IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	RESPONSE BRIEF ON BEHALF OF APPELLEE
v.	Crim. App. Dkt. No. 20080009
Specialist **PHILLIP L. PIERCE** United States Army, Appellant	**USCA Dkt. No. 11-0239/AR**

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Granted Issue

WHETHER THE ARMY COURT OF CRIMINAL APPEALS INCORRECTLY FOUND THAT THE MILITARY JUDGE'S FAILURE TO INSTRUCT ON THE NECESSARY ELEMENTS OF AN OFFENSE WAS HARMLESS BEYOND A REASONABLE DOUBT.

Certified Issue

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ).[1] This Court has jurisdiction under Article 67(a)(2)-(3), UCMJ.[2]

Statement of the Case

A panel of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his

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[1] 10 U.S.C. § 866.
[2] 10 U.S.C. § 867(a)(2)-(3).

pleas,[3] of one specification of attempting to commit indecent acts with a minor, one specification of attempting to communicate indecent language to a minor, and one specification of using the internet while attempting to induce a minor to commit indecent acts,[4] in violation of Articles 80 and 134, Uniform Code of Military Justice (UCMJ).[5] The panel sentenced appellant to reduction to E-1, forfeiture of all pay and allowances, to be confined for fifteen months, and to be discharged from the service with a bad-conduct discharge.[6] The convening authority approved the findings. The convening authority approved the sentence except for the total forfeiture of pay and allowances. In addition, the convening authority gave appellant twenty days confinement credit.[7]

On November 8, 2010, the Army Court affirmed the findings of guilty as to Charge I and its Specifications and to the Specification of Charge II, except to the words "in violation of Title 18, United States Code, Section 2422."[8]

On May 23, 2011 this Honorable Court granted appellant's petition for review and specified an additional issue. On June

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[3] JA 17.
[4] 18 U.S.C.A. § 2422(b)(2006).
[5] JA 79; Charge Sheet.
[6] JA 18.
[7] Action.
[8] JA 1.

14, 2011, the Judge Advocate General of the Army certified an additional issue to this Honorable Court.

Statement of Facts

On December 18, 2006, appellant was arrested in his Army Combat Uniform (ACU) while waiting in his Chevy Tahoe truck with tinted windows at the Bremerton, Washington Dairy Queen for two thirteen year old girls.[9] The arrest was the culmination of appellant's efforts to groom[10] Anastasia[11] who he believed to be a thirteen year old girl, and her unnamed friend to meet him for sex.[12] From October 25, 2006 until the date of his arrest appellant "chatted" over the internet while on duty[13] and at home[14] about, sex, oral sex,[15] mutual masturbation,[16] his military status,[17] his physical description and age,[18] and Anastasia's age

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[9] JA 44-46, JA 103-04.
[10] JA 247 (grooming is "often used in these communications by the person soliciting another so that they'd be more likely to agree to a sexual [sic] favors or further communication with that person by first making them comfortable in speaking to that person.").
[11] Anastasia is the screen name of the undercover agent (Agent Lepovetsky).
[12] JA 44-45, 47.
[13] *See e.g.* JA 109 (appellant indicating he has to take a lunch break), JA 111 (appellant discussing masturbation with Anastasia while waiting to be relieved to go to dinner); JA 113 (appellant asking Anastasia if her vagina was wet when rubbing it while he was "at work bored").
[14] *See e.g.* JA 128 (appellant explaining he does not use the phone to chat when he is at home).
[15] JA 112, 122.
[16] JA 121.
[17] JA 109 (appellant stating he is on Fort Lewis); JA 115 (appellant describing color of uniform).

and physical description.[19] He communicated with Anastasia using his internet capable cellular phone, and his home computer using a service provided by "Yahoo!" Incorporated.[20] "Yahoo!" is located in California and maintains records of chat logs in that state.[21]

After convincing Anastasia that she would be safe from physical harm, would not get pregnant and would not get a disease in part because he was in the Army, he set up a time and place to meet the two thirteen year old girls.[22] He told Anastasia to arrive at the Dairy Queen with her friend, instructing them not to wear underwear and that he would arrive in his Chevy Tahoe, wearing his military uniform.[23]

At trial appellant was charged *inter alia* with Article 134, Clause 1, 2, and 3 (18 U.S.C. § 2422) for attempting to entice a child to engage in sexual activity.[24] As such, the military judge instructed the panel in pertinent part that in order to be found guilty they must find by legal and competent evidence beyond a reasonable doubt:

> (1) That between on or about 25 October 2006 and on or about 18 December 2006 on divers occasions, the accused knowingly used the

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[18] JA 109.
[19] *See e.g.* JA 48, 109, 111.
[20] JA 128, 85-87.
[21] JA 51-52, 34.
[22] JA 51, 116, 126, 120-21.
[23] JA 47, 139-40.
[24] Charge Sheet.

