# MUTINY ON THE HIGH C: HOW THE ARMED FORCES REGULATE AND CRIMINALIZE SERVICEMEMBER SPEECH ONLINE

MAJOR MICHELLE E. BORGNINO*

*[A]bove all else, the First Amendment means the government has no power to restrict expression because of its message, its ideas, its subject matter or its content.*[1]

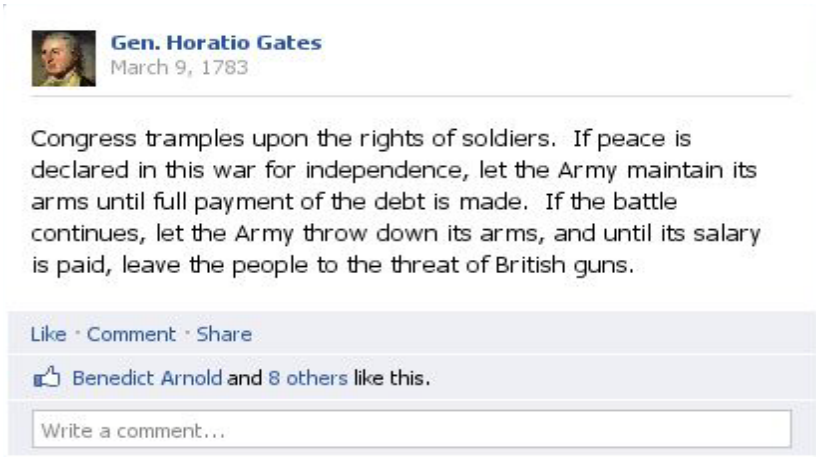
*When service members first don their uniforms and pick up their rifles, they do not set aside their citizenship. They reaffirm it, vow to guard it and assume the responsibility to maintain the professionalism of their station.*[2]

* Judge Advocate, United States Army. Presently assigned as Brigade Judge Advocate, 1st Stryker Brigade Combat Team, 1st Armored Division, Fort Bliss, TX. LL.M., 2016, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; J.D., 2006, Gonzaga University School of Law; B.A., 2002, Gonzaga University. Previous assignments include Editor, *The Army Lawyer*, The Judge Advocate General's Legal Center and School, 2014–2015; Special Victim Prosecutor, Virginia, Maryland, and the Military District of Washington, 2012–2014; Trial Defense Attorney, National Capital Region, 2010–2012; Fiscal Law Attorney, 1st Cavalry Division and Multi-National Division, Baghdad, 2009–2010; Administrative Law Attorney, 1st Cavalry Division, Fort Hood, Texas, 2008; Administrative Law Attorney, III Corps and Fort Hood, Fort Hood Texas, 2007–2008. Member of the bar of Texas. This article was submitted in partial completion of the Master of Laws requirements of the 64th Judge Advocate Officer Graduate Course.

[1] Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

[2] *Election Season Calls for Caution, Professionalism Among Military*, DOD LIVE (July 24, 2012), http://www.dodlive.mil/index.php/2012/07/election-season-calls-for-caution-professionalism-among-military/.

## I. Introduction




In March of 1783, a letter similar to this fictional *Facebook* post was circulated among the officers of the Confederation Army.[3] After years of failure by the Confederation Congress to pay its soldiers and officers, the Confederation Army was prepared to mutiny. An anonymous letter sent to the Army's officers called for a meeting on March 10, l783.[4] Although the 1783 letter's author had the foresight to remain anonymous, a statement like this could easily appear in a *Facebook* post, a "tweet," or on a blog, where anonymity is not always an option, and where the reader will not only know the name of the poster but potentially his age, location, interests, and whether affiliated with the military.[5] If this were to happen, it would raise delicate issues concerning what a modern-day commander could—and should—do. The protections of the First Amendment to the Constitution are fundamental to the rights enjoyed by every American citizen. But those protections do not apply equally to those who serve,

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[3] It is believed that General Horatio Gates sent this letter, but has never been confirmed. *See George Washington and the Newburgh Conspiracy, 1783*, GILDER LEHRMAN INST. OF AM. HISTORY, https://www.gilderlehrman.org/history-by-era/war-for-independence/resources/george-washington-and-newburgh-conspiracy-1783 (last visited Sept. 2016) ; *Newburgh Conspiracy*, GEORGE WASHINGTON'S MOUNT VERNON, http://www.mountvernonorg/research-collections/digital-encyclopedia/article/newburgh-conspiracy/ (last visited July 25, 2016).

[4] *See George Washington and the Newburgh Conspiracy, 1783*, *supra* note 3; *Newburgh Conspiracy*, *supra* note 3.

[5] Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History and Scholarship*, 13 J. OF COMPUTER-MEDIATED COMM. 210 (2008).

whether they serve as members of the military or as employees of the Department of Defense (DoD).[6] Those who volunteer to defend this fundamental right surrender the full scope of its protections to the extent necessary to allow the chain of command to function.[7] This necessitates an important balancing act for the military to ensure that reasonable restrictions are placed on speech by servicemembers in order to uphold good order and discipline, while at the same time affording servicemembers their right to free speech, to the greatest extent possible.

The global reach of the World Wide Web, combined with the explosion of social-media tools such as *Facebook* and *Twitter*, disrupt the military rules that restrict free speech.[8] While civilian courts in America have experience applying the First Amendment to online speech,[9] "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian"[10] and therefore faces a distinct set of challenges.

Specifically, commanders' need to maintain good order and discipline in the face of sometimes incredible odds necessitates limiting the right to free speech afforded to servicemembers. The fact that there are limitations is clear; how they apply in the age of the Internet is not. Current DoD guidance is both broad and vague.[11] It outlines terms but does not define them and provides no practical examples of prohibited behavior. Merely

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[6] *See* Parker v. Levy, 417 U.S. 733 (1974).

[7] Gene Policinski, *In the Military, Speech can be Punishable Conduct*, FIRST AMENDMENT CENT. (Apr. 16, 2012), http://www.firstamendmentcenter.org/in-the-military-speech-can-be-punishable-conduct.

[8] *Id.*

[9] *See* Bell v. Itawamba County School Bd., 799 F.3d. 379 (5th Cir. 2015) *petition for cert. filed*, 84 U.S.L.W 3304 (U.S. Nov. 19, 2015) (No. 15-666) (holding that in the *Tinker* rule conduct by a student that materially disrupts classwork or involves substantial disorder or invasion of the rights of others is not immunized by the First Amendment and applies when a student intentionally directs, at the school community, speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when the speech originated off campus (video posted to the Internet)) (citing Tinker v. Des Moines Independent County School District, 393 U.S. 503 (1969); Rideout v. Gardner, No. 14-cv-489-PB, 2015 WL 4743731 (D. N.H. Aug. 11, 2015) *appeal docketed*, No. 15-2021 (1st Cir. Sept. 9, 2015) (holding that a state statute prohibiting voters from taking and disclosing digital or photographic copies of their completed ballots violated the First Amendment because the statute was content based and did not survive a strict scrutiny analysis).

[10] Parker, 417 U.S. 733.

[11] *See, e.g.*, U.S. DEP'T OF DEF., DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES para. 4 (19 Feb. 2008) [hereinafter DoDD 1344.10].

adding additional regulation to supplement that which is currently available promises only to complicate an already complicated issue.

Further confusing the matter are rules regarding limitations on servicemember speech, which differ depending on the context in which the speech is uttered. For example, a servicemember serving in a deployed environment is subject to greater restrictions when it comes to his speech than he would be in a non-deployed environment.[12] But the fact that *Facebook* is one of the few methods (perhaps the only) by which he can reach out to family only exacerbates the problem.

Servicemembers have begun to see the effect of free-speech limitations on their online activities. For instance, Marine Sergeant (Sgt.) Gary Stein paid for his misunderstanding of the current state of the law with his career.[13] In 2010, Sgt. Stein co-founded a *Facebook* page called *Armed Forces Tea Party Patriots*.[14] After identifying himself as an active-duty marine,[15] he posted, "Screw Obama. I will not follow all orders from him."[16] Based on this comment, Sgt. Stein was administratively separated from the Marine Corps[17] with an other-than-honorable discharge, which is authorized when a particular action "constitutes a significant departure from the conduct expected of a [m]arine."[18] Troops may still express private views, but Sgt. Stein's case "highlights the potential for . . . opinions to go global as tech-savvy service members post personal details, videos[,] and pictures that can hurt the military's image at home and abroad."[19]

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[12] Carlson v. Schlesinger, 511 F.2d. 1327, 1332 (1975).

[13] *Marine's Facebook Page Tests Military Rules*, FIRST AMENDMENT CENT. (Mar. 8, 2012), http://www.first amendmentcenter.org/marine's-facebook-page-tests-military-rules; Brian Rooney, *Sgt. Gary Stein, Discharged for Obama Criticism, "Scared," Not Backing Down*, CBS NEWS (May 4, 2012), www.cbsnews.com/news/sgt-gary-stein-discharged-for-obama-criticism-not-backing-down/.

[14] *See supra* note 13 and accompanying sources.

[15] Brian Rooney, *supra* note 13.

[16] Marissa Taylor, *Marine Faces Other Than Honorable Discharge Over Anti-Obama Facebook Comment*, ABC News (Apr. 15, 2012), http://abcnews.go.com/US/marine-stg-gary-stein-honorable-discharge-anti-obama/story?id=16216279.

[17] It appears that Sergeant (Sgt.) Stein was separated for the comments he made, though his failure to remove the site in response to a lawful order to do so may also have played a part. Rooney, *supra* note 13.

[18] U.S. MARINE CORPS, Order 1900.16, SEPARATION AND RETIREMENT MANUAL subsec. 1004(c)(2) (26 Nov. 2013) [hereinafter MARCORSEPMAN].

[19] FIRST AMENDMENT CENT., *supra* note 13.

It is not merely sharing one's own views that can lead to adverse administrative action, or even court-martial. In an environment where smartphones abound,[20] it is impossible to predict who will later share posted experiences and opinions with others online, or post pictures or videos of you online without your knowledge. In 2012, Army Corporal (CPL) Jesse Thorsen, while wearing his Army Combat Uniform, took the stage with Ron Paul at a political rally.[21] While mainstream media captured CPL Thorsen's actions, any member of the crowd using a smartphone could have just as easily uploaded them to the Internet.[22]

Beneath the glossy surface of the Internet lies a miasma of First Amendment rules and regulations, which servicemembers can violate without knowing they exist, destroying their careers in the process. The Supreme Court has "reject[ed] the view that freedom of speech . . . as protected by the First . . . Amendment" is absolute.[23] But servicemembers have a right to know where and when certain speech is allowed and where the First Amendment pitfalls lie.[24] The number of individuals accessing social media increases daily, and its use is becoming more and more

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[20] Sixty-four percent of Americans own a smartphone. Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CENT. (Apr. 1, 2015), http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/. A smartphone is a "mobile phone which includes functions similar to those found on personal computers. Smartphones are a one-stop solution for information management, mobile calls, email sending, and Internet access." *Smartphone*, BUSINESS DICTIONARY, http://www.businessdictionary.com/definition/smartphone.html (last visited Sept. 8, 2016).

[21] *Soldier Who Took Stage at Ron Paul Rally Could Face Legal Trouble*, FIRST AMENDMENT CENT. (Jan. 6, 2012), http://www.first amendmentcenter.org/soldier-who-took-stage-at-ron-paul-rally-could-face-legal-trouble. Corporal Thorsen received a letter of reprimand, which was placed in his Official Military Personnel File for his conduct. Ryan J. Foley, *Ron Paul Backer Jesse Thorsen Reprimanded by Army Reserve for Participating in Political Rally*, HUFFINGTON POST (May 30, 2012), http://www.huffingtonpost.com/2012/03/30/ron-paul-jesse-thorsen-soldier-army-reserve_n_1391647.html.

[22] Smartphone "must-haves" include a great camera, lots of storage and the ability to transmit data to other phones and tablets in the vicinity. Kim Komando, *10 smartphone must-have feature*, USA TODAY (Dec. 13, 2013, 7:00 AM), http://www.usatoday.com/story/tech/columnist/komando/2013/12/13/smartphone-battery-processing-display camera/3921399/.

[23] Konigsberg v. State Bar of California, 366 U.S. 36 (1961).

[24] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 897 (2001).

integrated into American's daily lives,[25] making the task of regulating servicemember speech a daunting undertaking.

The military does not need more regulation. Currently, the limitations on servicemember speech are varied and found in multiple sources. But the articles of the Uniform Code of Military Justice (UCMJ) already provide the framework necessary to regulate servicemembers' speech and to punish speech that is unprotected because it is harmful and contrary to good order and discipline.[26] A thoughtful and comprehensive look at the UCMJ can expose these requirements so servicemembers may exercise their constitutional right of free speech to the greatest extent possible under the law. This article, rather than drawing on the UCMJ as a baseline, recommends adapting the UCMJ to accommodate the changes in technology by acknowledging that servicemembers' ability to communicate on a global scale has an effect on the way the military justice system functions. The military justice system is a commander's tool for maintaining morale, mission readiness, and good order and discipline.[27] Approaching online misconduct from the perspective of the UCMJ, rather than through a jumble of regulations, policies, and handbooks, will create a uniform set of expectations across the services.[28]

## II. A Culture of Social Media

> *We don't have a choice on whether we do social media, the question is how well we do it.*[29]

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[25] Sixty-five percent of adults use social media, up from seven percent in 2005. Andrew Perrin, *Social Media Usage: 2005–2015*, PEW RESEARCH CENT. (Oct. 8, 2015), www.pewinternet.org /2015/10/08/social-networking-usage-2005-2015/.

[26] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2012) [hereinafter MCM].

[27] *See* Lindsy Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. OF COMP. & INT'L L. 169 (2006).

[28] Executing fair, prompt military justice reinforces command responsibility, authority and accountability. This is true across the Services, and underscores the uniformity and jointness of the military justice system. DEFENSE LEGAL POLICY BOARD SUBCOMMITTEE REPORT, MILITARY JUSTICE IN COMBAT ZONES 25 (2013).

[29] Erik Qualman, *Quotable Quotes*, GOOD READS, http://www.goodreads.com/quotes/new?quote%5B author.name%5D=Erik+Qualman (last visited July 25, 2016). Erik Qualman is the author of *Socialnomics* and *Digital Leader*. *See* SOCIALNOMICS, http://socialnomics.net/erik-qualman/ (last visited Oct. 17, 2016).

Over the past decade, the personal and professional lives of many Americans have become inseparable from social-media platforms.[30] Broadly speaking, social media is "a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0,[31] and that allow the creation and exchange of user generated content."[32] One prominent type of social-medial platform is described as a social networking site. Social networking sites (SNSs) are "web-based services that allow individuals to (1) construct a public or *semi-public* profile within a bounded system; (2) articulate a list of other users with whom they share a connection; and (3) view and traverse their list of connections and those made by others within the system."[33] *Facebook*, *Twitter*, *LinkedIn*, and *Google+* are examples of this type of social-media platform.[34] So ubiquitous are these websites that sixty-five percent of American adults use them.[35] Young adults (ages eighteen to twenty-nine—more than half the military fits this demographic[36]) make up the greatest number of users: nearly ninety percent of this age group uses social media.[37] In addition, the average junior-enlisted member or junior officer

> does not remember a time when there was no Internet, no camera cell phone, and no text messaging. In that []she is a "digital native." This means of communication is as natural to . . . her as a letter home was to . . . [sic] previous generations. The status symbol today for the "wired

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[30] *See* JOSÉ VAN DIJK, THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA 174 (2013).

