IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. STEVEN M. TUCKER Private (E-1) United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20150634 USCA Dkt. No. 18-0254 / AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES

COURTS OF CRIMINAL APPEALS

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UNITED STATES, Appellee v. STEVEN M. TUCKER Private (E-1) United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20150634 USCA Dkt. No. 18-0254 / AR

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ISSUE PRESENTED

WHETHER THE ARMY COURT ERRED IN HOLDING THAT THE MINIMUM MENS REA REQUIRED UNDER CLAUSES 1 AND 2 OF ARTICLE 134, UCMJ, TO SEPARATE WRONGFUL FROM INNOCENT CONDUCT IS SIMPLE NEGLIGENCE.

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

STATEMENT OF THE CASE

On September 23, 2015, a military judge sitting as a general court-martial convicted Private Steven M. Tucker, pursuant to his pleas, of conspiring to obstruct justice, committing sexual assault, unlawfully providing alcohol to underage soldiers, and obstructing justice in violation of Articles 81, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 920, 934 (2012) [hereinafter UCMJ]. The military judge sentenced Private Tucker to be confined for forty-two months and to be discharged from the service with a bad-conduct discharge. (R. at 134). The convening authority approved only so much of the adjudged sentence as provided for thirty-six months of confinement and a bad-conduct discharge. (Action).

The Army Court first reviewed this case on October 28, 2016, and affirmed the findings of guilty and sentence as approved by the convening authority. *United States v. Tucker*, 75 M.J. 872 (A. Ct. Crim. App. 2016). Private Tucker petitioned this Court for review, and on February 2, 2017 this Court granted that petition. On May 23, 2017, this Court set aside the Army Court's decision, and remanded this case for a new review under Article 66, UCMJ, in light of *Elonis v. United States*, 135 S. Ct. 2001 (2015), and *United States v. Haverty*, 76 M.J. 199 (C.A.A.F. 2017). *United States v. Tucker*, 76 M.J. 257, 258 (C.A.A.F. 2017).

On March 27, 2018, the Army Court decided by a divided vote to once again affirm the findings of guilty and sentence. This Court granted Private Tucker's petition for review on July 19, 2018.

STATEMENT OF FACTS

Private Steven M. Tucker enlisted in the Army as a transportation management coordinator. On the evening of June 21, 2014, he and some ten other soldiers started socializing in their barracks. (JA 39, 77). Private Tucker was one of the soldiers who brought alcohol to the gathering, and he offered shots "to everyone that wanted one." (JA 47). He "was not checking IDs," and he had "open liquor available for anybody who entered the room." (JA 47). One of the soldiers to whom he gave alcohol was Private TG, who was less than 21 years old at the time. (JA 42). Private Tucker had never met Private TG before, however, and he did not have "any reason to believe she was under the age of 21." (JA 43).

The government charged Private Tucker with several offenses arising out of that evening, including his provision of alcohol to Private TG. The government specified this latter offense under Article 134, UCMJ and alleged that Private Tucker did:

> unlawfully provide Private [TG], a person under the age of 21, alcoholic beverages, such conduct being to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(JA 23). Private Tucker pled guilty to this offense, Specification 1 of Charge IV. At court-martial, however, the military judge expressed concerns as to whether Private Tucker was actually provident, given that he did not know Private TG's age or believe he had any reason to know. (JA 43). Following an extended colloquy with counsel, the military judge ultimately instructed Private Tucker on the concept of negligence, which he defined as "the lack of that degree of care that a reasonably prudent person would have exercised under the same or similar circumstances." (JA 48). The military judge asked Private Tucker if he was "negligent" in that he "didn't ask [Private TG] her age or try to verify her age before serving her?" (JA 48). Private Tucker replied "Yes, sir," and the military judge moved on with the rest of the court-martial. (JA 49-50).

ARGUMENT

One of the most intuitive rules of criminal law is that "wrongdoing must be conscious to be criminal." *Elonis*, 135 S. Ct. at 2009. Guilt requires a guilty mind, and absent exceptional circumstances, negligence, inadvertent actions, and mistakes are not criminal. *Id*. This rule governs military justice as much as it does any civilian penal system. It is a building block of military customary law, and as such, part of the necessary limits on Article 134's otherwise unconstitutional expanses. *Parker v. Levy*, 417 U.S. 733, 745 (1974). Congress enacted the nearly

limitless language of Article 134 knowing that such customary principles constrain it.

