

Addressing Bias in the JAG Corps

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## INTRODUCTION

In recent years, the public eye has turned to the issue of racial disparity in the criminal justice system, and the Department of Defense is not exempt from this public attention. In May 2017, an organization called “Protect our Defenders” release a report entitled “Racial Disparities in Military Justice: Findings of Substantial and Persistent Racial Disparities Within the United States Military Justice System” (Christensen & Tsilker, 2017). The report’s data concluded that in all service branches, black service members were substantially more likely than white service members to face discipline. That was report was followed up by an investigation by the Government Accountability Office, which found that in the Army, Navy, Marine Corps and Air Force, black, Hispanic and male service members were more likely to be investigated and tried by courts-martial by their white and female service members (“Military Justice”, 2019). Now, in 2020, this issue has been brought to the forefront of the conversation across the services and in Congress.

In August 2016, the American Bar Association adopted ABA Model Rule 8.4 (g), which says, in part, that it is professional misconduct for a lawyer to: (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. Since then, over half of state bar associations have created or adopted similar rules (Kubes, Davis, & Schwind, 2019). But what does it mean for an attorney to “know or reasonably know” that their conduct could constitute discrimination on the basis of race? One such indicator involves understanding and confronting the idea of unconscious bias. Perhaps the most important thing attorneys can do to move the wheels of justice forward is to commit to the work of recognizing and confronting bias.

### **UNCONSCIOUS BIAS EXPLAINED**

For the purposes of this paper, I will use implicit bias and unconscious bias interchangeably. However, there is a school of thought that considers the two terms to be similar, but not the same. Unconscious bias is generally defined as the belief systems that are engrained in us and that we utilize to make decisions about the world around us without our conscious awareness. Implicit bias does not always manifest itself in a way that is prejudicial in a negative manner. Sometimes implicit biases can also present in having a preference for a person or group of people. Overall, these biases affects our attitudes and actions, “thus creating real-world implications, even though individuals may not even be aware that those biases exist within themselves” (Staats, 2013).

The Ohio State University’s Kirwan Institute for the Study of Race and Ethnicity studies implicit bias and has narrowed its important characteristics. (1) Implicit biases are pervasive. There is no one immune to them. (2) Our implicit biases may not align with our spoken or declared beliefs. For example, one may profess to believe in racial equality, yet may still act in a way that shows bias against a race. (3) Implicit biases manifest in favoring our own in-group. For example, we may tend to trust people who look or think like us. (4) Finally, and most important to this discussion, implicit biases are malleable. We have the power to unlearn learned behaviors and to adjust the way we have been taught to see the world.

### **IMPLICIT BIAS TRAINING IN THE FEDERAL ARENA**

In 2016, the Department of Justice announced that it would train all law enforcement agents and prosecutors to recognize and address implicit bias as a part of its regular training curricula (“Department of Justice” 2016). In taking that step, the DOJ was acknowledging that a problem did or could exist and implemented actions to alleviate the problem. Likewise, the

department heads of multiple federal organizations such as the FBI, ATF, and DEA engaged in such training in accordance with how the Obama Administration had advocated implicit-bias exercises on the local level (Haugh, 2016). Other than this step in 2016, federal agencies have not, on a wide-scale, mandated implicit bias trainings. Local prosecutorial agencies (some states and counties) require such training, but it is few and far between.

The Department of Defense requires a number of trainings of its military members and employees each year, including those centered around understanding sexual harassment and sexual assault. While sections on bias are taught in some areas of professional military education to commanders, as of the date of this paper, unconscious bias training is not standardized as an educational pinnacle in commissioning sources such as ROTC, OTS, COT, and TFOT, in basic military training or in technical schools, and even in professional military education such as Airman Leadership School and Squadron Officer School. But just as the issues of sexual harassment and sexual assault permeate our Air Force and thus require training, so do biases permeate our Air Force. Though we are united by our mission and by our duty to uphold the Constitution, each of us bring to our military careers our own biases shaped throughout our lifetime. It is irresponsible of us as members of the armed forces to believe we have overcome these biases simply by putting on the uniform.

### **PROSECUTOR BIAS**

Implicit bias present in each human, regardless of socioeconomic status, race, gender, educational background, and any other demographic. Thus implicit bias presents in each person involved in the military justice process and demands recognition and addressing. For the purpose of this paper, I am focusing on the role it plays within a JAG, specifically a prosecutor.

There are understood to be three main areas that civilian prosecutors can unknowingly allow their implicit biases to affect the justice process: charging decisions, creating a pre-trial strategy, and throughout the trial (Kang, 2012). This is no different from the military lawyer.

A charging decision in the civilian world could be akin to the way in which JAGs advise commanders on what would be the appropriate military justice action for misconduct (preferring charges to court-martial, issuing a nonjudicial punishment, initiating administrative separation, etc.) With respect to this area of bias, color may affect how an Airman is perceived. Their background could inform the way in which they respond to the discipline; that background often differing from the lived experiences and understanding of the JAG engaged in the process. Additionally, a JAG can easily be influenced by their perception of an Airmen—viewed through the lens of their bias—and then offer their advice—which is shaped by that bias—to the commander as the best course of action.