> internet to attempt to persuade, induce, entice, or coerce "Anastasia", an individual under the age of eighteen (18) to engage in sexual activity;
>
> (2) That the accused believed that such individual, "Anastasia", was less than eighteen (18) years of age;
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> (3) That if the sexual activity had occurred, the accused could have been charged with a criminal offense under Article 125 or Article 134 of the Uniform Code of Military Justice; and
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> (4) That accused acted knowingly and willfully.[25]

As it relates to Clause 1 and 2 of Article 134, the military judge did not explicitly instruct on the terminal elements, that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was a nature to bring discredit upon the armed forces.[26] The charge sheet did contain the terminal elements.[27] As it relates to Clause 3, the military judge utilized the word "internet" in place of "any facility or means of interstate or foreign commerce."[28]

Summary of Arguments

In this case, the Army Court correctly determined that the military judge erred by failing to instruct the panel concerning

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[25] JA 74, 169-70.
[26] *Id.*
[27] JA 13-15 (Charge Sheet).
[28] 18 U.S.C.A. § 2422 (2006).

Clause 1 and 2 of Article 134. They further correctly determined that this error was harmless beyond a reasonable doubt because the government produced overwhelming evidence of both elements and appellant failed to contest those elements at trial. The Army Court erred, however in its analysis of the Clause 3 offense contained in the Specification of Charge II. The military judge did not err by using the term "internet" rather than "any facility or means of interstate or foreign commerce," because that determination is a matter of law for the military judge to decide. She then correctly put the factual predicate, whether appellant used the "internet," before the panel. Finally, even if this Court finds that the military judge did err by omitting an element in her instructions, such error is harmless beyond a reasonable doubt because appellant did not contest this issue and the government provided overwhelming evidence that the internet was a facility or means of interstate or foreign commerce in this case.

Issues Presented and Argument

Granted Issue

WHETHER THE ARMY COURT OF CRIMINAL APPEALS INCORRECTLY FOUND THAT THE MILITARY JUDGE'S FAILURE TO INSTRUCT ON THE NECESSARY ELEMENTS OF AN OFFENSE WAS HARMLESS BEYOND A REASONABLE DOUBT.

Standard of Review and Applicable Law

Whether a panel was properly instructed is a question of

law that is reviewed *de novo*.[29] If the Court finds error, it will review *de novo* whether the error was harmless beyond a reasonable doubt.[30]

In *Neder v. United States*, the Supreme Court held that the omission of instructions on the element of a crime is a trial error subject to harmless error review.[31] An error is harmless if, beyond a reasonable doubt, "the error complained of did not contribute to the verdict obtained."[32] *Neder* sets forth a two-prong test to determine if the omission of an elemental instruction is harmless error: (1) whether the element was uncontested, and (2) whether the element was supported by overwhelming evidence.[33] Whether an element is uncontested requires that appellant contest the issue **and** raise sufficient evidence to support a contrary finding at trial, ergo mere

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[29] *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008); *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996); *United States v. Ivey*, 53 M.J. 685, 699 (Army Ct. Crim. App. 2000).

[30] *Neder v. United States*, 527 U.S. 1, 15-16 (1999).

[31] *Id.; See also Hedgpeth v. Pulido*, 555 U.S. 57, 58, 63 (2008) (per curiam) (applying a harmless error analysis to the omission of instructions on alternative theories of guilt); *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) (citing *Neder*, 527 U.S. at 18) (applying harmless error analysis to the omission of required instructions on the mistake of fact defense); *United States v. New*, 55 M.J. 95, 126-28 (C.A.A.F. 2001) (Sullivan, J., concurring) (applying a harmless error analysis to the omission of an elemental instruction on an issue not reached by the majority).