The Army Court, however, would upset this balance. It has departed from the presumption against criminalizing negligence, and embraced instead a novel and unwarranted expansion of liability under Article 134. It has departed from settled law showing how the military's "legal traditions" and "centuries of practice" do not outlaw negligent offerings of alcohol. *United States v. Gifford*, 75 M.J. 140, 146 (C.A.A.F. 2016). The Army Court has departed from adverse authority by simply ignoring it, and then staking a position beset by errors and inconsistency, in order to affirm a conviction to which Private Tucker could not have pled providently. The Army Court's opinion is wrong. This Court should review it de novo and overturn it.

1. Negligence does not distinguish wrongful from innocent conduct—not as a general rule for Article 134, UCMJ and not in this specific case.

Article 134, UCMJ, has always reflected a range of offenses with a corresponding range of mental culpability requirements. A negligence standard has never been the rule for Article 134, but rather the exception and a rare one at that, arising only when grounded in the well-established customs of the services. Indeed, this Court has a more than 60 year history of dismissing efforts to criminalize mere negligence under Article 134. A failure to always act reasonably

is simply not the starting point for criminal liability under this most expansive of criminal statutes.

a. Article 134, UCMJ is constrained by military custom.

The text of Article 134 does not specify a mens rea; it is silent on the subject. *See Tucker*, 76 M.J. at 258. As a result, this Court must "discern any legislative intent about a mens rea requirement," and Congress must have articulated that intent with a "clear voice." *Haverty*, 76 M.J. at 203-04.

Fortunately, the Supreme Court of the United States has already discerned the legislative intent of Article 134, which is to enforce aspects of military common law and custom that would otherwise evade codification. *Parker v. Levy*, 417 U.S. 733, 745-47 (1974). Article 134 thus reduces the otherwise irreducible customs of military service into one provision that commanders can use to preserve the good order, discipline, and standing of the armed services. It is a creature of custom, and its constitutionality depends on these limits well-known to "those who have studied the law of courts martial." *Id*. at 747. The Army Court's opinion strays from the time-honored presumption against criminalizing negligence, and it veers into a novel, uncertain realm of expanded criminal liability.

b. Military custom has never made negligence the default measure of mental culpability.

The nature of Article 134 means that the mens rea for an offense charged thereunder is a matter of military custom, not simple negligence as the Army Court would have it. *United States v. Rapert*, 75 M.J. 164, 167-68 (C.A.A.F. 2016). And for at least 60 years, the custom of America's armed forces has been that "a mens rea requirement is the rule rather than the exception." *Gifford*, 75 M.J. at 146. This Court has made clear that, unless "required by statute or ancient custom," it will "simply hesitate to bottom criminal responsibility as a matter of law on a mere negligent omission." *United States v. Greenwood*, 19 C.M.R. 335, 342 (C.M.A. 1955). This is one of the basic "principles of Anglo-American criminal jurisprudence," fundamental to both the civilian and military legal systems of this nation. *Haverty*, 76 M.J. at 203.

i. The Army Court's opinion defies 60 years of controlling case law.

Upholding these broad principles, this Court has repeatedly rejected efforts to criminalize negligent conduct under Article 134. Negligently communicating a threat, for instance, does not violate Article 134. *Rapert*, 75 M.J. at 168. Negligently failing to care for a child does not violate Article 134.[1] *United States*

[1] In deciding *Vaughan*, this Court was careful to distinguish simple "negligence," the kind at play in this case, from "culpable negligence," which is synonymous with recklessness. 58 M.J. at 35.

v. Vaughan, 58 M.J. 29, 35 (C.A.A.F. 2003). Negligently departing from "commonsense rules of air traffic," in the absence of statute or regulation, "is not criminal" and thus not a violation of Article 134. *United States v. Webber*, 33 C.M.R. 68, 70-71 (C.M.A. 1963). Negligently failing to pay a debt does not violate Article 134. *United States v. McArdle*, 27 C.M.R. 1006 (C.M.A. 1959). Negligently exposing oneself does not violate Article 134. *United States v. Manos*, 25 C.M.R. 238, 240 (C.M.A. 1958). Negligently bouncing a check does not violate Article 134. *United States v. Downard*, 20 C.M.R. 254, 260-61 (C.M.A. 1955). Negligently possessing narcotics does not violate Article 134. *United States v. Lampkins*, 15 C.M.R. 31, 35 (C.M.A. 1954). [2]