[31] The World Wide Web, invented in 1989, provided an essentially one-way street of communication. Web 2.0 refers to the Internet as it came to be shortly after the beginning of the millennium, which offers channels for networked communication to become an interactive, two-way vehicle. *See* Lev Manovich, *The Practice of Everyday (Media): From Mass Consumption to Mass Cultural Production?*, 35 CRITICAL INQUIRY 2 (2009).

[32] Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUSINESS HORIZONS 2, 59, 60 (2009).

[33] Boyd & Ellison, *supra* note 5.

[34] Many separate and distinct social networking sites (SNS) exist. Also, different forms of social medial platforms, including user-generated content platforms exist. This article focuses primarily on *Facebook* and *Twitter* usage.

[35] Perrin, *supra* note 25.

[36] OFFICE OF THE DEPUTY ASSISTANT SECRETARY OF DEFENSE (MILITARY COMMUNITY AND FAMILY POLICY), 2013 DEMOGRAPHICS PROFILE OF THE MILITARY COMMUNITY 33 (2014).

[37] *Id.*

> generation" is how many friends you have on your . . . *Facebook* page.[38]

In an attempt to keep up with these young servicemembers and maintain positive communication with both the force and the public, the military has created thousands of official *Facebook* pages and *Twitter* feeds. As of the date of this article, the Army has 1448 official *Facebook* pages and 355 *Twitter* feeds;[39] the Navy has 881 official *Facebook* pages and 210 *Twitter* feeds;[40] the Air Force 530 official *Facebook* pages and 203 *Twitter* feeds;[41] the Marines have 404 official *Facebook* pages and 72 *Twitter* feeds;[42] and, bringing up the rear, the Coast Guard with 116 official *Facebook* pages and 19 *Twitter* feeds.[43] Each of these official sites is registered with its service-specific registry and, when approved, is also added to the DoD registry.[44] Each service also provides social-media handbooks on how social media can, and should, be used in an official capacity.[45] *Facebook* has even created a guide for military organizations in an attempt to help "military branches, units, and bases join the conversation, by sharing their stories and building a meaningful dialogue with their citizens and constituents."[46]

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[38] United States v. Wilcox, 66 M.J. 442, 462 (C.A.A.F. 2008) (citing John Keenan, *The Image of Marines*, MARINE CORPS GAZETTE, May 2008, at 3).

[39] *The U.S. Army on Social Media*, ARMY.MIL, http://www.army.mil/media/socialmedia/ (last visited July 25, 2016).

[40] *U.S. Navy Social Media*, NAVY.MIL, http://www.navy.mil/CommandDirectory.asp?id=0 (last visited July 25, 2016).

[41] *Social Media Sites*, AF.MIL, http://www.af.mil/afsites/socialmediasites.aspx (last visited Sept. 13, 2016).

[42] *Marine Corps Social Media*, MARINES.MIL, www.marines.mil/News/SocialMedia.aspx (last visited July 25, 2016).

[43] *Official Sites*, COAST GUARD COMPASS: OFFICIAL BLOG OF THE U.S. COAST GUARD, http://coastguard.dodlive.mil/official-sites/ (last visited July 25, 2016).

[44] U.S. DEPARTMENT OF DEFENSE, http://www.defense.gov/Sites/Register-A-Site (last visited July 25, 2016). The DoD provides service-specific online forms, where the link to the proposed official website is submitted. *Id.* The site is then reviewed and approved by the Office of the Chief of Public Affairs. *See The U.S. Army on Social Media*, *supra* note 39.

[45] *See* U.S. DEP'T OF ARMY, THE UNITED STATES ARMY SOCIAL MEDIA HANDBOOK, v. 3.2 (2014) [hereinafter ARMY HANDBOOK]; U.S. DEP'T OF NAVY, NAVY COMMAND LEADERSHIP SOCIAL MEDIA HANDBOOK (2012) [hereinafter NAVY HANDBOOK]; U.S. DEP'T OF AIR FORCE, AIR FORCE SOCIAL MEDIA GUIDE (2013) [hereinafter AIR FORCE HANDBOOK]; U.S. MARINE CORPS, THE SOCIAL CORPS: THE U.S.M.C. SOCIAL MEDIA PRINCIPALS [hereinafter MARINE CORPS HANDBOOK]; U.S. COAST GUARD, SOCIAL MEDIA HANDBOOK (2015) [hereinafter COAST GUARD HANDBOOK].

[46] Facebook, *Building your presence with Facebook Pages: A guide for military organizations*, DOD LIVE (Nov. 2011), http://marines.dodlive.mil/files/2011/11/Facebook

Military leadership's extensive use of social media sites like *Facebook* and *Twitter* suggests that it is also appropriate for members of the services to maintain their own presence on social media. In many ways, it has become the way that the military communicates, including how servicemembers communicate with each other and their families, and how the military as a whole communicates with the American people. But in order to see the true influence of social media, it is necessary to have a baseline understanding of the most popular forms used by the military and its members, namely *Facebook* and *Twitter*.

## A. *Facebook*

"Founded in 2004, *Facebook's* mission is to give people the power to share and make the world more open and connected. People use *Facebook* to stay connected with friends and family, to discover what's going on in the world, and to share and express what matters to them."[47] Founder and chief executive officer Mark Zukerberg told *Time* that *Facebook's* mission was to build a Web where the "default is social," in order to "make the world more open and connected."[48] To create a *Facebook* account, users must initially provide their name, email address or phone number, password, birthday, and gender.[49] Users will then be prompted to create a profile. Both a profile picture and cover photo can be added, as well as a work and education history, the places the user has lived, contact information, family and relationship information, along with other "Details About You."[50] Every time a user's *Facebook* page is viewed by others (depending on the privacy settings) they see a snapshot of the individual: where he lives and works, what his favorite music is, who his friends are, and so on.

Fully seventy-two percent of online American adults use *Facebook*.[51] The majority of those users, eighty-two percent, are between the ages of

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GuideMilitaryOrgs.pdf.

[47] *About Facebook*, FACEBOOK, https://www.facebook.com/facebook/info/?tab=page_info (last visited July 25, 2016).

[48] Dan Fletcher, *How Facebook Is Redefining Privacy*, TIME (May 20, 2010), http://www.time.com/time /magazine/article/0,9171,1990789,00.html.

[49] *Creating Your New Account*, FACEBOOK, https://www.facebook.com/help/345121355559712/ (last visited July 25, 2016).

[50] *About Facebook*, *supra* note 47.

[51] Maeve Duggan, *The Demographics of Social Media Users*, PEW RESEARCH CEN. (Aug. 18, 2015), www.pewinternet.org/2015/08/19/the-demographis-of-social-media-users/.

eighteen and twenty-nine.[52] As discussed above, such a demographic is significant because this age group also makes up the majority of active duty servicemembers.[53] It is reasonable to assume that a majority of the population of the U.S. military uses *Facebook* and is accustomed to its policy of social transparency.

### B. *Twitter*

*Twitter*, a micro blogging platform, was launched in 2006.[54] It is an "information network made up of 140-character messages flagged by a hashtag (#) called Tweets."[55] *Twitter* allows users to gather information by finding and following other Twitter accounts.[56] Messages from followed accounts will appear in the user's "Timeline" or personal *Twitter* homepage.[57] The company states that its mission is to "give everyone the power to create and share ideas and information instantly, without barriers."[58] This ideal is similar to that of *Facebook* and includes an implicit push for transparency in social media. Individual users can write their own tweets, retweet messages, or reply with a reaction to a tweet.[59] Unlike *Facebook*, only twenty-three percent of American adults use *Twitter*,[60] and seventy-nine percent of all accounts originate outside the United States.[61] *Twitter* is a truly global format for online commentary,[62] which allows for global interaction.[63]

Through *Facebook* and *Twitter*, people share the details of their lives, to include their political leanings, ideas about world events, and opinions on just about anything. All of this content, in words, pictures, videos, "Likes," and "Retweets" is speech,[64] as defined by case law, and is

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[52] *Id.*
[53] DEMOGRAPHICS PROFILE, *supra* note 36.
[54] Boyd & Ellison, *supra* note 5.
[55] *Getting Started with Twitter*, TWITTER, https://support.twitter.com/articles/215585?Lang=en (last visited July 25, 2016).
[56] *Id.*
[57] *Id.*
[58] *About Twitter*, TWITTER, https://about.twitter.com/company (last visited Jan. 16, 2016).
[59] *Getting Started with Twitter*, *supra* note 55.
[60] Duggan, *supra* note 51.
[61] *About Twitter*, *supra* note 58.
[62] VAN DIJK, *supra* note 30, at 76.
[63] *Twitter* has more than 320 million monthly active users. *About Twitter*, *supra* note 58.
[64] Texas v. Johnson, 491 U.S. 397, 404 (1989).

therefore protected by the First Amendment to the Constitution of the United States. Members of the military and DoD employees must understand, however, that this protection is not without its limits.

## III. Legal Limits on Servicemember Speech

To understand limits on a servicemember's protected speech, it is necessary to examine the basics of First Amendment jurisprudence. The goal of such an examination is to reach an understanding of what is speech, what delineates protected from unprotected speech, and the reason behind any distinction; this examination will also include a brief discussion of statutory limitations on the speech of federal employees.

### A. First Amendment Jurisprudence

*Congress shall make no law . . . abridging the freedom of speech.*[65]

The First Amendment to the Constitution appears, on its face, to protect from government regulation any speech that is uttered anywhere, at any time. However, its plain language actually gives little indication what the Framers intended.[66] Historically, the amendment was meant to prevent the restraint on speech that had been imposed on the colonies by England, i.e., the requirement to obtain licenses for publication, and punishment for seditious libel.[67] Due to this lack of information as to the Framers' intent, the Supreme Court has set out the basic framework for

> The First Amendment literally forbids the abridgment of only speech, but we have long recognized that its protection does not end at the spoken or written word. While we have rejected the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intents thereby to express an idea, we have acknowledged that conduct may sufficiently imbued with elements of communication to call within the scope of the First . . . Amendment.

*Id.* (internal citations omitted); *see also* R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377, 382 (1992); Virginia v. Black, 538 U.S. 343, 358 (2003).

[65] U.S. CONST. amend. I.

[66] CHEMERINSKY, *supra* note 24 at 896.

[67] *Id.* "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." Citizens United v. Federal Election Com'n., 588 U.S. 310, 340 (2010).

determining what speech the First Amendment protects from government interference.

As with any right guaranteed by the Constitution, the Supreme Court balances the benefit of speech against the harm. The Court declared,

> The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment . . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.[68]

Yet, despite the (declared) importance of free speech, the Court has also found that the protections of the First Amendment are neither plain in their meaning nor intended to impose "absolute" prohibitions on the government, by also declaring:[69]

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and the obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from

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[68] Thornhill v. State of Alabama, 310 U.S. 88, 101 (1940).

[69] Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960). Justice Black took the view that the Bill of Rights are plain in their meaning and "chastised those who rejected an absolute reading of the Bill of Rights by factoring the public interest into judicial review of rights as embracing the English doctrine of legislative omnipotence." Marci A. Hamilton, *Hugo L. Black, The Bill of Rights, 35 N.Y.U. L. Rev. 865 (1960)*, 75 N.Y.U. L. REV. 1525 (2000) (internal citations omitted).

> them is clearly outweighed by the social interest in order and morality.[70]

The basic tenets used to determine the constitutionality of legislation that regulates speech come from *Schneck v. United States.* In *Schneck*, members of the Socialist Party mailed pamphlets[71] to men who had been called into military service for the purpose of causing insubordination in the military and obstructing recruitment and enlistment.[72] The Court stated that "in many places and in ordinary times the defendants in saying all that was said . . . would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done."[73] The Court then identified the test that would become the framework for determining whether speech is protected under the First Amendment: "[W]hether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent."[74]

In 1967, the Court of Military Appeals applied the clear and present danger test to the prohibitions on speech contained in, expressly, Article 88 and, implicitly, Article 133 of the UCMJ.[75] In *United States v. Howe*, the court recognized that up until that point, the effort to define the outer limit of the right of free speech had been restricted to the civilian community.[76] Applying the *Schenck* test, the court held that "the

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[70] Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571–72 (1942) (citations omitted).

[71] The document had printed on it the first section of the Thirteenth Amendment and stated that the idea embodied in that amendment was violated by the conscription act, and that a conscript is little better than a convict. Schenck v. United States, 249 U.S. 47 (1919). It said, "Do not submit to intimidation," but emphasized peaceful means of protest. *Id.* On the other side, the document encouraged men to refuse to recognize the draft and stated, "If you do not assert and support your rights, you are helping to deny or disparage right which it is the solemn duty of all citizens and residents of the United States to retain." *Id.* at 51. Mr. Schenck and his co-conspirator (both private citizens) were convicted of the charges against them and the Court affirmed the convictions. *Id.*

[72] *Id.* at 48–49.

[73] *Id.* at 52.

[74] *Id.* (emphasis added). This test could be used to determine pre-publication restraint or post-publication punishment. In some cases, the circumstances in which the words would be used can be determined prior to their utterance and determined to be unprotected. *Id.* (citing Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 439 (1911)).

[75] United States v. Howe, 37 C.M.R. 429 (1967).

[76] *Howe*, 37 C.M.R. at 429 (citing Dennis v. United States, 341 U.S. 494 (1951)); *Schenck*, 249 U.S. 47; Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

impairment of discipline and the promotion of insubordination by an officer of the military service in using contemptuous words toward the Chief of State . . . in the present times and circumstances . . . constitutes a clear and present danger to discipline within our armed services."[77]

The clear and present danger test is relatively straight-forward, and it would have been easy enough to continue its application in both the civilian and military context. But in 1974, the Supreme Court created a slightly different test applicable to the military in *Parker v. Levy*.[78] *Parker* acknowledged that the sweep of First Amendment protections is less comprehensive in the military.[79] The Court reasoned that a deviation from the *Schenck* standard—really, a lesser standard—was warranted by the idea that the military is, by necessity, a specialized society separate from civilian society.[80] "Its law is that of obedience"[81] and the consequent necessity to impose discipline may render speech regulation permissible within the military that would be constitutionally impermissible outside it.[82] Put another way, some restrictions exist in the armed forces for reasons that have no counterpart in the civilian community,[83] because speech that is protected in a civilian context may undermine the effectiveness of command. If it does that, the Court held, it is constitutionally unprotected.[84]

Thus dangerous—and therefore, unprotected—speech in the military context is that which "interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops."[85] Consequently, if such speech also violates the UCMJ, a servicemember may be punished by court-martial. In addition to those cases, DoD policy and service-specific regulations also limit speech. Political speech, in particular, is an area where multiple sources of law and regulation limit what political activities a servicemember or DoD employee may engage in.

