.⁹⁴ Service members may object to trial by SCM,⁹⁵ and the applicable law and Rule for Court-martial allow the SCMCA to forward charges to a superior authority to convene a SCM. But the Rule also provides that "if the convening authority or the summary court-martial is the accuser, the jurisdiction of the summary court-martial is not

⁹² 10 U.S.C. § 820(b).

⁹³ *Id.*

⁹⁴ 10 U.S.C. § 824b; Rule for Court-Martial 1302(b), *Manual for Courts-Martial*, United States (2019 ed.) [hereinafter *MCM*].

⁹⁵ 10 U.S.C. § 820, Rule for Court-Martial 1303, *MCM*, *supra* note 94.

affected.”⁹⁶ Given the IRT finding that greater disparities exist where procedural safeguards are fewer and oversight less, the better practice when a unit has only one commissioned officer is to require the superior convening authority to withhold jurisdiction to convene the SCM to the higher level, or to appoint a SCMO outside of the accused Service member’s chain of command.⁹⁷

(10) Implement additional due process in the Administrative Separation proceedings of a Service member not otherwise entitled to a Separation Board. Enlisted Service members with less than six-years of military service who are proposed for involuntary separation with an honorable or general characterization of service are not entitled to a Separation Board and are processed for elimination under an abridged notification process. Yet this “bad paper” will follow them throughout life, potentially depriving them of employment opportunities, as well as denying them eligibility for post-9/11 GI Bill benefits.

Current Service member rights and protections associated with the notification process, as set forth in DoD Instruction 1332.14, *Enlisted Administrative Separations*, provide inadequate protections for our most vulnerable Service members. The Instruction requires such Service members “be provided a reasonable period of time, but not less than 2 working days, to act on the notice” of proposed separation.⁹⁸ Additionally, DoD policy does not require a legal review before the Separation Authority renders separation and discharge characterization decisions.

DoD should amend DoD Instruction 1332.14 to require additional due process for Service members not otherwise entitled to administrative board proceedings, except that these new processes would not apply to entry-level separation actions under which a Service member would receive an uncharacterized discharge. This enhanced due process could take the form of additional notifications regarding the Service member’s right to consult with counsel prior to

⁹⁶ Rule for Court-Martial 1302(b), *MCM*, *supra* note 94.

⁹⁷ “The large positive disparity for trial by [summary court-martial] also merits further study. Specifically, it begs the question of whether Black Airmen were more likely to be referred to [summary court-martial] because they were more likely to have rejected nonjudicial punishment, which could indicate a lack of trust in the more informal Article 15 process.” CNA, *Exploring Racial Disparities*, *supra* note 14, at 51.

⁹⁸ DoD Instruction 1332.14, *Enlisted Administrative Separations*, Enclosure 5, *Procedures for Separation* [hereinafter DoDI 1332.14].

making a decision to waive his or her already limited rights under the notification process and additional information regarding the detrimental effects of a General Discharge.⁹⁹

(11) Add additional due process and access controls for titling, indexing, and expungement of information in the Defense Central Index of Investigations (DCII) and the Department of Justice (DOJ) National Criminal Information Center (NCIC) and Interstate Identification Index (III). Titling and indexing are intended as administrative procedures used by criminal investigation organizations to coordinate, deconflict, and assess allegations and investigations; however, being titled or indexed in the DCII and NCIC/III can have long-lasting, detrimental effects on a Service member. Racial disparities regarding the greater likelihood of Black Service members being investigated produce similar disparities regarding titling and indexing. Compounding matters, the DoD standard for being placed in DCII is “credible evidence,” a standard well below the Federal “probable cause” standard for being placed in DOJ’s NCIC/III. Additional due process and access controls, such as a requirement for a probable cause review by an independent military judge or magistrate prior to indexing in the NCIC/III, will ensure that Service members receive due process commensurate with their civilian counterparts. To ensure that titling/indexing records are used only for their intended purposes, DoD should submit a legislative proposal to restrict the use of information filed in the DCII in promotion, assignment, and other personnel decisions, particularly for titling entries more than 5 years old in which allegations were not substantiated or no action was taken. Additionally, expungement processes should be enhanced by adding an independent review above the MCIO level, to improve real and perceived objectivity. Further, DoD and the Military Services should promptly implement section 545 of the FY 2021 NDAA, which directed DoD to create and implement an expanded expungement process for records maintained in the DCII.¹⁰⁰ The Department should also implement automatic expungement from the DCII after 5 years if the allegations at issue were not substantiated, no action was taken, and no additional indexing or titling determinations were made against the subject in the intervening period.

