# "EQUALITY OF TREATMENT": HOW SERVICE MEMBERS OF COLOR ARE DISPROPORTIONATELY IMPACTED BY THE MILITARY LAW ENFORCEMENT'S TITLING PROCESS

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*The inequality experienced today is part of the legacy of our nation's past. It is also, more specifically, the harvest of the military's own history of racial exclusion, followed by racial segregation and discrimination. It is, as well, intimately linked to and reinforced by social conditions existing in the larger society. White and non-white alike are preconditioned before coming into the service. Racial bias in military justice should not come as a surprise . . . In a society permeated by racism, it is again too much to expect that any institution of that society—including the military—is going to completely transcend discrimination. It is, in some measure, going to reflect it.*[1]

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[1] 1 DEP'T OF DEF. TASK FORCE ON THE ADMIN. OF MIL. JUST. IN THE ARMED FORCES, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES, at x (Nov. 30, 1972) [hereinafter TASK FORCE REPORT].

## I. Introduction

President Harry S. Truman, grandson of slave owners, Missouri native, and former white supremacist,[2] signed the order ending segregation in the Armed Forces on July 26, 1948.[3] The brief, but significant, executive order declared, "there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion, or national origin."[4] Despite President Truman's efforts, discrimination based on race has hounded the services in myriad ways. Disparities in the administration of military justice recently came to light in 2017 with a report by the non-profit organization Protect Our Defenders (POD).[5] The report triggered Congressional interest, and in response, Congress sought additional analysis from the Government Accountability Office (GAO)[6] and the Defense Advisory Committee on Investigations, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD).[7] The conclusions were consistent: at various points between investigation and prosecution, Service members of color had a different experience with military justice than their white counterparts.[8]

However, the hearings and reports referenced above are not the first time the military has reckoned with its justice system failing to treat its members equally. The history of military justice is replete with anecdotal, and often tragic, evidence of racially-disparate treatment.[9] Discrimination

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[2] DeNeen L. Brown, *How Harry S. Truman Went from Being a Racist to Desegregating the Military*, WASH. POST (July 26, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/07/26/how-harry-s-truman-went-from-being-a-racist-todesegregating-the-military. Although President Truman is heralded as the groundbreaking integrator of the military, desegregation was arguably already happening informally in World War II. RONALD W. PERRY, RACIAL DISCRIMINATION AND MILITARY JUSTICE 14 (1977). During World War II, "there was tremendous pragmatic pressure to assign men based on their individual skills and expertise instead of their color. Faced with a 'sink or integrate' decision, the military as a whole opted for integration." *Id.* at 14-15.

[3] Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948).

[4] *Id.*

[5] DON CHRISTENSEN & YELENA TSILKER, PROTECT OUR DEFENDERS, RACIAL DISPARITIES IN MILITARY JUSTICE (2017) [hereinafter POD REPORT].

[6] U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-344, MILITARY JUSTICE: DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL AND GENDER DISPARITIES (2019) [hereinafter 2019 GAO REPORT].

[7] DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION AND DEF. 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) [hereinafter DAC-IPAD DISPARITIES REPORT].

[8] *Id.* at 13; POD REPORT, *supra* note 5, at i–ii; GAO REPORT, *supra* note 6, at 38.

[9] One example is the court-martial of Cadet Johnson Whittaker. Whittaker was a Black cadet at West Point in 1880. John F. Marszalek, Jr., *A Black Cadet at West Point*,

AMERICAN HERITAGE (August 1971), https://www.americanheritage.com/black-cadet-west-point. On April 5, 1880, Whittaker received a threatening note and two days later, on April 7, he was found beaten, covered in blood and tied to the bed in his room. *Id.* Whittaker reported being dragged from his bed and attacked by three men. *Id.* Whittaker's ears and hands were cut, he was strangled, and struck on the head and face. *Id.* Following a cursory investigation that lasted approximately a day, the commandant of cadets determined Whittaker faked the attack. *Id.* On April 9, a court of inquiry began to further inquire into the event, where Whittaker was painstakingly interrogated. *Id.* Using handwriting analysis, the court of inquiry eventually determined Whittaker had written the threatening note and maimed himself. *Id.*

The following year, Whittaker was court-martialed for "conduct unbecoming an officer and a gentleman, in violation of United States Military Academy Regulations, and with conduct prejudicial to good order and discipline." *Id.* The first charge was for writing the threatening note and mutilating himself and the second was for lying to the court of inquiry. *Id.* During the trial, members heard about the ostracism Whittaker faced while he was at West Point. *Id.*; *Cadet Whittaker's Trial: Finding Out Objections Other Cadets Had to Him*, N.Y. TIMES, Feb. 18, 1881, at 3. Cadet Joseph Kittle testified, "I never knew anybody in the class who spoke to him except officially." *Id.* Kettle continued to say that he objected to Whittaker because of his hair oil that had a "disagreeable odor" and "partly to [Whittaker's] color." *Id.* The theory of the prosecution was that Whittaker committed these acts because he was "backward in his studies" and to get revenge on the academy for the ostracism. *Arguing for Whittaker: Ex-Gov. Chamberlain Summing Up a Famous Case*, N.Y. TIMES, June 2, 1881, at 3; Marszalek, *supra*. During his closing argument, Whittaker's defense attorney, Daniel Chamberlain, noted that both Whittaker and West Point itself were on trial. *Id.* Chamberlain stated, "[t]he fact of the peculiar relations arising from Whittaker's race cannot be overlooked. Those relations were non-recognition, non-intercourse, compulsory isolation as to all unofficial matters." *Id.* Chamberlain's argument methodically dismantled the government's theory of the case, pointing out issues like the manner in which Whittaker was tied up would have required the mattress be removed and then replaced, which would have been impossible for Whittaker to do by himself with his hands tied. *Id.* The prosecutor, a judge advocate, Major Asa Bird Gardiner, not only called Whittaker a coward for not resisting if this attack did occur, but also used disturbingly racist arguments, including that "[Black people] are noted for their ability to sham and feign . . . ." Marszalek, *supra*. Whittaker was found guilty, sentenced to be dishonorably discharged from West Point, pay a fine, and to be confined at hard labor. *Id.*

After review by The Judge Advocate General found numerous errors in the proceedings against Whittaker, President Chester A. Arthur overturned Whittaker's court-martial and set aside his sentence on March 22, 1882, which meant he could return to West Point. *Id.* However, because Whittaker had failed his Philosophy class in June 1880, he was separated from the United States Military Academy and never returned. *Id.* In 1995, President Bill Clinton posthumously awarded Whittaker his Army commission in an effort to address the "plainly racist purge" of Whittaker from West Point. John F. Harris, *The Late Lieutenant*, WASH. POST (July 25, 1995), https://www.washingtonpost.com/archive/lifestyle/1995/07/25/the-late-lieutenant/e7b7f2ad-31b5-4d40-b316-85df5027e344.

The Houston Riot Trials are also a grim example of race issues in the administration of military justice. An all-Black infantry regiment was sent to guard a construction site near Houston, Texas. Fred L. Borch III, *"The Largest Murder Trial in the History of the United States": The Houston Riots Courts-Martial of 1917*, ARMY LAW., Feb. 2011, at 1. Violence erupted between members of the infantry regiment, the Houston police, local civilians, and National Guardsmen after a Houston police officer beat two Black Soldiers. *Id.* Shortly

is evidenced not just in intermittent examples, but is also consistently, empirically proven by data. In 1972, the Task Force on the Administration of Military Justice of the Armed Forces analyzed a variety of metrics to show that the problem was not merely anecdotal.[10] The Task Force concluded "the military system does discriminate against its members on the basis of race and ethnic background. The discrimination is sometimes purposive; more often, it is not."[11]

In various reports over the last five decades, disparate results based on race appear throughout military justice.[12] Of particular importance to this paper are the disproportionate rates that Soldiers[13] of color face

after, a single general court-martial was convened with sixty-three Soldiers involved in the violence as accused. *Id.* at 2. All sixty-three Soldiers were represented by a single defense counsel, who was not an attorney. *Id*. At the end of the trial, thirteen Soldiers were sentenced to death, forty-one sentenced to life imprisonment, four sentenced to lesser terms of confinement, and five were acquitted. *Id.* Two days after the sentence was announced, the Army executed the thirteen Soldiers, by hanging, in a mass execution. *Id.*

The military has not executed anyone since John Bennett, who was Black, in 1961. *See* James J. Fisher, *A Soldier is Hanged*, KAN. CITY TIMES (Apr. 13, 1961) at 7. The history of the military's last executions is yet another example of race-based disparities. "[B]etween 1955 and 1960, all eight white Soldiers who were condemned to death, each of them a murderer, saw their sentences commuted by the Eisenhower administration." Richard A. Serrano, *The Hidden Segregation of Military Executions During the Civil Rights Movement*, TIME (Feb. 11, 2019, 12:37 PM), https://time.com/5525283/soldier-execution-civil-rights/. By contrast, the last eight Soldiers actually executed by the military were all Black. *Id.* Three out of the four Service members currently on death row at Fort Leavenworth, Kansas are persons of color. *Racial Disparity in the Military Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/military/racial-disparity-in-the-military-death-penalty (last visited Nov. 25, 2022); *see also* David C. Baldus, et al., *Racial Discrimination in the Administration of the Death Penalty (1984–2005)*, 101 J. OF CRIM. L. & CRIMINOLOGY 1227, 1293 (2011) Using a statistical analysis of death penalty cases, the authors found "systemic racial disparities in the administration of the military death penalty across the sixteen multiple-victim cases. These disparities cannot be explained by legitimate case characteristics or the effects of chance in a race-neutral system." *Id.*

[10] TASK FORCE REPORT, *supra* note 1, at 1.

[11] *Id.* at 17.

[12] POD REPORT, *supra* note 5, at i–ii; 2019 GAO REPORT, *supra* note 6, at 38; DAC-IPAD DISPARITIES REPORT, *supra* note 7, at 13.

[13] This paper will focus predominantly on the Army and its regulations. However, various reports found disparities in investigations in both the Navy and the Air Force. 2019 GAO REPORT, *supra* note 6, at 38; DAC-IPAD DISPARITIES REPORT, *supra* note 7, at 13. Further, the standard for titling and the process to remove titling and indexing information is fundamentally the same for the Air Force and Navy. *See generally*, U.S. DEP'T OF AIR FORCE, MANUAL 71-102, AIR FORCE CRIMINAL INDEXING (21 July 2020) [hereinafter AFMAN 71-102]; U.S. DEP'T OF NAVY, NAVAL CRIMINAL INVESTIGATIVE SERVICE MANUAL 1 (Aug. 2013) [hereinafter NCISMAN 1].

investigation by military law enforcement.[14] In addition to the emotional stress of being investigated,[15] there are collateral consequences on the individual being investigated, starting with being titled and indexed.[16] Although titling and indexing may seem insignificant, there are a number of consequences that can have a lasting impact on a Soldier's life. As the data suggest, law enforcement agencies investigate Service members of color more often, it then logically follows that more Service members of color are titled. Therefore, these Service members will disproportionately suffer the effects of being titled and indexed in various databases—even if the case is not supported by probable cause or the Service member faces no punishment.

When Department of Defense (DoD) law enforcement investigates a Service member, he or she will likely be titled and indexed very early in the investigation, using a standard lower than probable cause. Titling is a process unique to the military, in which the law enforcement agent will place the name of an individual in the subject block of a Law Enforcement Report (LER).[17] Placing a name in the subject block occurs "as soon as the investigation determines there is credible information that the subject committed a criminal offense."[18] Credible information is defined as "[i]nformation disclosed or obtained by a criminal investigator that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to lead a trained investigator to presume the fact or facts in question are true."[19] Comparatively, probable cause is defined as "[a] reasonable ground to suspect that a person has committed or is committing a crime . . . more than a bare suspicion, but

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[14] Matthew Cox, *Calls to Military Law Enforcement Reveal Racial Disparities, Army General Says*, MILITARY.COM (26 Feb. 2021), https://www.military.com/daily-news/2021/02/26/calls-military-law-enforcement-reveal-racial-disparities-army-general-says.html; 2019 GAO REPORT, *supra*, note 6, at 38; DAC-IPAD DISPARITIES REPORT, *supra* note 7, at 13.

[15] *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 822 (2015). (discussing the "intangible psychological costs relating to uncertainty or anxiety stemming from [a] pending trial" following a civilian arrest).

[16] U.S. DEP'T OF DEF., INSTR. 5505.07, TITLING AND INDEXING IN CRIMINAL INVESTIGATIONS (Feb. 28, 2018) [hereinafter DoDI 5505.07] Note: the numbering of DoDI 5505.07 changed from 5505.7 to 5505.07, but the regulation remained substantively the same; *see also*, U.S. DEP'T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING Glossary (27 Sept. 2016) [hereinafter AR 190-45] (defining "title" and "index").

[17] AR 190-45, *supra* note 16, Glossary. An LER is "[a]n official written record of all pertinent information and facts obtained in a USACID and MP law enforcement report or criminal investigation." U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES Glossary (21 July 2020) [hereinafter AR 195-2]. Law Enforcement Reports were previously known as Reports of Investigation (ROI). *Id.* at Summary of Change.

[18] DoDI 5505.07, *supra* note 16, para. 1.2a.

[19] *Id.* para. G.2.

less than evidence that would justify a conviction."[20] The subject is titled before a determination of probable cause is made by an attorney.[21] Simply put, credible evidence is a much lower standard than probable cause. Further, the current titling and indexing process allows law enforcement to use this incredibly low standard to create, maintain, and use a record on an individual. A subject may be titled for an offense for which they were never prosecuted or otherwise punished. Worse, a subject may be titled for an offense for which there was not even probable cause to believe he or she committed the offense.

Once someone is titled, the information is indexed in the Defense Central Index of Investigations (DCII) "to ensure this information is retrievable for law enforcement or security purposes in the future."[22] Although the DoD and its law enforcement agencies adamantly maintain that "titling and indexing are administrative procedures and will not imply any degree of guilt or innocence," [23] there are adverse collateral consequences that may arise merely because someone is titled as the subject of an investigation. These can be informally sorted into tangible and intangible. A tangible consequence may be, for example, revocation, suspension, or denial of a security clearance.[24] An intangible consequence would be that a commander becomes aware that one of his or her Soldiers was investigated and titled, which may cause the commander to form a negative bias about the Soldier or have an already-formed bias confirmed based solely on the titling information. As of 1994, at least twenty-seven federal agencies had access to the DCII and the information contained therein could be "used to determine promotions, to make employment

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[20] *Probable Cause*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[21] *Compare* AR 195-2, *supra* note 17, para. 3-16(b) *with* DODI 5505.07, *supra* note 16, para. 1.2(a) (Army Regulation requires coordination with an attorney for determining whether there is probable cause for each offense, but the DOD Instruction mandates that a subject be titled "as soon as . . . there is credible information that the subject committed a criminal offense."). *See also* Memorandum of Agreement between Office of The Judge Advocate General, Office of Special Trial Counsel and U.S. Army Criminal Investigation Division, subject: Legal Coordination for CID Law Enforcement Reports 2 (16 Sept. 2022) [hereinafter JAG MOA 2022] (delineating the necessary coordination between law enforcement personnel and judge advocates to manage criminal allegations and determine probable cause).