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[77] *Howe*, 37 C.M.R. at 437.
[78] Parker v. Levy, 417 U.S. 733 (1974).
[79] *Id.*
[80] *Id.* at 743.
[81] *In re* Grimley, 137 U.S. 147, 153 (1890).
[82] *Parker*, 417 U.S. at 758.
[83] United States v. Priest, 45 C.M.R. 338, 344 (C.M.A. 1972). Some examples include operational security; handling of classified information; command and control; and the good order and discipline of the force.
[84] United States v. Gray, 42 C.M.R. 255 (C.M.A. 1970).
[85] United States v. Brown, 45 M.J. 389, 395 (C.A.A.F. 1996).

## B. Regulation of Political Speech and Activities

Political speech lies at the core of the First Amendment,[86] but due to the position of the armed forces in the executive branch of the government, it is also imperative that no servicemember or employee be seen to officially endorse any political ideal or candidate. Yet, the importance of political speech to American citizenship requires the allowance of political speech to the greatest extent possible. Consequently, the DoD encourages "members of the Armed Forces . . . to carry out the obligations of citizenship" as long as that participation is in "keeping with the traditional concept that members on active duty should not engage in partisan political activity, and that members not on active duty should avoid inferences that their political activities imply or appear to imply official sponsorship, approval, or endorsement."[87] This is as true for DoD civilian personnel as it is for those who serve on active duty, and may be more important for those civilian employees who also serve in the reserve components and will fall under different restrictions, at different times, depending on their status. It is due to these principles that laws and regulations have been enacted to outline the limits of political speech. These will be discussed in turn.

### *1. Department of Defense Directive 1344.10*

The DoD regulates the political activities of active duty servicemembers, including the National Guard, in DoD Directive (DoDD) 1344.10 and the service-specific policies that stem from it.[88] The directive lists out a number of actions that may and may not be taken by servicemembers.[89] While too numerous to be listed here, it is important

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[86] *See* New York Times Co. v. United States, 403 U.S. 713 (1971).

[87] DoDD 1344.10, *supra* note 11, para. 4.

[88] *See* U.S. DEP'T OF ARMY, REG., ARMY COMMAND POLICY para. 5-3 (18 Mar. 2008) (RAR 22 Oct. 2014) [hereinafter AR 600-20]; U.S. DEP'T OF AIR FORCE, INSTR. 51-902, POLITICAL ACTIVITIES BY MEMBERS OF THE US AIR FORCE (12 Nov. 2010) [hereinafter AFI 51-902]; U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5720.44C, DEPARTMENT OF THE NAVY PUBLIC AFFAIRS POLICY AND REGULATIONS para. 0103 (14 Oct. 2014) [hereinafter SECNAVIST 5720.44C].

[89] DoDD 1344.10, *supra* note 11. A member of the Armed Forces on active duty may: register to vote; vote; encourage others to vote; write a letter to the editor under certain circumstances; and display a political bumper sticker on the member's private vehicle. The member may not: participate in partisan political fundraising activities, rallies, or conventions; allow or cause to be published partisan political writings soliciting votes for or against a partisan political party, candidate or cause; serve in any official capacity with

to understand that at the basic level, partaking[90] in partisan activities in an official capacity is prohibited.[91] Servicemembers must also ensure that they do not act in a manner that "could reasonably give rise to the inference or appearance of official sponsorship, approval or endorsement,"[92] and that they do not participate in political activities while in uniform.[93] Although servicemembers may express personal opinions on political candidates and issues, they may not do so as a representative of the United States.[94]

The use of online forms of communication make violating this policy easier. When an individual participates in an in-person discussion, while wearing civilian clothes, it is easier to disassociate that person's job from their political views. When an opinion is expressed on *Facebook*, however, "friends of friends" who see that opinion next to a photograph of a soldier in uniform may infer an endorsement.[95] Additionally, when a superior non-commissioned officer or commissioned officer posts a political opinion, their subordinates may mistake it as an endorsement or, perhaps, even a command.

The DoD issued guidance for the 2016 election season, which supplements Directive 1344.10.[96] This policy attempted to provide more specific rules with regard to the use of social media.[97] Active duty members could generally express personal views on public issues or political candidates using social media, as this act is similar to writing a

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or be listed as a sponsor of a partisan club; or speak before a partisan political gathering. *Id.* para. 4.1.

[90] Participation includes more than mere attendance as a spectator. *Id.* para. 4.1.2.1

[91] *Id.* para. 4.1.2.

[92] *Id.* para. 4.1.4.

[93] *Id.*

[94] *Id*. para. 4.1.1.6. If the individual is identified as a servicemember on active duty, or if the member is otherwise reasonably identifiable as a member of the Armed Forces, the a statement that the views expressed are those of the individual only and not of the Department of Defense or Department of Homeland Security must be included. *Id*.

[95] If you comment on a post by another person, anyone who can see that post will see your comment. Only the person making the post has the ability to control the audience. *Privacy Basics: What Others See About You*, FACEBOOK, https://www.facebook.com/about/basics/what-others-see-about-you/ (last visited July 25, 2016).

[96] Memorandum from Office of the Secretary of Defense to Department of Defense, et al., subject: 2016 DoD Public Affairs Guidance for Political Campaigns and Elections (25 Aug. 2015) [hereinafter Public Affairs Memo].

[97] *Id.*

letter to the editor of a newspaper.[98] However, if that social-media site "identifies the member as on active duty (or if the member is otherwise reasonably identifiable as an active duty member)," the member must "clearly and prominently state that the views expressed are those of the individual" and not those of the DoD or Department of Homeland Security.[99] The problem with this guidance is that it does not provide servicemembers with enough information to know what makes them reasonably identifiable as an active-duty member. Is it necessary that the individual list their position in the active service on their profile? Or, is a picture of that individual in uniform enough?

The public affairs guidance makes it clear that active duty servicemembers "may not post or make direct links to a political party, partisan political candidates, campaign, group, or cause,"[100] because such acts are akin to distributing literature on behalf of those entities or individuals.[101] A servicemember may, however, "like" or "become a friend" of the very same entities or individuals as long as the member refrains from engaging in any activities[102] with regard to the "liked" or "friended" social media account.[103]

Even with this direction regarding how active duty servicemembers may participate in the online discussion of politics,[104] it remains unclear how much information is needed on a *Facebook* or *Twitter* profile to reasonably identify an individual as an active duty member, and therefore, whom the rules apply to. As in so many situations, the appearance of association or endorsement can cause as much harm as actual association or endorsement.[105] Therefore, it behooves an active duty servicemember

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[98] *Id.* para. 9.4.2. No letter to the editor of a newspaper may be part of a letter writing campaign. DoDD 1344.10, *supra* note 11, para. 4.1.1.6. This prohibition may be interpreted to include any action on social media where a user is asked to "Share/post/retweet this post/tweet to show your support."

[99] Public Affairs Memo, *supra* note 96, para. 9.4.2.

[100] *Id.* para. 9.4.2.

[101] *Id.*

[102] "Activities" is defined to include suggesting that others like, friend, or follow the political party, partisan political candidate, campaign, group, or cause or forwarding an invitation or solicitation from said entities to others. *Id.* para. 9.4.3.

[103] *Id.*

[104] Because these documents are policies that provide guidance and rely on subordinate commands for their application, their terms are not directly enforceable through the Uniform Code of Military Justice. *See infra* sec. V.D. for further discussion.

[105] *See* U.S. DEP'T. OF DEF., 5500.7-R, JOINT ETHICS REGULATION (JER) (30 Aug. 1993) (C7, 17 Nov. 2011) (containing additional information on how the appearance of a violation is as important to avoid as an actual violation).

to refrain from detailed discussions of partisan political activities or candidates in a partisan political race. "As all of us know, we are always a spokesman . . . always, even when we are not in uniform or are off duty. Credibility is our most important asset."[106]

Because DoDD 1344.10, regarding servicemember political speech is not punitive,[107] the only way to potentially punish any violation of the policy would be to first order a servicemember to cease committing violations of the policy, and then punish that individual for non-compliance using either Article 90 or 91 of the UCMJ, depending on who gave the cease and desist order.[108] Active duty members of the military are not the only government employees who must be cautious when discussing politics on social media. The rules for DoD civilians are just as complicated and, unfortunately, also lacking in detailed guidance.

*2. The Hatch Act*

Civilian employees make up almost twenty-five percent of the DoD.[109] Although commanders and supervisors need to understand how these regulations are different from those that regulate uniformed servicemembers, most do not.

The Hatch Act of 1939 restricted the partisan political activity of civilian executive branch employees of the federal government, District of Colombia government, and some state and local employees.[110] Its predecessor, the Pendleton Civil Service Reform Act of 1883,[111] laid the groundwork for Congress to restrict the political actions of government

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[106] Naval Air Facility, Washington, D.C., *Political Activities & Policies*, FACEBOOK (Oct. 4, 2012, 2:13 PM), https://m.facebook.com/notes/naval-air-facility-washington-dc/political-activities-policies/10151129119898 145.

[107] *See infra* Section V.D.

[108] Article 90 of the UCMJ punishes (in part) the willful disobedience of a superior commissioned officer. 10 U.S.C. § 890. *See infra* Section V.C. for further discussion of Article 91.

[109] DEMOGRAPHICS PROFILE, *supra* note 36.

[110] Hatch Act of July 19, 1940, ch. 640, Pub. L. No. 76-753, 54 Stat. 767 (1940).

[111] Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883). In the wake of President Garfield's assassination by a public office seeker, the act provided for the open selection of government employees and guaranteed the right of citizens to compete for federal appointment without regard to politics, religion, race, or national origin. *Pendleton Civil Service Act*, BRITANNICA, http://www.britannica.com/topic/Pendleton-Civil-Service-Act (last visited July 25, 2016).

employees.[112] The enactment of the 1939 Act was meant to ensure the political neutrality of government workers by barring partisan political activities of government employees, in order to prevent partisan elected officials from using government employees for their personal political purposes.[113] It also prevented public employees' loyalty from going to a single party or official, and insulated public employees from politically motivated employment actions.[114]

Although not addressing the Hatch Act directly, *Pickering v. Board of Education* is instructive for government (local, state, or federal) employees in understanding the government's interests behind the Hatch Act.[115] In *Pickering*, a public school teacher was removed from his position for writing a letter to the editor of a newspaper criticizing the school board's use of funds for athletes.[116] The Supreme Court, in reversing the removal, set forth a balancing test to weigh any conflict between personal and government interests:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon *matters of public concern* and the interest of the State, as an employer, in promoting efficiency of the public services it performs through its employees.[117]

The Hatch Act, specifically, survives this test.[118] In *U.S. Civil Service Commission v. National Association of Letter Carriers*, the Court identified four

> [O]bviously important [government] interests [which the Hatch Act is meant to uphold]: the impartial execution of the laws; maintaining public confidence in the system of

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[112] Shannon D. Azzaro, *The Hatch Act Modernization Act: Putting the Government Back in Politics*, 42 FORDHAM URB. L. J. 781, 788 (2015).
[113] James S. Bowman & Jonathan P. West, *State Government "Little Hatch Acts" in an Era of Civil Service Reform: The State of the Nation*, 29 REV. PUB. PERSONNEL ADMIN. 20, 21 (2009).
[114] *Id.*
[115] Pickering v. Board of Education, 391 U.S. 563 (1968).
[116] *Id.* at 564.
[117] *Id.* at 568 (emphasis added).
[118] U.S. Civil Serv. Comm'n, v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973) (holding that the Hatch Act does not prohibit speech on political matters; it only prohibits employees from being a partisan candidate, which is not a fundamental right); United Pub Workers v. Mitchell, 330 U.S. 75 (1947).

> representative government; not allowing the government workforce to be employed to build a powerful, invincible and perhaps corrupt political machine; and ensuring that advancement in the government service not depend on political performance.[119]

The Hatch Act Modernization Act (HAMA) passed in 2012,[120] after several constitutional challenges and attempts at incremental reform of the 1939 act,[121] was designed to reduce restrictions on federal employees, but still prohibit the use of "official authority or influence for the purpose of interfering with or affecting the result of an election," "knowingly solicit[ing], accept[ing], or receiv[ing] a political contribution" from certain persons, "run[ning] for the nomination or as a candidate for election to a partisan political office," or "solicit[ing] or discourag[ing] the participation in political activity of" certain persons.[122] Additionally, certain employees "may not take an active part in political management or political campaigns."[123] One of the changes the HAMA makes is the institution of penalties for federal employees, including "removal, reduction in grade, debarment from [f]ederal employment for a period not to exceed [five] years, suspension, reprimand, or an assessment of a civil

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[119] Briggs v. Merit Systems Protection Bd. 331 F.3d. 1307 (2003) (citing U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565–66, 93 S. Ct. 2880 (1973)). In *Briggs*, a social studies teacher for District of Columbia (D.C.) Public Schools was removed after he filed a Declaration of Candidacy to run on the D.C. Statehood Green Party slate for the Ward Two seat on the D.C. Council, in violation of the Hatch Act. *Briggs*, at 1310.

[120] Hatch Act Modernization Act of 2012, Pub. L. No. 112-230, 126 Stat. 1616.

[121] *See* Azzaro, *supra* note 112. The Supreme Court explored what interest the federal government has in its own employees and state employees, and whether this interest interferes with an employee's First Amendment rights. *See also* United Pub Workers v. Mitchell, 330 U.S. 75 (1947) (rejecting the argument that Congress may not constitutionally regulate the political activities of industrial workers to the same extent as administrative workers because the former are not in positions where impartiality in public matters is required); Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127 (1947) (affirming the action of the Commission withholding federal funds from the state until the state ordered suspension a member of the Oklahoma Highway Commission for Hatch Act violations).

[122] 5 U.S.C.A. § 7323 (2016).

[123] *Id.*

penalty not to exceed $1000.[124] Since this change, several federal employees have been removed based on violations of the HAMA.[125]

Recognizing that the HAMA's prohibitions are not always clear, the United States Office of Special Counsel (OSC) released "Frequently Asked Questions" (FAQ) to address how civilian employees may use social media and email in the context of political activity.[126] Most specifically, the OSC guidance outlines prohibitions against engaging in political activities while on duty, defining that status as: when the employee is "in a pay status, other than paid leave, or [is] representing the government in an official capacity."[127] The FAQ also provides some helpful examples of which actions are allowed and not allowed on social media.[128]

*3. Crossover*

It is important for those members of the Reserve component of the military who are also federal, state, or local government employees to understand the distinction between restriction of political speech for military members on active duty (or otherwise reasonably identifiable as an active duty member)[129] and those proscribed by the Hatch Act or any

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[124] Hatch Act Modernization Act of 2012 § 1618.

[125] U.S. Office of Special Counsel, *Press Release, U.S. Office of Special Counsel, MSPB Orders Removal of Employee for Hatch Act Violations*, OFFICE OF SPECIAL COUNSEL (June 18, 2015), https://osc.gov/News/pr15-13.pdf.

