IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee* v. **Fernando M. BROWN** Chief Machinery Technician (E-7) U.S. Coast Guard, *Appellant*	REPLY ON BEHALF OF APPELLANT Crim. App. Dkt. No. 001-69-21 USCA Dkt. No. 22-0249/CG

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

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ISSUE PRESENTED

ARE APPELLANT'S CONVICTIONS UNDER ARTICLE 91 LEGALLY INSUFFICIENT WHERE THERE IS AN ABSENCE OF EVIDENCE THAT THE CHARGED CONDUCT OCCURRED IN THE SIGHT, HEARING, OR PRESENCE OF THE ALLEGED VICTIMS WHILE THEY WERE IN THE EXECUTION OF THEIR OFFICE?

Introduction

This case involves three distinct, though related, issues. First, the applicability, interpretation, and application of the President's delineated element that Article 91 disrespect be "used toward and *within sight or hearing* of" the disrespected petty officer.[1]

Second, the applicability, interpretation, and application of the definition of "disrespect by acts," which provides a list of examples of disrespectful acts occurring "in the presence of" the victim.[2]

Third, the interpretation and application of Article 91's statutory "in execution of office" requirement and element. This naturally raises a temporal question because the victims must be in the execution of office *at the time of* the

[1] JA 0183 (*MCM 2019*, pt. IV, para. 17.b.(3)) (emphasis added).
[2] JA 0180 (*MCM 2019*, pt. IV, para. 15.c.(2)(b)); Military Judges' Benchbook, para. 3A-15-3(d) (29 Feb. 2020) [hereinafter Benchbook]; JA 167, 169, 172, (Special Findings adopting the *MCM* and Benchbook definition of "disrespect by acts.") (emphasis added to all).

charged conduct. But the parties disagree on how to define the relevant time period (the time the text messages were sent vs. the time they were read).

Argument

1. The President's "within sight or hearing" element requires physical proximity between the accused and the alleged victim.

A. Summary of parties' positions.

Appellant contends his conduct (remotely sending text messages) fell outside the President's element that Article 91 disrespect must occur "within sight or hearing" of the disrespected party. In support of this position Appellant argues, *inter alia*, that (1) the plain meaning of "within sight or hearing" denotes physical proximity, within the range of sensory perception,[3] (2) historical usage confirms exactly this meaning, demonstrating that "within sight or hearing" is a term of art denoting a requirement for physical proximity, within the range of sensory perception,[4] and (3) that the physical proximity required by "within sight or hearing" serves a sound purpose: avoiding difficulties in applying Article 91's temporal limitation (that the victim must be "in execution of office" *at the time of* the conduct) to remote and non-contemptuous forms of communication.[5]

The Government counters that this Court *should not* apply the President's

[3] Appellant's Br. at 23.
[4] Appellant's Br. at 23-25.
[5] Appellant's Br. at 26-27.

"within sight or hearing" element because (1) it does not appear in the statutory text,[6] and (2) the judiciary is not bound by the President's elements in Part IV of the *Manual for Courts-Martial* (*MCM*).[7] Alternatively, to the extent this Court finds the prosecution *is* required to prove the *MCM*'s "within sight or hearing" element, the Government argues that this phrase should be interpreted broadly, to encompass the receiving party "seeing" a previously sent electronic communication.[8] While acknowledging the historical usage cited by Appellant, the Government urges this Court not to adopt a similar interpretation, though it offers no example of the phrase being used to mean anything other than physical proximity.[9]

B. <u>This Court should hold the Prosecution is required to prove the President's "within sight or hearing" element because it narrows the scope of conduct covered by Article 91, granting the accused greater protection from criminal prosecution.</u>

As a threshold matter, this Court must decide whether to give effect to this element at all. It is undisputed that the "within sight or hearing" element appears in the *MCM* (and has since the inception of the UCMJ), and was explicitly adopted by the Military Judge in his Special Findings, but it does not appear in the statutory

[6] Appellee's Br. at 33.
[7] Appellee's Br. at 46-47.
[8] Appellee's Br. at 49-51.
[9] Appellee's Br. at 50-51.

text. The dispute revolves around the significance of this placement. This Court should not adopt the Government's position that the prosecution need not prove this delineated element.