The foregoing decisions dispel any idea that, in "the context of Article 134 offenses specifically, the minimum *mens rea* required to separate wrongful conduct from innocent conduct is simple negligence when combined with clauses 1 and 2 of the terminal element." (JA 14). Yet the Army Court ignores these decisions. Despite the pleadings, oral argument, and even the dissenting opinion in this case,

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[2] The Air Force Court of Criminal Appeals has likewise upheld the presumption against negligent Article 134 offenses. *See, e.g., United States v. Holmes*, 18 C.M.R. 599, 600-01 (A.F.B.R. 1954) (negligently possessing a forged pass does not violate Article 134); *United States v. Haver*, 22 C.M.R. 808, 809 (A.F.B.R. 1956) ("there is, in military law, no such offense as negligently destroying private property"); *United States v. Jones*, ACM S27674, 1988 CMR LEXIS 559, at *4-6 (A.F.C.M.R. July 5, 1988) (negligent trespasses do not violate Article 134).

a majority of the Army Court disregards seven precedential decisions that reflect military custom and refute its holding.[3] Efforts to criminalize negligent conduct under Article 134 have frequently failed, and at this point it should be past cavil that the default for mental culpability is not negligence. The foregoing cases are not merely hostile to the Army Court's conclusion, they defeat it outright.

ii. The exceptions to Article 134's mens rea requirement only validate the rule.

The exceptions to the general rule requiring more than negligence for Article 134 offenses do not overturn the rule. While the Army Court hails the crimes of negligent homicide and negligent discharge of a firearm as proof of "the implied intent of Congress to authorize simple negligence as a *mens rea* for Article 134 offenses," it fails to acknowledge that these offenses only exist because of the pronounced military interests they serve and the long-standing customs from which they arise. (JA 8). Rather than crown a new standard for mental culpability, these offenses validate the presumption against punishing negligence.

In upholding negligent homicide as an Article 134 offense, for example, this Court relied on the fact that:

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[3] The majority opinion does discuss *Rapert*, but only insofar as the word "wrongfully" saved that offense from reversal. (JA 13). What the Army Court fails to recognize, however, is that this "wrongful" element reflected long-standing custom which kept the offense from being a "negligent" one that would have ran afoul of *Elonis*. *Rapert*, 75 M.J. at 168. The inescapable impact of *Rapert* on this case, then, is that Article 134 does not punish negligence as a matter of course.

> There is a special need in the military to make [negligent homicide] . . . a criminal act . . . because of the extensive use, handling and operation in the course of official duties of such dangerous instruments as weapons, explosives, aircraft, vehicles, and the like. The danger to others from careless acts is so great that society demands protection.

United States v. Kick, 7 M.J. 82, 83-84 (C.M.A. 1979). Likewise, the offense of negligently discharging a firearm only survives *Parker* and *Elonis* because it captures "a failure to follow well-established safety precautions," a concern integral to military service and the profession of arms. *United States v. Weller*, No. NMCCA 201100043, 2012 CCA LEXIS 154, at *15 (N-M Ct. Crim. App. Apr. 30, 2012), *review denied*, 71 M.J. 380 (C.A.A.F. 2012).[4] The same cannot be said for the provision of alcohol to soldiers under 21. *See Gifford* 75 M.J. at 146.

Even cases cited by the Army Court recognize that Article 134 "must be interpreted in the light of existing service customs and usages." *United States v. Kirchner*, 4 C.M.R. 69, 70 (C.M.A. 1952); *United States v. Sadinsky*, 34 C.M.R. 343 (C.M.A. 1964). Indeed, far from suggesting that Congress wanted to broadly

[4] This Court has only found one other negligent act criminal under Article 134, UCMJ: failing to deliver mail, as a lesser included offense of stealing, secreting, or destroying it. *See United States v. Beach*, 7 C.M.R. 48 (C.M.A. 1953). However, even this crime underscores the degree to which negligent conduct must offend military customs before it can be punished under Article 134: "Failure to perform one's military duties is a recognized offense of long-standing. And where that duty relates to delivery of mail, a matter of serious—not to say overwhelming—importance to morale in an overseas area, it takes on a significance far in excess of those other duties which might aptly be described as 'routine.'" *Id.* at 50.

criminalize negligence, this Court's decisions deliver a clear and concerted message: the essence of Article 134 is custom, and custom strongly disfavors criminal punishment for negligent acts, especially those that do not impact military operations directly.

c. Recklessness is the minimum mens rea needed to separate wrongful from innocent conduct in this case.