[22] DODI 5505.07, *supra* note 16, para. 3.1.

[23] DODI 5505.07, *supra* note 16, para. 1.2(c); *see also* AR 195-2, *supra* note 17, para. 4-4(b) (stating "the decision to list a person's name in the title block of [an LER] is an investigative determination that is independent of judicial, nonjudicial, or administrative action taken against an individual or the results of such action").

[24] *See* U.S. DEP'T OF ARMY, REG. 380-67, PERSONNEL SECURITY PROGRAM para. I-12 (24 Jan. 2014) [hereinafter AR 380-67] (providing guidelines to determine security clearance eligibility).

decisions, to assist in assignment decisions, to make security determinations, and to assist criminal investigators in subsequent investigations."[25] However, at present, it is nearly impossible to ascertain precisely which agencies and entities have access to the DCII and for what purposes.

In 2021, Congress ordered the Secretary of Defense to reform the process by which someone can request to have their name and identifying information removed from the subject block of an LER and from any databases where law enforcement sent the information.[26] The new law requires that individuals have the ability to expunge or correct law enforcement records if probable cause did not or does not exist to believe that the person committed the offense.[27] In an indirect way, Congress raised the standard for someone to be titled from "credible information" to "probable cause." This is a good first step in addressing the problems with titling and indexing. However, the change is inadequate because the onus is on the titled Service member to have the record corrected or expunged entirely. The expectation is that a junior-enlisted[28] Service member will know he or she was titled, be aware that it may cause negative ramifications in the future, and understand how to go about correcting it. Further, this process will still likely take a substantial amount of time to complete, during which the Service member will remain titled and may lose career opportunities, pay, or other benefits. Moreover, because the titling determination happens so early in the investigation, it has the potential to taint the rest of the investigation and the disposition of the case. The expungement process outlined by Congress fails to address these issues because it only mandates change well after the Service member has been titled. In order to adequately address the consequences of titling, the DoD must change the process by which someone is titled and indexed.

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[25] Major Patricia A. Ham, *The CID Titling Process—Founded or Unfounded?*, ARMY LAW. 1, 5 (Aug. 1998) (citing DAB REPORT, *infra* note 106, at 90). Major Ham's article was published in 1998 and, at the time, she cited to multiple sources that indicated it was possible that more than twenty-seven agencies had access to the DCII, and that additional entities could be granted access. *Id*.

[26] WILLIAM M. (MAC) THORNBERRY NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2021, PUB. L. NO. 116-283, § 545, 134 Stat. 3388, 3613-15 (2021) [hereinafter FY21 NDAA].

[27] *Id.* § 545(c).

[28] Although by no means definitive for all cases, as an example of who is being court-martialed and convicted, the data in the DAC-IPAD Court-Martial Adjudication Data Report showed that in adult-victim sexual assault cases from the fiscal year 2018, the vast majority of the accused were in the paygrade of E-4 or below. DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, AND DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, COURT-MARTIAL ADJUDICATION DATA REPORT 9 fig.4 (2019).

Titling and indexing can have a significant and lasting effect on the Soldier and on the military justice process as a whole. It is vital to take steps to address the inequities found in the military justice system, at all points—from investigation to disposition of the offense. The military justice system must be seen as fair or it will be entirely ineffectual.[29] Correcting race-based disparities will require rooting out bias and addressing the causes of it. In the meantime, Congress and the DoD must take steps to mitigate the consequences of unequal treatment. This can be accomplished, in part, by changing titling and indexing.

This paper first reviews the history of racial disparities in military justice, specifically in military law enforcement investigations. Next, it explains the titling process and what potential impacts that being titled may have on an individual. Finally, to address these concerns, this paper proposes a three-fold solution. First, there must be more clarity regarding how titling and indexing impacts Service members. Second, an individual should not be titled for an offense until law enforcement agents complete a substantial portion of the investigation and an attorney makes a probable cause determination. Final determination on probable cause and criminal indexing will rest with the Criminal Investigation Division (CID).[30] Third, the Secretary of Defense must actually promulgate the change mandated by Congress to reform the process to amend law enforcement records and remove a subject's information from various databases.

## II. Numbers Don't Lie: More Service Members of Color are Involved in the Military Justice Process, Starting with Investigation

For half a century, both Congress and the DoD have had clear proof that Service members of color are not treated the same as their white colleagues regarding discipline. Despite the ample evidence, both entities continue to call for more analysis and more data in an attempt to understand the causes of the disparity. Throughout its history, the military

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[29] Daniel Lam, *They Faced Racial Bias in Military Discipline. That can Impact National Security*, NPR NEWS (Sept. 14, 2021, 6:28 PM), https://www.npr.org/2021/08/22/1028765938/racial-bias-military-discipline-national-security-combat-readiness. *See also* Michael T. Klare, *Protests Force the US Military to Face Its Own Racism*, THE NATION (Jun. 10, 2020), https://www.thenation.com/article/world/military-racism (arguing that racial discrimination broadly and the military's inability or unwillingness to confront it "complicate[s] US efforts to rally a new ideological crusade against Beijing and Moscow" because of the hypocrisy between the United States policy positions on racism and civil rights and the actions of its law enforcement officers and military).

[30] JAG MOA 2022, *supra* note 21, at 2.

justice system has been a topic of close Congressional attention, but increasingly so in the last fifteen years.[31] More than 600 bills involving military justice have been introduced in Congress just since 1973—half of those in the last decade alone.[32] Evidence that the military was mishandling the investigation and prosecution of sexual assault resulted in the bulk of the recent increased interest.[33] In addition to sexual assault cases, members of Congress have also recently been concerned about racial disparity in the military justice system.[34] This is not the first time racial disparities in the military justice system have been investigated. Multiple reports and analyses have concluded that racial disparities exist in the administration of military justice. Some of the earliest reports conclude that it is merely a perception problem on the part of Service members of color and a communication problem on the part of leadership.[35] Later studies used the numbers of actions like non-judicial punishment (NJP) or pretrial confinement to empirically show race-based discrepancies actually exist.[36] Despite the incongruity between the early reports and the data-based studies, there is consistency in that the specter of discrimination has threatened the fair administration of military justice for decades.

### A. "[T]hugs" with a "[C]hip on [T]heir [S]houlder"

In the late 1960s and early 1970s, incidents at a Marine base and aboard two naval ships prompted increased scrutiny on race issues in the military, with a specific interest in military justice.[37] In December 1969,

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[31] *See* Max Jesse Goldberg, *Congressional Influence on Military Justice*, 130 YALE L.J. 2110, 2133 (2021).
[32] *Id.*
[33] *Id.*
[34] *See* Jennifer Steinhauer, *Pushing Beyond Sex Assault, Gillibrand Faces Resistance to Military Bill*, N.Y. TIMES (July 14, 2021), https://www.nytimes.com/2021/07/14/us/politics/sexual-assault-military-felonies.html. Senator Kirsten Gillibrand has been one of the leading advocates for substantial transformation of how the military justice system handles sexual assault crimes. She also argues that her proposal to remove commanders from the decision to prosecute all felonies would help combat racial injustice. *Id.*
[35] *See* discussion *infra* Section II.A.
[36] *See* discussion *infra* Section II.B.
[37] The reports produced because of these incidents were not the first evaluation of integration and race issues in the military. In 1962, President John F. Kennedy convened the President's Committee on Equal Opportunity in the Armed Forces. The 1963 Report produced by the Subcommittee did not directly address military justice, but found that Black Service members and their families suffered pervasive discrimination, both on and

the Special Subcommittee to Probe Disturbances on Military Bases of the House Armed Services Committee issued a report relating to an incident at Camp Lejeune, North Carolina.[38] On July 20, 1969, a physical altercation took place between groups of Black[39] and white Marines outside of a club, which resulted in one Marine's death.[40] After hearings at Camp Lejeune and in Washington, D.C., the subcommittee aptly concluded, "Camp Lejeune and the Marine Corps have a race problem because the Nation has a race problem."[41]

According to the report, the young, Black Marines were "probably more bitter" and entering the Marine Corps "fresh from scars of all the

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off base. Emily Ludolph, *The Military's Discrimination Problem was So Bad in the 1960s, Kennedy Formed a Committee*, N.Y. TIMES (July 16, 2019), https://www.nytimes.com/2019/07/16/us/the-militarys-discrimination-problem-was-so-bad-in-the-1960s-kennedy-formed-a-committee.html; PRESIDENT'S COMM. ON EQUAL OPPORTUNITY IN THE ARMED FORCES, EQUALITY OF TREATMENT AND OPPORTUNITY FOR NEGRO MILITARY PERSONNEL STATIONED WITHIN THE UNITED STATES 10-11 (1963), http://blackfreedom.proquest.com/wp-content/uploads/2020/09/desegarmed1.pdf. Additionally, these were not the only events that prompted action by the DoD. In 1971, there was an altercation in the barracks on Travis Air Force Base, California, between a Black and white Airman. KRISTY N. KAMARCK, CONG. RSCH. SERV., R44321, DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED SERVICES: BACKGROUND AND ISSUES FOR CONGRESS 18 (2019). The fight "escalated into riots that ended in 135 arrests, 10 injuries, the death of a civilian firefighter, and significant property damage." *Id.* In response, the DoD "established the Race Relations Education Board, required race relations training for all [Service members], and opened the Defense Race Relations Institute (DRRI)" which was the precursor to the Defense Equal Opportunity Management Institute. *Id.*

[38] STAFF OF SPECIAL SUBCOMM. TO PROBE DISTURBANCES ON MIL. BASES, 91ST CONG., INQUIRY INTO THE DISTURBANCES AT MARINE CORPS BASE, CAMP LEJEUNE, N.C., ON JULY 20, 1969 (1969) [hereinafter CAMP LEJEUNE REPORT].

[39] Throughout this paper, the author will use the term "Black" rather than "African-American." The choice of language used to identify oneself is deeply personal and the two terms are not necessarily interchangeable. *See* Katherine E. Ridley-Merriweather et al., *Exploring How the Terms "Black" and "African-American" May Shape Health Communication Research*, HEALTH COMMC'N 4 (2021). The history, connotations, and present use of each term exceeds the scope of this paper. Most of the studies and reports regarding military racial disparities use the term "Black." Additionally, as of August 2021, fifty-eight percent of polled Black Americans did not have a preference between "Black" or "African-American." Justin McCarthy and Whitney Dupree, *No Preferred Racial Term Among Most Black, Hispanic Adults*, GALLUP (Aug. 4, 2021), https://news.gallup.com/poll/353000/no-preferred-racial-term-among-black-hispanic-adults.aspx.

[40] STAFF OF SPECIAL SUBCOMM. TO PROBE DISTURBANCES ON MIL. BASES, 91ST CONG., INQUIRY INTO THE DISTURBANCES AT MARINE CORPS BASE, CAMP LEJEUNE, N.C., ON JULY 20, 1969, at 5054-55 (Comm. Print 1969) [hereinafter CAMP LEJEUNE REPORT].

[41] *Id.* at 5055. In the report, the Subcommittee noted, "Indeed, we recognize that a serious race problem exists at Camp Lejeune and in the Marine Corps for, in fact, it exists in every corner of the United States. It exists in all the services, and certainly the tragic events of July 20, 1969, at Camp Lejeune present strong and real evidence of its presence." *Id.* at 5054.

racial trauma that is prevalent in our society."[42] Although there were complaints about discrimination in the administration of military justice, the Subcommittee attributed these complaints not to real discrimination, but to "militarization" and "polarization" of some Black Marines, as well as a failure of communication by leaders.[43] The report concluded that this incident was caused by a few Black Marines "who fanned the flames of racism, misconceptions, suspicions, and frustrations."[44] In an effort to combat this, the report recommended commanders ensure "the administration of military justice . . . [is] carefully and continually explained to avoid the many misconceptions and misunderstandings that seemed to have developed concerning these matters."[45] Essentially, and somewhat puzzlingly, the 1969 Camp Lejeune Report concluded that there was not actually a problem or disparity regarding military justice, promotions, or duty assignments. The only real issue was a few Marines, who had likely experienced racism and discrimination in the civilian world,[46] perceived that race was impacting command decisions, and inappropriately expressed their frustrations.

A 1973 report from the Special Subcommittee on Disciplinary Problems in the U.S. Navy of the House Armed Services Committee (HASC) similarly found that it was a perception problem on the part of Black Sailors and a communication problem on the part of leadership, not the presence of actual discrimination or disparate treatment.[47] The 1973 report was the culmination of investigation into an incident aboard the USS *Kitty Hawk*, which turned violent, and a non-violent protest aboard the USS *Constellation*.[48] The subcommittee was charged with

[42] *Id.* at 5055–56.
[43] *Id.* at 5056.
[44] *Id.* at 5052.
[45] *Id.*
[46] Although *de jure* segregation had, in theory, ended by the 1970s in the United States through the landmark Supreme Court ruling in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000e et seq.), the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. § 10301) and the Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§3601-3619), racism and discrimination were still pervasive in the United States. As an example, the use of "dog-whistle politics" by President Richard Nixon was used to "gain the support of white voters who had vague anxieties about [B]lack criminality." *Editor's Introduction: Responding to the Cumulative Damage of Racism*, 77 AM. J. OF ECON. & SOCIO. 581, 593 (2018).
[47] STAFF OF H. ARMED SERVS. COMM., 92ND CONG., REPORT BY SPECIAL SUBCOMM. ON DISCIPLINARY PROBLEMS IN THE U.S. NAVY 17685 (Comm. Print 1973) [hereinafter NAVY REPORT].
[48] *Id.* at 17674–79.

investigating "the alleged racial and disciplinary problems" aboard the two naval ships.[49] Like the 1969 Camp Lejeune Report, the 1973 Navy Report determined:

> During the course of this investigation, we found *no substantial evidence* of racial discrimination upon which we could place true responsibility for causation of these serious disturbances. Certainly there were many *perceptions* of discrimination by young blacks, who, because of their sensitivity to real or fancied oppression, often enlist with a "chip on their shoulder." . . .
> To repeat, what many of these men view as discrimination is, more often than not, a perception rather than a reality.[50]

The 1973 Navy Report was less holistic than the 1969 Camp Lejeune Report in considering external factors, like pervasive discrimination in the civilian world. The former report baldly and somewhat dismissively concluded the following regarding the violent riot on the USS *Kitty Hawk*:

> [T]he riot . . . consisted of . . . a very few men, . . . [with] below-average mental capacity, most of whom had been aboard for less than one year, and all of whom were [B]lack. . . . [They] acted as 'thugs' which raises doubt as to whether they should ever have been accepted into military service in the first place.[51]

In neither the 1969 Camp Lejeune Report nor the 1973 Navy Report did the investigating body appear to actually look to statistics, for example, rates of NJP, rates of law enforcement investigation, or courts-martial to determine if there was discrimination or disparity. For this reason, the 1973 Navy Report, specifically, was "read with some suspicion by social-scientist observers, who, among other things, worried that the formal interviews conducted by special congressional committees do not always render an accurate picture of the situation."[52] It was not until the four-volume 1972 Task Force Report and the 1977 book, *Racial Discrimination and Military Justice*, by Ronald W. Perry, did the examination of racial disparity in military justice include an analysis of the actual numbers, as opposed to merely the opinions of those who gave statements and of the subcommittee members. The other deficiency in both of the early reports

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[49] *Id.* at 17673.
[50] *Id.* at 17685.
[51] *Id.* at 17670.
[52] PERRY, *supra* note 2, at 1.

is that the investigating bodies began with the assumption that there was no actual discrimination.[53] Instead, both reports lauded the military for its efforts to integrate and seemed to allude to the notion that the military had been working tirelessly toward that goal since 1948.[54] The problem was with a few, radicalized Black Service members, rather than systemic discrimination within the services themselves.