[126] U.S. Office of Special Counsel, *The Hatch Act: Frequently Asked Questions on Federal Employees and the Use of Social Media*, OFFICE OF SPECIAL COUNSEL, https://osc.gov/Pages/Hatch-Act-Social-Media-and-Email-Guidance.aspx (last visited July 25, 2016). *See also* Joe Davidson, *Hatch Act do's and dont's for federal employees*, WASH. POST (Oct. 30, 2014), https://www.washingtonpost.com/news/federaleye/wp/2014/10/30/hatch-act-dos-and-donts-for-federal-employees/; *Hatch Act Advisory Opinions*, OFFICE OF SPECIAL COUNSEL, https://osc.gov/pages/advisory-opinions.aspx (last visited July 25, 2016).

[127] *Id.*

[128] *Id.*

[129] It is not impossible for a member of the reserve component to take part in partisan political activities. One of the most prominent examples of a U.S. Senator who was also an Air Force Judge Advocate is Sen. Lindsay O. Graham. *See* Craig Whitlock, *Sen. Graham Moved up in Air Force Reserve Ranks Despite Light Duties*, WASH. POST (Aug. 2, 2015), https://www.washingtonpost.com/world/national-security/for-lindsey-graham-years-of-light-duty-as-a-lawmaker-in-the-air-reserve/2015/08/02/c9beb9fc-3545-11e5-adf6-7227f3b7b338_story.html. *See also* Niels Lesniewski & Megan Scully, *Why Won't the Senate Let Joe Heck Become a General?*, ROLL CALL (Aug. 30, 2013, 3:00 PM), http://blogs.rollcall.com/wgdb/why-wont-senate-let-joe-heck-become-general-army-

similar state or local statute.[130] For civilian employees of the federal government, it is permissible to display a political party, campaign logo, or candidate photograph as their cover or header photo.[131] The same action may or may not be acceptable for that individual while in their military status.[132] None of the permissible political speech of federal employees may take place "while on duty or in the work place," because to do so would show support for a partisan group or candidate in a partisan race.[133] While a member of the federal civilian workforce may engage more freely in political discussion in a personal capacity when not at work or on duty, a servicemember in an active status does not remove his status when he takes off his uniform at the end of the day. Members of the reserve components must be aware of this distinction (as well as the fact that they may be reasonably identifiable as an active duty member on social media even when they are not in an active status), and proceed with caution when deciding to use political banners for their cover or header photos or to post information about their political ideals or leanings using social media.

## IV. Where Does This Leave Us?

The intersection where free speech meets military interests is lately a topic of much discussion,[134] and with good reason: as a contentious

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reserves/. A review of Representative Heck's Official *Facebook* page reveals no indication that he also serves in a military capacity. *Rep. Joe Heck, Government Official*, FACEBOOK, https://www.facebook.com/RepJoeHeck/timeline (last visited July 25, 2016).

130 For a discussion of the various state "Little Hatch Acts" *see* Rafael Gely & Timothy D. Chandler, *Restricting Public Employees' Political Activities: Good Government or Partisan Politics?*, 37 HOUS. L. REV. 775, 791–96 (2000).

131 U.S. Office of Special Counsel, *supra* note 123.

132 Whether or not it is acceptable is unclear, given the current guidance. *See* Public Affairs Memo, *supra* note 96, para. 9.4.2.

133 U.S. Office of Special Counsel, *supra* note 126.

134 Mitch Shaw, *Air Force Warns Airmen Against Talking Politics on Social Media*, MILITARY, http://www.military.com/daily-news/2016/02/09/air-force-warns-airmen-talking-politics-social-media.html (last visited July 25, 2016); Douglas Yeung & Olga Oliker, *Loose Clicks Sink Ships*, U.S. NEWS & WORLD REPORT (Aug. 14, 2015, 12:00 PM), http://www.usnews.com/opinion/blogs/world-report/2015/08/14/when-social-media-meets-military-intelligence; Brian Adam Jones, *The Sexist* Facebook *Movement The Marine Corps Can't Stop: The story of women in the military you haven't heard, and the Marine Corps doesn't want you to know*, TASK AND PURPOSE (Aug. 20, 2014), http://taskandpurpose.com/ sexist-facebook-movement-marine-corps-cantstop/?utm_source=internal&utm_medium=internal&utm_ campaign=speech; Brian Adam Jones, *4 Ridiculous Ways the Military Limits Freedom of Speech*, TASK AND PURPOSE (Aug. 22, 2014), http://taskandpurpose.com/4-ridiculous-ways-military-limits-freedom-speech/.

election has come and gone, and future elections appear to be similarly adversarial, it is imperative that servicemembers understand what political commentary on social media is permissible. But elections are not the only need for worry. The proliferation of official military social media sites and its continued use by senior military leadership makes sites like *Facebook* and *Twitter* part of a servicemember's daily life. In a world where social media users are conditioned to transparency and accustomed to posting their every thought and opinion to social media, it is unfair for the military to hold servicemembers accountable for their speech when it is unclear what speech is (specifically) prohibited, and what is not.

In an attempt to clarify the issue, each of the services has addressed online conduct through their respective social-media handbooks. Of course no two are the same, each provides some generalized insight for servicemembers on the appropriate use of social media. For example, the Coast Guard handbook lays out the difference between official, unofficial, and personal use of social media.[135] The Air Force social media guide refers airmen to Air Force Instruction 1-1 and reiterates the idea of personal responsibility for anything said or posted on social media.[136] The Navy guide, while mostly geared toward commanders and official use, reminds sailors to add a disclaimer that the opinions being shared are their own and do not represent the command or the Navy's viewpoints. However, there is no explanation of when such a disclaimer must be used.[137] The Marine handbook provides much of the same general information, as well as a reminder that violations of regulations or policies may result in disciplinary action under the Uniform Code of Military Justice (UCMJ).[138] The current Army guide only relates to official use of social media.[139] Each service attempts to provide some guidelines and remind servicemembers that improper use of social media may result in action under the UCMJ, but only the Air Force mentions any specific article of the code (Article 88) and none describe what types of speech

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[135] COAST GUARD HANDBOOK, *supra* note 45. "Official: Engaging on social media *is* your job and you are doing it on behalf of the Coast Guard. Unofficial: Engaging on social media *is related* to your job, but you are doing so in a personal capacity. What you are posting online mentions the Coast Guard, your job or your experience. Personal: Engaging on social *is not related* to our job. What you are posting does *not* mention the Coast Guard *in any way*. *Id.* at 3 (emphasis added).

[136] AIR FORCE HANDBOOK, *supra* note 45, at 4. *See also* U.S. DEP'T OF AIR FORCE, INSTR. 1-1, AIR FORCE STANDARDS para. 2-15 (7 Aug. 2012) [hereinafter AFI 1-1].

[137] NAVY HANDBOOK, *supra* note 45, at 6.

[138] MARINE CORPS HANDBOOK, *supra* note 45, at 7.

[139] ARMY HANDBOOK, *supra* note 45.

may cause issues in any detail.[140] Even when cobbled together, these handbooks do not provide a clear picture of the acceptable ways servicemembers can use social media.

Perhaps in an attempt to fill the gap in guidance on the appropriate use of social media, the Army issued All Army Activities (ALARACT) Message 122/2015[141] and has produced a plan for the promotion of professional online conduct,[142] the discussion of which follows.

### A. All Army Activities Message 122/2015

The ALARACT Message 122/2015 provides some helpful information to all servicemembers (not just soldiers) as to what type of behavior is unacceptable in an online setting, by providing some key definitions. It defines online conduct as well as online misconduct and electronic communication which helps to clarify the context of the speech to be regulated.[143] Online conduct is the use of electronic communication in an *official or personal* capacity that is consistent with the Army Values and standards of conduct.[144] Online misconduct is defined as the use of electronic communication to inflict harm.[145] The examples provided in the ALARACT describing what constitutes online misconduct cover a wide range of conduct,[146] but does not cover all the actions that might cause a soldier to run afoul of the UCMJ. Most of the actions described are prohibited by regulation rather than by statute, and the "harm" described seems to be focused toward preventing harm to other individuals, rather than any potential harm that statements may have on the chain of command or the Army's ability to maintain good order and

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[140] The Air Force guide, after stating that all regulations that "normally apply" to airmen apply, explains that "speaking disrespectful words in violation of the UCMJ" is problematic. AIR FORCE HANDBOOK, *supra* note 45, at 4.

[141] All Army Activities Message, 122/2015, 271301Z Jul 15, U.S. Dep't of Army, subject: ALARACT Professionalization of Online Conduct [hereinafter ALARACT 122/2015].

[142] Memorandum from Sec'y of Army to Principal Officials of Headquarters, Dep't of Army et al., subject: Implementation Plan—Professionalization of Online Conduct (16 June 2015).

[143] ALARACT 122/2015, *supra* note 141, para. 3A.

[144] *Id.* para. 3B.

[145] *Id.* para. 3C.

[146] Examples given include harassment, bullying, hazing, stalking, discrimination, retaliation, or any other types of misconduct that undermine dignity and respect. *Id.* para. 4.

discipline.[147] Furthermore, the message itself is not punitive and does not actually create new misconduct; it merely reminds soldiers of some of the ways that online speech may be problematic. The Army's plan for the regulation of and training about professional online behavior, discussed in the next section, may be an attempt to fill the remaining gap.

### B. Secretary of the Army Memorandum—Professionalization of Online Conduct

On June 16, 2015, the Secretary of the Army published a memorandum providing an implementation plan assigning primary and supporting roles in the "Army effort to promote professional Online Conduct by current and future [s]oldiers, Army civilians, contractors, and [f]amily members."[148] In addition, the memorandum lays out the Army's view of how social media is affecting the force.

> The evolution of the Internet, social media, and other electronic communications media over the last decade has altered how people communicate and interact. Protected by a sense of anonymity and lack of accountability, some individuals in society are participating in inappropriate and potentially harmful interactions using electronic communications. For organizations, this type of behavior undermines trust within and damages their public reputation. The Army must take the initiative to clarify its standards for Online Conduct. As members of the Army Team, our individual interactions offline and online reflect on the Army and our values. Therefore, it is crucial that we act responsibly and understand that Army standards of conduct apply to all aspects of our life, including Online Conduct. Harassment, bullying, hazing, stalking, discrimination, retaliation, and any other type of misconduct that undermines dignity and respect are not consistent with the Army Values. Individuals who participate in or condone misconduct, whether offline or

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[147] "Hazing, bullying and other behaviors that undermine dignity and respect" are prohibited by regulation and made punishable under the UCMJ. AR 600-20, *supra* note 88, para. 4-19.

[148] ALARACT 122/2015, *supra* note 141.

> online, may be subject to criminal, disciplinary, and/or administrative action.[149]

The plan's goal is to clarify standards for online conduct through three lines of effort: Policy/Regulation, Training, and Awareness.[150] The awareness campaign, "Think, Type, Post" was launched in 2015 and is designed to educate and inform the Army family on the proper use of electronic communications.[151] The policy/regulation aspect of the plan calls for updating current policies, regulations, contracts and agreements, as well as creating a tracking system for online-related incidents.[152] The plan for training is to update existing "treatment of persons," Equal Opportunity, and Equal Employment Opportunity policies, as well as computer user training.[153] While the object of the training update is to "train current and future [s]oldiers, Army [c]ivilians, and contractors how to protect themselves, identify and prevent inappropriate behavior, and report online-related incidents,"[154] the focus of the implementation plan is clearly meant to deal with online behavior surrounding and incident to the Army's current battle to end sexual assault and sexual harassment within the ranks. Such a focus, while timely and appropriate, is nevertheless too narrow and leaves soldiers to deal with other types of online misconduct on their own. Any training related to online conduct must necessarily address what types of conduct to refrain from, but should also include information for soldiers on how they can protect themselves online by managing privacy settings.[155]

## C. A Step in the Right Direction?

The efforts by the services to inform their members of the acceptable limits for online conduct are laudatory, but, taken together, they do not present a complete picture of the current state of the law that regulates servicemember speech. Additionally, the regulation the Secretary of the

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[149] *Id.*
[150] *Id.*
[151] *STAND TO!: Online Conduct—Think, Type, Post*, ARMY (June 16, 2015), http://www.army.mil/standto/ archive_2015-06-16/.
[152] ALARACT 122/2015, *supra* note 141. An "online-related incident" is one where an electronic communication is used as the primary means for committing misconduct, or the electronic communication, standing alone, constitutes the most serious offense among a number of offenses. *Id.*
[153] *Id.*
[154] *Id.*
[155] *See* App. A, *infra* for training recommendations.

Army describes in his memorandum would be encompassed in Army regulations only,[156] and would not affect the regulation of speech by the other services: each service would need to create its own regulation and policy, which would undoubtedly differ from one another. Today's military operates in a mostly joint environment,[157] and social media use occurs throughout the DoD. The creation of an Army regulation does not assist the other services, and each service will likely handle the issue of online misconduct in a slightly different fashion.

If the goal is to clarify what acceptable online behavior is, simple and straightforward is better. Soldiers, sailors, airmen, marines, and coast guardsmen should be able to consult a single source to determine what conduct is prohibited. Rules regarding bullying, hazing and sexual harassment should not vary between services. Judges should not have to grapple with whether a regulation is actually punitive, as it may purport to be.[158] Many of the provisions of the UCMJ are applicable to online conduct in their current form,[159] and others can be easily modified to incorporate online misconduct.[160]

## V. Wave-Tops and Undertows

Each of the articles of the UCMJ discussed in the following section are either currently applicable to online misconduct or should be amended to allow for its incorporation. No discussion of the current state of the UCMJ is complete without reference to the recommendations made by the Military Justice Review Group (MJRG).[161] For each of the articles discussed, the MJRG used the UCMJ as the baseline for reassessing the statute's effectiveness and applicability to current military practice, and has made recommendations to Congress as to whether any change should

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[156] ALARACT 122/2015, *supra* note 141.

[157] JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 2015 (2015).

[158] *See* discussion of Article 92, *infra* Sect. V.D.

[159] *See* 10 U.S.C. §§ 889, 891, 894, 933 (2012).

[160] Use of the term "online misconduct" in this paper is not an adoption of the definition provided in ALARACT 122/2015. The term is meant to encompass a broader scheme of misconduct. ALARACT 122/2015, *supra* note 141.

[161] The Military Justice Review Group (MJRG) was formed at the direction of the Secretary of Defense, on the recommendation of the Joint Chiefs of Staff, to complete a holistic review of the UCMJ in order to ensure that it effectively and efficiently achieves justice consistent with due process and good order and discipline. REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 5 (2015) [hereinafter MJRG REPORT].

be made.[162] Where the MJRG made relevant recommendations regarding statutory changes, those recommendations are also discussed here.