[32] *Id.* at 15 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

[33] *Neder*, 527 U.S. at 17; *See United States v. Upham*, 66 M.J. 83, 86-87 (C.A.A.F. 2008).

argument is not enough to meet the second prong of the test.[34] The terminal elements of Article 134, Clause 1 and 2 are required elements, and thus failure to instruct the panel on these elements requires this Court to determine whether such error was harmless beyond a reasonable doubt.[35] The government need only satisfy the *Neder* two-prong test with regard to one of the two terminal elements for this Court to affirm the finding and sentence.[36] The *Neder* test is applied in reverse order below.

Argument

A. Prejudicial to Good Order and Discipline (Clause 1)

Appellant's conduct was overwhelmingly prejudicial to good order and discipline and no evidence was presented to contest this element. The theory was presented to the panel in the plain language of the charge sheet.[37] Acts must be "directly and palpably" prejudicial to good order and discipline.[38] The conduct is directly related to good order and discipline because a large majority of his crime occurred while he was on duty. Appellant communicated with Anastasia for over a month and a

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[34] *Id.* at 19.
[35] *United States v. Phillips*, 70 M.J. 161, 165 (C.A.A.F. 2011).
[36] *See generally United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008).
[37] JA 15.
[38] *United States v. Mayfield*, 21 M.J. 418, 421 (C.M.A. 1986).

half via text message.[39] In this time, appellant had approximately fifteen sexually explicit conversations with Anastasia that covered approximately thirty-one hours of on-duty time.[40] During these conversations appellant was told Anastasia's age numerous times, yet he continued asking her to masturbate for him, describe her measurements, and requested that she meet him at her house, hotel, or elsewhere.[41]

In addition, to committing these acts while on duty, he was clearly not completing any duties expected of a Soldier. Moreover, other Soldiers in the unit knew of his indiscretions, further affecting good order and discipline in the unit. On September 24, 2007, appellant was with some Soldiers painting a barracks room. SPC June, another Soldier in the unit, offered the group an opportunity to purchase a computer and appellant

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[39] JA 47.

[40] JA 109-12 (conversation on November 20, 2006 while on duty from 1106-1758); JA 113(conversation on November 27, 2006 while on duty from 1358-1447); JA 114 (conversation on November 29, 2006 while on duty from 1040-1305); JA 117(conversation on December 1, 2006 while on duty from 1240-1354); JA 119-22 (conversation on December 15, 2006 while on duty from 0833-1423); JA 124-26(conversation on December 8, 2006 while on duty from 1201-1502); JA 128-31(conversation on December 11, 2006 while on duty from 1026-1808); JA 132-36(conversation on December 13, 2006 while on duty from 0926-1251); JA 138-40(conversation on December 18, 2006 while on duty from 1117-1336).

[41] *See e.g.* JA 111-13, 115, 120-21, 129, 136 (appellant discussing masturbation); JA 108-09, 125, 126 (Anastasia confirming her age, her friends age, and that she doesn't shave pubic hair because she has none); JA 109 (appellant asking about measurements); JA 111, 116, 134-35, 139, 140 (appellant discussing possible meeting locations).

declined, explaining his had been taken away. Simultaneously, the other Soldiers began "smiling and laughing."[42] The inference from this exchange establishes that other Soldiers were aware of appellant's conduct and likely held him and his status as a Soldier in low regard. Logically, this then affects morale and unit cohesion.

Appellant relies on *Medina* to argue that an appellate court may not affirm a finding on a theory not presented to the panel.[43] Unlike *Medina*, which was a guilty plea where the military judge gratuitously added the terminal elements of Article 134, Clause 1 and 2 during the providence inquiry, the specification here contained the terminal elements and the government presented evidence of each of them, thus placing the issue squarely before the members. Appellant concedes that this issue was not expressly contested by the defense at trial.[44] As such both prongs under *Neder* have been met and this Court may approve the Specification of Charge II.