### B. Task Force Concludes that Systemic Racial Discrimination Exists in Military Justice

On April 5, 1972, the then-Secretary of Defense Melvin R. Laird commissioned the Task Force on the Administration of Military Justice in the Armed Forces.[55] Similar to the current focus on racial disparity in the military justice system, the 1973 Task Force was precipitated, in part, by a contemporary report from a civilian advocacy organization, the National Association for the Advancement of Colored People (NAACP), which highlighted discrimination of Black Service members stationed in West Germany.[56] The NAACP report and Congressional interest prompted President Nixon to direct a "fresh look" at the question of racial discrimination in the military justice system.[57] The purpose of the Task Force was to identify and assess discrimination in military justice, making recommendations to address the issue.[58] Whereas the 1969 Camp Lejeune Report and the 1973 Navy Report presumed that there were no racial disparities, the Task Force assumed the opposite: that racial disparities existed in the administration of justice in the military and that there was a

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[53] *See* PERRY, *supra* note 2, at 2. Perry only discusses the 1973 Navy Report, but the 1969 Camp Lejeune Report is similarly short-sighted. In the latter, the authors noted there were allegations of "isolated instances" of the use of racial slurs and "isolated allegations of racial prejudice in promotions or duty assignments. But these allegations were not substantiated." CAMP LEJEUNE REPORT, *supra* note 38, at 5056.

[54] CAMP LEJEUNE REPORT, *supra* note 38, at 5056; NAVY REPORT, *supra* note 47, at 17685. *See also* U.S. DEP'T OF DEF., BD. ON DIVERSITY AND INCLUSION, RECOMMENDATIONS TO IMPROVE RACIAL AND ETHNIC DIVERSITY AND INCLUSION IN THE U.S. MILITARY 2 (2020) (noting "[a]lthough DoD had declared racial equality a priority, the necessary practices, procedures, and trainings were not in place to address race relations in the Armed forces" in the 1960s and 1970s).

[55] 1 DEP'T OF DEF. TASK FORCE ON THE ADMIN. OF MIL. JUST. IN THE ARMED FORCES, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 1 (Nov. 30, 1972) [hereinafter TASK FORCE REPORT].

[56] *Id.* at 2.

[57] *Id.*

[58] *Id.* at 2-3.

disparity in punishment rates.[59] The Task Force, co-chaired by the First Army Commander and the General Counsel of the NAACP,[60] considered statements from witnesses, statistical information, the results from an opinion survey of Service members, and on-site interviews at various military installations.[61]

The Task Force determined the available data showed a "clearly discernable disparity in disciplinary rates between [B]lack and white servicemen."[62] For example, the Task Force evaluated NJP data from across the services between June 5 and July 5, 1972.[63] During that time, a greater number of Black Service members received NJP, approximately 25 percent, than the percentage of the Black Service member population at the participating installations, approximately 16 percent.[64] Similarly, in evaluating pre-trial confinement data, the Task Force found not only were Black Service members disproportionately placed in pre-trial confinement, but also that the length of time spent in pre-trial confinement was, on average, five days longer than white Service members and was the longest of any racial group in the study.[65]

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[59] *Id.* at 2.
[60] *Id.* at 3.
[61] *Id.* at 4.
[62] *Id.* at 25. The TASK FORCE REPORT is the first to voice a consistent complaint among those attempting to study racial disparities in military justice—lack of comprehensive data. *See id.* at 24. This was echoed by the DAC-IPAD in its Report on Racial and Ethnic Data. *See* DAC-IPAD DISPARITIES REPORT, *supra* note 7, at 13. Although the GAO REPORT states that there are disparities, the GAO forthrightly put the lack of data problem in the name of the report ("*Military Justice: DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities*"). GAO REPORT *supra* note 6. The perpetual obstacle of lack of consistent data should be solved by the implementation of Article 140a, Uniform Code of Military Justice, which requires the Secretary of Defense to prescribe uniform standards and criteria for data collection. UCMJ art. 140a(a)(1) (2021). The Department of Defense has directed "each Service to maintain and operate a military justice case processing and management system that will track every investigation initiated by military law enforcement . . . ." DAC-IPAD DISPARITIES REPORT, *supra* note 7, at 15.
[63] The Task Force received data from all of the military services, with each service submitting data from "preselected commands and installations." 3 DEP'T OF DEF. TASK FORCE ON THE ADMIN. OF MIL. JUST. IN THE ARMED FORCES, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES, at 91 (Nov. 1, 1972) [hereinafter TASK FORCE REPORT, VOL. III].
[64] *Id.* at 95. Strikingly, the quantum of punishment did not vary significantly between Black, white and "Spanish Surnamed" Service members. *Id.* at 96.
[65] *Id.* at 119. The Report continued, "[Black Service members] are less likely to be discharged in lieu of trial than [white Service members] or other minority group individuals" and "[white Service members] were over *twice as likely to be released without trial or Article 15 punishment* than [Black Service members]." *Id.* at 120 (emphasis added).

C. More of the Same

In April 1995, the GAO consolidated seventy-two studies related to discrimination in the military.[66] This GAO collection of studies failed to include the 1972 Task Force Report but states "[s]tudies done in the 1970s and 1980s showed no disparities in discipline rates between blacks and whites . . . ."[67] However, contrary to this conclusion, the GAO cited to a 1992 report from the Defense Equal Opportunity Management Institute (DEOMI), which lists at least three reports from the late 1970s, all of which found racial disparities in arrests, the administration of NJP and courts-martial.[68] Despite the supposed lack of empirical proof, the GAO noted the perception of bias in the administration of discipline was "prevalent not only in the Navy but throughout the services."[69] Studies in the 1990s, using various data, showed Black Service members were "overrepresented in the populations of [Service members] receiving judicial and nonjudicial punishments."[70] In April 1992, the DEOMI hosted a Uniform Code of Military Justice (UCMJ) conference to discuss the "disparity phenomenon" and next steps to address it.[71] At that conference, the Army planned to initiate a study to establish a "paper trail" from investigation to court-martial, presumably to be able to track disparity issues.[72] Given the present lack of comprehensive data almost thirty years later, that initiative appears to have failed.[73]

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[66] U.S. GOV'T ACCOUNTABILITY OFF., GAO/NSIAD-95-103, EQUAL OPPORTUNITY: DOD STUDIES ON DISCRIMINATION IN THE MILITARY 1 (1995) [hereinafter 1995 GAO REPORT].
[67] *Id.* at 5.
[68] CASE K. TONG & LIEUTENANT COLONEL CATHY A. JAGGARS, DEF. EQUAL OPPORTUNITY MGMT. INST., PHASE 1 REPORT: AN INVESTIGATION INTO THE DISPARITY OF JUDICIAL AND NON-JUDICIAL PUNISHMENT RATES FOR BLACK MALES IN THE ARMED SERVICES App'x A (1992) [hereinafter DEOMI REPORT].
[69] 1995 GAO REPORT, *supra* note 66, at 42. Notably, in a 1974 study by the Navy Personnel Research and Development Center, the authors conclude, based on disciplinary data and questionnaire responses, that an "overwhelming majority of blacks believed military justice favors whites . . . . *[b]ecause many whites also shared this belief*, the Navy cannot overlook the probability that discriminatory incidents [are] taking place abord ships." PATRICIA J. THOMAS ET AL., NAVY PERSONNEL RSCH. AND DEV. CTR., PERCEPTIONS OF DISCRIMINATION IN NON-JUDICIAL PUNISHMENT viii (1974) (emphasis added).
[70] 1995 GAO REPORT, *supra* note 66, at 5.
[71] DEOMI REPORT, supra note 68, at 3.
[72] *Id.* at 4.
[73] *See* 2019 GAO REPORT, *supra* note 6, at 66; *see also* Barry K. Robinson & Edgar Chen, *Déjà Vu All Over Again: Racial Disparity in the Military Justice System*, JUST SECURITY (Sept. 14, 2020), https://www.justsecurity.org/72424/deja-vu-all-over-again-racial-disparity-in-the-military-justice-system (noting that "one of the principal takeaways from the [HASC hearing on racial disparities] was that a lack of reliable, consistent data stood in the way of pinpointing the root causes of these disparities").

D. Current events: Protect Our Defenders (POD) Lights a Fire

Larger interest[74] in racial disparities in military justice appeared relatively dormant until 2017, when POD published a report using data obtained by the Freedom of Information Act (FOIA) that showed "for every year reported and across all service branches, [B]lack [S]ervice members were substantially more likely than white [S]ervice members to face military justice or disciplinary action."[75] Regarding the Army, POD found that Black Soldiers were 1.61 times more likely to face general or special court-martial than white Soldiers.[76]

The POD report received considerable coverage by news media.[77] In 2019, the GAO released a report on the issue that was more comprehensive than the POD Report. The GAO Report found that Black, Hispanic, and male Service members were more likely "to be the subjects of recorded investigations in all of the military services."[78] In the Army, that disparity was the highest, where a Black Soldier was 2.11 times more likely to be the subject of an investigation than a white Soldier.[79] The DAC-IPAD DISPARITIES REPORT also found that "Black Service members are disproportionately affected by allegations of sexual offenses at the investigative stage."[80] At a hearing on June 16, 2020, of the HASC Subcommittee on Military Personnel, Lieutenant General (LTG) (Ret.) Charles N. Pede, then The Judge Advocate General of the United States

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[74] There appear to be few, if any, studies or reports specifically about military justice between the early 1990s and 2017. However, racism in the ranks of the armed services, generally, did not go unnoticed. *See e.g.* SCHUYLER WEBB AND WILLIAM HERMANN, DEF. EQUAL OPPORTUNITY MGMT. INST., HISTORICAL OVERVIEW OF RACISM IN THE U.S. MILITARY 17 (2002) (providing a host of horrifying accounts of overt racism including the 1992 mock lynching of the only Black Soldier in a unit as "punishment for being late for a unit meeting"); Evan Thomas, *At War in the Ranks*, NEWSWEEK (Aug. 10, 1997, 8:00 PM), https://www.newsweek.com/war-ranks-172396 (describing two Black Service members who argued that their persecution by the military was based on their race).

[75] POD REPORT, *supra* note 5, at i.

[76] POD REPORT, *supra* note 5, at 13.

[77] *See, e.g.*, Safina Samee Ali, *Black Troops More Likely to Face Military Punishment than Whites, New Report Says*, NBC NEWS (June 7, 2014, 10:12 PM), https://www.nbcnews.com/news/nbcblk/black-troops-more-likely-face-military-punishment-whites-new-report-n769411; Greg Price, *Is the Military Racist? Black Troops Punished Far More than White Service Members, Study Finds*, NEWSWEEK (June 7, 2017, 11:23 AM), https://www.newsweek.com/black-troops-study-punishment-622334; Tom Vanden Brook, *Black Troops as Much as Twice as Likely to be Punished by Commanders, Courts*, USA TODAY (June 7, 2017, 11:55 AM), https://www.usatoday.com/story/news/politics/2017/06/07/black-troops-much-twice-likely-punished-commanders-courts/102555630.

[78] 2019 GAO REPORT, *supra* note 6, at 38.

[79] 2019 GAO REPORT, *supra* note 6, at 41 fig.5.

[80] DAC-IPAD DISPARITIES REPORT, *supra* note 7, at 13.

Army, stressed the need to further assess the problem.[81] During the hearing, LTG Pede told the subcommittee he directed a "comprehensive assessment with the Provost Marshal General to get left of the allegation, left of the disposition decision, to examine why the justice system is more likely to investigate certain Soldiers and what our investigation and command decisions tell us about the issue."[82] As of this writing, nearly three years later, the results of that comprehensive assessment have yet to be published or otherwise made available to the public. Nevertheless, even only considering the 2019 GAO Report, the POD Report, and the DAC-IPAD Disparities Report, what becomes alarmingly evident is Service members of color, in particular Black Service members, are "more likely to be suspected of and investigated for wrongdoing, but ended up being convicted and punished less or at about the same rate as white troops. In other words, there apparently is some insidious bias in how the military initiates investigations into wrongdoing . . . ."[83]

Racial disparities in the military justice system are not new, and neither is stakeholder awareness of the problem.[84] For decades, Congress and the military have known Service members of color are treated differently than their white peers in the context of discipline. Even without a dozen studies specifically about the military justice system, there is substantial evidence that Black Americans are more likely to be

[81] *On Racial Disparity in the Military Justice System – How to Fix the Culture: Hearing Before the Subcomm. On Mil. Personnel, H. Armed Servs. Comm.,* 116th Cong. 2-4 (2020) (statement of Lieutenant General Charles N. Pede, The Judge Advocate General, U.S. Army) [hereinafter LTG Pede HASC Statement].

[82] U.S. H. ARMED SERVS. COMM., *20200616 MLP Hearing: "Racial Disparity in the Military Justice System – How to Fix the Culture,*" 1:26:00 YOUTUBE (June 16, 2020), https://www.youtube.com/watch?v=nDGIXB4wMAg&t=6486s [hereinafter HASC 2020 Hearing Recording].

[83] Mark Thompson, *Racism in the Ranks*, PROJECT ON GOV'T OVERSIGHT (Jul. 8, 2020), https://www.pogo.org/analysis/2020/07/racism-in-the-ranks.

[84] Robinson & Chen, *supra* note 73 (noting that "the United States armed forces have been mired in a maddening loop of racial disparity with respect to its own military justice system for over half a century").

searched,[85] arrested,[86] or stopped[87] by civilian law enforcement, so the notion that there is disparate treatment in the military should not be a surprise.

Although none of the military reports provide a cause, inequity is apparent. There is nothing explicit in any of the military law enforcement policies or the UCMJ that would clearly explain why there is disparity in treatment. Further, there is evidence that military police are actually more empathetic and have a stronger focus on non-violent de-escalation than civilian police.[88] Nevertheless, "[i]f the net effect of the action, or inaction, is to discriminate against individuals or groups, the question of intent or motivation need not be considered."[89] Regardless of intent, the fact remains that Black Service members are more likely to be the subjects of law enforcement investigations. Consequently, the policy of titling and indexing has a disparate impact on them. Although all aspects of racial disparities in military justice must be addressed, fixing the titling process is one of the simplest, quickest, and most effective solutions.