## A. Contemptuous Words

Article 88 of the UCMJ prohibits commissioned officers from using contemptuous words against certain senior government officials.[163] Contemptuous words are those which are insulting, rude, disdainful, or otherwise disrespectfully attribute to another a quality of meanness, disreputableness, or worthlessness.[164] Historically, this provision dates back to the British Articles of War, which were largely adopted at the beginning of the Revolutionary War.[165] Under the Continental Congress's Articles of War in 1775, any officer or enlisted person behaving with "contempt or disrespect toward the general or general's, or commanders in chief of the continental forces, or [] speak[ing] false words, tending to his or their hurt or dishonor" could be punished by a court-martial.[166] While the persons against whom contemptuous speech is prohibited has

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[162] *Id*. at 5–8 (2015). In some cases, they recommended no change to the position of the statute within the UCMJ, to a provision's language, or both. *Id*. In reaching their conclusions, the MJRG was guided by five principles, set out by the DoD General Counsel:

> 1. Use the current UCMJ as a point of departure for baseline reassessment;
> 2. Where they differ with existing military practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial of criminal cases in the United States district courts should be incorporated into military justice practice;
> 3. To the extent practicable, UCMJ articles and MCM provisions should apply uniformly across the military services;
> 4. Consider any recommendations, proposals, or analysis relating to military justice by the Response Systems Panel; and
> 5. Consider, as appropriate, the recommendation, proposals, and analysis in the report of the Defense Legal Policy Board, including the report of that Board's Subcommittee on Military Justice in a Combat Zone.

*Id*. at 5–6.

[163] 10 U.S.C. § 888 (2012).

[164] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES BENCHBOOK para. 3-12-1*d* (1 Sept. 2014) [hereinafter DA PAM 27-9]. *See also* Lieutenant Colonel Michael J. Davidson, *Contemptuous Speech Against the President*, ARMY LAW. July 1999.

[165] United States v. Howe, 37 C.M.R. 429 (1967).

[166] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 953–54 (photo reprint 1920) (2d ed. 1896).

changed,[167] the purpose behind the statute remains the same: it promotes the military's interest in ensuring a qualified, effective force.[168]

Only one appellate case has involved this particular charge,[169] but the facts of the case are informative as to why the charge remains relevant in the age of social media. In *United States v. Howe*, a Second Lieutenant (Lt.) in the U.S. Army joined in a rally against the Vietnam War, carrying a sign that read, "Let's have more than a choice between petty ignorant facists [sic] in 1968" on one side, and "End Johnson's facist [*sic*] aggression in Viet Nam" on the other.[170] At the time of the rally, Howe was off-duty and in civilian clothes, but was recognized as a member of the military due to a lieutenant's rank emblem and Army sticker on his vehicle.[171] A military policeman who was present at the demonstration testified that he recognized three or four other servicemembers at the scene.[172]

The fact that the appellee in *Howe* was recognized as affiliated with the Army, even though he was not present in uniform or acting in an official capacity, lends this provision of the UCMJ its continued usefulness. On this point the court noted, "There is no means of knowing the number of other servicemen who may have been present, not in uniform, and not identified by the [military police officer]; nor the number of servicemen who may have seen the petitioner marching, on the films broadcast by the television stations."[173] Consequently, the article prevents such conduct from harming the morale and discipline of those other servicemembers.

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[167] Prior to the enactment of the 1950 Uniform Code of Military Justice, Article 62 of the Articles of War applied to both officers and "any other person subject to military law." Articles of War 62 of 1920.

[168] MJRG REPORT, *supra* note 161, at 718.

[169] *Id.* at 717.

[170] *Howe*, 37 C.M.R. at 432. Lieutenant Howe was convicted under Article 88 and also Article 133, UCMJ, Conduct Unbecoming an Officer and a Gentleman, and sentenced to a dismissal, total forfeitures, and confinement at hard labor for two years, which the convening authority reduced to one year. The appellate court affirmed his conviction. *Id.*

[171] Matthew B. Tully, *Watch what you say: Speech limitations under UCMJ*, ARMY TIMES (Aug. 27, 2007, 12:22 PM), http://archive.armytimes.com/article/20070827/BENEFITS 08/708270305/Watch-what-you-say-Speech-limits-under-UCMJ.

[172] *Howe*, 37 C.M.R. at 433.

[173] *Id.* The demonstration was recorded by at least two local television stations. *Id.*

*Facebook*, *Twitter*, and even *YouTube*[174] broadcast information to a much larger audience than a local television station did in 1967. "Giving broad circulation to a written publication containing contemptuous words of the kind made punishable by [the] article, or the utterance of such contemptuous words in the presence of military inferiors" aggravates the nature of the offense.[175] Posting words like those used by Lt. Howe on a *Facebook* page or *Twitter* account would make that opinion known to anyone with access to the page. This might include junior members of the military or direct subordinates. To make matters worse, any individual present at a demonstration or similar event taking place in 2016 could record the event on a smartphone and post it to *Facebook* or *Twitter* without the knowledge of the participating servicemember (this essentially happened to Howe, who could be seen on the television broadcast of the rally[176]).

The current text of the statute reads:

> Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth or possession in which he is on duty or present shall be punished as a court-martial may direct.[177]

With one minor change, the article could better serve its purpose. Specifically, the language "in which he is on duty or present" when referring to contemptuous words against the governor or legislature of any state is unnecessarily limiting in light of the ability of an officer to post, tweet, or retweet from anywhere in the world.

The *Congressional Record* discussing the creation of the UCMJ does not directly address the requirement of physical presence in a state or

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[174] "Launched in May 2005, *YouTube* allows billions of people to discover, watch, [sic] and share originally-created videos. *YouTube* provides a forum for people to connect, inform, and inspire others across the globe and acts as a distribution platform for original content creators and advertisers large and small." *About YouTube*, YOU TUBE, https://www.youtube.com/yt/about/ (last visited July 25, 2016).

[175] *Howe*, 37 C.M.R. at 444 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. XXVIII, ¶ 167 (1951)). The current version of the *Manual for Courts-Martial* contains similar language. *See* MCM, *supra* note 26, pt. IV, ¶ 12c.

[176] *Id.* at 433.

[177] 10 U.S.C. § 888 (2012).

territory, though the provision has been part of the Articles of War since the Continental Congress adopted them in 1776.[178] It is relatively clear, however, from the language of the statute that the purpose is to preserve the authority of a Governor or legislator within their territory. Keeping that official's constituents from hearing insulting, rude, or disdainful language uttered about their governmental leaders in a non-political or private context helps maintain the respect and dignity of these officials. Yet, the possibility of an individual's contemptuous words coming to light and having an effect on the local community grows, depending on the number of social media sites used, the number of friends or followers an officer has and the privacy settings used by that individual. Transparency on such a global scale requires that the text of the statute be modified to bring the code in line with the ability of modern technology to widely disseminate information.[179]

B. Disrespect of a Superior Commissioned Officer

The prohibition against disrespecting a superior commissioned officer is an obvious and necessary restriction of servicemember speech,[180] but not all types of disrespectful speech regarding a superior commissioned officer are actionable under this statute. The language, action, or failure to act must be directed at the officer, and the accused must know that the individual is a superior commissioned officer.[181] The disrespect contemplated by the statute is more than discourtesy or rudeness and must be that which detracts from the respect due to the authority and person of a superior commissioned officer.[182] Additionally, the words must be conveyed to, against, or in reference to the officer in question.[183] The disrespect may come in the form of gestures or actions, so long as those actions are directed toward a superior commissioned officer,[184] and the

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[178] *Howe*, 37 C.M.R. 429, (citing WINTHROP, *supra* note 168).
[179] *See infra* App. B.
[180] 10 U.S.C. § 889 (2012).
[181] MCM, *supra* note 26, pt. IV, ¶ 13.b(2)(4).
[182] U.S. v. Sorrells, 49 C.M.R. 44, 45 (C.M.A. 1974) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶168 (1969) (Revised edition)).
[183] *Sorrells*, 49 C.M.R. at 45 (citing WINTHROP, *supra* note 168, at 467–68). Private Sorrells's conviction under Article 89 was overturned because, though he yelled and used profanity in an altercation with a captain, that officer was not the subject of his rant. *Id.*
[184] United States v. Van Beek, 47 C.M.R. (C.M.A. 1973). Sergeant Van Beek was convicted under Article 89 for detonating a chemical hand grenade on the windowsill of Captain Reams's quarters. *Id.*

context in which the speech occurs may also be taken into account in determining whether it qualifies as disrespect.[185]

This provision has the flexibility to be useful in the social-media context, because the officer at which the words are directed need not necessarily be present to hear them. Rather than saying the words directly to the officer, posting the same to the officer's social-media account is likely sufficient to satisfy the "directed at" requirement. Posting about a superior commissioned officer on a personal page,[186] or on the unit page, would also likely meet the requirement. Additionally, the officer at whom the speech is directed need not be in the execution of her office at the time of the disrespectful behavior.[187] Therefore, any disrespectful posting, be it words, pictures, or other content that is directed at any superior commissioned officer in the service, could be punishable under this article.[188]

It is unlikely that a single act of disrespect would cause a servicemember to face a court-marital, but it is not unreasonable to fathom non-judicial consequences under Article 15, UCMJ,[189] or administrative action flowing from online acts of disrespect. The proliferation of senior leader *Facebook* and *Twitter* accounts, combined with a culture of transparency of thought, requires servicemembers to be more guarded with their thoughts about senior leaders on social media. An ill-placed post on a senior leader page, containing "opprobrious epithets or other

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185 United States v. Najera, 52 M.J. 247 (C.A.A.F. 2000).

186 It is not essential that the disrespectful behavior be in the presence of the superior, but ordinarily one should not be held accountable for what was said or done in a purely private conversation. MCM, *supra* note 26, pt. IV, ¶ 13.c(4). If the only audience to the conduct were not members of the military, for example a *Facebook* page with only a few specific members, then an analysis of the surrounding facts and circumstances would need to determine whether the conversation was truly private.

187 MCM, *supra* note 26, pt. IV, ¶ 13.c(1)(c).

188 The MJRG recommended incorporating "assaulting a superior commissioned officer," which is currently codified in Article 90, UCMJ, into Article 89. The proposal "would align similar offenses under Article 89." These two offenses use the same definition of superior commissioned officer; however, assault of a superior commissioned officer under Article 90 currently requires the officer to be in the execution of his office. The assault or offer of assault as described in the language of the current Article 90 is unlikely to take place online; nevertheless, it is important for military justice practitioners to be aware of the potential change. In the near future, the posting of disrespectful words followed by a physical assault on a superior officer (or vice-versa) could result in the charging of both under a modified version of Article 89. MCM, *supra* note 26, pt. IV, ¶ 14.b(1)(d). Assumedly, the technical amendments discussed by the MJRG would include a syncing of this element. MJRG REPORT, *supra* note 161, at 720.

189 10 U.S.C. § 815 (2012).

contumelious or denunciatory language"[190] regarding that leader, could easily land a servicemember in hot water, and likely spell the end of that individual's career in the military.

C. Insubordination

The conduct prohibited by Article 91, UCMJ, is similar to that which is prohibited under Article 89, except that it proscribes insubordinate conduct toward a warrant officer, noncommissioned officer, or petty officer.[191] The provision is broken into three parts, two of which are relevant to the current discussion.[192] Both the willful disobedience of a warrant officer, noncommissioned officer, or petty officer, and contemptuous or disrespectful language or deportment towards those persons are prohibited,[193] and each is relevant to the regulation of servicemember conduct on social media.

For the violation of an order to be punishable, it must be a lawful order that the accused has a duty to obey, and the accused must know that the individual giving the order is a warrant officer, noncommissioned officer, or petty officer.[194] Additionally, the order cannot be one to perform the general duties of a servicemember, but must be directed toward the "performance or nonperformance of some *special function*."[195] Any such order must also "relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline and usefulness of members of a command, and directly connected with the maintenance of good order in the service."[196] Interestingly, there need not be a superior-subordinate relationship between the accused and his victim for a violation of Article 91. A sergeant (E-5) can be the victim of disrespect from a staff sergeant (E-6).[197]

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[190] U.S. v. Sorrells, 49 C.M.R. 44, 45 (C.M.A. 1974).
[191] 10 U.S.C. § 891 (2012).
[192] The statute also addresses the assault of a warrant officer, noncommissioned officer, or petty officer. 10 U.S.C. § 891(1) (2012).
[193] 10 U.S.C. § 891(2)(3) (2012).
[194] MCM, *supra* note 26, pt. IV, ¶ 15.b(2).
[195] United States v. Bratcher, 18 U.S.C.M.A 125, 128 (C.M.R. 1969).
[196] United States v. Washington, 57 M.J. 394, 398 (C.A.A.F 2002) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14.c(2)(a)(iii)(2000)).
[197] United States v. Diggs, 52 M.J. 251 (C.A.A.F. 2000).

While willful disobedience of a warrant officer, noncommissioned officer, or petty officer does not require the officer to be acting in the execution of his office, any contemptuous treatment or disrespectful language or deportment toward the same individual does require that he be executing his official position.[198] An individual is "in the execution of office when engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage."[199] Some contemptuous treatment or disrespectful deportment must certainly take place in a face-to-face situation; however, it is easy to see how the use of disrespectful language need not be so. A warrant officer or enlisted member of a service could post all manner of disrespectful content to their own social media accounts (which are likely to have an audience including others subordinate to or who work with the victim), on the social media account of the victim, or to the unit's official social media sites (where the audience is sure to know the victim and such statements would have a direct effect on the morale or good order and discipline of the unit).[200]

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[198] MCM, *supra* note 26, pt. IV, ¶ 15.b(3)(e). A "language only" specification for disrespect does not exist. United States v. Najera, 52 M.J. 247 (C.A.A.F. 2000) (overruling United States v. Wasson, 26 M.J. 894 (A.F.C.M.R. 1988)). *Najera* dealt with an Article 89 offense, but *Wasson* was an Article 91(3) case, so it is reasonable to believe that the reasoning from *Najera* applies to Article 91(3) offenses. *See* DAVID A. SCHLUETER ET AL., MILITARY CRIMES AND DEFENSES § 5.10[5][a] n.497 (2d ed. 2012). *See also* Major Timothy Grammel, *Justice and Discipline: Recent Developments in Substantive Criminal Law*, ARMY LAW. (April 2001).

[199] MCM, *supra* note 26, pt. IV, ¶ 14.c(1)(b).

[200] One limitation to this provision is the requirement that the victim be in the execution of duties. The limitation is unfortunate in the face of military efforts to stop retaliation against sexual assault victims. *See* Sara Childress, *How the Military Retaliates Against Sexual Assault Victims*, FRONTLINE (May 18, 2015), www.pbs.org /wgbh/frontline/artile/ how-the-military-retaliates-against-sexual-assault-victims/. Some fifty-two percent of women who officially reported sexual assaults in 2014 perceived some form of social retaliation. SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY, VOLUME 2. ESTIMATES FOR DEPARTMENT OF DEFENSE SERVICE MEMBERS FROM THE 2014 RAND MILITARY WORKPLACE STUDY 93 (Andrew R. Morral, et al. eds., 2015). Many report being harassed, physically attacked, or threatened by *their peers*. *Embattled: Retaliation against Sexual Assault Survivors in the U.S. Military*, HUMAN RIGHTS WATCH (May 18, 2015), https://www.hrw.org/report/2015/o5/18/embattled/retaliation-against-sexual-assault-survivors-us-military (emphasis added). The ability to charge warrant officers and enlisted members who disrespect victims who report sexual assault—who are their peers in a social media context—would provide greater deterrence than the current system, where such actions are punishable only as a violation of a lawful regulation under Article 92, UCMJ. AR 600-20, *supra* note 88, ch. 8; *see also* Judicial Proceedings Panel Request for Information Set #3, Question 81, 82, http://jpp.whs.mil/Public/docs/03_Topic-Areas/06-Retaliation/20150519/05_JPP_RFI_Set3Q67-88_201505.pdf (last visited Oct. 17, 2016).

