

VIA ELECTRONIC MAIL

July 10, 2023

TO: Lieutenant General Stephen L. Davis
Inspector General
Office of the Air Force Inspector General
1140 AF Pentagon
Washington DC 20330

CC: Mr. Frank Kendall III
Secretary of the Air Force
U.S. Air Force
1690 Air Force Pentagon
Washington, D.C. 20330

The Honorable Robert P. Storch
Inspector General
Department of Defense
4800 Mark Center Drive
Alexandria, VA 22350

Kristen Clarke
Assistant Attorney General for Civil Rights
Civil Rights Division, Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

**Re: Request for Investigation into Potential Constitutional and
Department Ethics Violations Committed by General C.Q. Brown**

Dear Inspector General Davis:

The American Accountability Foundation (AAF) is a non-profit organization focused on educating the public on issues related to personnel, policy, and spending. It has come to the attention of AAF that General C.Q. Brown (“General Brown”) has made a number of statements about hiring on the basis of race as well as monitoring the private beliefs of employees or potential employees with the intention of censoring those beliefs. If implemented, the statements and views of General Brown on what should be official hiring policy of the U.S. Air Force present a significant likelihood of violating the civil and constitutional rights of military personnel, in addition to violating existing code of conduct for Air Force personnel.



Under the direction and supervision of General Brown, subordinates in the U.S. Air Force may have unintentionally already committed a number of such violations in their hiring and promotion processes. As General Brown has openly advocated for these changes while acting in his official capacity, in uniform, and using Air Force channels for his communication, his actions appear to constitute a misuse of government resources and abuse of position. Accordingly, AAF requests an immediate investigation into the actions of General C.Q. Brown and the potential adverse personnel actions taken at his behest or implicit direction. The United States Air Force should not offer a safe harbor for race-based discrimination, regardless of its chief uniformed officer's preference for such policies.

Background

General Brown has made the following statements with regard to racial issues and how the government should respond to those issues:

- On June 5, 2020, General Brown voiced skepticism over whether non-black airmen “how these [non-black] Airmen view racism, whether they don’t see it as a problem....” He continued that “I’m thinking about how I can make improvements, personally, professional, and institutionally, so that all Airmen, both today and tomorrow, appreciate the value of diversity....”¹
- In a *PBS News Hour* broadcast on July 28, 2021, he stated that “the beauty of” George Floyd’s death was that it forced the Air Force to take a “hard look at ourselves” and that that the military needs to break up the “white boys club” and that the military needs to make sure that the military has a “diverse set of candidates.”
- In a February 11, 2021, *People Magazine* interview, he stated that “we’ve got to closely manage our diverse populations...to make sure their development and opportunities aren’t happening by luck.” He stated further that the Air Force needs to “tweak the screening process, so it’s not so reliant upon a paper test” when considering recruitment and promotion opportunities.²

¹ Gen. C.Q. Brown, “What I’m Thinking About,” YouTube, June 5, 2022. <https://www.youtube.com/watch?v=pfEnYg3C2JM>

² Gen. C.Q. Brown, “Air Force Chief of Staff Gen. Brown Jr. Opens Up About Emotional Talks on Race with his Sons,” *People*, Feb. 11, 2021. <https://people.com/human-interest/voices-against-racism-general-charles-q-brown-jr/>.



- On an interview with Washington Post posted to YouTube on January 25, 2021, he stated that “We broke up our promotion boards to actually do developmental categories, so it wasn’t kind of about a big one-size-fits-all by and large....” “The other things that we have to do is ensure that we have diversity on the boards, but also diversity on the candidate list. That’s something we have been doing....”³
- He stated in a February 2022 *Defense One* article that “you’ve got to look at the demographics of our country, how it’s changing” and “if you have that approach [of opposing inclusivity efforts] you’re gonna have very few people that come serve.” In the same interview, General Brown stated that credit for flight experience has been capped for admission into the pilot program for the express purpose of admitting more non-white pilots.⁴
- In an interview with the Chicago Council on Global Affairs in November 2020, General Brown flatly said “I hire for diversity” and that “I purposely build my office, my front office, and my team with diverse” backgrounds to hear “from all these different groups [which] provides a perspective.” He reiterated that different demographics “got to be on the slate and be considered.”⁵
- In a July 28, 2021, interview with PBS, General Brown stated that “membership of an extremist organization that goes against our core values,” should not be a part of the military and that recruits’ social media should be monitored because “individuals will put things on social media that they would never say to your face” and that it would “also tell you a little bit about the character of the individual that you’re bringing into our service.” He said that wrong views would be a “factor” in determining whether a recruit would be taken.⁶

³ Gen. C.Q. Brown, “Air Force Chief of Staff Gen. Charles Q. Brown Jr. on Racial Injustice, AI in Air Combat and China,” *Washington Post Live*. <https://www.youtube.com/watch?v=MkUGv3FHhmU>.