As this Court explained in *United States v. Davis,* although courts are not bound by the President's elements and explanations in Part IV of the *MCM*, "where the President unambiguously gives an accused greater rights than those conveyed by higher sources, [courts] should abide by that decision unless it clearly contradicts the express language of the Code."[10] This is where the Government first errs, arguing that because the "within sight or hearing" element does not "appear within Article 91(3)'s statutory text" this Court "should end the inquiry there after finding the statutory language plain and unambiguous."[11] The Government's argument that courts *should not* look beyond the statutory text is the exact opposite of this Court's instruction that courts *should* abide by the *MCM*'s provisions unless the *MCM* "clearly contradicts" the statutory text.[12] The Government does not seem to argue the *MCM*'s "within sight or hearing" element "clearly contradicts" the statutory text, but nevertheless, urges this Court to "end the inquiry"[13] without looking beyond the statutory text.

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[10] 47 M.J. 484, 487 (C.A.A.F. 1998).
[11] Appellee's Br. at 33.
[12] *United States v. Davis*, 47 M.J. 484, 487 (C.A.A.F. 1998).
[13] Appellee's Br. at 33.

The Government's approach—to simply ignore the *MCM*—is not supported by caselaw.[14] Indeed, this Court in *Davis* directly cautioned against ignoring the *MCM* where it provides greater protection than the statutory text: "What the due process hierarchy dictates is that the more protective of the due process sources (the Constitution, the UCMJ, the Manual, the regulations, or military case law) must prevail. In this way, the military justice system will be applied in a consistent, and more importantly, fair fashion."[15] Expounding on *Davis*, this Court stated even more clearly in *United States v. Guess* that courts "should adhere to the Manual's elements of proof" absent inconsistency with the statutory text:

> Although the President's interpretation of the elements of an offense is not binding on this Court, absent a contrary intention in the Constitution or a statute, *this Court should adhere to the Manual's elements of proof*. Where the President's narrowing construction is favorable to an accused and is not inconsistent with the language of a statute, "we will not disturb the President's narrowing construction, which is an appropriate Executive branch limitation on the conduct subject to prosecution."[16]

Nevertheless, the Government urges this Court to do exactly what precedent consistently cautions against: ignore the *MCM* and look only to the statutory text.

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[14] Additionally, Appellant points out the President's inherent power to control the military, as Commander-in-Chief. *See* U.S. Const. art. II, § 2, cl. 1.

[15] *Davis*, 47 M.J. at 487 n.*2 (quoting D. Schlueter, *Military Criminal Justice: Practice and Procedure* § 1–1(B) at 8–9 (4th ed. 1996)) (internal quotation marks omitted).

[16] 48 M.J. 69, 71 (C.A.A.F. 1998) (quoting *Davis*, 47 M.J. at 486-87) (emphasis added).

This Court should not abandon its own precedent by doing so.

Next, the Government argues the *MCM*'s "within sight or hearing" element should not apply because the "'within sight' language does not narrow the statutory text's language but merely explains it."[17] This argument is equally unavailing. As the Government repeatedly stresses throughout its brief, neither the "within sight or hearing" requirement, "nor any synonym of these terms" are present within the statutory text.[18] It is difficult to understand how the Government thinks the *MCM*'s "within sight or hearing" requirement is merely an explanation of the statutory text, when, as the Government explicitly stresses, the statutory text does not contain any such requirement. The Government does not seem to recognize the contradiction in its own argument: it cannot simultaneously urge this Court to ignore the "within sight or hearing" element precisely *because it is not contained in the statutory text*, and then turn around and argue this element *does not narrow the statutory text*. To the contrary, as pointed out in Appellant's original brief, and explicitly (though apparently unintentionally) acknowledged by the Government, the *MCM* clearly adds to the statutory requirements by requiring that disrespect be *both* "toward *and* within sight or hearing" of the alleged victim.[19]

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[17] Appellee's Br. at 50 (This argument is also interwoven in other places throughout Appellee's brief.).
[18] *See, e.g.*, Appellee's Br. at 33.
[19] JA 0183 (*MCM 2019*, pt. IV, para. 17.b.(3)(c)) (emphasis added).