D. Violation of a Lawful General Order or Regulation

Any person subject to the UCMJ who violates or fails to obey any lawful order or regulation may be charged under Article 92, UCMJ.[201] A general order or regulation is presumed lawful so long as there is a valid military purpose, which is expressed in a clear, specific, narrowly drawn mandate.[202] The order or regulation must be directed at a group that includes the accused,[203] and it must also be punitive.[204]

Currently, Article 92 is the mechanism by which the military punishes hazing, bullying, and sexual harassment[205]—all of which can take place in an online setting. This use of a regulation as the middleman to punish behavior can lead to issues, because whether a regulation is punitive or not is a matter on which reasonable minds can differ. "No single characteristic of a general order determines whether it applies punitively to members of a command.[206] In *United States v. Green*, the Army Court of Criminal Appeals lays out how courts should analyze orders and regulations to determine their punitive nature.[207] First, a court must determine whether the directive is merely a guideline for conduct, or intended to regulate the conduct of individual servicemembers.[208] Second, the application of sanctions for violations of an order or regulation must be self-evident.[209] Third, the order or regulation cannot rely on subordinate commanders for implementation to give its effect as a code of conduct.[210] Regulations that do not meet these requirements cannot be enforced using Article 92.

Each service has its own policies when it comes to hazing, bullying, and sexual harassment through the use of social media. Army Regulation 600-20, paragraph 4-19, prohibits bullying and hazing, while Chapter 7

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Written retaliation could also be potentially punished with a charge under Article 134, Indecent Language. *See infra* Section I.1.

[201] 10 U.S.C. § 892 (2012).

[202] MCM, *supra* note 26, pt. IV, ¶ 14.c(2)(a)(iii).

[203] United States v. Jackson, 46 C.M.R. 1128 (A.C.M.R. 1973) (finding that a regulation was intended to guide military police rather than individual soldiers).

[204] *See* United States v. Pope, 63 M.J. 68 (C.A.A.F. 2006); *see generally* Captain John B. DiChiara, *Article 92: Judicial Guidelines for Identifying Punitive Orders and Regulations*, 17 A.F. L. REV. 61 (1975).

[205] *See* United States v. Asfeld, 30 M.J. 917 (A.C.M.R. 1990); United States v. Hecker, 42 M.J. 640 (A.F. Ct. Crim. App. 1995).

[206] United States v. Nardell, 45 C.M.R 101, 103 (A.C.M.R. 1972).

[207] United States v. Green, 58 M.J. 855 (A. Ct. Crim. App. 2003).

[208] *Id.* at 857.

[209] *Id.*

[210] *Id.*

deals exclusively with the prevention of sexual harassment.[211] While paragraph 4-19 is clearly punitive, whether or not Chapter 7 is punitive is not clear.[212] The Navy proscribes sexual harassment and hazing (but does not address bullying) through two separate policies, both of which are clearly punitive.[213] The Air Force also uses two policies to prohibit sexual harassment and hazing.[214] The regulation addressing sexual harassment purports to make harassment based on sexual orientation punitive, but no other section of that regulation is specified as punishable under the UCMJ.[215] The Marine Corps orders are explicitly punitive,[216] but neither of the Coast Guard instructions are likely punitive.[217] Within the current state of the law, very few actions of sexual harassment and hazing can be punished by the services under Article 92.[218]

The only other current option comes in the form of Article 93, UCMJ, but that application is extremely limited. Article 93 of the UCMJ proscribes the "cruelty toward, or oppression or maltreatment of, any person *subject to his orders*."[219] This means that any act of sexual harassment, hazing, or bullying that occurs between peers, by a subordinate to a superior, or is directed toward a civilian cannot be charged under this statute. The limited application of Article 93, along with the

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[211] AR 600-20, *supra* note 88, para. 4-19, ch.7.

[212] *Id.* Recently, an Army military judge found Chapter 7 of Army Regulation (AR) 600-20 failed to meet the requirements set out by *Green*, and dismissed a charge of sexual harassment under Article 92. United States v. Patterson, at 37 (1st Armored Div., Ft. Bliss, TX, Aug. 20, 2015) (on file with author).

[213] U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5300.26, DEPARTMENT OF THE NAVY POLICY ON SEXUAL HARASSMENT (3 Jan. 206) [hereinafter SECNAVIST 5300.26]; U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 1610.2A, DEPARTMENT OF THE NAVY PUBLIC AFFAIRS POLICY ON HAZING (15 Jul. 2005) [hereinafter SECNAVIST 1610.2A].

[214] AFI 1-1, *supra* note 133; U.S. DEP'T OF AIR FORCE, INSTR. 36-2706, EQUAL OPPORTUNITY PROGRAM MILITARY AND CIVILIAN (5 Oct. 2010) [hereinafter AFI 36-2706].

[215] AFI 36-2706, *supra* note 213, para. 1.1.3. Cyber-bullying also takes place in the form of "slut-shaming," which is often encountered by victims of sexual assault as a form of retaliation. *See* Emily Poole, *Hey Girls, Did You Know? Slut-Shaming on the Internet Needs to Stop*, 48 U.S.F. L. Rev. 221 (2013).

[216] U.S. MARINE CORPS, ORDER 1000.9A, SEXUAL HARASSMENT (30 May 2006) [hereinafter MCO 1000.9A]; U.S. MARINE CORPS, ORDER 1700.28B, HAZING (20 May 2013) [hereinafter MCO 1700.28B].

[217] U.S. Coast Guard, Commandant Instr. M5350.4C, Coast Guard Civil Rights Manual (May 2010) [hereinafter COMDTINST M5350.4C]; U.S. Coast Guard, Commandant Instr. 1610.1, Hazing Awareness Training (23 Jan. 1991) [hereinafter COMDTINST 1610.1].

[218] For a more detailed discussion of the services bullying and hazing regulations *see* Major Stephen M. Hernandez, *A Better Understanding of Bullying and Hazing in the Military*, 223 MIL. L. REV. 415 (2015).

[219] 10 U.S.C. § 893 (2012).

inability to punish under Article 92, left huge gaps in the services' current ability to enforce their policies to discourage sexual harassment and hazing.[220] Currently, only the Army has any regulation against bullying.[221]

Like so many of the issues that come with the wide-spread use of social media, the potential that servicemembers will bully, haze, and harass using *Facebook* or *Twitter* calls for a unified approach to the regulation of these offenses across the services. The most straightforward way to accomplish that is by adding these offenses to the UCMJ.[222] Because any statute would regulate the speech of servicemembers who still have the right to say mean things about each other in certain contexts, the best place for a provision would be a specified offense under Article 134, UCMJ.[223] Placing these offenses within Article 134 would require any Internet posting that harasses, is harmful, uses demeaning language, or contains content as part of a rite of passage or hazing to have a military nexus;[224] therefore, it would be less likely to run afoul of the First Amendment.

### E. Mutiny

Mutiny is a term that many associate with the Navy of yesteryear, or perhaps with the 1962 film *Mutiny on the Bounty*, starring Marlon Brando.[225] In reality, mutiny is still a charge under the UCMJ,[226] and it is still in use.[227] There are two types of mutiny that can be committed.[228] Because it is not a charge seen often, it is worth setting out the elements in full:

([1]) *Mutiny by refusing to obey orders or perform duty*

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[220] *See also supra* note 199 and accompanying sources.
[221] AR 600-20, *supra* note 88, para. 4-19.
[222] *See infra* App. C–E.
[223] 10 U.S.C. § 934 (2012); *see also infra* Section I.
[224] Under Article 134, UCMJ, conduct must either be prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. 10 U.S.C. § 934 (2012).
[225] MUTINY ON THE BOUNTY (Metro-Goldwin-Mayer 1962).
[226] There are also several federal laws that prohibit similar acts. *See* MJRG REPORT, *supra* note 161, at 741.
[227] In 2013, a case was decided at the Army Court of Criminal Appeals regarding a charge of mutiny, among other things. United States v. Savage, 72 M.J. 560 (A.C.C.A. 2013).
[228] United States v. Duggan, 15 C.M.R. 396, 398 (C.M.A. 1954).

> (a) That the accused refused to obey orders or otherwise do the accused's duty;
>
> (b) That the accused in refusing to obey orders to perform duty acted in concert with another person or persons; and
>
> (c) That the accused did so with the intent to usurp or override lawful military authority.[229]
>
> ([2]) *Mutiny by creating violence or disturbance*.
>
> (a) That the accused created violence or a disturbance; and
>
> (b) That the accused created this violence or disturbance with intent to usurp or override lawful military authority.[230]

The first type of mutiny may be committed by a refusal to obey orders from a proper authority, if the necessary intent to override military authority and concerted action are present.[231] In the second type, a person with a similar intent, either acting alone or with others, creates violence or disturbance may commit mutiny.[232]

The first type of mutiny must be committed in a group, and it is this form of mutiny, one which does not always end in violence, that is most applicable to the social media context. In order to meet the elements of the statute, both a collective intent and a collective action are necessary.[233] The action itself need not be violent; it may consist of a persistent and concerted refusal or omission to obey orders.[234] To return to the hypothetical *Facebook* post by General Gates at the beginning of this paper: imagine that the day after the post appeared, a group of officers met to discuss the issue, and that after that discussion, they refused to pick up their arms and fight when ordered to do so. Such action would likely

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[229] MCM, *supra* note 26, pt. IV, ¶ 18.b(2). The elements for the two types of mutiny are listed in the *Manual* in the opposite order listed here, however, to remain consistent with the analysis in *Duggan*, they have been reversed for this discussion.
[230] *Id.* pt. IV, ¶ 18.b(1).
[231] *Duggan*, 15 C.M.R. at 398.
[232] *Id.*
[233] United States v. Woolbright, 31 C.M.R. 36 (C.M.A. 1961).
[234] *Duggan*, 15 C.M.R. 396.

be a mutiny of the first type, if the act were done with the proper intent.[235] If the officers never met, but merely made positive responses to the post and then took the same concerted action, the discussion on *Facebook* would—at the very least—serve as evidence of their collective intent. To illustrate with a modern-day example, if Lieutenant Colonel Terrance Lakin had a *Facebook* page, he might have called other soldiers to join him in refusing a lawful order to deploy.[236]

It is possible that in the second type of mutiny, communications on social media by individuals involved in a violent plot to overthrow military authority could be used to prove intent that the overthrow was the purpose behind an action. This could also be true for information posted to an individual's *Facebook* page, as this second form of mutiny does not require a collective.[237]

## F. Provoking Speech

There are certain well-defined and narrowly-limited classes of speech that have never been thought to raise constitutional issues when prevented and punished. These classes include speech that is lewd and obscene; profane; libelous; insulting; or "fighting words"—speech, which, by its very utterance, inflicts injury and tends to incite an immediate breach of

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[235] A collective intent to defy authority would fall short of a collective intent to usurp or override military authority. United States v. Snood, 42 C.M.R. 635, 640 (A.C.M.R. 1970).

[236] *See* Jerome R. Corsi, *Officer Imprisoned for Challenging Obama Tells Story*, WND (Aug. 10, 2012, 9:21 PM), www.wnd.com/2012/08/officer-imprisoned-for-challenging-obama-tells-his-story/. In 2008, after questioning President Obama's eligibility for office, then-Lieutenant Colonel (LTC) Terry Lakin refused orders to deploy to Afghanistan, stating, "I don't know who my commander-in-chief is." Sharon Rondeau, *Dr. Terry Lakin: Congressmen Admitted They Did Not Know Who Obama Is*, BIRTHER REPORT, http://www.birtherreport.com/2015/02/dr-terry-lakin-congressman-admitted.
html. Thus, LTC Lakin was charged with missing movement (Article 87, UCMJ) and four specifications of failure to obey a lawful order (Article 92). United States v. LTC Terrence Lakin, No. 20100995, at Charge Sheet (Walter Reed Army Medical Center, Washington, D.C., Dec. 16, 2010). He pleaded guilty to some of the charges, was convicted of others, and was sentenced to a dismissal from the service and six months in prison. Huma Khan, *'Birther' Dismissed from Army for Refusing Deployment, Sentenced to Six Months in Prison*, ABC NEWS (Dec. 10, 2010), http://abcnews.go.com/Politics /birther-terry-lakin-dismissed-army-sentenced-months-prison/story?id=12414886.

[237] *See* Dennis v. United States, 341 U.S. 494, 71 S. Ct. 857 (1951). Today, the Communist Political Association could post information to a website or official *Facebook* page in order to further their goals.

peace.[238] Article 117 of the UCMJ is the military's codification of this principle.[239]

The military's attempts to prevent the use of violence by a person to whom such speeches or gestures are directed, and forestall the commission of an offense by an otherwise innocent party, predates the Court's carving out of the "fighting words" doctrine by several hundred years.[240] Because the regulation of speech walks a thin line between what is protected speech and what is not, the speech and gestures proscribed by Article 117 must be made in the presence of the person to whom they are directed; however, that person need not be conscious of them.[241] Additionally, the speech or gestures—by their very utterance—must be of a nature that a reasonable person would respond violently or turbulently[242] or, because of its nature, likely to lead to quarrels, fights, or other disturbances.[243] Such a reaction must be of an immediate nature.[244] The right to use abusive epithets has been held to be of slight social value,[245] which is outweighed by a state's interest in order. The military's interest in maintaining morale and good order and discipline is stronger still.

The requirement that the speech occur in the presence of the individual toward whom it is directed and provoke an immediate response makes it difficult to use this provision to charge online conduct, but it may not be impossible. In *Nebraska v. Drahota*, the Nebraska Supreme Court analyzed whether the fighting-words doctrine could be applied to personally abusive speech when conveyed in a targeted, one-on-one fashion.[246] The *Drahota* court looked specifically at an email exchange between a college student and his former professor.[247] The court ultimately ruled that Drahota's emails did not constitute fighting words; they concluded that the words would have provoked an immediate and

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[238] Chaplinsky v. New Hampshire, 314 U.S. 568, 571–72 (1942).

[239] The military courts use an objective test to identify provoking speech—whether a reasonable person would expect the words to induce a breach of the peace. *See* United States v. Killion, No. S32193, 2015 WL 430323, at *5 (A.F. Ct. Crim. App. Jan. 28, 2015) *review granted* 75 M.J. 14 (C.A.A.F. June 3, 2015).

[240] *See* DAVID A. SCHLUETER ET AL., MILITARY CRIMES AND DEFENSES § 5.38[2] (2d ed. 2012).

[241] *Id.* at § 5.38[3][b][i].

[242] United States v. Nicolas, 14 C.M. R. 683 (A.F.B.R. 1954).

[243] United States v. Davis, 37 M.M 152, 155 (C.M.A. 1993).

[244] *See* Cantwell v. State of Connecticut, 310 U.S. 296, 309–10 (1940); *Chaplinsky*, 314 U.S.at 571–72; DA PAM 27-9, *supra* note 166, para. 3-42-1*d.*

[245] State v. Broadstone, 233 Neb 595, 447 N.W. 2d 30 (1989).