⁹⁹ See generally, Marine Corps Order P1600.16 (Change 2), *Marine Corps Separations and Retirement Manual*, February 15, 2019, for an example of additional rights advisements that could be provided to all Service members.

¹⁰⁰ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, § 545, 134 Stat. 3613-15 (2021).

(12) Increase emphasis on compliance with Article 137, Uniform Code of Military Justice (UCMJ), which requires the explanation to Service members of certain punitive Articles of the UCMJ at various points in their career. Article 137, UCMJ,¹⁰¹ requires that 61 specific UCMJ Articles be explained to all enlisted and officer Service members at specific points during their careers. However, the Services do not consistently train Service members as required by Article 137. The DoD should consult with the Service Judge Advocates General and the SJA to the Commandant of the Marine Corps, to establish appropriate processes and policies to ensure compliance with the statutory requirements of Article 137.

Oversight and Transparency.¹⁰²

The third set of key recommendations addresses oversight and transparency. It is imperative that DoD improve data collection across all systems. It is also important to develop and deploy tools to provide commanding officers and other key stakeholders timely and relevant information to implement and assess the effectiveness of improvements to command climate; fairness in investigative, administrative, and military justice processes; and related command decisions and personnel processes.

(13) Improve and standardize data collection across all phases of the investigative, administrative, and military justice systems, particularly at the initial intake stages. Several of the IRT's data collection and reporting recommendations can be implemented relatively quickly by standardizing existing DoD-wide reporting requirements. The IRT analyzed two statutorily required reports that assist Congress in exercising its oversight of the military justice system: the 549G and 146a reports. As noted above, our analysis of the data in these two reports revealed vast inconsistencies in how the Services defined and reported the data, and exposed gaps in data needed to form the basis of meaningful review and analysis. The IRT recommends DoD supplement Congressional reporting requirements by mandating the Services provide standardized sets of additional data to allow for more comprehensive analysis. Further, the DoD should require additional data to be provided in these reports, including, data regarding uses of

¹⁰¹ 10 U.S.C. § 937.

¹⁰² See Appendix C for a detailed discussion of the Oversight and Transparency recommendations.

the vessel exception, counsel representation at summary courts-martial, and instances in which a unit's commanding officer served as both the Summary Court Martial Convening Authority and Summary Court-Martial Officer for Service members under his or her command. The IRT also recommends the Department standardize all data definitions and formats for the 549G and 146a reports and require reporting of both "raw numbers" and "rates per thousand" to allow for meaningful analysis and comparisons across Services and ensure effective oversight by the Department and Congress.

Other recommendations regarding data collection and improved analysis will require input from subject matter experts and DoD-wide effort. CNA's report on the use of data to measure and interpret disparities in the military justice system offers several detailed recommendations and considerations in this regard.¹⁰³ Additionally, the IRT encourages DoD to capture data for all investigations, as encompassed by the IRT's broader definition of "investigations," and to use the additional data both to improve future quantitative analysis of racial disparities and to inform efforts to further professionalize investigations within the DoD.¹⁰⁴

(14) Develop processes and policies for timely analysis and reporting of data to commanding officers and other key stakeholders. In order to effectively inculcate a climate and culture committed to Diversity Equity, Inclusion, and Access,¹⁰⁵ commanders need trained and expert assistance to help identify issues and develop corrective action plans. The lack of timely analysis and reporting regarding disparities in the military justice system disadvantages commanding officers, who would greatly benefit from access to information and analysis that would allow them to be more responsive in addressing climate and disparity issues. Additionally, using technology with real-time data would empower decision-makers to implement judicious training and other remediation measures to improve performance and operational readiness.

(15) Provide commanding officers with "detection tools" and expert assistance to address potential areas of disparity. Although commanding officers are identified as discrete

¹⁰³ CNA, *How to Use Administrative Data*, *supra* note 47.

¹⁰⁴ *IRT Charter*, *supra* note 3, at 2.

¹⁰⁵ Department of Defense, DoD Directive 1020.02E, *Diversity Management and Equal Opportunity in DoD* (June 8, 2015, incorporating Change 2, effective June 1, 2018) [hereinafter DoDD 1020.02E, *Diversity Management*].

discretionary actors at many nodes throughout the continuum, they also bear ultimate responsibility and accountability for the climate and culture of their organizations.¹⁰⁶ The IRT notes that the investigative and military justice system provides adequate tools for commanders to maintain good order and discipline. However, the IRT believes that commanding officers require additional tools to maintain a healthy climate for the people they are charged to command.