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[85] In a ten-month period, the Los Angeles Times found that twenty-four percent of black drivers and passengers were searched, compared with sixteen percent of Latinos and five percent of white people, even though police were more likely to find contraband after searching white people. Ben Poston & Cindy Chang, *LAPD searches Blacks and Latinos more. But They're Less Likely to have Contraband than Whites,* L.A. TIMES (Oct. 8, 2019, 3:52 PM), https://www.latimes.com/local/lanow/la-me-lapd-searches-20190605-story.html.

[86] Pierre Thomas et al., *ABC News Analysis of Police Arrests Nationwide Reveals Stark Racial Disparity*, ABC NEWS (June 11, 2020, 5:04 AM), https://abcnews.go.com/US/abc-news-analysis-police-arrests-nationwide-reveals-stark/story?id=71188546. Between 2014 and 2016, more than half of the arrests in the city of Charlottesville, Virginia, were black men, despite them only making up approximately 8 percent of the city's population. Ben Hitchcock, *Race-based Bias: Consultants Demonstrate Racist Policing, Council Says Study Didn't Go Far Enough*, C-VILLE (Feb. 4, 2020, 4:47 AM), https://www.c-ville.com/race-based-bias-consultants-demonstrate-racist-policing.

[87] "A Black person is five times more likely to be stopped without just cause than a white person." *Criminal Justice Fact Sheet,* NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, CRIMINAL JUSTICE FACT SHEET, https://naacp.org/resources/criminal-justice-fact-sheet (last visited Nov. 28, 2022). In Washington, D.C., Black people make up forty-six percent of the city's population, but made up seventy percent of the traffic stops during a one-month period in 2018. Paul Duggan, *A Disproportionate Number of D.C. Police Stops Involved African Americans*, WASHINGTON POST (September 9, 2019, 7:26 PM), https://www.washingtonpost.com/local/public-safety/a-disproportionate-number-of-dc-police-stops-involved-african-americans/2019/09/09/6f11beb0-d347-11e9-9343-40db57cf6abd_story.html.

[88] Andrea Scott, *'Everybody We Deal with is Trained to Kill'– Why We Don't See Military Police Brutality*, TASK & PURPOSE (Nov. 6. 2020, 6:23 PM), https://taskandpurpose.com/news/what-do-military-police-do.

[89] TASK FORCE REPORT, *supra* note 1, at 21-22.

## III. Titling and Indexing

Titling and indexing have a relatively short but complicated history of competing interests. On one side are members of Congress and organizations outside of the DoD, troubled by the standard used to title the subjects of investigations, how that data is used, and the lack of reasonable process by which someone can amend or expunge their information from LERs or databases. On the other side are the DoD and its law enforcement agencies who believe that titling and indexing in the DCII merely "create[s] an administrative index of investigations, searchable by subject name or other identifying data"[90] and maintain that the DCII is a vital tool for investigators.[91] However, the DCII is not the only location where this information may be stored and used by various entities. Facilitating legal, ethical, and effective crime fighting as well as conducting thorough investigations for those seeking clearance to access classified information are legitimate goals. Nevertheless, it remains unclear whether titling and indexing have actually helped investigators and, more importantly, whether whatever assistance they have provided should outweigh the interests of the individual Soldier.

### A. Congress Gets Ignored: An Abridged History of Titling and the DCII

The DoD established the DCII[92] in 1967 as a centralized repository for investigations and security determinations by DoD agencies.[93] Much of the history of the DCII and titling went substantially undisturbed until 1990, when the HASC directed the military services "to revise their procedures along the lines used by the Army to ensure that probable cause has been proven before 'titling' occurs."[94] The HASC further directed that

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[90] DEP'T OF DEF. OFF. OF INSPECTOR GEN., REVIEW OF THE IMPLEMENTATION OF DOD INSTRUCTION 5505.7, "TITLING AND INDEXING SUBJECTS OF CRIMINAL INVESTIGATIONS IN THE DEPARTMENT OF DEFENSE" PHASE I – THE DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS 8 (July 7, 2000) [hereinafter 2000 DOD IG REPORT].

[91] *See id.*

[92] This database is currently known as the Defense Central Index of Investigations, but was previously known as the Defense Clearance and Investigations Index. *See* Ham, *supra* note 25, at 3.

[93] DEP'T OF DEF. OFF. OF INSPECTOR GEN., NO. D-2001-136, AUDIT REPORT: DEFENSE CLEARANCE AND INVESTIGATIONS INDEX DATABASE, i (June 7, 2001) [hereinafter 2001 DCII AUDIT REPORT].

[94] LESLIE ASPIN, NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1991, H.R. REP. NO. 101-665, at 216 (1990).

the services "expunge from their records the names of all individuals who have been 'titled' without probable cause" and directed the Department of Defense Inspector General (DoD IG) to "monitor the implementation" of these directives.[95] The Committee was concerned with the titling process and the availability for redress because an individual's "name is included in law enforcement records 'ad infinitum' and is usually not expunged unless the individual proves his innocence."[96] Despite the use of the word "directs," the DoD seemingly interpreted the HASC committee's words as mere recommendation and produced a report evaluating the feasibility of that recommendation.[97]

In the 1991 report, DoD IG agreed that investigative organizations needed consistent titling and indexing policies, but found that the probable cause standard would have a "significant negative impact" on investigations because "it would severely limit the entry of names into the [DCII]."[98] In addition to the probable cause determination process being "lengthy and time consuming,"[99] DoD IG was concerned because if a case was closed as unfounded using the probable cause standard, the individual would no longer be listed in the DCII.[100] In fact, DoD IG warned of "erasing millions of records of investigations" if the HASC titling standard were to be adopted.[101] Presumably, the records subject to purging would have been those cases for which there was no probable cause to believe either that a UCMJ offense had occurred or that the individuals listed in the title block committed that offense. Essentially, DoD IG warned that if the higher probable cause standard was adopted for titling, fewer records would be maintained in the DCII database which, ironically, seems to be the same goal of the HASC in directing the uniform standard be probable cause. To DoD IG, the HASC's concern about the negative impact on individuals who were listed in the DCII was outweighed by "[t]he value of maintaining investigative information . . . to show that an allegation was raised, pursued, proved, disproved, or in some instances, to establish a modus operandi."[102]

At the time of the 1991 DoD IG Report, Army Criminal Investigation Division (CID) was the only military law enforcement agency that used

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[95] *Id.*
[96] *Id.*
[97] DEP'T OF DEF. INSPECTOR GEN., NO. 91FBD013, REVIEW OF TITLING AND INDEXING PROCEDURES UTILIZED BY THE DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS, Executive Summary (1991) [hereinafter 1991 DOD IG REPORT].
[98] *Id.* at 2.
[99] *Id.* at 5.
[100] *Id.*
[101] *Id.* at 11.
[102] *Id.* at 3.

the probable cause standard for titling.[103] As a result of the report, the DoD issued Department of Defense Instruction (DoDI) 5505.7 in 1992.[104] Rather than probable cause, this instruction mandated the use of the credible information standard to title and index someone.[105]

Shortly after the issuance of DoDI 5505.7, two organizations outside of the DoD released reports that called into question not only the standard for titling, but also expressed concern for the detrimental impacts on those individuals listed in the DCII. In 1995, the Advisory Board on the Investigative Capability of the Department of Defense (DAB) issued its report.[106] The report followed congressional recommendation that the Secretary of Defense assess the capabilities of the defense criminal investigative organizations.[107] Specifically regarding titling, while recognizing the value for military investigators to be able to identify and retrieve investigations, the DAB concluded, "[w]e find the current number of organizations, and thus, individuals, with access to the DCII troubling, *especially in light of the credible information standard for titling and indexing* and the sheer number -- approximately 19 million -- of individuals whose identities appear in the system."[108] The DAB Report further noted that the credible information standard is "very broad and subjective . . . with no second party review of the determination,"[109] and the difficulty for an individual to remove their name from the DCII was "unfair."[110] In 1999, the National Academy of Public Administration (NAPA) conducted a study relating to sex crime investigations.[111] The NAPA study recommended that DoDI 5505.7 use the probable cause standard, rather than credible information, and that information should not be entered into the DCII until probable cause was determined.[112]

Possibly because of these conclusions and in addition to its prior interest, the HASC, in its committee report on the Fiscal Year 2001 National Defense Authorization Act (FY01 NDAA), recommended a

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[103] *Id.* at 2; *see also* Captain Paul M. Peterson, *CID ROI: Your Client and the Title Block*, ARMY LAW. 49, 49 (Oct. 1987) (noting that titling was "one of the final steps in the CID investigation process" and that it was a determination using the probable cause standard).
[104] Ham, *supra* note 25, at 8.
[105] Ham, *supra* note 25, at 8.
[106] 1 ADVISORY BD. ON THE INVESTIGATIVE CAPABILITY OF THE DEP'T OF DEF., REPORT OF THE ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITY OF THE DEPARTMENT OF DEFENSE (1995) [hereinafter DAB REPORT].
[107] *Id.* at v.
[108] *Id.* at 45 (emphasis added).
[109] *Id.* at 45–46.
[110] *Id.* at 46.
[111] NAT'L ACAD. OF PUB. ADMIN., ADAPTING MILITARY SEX CRIME INVESTIGATIONS TO CHANGING TIMES: SUMMARY REPORT (1999) [hereinafter NAPA REPORT].
[112] *Id.* at 19.

section that would specifically require probable cause for the entry of subjects into the DCII.[113] The committee was "concerned that the standard for the [DoD] for titling a crime suspect as established by [DoDI] 5505.7 requires 'credible information.' This standard appears to be significantly different from the 'probable cause' standard common in state and federal criminal procedure."[114] The HASC's recommendation did not make its way into the final version of the FY01 NDAA.[115] Nevertheless, the same year, DoD IG conducted a review on the implementation of DoDI 5505.7.[116] The 2000 DoD IG Report expressly addressed the concerns of both DAB and NAPA, but disregarded both[117] and emphasized at several points: titling of subjects and entry into the DCII is only administrative and is not intended to function as criminal history data.[118] As part of explanatory background information, the report concluded the pre-DoDI 5505.7 probable cause standard by the Army "treated the DCII as a criminal history database for the purpose of identifying likely criminals, rather than for its intended function as an administrative database for the purpose of identifying the existence of investigative files."[119] Indeed, the DoD IG contrasted the DCII with "criminal history indices such as the National Crime Information Center (NCIC), operated by the Federal Bureau of Investigation (FBI)."[120] In actuality, as discussed *infra*, the distinction between being used as a criminal history database and being merely an administrative database is almost non-existent for the DCII.[121]

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[113] H.R. REP. NO. 106-616, at 368 (2000).
[114] *Id.*
[115] FLOYD D. SPENCE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2001, PUB. L. NO. 106-398, § 552, 114 Stat. 1654, 1654A-125 (2000). The law did require the Secretary of Defense to establish a policy to create a uniform process, which would allow for any individual who had been entered into "a central index for potential retrieval and analysis by law enforcement organizations" to obtain a review of that designation and would require the expungement of identifying information if it was "determined the entry of such identifying information on that individual was made contrary to [DoD] requirements." *Id.*
[116] DEP'T OF DEF. OFF. OF INSPECTOR GEN., REVIEW OF THE IMPLEMENTATION OF DOD INSTRUCTION 5505.7, "TITLING AND INDEXING SUBJECTS OF CRIMINAL INVESTIGATIONS IN THE DEPARTMENT OF DEFENSE" PHASE I – THE DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS (July 7, 2000) [hereinafter 2000 DOD IG REPORT].
[117] *Id.* at iii.
[118] *Id.* at iii, 1, 5, 8-9.
[119] *Id.* at 1.
[120] *Id.* at 5.
[121] In its 1991 report, DoD IG justified maintaining entries in the DCII at the lower credible information standard because to adopt the probable cause standard would lead to the "loss of valuable law enforcement information." 1991 DOD IG REPORT, *supra* note 97, at 11.

Of the alleged tension between the harm caused to the individuals listed in the DCII and law enforcement interests, the DoD IG bluntly concluded:

> [T]his evaluation found no evidence to support the contention that the credible information standard is misunderstood, or that titling or indexing subjects of investigations under such a standard have, in and of themselves, harmed the subjects of investigations in any way. Similarly, the present policy of titling and indexing at the start of an investigation has not been found to produce unfair results. On the contrary, accomplishing such actions at the beginning of an investigation has benefited the [DoD] investigative and security community through increased awareness of mutually significant case files. Further, the practice lessens the potential of multiple investigations of the same person.[122]

Despite the questionable claim that no one was being harmed, DoD IG conducted a follow-on review focused on surveying the use of data by those who have access to the DCII.[123] Cryptically, the survey results indicated "some users misunderstand the purpose of the DCII and uses of the criminal investigative data contained therein, and that additional training of non-[Defense Criminal Investigative Organizations] DCII users is necessary."[124] The report gave no indication about who was misusing the data or how, but proposed solutions which included sanctions, training, informational banners, and examination for DCII users.[125] Between the DoD IG reports in the early 2000's and the FY 2021 NDAA, the titling and indexing processes were mostly undisturbed.[126]

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[122] 2000 DOD IG REPORT, *supra* note 116, at 17-18.

[123] DEP'T OF DEF. INSPECTOR GEN., DEPARTMENT OF DEFENSE POLICY CONCERNING TITLING AND INDEXING OF INDIVIDUALS IN THE DEFENSE CLEARANCE AND INVESTIGATIONS INDEX (2002), https://apps.dtic.mil/sti/citations/ADA400229 [hereinafter 2002 DOD IG REPORT].

[124] *Id.* at 5.

[125] *Id.* at 6.

[126] Although not in formal legislation, members of Congress recently developed an interest not only in the titling process but also in racial disparities in military law enforcement investigations. In the advance policy questions to Ms. Michele A. Pearce during her confirmation to be General Counsel of the Department of the Army on August 4, 2020, the Senate Armed Services Committee (SASC) specifically asked Ms. Pearce about racial disparity and titling. SENATE ARMED SERVS. COMM., ADVANCE POLICY QUESTIONS FOR MS. MICHELE PEARCE, NOMINEE TO BE GENERAL COUNSEL OF THE DEPARTMENT OF THE ARMY (2020), https://www.armed-services.senate.gov/imo/media/doc/Pearce_APQs.pdf. When

B. Current Events: Titling, the Databases, and Removing Information

Regardless of the urging to the contrary, the standard to add a person's name in the title block of an LER remains credible information, rather than probable cause. A subject will be titled as soon as the low threshold is met, likely extremely early in the investigation. The titled subject's information will then be indexed in at least the DCII, but likely more than that one database. After being included in the title block of the LER and indexed in various databases, the ability for a titled subject to remove his or her information is remarkably difficult. All of this leaves titled Service members stranded, weathering the consequences without relief.