[246] State v. Drahota, 280 Neb. 627, 629-30 (2010).

[247] *Id.*

turbulent response, but despite this, found they were political speech.[248] The court also discussed the fact that the professor could not have retaliated, because he did not know who the sender was, and therefore would not have known against whom to retaliate.[249]

Applying this concept to social media, *Drahota* could criminalize situations where words expressed on one-on-one online platforms (i.e., email, text, *Facebook Messenger*) are sufficiently inflammatory as to incite violence or turbulence, because the words would be directed at a particular individual who could readily know both the identity of the sender and where to locate that person. Such a case under Article 117 would be very fact-specific and a charge under this Article should be used sparingly, if ever. A slight amendment to this statute, to include the reality of posting inflammatory speech to social media, would give this statute greater relevance.[250]

G. Cyber-stalking

Twenty-six percent of young women aged eighteen to twenty-four have been stalked online,[251] and social media is the most common place to encounter this type of harassment.[252] The military's current statute proscribing stalking does not encompass cyber-stalking.[253] The MJRG has recommended that cyber-stalking be added to the statute, along with provisions for threats to intimate partners.[254] Additionally, the MJRG has recommended moving the statute away from Article 120, UCMJ, recognizing that stalking is not necessarily sexual in nature, though it can be.[255]

The language proposed by the MJRG is very similar to that of the current federal statute criminalizing cyber-stalking,[256] with one significant exception. The statute recommended by the MJRG addressed only courses of conduct that would cause or induce a reasonable fear of death or bodily

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[248] *Id.* at 638.
[249] *Id.*
[250] *See infra* App. F.
[251] Maeve Duggan, *Online Harassment*, PEW RES. CENT. (Oct. 22, 2014), http://www .pewinternet.org. 2014/10/22/online-harassment.
[252] *Id.*
[253] 10 U.S.C. § 920 (2012).
[254] MJRG REPORT, *supra* note 161, at 878.
[255] *Id.*
[256] 18 U.S.C.A. § 2261A (2013).

harm (including sexual assault),[257] leaving a course of conduct that would cause or reasonably be expected to cause substantial emotional distress unaddressed.[258] The report further identified actions that might cause emotional distress, or that target professional reputation, as uniquely military; therefore, they determined such conduct is more appropriately dealt with through regulation, or as an enumerated offense under Article 134.[259] However, this drafting fails to address what could be serious misconduct.

Not every case of stalking will cause the victim to be in fear of bodily harm, but it may cause the victim to be unable to work or function on a day-to-day basis. Causing severe emotional distress is not necessarily a military-specific offense. Additionally, while such conduct may be contrary to good order and discipline, or service discrediting in some cases, that may not always be true, and need not be to make the conduct punishable. Recent cases out of the federal circuit courts have held that because 18 U.S.C. § 2216A proscribes harassing and intimidating conduct, it is not facially invalid under the First Amendment.[260] Specifically, because the statute criminalizes a "course of *conduct* that . . . causes . . . substantial emotional distress," the proscribed acts are tethered to the underlying criminal conduct, and not to speech.[261] Finally, "because the statute requires both malicious intent on the part of the defendant and substantial harm to the victim, it is difficult to imagine what constitutionally protected speech would fall under these statutory prohibitions."[262] "It has rarely been suggested that the constitutional freedom of speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."[263] Following this reasoning, causing substantial emotional distress should be included in any update to the UCMJ stalking provision

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[257] MJRG REPORT, *supra* note 161, at 879. The intent to cause or reasonably expect to cause substantial emotional distress is specifically provided for in the federal statute. 18 U.S.C.A. § 2261A(2)(B) (2013). The MJRG report notes that "substantial emotional distress" may be addressed under Article 134, a uniquely military offense. MJRG Report, *supra* note 158, at 881. The language present in the federal statute suggests that it is not uniquely military in nature and, therefore, should be addressed in a broader form.

[258] *Id.* at 880–81.

[259] *Id.*

[260] United States v. Osinger, 753 F.3d 939, 944 (9th Cir. 2014) (citing United States v. Petrovic, 701 F.3d 849 (8th Cir. 2012)).

[261] *Osinger*, 753 F.3d at 944 (emphasis in original) (internal citation omitted).

[262] *Petrovic*, 701 F.3d at 856; *see also* United States v. Sayer, 748 F.3d 425, 434 (1st Cir. 2014) (rejecting a facial challenge to 18 U.S.C. § 2261A(2)(A) on similar grounds).

[263] United States v. Stevens, 559 U.S. 460, 471 (2010).

in order to make such conduct punishable, and cause the language to mirror the federal statute.[264] Anything less would necessarily fall short of upholding the standards of conduct expected of military members.

## H. Conduct Unbecoming an Officer and Gentleman

Conduct that occurs in an official capacity that is disgraceful or dishonors a person as an officer, seriously compromises an officer's character as a gentleman, or that occurs in an unofficial or private capacity but dishonors or disgraces an officer personally, and therefore seriously compromises the person's standing as an officer, is conduct unbecoming of an officer and a gentleman in violation of Article 133, UCMJ.[265] The given definition for conduct unbecoming is extremely broad and lends itself easily to the regulation of online conduct by commissioned officers. Though the statute is imprecise, it has been upheld against a void-for-vagueness challenge on several occasions.[266] As explained by the courts, the statute may proscribe any conduct that a reasonable person under the circumstances would understand to be proscribed.[267]

Case law provides samples of unbecoming conduct that could foreseeably occur in an online setting. In *United States v. Hartwig*, for instance, Captain Hartwig responded to a "Dear Soldier" letter, which was delivered to him during Operation Desert Storm.[268] His response was overtly sexual in nature and asked the fourteen-year-old girl who sent the letter to send him her fantasies, and a nude photograph, and asked whether she would like to visit a nude beach.[269] The Court of Military Appeals found that such private speech can constitute a violation of Article 133,[270] and that speech need not be published before it can be punishable.[271] This exchange could easily have taken place over email or using an instant messaging service; or, rather than a "Dear Soldier" letter, CPT Hartwig

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[264] *See infra* App. F for the statute proposed by the MJRG, plus the additional language which would cover substantial emotional distress.
[265] MCM, *supra* note 26, pt. IV, ¶59.c(2).
[266] *See* Parker v. Levy, 417 U.S. 733, 743 (1974); United States v. Zander, 46 M.J. 558 (N-M. Ct. Crim. App. 1997).
[267] United States v. Van Steenwyk, 21 M.J. 795, 801–02 (N.M.C.M.R. 1985).
[268] United States v. Hartwig, 39 M.J. 125, 127 (C.M.A. 1994).
[269] *Id.*
[270] *Id.* at 128. *See also* United States v. Norvell, 26 M.J. 477 (C.M.A. 1988) (upholding a conviction under Article 133 for language from an officer to an enlisted woman that described how to avoid detection of marijuana use in a urinalysis).
[271] *Hartwig*, 39 M.J. at 128.

might have met the young woman on *Facebook*. If that were the case, the information on her *Facebook* page could be used to show a lack of mistake of fact as to her age.[272] *Hartwig* is also instructional in that its holding makes clear the prosecution need not prove actual damage to the reputation of the military, but rather only the tendency of the language to cause damage.[273]

In a second case, *United States v. Boyett*, the appellant was convicted of engaging in an unprofessional social relationship, including sexual intercourse, with an enlisted servicemember.[274] Communications between the parties to the relationship that occurred offline could have easily taken place using an instant messenger or other social media platform, especially if one member was deployed. While unprofessional relationships between officers and enlisted personnel can be charged (with respect to the officer) under Article 133, all members of the services must also be aware of their own policies against fraternization between the ranks so as not to violate the customs of their service.[275]

## I. Article 134, the Catch-All

The general article of the UCMJ covers all other "disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons . . . may be guilty."[276] Any act that a servicemember commits, or fails to commit, that is prejudicial to good order and discipline, or is of a nature to bring discredit upon the armed forces[277] may be charged under this article, unless it is addressed in a more specific statute.[278] The specified offenses laid out in Article 134 are created by Executive Order.[279] Two of the specified offenses are of particular relevance to efforts to regulate online misconduct: indecent language and communicating a threat.

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[272] A mistake of fact as to age was part of Hartwig's defense. *Id.* at 130.
[273] *Id.*
[274] United States v. Boyett, 42 M.J. 150 (C.A.A.F. 1995).
[275] MCM, *supra* note 26, pt. IV, ¶ 60.b(1)(2).
[276] 10 U.S.C. § 934 (2012).
[277] MCM, *supra* note 26, pt. IV, ¶ 60.b(1)(2).
[278] *Id.* at pt. IV, ¶ 60.c(5)(a).
[279] *Id.* at 1.

*1. Indecent Language*

The First Amendment does not protect obscenity.[280] "Indecent" is synonymous with "obscene," and such language is not afforded constitutional protections.[281] Language that is communicated, either in writing or orally, by an accused to another person that is indecent and either prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces can be charged under the current version of Article 134, UCMJ.[282] "Indecent language" is words that are grossly offensive or shock the moral sense,[283] or which reasonably tend to corrupt morals or incite libidinous thoughts.[284]

Indecent language that is communicated in an online forum is punishable under this article. In *United States v. Lambert*, the Air Force Court of Criminal Appeals addressed whether speech conveyed in a *private* chat room could still be regulated.[285] The appellant's argument that indecent language between two consenting adults is constitutionally protected was unpersuasive to the court in light of *United States v. Moore*, where the Court of Military Appeals held that while "the personal relationship existing between a given speaker and his auditor,"[286] is a factor in determining whether the language is indecent it does not otherwise provide constitutional protection to language that "was demeaning vulgarity interwoven with threats and demands for money and sex."[287]

If language of an indecent nature is not constitutionally protected when spoken between consenting adults, it is certainly not protected when broadcast to a greater audience on social media. Additionally, any

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[280] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973); Roth v. United States, 354 U.S. 476, 485 (1957).
[281] United States v. French, 31 M.J. 57, 59 (C.M.A. 1990).
[282] MCM, *supra* note 26, pt. IV, ¶ 89.b.
[283] United States v. Lambert, No. 38291 2014 WL 842966, at *2 (A. F. Ct. Crim. App Feb. 24, 2014).
[284] MCM, *supra* note 26, pt. IV, ¶ 89.c.
[285] *Lambert*, No. 38291 2014 WL at *1. *See also* United States v. Moore, 38 M.J. 490 (C.M.A. 1994) (holding that the indecent remarks of the appellant were not protected by the First Amendment and that indecent language, even between two consenting adults, is not constitutionally protected by the right of privacy).
[286] United States v. French, 31 M.J. 57, 59 (C.M.A. 1990).
[287] *Moore*, 38 M.J. at 492–93.

indecent language communicated via *Facebook Messenger*,[288] even to another consenting adult, may be punishable.

The types of language that could be charged using this provision are numerous, but because of the requirement that the words tend to incite libidinous thoughts, disrespectful or contemptuous language is not appropriate for a charge under this section of the code. Such language would need to be addressed by Article 91 (for a noncommissioned, warrant or petty officer in the execution of her officer) or Article 89 (for an officer). A wide gap in the ability of the military to punish language directed at senior enlisted members or used in retaliation in a social media context still exists.

*2. Communicating a Threat*

The government's efforts to criminalize the communication of a threat have seen substantial attention in the last year.[289] Currently, the elements of this offense are as follows:

> (1) That the accused communicated certain language expressing a present determination to intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;
>
> (2) That the communication was made known to that person or to a third person;
>
> (3) That the communication was wrongful; and
>
> (4) That, under the circumstances, the conduct of the accused was to the prejudice of goo order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[290]

In *Elonis v. United States*, the Supreme Court looked at a similar federal statute that made a communication in interstate commerce of a

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[288] *Messenger* is a *Facebook* mobile application that allows for sending text-type messages, photos, videos, and more. *Facebook Mobile Apps*, FACEBOOK, https://www.facebook.com/help/237721796268379 (last visited Sept. 12, 2016).

[289] *See* Elonis v. United States, 135 S. Ct. 2001 (2015); United States v. Rapert, 75 M.J. 164 (C.A.A.F. Mar. 18, 2016).

[290] MCM, *supra* note 26, pt. IV, ¶110b.

threat to kidnap or injure another person a crime.[291] The statute did not require that the accused have any mental state with respect to the language communicated.[292] The Court found that this lack of mens rea within the statute rendered it unenforceable, because the accused must know that his conduct fits the definition of an offense; therefore, he must have intended his statements as a threat.[293] In response to the decision in *Elonis*, the Joint Services Committee released a recommend change to the explanation portion of the Article 134 offense for public comment.[294]

The MJRG addressed the future of communicating a threat under Article 134, and recommended that it be removed from the Article and combined with a "[t]hreat or hoax designed or intended to cause panic or public fear"—which is also currently a specified offense under 134—and recommended creation of a new offense, Article 115.[295] It is clear from the Court of Appeals for the Armed Forces' (CAAF) decision in *United States v. Rapert* that the changes proposed by the Joint Services Committee and the MJRG are not necessary to avoid the dilemma presented in *Elonis*.[296] In *Rapert*, the CAAF explained that, as written, Communicating a Threat under Article 134, UCMJ contains both an objective and subject prong.[297] An objective approach is taken when analyzing whether a communication constituted a threat under the first element—the existence of a threat should be evaluated from the point of

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[291] *Elonis*, 135 S. Ct. at 2008; 18 U.S.C. § 875(c).
[292] *Elonis*, 135 S. Ct. at 2008.
[293] *Id.* at 2013.
[294] MCM; Proposed Amendments, 80 Fed. Reg. 63209 (Oct.19, 2015). The proposed change recommended by the Joint Services Committee would amend the explanation to read:

> c. *Explanation*. For purposes of this paragraph, to establish that the communication was wrongful it is necessary that the accused transmitted the communication for the purpose of issuing a threat, with the knowledge that the communication would be viewed as a threat, or acted recklessly with regard to whether the communication would be viewed as a threat. However, it is not necessary to establish that the accused actually intended to do the injury threatened. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving injury to another.

*Id*.
[295] MJRG REPORT, *supra* note 161, at 855.
[296] United States v. Rapert, 75 M.J. 164 (C.A.A.F. Mar. 18, 2016). *See also infra* App. H for the statute proposed by the MJRG.
[297] *Rapert*, 75 M.J. at 168.

view of a reasonable person.[298] The third element of the offense, which requires a threat to be "wrongful" is understood to reference the accused's subjective intent.[299]

Though the CAAF has determined "the infirmities found in 18 U.S.C. § 875(c) are not replicated Article 134, UCMJ,"[300] the Supreme Court decision in *Elonis* provides two helpful insights into the conversation of criminalizing online conduct. First, it shows that what someone posts to *Facebook*, or to another other social media site, if done with the requisite intent, can be the basis of a charge of communicating a threat. In *Elonis*, all of the language—which included photographs—was posted to the appellant's *Facebook* page.[301] Second, it reiterates that threatening speech against others falls outside the realm of First Amendment protections.