The use of the conjunction "and" means it is not enough for the disrespectful conduct to be directed "toward" alleged victims (as required by the statutory text); it must *also* occur "within [their] sight or hearing." To put it plainly, the President's elements and explanations limit conduct covered by Article 91 to disrespect that occurs within a petty officer's physical proximity. This Court should reject the Government's invitation to ignore the *MCM*'s explicitly delineated elements.

Finally, as pointed out in Appellant's original brief, military courts examining presidentially promulgated elements look to the length of time the element had been contained in the *MCM*, and whether Congress has acted to change it.[20] In the present case, this factor should cut maximally in favor of applying the "within sight or hearing" element, as it has been an explicitly delineated element since the first post-UCMJ *MCM* in 1951. It has remained so for the intervening seventy-one years. Congress has not acted in the last seven decades to change or indicate disagreement with this element.[21] This Court should

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[20] Appellant's Br. 39-40.

[21] Indeed, the "within sight or hearing" element was a specifically delineated element of Article of War 65 in the last pre-UCMJ MCM in 1949. *See MCM*, U.S. Army, 207-08 (1949 ed.), https://tile.loc.gov/storage-services/service/ll/llmlp/manual-1949/manual-1949.pdf. Thereafter, Congress expressly derived Article 91 from Article of War 65. *See Index and Legislative History Uniform Code of Military Justice*, United States Navy Office of the Judge Advocate General, U.S. Government Printing Office 1,226 (1950) ("This article

not break with this long track record of congressional endorsement by adopting the Government's suggestion to eliminate an element as old as the UCMJ itself from Article 91. The Government does not substantively address this issue in its answer.

In conclusion, this Court should answer the threshold question in the affirmative: the prosecution *is* required to prove the "within sight or hearing" element.

C. "Within sight or hearing" means within the range of sensory perception.

After determining that the prosecution must prove the elements—a proposition so basic it is almost surreal to debate—this Court must get to the heart of the issue: interpreting the meaning of the "within sight or hearing" element.

As always, statutory interpretation begins with plain meaning.[22] Both sides contend the meaning of "within sight or hearing" is plain.[23] Appellant concludes the phrase plainly "contemplate[s] a sensory range within which the conduct must

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[91] is derived from A.W. 65."). By expressly adopting a successor to the then-existing offense without taking any action to change or indicate disagreement with its current elements, it can fairly be said that Congress not only did not object to those elements, but expressly endorsed them.

[22] This Court has repeatedly stated it is "well established" the *MCM* should be interpreted in accordance with the standard rules of statutory interpretation. *See United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007) (citing *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006)); *United States v. Lucas*, 1 C.M.R. 19, 22 (C.M.A. 1951)).

[23] *See* Appellant's Br. at 22-23; Appellee's Br. at 49-50.

occur."[24] The Government, meanwhile, advocates a much broader plain meaning, concluding: "'within sight' plainly means a 'situation or circumstances in the limits or compass of . . in or into the range of' a victim's 'process, power, or function of seeing.'"[25] When examining these two offered meanings side-by-side, it becomes clear which is plainer. Indeed, with due respect, there is some irony in the idea that a conclusion as convoluted as that advanced by the Government could be considered "plain."[26]

Appellant respectfully submits his plain meaning analysis is far more convincing, even in isolation. But Appellant, unlike the Government, does not offer his analysis in isolation. Appellant points this Court to corroborating canons of statutory interpretation, all of which support the same conclusion. First, historical usage confirms Appellant's reading to a tee, demonstrating that "within sight or hearing" is a term of art denoting a requirement for physical proximity, within the range of sensory perception.[27] Second, the physical proximity required