B. Of a Nature to Bring Discredit Upon the Armed Forces (Clause 2)

Appellant's conduct was overwhelmingly of a nature to bring discredit to the armed forces and no evidence was presented to contest this element. As above, this Court should apply the

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[42] JA 22.
[43] *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008).
[44] Appellant's Brief (AB) at 13.

same standard articulated in *Neder* to determine if the military judge's failure to properly instruct the panel on this element is harmless beyond a reasonable doubt. While this Court has declined to adopt a *per se* rule concerning conduct that is service-discrediting, it has stated, "[a]n unlawful act can serve to establish service discredit."[45] Moreover, this Court recently held that in order for a finding of guilty concerning Clause 2, the public need not be actually aware and that "proof of the conduct itself *may* be sufficient for the rational trier of fact to conclude...under all of the circumstances, it was of a nature to bring discredit upon the armed forces."[46] The government is "not required to present evidence that anyone witnessed or became aware of the conduct. Nor is the government required to specifically articulate how the conduct is service discrediting."[47] The government merely needs to present sufficient evidence to support the conviction.

In the present case the government presented overwhelming evidence that appellant's conduct was of a nature to bring discredit to the armed forces. The government presented the chat logs from appellant's conversations with Anastasia as Prosecution Exhibit 9. Here, appellant displays his true criminal nature, that "if known by the public" would certainly

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[45] *United States v. Vaughan*, 58 M.J. 29, 36 (C.A.A.F. 2003).
[46] *Phillips*, 70 M.J. 161, 163 (C.A.A.F. 2011).
[47] *Id.* at 166.

be of nature to discredit the service.[48] The NCIS agent who posed as a thirteen year old girl was a civilian.[49] Far from minimal as appellant suggests, appellant often used his military status when grooming Anastasia.[50] In the context of grooming, appellant's actions were especially egregious because he used his status as a Soldier and the community's good will toward Soldiers to show that he was someone Anastasia could trust. He further used his status as an Army Soldier to reassure Anastasia that she would not get diseases from him playing with her vagina with his penis, because he was in the Army and got "tested all the time."[51] He also used his status as a Soldier by telling Anastasia that he took various classes, opportunely highlighting only "safety" and "sexual harassment" classes.[52] In the context of attempting to entice and build trust in a minor to perform sexual acts with appellant, this conduct is clearly of a nature to bring discredit to the armed forces.

In addition, appellant's plan to meet Anastasia included another underage female, who he attempted to groom to engage in

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[48] *Id.*
[49] JA 26.
[50] JA 41, *See also e.g. supra* n. 40 (highlighting all the conversations that took place while appellant was on duty); JA 114, 121 (telling Anastasia he is in the Army); JA 115, 135 (discussing his uniform); JA 109 (discussing his duty location).
[51] JA 121.
[52] JA 114.

sex acts with him using Anastasia as an intermediary.[53] This is relevant to the charge of enticement because he also needed this friend to make Anastasia more comfortable so that she would come and meet him. Moreover, appellant set up a meeting in a public place, and advised the two thirteen year old girls to wear dresses and no panties.[54] Appellant argues that arriving at the meeting place in uniform alone does not make the conduct discrediting.[55] However, in light of the entire record and the important role his military status played in setting the meeting, wearing the uniform to the meeting takes on an entirely different and sinister meaning. As such, any reasonable finder of fact would find appellant's conduct service discrediting behavior beyond a reasonable doubt.

Appellant did not contest this element at trial. Appellant argues that the few questions about the chat rooms and a brief sentence on closing indicate that this issue was contested at trial. *Neder* requires more, indicating in order to be contested the appellant must both contest the issue and raise sufficient evidence to support a contrary finding.[56] This Court must look

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[53] *See* JA 120, 124-26, 128-30, 132-34, 136-38, 140 (Anastasia indicating she would be less scared with friend at meeting).
[54] JA 140.
[55] AB 17.
[56] 527 U.S. at 19; *see also United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1197 (9th Cir. 2000) (court focusing on whether government evidence was "uncontradicted" or defense presented evidence to the contrary).

to the evidence to evaluate whether or not appellant actually contested the element.[57] The fact that the chat rooms were private was not disputed at trial.[58] The overwhelming evidence described above in addition to appellant's confession was uncontroverted and appellant called no witnesses to indicate that appellant's conduct was not service discrediting.

Appellant's entire defense was to dispute the intent element of the Specification of Charge II by arguing this was a virtual world and by attacking the connection of the chat logs to himself.[59] Appellant put forth no evidence, made no motions, nor did his trial defense counsel state in argument anything that could support a contrary finding. Moreover, the government specifically argued this theory of liability to the panel in rebuttal argument.[60] As such, both prongs under *Neder* have been met and this Court may approve the Specification of Charge II.