## VI. Conclusion

Opting out of connective media is not an option.[302] The military has rightly embraced the culture of social media for the benefit of servicemembers. Yet, the creation of new policy in an attempt to regulate the online speech of servicemembers, without acknowledging the applicability of the current statute, and updating of the UCMJ where necessary, is an incomplete measure.

Any plan proposed by the Department of the Army, or any other military department, is woefully inadequate if it does not contemplate how the UCMJ applies. Currently, legal involvement in the proposed implementation plan is minimal; the Office of The Judge Advocate General must be involved in updating regulations where there is a potential for future criminal liability.[303] The focus of the current implementation plan on issues pertaining to sexual harassment, hazing, bullying, and disrespect are too narrow to encompass the broad range of unprotected speech that may be used via electronic means. Additionally, issues persist with current prosecutions of sexual harassment under Article 92, and the creation of new or updated regulations may only exacerbate the problem.

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298 *Id.* (citing United States v. Phillips, 42 M.J. 127, 129 (C.A.A.F 1995).
299 *Id.* at 169.
300 *Id.* at 168.
301 *Elonis*, 135 S. Ct. at 2005–07.
302 VAN DIJK, *supra* note 30, at 174.
303 ALARACT 122/2015, *supra* note 141, encl. 1.

Though the regulation of unprotected speech is a complicated matter, the solution is simple: The creation of a single body of law that is adaptable "to an ever-changing, technological world"[304] will provide guidance to understand the limitations of free speech. The laws that govern the actions of our soldiers, sailors, airmen, marines and coast guardsmen, once amended, would ensure a fair and equal application across services.

The difficult task for leaders is to convince the digital natives that once they put on the uniform, everyone sees them—even if it is through social media—and sees them as representatives of the U.S. military.[305] Having one punitive code with which to enforce this idea, and a comprehensive understanding of how it applies in a digital age, will give commanders the power to maintain the morale and good order and discipline of their units.

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[304] Poole, *supra* note 214, at 260.

[305] United States v. Wilcox, 66 M.J. 442, 462 (C.A.A.F. 2008) (citing John Keenan, *The Image of Marines*, MARINE CORPS GAZETTE, May 2008, at 3).

## Appendix A. Training Recommendations

The following are recommended topic areas for training on the use of social media.[306] All servicemembers, regardless of rank should be provided the training outlined in the right-hand column. Any member serving in a leadership role should also be provided the training outlined on the left, as the risk of improper influence is greater in such positions.

| Leader Training | Servicemember Training |
|---|---|
| Do encourage servicemembers to vote. Never imply that they should vote for a particular party or individual. | Remember to register and vote.[307] |
| Use social media to follow political and military issues.<br>• If you are going to post/share/tweet information first consider your audience—could your action be seen as an endorsement?<br>• Will the things you say reflect poorly on your fellow servicemember?<br>• Will your words be seen as disrespectful of a superior commissioned officer? | Use social media to follow political and military issues.<br>• Before you post/share/tweet information think about your audience.<br>• Will the things you say reflect poorly on your fellow servicemembers?<br>• Will your words be seen as disrespectful of a superior commissioned officer?<br>• Will your words be seen as disrespectful to your senior enlisted leadership? |

[306] This training could be integrated into any unit training concerning elections or given as stand-alone training. It is recommended that the public affairs officer, the G-6, or a judge advocate give training on this topic.

[307] The Federal Voting Assistance Program is a great resource for servicemembers who will vote in an absentee status. FEDERAL VOTING ASSISTANCE PROGRAM, https://www.fvap.gov (last visited July 26, 2016). *See also* Military Voter Protection Project, *Listen Up! Are you Election Ready?*, FACEBOOK, https://www.facebook.com/142143492483536/videos/689519355714/ (last visited Sept. 13, 2016).

| | |
|---|---|
| • Will your words be seen as disrespectful to your senior enlisted leadership?<br><br>• Are your words about the President or another senior elected official insulting, rude or disdainful?<br><br>• Can your words be interpreted as directing other members to refuse to obey lawful orders?<br><br>• Can your words be interpreted as intent to overthrow a lawful military authority? | • Are your words about the President or another senior elected official insulting, rude or disdainful?<br><br>• Can your words be interpreted as encouraging other members to refuse to obey lawful orders?<br><br>• Can your words be interpreted as intent to overthrow a lawful military authority? |
| Understand social media privacy settings.[308]<br><br>• Update your social media privacy settings and encourage your servicemembers to do the same.<br><br>• Each time to post/share/tweet, check the audience. | Update your social media privacy settings.<br><br>• Each time to post/share/tweet, check the audience. |
| Consider operational security at all times-do clues in the background of photographs or details of travels provide the | Consider operational security at all times-do clues in the background of photographs or details of travels |

[308] *Facebook* has tutorials taking the user through what the privacy settings mean and how to adjust them to individual wants and needs. *See Privacy Basics*, *supra* note 95.

| | |
|---|---|
| location of military forces which should not be shared? | provide the location of military forces which should not be shared? |
| Disable geotagging on any device used to access social media.[309]<br><br>• Tagging of a photograph can create threats by providing coordinates to government buildings and training areas. | Disable geotagging on any device used to access social media.<br><br>• Tagging of a photograph can create threats by providing coordinates to government buildings and training areas. |
| Have a basic understanding of restrictions on political speech for civilian employees<br><br>• Encourage them to see their union representative or labor counselor with questions | Be familiar with Hatch Act limitations<br><br>• Are you also a member of a reserve component?<br><br>• If so, make sure the information from your social media accounts is appropriate under both civilian and military rules |

[309] *See* Yeung & Oliker, *supra* note 134.

## Appendix B. Article 88, UCMJ Update Recommendations

The current text of Article 88, UCMJ is as follows.[310] Language recommended for deletion is crossed out.

§ 888. Art. 88. Contempt Toward Officials

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Territory, Commonwealth, or possession ~~in which he is on duty or present~~ shall be punished as a court-martial may direct.[311]

[310] 10 U.S.C. § 888 (2012).

[311] The textual explanation of the statute located in the MCM should make clear that any of these actions are still punishable if done using an interactive computer service, an electronic communication service, or an electronic communication system, when the words used are intended to lessen the authority of that person or body.

Appendix C. New Provision—Article 134, Hazing

For all offenses under Article 134, UCMJ, the language of the statute is the same.[312] The elements of the proposed addition to Article 134 addressing Hazing are as follows:[313]

(*b*) *Elements*

(1) That the accused committed an act;

(2) That the act of the accused willfully or recklessly created a substantial risk of injury to the physical or mental health of another person;

(3) That the act was done without proper authority;

(4) That the act was done during the course of a person's initiation or affiliation with any formal or informal group or organization; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(*c*) *Explanation.*

(1) Acts that may constitute hazing may result from any form of initiation, rite of passage, or congratulatory act that includes but is not limited to:

(a) Physical brutality, such as whipping, beating, striking, branding, electronic shock, placing a harmful substance on the body, or other similar activity;

(b) Physical activity such as forced calisthenics or exposure to the elements;

(c) Activity involving consumption of a food, liquid, alcoholic beverage, liquor, drug, or other substance that subjects the other person

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[312] 10 U.S.C. § 934 (2012).

[313] For the creation of this proposed Article, several sources were consulted. AR 600-20, *supra* note 88, para. 4-19; TEX. EDUC. CODE ANN. § 37.151-154 (West 2015); N.Y. PENAL Law §120.16-7 (McKinney 2015); MASS. GEN. LAWS ANN. ch. 269, § 17 (West 2015).

to an substantial risk of harm or that adversely affects the mental or physical health or safety of the person;

(d) Extreme mental stress including extended deprivation of sleep or rest or extended isolation.

(*d*) *Consent*

That the person against whom the conduct was directed consented to or acquiesced in the activity is not a defense.

(*e*) *Proper Authority*

When authorized by the chain of command and/or operationally required, the following conduct does not constitute hazing:

(1) The physical and mental hardships associated with operations and operational training;

(2) Lawful punishment imposed pursuant to another Article of the UCMJ;

(3) Administrative corrective measure, including verbal reprimands and command-authorized physical exercises.

(4) Extra military instruction or corrective training that is a valid exercise of military authority needed to correct a member's deficient performance;

(5) Physical training and remedial physical training; and

(6) Other similar activities that are authorized by the chain of command and conducted in accordance with applicable service regulation.

Appendix D. New Provision—Article 134, Bullying

For all offenses under Article 134, UCMJ, the language of the statute is the same.[314] The elements of the proposed addition to Article 134 addressing Bullying are as follows:[315]

(*b*) *Elements*

(1) The accused committed an act by means of written, verbal, or electronic expressions, or physical acts or gestures, or any combination thereof;

(2) The act was directed at a person or group of persons with the intent to exclude or reject that person or persons from inclusion in a group;

(3) The act had the effect of:

(a) Physically harming the person or property of another;

(b) Placing another in reasonable fear of physical harm to the person or their property;

(c) Creating an intimidating or hostile work environment; or

(d) Substantially interfering with the duty performance of the person or the ability of a person to participate in or benefit from services or activities provided by the service; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(*c*) *Explanation*

(1) Acts that may constitute bullying include but are not limited to:

(a) Repeated or pervasive taunting, name-calling, belittling, mocking or use of put-downs, or demeaning humor regarding the actual or perceived race, color, national origin, ancestry, religion, gender identity or

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[314] 10 U.S.C. § 934 (2012).

[315] For the creation of this proposed Article, several sources were consulted. AR 600-20, *supra* note 88, para. 4-19; NEV. REV. STAT. § 388.122 (West 2011); CAL. EDUC. CODE ANN. § 32282 (West 2011); VA. CODE ANN. § 22.1-279.6 (West 2011).

express, sexual orientation, mental disability of a person, sex or any other distinguishing characteristics or background of a person;

(b) Behavior that is intended to harm another person by damaging or manipulating his or her relationships with others, to include their leadership or chain of command, by conduct that includes but is not limited to the spreading of false rumors; or

(c) Repeated or pervasive nonverbal threats or intimidation such as the use of aggressive, menacing, or disrespectful gestures.

(*d*) *No Proper Authority*

Though this conduct may appear to be corrective training, it is never authorized or permissible.

Appendix E. New Provision—Article 134, Sexual Harassment

For all offenses under Article 134, UCMJ, the language of the statute is the same.[316] The elements of the proposed addition to Article 134 addressing Sexual Harassment are as follows:[317]

(*b*) *Elements*

(1) The accused made unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal or physical conduct of a sexual nature when:

(a) Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job or career;

(b) Submission to or rejection of such conduct by a person is used as a basis or career or employment decisions affecting that person; or

(c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile or offensive working environment.

(*c*) *Explanation*

(1) Unwelcome behavior is behavior that a person does not ask for and which a reasonable person would consider undesirable or offensive.

(2) Sexual harassment does not only occur in a supervisor-supervisee relationship; the harasser and victim may be of the same rank or coworkers. The harasser may also be junior in rank to the victim.

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316 10 U.S.C. § 934 (2012).

317 For the creation of this proposed Article, several sources were consulted. AR 600-20, *supra* note 88, ch. 7; AFI 36-2706, *supra* note 213, at 150; MCO 1000.9A, *supra* note 215, encl. 1; COMDTINST M5350.4C, *supra* note 216, 2-C.9-11; SECNAVIST 5300.26, *supra* note 215, Encl. 1–2.

Appendix F. Article 117, UCMJ Update Recommendations

The statutory language of Article 117 would remain the same.[318] A paragraph should be added to the *Explanation* portion contained in the MCM.[319] The paragraph would read as follows:

(*c*) *Explanation*

(3) Words or gestures used in the presence of the person to whom they are directed may include those sent from a location where an individual communicating by electronic means would reasonably expect to be confronted with such words.

[318] 10 U.S.C. § 917 (2012).
[319] MCM, *supra* note 26, pt. IV, ¶ 42.c.

## Appendix G. MJRG Proposal—Article 130, Stalking

The new Article of the UCMJ proposed by the MJRG to address cyberstalking and threats to intimate partners reads as follows.[320] Recommended additional language designed to bring the UCMJ more in-line with the federal statute is located inside the brackets.

§930. Art. 130. Stalking

(a) IN GENERAL.—Any person subject to this chapter—

(1) Who wrongfully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner;

(2) Who has knowledge, or should have knowledge, that the specific person will be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner; and

(3) Whose conduct induces reasonable fear in the specific person of death or bodily harm including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner; [or]

[(4) Who wrongfully engages in a course of conduct which causes, attempts to cause, or would reasonably be expected to cause substantial emotional distress to a specific person, a member of his or her immediate family or his or her intimate partner;]

is guilty of stalking and shall be punished as a court-martial may direct.

(b) DEFINITIONS.—In this section:

(1) The term 'conduct' means conduct of any kind, including use of surveillance, the mails, an interactive computer service, an electronic communication service, or an electronic communication system.

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[320] MJRG REPORT, *supra* note 161, at 878–80.

(2) The term ‘course of conduct’ means—

(A) A repeated maintenance of visual or physical proximity to a specific person;

(B) A repeated conveyance of verbal threat [sic], written threats, or threats implied by conduct, or a combination of such threats, directed at or toward a specific person;

(C) A pattern of conduct composed of repeated acts evidencing a continuity of purpose.

(3) The term ‘repeated’, with respect to conduct, means two or more occasions of such conduct.

(4) The term ‘immediate family’, in the case of a specific person, means—

(A) That person’s spouse, parent, brother or sister, child, or other person to whom he or she stands in loco parentis; or

(B) Any other person living in his or her household and related to him or her by blood or marriage.

(5) The term ‘intimate partner’ in the case of a specific person, means—

(A) A former spouse of the specific person, a person who shares a child in common with the specific person, or a person who cohabitates with or has cohabitated as a spouse with the specific person; or

(B) A person who has been in a social relationship of a romantic or intimate nature with the specific person, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

Appendix H. MJRG Proposal—Article 115, Communicating Threats

The new Article of the UCMJ proposed by the MJRG to address communicating threats reads as follows:[321]

§915. Art. 115. Communicating Threats

(a) COMMUNICATING THREATS GENERALLY.—Any person subject to this chapter who wrongfully communicates a threat to injury the person, property, or reputation of another shall be published as a court-martial may direct.

(b) COMMUNICATING THREAT TO USE EXPLOSIVE, ETC.—Any person subject to this chapter who wrongfully communicates a threat to injury the person or property of another by use of (1) an explosive; (2) a weapon of mass destruction; (3) a biological or chemical agent, substance, or weapon; or (4) a hazardous material, shall be punished as a court-martial may direct.

(c) FALSE THREAT CONCERNING USE OF EXPLOSIVE, ETC.—Any person subject to this chapter who maliciously communicates a false threat concerning injury to the person or property of another by use of (1) an explosive; (2) a weapon of mass destruction; (3) a biological or chemical agent, substance, or weapon; or (4) a hazardous material, shall be punished as a court-martial may direct. As used in the preceding sentence, the term "false threat" means a threat that, at the time the threat is communicated, is known to be false by the person communicating the threat.

[321] MJRG Report, *supra* note 161, at 855–56.