The appropriate mens rea for offenses charged under Article 134 thus depends on custom, which generally requires more than negligence—at a minimum, recklessness. *See, e.g.*, *Haverty*, 76 M.J. at 208. This case is no exception. Providing alcohol to a nineteen-year-old does not pose so great a threat to good order, discipline, or the credit of the armed forces that even inadvertent and careless occurrences must be criminalized. Indeed, this Court has already determined that the act of providing alcohol to underage personnel, taken in historical context, only constitutes an offense when done *recklessly*. *Gifford*, 75 M.J. at 143, 146. Nothing in the military's "legal traditions" or "centuries of practice" demands punishment for a servicemember who negligently gives alcohol to someone under the age of 21. *Id*. *Gifford* resolves this question quickly and in favor of Private Tucker.

d. Private Tucker improvidently pled to Specification 1 of Charge IV, and this Court should set that plea aside.

The right mens rea for Specification 1 of Charge IV would have been recklessness. But the government did not charge that, the military judge did not inquire on that, and Private Tucker did not admit to that. The military judge's reliance on the wrong mens rea was reversible error, and it precluded Private Tucker from understanding "how the law related to the facts." *United States v. Schell*, 72 M.J. 339, 345-46 (C.A.A.F. 2013). The military judge's failure is a substantial basis in law to question Private Tucker's plea, and this Court should set that plea aside. *Id*.; *see also United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) ("The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts.").

If it was still somehow "clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty," then the error would be harmless, but those circumstances are absent here. *Schell*, 72 M.J. at 345. Private Tucker did not know the elements of the crime and could not plead to them because he was misled about the requisite mens rea. *See id*. Private Tucker had no "reason to believe [Private TG] was under the age of 21." (JA 48). As a result, he could not have "consciously disregard[ed] the known risk" that she

was "under twenty-one," because he did not perceive the risk to begin with. *Gifford*, 75 M.J. at 147.

Private Tucker may have thought "quite a few people under 21" lived in the barracks, but that does not mean he had a reason to think Private TG was one of them. (JA 43, 48). His only direct statements on the matter show that he was negligent but unware of the risk. Thus, the record does not "clearly" establish that Private Tucker "freely" admitted to recklessly giving Private TG alcohol. *Schell*, 72 M.J. at 345. The record does not establish that Private Tucker recklessly provided alcohol to a minor, and it does not establish that Private Tucker understood the law as it related to the facts. Under such circumstances, this conviction must be set aside. *Schell*, 72 M.J. at 346.

2. A host of mistakes, misjudgments, and misapprehensions led the Army Court astray.

The Army Court erred in affirming Private Tucker's conviction for Specification 1 of Charge IV, and a welter of errors are responsible for pulling it so far afield from clear and controlling caselaw. In particular, the Army Court's opinion overlooks the nature of a *Care* inquiry; it conflates a plea of guilty with a guilty mind; it misreads several decisions of this Court; and it ultimately betrays an "ends justify the means" approach to legal reasoning that favored dubious policy

considerations over binding precedent. This motley array of mistakes led the Army Court to a novel and unsupported decision this Court should overturn.

a. The charged term "unlawfully" is immaterial as the military judge only questioned Private Tucker about negligence.

The Army Court claims the term "unlawfully" saves the charge from reversal. (JA 13). It does not. While "unlawfully" may offer the right measure of mental culpability in other cases,[5] it does not matter here because Private Tucker never expressed any understanding of the term. The military judge only discussed simple negligence, and he never inquired if Private Tucker "unlawfully" provided alcohol to Private TG. (JA 28-69). Even if, *arguendo*, the word "unlawfully" could have made the offense cognizable, its mere presence in this pleading did nothing. The word "unlawfully" hardly advanced beyond the charge sheet, and the unsure providence inquiry leading to Private Tucker's plea only addled things further. Such conditions prevent any finding that Private Tucker knowingly and voluntarily pled guilty to this allegation, regardless of the terms charged.