*1. Current Titling Standard*

The most current version of DoDI 5505.07, effective February 28, 2018, uses the incredibly low credible information standard for titling set in 1992.[127] However, the probable cause standard has a thorough history of judicial interpretation by way of the Fourth Amendment, which safeguards the right of people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, . . . and no Warrants shall issue, but upon probable cause . . . ."[128] Simply put, unreasonable searches and seizures are those without either a warrant or probable cause.[129] Law enforcement may not arrest an individual without a warrant or probable cause.[130] Comparing the probable cause standard to credible information, the Army Board for Correction of Military Records (ABCMR) described of the latter, it "require[s] *only the merest scintilla of evidence* far below the burdens of proof normally borne by the government

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asked what steps she would take to address racial disparities in the Army investigations, she replied:

> In 99 [percent] of all criminal investigations, the victim or complainant identifies the alleged offender. Army investigators have little to no influence over who is identified as an alleged offender, and Army investigators have no discretion in whether to open an investigation or not, since they are required to investigate all criminal allegations in accordance with both D[o]D and Army policies.

*Id.* at 14. When asked if the processes to be removed from the title block and DCII were fair, Ms. Pearce responded that they were. *Id.*

[127] DoDI 5505.07, *supra* note 16, para. 1.2.

[128] U.S. CONST. amend. IV.

[129] Herring v. United States, 555 U.S. 135, 136 (2009).

[130] *See* United States v. Watson, 423 U.S. 411, 423-24 (1976).

in criminal cases (beyond a reasonable doubt), in adverse administrative decisions (preponderance of the evidence), and in searches (probable cause)."[131]

When there is credible information an offense was committed and the subject committed it, the subject's name will be placed in the title block of the report of investigation and that information will go into at least the DCII.[132] Later, if there is evidence that supports a finding of probable cause, the offense will be "founded."[133] When an offense is founded, which means there is probable cause to support the offense, information from the investigation will be forwarded to the FBI's NCIC.[134] Essentially, if a subject of an investigation is titled, but it is unfounded, the information will go into at least the DCII. For a founded offense, the information will not only go into the DCII, but also the NCIC. The information in the DCII is supposedly retained to "ensure [it] is retrievable for law enforcement or security purposes in the future."[135] According to the Defense Counterintelligence and Security Agency (DCSA), "DCII access is limited to the Department of Defense and other federal agencies that have adjudicative, investigative and/or counterintelligence missions."[136]

In the regulations that reference titling, the common refrain is that being titled or indexed is merely administrative and should not have any "judicial or adverse administrative" consequences.[137] Fundamentally, the DoD asserts that because titling and indexing is only administrative, it

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[131] [Redacted Name], ABCMR No. AR20170014461 (Army Bd. for Corr. of Mil. Recs., Oct. 22, 2014), https://boards.law.af.mil/ARMY/BCMR/CY2014/20140014461.txt (emphasis added).

[132] DoDI 5505.07, *supra* note 16, paras. 1.2(a), 3.1. The only listed reason for delaying indexing in the DCII is "operational security." *Id.* para. 1.2(a).

[133] AR 190-45, *supra* note 16, Glossary (defining "Founded offense"). *See also* AR 195-2, *supra* note 17, Glossary. Notably, AR 195-2 defines a founded offense as "[a] determination made by law enforcement, in conjunction with the appropriate prosecution or legal representative." *Id.*

[134] AR 190-45, *supra* note 16, paras. 4-1(a), 4-1(b)(1). *See also*, JAG MOA 2022, *supra* note 21, at 1. The NCIC is a database that allows "criminal justice agencies" to obtain a variety of information, including "criminal histories." *National Crime Information Systems,* U. S. DEP'T OF JUST., https://www.justice.gov/tribal/national-crime-information-systems (last visited Nov. 30, 2022). Similarly, any deoxyribonucleic acid (DNA) collected during the course of the investigation will only be sent to the United States Army Criminal Information Laboratory to be included in the Combined DNA Index System (CODIS) after the investigator makes a determination that there is probable cause with concurrence of a judge advocate. AR 190-45, *supra* note 16, para. 2-8(e)(1)–(2).

[135] DoDI 5505.07, *supra* note 16, para. 3.1.

[136] *Defense Central Index of Investigations*, DEF. COUNTERINTEL. AND SEC. AGENCY, https://www.dcsa.mil/is/dcii/ (last visited Nov. 30, 2022).

[137] *See* AR 190-45, *supra* note 16, para. 4-3(a); DoDI 5505.07, *supra* note 16, para. 1.2.f.; 32 C.F.R. § 635.13(c) (2017).

justifies using a standard below probable cause. However, the DoD also claims to keep titling information in the DCII specifically for law enforcement purposes, including "*establishi[ing]* a modus operandi."[138] The 1991 DoD IG Report provided an example of the need to maintain information on "unfounded allegations" because if "previous allegations were similar to the new allegations, [it would lend] some credibility to the new allegations."[139] If it is true that the DCII is different from "criminal history indices" like NCIC, [140] that belies the rationale of using the information to establish something like modus operandi. Using a previous investigation to establish a pattern of misconduct "is illogical unless there is an underlying assumption that the allegations against an individual who is merely titled in an [LER] are true."[141] Further, as will be discussed at length *infra*, who exactly has access to this information and how it is used is confusing and ambiguous, leaving titled Service members to wonder when and how it might affect them in the future.

### *2. Removing Information from the DCII and Law Enforcement Records*

Once indexed in the DCII, "the information will remain in the DCII . . . unless there is mistaken identity or it is later determined no credible information existed at the time of titling and indexing."[142] This standard is nearly impossible for applicants to hurdle because credible information is such a low standard.[143] The "mistaken identity" provision is not as helpful as it appears because it "does not mean that someone other

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[138] 1991 DoD IG REPORT, *supra* note 97, at 11 (emphasis added).

[139] *Id*. The report also cites child abuse cases by DoD teachers and doctors that were "resolved by commanders before a judicial finding of probable cause." *Id*. at 12. The report claims "[c]ases have been identified where the subject is allowed to resign from the [DoD] and solicit employment with" other government agencies. *Id.* "The military investigative file is the only record of the investigation that can be used to alert public health and safety officials to such investigations," thus justifying maintenance of unfounded offenses. *Id.*

[140] 2000 DoD IG REPORT, *supra* note 90, at 5.

[141] Ham, *supra* note 25 at 14.

[142] DoDI 5505.07, *supra* note 16, para. 1.2(d). The standard for the removal of information from a title block is the same across the services because it comes from an instruction that is applicable to all services under the DoD.

[143] Telephone Interview with Timothy M. MacArthur, Clinical Professor and Director, Mason Veterans and Servicemembers Legal Clinic (Feb. 15, 2022); Telephone Interview with Jeffrey F. Addicott, Professor of Law and Director, Warrior Defense Project (Mar. 22, 2022). Both practitioners indicated that although there was a substantial number of people seeking help with titling and indexing issues, the rate of success in getting this information removed was extremely low.

than the subject is found to have committed the offense. Rather, it means that someone with the same name as the listed subject should have been entered as the subject instead."[144] Essentially, an individual could only have his or her name removed if someone with the exact same name committed a crime, but the other identifying information, like social security number, was input incorrectly. If someone believes they were wrongly indexed in the DCII—either because of mistaken identity or lack of credible information—that person "may appeal to the DoD [c]omponent head to obtain a review of the decision."[145] In the Army, that means submitting a request to the director of the U.S. Army Crime Records Center.[146] Should the DoD component head not grant relief, the Service member may submit a request to their respective service's board for correction of military records. The Service member may not apply to those boards until after he or she goes through the administrative process with the service law enforcement agency.[147] Applicants to any of the service boards must file their application for relief within three years "after an alleged error or injustice" is or should have been discovered.[148] If the application is outside of the prescribed statute of limitations, the board may deny the application entirely or may review it if the untimely filing is excused "in the interest of justice."[149] The titled Service member must not only know, or reasonably should have known, that they were titled and indexed, but also understand that the titling may have a detrimental impact

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[144] Ham, *supra* note 25, at 5.

[145] DoDI 5505.07, *supra* note 16, para. 3.2.

[146] AR 195-2, *supra* note 17, para. 4-4(c). In the Navy, the individual submits the request to the director of the naval criminal investigative service headquarters. NCISMAN 1, *supra* note 13, para. 23-11. Notably, the NCISMAN states, "Once the subject of a criminal investigation is indexed, the name shall remain in the DCII, e*ven if a later finding is made that the subject did not commit the offense* under investigation . . . ." *Id.* para. 23-8(d)(1) (emphasis added). However, NCISMAN goes on to state that a person may be removed from the title block in the case of mistaken identity or if there was no credible information at the time. *Id.* para. 23-8(d)(1)(a)-(b). In the Air Force, the request goes to the Department of the Air Force – criminal justice information cell. AFMAN 71-102, *supra* note 13, para. 9.2.

[147] 32 C.F.R. § 581.3(d)(3) (2022) 32 C.F.R. § 723.3(c)(4) (2022); 32 C.F.R. § 865.3(c)(3) (2022). *See generally* U.S. DEP'T OF DEF., DIR. 1332.41, BOARDS FOR CORRECTION OF MILITARY RECORDS (BCMRS) AND DISCHARGE REVIEW BOARDS (DRBS) (Mar. 8, 2004)(C1 Feb. 2, 2022) [hereinafter DODD 1332.41]; 10 U.S.C. § 1552 (outlining authorities for the service boards for records correction).

[148] 32 C.F.R. § 581.3(d)(2) (2022). *See also* 32 C.F.R. § 723.3(b) (2022); 32 C.F.R. § 865.3(f) (2022). The Navy standard is slightly more lenient because it does not contain the "should have known" caveat; only actual discovery of the error triggers the three-year time limit. 32 C.F.R. § 723.3(b) (2022).

[149] 32 C.F.R. § 581.3(d)(2) (2022); 32 C.F.R. § 723.3(b) (2022); 32 C.F.R. § 865.3(f)(2) (2022).

on them, and then also exhaust all of their administrative remedies within three years in order to be considered by the service record correction boards.

In addition to removing their information from the DCII, titled subjects may also want to remove their name from the subject block of the LER in an effort to stem any additional effects from being listed. In the Army, the regulations pertaining to the removal of an individual's name from the subject or title block of an LER are confusing and downright contradictory. To clarify, one's name can only be removed from the DCII as described above. Even if a subject's name is removed from the title block of an LER, the subject will remain in the DCII.[150] To remove a name from the subject or title block of an LER, one paragraph of Army Regulation (AR) 190-45 allows it "only if it is determined that there is *not probable cause* to believe the individual committed the offense for which he or she is listed as a subject."[151] Another document, Department of the Army Pamphlet (DA Pam.) 190-45, provides "procedural guidance for the preparation and reporting of [LERs]."[152] In discussing naming the subject of an investigation, one paragraph simultaneously says, "The entry 'none' will be used as the subject/suspect entity in a status LER, final LER, and supplemental LER, when all offenses pertaining to that entity are determined to be unfounded," and, "When an actual entity (person) other than 'unknown' is listed in the subject/suspect block, and all offenses are determined to be unfounded, that entity will remain listed in the subject/suspect block."[153] The confusing interplay between regulatory guidance is not new,[154] and it continues.

In the National Defense Authorization Act for Fiscal Year 2021 (FY 21 NDAA), Congress mandated significant changes to the process by which someone can request amendment or expungement of the title block of a law enforcement report of investigation.[155] The Secretary of Defense must establish a process through which a titled individual can request correction or expungement of criminal investigation reports, an entry into

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[150] AR 190-45, *supra* note 16, para. 3-6(a).

[151] *Id.* (emphasis added). If a law enforcement agent determines there is probable cause supported by corroborating evidence, an offense can be founded. If he makes a determination that the "criminal offense was not committed or did not occur" the offense would be unfounded. *Id.* at Glossary (defining "unfounded offense").

[152] U.S. DEP'T OF ARMY, PAM. 190-45, ARMY LAW ENFORCEMENT REPORTING AND TRACKING SYSTEM para. 1-1 (18 Apr. 2019) [hereinafter DA PAM. 190-45].

[153] *Id.* para. 1-5(d)(4).

[154] *See* Ham, *supra* note 25, at 13.

[155] WILLIAM M. (MAC) THORNBERRY NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2021, PUB. L. NO. 116-283, § 545, 134 Stat. 3388, 3613-15 (2021) [hereinafter FY21 NDAA].

the DCII, and "[a]ny other record maintained in connection with [an investigation report or an entry in the DCII] . . . in any system of records, records database, records center, or repository maintained by or on behalf of the [d]epartment."[156] Those records "shall" be corrected or expunged when:

> (A) *Probable cause* did not or does not exist to believe that the offense for which the person's name was placed or reported . . . occurred, or insufficient evidence existed or exists to determine whether or not such offense occurred.
> (B) *Probable cause* did not or does not exist to believe that the person actually committed the offense for which the person's name was so placed or reported . . . or insufficient evidence existed or exists to determine whether or not the person actually committed the offense.
> (C) Such other circumstances, or on such other bases, as the Secretary may specify in establishing the policy and process, which circumstances and bases may not be inconsistent with the circumstances and bases provided by subparagraphs (A) and (B).[157]

By the plain language of this statute, the clear congressional intent is if someone is titled, he or she should be able to request an amendment to that record not only if probable cause did not exist that a crime occurred at the time the record was made, but also if probable cause does not presently exist for that crime. Similarly, the FY 21 NDAA also states a record should be amended if there is no probable cause, either at the time or presently, to believe that the person committed the offense. This is a seismic shift to the standard outlined in DoDI 5505.07, which currently states, "when reviewing the appropriateness of a titling or indexing decision, the reviewing official will only consider the investigative information *at the time of the decision* to determine if the decision was made in accordance with [the credible information standard]."[158] The recent legislation further requires certain considerations that "shall" be weighed in determining whether there is a basis for correction or expungement. These considerations include "the extent or lack of

[156] *Id.* § 545(a)(1)–(3).
[157] *Id.* § 545(c)(1)(A)–(C) (emphasis added).
[158] DoDI 5505.07, *supra* note 16, para. 3.3 (emphasis added); *see also* AR 190-45, *supra* note 16, para. 4-3(d), which "emphasize[s] that the credible information error must occur at the time of listing the entity as the subject of the LER rather than subsequent investigation determining that the LER is unfounded."

corroborating evidence," whether adverse action was initiated, and the outcome of that adverse action.[159] None of these extremely relevant considerations are listed anywhere in DoDI 5505.07.