Part and parcel of pre-trial strategy also includes the question of whether an Accused in a court-martial should be offered a potential plea or pre-trial agreement. Often in a base legal office, the idea of whether someone “deserves” to be offered a plea in order to make the most of their life post-military will arise. When our biases influence what we think people deserve, it presents the dangerous likelihood that we could offer more favorable terms to those whom our bias favors.

Finally, trial strategy employs bias in its very structure. The purpose of voir dire is to find a fair and impartial panel often touted to “give a fair shake” to both the Government and the Accused. Attorneys for both the prosecution and defense often explain bias to potential panel members in order to have them buy into the concept that non-bias members must be the ones to judge this case. We know that we cannot rid ourselves of bias entirely and thus will not rid a

panel of bias. But in explaining this to potential members, the role of the attorney is to remind them that we all have biases and we must be conscious about those biases to make sure we do not employ them when making very important life decisions about an Airman's future. But once a panel member has been seated, attorneys make arguments they hope will trigger the implicit biases of the panel to sway them to their side.

The purpose of military justice is, in part to "safeguard and foster military discipline" (Harding, 2010). In doing so, military justice enables the Air Force to carry out its mission. But there is no mission without the people and thus it is important for the advisors of commanders—the JAG Corps—to take an introspective look into its processes and how those processes effect our people. In the words of The Judge Advocate General of the United States Air Force, "our approach must be infinite, a constant struggle for betterment" (Rockwell, 2020).

### **PROPOSAL**

With betterment in mind, I propose four courses of action to help correct the racial disparities in military justice by and through addressing JAG bias.

First, implicit bias training should be added to the permanent curriculum at the Air Force Judge Advocate General's School (AFJAGS). This should be included as a mandatory training session at the Judge Advocate Staff Officer Course (JASOC) as well as paralegal courses. Like with the rules of professional responsibility, an annual refresher training should be required of all JAGs.

Second, bias toolkits should be formed and distributed to all base legal offices for use. A model for a bias toolkit can be found on the American Bar Association (ABA) website. The Diversity and Inclusion 360 Commission, a one-year presidential initiative established by former ABA President Paulette Brown created a number of videos and text resources for legal

practitioners including prosecutors, defense attorneys, and judges (Implicit Bias Toolkit, n.d.). Creating a toolkit like this for base legal will provide the SJA with the tools to complete annual training for their offices as well as help create a framework that SJAs can use to internally review their office's advice. A quarterly review of the advice given by a base legal office military justice team will help to ensure that JAGs are consistent *and* will provide a baseline for the office to realize when their biases may be affecting their advice.

Third, the Air Force JAG Corps must gather wider statistics. At this time, the Air Force tracks non-judicial punishment and courts-martial and can distinguish by the following racial categories: White, Black, or Other/Unknown in rates by thousands. In order to truly understand the trends and statistics of the military justice system as a whole, the Air Force should track specific demographic data. Additionally, the Air Force should compile statistics on outcomes of cases as it relates to racial demographic data. When problems arise such as this revelation of the disparate treatment of Black Airmen by the Air Force's military justice system, we rush to find fixes. There are no quick fixes to systemic issues. In order to affect lasting change in a systemic issue, we must truly understand the magnitude of its reach. Without proper and more expansive statistics, it is impossible for us to truly know how unequal we administer justice, especially as it relates to administrative procedures such as separations. After the Air Force has compiled such statistics, it will be in a better position to strategize lasting solutions.

Fourth and finally, base legal offices should regularly monitor trends in command decisions on military justice and outcomes of military justice action on a quarterly basis. This can be done in conjunction with Status of Discipline (SOD) meetings. The purpose of this review will be additional oversight and can be the basis of a limited re-training of implicit bias. This frequent review is necessary to ensure that any change in behavior and decision-making that is

introduced and followed-through in the weeks after an implicit bias training is conducted, maintains effectiveness.

A 2017 study on the effectiveness of implicit bias training showed that the positive effects of implicit bias training generally decline after two weeks (Federal Judicial Center, n.d.). This harsh reality means that we have a duty to ensure that this conversation does not end when the hype of the Protect Our Defenders report dies down or when Congress's attention is turned in other directions. Simply said, confronting our biases requires constant attention. In order to move forward for a more inclusive and less bias Air Force, lawyers must be committed to constantly addressing the biases present in their own lives and in the ways that bias informs military justice at the base legal level. The heart of the Air Force is the squadron. For JAGs who directly advise squadron commanders, this places an overwhelming amount of responsibility upon us to make sure

### CONCLUSION

While my proposals will not deliver a total solution to the military justice system's disparate impact against Airmen of color, it is my hope that they will provide the following: conscious steps the JAG Corps can take to ensure its practitioners are trained well, that trends and statistics are formally recorded and reviewed for strategic decision making, and that as legal practitioners, we keep ourselves morally and ethically accountable for the serious decisions we advise on and make.

The old adage that justice is blind is simply not true. As humans, we see color. We cannot afford to pretend that our justice system treats people equally when the vision of those who administer that justice may be clouded by biases. As an Air Force we must strive to recognize our shortcomings and actively work to ensure that our force is one of true justice for all.



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