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[5] The term "unlawfully" means "without legal justification." *United States v. McMonagle*, 38 M.J. 53, 61 (C.A.A.F. 1993). In the context of this case, that term simply begs the question, calling the act "criminal" because it was "unlawful," and failing to tell us "whether the proper level of mens rea that we should infer is 'general intent,' 'negligently,' 'recklessly,' 'knowingly,' or 'intentionally.'" *Haverty*, 76 M.J. at 204. As Judge Salussolia observed in his dissent from the Army Court's opinion, the Kentucky Penal Code criminalizes the *knowing* provision of alcohol to persons under 21 years of age. (JA 16, n. 9). That then implies Specification 1 of Charge IV could only be "unlawful" if done *knowingly*.

b. The Army Court's reliance on the "admitted wrongfulness of his actions" is inapposite.

The Army Court refers to Private Tucker's "admitted wrongfulness of his actions" as a factor separating "his criminal conduct from otherwise innocent conduct." (JA 2, 11). The Army Court does not elaborate further, and it need not, as it is plainly irrelevant; an accused's *post hoc* awareness is something entirely different from his mental state at the time of the alleged offense.

One of the "instinctive" concepts in criminal law is that crime only occurs when a guilty mind performs a guilty act. *See, e.g.*, *Morissette v. United States*, 342 U.S. 246, 251 (1952) (observing how the common law has long recognized crime "as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand"). The mens rea and actus reus must be contemporaneous. The only mental state that matters, then, is the one causing the actus reus. That an accused later sees how his actions led to some harm says nothing about the mens rea defining the offense. Acknowledging in hindsight that one's conduct was prejudicial or discrediting does not mean it was actually wrongful or reckless at the time alleged. Any reliance on Private Tucker's providence inquiry to redefine the mens rea for the offense would be circular, misplaced, and entirely muddled.

c. The Army Court misconstrues the cases it cites.

The Army Court ignores several controlling cases and misconstrues many of those it does discuss. Three of these cases stand out as chief contributors to the erroneous decision: the first is antithetical to the Army Court's cause; the second is so plainly applicable to this case that efforts to distinguish it fall flat; and the third is only relevant insofar as it sides against the Army Court's conclusion.

i. The Army Court's reliance on Sadinsky *is misplaced.*

Although cited for the proposition that "the terminal element of Article 134, UCMJ, separates wrongful from otherwise innocent conduct," (JA 12), *Sadinsky* says something quite different:

> The specification alleges that [the] accused wrongfully and unlawfully, and through design, jumped from the aircraft carrier on which he served, into the sea. That pleading flatly eliminates any possibility that the accused was pushed or slipped, or that the incident otherwise resulted from misfortune, accident, or *negligence* . . . . [A]lthough addition of words of criminality . . . cannot make criminal acts which obviously are not, here that allegation serves to demonstrate the proscribed character of accused's act.

Sadinsky, 34 C.M.R. at 345 (emphasis added). Article 134 not only required proof of the terminal element, but also an appropriate scienter such as "wrongfully and unlawfully, and through design," in order to punish Sadinsky's sea-bound backflip. *Id*. Had the pleading merely alleged his dive off the U.S.S. Intrepid "resulted from . . . negligence," it would have failed to state an offense. *Id*. Thus *Sadinsky* shows

how negligence plus the terminal element is not always enough to distinguish wrongful from otherwise innocent conduct. Rather than offering support, this case further unravels the Army Court's ruling.

ii. The Army Court's attempt to distinguish Gifford *is unavailing.*

This case is not "fundamentally different from *Gifford*." (JA 9). While *Gifford* dealt with an offense alleged under Article 92, rather than Article 134, that distinction is immaterial here. The relevance of *Gifford* to this case lies in its discussion of both mens rea and the military's historic approach to alcohol. To the first point, *Gifford* makes clear that, where the lawmaker is silent, as in Article 134, "knowledge with respect to age should [be] reviewed under a recklessness standard." 75 M.J. at 146. *Gifford* further clarifies that there is no military practice of punishing the imprudent provision of alcohol as a strict liability or negligent offense. *Id*. The "risks that accompany alcohol consumption do not diminish the common experience that distributing alcohol to peers at a social event . . . is typically legal," and so it must follow that nothing short of recklessness can distinguish wrongfulness from this otherwise commonplace, innocent behavior. *Id*. at 146.

iii. Blanks *is about stare decisis, and it only undercuts the Army Court's opinion.*