⁴ “Inside the Air Force Chief’s Mission for Racial Equity,” *Defense One*. <https://www.defenseone.com/policy/2022/02/inside-air-force-chiefs-mission-racial-equity/362191/>

⁵ “Gen. Brown on the Air Force, Equity, and Inclusion, Chicago Council on Global Affairs.” <https://www.youtube.com/watch?v=re04iV76WFs>

⁶ Nick Schiffrin and Dan Sagalyn, “Gen. Brown on Extremism in the Air Force and Threats from China, Afghanistan,” PBS, July 28, 2021. <https://www.pbs.org/newshour/show/gen-brown-on-extremism-in-the-air-force-and-threats-from-china-afghanistan>.



Legal Standards

Federal officials, and high-ranking military officials, are held to high standards of conduct. In addition to various ethics obligations and standards of conduct is the prohibition on federal officials from willfully depriving a person of a right or privilege protected by the Constitution or laws of the United States.⁷

According to the Department of Justice:

For the purpose of Section 242, acts under ‘color of law’ include acts not only done by federal, state, or local officials within their lawful authority, but also acts done beyond the bounds of that official's lawful authority, if the acts are done while the official is purporting to or pretending to act in the performance of his/her official duties... It is not necessary that the crime be motivated by animus toward the race, color, religion, sex, handicap, familial status or national origin of the victim.⁸

In the circumstances laid out below, it appears that several such rights may be in play.

1) Equal Protection Under the Law

Discrimination by federal actors based on race is prohibited under the equal protection clause of the Fourteenth Amendment. The recent court decision in *Students for Fair Admissions v. Harvard College*, 600 U.S. ___, *13 (June 29, 2023), elaborated on the appropriate standard to be applied by academic institutions. While footnote 4 excludes military academies from its holding, the decision nevertheless establishes a clear standard for federal officials in the hiring and promotion process that stamps out race-based decision-making.

2) Right to Free Speech

Generally speaking, with regard to free speech rights of government employees, the speech is protected if the employee is a private citizen, is speaking about a matter of public concern, and the speech does not interfere with the person’s job. See *Connick v. Myers*, 461 U.S. 138 (1983). When government employees speak on matters that “are of interest to the public at large, a subject on which employees are uniquely qualified,” they receive First Amendment protection. *San Diego v. Roe*, 543 U.S. 77, 80 (2004). “Outside of this category, the Court has held that when government employees speak or write on their own

⁷ 18 U.S.C. § 242.

⁸ Deprivation of Rights Under Color of Law, U.S. Department of Justice, Civil Rights Division (last updated May 31, 2021), found at: <https://www.justice.gov/crt/deprivation-rights-under-color-law>.



time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification “far stronger than mere speculation in regulating it.” *Id.* (quoting *United States v. Treasury Employees*, 513 U.S. 454, 454, 465 (1995)).

While military servicemembers do have “potentially less protective” Free speech rights as opposed to civilians, “servicemembers enjoy some measure of the right to free speech granted by the First Amendment.” *United States v. Wilcox*, 66 M.J. 442, 446-47 (2008). Examples of unprotected military speech usually have some nexus to military readiness or cohesiveness. *Wilcox*, 66 M.J. At 448 (fighting words, obscenity, and dangerous speech). Dangerous speech is defined as speech that “interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops.” *Id.* at 448. Also, speech that undermines the effectiveness in response to military command is unprotected. *See e.g. United States v. Priest*, 45 C.M.R. 338 (CMA 1972)(anti-war newsletters).

However, military servicemembers are afforded Free Speech protections when the speech restrictions are not content-neutral. “[W]ords and actions are entitled to protection unless there is a greater countervailing government interest in suppressing the particular speech or expressions in question.” *Carlson v. Schlesinger*, 511 F.2d 1327, 1332 (D.C. Cir. 1975).

3) Federal Codes of Conduct

It is Department of Defense policy to “Prohibit discrimination based on race, color, [etc.]” 32 C.F.R. §191.4. Similarly, Air Force Policy Directive 36-27, §1.1 states that it is “Unlawful discrimination against military members is any unlawful action that denies equal opportunity to persons or groups based upon their race, color, [etc.]” This includes “refusing to hire or promote, removing, or otherwise discriminating against any individual with respect to compensation, terms, conditions, or privileges of employment because of a person’s race...color, [etc.]” §1.2.

The Enlisted Force Structure, the Air Force’s handbook, a document that explains the “framework, development levels responsibilities and standards of our enlisted force” that applies “to all of us” reveals how General Brown is not living up to the standards of conduct within the Air Force.⁹ Within this handbook, Airmen swear to support and defend the Constitution of the United

⁹ *The Enlisted Force Structure*, af.mil, 2
https://www.doctrine.af.mil/Portals/61/documents/Airman_Development/BrownBook.pdf.