Certified Issue

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Applicable Law and Argument

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[57] *See generally Upham*, 66 M.J. at 87 (examining evidence presented to determine whether the issue was contested).
[58] JA 38-39, 231 (government indicating chat room was private); *Neder* 527 U.S. at 19.
[59] *See* JA 67-70.
[60] JA 180.

The Certified Issue is primarily about the interpretation of the jurisdictional element of 18 U.S.C. § 2422(b). In every case, this statute's jurisdictional element, the use of a "facility or means of interstate or foreign commerce,"[61] establishes the basis for Congress to proscribe the charged conduct.[62] Additionally, whether a court-martial possesses jurisdiction over the offense is a matter of law for the military judge to decide.[63] This court reviews questions of law and whether a panel was instructed properly de novo.[64]

In light of the foregoing, the military judge correctly instructed the panel that to find appellant guilty of Charge II, he must have used the "internet" to commit the charged offense. The military judge simply did not instruct the panel that the internet is *per se* a "facility or means of interstate or foreign commerce." This omission is not legal error – a military judge is not required to instruct the panel about his or her legal decisions.[65] Moreover, the government is not required to prove,

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[61] 18 U.S.C. § 2422(b).
[62] *See infra.* (Part B).
[63] *See infra.* (Part B).
[64] *Ober*, 66 M.J. at 405; *New*, 55 M.J. at 100.
[65] *United States v. Sadler*, 29 M.J. 370, 376 (C.M.A. 1990) (Stating about a state statute, that "[i]f the military judge's premise was correct, we agree that he would not be required to instruct on the specific terms of the statute. Matters of law are for the military judge, not for the court members.").

that the internet is a facility of interstate commerce.[66] Finally, the Government proved beyond a reasonable doubt that appellant in fact used the internet while attempting to entice a minor to commit indecent acts.[67] Accordingly, the factual predicate of the jurisdictional element of 18 U.S.C. § 2422 was instructed and proved to the panel.

A. The Government is not Required to Prove Movement in Interstate Commerce in Appellant's Case.

The term "facility or means of interstate . . . commerce" is not defined for 18 U.S.C. § 2422.[68] However, case-precedent adds meaning to the term by establishing its constitutional foundation and by establishing other instrumentalities that are *per se* facilities of interstate commerce. As a matter of statutory interpretation, when Congress uses the term "facility of interstate commerce," it is regulating a channel of interstate commerce and not something actually in interstate commerce.[69] As then-Circuit Judge Sotomayor stated when interpreting 18 U.S.C. § 2425:

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[66] *See infra.* pp. 20-21 (arguing the courts implicitly conclude that an internet transmission satisfies the jurisdictional issue).
[67] JA 28-61; Pros. Ex. 9 (JA 107-140).
[68] *See* 18 U.S.C. § 10 (defining "interstate commerce" but not a "facility or means" of interstate commerce); *but see* 18 U.S.C. § 1958(b) ("facility of interstate or foreign commerce includes means of transportation and communication").
[69] *See* U.S. Const. Art. I, § 8, cl. 3.; *United States v. Lopez*, 514 U.S. 549, 558 (1995).

> "us[e of] the mail or any facility or means of interstate . . . commerce" to specified ends, is clearly founded on the second type of Commerce Clause power categorized in *Lopez*, that is, the power to regulate and protect the instrumentalities of interstate commerce "even though the threat may only come from intrastate activities." It is well-established that when Congress legislates pursuant to this branch of its Commerce Clause power, it may regulate even purely intrastate use of those instrumentalities.[70]

In *United States v. Faris*, the Eleventh Circuit Court of Appeals reached the same legal conclusion regarding the text of 18 U.S.C. § 2422 (the statute at issue in the instant case).[71] Accordingly, as a matter of statutory interpretation, the jurisdictional element of 18 U.S.C. § 2422 does not require any proof of actual movement or any proof of commerce – only proof of the use of a facility of interstate commerce.[72]