In addition to making it easier to remove information from the title block of an LER, Congress also required the DoD to assist someone who has been titled to "correct, expunge or remove, [or] take other appropriate action on . . . any record maintained . . . outside of the [DoD] to which such component provided, submitted, or transmitted information about the covered person, which information has or will be corrected in, or expunged or removed from, [DoD] records."[160] The law mandates the DoD to make it easier to become untitled and help titled individuals remove or amend the information located outside of the DoD. These changes are definitely beneficial to subjects of investigations and must be implemented. However, more than a year after the FY 21 NDAA became law, this author is unable to find any evidence that the Secretary of Defense has taken any action to facilitate any of these modifications.

The current standard for being titled is exceedingly easy to meet and the ability to become untitled is disturbingly difficult. Therefore, the likelihood of being titled and remaining titled is high. Given the fact that Black Soldiers are subjected to military law enforcement investigations at higher rates than white Soldiers, it logically follows that more Black Soldiers are titled, will remain titled and indexed in various databases, and suffer the collateral ramifications.[161] In order to stem this, the timing and standard for titling must change and the Secretary of Defense must follow through on the legislative mandate.

## IV. After Being Titled

Titling and indexing in and of themselves can result in a variety of consequences that can occur in the short-term or decades later. In 2014, an Army veteran and survivor of sexual assault applied to receive her nursing license.[162] Her application was delayed because law enforcement titled her

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[159] FY 21 NDAA, *supra* note 155, § 545(c)(2)(A)-(C).
[160] FY 21 NDAA, *supra* note 155, § 545(c)(3)(B).
[161] This is a conclusion based on the simple fact that if Black Soldiers are investigated more and the standard for titling is incredibly low, it logically follows that a disproportionate number of Black Soldiers will be titled.
[162] *M-VETS Helps a Survivor of Military Sexual Trauma Clear Erroneous UCMJ Titling Decision*, ANTONIN SCALIA LAW SCHOOL: M-VETS (Sept. 11, 2020), https://mvets.law.gmu.edu/2020/09/11/m-vets-helps-a-survivor-of-military-sexual-trauma-clear-erroneous-ucmj-titling-decision [hereinafter M-VETS PRESS RELEASE].

in 1991 for sodomy and false official statement.[163] While still serving in the military, the woman reported she was sexually assaulted.[164] Agents from CID questioned the victim and the alleged perpetrators, who claimed the encounter was consensual. Law enforcement agents determined they did not believe the victim and titled her for sodomy and false official statement.[165] Weeks after the report and initiation of the investigation, one of the perpetrators confessed to CID.[166] There was no adverse administrative or criminal action taken against the victim, and she left the service with an honorable discharge.[167] Following the discovery of her titling, she sought out the help of a civilian veteran's legal clinic, which helped her get the information related to her titling removed, and continue the process of obtaining her nursing license.[168] This is a rare success story and it still took her years to complete the process with the assistance of an attorney.[169] The service boards for correction of military records, which determine whether to amend or alter the title block in an LER, have reading rooms available online for many of their decisions.[170] The board granted the applicant relief in almost none of the cases involving the removal of information from the titling block of an LER or ROI.[171]

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[163] *Id.* As this person was in the Army and titled in 1991, the standard for titling her would have been probable cause. *See* 1991 DOD IG REPORT, *supra* note 97, at 2; *see also* Ham, *supra* note 25, at 6.

[164] *M-VETS Helps a Survivor of Military Sexual Trauma Clear Erroneous UCMJ Titling Decision*, ANTONIN SCALIA LAW SCHOOL: M-VETS (Sept. 11, 2020), https://mvets.law.gmu.edu/2020/09/11/m-vets-helps-a-survivor-of-military-sexual-trauma-clear-erroneous-ucmj-titling-decision [hereinafter M-VETS PRESS RELEASE].

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Army Board for the Correction of Military Records*, DEP'T OF DEF. (May 11, 2022), https://boards.law.af.mil/ARMY_BCMR.htm; *Air Force Board for the Correction of Military Records*, DEP'T OF DEF. (Dec. 3, 2022), https://boards.law.af.mil/AF_BCMR.htm; *[Board] for Correction of Naval Records*, DEP'T OF DEF. (Oct. 31, 2022), https://boards.law.af.mil/NAVY_BCNR.htm; *Coast Guard Board of the Correction of Military Records*, DEP'T OF DEF. (Jan. 15, 2021), https://boards.law.af.mil/CG_BCMR.htm.

[171] *See, e.g.,* [Redacted Name], ABCMR No. AR20190000919 (Army Bd. for Corr. of Mil. Recs., Oct. 18, 2019), https://boards.law.af.mil/ARMY/BCMR/CY2019/20190000919.txt. The applicant in this case was titled in 2008 for wrongful disposition of government property, a violation of Article 108, UCMJ. *Id.* The applicant was never prosecuted, but was given an oral reprimand. *Id.* Ten years, two deployments, and two promotions later, the applicant was prohibited from attending the sergeants major course because he was titled. *Id.* The Army Board for the Correction of Military Records (ABCMR) denied his request to correct the LER. *Id. But see* Ham, *supra* note 25, at 16–17 (describing two ABCMR cases in which the applicants were granted their requested relief, including

The consequences of titling, who uses the information, and how it is used is obscure.[172] The only thing that is unambiguous is the mantra that titling and indexing is an administrative procedure and "judicial or adverse administrative actions will not be taken [against individuals or entities] based solely on the existence of a titling or indexing record in a criminal investigation." [173] Notwithstanding this claim, there can be negative consequences for being titled, most of which are not formal judicial or adverse administrative actions. First, it is important to consider where this information goes. Second, it is equally important to consider specific negative consequences like security clearance issues, possible promotion issues, confirmation bias, as well as the mere existence of the record and its potential for future use by law enforcement.

## A. Where Does It Go?

After an LER is initiated, the report may be indexed in more than one system, including the DCII, the Law Enforcement Defense Data Exchange (LE D-DEx), and the Army Law Enforcement Reporting and Tracking System (ALERTS). Titled subjects should be fully informed of how the information in these systems will be used because, as acknowledged by Army regulation, being titled and indexed "may have an impact upon their military or civilian careers."[174]

### *1. The DCII*

The DCII has its own website with links to Resources and Frequently Asked Questions, but there is no link that leads to a list of agencies that

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removing information from the DCII.) Major Ham concludes the "ABCMR is listening and willing to act." *Id.* However, that may no longer be the case.

[172] Although in a slightly different context, in considering the collateral consequences of an arrest on immigration, public housing, social services and education, Eisha Jain commented on the difficulty of finding accurate information about the collateral, non-criminal consequences of an arrest. Jain, *supra* note 15, at 859. "Accurate information about how arrests are used can thus be difficult to find," and "[o]n a practical level, when criminal defense attorneys voluntarily assume the additional work of attempting to negotiate noncriminal consequences, they may have no access to timely, relevant information that will allow them to engage in effective advocacy." *Id.* at 859-60.

[173] DoDI 5505.07, *supra* note 16, para. 1.2 (f); *see also* 32 C.F.R. § 635.13(c) (2022); AR 190-45, *supra* note 16, para 4-3(a); NCISMAN 1, para. 23-2(b); AFMAN 71-102, Glossary, (defining "titling" and stating that "titling and indexing do not, in and of themselves, imply any degree of guilt or innocence").

[174] AR 195-2, *supra* note 17, para. 1-4(g)(2).

have access to the information in the database and why they have access. In order to find this information, one may attempt to obtain it through FOIA.[175] Alternatively, because the DCII is covered by the Privacy Act of 1974 (Privacy Act),[176] the agency who maintains the records is required to publish a system of records notice (SORN). The SORN that pertains to the DCII generally outlines who may be able to access the information and broadly for what purposes, but fails to provide specific details.

Congress passed the Privacy Act because of concerns about the "collection, maintenance, use, and dissemination of personal information by Federal agencies."[177] Further, "the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information."[178] The Privacy Act includes a number of protections for individual information kept in a "system of records." A system of records "means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual." [179] The Privacy Act prohibits the disclosure of records contained within a system of records unless the individual to whom the record pertains requests the record be disclosed or provides written consent for the record to be disclosed.[180] The law also requires each agency that maintains a system of records to publish a SORN in the Federal Register that includes, among other information, "each routine use of the records contained in the system, including the categories of users and the purpose of such use" and "the policies and practices of the agency

[175] Through FOIA, the author requested a list of all agencies who have access specifically to the DCII and for what purposes. The system of records notice that covers the DCII, discussed *infra*, also covers several other databases, so the information responsive to this FOIA request would help clarify exactly how the DCII information is used. In their response, the defense counterintelligence and security agency stated that "DCII access is limited to the [d]epartment of [d]efense and other federal agencies that have adjudicative, investigative and/or counterintelligence missions." It further directed the author to the system of records notice. Memorandum from the Defense Counterintelligence and Security Agency to Author 1 (Apr. 19, 2022) (on file with author).

[176] Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified as amended at 5 U.S.C. § 552a) [hereinafter Privacy Act].

[177] *Id.* § 2(a)(1) (1974). Despite the noble goals of the Privacy Act, in considering the vast expansion of authority to collect and use Americans' data, the Brennan Center described the Privacy Act as "increasingly little more than a fig leaf." RACHEL LEVINSON-WALDMAN, BRENNAN CTR. FOR JUST., WHAT THE GOVERNMENT DOES WITH AMERICANS' DATA 7 (2013) [hereinafter BRENNAN CENTER PRIVACY REPORT].

[178] Privacy Act, *supra* note 176, § 2(a)(3).

[179] 5 U.S.C. § 552a(a)(5).

[180] *Id.* § 552a(b). The law also provides twelve exceptions to this general prohibition. *Id.* § 552a(b)(1)–(12).

regarding storage, retrievability, access controls, retention, and disposal of records."[181]

The DCII is a system of records because it is a group of records that contains information that is retrieved by an identifying particular.[182] Accordingly, there should be a SORN published in the Federal Register. A SORN previously existed for the DCII, but was rescinded on June 14, 2021.[183] It was rescinded because the DoD began maintaining the DCII, along with seven other systems of records, as part of the Personnel Vetting Records Systems (PVRS).[184] The DoD published the SORN for the PVRS on October 17, 2018, noting that the system was intended to "allow[] DoD to conduct end-to-end personnel security, suitability, fitness, and credentialing processes."[185] The PVRS SORN lists thirty-three routine uses for which records may be disclosed outside of the DoD, many of which generally pertain to security investigations, suitability for Government employment, and eligibility for access to facilities or information systems.[186] However, one purpose for which records in the DCII may be disclosed is "[t]o any source from which information is requested in the course of an investigation, to the extent necessary to identify the individual under investigation, inform the source of the nature and purpose of the investigation, and to identify the type of information requested."[187] Further, a record may be disclosed

> [t]o the appropriate [f]ederal, [s]tate, local, territorial, tribal, foreign, or international law enforcement authority or other appropriate entity where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law, whether criminal, civil, or regulatory in nature, and whether arising by general statute or by regulation, rule or order issued pursuant thereto. The relevant records in the system of records may be referred, as a routine use, to the agency concerned and charged with the responsibility of investigating or prosecuting such violation or charged

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[181] *Id.* § 552a(e)(4)(D)–(E).
[182] The User's Guide, which would presumably explain exactly how the information is retrieved "is only accessible to users after they log into DCII." *DCII [Frequently Asked Questions]*, DEF. COUNTERINTEL. AND SEC. AGENCY, https://www.dcsa.mil/is/dcii/dcii_faqs (last visited Dec. 8, 2022).
[183] Privacy Act of 1974; System of Records, 86 Fed. Reg. 31487 (June 14. 2021).
[184] *Id.*
[185] Privacy Act of 1974; System of Records, 83 Fed. Reg. 52420, 52421 (Oct. 17, 2018).
[186] *See id.* at 52423-25.
[187] *Id.* at 52424.

> with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto.[188]

This language is incredibly broad and it, taken along with the thirty-two other possible routine uses, paints an indecipherable picture of how the records in the DCII may actually be used. The lack of transparency and specific information makes it exceedingly difficult for indexed subjects to fully understand how they will be impacted and for attorneys to advise their clients on second- and third-order effects.

### *2. Law Enforcement Defense Data Exchange*

Although not mentioned in DoDI 5505.07, information in the title block of an LER also likely goes into the LE D-DEx. In an increasingly data-driven world, policing is no exception. While the analysis of data may help police officers become more efficient and effective, the increased use of data is also concerning.

Currently, all DoD law enforcement agencies participate in the Law Enforcement Defense Data Exchange.[189] The intent of the LE D-DEx is to "share [criminal justice information] across organizational boundaries to enhance the [DoD's] crime prevention and investigative lead sharing."[190] Criminal justice information (CJI) is defined as "data necessary for LEAs to perform their mission and enforce the laws, *including but not limited to*: biometric, identity history, person, organization, property, and case or incident history data."[191] Although titling information is not specifically mentioned, it arguably falls within this definition. Law enforcement agencies will, "[t]o the maximum extent possible, . . . share all CJI."[192] The agency responsible for LE D-DEx, NCIS, describes the database as "one of the largest law enforcement information sharing systems in the world."[193] It allows "patrol officers, investigators, or analysts . . . to gather critical and otherwise inaccessible information using [LE D-DEx's] robust

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[188] *Id.* at 52425.
[189] This database is run by NCIS and is also known as the Law Enforcement Information Exchange. *LInX/D-DEx*, NAVAL CRIM. INVESTIGATIVE SERV., https://www.ncis.navy.mil/Mission/Partnership-Initiatives/LInX-D-Dex (last visited Dec. 9, 2022) [hereinafter LE D-DEX WEBSITE].
[190] U.S. DEP'T OF DEF., INSTR. 5525.16, LAW ENFORCEMENT DEFENSE DATA EXCHANGE (LE D-DEX) para. 3(a) (Aug. 29, 2013) (C3 Oct. 30, 2020) [hereinafter DODI 5525.16].
[191] *Id.* Glossary (defining "CJI") (emphasis added).
[192] *Id.* encl. 3, para. 1(c).
[193] LE D-DEX WEBSITE, *supra* note 189.

search and analysis features.[194] "Users can find, identify and analyze suspects, relationships, criminal methods of operation, histories and mugshots" all via this database.[195] The information uploaded to the LE D-DEx is "documented criminal justice information obtained by DoD [law enforcement agencies] in connection with their official law enforcement duties."[196]

As the LE D-DEx is a system of records, it also has a published SORN.[197] In the LE D-DEx SORN, it provides categories of individuals covered by the system, its purpose, and how the records may be disclosed.[198] The categories of individuals covered include "any individual involved in, *or suspected of being involved in a crime* . . . and/or any individual named in an arrest, booking, parole and/or probation report."[199] The purpose for the database is to improve communication and sharing of law enforcement data between law enforcement agencies.[200] This seems to be an overlap with the DCII, which is also intended to preserve all law enforcement investigations so that they may be retrieved by law enforcement "in the future."[201]

The DoDI governing the LE D-DEx states that only DoD law enforcement agencies can access the LE D-DEx.[202] However, the records in the LE D-DEx may be released to any "law enforcement authority" where it is relevant "for their situational awareness," and to any individual or organization "where such disclosure may facilitate the apprehension of fugitives, the location of missing persons, the location and/or return of stolen property or similar criminal justice objectives."[203] The DoD uses LE D-DEx to share CJI with the FBI's National Data Exchange System (N-DEx).[204] Notably, N-DEx contains information that is not otherwise contained in the NCIC or III databases, like incident and case reports and corrections data.[205]

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[194] LE D-DEX WEBSITE, *supra* note 189.
[195] LE D-DEX WEBSITE, *supra* note 189.
[196] DODI 5525.16, *supra* note 190, encl. 3, para 1(a).
[197] Privacy Act of 1974; System of Records, 75 Fed. Reg. 24931 (May 6, 2010).
[198] *Id.*
[199] *Id.* (emphasis added).
[200] *Id.*
[201] DODI 5505.07, *supra* note 16, para. 3.1.
[202] DODI 5525.16, *supra* note 190, encl. 3, para. 1(f).
[203] Privacy Act of 1974; System of Records, 75 Fed. Reg. 24931 (May 6, 2010).
[204] AR 195-2, *supra* note 17, para. 3-16(f).
[205] Jeffrey Fisher & Nicole Lemal-Stefanovich, *The National Data Exchange (N-DEx): A Leader in Information Sharing*, FED. BUREAU OF INVESTIGATION L. ENF'T BULL., https://leb.fbi.gov/articles/featured-articles/the-national-data-exchange-n-dex-a-leader-in-information-sharing (last visited Jan. 4, 2023) (calling the information contained in the N-DEx "vast," claiming that the database houses nearly one billion records).