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[24] Appellant's Br. at 22-23.
[25] Appellee's Br. 49-50 (ellipsis in original).
[26] Ultimately servicemembers must have reasonable notice of what conduct is criminal. Imagine a vignette in which two servicemembers are reading the *MCM*. One says to the other: "what does 'within sight or hearing' mean?" The other replies: "It's plain! It means a 'situation or circumstances in the limits or compass of . . . in or into the range of' a victim's 'process, power, or function of seeing.'" This is unrealistic.
[27] Appellant's Br. at 23-25.

by "within sight or hearing" serves a sound purpose: avoiding difficulties in applying Article 91's temporal limitation (that the victim must be "in execution of office" *at the time of* the conduct) to remote and non-contemptuous forms of communication.[28] This purpose is only vindicated by Appellant's reading of "within sight or hearing."[29] Similarly, scholarship demonstrates military justice experts reach the same conclusion as Appellant: "within sight or hearing" means presence.[30] The Government, on the other hand, offers no additional canons beyond plain meaning.[31] In over a year of a half of litigating this issue, the

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[28] Difficulties that are on full display in this very case. Of course, the narrowing construction also serves to protect the accused by making less conduct criminal, and by narrowing the scope of the offense, presumably in recognition of the more limited need to criminalize disrespect of noncommissioned officers (as opposed to commissioned officers) in furtherance of good order and discipline. Indeed, the latter point can be seen by the fact that disrespect of a noncommissioned officer was not an offense at all in the armed forces until the 1916 revision to the Articles of War. Our armed forces survived for well over a century with *no* criminalization of this offense, so it is hardly surprising that policy reasons may support significant limitations on its scope.

[29] Appellant's Br. at 26-27.

[30] *See* David A. Schlueter, *Military Criminal Justice: Practice and Procedure*§ 2-3[C], page 88 (2021 ed.) (citing the *MCM*) (stating matter-of-factly, on this very topic, that "[t]he words or actions must be in the presence of the victim.").

[31] While not specifically relating to the interpretation of "within sight or hearing," the Government does argue that adopting its proposed broad interpretation would most thoroughly effectuate Article 91's purpose of protecting petty officers from disrespect, by allowing criminal prosecutions for the broadest range of possible scenarios. Appellee's Br. at 34-38. This is not how statutory interpretation works. It is a truism that broadly interpreting a criminal statute would allow the Government to enforce it more broadly. But this is the exact opposite of the

Government has not found a single source that interprets "within sight or hearing," nor any similar phrase, to mean what they contend it plainly means. Indeed, the Government has not found a single source that interprets the phrase to mean anything other than what Appellant contends it means. The Government's offered meaning cannot be plain when every known source reaches the exact opposite conclusion.

Finally, to the extent any ambiguity remains, the rule of lenity requires that it be resolved in favor of the defendant. To save the conviction from the application of the rule of lenity, the Government must affirmatively show why ambiguity should be resolved in its favor. Appellant respectfully submits the Government has not done so.

This Court should find "within sight or hearing" requires physical proximity, within the range of sensory perception. This is the commonsense meaning. Historical usage confirms as much and demonstrates that "within sight or hearing" is merely a more precise historical synonym for "presence." Additionally, this reading effectuates the purpose of the "within sight or hearing" requirement: avoiding difficulties in applying Article 91's temporal limitation to remote and non-contemptuous forms of communication. Finally, to the extent this Court finds

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hallowed principle that ambiguity in criminal prohibitions should be construed strictly.

any remaining ambiguity, the rule of lenity requires application as a "tiebreaker" in Appellant's favor.

D. This Court should clarify the framework of statutory interpretation applicable to presidentially delineated elements.

Adjacent to, and intertwined with, the Government's argument that this Court should either ignore or broadly interpret the "within sight or hearing" element is a broader question about the proper framework of statutory interpretation applicable to presidentially delineated elements within the *MCM*. The lower court interpreted this Court's decision in *Davis* to mean: "To the extent the President has the authority to grant greater rights to a servicemember by excluding certain means of communication from Article 91's reach, he must do so unambiguously."[32] In other words, the lower court would place the burden on servicemembers to resolve *any ambiguity in the words* of presidentially delineated elements in their favor.[33] This is not Appellant's reading of *Davis* and is the exact opposite of the age-old principle of statutory interpretation that penal laws should be construed strictly, and that any ambiguity in their words must be resolved in