B. As a Matter of Law, the Internet is a Facility or Means of Interstate or Foreign Commerce.

The military judge's jurisdictional instruction in this case[73] relies on the conclusion that, as a matter of law, the internet is a facility or means of interstate commerce. This conclusion is well founded in logic and case-precedent. First,

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[70] *United States v. Giordano*, 442 F.3d 30, 41 (2d Cir. 2006) (Sotomayor, J.) (quoting *Lopez*, 514 U.S. at 558).
[71] *United States v. Faris*, 583 F.3d 756, 759 (11th Cir. 2009) (quoting *Lopez*, 514 U.S. at 558) (construing 18 U.S.C. § 2242).
[72] *See e.g., Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *United States v. Marek*, 238 F.3d 310, 317 (5th Cir. 2001); *Giordano*, 442 F.3d at 41.
[73] JA 74 (instructing that to find appellant guilty of Charge II, he must have "used the internet" to commit the charged offense).

resolution of a statute's jurisdictional prescription is purely a question of law. Second, use of the internet always satisfies this jurisdictional element of the statute. Finally, federal circuit court treatment of this issue supports the conclusion that, as a matter of law, the internet is a facility or means of interstate commerce.

At its core, the Certified Issue is a jurisdictional issue. A court-martial has jurisdiction over an offense where, *inter alia*, jurisdiction is permitted by the Constitution.[74] In this case, Charge II assimilated 18 U.S.C. § 2422 which confers jurisdiction over the offense when the charged conduct is committed by use of a facility of interstate commerce.[75] Appellant's use of the internet unequivocally establishes this jurisdiction.

The internet is *per se* a facility of interstate commerce. The Supreme Court remarked about the internet, "[it] is an international network of interconnected computers" and is comparable to "a sprawling mall offering goods and services."[76] This recognition of the internet's ubiquitous influence compels the conclusion of its character. In fact, it is overwhelmingly accepted among the federal circuits that the internet is a

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[74] Rule for Courts-Martial 201(b)(5) and 203.
[75] U.S. Const. Art. I, § 8, cl. 3; 18 U.S.C. § 2422(b); Article 134, UCMJ.
[76] *Reno v. ACLU*, 521 U.S. 844, 850-853 (1997).

"facility or means of interstate . . . commerce."[77] More importantly, as the federal circuit court cases make clear, there is no situation in which the internet is *not* a *facility* of interstate commerce. Whether used wholly intrastate or among states, and whether used for commerce or otherwise, the internet (similar to telephone networks,[78] cellular phone networks,[79] ATM networks,[80] and the mail system[81]) inherently meets the definition of a facility of interstate commerce.[82]

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[77] *See generally United States v. Lewis*, 554 F.3d 208, 215 (1st Cir. 2009) (holding "the government may satisfy the interstate commerce element by proving that child pornography images were transmitted over the internet"); *United States v. Trotter*, 478 F.3d 918, 920-21 (8th Cir. 2007) (holding that the internet is an instrumentality and channel of interstate commerce) (citing *United States v. MacEwan*, 445 F.3d 237, 245 (3rd Cir. 2006)); *MacEwan*, 445 F.3d at 245 (holding that the "internet is an instrumentality of interstate commerce"); *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002) (quoting *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997) "[t]ransmission of photographs by means of the internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce); *United States v. Pierson*, 544 F.3d 933, 939-940 (8th Cir. 2008) (holding proving internet use sufficient factual predicate to establish facility of interstate commerce)(*United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004)(holding that "the internet is an instrumentality of interstate commerce")).

[78] *United States v. Perez*, 414 F.3d 302, 304-05 (2d Cir. 2005) (per curiam) (holding that telephone networks are facilities of interstate commerce).

[79] *United States v. Giordano*, 442 F.3d 30, 40-41 (2d Cir. 2006) (Sotomayor, J.) (holding that cellular phone networks are facilities of interstate commerce); *United States v. Clayton*, 108 F.3d 1114, 1117 (9th Cir. 1996), *cert. denied* 522 U.S. 893 (1997).

[80] *United States v. Baker*, 82 F.3d 273, 275 (8th Cir. 1996) (holding that an ATM network was a facility of interstate commerce).