B. Consequences

There are wide-ranging effects that may follow titling and indexing. These consequences may or may not have a lasting impact, but any of them can cause significant disruption for a titled Service member. Aside from impacts on the individual, if Black Service members are titled at disproportionately higher rates, that can have a ripple effect on the diversity of the Armed Forces as well the integrity of investigations and prosecutions.

*1. Suspension of Favorable Personnel Actions*

One of the first things that will follow a titling decision, is a suspension of favorable personnel actions (flag), which precludes both favorable actions and movement of the Soldier.[206] Upon titling by law enforcement, commanders are required to flag that Soldier.[207] A flag for a law enforcement investigation is a nontransferable flag, which means that a Soldier "may not be voluntarily reassigned to another unit."[208] The flag may only be removed after the commander submits a department of the Army (DA) form 4833 to CID.[209] Commanders complete a DA form 4833 after both the investigation and any potential adverse action. Therefore, a Soldier would be flagged from the point that a law enforcement office determined there was credible information, throughout the investigation, and until after the commander submits the DA Form 4833.

In the meantime, the Soldier is unable to change units, reenlist, appear before a promotion board, receive individual awards, attend military or civilian schools, retire or resign, or receive payment of enlistment bonus.[210] A Soldier can be flagged for a substantial length of time because titling happens so early in the investigative process. Flagging serves legitimate purposes, and Soldiers who are under investigation should be prohibited, in some way, from leaving the Army and its jurisdiction. However, while a Soldier is flagged under the current system, he or she is losing career opportunities and pay during this likely lengthy period. This

[206] U.S. DEP'T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAG) para. 2-1(a) (5 Apr. 2021) [hereinafter AR 600-8-2].
[207] *Id.* para. 2-2(h).
[208] *Id.* para. 2-2.
[209] *Id.* para. 2-9(b)(10)(a). A DA Form 4833 is a commander's report of disciplinary or administrative action. AR 190-45, *supra* note 16, para. 4-7. It is a record of the "action[] taken against identified offenders" and to "[r]eport the disposition of offenses investigated by civilian [law enforcement] agencies. *Id.* para. 4-7(a)(1)–(2).
[210] AR 600-8-2, *supra* note 206, para. 3-1(a)–(j).

could affect promotion and retention merely because there is credible information—not probable cause—to believe they committed a crime. By waiting to title and flag a Soldier until a probable cause determination is made, he or she will suffer fewer undue administrative impacts because the decision would be made later in the process. Further, by using a probable cause standard, there would be more evidence and, therefore, more reason to believe that the Soldier may have committed a crime.

*2. Denial of Security Clearance*

In order to be enlisted in the Army, all applicants must undergo an entrance national agency check (ENTNAC).[211] An ENTNAC includes a search of the DCII.[212] As discussed above, a search of the DCII would likely reveal any information relating to a titling decision. If an individual is only titled, but the case is unfounded or was never prosecuted in any way, that may not disqualify very junior enlisted Service members in certain military occupational specialties (MOS) that do not require any kind of clearance. If an individual wants to become either a commissioned officer or warrant officer, a secret clearance is required.[213] To obtain a secret clearance, personnel must undergo a specific adjudicative process as outlined by AR 380-67, Appendix I.[214] One of the thirteen considerations in determining whether to grant a clearance is history of criminal conduct.[215] Merely an "[a]llegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted" is something that "could raise a security concern and may be disqualifying."[216] The same paragraph also lists considerations that "could mitigate security concerns" including "time . . . elapsed since the criminal behavior," coercion into committing the offense, "evidence of successful rehabilitation," and "[e]vidence that the person did not commit the offense."[217]

If the subject of an investigation already possesses a security clearance, upon receipt of "initial derogatory information," a commander must decide whether to "suspend subject's access to classified information

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[211] U.S. DEP'T OF ARMY, REG. 380-67, PERSONNEL SECURITY PROGRAM para. 3-14 (24 Jan. 2014) [hereinafter AR 380-67].
[212] *Id.* app. B, para. B-1(a).
[213] *Id.* para. 3-14(a).
[214] *Id.* app. I.
[215] *See id*. app I, para. I-12; *see also id.* para. 2-4(h).
[216] *Id.* app. I, para. I-12(b)(3).
[217] *Id.* app. I, para I-12(c)(1)–(4).

or assignment to sensitive duties."[218] Further, the commander must forward any "credible derogatory information" to the U.S. Army Central Clearance Facility (CCF) to process the denial or revocation of already-granted clearance or access using the considerations outlined in Appendix I.[219] In the context of a criminal investigation, a Service member may have their clearance suspended in the short-term and revoked in the long-term.

Consider the hypothetical example of a Black sergeant who was accused of stealing a roommate's gaming console and was subsequently titled for larceny. The case was not founded because additional investigation revealed that the roommate's boyfriend actually stole the machine and pawned it for money to buy drugs. Even with the alternative culprit, the sergeant would remain titled for the larceny and the information uploaded into at least the DCII. The following year, the sergeant wanted to participate in the Army's Green to Gold[220] program to become a commissioned officer. Assuming the previous titling did not prohibit his acceptance into the program, his application for the requisite secret clearance would, at best, be delayed. He would likely be forced to respond to the DCII entry. At worst, his clearance would be denied and he would be unable to join the officer corps.

A situation like this matters because diversity in the officer corps is lacking. A DoD report found white officers make up seventy-three percent of active component officers, whereas Black officers make up just eight percent.[221] As of May 2021, there were forty-one four-star generals and admirals, but only two were Black.[222] This lack of diversity is not only unrepresentative of the United States population as a whole,[223] but it also harms readiness.[224] Multiple reasons[225] may explain why the officer corps

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[218] *Id.* para. 8-3.
[219] *Id*. para. 8-2(a).
[220] *See generally* U.S. DEP'T OF ARMY, CADET COMMAND REG. 145-6, ARMY ROTC GREEN TO GOLD POLICY (1 Jan. 2019).
[221] U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE BOARD ON DIVERSITY AND INCLUSION REPORT: RECOMMENDATIONS TO IMPROVE RACIAL AND ETHNIC DIVERSITY AND INCLUSION IN THE U.S. MILITARY 8 (Dec. 15, 2020) [hereinafter DOD DEI REPORT].
[222] Robert Burns & Lolita C. Baldor, *Top US General Urges Greater Racial Diversity in Military*, AP NEWS (May 5, 2021), https://apnews.com/article/race-and-ethnicity-government-and-politics-1deffc0efb652716aa44dab756b614d1.
[223] *See* DOD DEI REPORT, *supra* note 221, at 8; *see also* Helene Cooper, *African-Americans are Highly Visible in the Military, but Almost Invisible at the Top*, N.Y. TIMES (May 25, 2020), https://www.nytimes.com/2020/05/25/us/politics/military-minorities-leadership.html.
[224] *See* DOD DEI REPORT, *supra* note 221, at 4 (stating that diversity and inclusion "are fundamental necessities to force readiness").
[225] These reasons include a history of being excluded from combat arms, a lack of role models and mentorship, and overt institutional racism. Tom Vanden Brook, *Where are the*

and upper echelon military leadership are almost entirely white and male. However, if Black Service members are more likely to be investigated by military law enforcement, which could lead to things like the loss or denial of a security clearance, it is yet another reason why they may not become officers, and if they do, why they may not continue on to senior leadership.[226] If this only happens to one or two Black Service members, not only is the officer corps losing diversity, but also dozens of young enlisted Soldiers and officers are losing a potential mentor.

*3. Commanders, Confirmation Bias, and Tunnel Vision*

Titling and indexing can also lead to intangible consequences that are more difficult to clearly articulate or quantify, including influencing biases and tunnel vision in the investigation of the case. Army commanders, at all levels, are not only tasked with accomplishing a given mission, but also taking care of their Soldiers. In order to assist commanders in this endeavor, the Army developed the Risk Reduction Program (RRP).[227] The RRP is "an efficient way of assisting commanders in ascertaining and addressing high-risk behavioral problems." [228] As part of the RRP, commanders have access to the Commander's Risk Reduction Toolkit (CRRT).[229] The CRRT is a consolidated database that combines "[twenty-six] authoritative data sources displaying [forty] risk factors to present command officials with a consolidated history of each Solder's personal information and potential risk."[230] One of those twenty-six data sources is the Army law enforcement reporting and tracking system (ALERTS),[231]

*Black Officers? US Army Shows Diversity in its Ranks but Few Promotions to the Top*, USA TODAY (Sept. 1, 2020), https://www.usatoday.com/in-depth/news/politics/2020/09/01/military-diversity-army-shows-few-black-officers-top-leadership/3377371001.

[226] *See* Brief for Protect Our Defenders and Black Veterans Project as Amici Curiae Supporting Petitioner at 16, Jackson v. Braithwaite, No. 20-19, 2020 WL 6829074 (U.S. Nov. 23, 2020) (arguing that "[i]n addition to the stigma created by meritless accusations, such charges may entirely derail the promising careers of racial minorities who may otherwise be on track for leadership positions in the military").

[227] U.S. DEP'T OF ARMY, PAM. 600-24, HEALTH PROMOTION, RISK REDUCTION, AND SUICIDE PREVENTION para. 2-16 (14 Apr. 2015) [hereinafter DA PAM. 600-24].

[228] *Id.* para. 2-16(a).

[229] U.S. DEP'T OF ARMY, DIR. 2021-10, COMMANDER'S RISK REDUCTION TOOLKIT (15 Apr. 2021) [hereinafter AD 2021-10].

[230] *Id.* para. 3(a).

[231] *Id.* encl. para. 1(d).

which is an automated records management system (RMS).[232] When a criminal offense is reported to either military police or CID, an officer or agent will initiate the investigation in ALERTS.[233] A subject will be included if "credible information exists that would cause a trained investigator . . . to presume that the person committed a criminal offense."[234] If credible information exists to title a person, their information will be included in ALERTS, which feeds into the CRRT, which is accessible by battalion commanders, sergeants major, company commanders, and first sergeants.[235] Therefore, no fewer than four people in a Soldier's chain of command will have access to the information if he or she has been titled for an offense. These four people are the most directly responsible for the Soldier's welfare and must take that obligation seriously, but they are also the ones who are the most directly responsible for the professional development and discipline of the Soldier. Being titled could contribute to unconscious, implicit bias or explicit bias that results in intentional prejudice.[236]

As an example, consider if Specialist Smith was previously titled for false official statement; even if the case was unfounded, it would still likely appear in the CRRT and be available for her company commander and first sergeant to see. That one piece of information could affect the opinion and judgment of the company commander and the first sergeant because of confirmation bias. Confirmation bias is "the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand."[237] When the company commander sees that Specialist Smith was titled for false official statement, through the CRRT or elsewhere,[238] even if the commander knows how low the

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[232] AR 190-45, *supra* note 16, para. 1-4(4). "[ALERTS] tracks law enforcement cases from incident occurrence, case investigation, to final case disposition . . . ." DA PAM. 190-45, *supra* note 152, para. 4-1.

[233] DA Pam 190-45, *supra* note 152, para. 1-4(c). "Initial LERs are dispatched using ALERTS." *Id.* para. 2-3(b).

[234] *Id.* para 1-5(a).

[235] *See* AD 2021-10, *supra* note 229, para. 4(a).

[236] *See* Anna Mulrine Grobe, *Why do Black Troops Face a Harsher Form of Military Justice?*, CHRISTIAN SCI. MONITOR (Jul. 17, 2020), https://www.csmonitor.com/USA/Military/2020/0720/Why-do-Black-troops-face-a-harsher-form-of-military-justice (quoting a former Air Force judge advocate who said she witnessed both "inadvertent[]" discrimination and "personal prejudice [having] a ton of room to run").

[237] Raymond S. Nickerson, *Confirmation bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175 (1998).

[238] Another way that a commander might receive this information is through the blotter report. *See* AR 190-45, *supra* note 16, para. 7-15. The blotter report is distributed to the senior commander of an installation, the staff judge advocate and CID. *Id.* para. 7-15(c). The blotter report is also sent to commanders or supervisors of subjects or victims of a

titling standard is and sees that the case was unfounded, the company commander may, and probably will, assume that Specialist Smith is a liar. The company commander may do this consciously or subconsciously.[239] Either way, in every subsequent interaction with Specialist Smith, the company commander may be less likely to give Specialist Smith the benefit of the doubt and either knowingly or inadvertently look for evidence that confirms his suspicion that she is a liar.[240] The decisions that the company commander makes regarding Specialist Smith—including discipline and career advancement—are going to be different than any other Soldier in the commander's formation because she was titled and indexed.

Confirmation bias does not only affect how a commander treats a subordinate Soldier. It affects how police investigate. Tunnel vision can infect the entire criminal justice system and it starts with the police investigation. Tunnel vision is the "product of various cognitive 'biases,' such as confirmation bias, hindsight bias, and outcome bias."[241] It "leads investigators, prosecutors, judges, and defense lawyers alike to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion."[242] During the initial police investigation, tunnel vision "can be most damaging, because all later stages of the process feed off the information generated in the police investigation."[243] The DoD titling process has the potential to cause particularly devastating tunnel vision that could taint the entire investigation and disposition of the case because it forces law enforcement officers to affirmatively make a determination about a subject exceedingly early in the investigation.[244]

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crime. *Id.* Whereas the blotter report would come to a commander at the time of the investigation, the information in the CRRT may be available to a Soldier's commander after the initial investigation. Additionally, LERs are sent "through the field grade commander to the immediate commander" of the subject listed in the reports. *Id*. para. 4-2(c)(3).