(16) Establish a Principal Staff Assistant (PSA) for Law Enforcement. The IRT determined that the Department requires a Principal Staff Assistant (PSA) for law enforcement. On behalf of the Secretary and Deputy Secretary of Defense, this PSA would provide oversight and governance, advocate for resources, and provide strategic guidance to the entire DoD law enforcement community. More than 97,000 military and civilian law enforcement officers comprise the DoD law enforcement community, yet they have no all-encompassing and consolidated senior representation in OSD. Rather, responsibility for law enforcement policy and representation is spread across three Under Secretary portfolios, in addition to some portions that reside within the DoD Office of the Inspector General. Centralized OSD oversight for this crucial profession would increase visibility and advocacy for law enforcement policies and practices within the DoD, and close gaps and encourage consistent practices in law enforcement across the Services.

(17) Institute appropriate oversight mechanisms to assess the impact of actions taken to ameliorate or eliminate racial disparities in law enforcement investigations, command inquiries, command-directed and other administrative investigations, adverse administrative actions, nonjudicial punishment, and military justice actions. While additional data is being collected and as DoD and the Military Services undertake measures to mitigate racial disparities in the investigative, administrative, and military justice processes, DoD should establish criteria to determine when data indicating possible racial, ethnic, or gender disparities should be further reviewed, and describe how such a review should be conducted.¹⁰⁷ The Military Services should undertake regular internal reviews and make oversight a priority review or inspection item for Military Service Inspectors General.

¹⁰⁶ *Id.* at Enclosure 2, para 6b (establishing that leaders at all levels must be held appropriately accountable for fostering a climate of inclusion that supports diversity).

¹⁰⁷ *See*, 2019 GAO Report, *supra* note 14, at 32; and CNA *Exploring Racial Disparities*, *supra* note 14, at i.

IX. Critical Enablers

Vital to the implementation of the IRT's recommendations is the recognition of two critical enablers.

First, the DoD cannot implement these recommendations without the necessary resources. Few of these procedural, policy, or data changes will come cheaply or easily. Commanding officers, unit leaders, law enforcement, legal professionals, and other key stakeholders require additional resources to focus on the areas that create the greatest disparities in the investigative and military justice systems. Necessary resources are not limited to fiscal resources, but also include the personnel, training, and temporal resources needed to implement actions that will directly impact disparities in these systems. If DoD is serious about addressing racial disparities, it needs to determine what resources are needed and work across the DoD, and with Congress, to ensure those resources are programmed, budgeted, and available for execution for this purpose. In short, if DoD intends to take on racial disparities and win, these initiatives must be prioritized and fully funded by the DoD, across the out-years; unfunded mandates will not suffice.

Perhaps most importantly, the DoD and Military Services must seize the narrative and communicate effectively and proactively with all stakeholders, encouraging buy-in and making them part of the solution to this challenge. DoD and the Services must publicly acknowledge the existence of these disparities, and continually tell the force, other key stakeholders, and the public what they plan to do about disparities, and why. They must proactively engage the force and regularly update them on measures taken, progress made, and any setbacks, and seek input and contributions from Service members and other stakeholders to better shape actions and identify areas for improvement going forward.

X. Final Thoughts¹⁰⁸

The U.S. Military often has been at the forefront of tackling difficult social issues. The armed forces have led the Nation in efforts to eliminate unlawful discrimination, and few other institutions have equaled the military's commitment to achieving equal opportunity within its ranks.¹⁰⁹ Acting now to address racial disparities in the investigative and military justice systems continues this important work. In deciding whether and how to adopt and implement the IRT's recommendations, OSD and the Services must have the courage to challenge the existing state of affairs, and the perseverance to see these actions through to completion. Making meaningful and lasting progress in addressing racial disparities across the DoD will require new and sustained investments in training and education, additional Service member protections, and scrupulous oversight.

Although each IRT recommendation is important in its own regard, together our recommendations are integral to fostering a military climate and culture that value every Service member for what they can bring to our critical national security mission. There is no time to waste. Accordingly, these recommendations should be implemented in a manner that is both deliberate and expeditious.

¹⁰⁸ Given the constraints of time and resources the IRT did not address all areas identified in the IRT Charter. The IRT recommends future study on: (1) the of role of Military Department Boards for the Correction of Military/Naval Records in remediating the effects of racial disparity; and (2) existence of racial disparities in the courts-martial post-trial and clemency processes.

¹⁰⁹ 1972 Report, *supra* note 23, at 2.