States. *Id.* at 5. The Air Force has a “zero-tolerance policy for... discrimination.” *Id.* at 14.

Standards of ethical conduct for employees of the Executive Branch apply to military personnel, including high-ranking military officers.¹⁰ Within these standards exist the requirement to avoid using one’s position of authority or official government resources, including actions or statements taken while acting in an official capacity, for any improper or unauthorized purposes. Actions that would deprive another of a constitutional or civil right or violate the law or Department policy or regulation would be considered unauthorized purposes. Actions that violate these standards may also raise to the level of “improper conduct” and even an “abuse of authority.”¹¹

Analysis

1) General Brown’s statements appear to violate the Equal Protection Clause

Any hiring practices that the Air Force has undergone that would be at the direction of, or consistent with, General Brown’s statements above would violate the equal protection clause of the Fourteenth Amendment.

The follow-up case to the famous case by the same name, *Brown v. Board of Education*, 349 U.S. 284, 300-01 (1955), the Supreme Court stated that schools must admit students “on a racially nondiscriminatory basis.” As the Supreme Court noted in the recent *Students for Fair Admissions v. Harvard College*, 600 U.S. ___, *13 (June 29, 2023), (“SFA”) “[S]o too in other areas of life.” *Id.* “[I]mmediately after *Brown*, we began routinely affirming lower court decisions that invalidated all manner of race-based state action.” *Id.* Examples listed from other court cases in *SFA* were segregated busing, segregated beaches, segregated recreational activities, golf courses, neighborhoods, business, trains,

¹⁰ Joint Ethics Regulation, Department of Defense Directive 5500.07-R (Nov. 29, 2007), incorporating 5 C.F.R. § 2635.

¹¹ The Office of the Air Force Inspector General has provided useful definitions for a few relevant terms: “improper conduct” is defined as conduct (acts or omissions) found to violate an identifiable directive, instruction, policy, regulation, rule, statute, or other standard applicable to the Air Force, without regard to knowledge, motive, or intent. Similarly, “Abuse of authority is further defined as it relates to personnel. It is an arbitrary or capricious exercise of power by a military member or a federal official or employee that adversely affects the rights of any person or that result in personal gain or advantage to them.” Definitions found at: <https://www.offutt.af.mil/Resources/Fact-Sheets/Display/Article/311447/ig-definition-of-terms/#:~:text=Abuse%20of%20Authority%2D%2DAbuse,gain%20or%20advantage%20to%20them.>



schools, juries and other areas. *Id.* The message from this historical recitation is clear: the equal protection clause applies to all areas of life, not just education.

“Our cases had thus ‘consistently denied the constitutionality of measures which restrict the rights of citizens on account of race.’” *SFA* at 13. And, they “consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. *Id.* at *14 (quoting *Loving v. Virginia*, 388 U.S. 1, 8 (1967)). Thus, the “core purpose” is to “do away with all governmentally imposed discrimination based on race.” *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

“Eliminating racial discrimination means eliminating all of it.” *Id.* at *15. “And the Equal Protection Clause, we have accordingly held, applies ‘without regard to any differences of race, of color, or of nationality’ and is ‘universal in application.’” *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

Within this context, the Supreme Court has struck down policies at university settings that impose race as a criterion for college admissions.¹² Justifications such as “training future leaders,” adaptation to “a pluralistic society,” “better educating its students through diversity,” and “producing new knowledge stemming from diverse outlooks” are not sufficient to pass the strict scrutiny necessary to justify racial discrimination. *SFA*, at *23.

Because the Equal Protection Clause, as interpreted in *Brown*, applied to all settings, including “business,” (i.e. employment), so too should *SFA* apply to all settings, including hiring practices by the government. And, here, the hiring practices advocated for by General Brown violate the principles articulated in *SFA*.

In General Brown’s *People Magazine* interview, he stated that “we’ve got to closely manage our diverse populations...to make sure their development and opportunities aren’t happening by luck.” This implies that “diverse” (i.e. non-white) populations need government actively working to make sure they get hired and promoted, as evidenced by General Brown’s PBS comment that the “white boys club” should be broken up. In his *Washington Post* interview, General Brown stated “The other things that we have to do is ensure that we have diversity on the [promotion] boards, but also diversity on the candidate list. Indeed, he flatly told the Chicago Council on Global Affairs that “I hire for diversity” and that “I purposely build my office, my front office, and my team

¹² Colleges are not forced to ignore race. They may consider how someone overcame racial discrimination, for example. But the consideration would have to be “tied to that student’s courage and determination,” not race as its own standalone criteria.



with diverse” backgrounds to hear “from all these different groups [which] provides a perspective.”