The Army Court's reliance on *United States v. Blanks*, 77 M.J. 239 (C.A.A.F. 2018) is likewise misplaced. *Blanks* did uphold a simple negligence standard for dereliction of duty under Article 92(3), UCMJ, but only because "Congress intended to establish a simple-negligence standard for dereliction of duty." *Id.* at 242, *citing to United States v. Lawson*, 36 M.J. 415, 421 (C.A.A.F. 1993). That determination rested on a detailed review of the legislative history and the state of customary military law prior to the UCMJ. *Lawson*, 36 M.J. at 419-21. A review of both sources in this case, however, will never show that Congress intended to punish the negligent distribution of alcohol. *See Gifford*, 75 M.J. at 146.

For its own part, *Blanks* was about stare decisis, not about expanding criminal sanctions to hitherto innocent acts of negligence. The Army Court tries to stretch *Blanks* beyond its bounds, and in the throes of that effort, it misses the actual import of the case here: when Congress wants to proscribe acts of negligence, it states its intent clearly. It did not do that with Article 134.

d. The Army Court concludes that Article 134 must punish negligent conduct because it believes the Army must punish negligent conduct.

The Army Court's departure from settled, controlling caselaw appears to have sprung from the foregoing errors, and perhaps more fundamentally, an

abiding concern for commanders' ability to police negligence. As the lower court expressed this concern:

> The Unites States military is entrusted with the Nation's war-fighting machinery, and is charged with protecting the Nation against existential threats. Ensuring a disciplined fighting force must include the prohibition of some negligent conduct that would not be punishable in the civilian context. . . . the vast and overwhelming majority of Army discipline problems are addressed through non-judicial punishment. If negligent conduct is not punishable under Article 134, UCMJ, at a general court-martial, it is also not punishable by any other means under the UCMJ.

(JA 17-18). In other words, the Army Court concludes that Article 134 offers the only means of deterring negligent conduct, and so Article 134 must therefore be the means to deter negligent conduct.

The premise is wrong and so is the reasoning. The UCMJ is a criminal code, not a torts statute. Congress has already decided what negligent acts are criminal; dereliction of duty under Article 92, UCMJ already addresses a broad range of negligence that could actually degrade the "Nation's war-fighting machinery." *See Blanks*, 77 M.J. 239. Other provisions of the Code proscribe more specific concerns with servicemembers who, for example, negligently miss movement, misbehave before the enemy, let prisoners escape, hazard vessels, or lose

government property.[6] Congress has made its list of negligence-based offenses, and the Army Court cannot expand it.

Furthermore, the armed forces need not punish every act of negligence to remain ordered, disciplined, and respected. Administrative actions can discourage negligent behavior as well. The constellation of executive orders, regulations, and directives that guide every service provide for measures like letters of reprimand, evaluations and fitness reports, property loss investigations, and corrective training. These tools of command often provide the most appropriate and effective responses to inadvertent and unintentional acts.

Commanders already have the authority they need. For decades, Article 134 has let military leaders foster the martial spirit and customs that battle-ready formations require. Generations of fighting Americans have tested, honed, and preserved their experiences in the military customs we follow today. These customs continue because they work, and they have worked well without criminalizing negligence at large. These customs have kept our warfighters ordered, disciplined, and respected precisely because they strike the right balance with justice. These customs work, and there is no need to depart from them now.

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[6] *See* Articles 87, 96, 99, 108, 110, UCMJ. All of these offenses have a historic and customary association with negligence, as well as a central focus on the performance of military duties rather than off-duty behavior.

3. This Court should set aside Specification 1 of Charge IV.

WHEREFORE, appellant respectfully requests this Honorable Court set aside Specification 1 of Charge IV.

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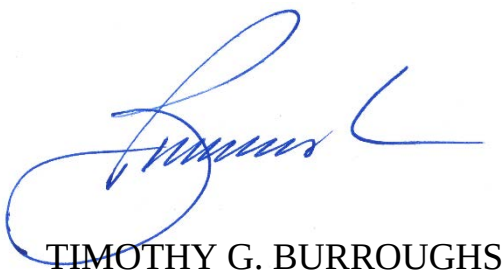
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Tucker*, Crim. App. Dkt. No. 20150634, USCA Dkt. No. 18-0254 / AR, was delivered to the Court and Government Appellate Division on August 20, 2018.



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