Where there is no factual dispute as to the basis of jurisdiction, the military judge may properly determine jurisdiction exists as a matter of law.[83] In *United States v. Williams*, the determination whether Fort Hood was in the special maritime or territorial jurisdiction of the United States was a contested matter of fact.[84] Although some of Fort Hood was within federal jurisdiction, nearly 50,000 acres of Fort Hood was not within federal jurisdiction. Thus, the court decided that "more than questions of law were involved in establishing which locations at Fort Hood come within the special maritime and territorial jurisdiction of the United States."[85] In the instant case, there is no such factual dispute about whether the internet is or is not a facility of interstate commerce.

Federal courts repeatedly analyze these cases in a way that illustrates where the jurisdictional issue ends and where assessment of the sufficiency of evidence begins. In so doing the federal courts implicitly decide the jurisdictional issue

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[81] 18 U.S.C. § 2422(b).
[82] *See e.g., Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *United States v. Lopez*, 514 U.S. 549, 558 (1995); *United States v. Faris*, 583 F.3d 756, 759 (11th Cir. 2009) (quoting *Lopez*, 514 U.S. at 558) (construing 18 U.S.C. § 2242); *Giordano*, 442 F.3d at 41; *United States v. Marek*, 238 F.3d 310, 317 (5th Cir. 2001).
[83] *United States v. Williams*, 17 M.J. 207, 215 (C.M.A. 1984) (implying that jurisdictional status is a matter of law where determination of the issue does not present a question of fact).
[84] *Id.*
[85] *Id.*

prior to assessing the sufficiency of the evidence. That is to say that these courts presume that if the appropriate facts regarding the internet are in the record then the element is established. This approach was used by the Fifth Circuit Court of Appeals in *United States v. Henriques*,[86] and the Eleventh Circuit in *United States v. Hornaday*.[87] Both of these federal circuit courts implicitly conclude that the internet is a facility of interstate commerce and focus their sufficiency inquiry on whether the evidence showed that the appellant used the internet. In *United States v. Mellies*, the Sixth Circuit Court of Appeals went even further, concluding that the trial judge did not err by instructing that as a matter of law the use of the internet was movement in interstate commerce.[88] The approach taken by these courts is strong, persuasive precedent of how the internet is viewed in relation to the jurisdictional element and further support the conclusion that the internet is *per se* a facility of interstate commerce.

C. The Military Judge Properly Instructed the Panel on the Jurisdictional Element of 18 U.S.C. § 2422.

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[86] *United States v. Henriques*, 234 F.3d 263, 265-66 (5th Cir. 2002) ("Although the evidence clearly established Henriques [sic] use of the Internet, since the government did not attempt to prove the nexus to the Internet for the three images independently, Henriques' conviction must be reversed.").
[87] *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) (concluding that even and intermediary that entices a child via the *internet* violates the statute).
[88] *United States v. Mellies*, 329 Fed. Appx. 592, 605-07 (6th Cir. 2009)(unpub.).

In the instant case the military judge included the factual predicate for the jurisdictional element in her instruction to the panel. It is unnecessary, and inconsistent with case-precedent, to analytically remove the jurisdictional inquiry one step further by having the panel determine whether the internet is a facility of interstate commerce. Moreover, further removing the jurisdictional analysis would be inconsistent with at least one federal circuit's pattern jury instructions:

> The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt: First: That the Defendant knowingly used [the mail][a computer][describe other interstate facility as alleged in indictment]. . . .[89]

In this case, the military judge's instruction on the jurisdictional element of 18 U.S.C. § 2422 described the interstate facility as "the internet."[90]

Case-precedent is clear that military judges have "substantial discretionary power in deciding on the instructions to give."[91] The military judge's instruction to the panel – that to find appellant guilty of Charge II, he must have "used the internet" to commit the charged offense – is legally adequate to inform the panel members of one of the jurisdictional bases of

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[89] Pattern Crim. Jury Instr. 11th Cir. for 18 U.S.C. § 2422(b) (JA 182-183).
[90] JA 74.
[91] *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) (quoting *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993), *cert. denied*, 512 U.S. 1244 (1994)).

18 U.S.C. § 2422.[92] In other words, the panel could find appellant used a "facility or means of interstate . . . commerce"[93] by finding that he used the internet. The military judge's instruction squarely placed the burden on the panel of finding appellant guilty beyond a reasonable doubt of the predicate, jurisdictional fact – that appellant used the internet when attempting to induce a minor to commit indecent acts.[94] As such, the panel properly considered each element and this court can affirm the finding with respect to Charge II.