These statements by General Brown unequivocally state that General Brown has based hiring decisions, and implicitly directed his subordinates to do the same, based upon racial criteria as opposed to merit-based qualifications. *SFA* would almost certainly find that this practice violates the Constitutional rights of those military personnel adversely affected by his decisions and directions.

2) General Brown’s comments about censoring social media statements likely violates free speech rights of military personnel

General Brown’s statements encouraging the censorship of social media comments by military personnel appear to run counter to case law protecting free speech rights of American military personnel.

General Brown’s statements do not pass scrutiny in either the public employment or the military Free Speech standards. On PBS, General Brown openly stated that the Air Force should monitor social media to review recruits to determine whether the recruits should be considered extremist and, therefore, have character concerns such that they should not be admitted into the Air Force. It is true that, if a recruit is promoting terroristic type activity or is openly talking negatively about the military to a detrimental degree, then that would likely be cause to not admit that recruit.

But, in this context, it appears General Brown is advocating for excluding recruits who do not adhere to his particular (Constitutionally problematic) views on race. For instance, a recruit who criticizes the controversial philosophy known as “critical race theory” (CRT) or disagrees with the proposition that the United States is systemically and irredeemably racist is hardly an extremist or a legitimate target of government-ordained censorship. A recruit is not a high-level employee. Speaking on issues of race is not classified. It is of public concern, however. And, this speech would be unrelated to the job duties of an airman and would not disrupt the flow of an efficient workplace (assuming the recruit can keep his private views to himself while at work).

Within the context of race, the courts have gone as far as to say that self-identifying as a “white supremacist” online was found not to have a sufficient connection between the speech and the military. *Wilcox*, 66 M.J. at 445-46, 449-51. Indeed, if the courts have gone as far as to decide that a serviceman can self-identify as a white supremacist, mere disagreement on a hot button issue like the validity of CRT is clearly within the protected sphere of the First Amendment.



As such, your office should conduct an investigation to determine to what extent those who are under General Brown's command are monitoring social media on matters of race and to what extent military personnel or recruits are excluded from service or are denied opportunities as a result of private speech.

3) General Brown's statements likely run afoul of Federal Standards of Conduct

Here, General Brown's actions should be investigated because he used Air Force resources to advocate openly for discrimination, in violation of both the Constitution, U.S. law, and Air Force Policy. Indeed, the comments above were made while using his official title, while speaking about how he operates in his official capacity, sometimes in uniform, and sometimes using Air Force channels to speak. This likely constitutes improper conduct and an abuse of authority, potentially made worse based on the degree to which subordinates acted upon his directions to discriminate based on race.

General Brown's actions and personnel directions are also governed by Department of Defense regulations. Recent case law in the Equal Protection arena may be useful in the analysis. *SFA*, while not addressing Air Force Policy, provides helpful logic in demonstrating how General Brown's approaches "den[y] equal opportunity" and "refusing to hire or promote" on the basis of race or color. There, Harvard college argued that "an individual's race is never a negative factor in their admissions programs." *SFA*, at 27. It argues that giving preferences to an orchestra player does not mean that it's a "negative" to not excel at a musical instrument. *Id.*

The Court said this logic is "hard to take seriously." *SFA*, at *27. "College admissions are zero-sum." *Id.* "A benefit provided to some applicants but not others necessarily advantages the former group at the expense of the latter." *Id.*

Similarly, here, recruiting and promotions are zero-sum. Only a certain number of people are taken in any given year. Only a certain number of promotions are available. Therefore, taking recruits and placing people in leadership capacities with an intentional effort to be inclusive of certain races will inherently be to the detriment of races that are not given that priority. General Brown's statements as to how he hires people and how the Air Force should take in recruits necessarily constitutes a denial of "equal opportunity," which violates Air Force Policy and should be investigated as such.

In the same way, General Brown violated The Enlisted Force Structure and the Federal Standards of Conduct concerning misuse of position and government resources. The act of giving preferences to some candidates on the basis of race,



to the detriment of other races, is “discrimination,” for which the Air Force has “zero-tolerance.”

Conclusion

As stated, General Brown’s public statements about race, how the Air Force should (or does) handle race, and how he personally hires on the basis of race, appear to violate the Equal Protection Clause of the Fourteenth Amendment, the Free Speech Clause of the First Amendment, Air Force equal opportunity policies, and basic ethics standards of conduct for federal and military officials.

AAF respectfully requests an investigation into whether General Brown’s actions, statements and implicit direction to subordinates resulted in the violation of the Constitutional and civil rights of military personnel and recruits. Additionally, an investigation should consider any other military personnel that have committed such violations of U.S. law and Department policy. Finally, remedial or preventive actions should be taken to ensure no additional future violations occur as a result of General Brown’s personal views in favor of race-based discrimination. Thank you for your prompt attention in this matter.

Sincerely,

Thomas Jones

President,

American Accountability Foundation