[239] *See* Nickerson, *supra* note 237, at 175 (describing confirmation bias as "a less explicit, less consciously one-sided case-building process" when compared to building a case for one's position consciously).

[240] *See id. See also* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 312 (2006) (noting that "[e]mpirical research . . . demonstrates that people not only seek confirming information, they also tend to recall the information in a biased manner").

[241] Findley & Scott, *supra* note 240, at 307–08.

[242] Findley & Scott, *supra* note 240, at 292.

[243] Findley & Scott, *supra* note 240, at 295.

[244] Arguably, the credible information standard is lower than reasonable suspicion, which is required for police to stop and frisk an individual. *See* Terry v. Ohio, 392 U.S. 1 (1968). Reasonable suspicion is defined as "[a] particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity." *Reasonable Suspicion,* BLACK'S LAW DICTIONARY (11th ed. 2019). Credible information merely

Whereas tunnel vision and bias is, in part, caused by the mere identification of a subject early in a police investigation,[245] the titling requirement involves an intentional decision (whether there is credible information that this subject committed a crime) and specific action on the part of the officer (placing the subject's name in the title block). Titling is done at the earliest stages of the investigation and gives the law enforcement officer no opportunity to be neutral. Early titling can not only pollute the instant investigation[246] and subsequent disposition, but it can also affect any subsequent investigation in which the titled individual is a subject. Department of Defense law enforcement agencies want to be able to access prior investigations in case the subject is ever investigated again. This arguably increases the tunnel vision of investigators in any subsequent investigation—employing the "where there is smoke, there is fire" approach.[247]

*4. Dirty Data Leaking out into Civilian Policing*

Another concern about titling information is its use in data-based policing. The collection and use of individuals' personal data by private companies and the police is growing.[248] Federal and state government data collection, while slightly more regulated, is no different. Despite the best

requires information that "is sufficiently believable to lead a trained criminal investigator to presume the facts or facts in question are true." DODI 5505.07, *supra* note 16, Glossary, G.2 (defining "credible information").

[245] *See* Findley & Scott, *supra* note 240, at 316 (citing two cases in which the defendants were wrongfully convicted and concluding, "[c]onvinced by an early—although plainly flawed—eyewitness identification, police and prosecutors . . . sought evidence that would confirm guilt, not disconfirm it").

[246] *See id.* at 338 (noting that "[c]linical studies show that interrogators who approach an interrogation with a perception or presumption of guilt typically choose guilt-presumptive questions and use high-pressure tactics").

[247] *See* 1991 DOD IG REPORT, *supra* note 97, at 11 (arguing the need to maintain "unfounded allegations" in the DCII, because "[t]he previous allegations were similar to the new allegations, lending some credibility to the new allegations. *As a result, the new allegations were pursued*") (emphasis added).

[248] *See generally*, Louise Matsakis, *The WIRED Guide to Your Personal Data (and Who is Using It)*, WIRED (Feb. 15, 2019, 7:00 AM) https://www.wired.com/story/wired-guide-personal-data-collection (providing a detailed background of the use of personal, individual information by private companies). Police are also using geolocation data from private companies, like Google, to create "digital dragnets" by way of geofence warrants that identify people who were near the scenes of crimes. Jon Schuppe, *Cellphone Dragnet Used to Find Bank Robbery Suspect was Unconstitutional, Judge Says*, NBC NEWS (Mar. 7, 2022, 5:19 PM) https://www.nbcnews.com/news/us-news/geofence-warrants-help-police-find-suspects-using-google-ruling-could-n1291098.

intentions of the Privacy Act, a vast amount of miscellaneous data on individual Americans is increasingly being used for law enforcement and national security purposes.[249] Law enforcement databases, in particular, present significant concerns about their use. Some civilian law enforcement agencies are using predictive policing, which is a "system that analyzes available data to predict *where* a crime may occur in a given time window (place-based) or *who* will be involved in a crime as either victim or perpetrator (person-based)."[250] Although there is little publicly available indication that DoD law enforcement agencies are using predictive policing, NCIS, the organization that maintains the LE D-DEx, boasts that it "makes the identification and prosecution of criminals and terrorists not only possible, but easier."[251]

If Black Soldiers are investigated more often than their white counterparts, and titling is an incredibly low standard, it follows that the population of individuals indexed in both the DCII and LE D-DEx is likely to be disproportionately Black. Further, there may be entries in which a subject is listed in the title block without probable cause to support that he or she actually committed a crime. That data is arguably flawed, which produces flawed predictions for use by other law enforcement organizations who use that data.[252] Even if military law enforcement is not using predictive policing, "police data generated by the unlawful or biased practices and policies of a specific police department or division can corrupt practices and data in other jurisdictions, and skew decision-making throughout the criminal justice system." [253] Discriminatory practices, intentional or not, creates bad data, which is inherently unreliable.

## V. Proposal and Conclusion

The titling process as it currently exists is harmful and has wide-reaching effects that Soldiers may never know about until they are impacted. It is vital that the DoD and Congress take genuine steps to address the problems caused by titling.

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[249] *See* BRENNAN CENTER PRIVACY REPORT, *supra* note 177, at 10–11.
[250] Rashida Richardson, Jason M. Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems and Justice*, 94 N.Y.U. L. REV. ONLINE 15, 21 (2019).
[251] LE D-DEX WEBSITE, *supra* note 189.
[252] "Given the nature of prediction, a racially unequal past will necessarily produce racially unequal outputs. To adapt a computer-science idiom, 'bias in, bias out.'" Sandra G. Mayson, *Bias in, Bias Out*, 128 YALE L. J. 2218, 2224 (2019).
[253] Richardson, *supra* note 250, at 47.

A. Proposal

The first, and possibly the most important step, is to make all of the information about titling and indexing much more transparent. By regulation, a commander is required to brief a titled Soldier that they will remain titled and indexed "whether action is taken against them or not."[254] Commanders are further instructed to inform the Soldier "of the purposes for which the reports are used." [255] Even if an enterprising Soldier attempted to conduct the research for himself or herself, the information is simply too difficult to find without special access or, perhaps, a FOIA request. This is unacceptable for a record created, stored, and used by the United States government that may have a significant effect immediately or years into the future. Merely having the information more easily available would not cause any adverse impacts on the effectiveness of law enforcement or on national security. In order to effectuate this, DoD law enforcement agencies should develop a form that is regularly updated and plainly explains what titling is, where the information is included, and what entities have access to it. This form would be provided to subjects immediately upon the inclusion of their name in the title block of an LER. The form may also explain what will happen if the subject's case is founded, including, but not limited to, inclusion of the subject's information in CODIS and NCIC. Finally, the form would outline the process to expunge or amend the law enforcement records and provide the contact information for the CRC and the ABCMR. Titled individuals must know specifically where this information goes, who can access it, and for what purposes they can access it because it can be used against them. It should be easily accessible by anyone, and should not require a law degree or FOIA request to obtain.

Second, the standard for titling and indexing should be probable cause as determined by an attorney, and the decision should not be made until there is enough evidence to adequately make the determination. Making this change might require an LER to be without a subject while the investigation is pending. However, that does not harm law enforcement objectives in any way. Changing the standard prevents entirely innocent people from being placed in the subject block of an LER. It would also allow commanders to wait to flag a Soldier until there is more than a "mere scintilla of evidence," thus avoiding the repercussions of a premature flag. A record should not exist of someone being investigated if there is not probable cause to support it.

[254] AR 195-2, *supra* note 17, para. 1-4(g)(2).
[255] *Id.*

In its 1991 report, the DoD IG found that the probable cause standard was "not effective" for law enforcement purposes for two reasons. First, there would be "too great a time delay" between the initial report and when "it is finally reported in a retrievable manner following a final determination of probable cause."[256] This would impair the "ability of . . . DCIOs to coordinate their investigative activity with the CID."[257] Second, "time delays in reporting final information to the DCII caused by the coordination process between the agent and [staff judge advocate] have an adverse impact on other [DoD] agencies conducting investigations."[258] This would be entirely addressed if law enforcement agencies were able to open a file with an intended subject to show that there is an investigation ongoing, but then only title and index the subject if there is probable cause to support the allegation. Further, if law enforcement agencies are going to use the information for investigatory purposes, for example, to establish modus operandi, it should be supported by at least probable cause. Credible information is too low a standard to keep using in light of how the information is used.

Third, the Secretary of Defense must promulgate the changes to the amendment and expungement process to LERs as required by the FY 21 NDAA. The current process to remove one's name from the title block and from databases where that information is indexed borders on absurdity because the standard to become titled is so low. As well, the DoD instruction currently only allows removal of the subject's name if there was not credible information at the time the determination was made. This allows for the ludicrous situation where someone was titled as a subject, but further investigation established an alibi or that another person committed the crime. That subject can never have their information removed from the title block of the LER if there was credible information at the time the agent made the decision to title them. This change could be easily implemented simply by amending the DoD instruction that governs titling and indexing.

None of these changes would significantly impair the ability of law enforcement officers to do their jobs, and they are necessary to prevent the disparate impact of titling on Soldiers of color. Amending the titling process also enables more impartial investigations and helps stem bias. These modifications are an uncomplicated way to curtail the negative effects of titling for the subjects who most deserve the reprieve. Fixing the titling and indexing process also addresses racially disparate impacts in

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[256] 1991 DOD IG REPORT, *supra* note 97, at 14.
[257] 1991 DOD IG REPORT, *supra* note 97, at 14.
[258] 1991 DOD IG REPORT, *supra* note 97, at 14.

the military justice process where the issue appears to be most concerning—to the left of the allegation,[259] during the investigation stage.

B. Conclusion

By his own account, Captain Gilberto De Leon was titled, but never charged, for participating in the Guard Recruiting Assistance Program (G-RAP). [260] This Army program was the subject of a massive CID investigation that was rife with problems.[261] Captain De Leon, who hails from Puerto Rico, participated in G-RAP in 2007, but in an article penned for the Military Times in 2022, he wrote of his experience after being titled and, presumably, indexed. According to Captain De Leon, the titling action "halts all progress" relating to promotion, advanced security clearance or applying for a civilian job.[262] During his career, Captain De Leon deployed multiple times, completed ranger school, and received the Meritorious Service and Bronze Star Medals.[263] After nearly two decades of service, his promotion to major was delayed and "[his] career is essentially over" as a result of his being titled.[264] Other Soldiers titled as part of the G-RAP investigation experienced problems with promotion, faced separation action, "suspen[ded] security clearances[,] loss of civilian

[259] *See* HASC 2020 Hearing Recording, *supra* note 82, 1:26:00.
[260] Gilberto De Leon, *I Never Committed a Crime and Was Never Charged, but an Army Fraud Probe Will Probably End my Career*, MILITARY TIMES (Mar. 15, 2022), https://www.militarytimes.com/opinion/2022/03/15/i-never-committed-a-crime-and-was-never-charged-but-an-army-fraud-probe-will-probably-end-my-career.
[261] Dave Philips, *Army Fraud Crackdown Uses Broad Net to Catch Small Fish, Some Unfairly*, N.Y. TIMES (May 28, 2017), https://www.nytimes.com/2017/05/28/us/national-guard-army-fraud-crackdown.html. *See also* Dennis P. Chapman, *Task Force Raptor: Failure of Military Justice*, CRIM. LAW PRAC. Winter 2021, at 19, 19-20 (condemning the investigation into the G-RAP program as an "overzealous quest in which Army investigators grew so single-minded in their pursuit of wrongdoing that they became blind to exculpatory evidence and willing to pronounce Soldiers guilty of fraud on evidence so thin that one might reasonably question whether they had implicitly adopted a presumption of guilt as their basic operating assumption"); Jeffrey F. Addicott, *The Army's G-RAP Fiasco: How the Lives and Careers of Hundreds of Innocent Soldiers Were Destroyed*, 51 ST. MARY'S L.J. 549, 559 (2020) ("[T]he investigation and the investigatory techniques employed by the CID were rampant with shocking levels of abuse, incompetence, and mismanagement.").
[262] De Leon, *supra* note 260.
[263] De Leon, *supra* note 260.
[264] De Leon, *supra* note 260.

employment[,] debarment from [f]ederal contracts[,] and impediments to securing employment in law enforcement."[265]

In 2009, a CID LER pertaining to Navy Lieutenant Christopher Code stated there was both "credible information" and "'probable cause' to believe that [Lieutenant] Code made a false statement."[266] Lieutenant Code was never charged,[267] and sought relief from his titling and indexing from the Army, the ABCMR and the District of Columbia Circuit Court.[268] His fight lasted more than seven years.[269] In the meantime, the Army used the titling decision alone to attempt to recoup the value of services, more than $40,000, that he allegedly obtained under false pretenses.[270] In 2020, after reviewing the facts of his case, the District of Columbia Court of Appeals held the ABCMR's decision that there was credible information supporting Code's titling and indexing was "arbitrary and capricious."[271]

These two stories are illustrative of the deeper problem with titling and indexing. The problem has not gone unnoticed, but has gone unrepaired by the DoD, which is similar to the predicament of racially disparate impacts in the military justice system, broadly. Congress and the DoD are aware of disparities that "persist in the same pattern: Minority [Service members] are more likely to be brought before the military justice system" but are no more likely than their white peers to be convicted or punished more severely.[272]

Racial disparities consistently appear at the investigation stage of the often-lengthy military justice process. Problematically, this is one of the places where it can do the most damage not only to the Soldier, but also to the investigation and disposition of a case. Therefore, titling and indexing must be significantly reevaluated and changed. The causes for bias early in the military justice process are still arguably unknown and, obviously, there is no quick or easy fix for bias or prejudice—implicit or otherwise. However, there is no need to wait, hand-wringing, for new data or a new

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[265] Chapman, *supra* note 261, at 45; *see also* Addicott, *supra* note 261, at 558 (calling the CID titling process a "highly dubious administrative practice [that] was particularly devastating to the hundreds of innocent and fully-exonerated participants in the G-RAP and AR-RAP in terms of promotions, security clearances, and job selection both in the military and civilian world").
[266] Code v. McCarthy, 959 F.3d 406, 413 (D.C. Cir. 2020).
[267] *Id.* at 417.
[268] *Id.* at 414–15.
[269] *See* Code v. McHugh, 139 F. Supp. 3d 465, 467 (D.C. Cir. 2015).
[270] *McCarthy*, 959 F.3d at 416–17.
[271] *Id.* at 416.
[272] Robinson & Chen, *supra* note 73.

understanding of the underlying causes of disparities.[273] Congress and the DoD have what they need to take action. Congress and the DoD must look for ways to mitigate the *consequences* of bias in addition to addressing biases themselves. Fixing the titling process is the just thing to do and, importantly, a step in the right direction toward "equality of treatment."

[273] *See* Robinson & Chen, *supra* note 73 (suggesting that the Military Services start "listening to the qualified voices that have been shouting out solutions for decades already").