Specified Issue

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED AS A MATTER OF LAW WHEN IT HELD THAT THE MILITARY JUDGES INSTRUCTION ON 18 U.S.C. § 2422(B), WHICH INSTRUCTION USED THE TERM "INTERNET" INSTEAD OF ANY FACILITY OR MEANS OF INTERSTATE OR FOREIGN COMMERCE," WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Standard of Review and Applicable Law

The legal standard is the same here as articulated above with respect to the Granted Issue in this case.[95]

Argument

The government overwhelmingly established that appellant used a facility of interstate commerce (the internet) and this element was not contested at trial. Even assuming arguendo that

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[92] JA 74.
[93] 18 U.S.C. § 2422(b).
[94] *See* JA 67(trial counsel argued in summation that the panel must find appellant used the internet); *see generally*, Pros. Ex. 9 (JA 107-140), 11,(JA 85-103), 12 (JA 104-106).
[95] *See Supra.* pp. 6-8.

the internet is not per se a facility of interstate commerce, proof of its use in this case overwhelmingly established that it is a facility of interstate commerce. The government presented evidence defining the internet and establishing that appellant used it. The government introduced evidence that the communication transmitted from appellant to Anastasia was in fact via the internet and cell phone.[96] Special Agent Lepovetsky described how sting operations work, which included a description of communicating on-line.[97] The Agent described that the first communication with appellant was using Yahoo chat,[98] a company that maintains servers in California,[99] from her location at training in Rhode Island.[100] While this evidence establishing interstate activity certainly is not necessary to prove a facility of interstate commerce, it is relevant to show the nature of the internet generally. Thus, even though the majority of the conversations between the Agent and appellant were wholly intrastate, the national character of the internet was placed before the panel. By placing the nature of the internet before the panel and evidence of its use by appellant the government overwhelmingly established that the internet is a facility of interstate commerce.

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[96] JA 128, 104.
[97] JA 27-44 (describing how Yahoo Chat works).
[98] JA 27 (additional conversations also utilized Yahoo chat).
[99] JA 34, 85-86.
[100] JA 175-177.

Appellant did not contest the omitted element. The omitted element is "any facility of interstate or foreign commerce."[101] Rather his argument focused on the theory that the internet is a "virtual world" and that it was not him that **used** the internet.[102] Appellant's argument that the military judge foreclosed his opportunity to contest that the internet is in fact a facility of interstate commerce is without merit.[103] In order for appellant to benefit from the *Neder* test, he merely had to contest that the internet was a facility of interstate commerce as a matter of law. *Neder* does not require that the issue be contested before the fact finder.

Appellant did not contest this legal conclusion in this case. Merely responding to the military judge's specified issue concerning whether the Specification of Charge II stated an offense does not amount to a contest of the separate and distinct issue of whether the internet is a facility of interstate commerce.[104] Even if the military judge would have instructed as appellant desires and placed the nature of the internet at issue, virtually no argument exists that removes the internet from being found a facility of interstate or foreign

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[101] 18 U.S.C. § 2422(b).
[102] JA 67-70.
[103] AB 24.
[104] JA 143.

commerce.[105] Thus, appellant's foreclosure argument is logically without impact.

Because the government overwhelmingly established that appellant used a facility of interstate commerce (the internet) and this element was not contested at trial, this Court can confidently affirm findings with respect to Charge II and its Specification.

Conclusion

WHEREFORE, the Government respectfully requests that this Honorable Court affirm in part and reverse in part the decision of the Army Court of Criminal Appeals. First, we ask that this Court affirm the Army Court with respect to the Granted Issue and hold that that failure to instruct the panel on the terminal elements was harmless beyond a reasonable doubt. Second, we ask this Court to reverse the Army Court with respect to the Certified Issue and find that the military judge did not err when she instructed using the term "internet" rather than "facility of interstate or foreign commerce." Finally, if the Court does find the instruction using the term "internet" to be error, then we ask this Court to find that such an error was harmless beyond a reasonable doubt.

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[105] See *Supra* Certified Issue.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov and Ms. Wumie Konteh on 24 August 2011, and delivered to defense appellate counsel by hand on August 24, 2011.

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