[32] *United States v. Brown*, 82 M.J. 702, 706 (C.G. Ct. Crim. App. 2022).
[33] Or, put another way, would place the burden on the President to act with 100% clarity in his words (a near impossible task) in order to grant greater rights to servicemembers.

favor of the accused.[34]

While the Government does not go as far as the lower court in its brief, echoes of this "inverse rule of lenity" can be heard throughout its arguments. This Court should clarify its precedent *does not* create such a rule. Indeed, such a rule would create an extremely convoluted framework of statutory interpretation where courts (and servicemembers desirous of knowing what conduct was criminal) would have to chart out the UCMJ's statutory elements side-by-side with the *MCM's* elements, determine where they overlapped and diverged by strictly construing the statutory language in favor of the accused (as required by fair notice, the vagueness doctrine, and the rule of lenity) while strictly construing the *MCM's* language against the accused (because according to the Government, the President may only grant greater rights via unambiguous language). This two-tiered framework of review would be extremely confusing and would significantly *increase* servicemembers' level of uncertainty as to what conduct was "forbidden and subject to criminal sanction"—the very evil the rules of statutory interpretation seek to avoid.[35] Servicemembers should not be required to decipher such riddles to

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[34] "Whether referred to as 'the vagueness doctrine' or the 'rule of lenity', '[t]he rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.'" *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (citations omitted).

[35] *See Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2017).

know what conduct will see them branded as criminals.[36]

To the contrary, this Court's precedent is clear that the *MCM* should be interpreted in accordance with the standard rules of statutory interpretation.[37] Among the oldest and most fundamental of these rules of statutory interpretation are the above-discussed rules requiring that criminal prohibitions be construed strictly.[38] With respect to *Davis's* reference to the President "unambiguously giv[ing] an accused greater rights," expressly delineating an element (which contains an additional requirement the Government concedes is not found in the

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[36] Appellant also points out that the UCMJ itself is designed to be highly sensitive to the rights of servicemembers to be put on notice of what conduct is subject to criminal prosecution. Article 137, UCMJ, 10 U.S.C. § 937, explicitly commands that the code's provisions be "carefully explained" to enlisted members within fourteen days of entry on to active duty. Article 137 further requires that relevant texts, to include the *MCM*, be maintained and made available to all servicemembers. Appellate defense counsel can personally attest that such training heavily (almost exclusively) refers servicemembers to the *MCM* itself. It would be a cruel joke, and directly contradictory to the spirit of this statute, to provide such training and then turn around and either ignore the *MCM*'s listed elements, or strictly construe their language *against* servicemembers, in contravention of all standard rules of statutory interpretation that ambiguity in penal laws be construed strictly in favor of the accused.

[37] *See Custis*, 65 M.J. at 370 (citing *James*, 63 M.J. at 221); *Lucas*, 1 C.M.R. at 22; *see also United States v. Wilson*, 76 M.J. 4, 7 (C.A.A.F. 2017) (applying the canon of *expressio unius est exclusio alterius* to the President's explanation of an offense in *MCM* Part IV); *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015) (applying the traditional rules of statutory interpretation to the Rules for Courts-Martial).

[38] *See Wiltberger*, 18 U.S. at 95.

statutory text) is an unambiguous grant of greater rights.[39] There are few limitations on the Government's exercise of criminal sanction more fundamental or unambiguous than expressly delineating the elements required to convict and punish. This Court should not adopt a rule by which the words of delineated elements are strictly construed *against servicemembers*, and should use this case to clarify that such rule does not, and never has, existed. This Court should directly clarify its reference in *Davis* to the President "unambiguously giv[ing] an accused greater rights" *does not* create a new framework of statutory interpretation in which accused servicemembers bear the burden to resolve all potential ambiguity in the words of presidentially delineated elements, or risk those elements being cast aside.

2. The definition of "disrespect by acts" requires the accused's conduct to occur "in the presence of" the alleged victim.

A. Summary of parties' positions.

[39] *See Davis*, 47 M.J. at 486-87. An example of an *MCM* provision that did not "unambiguously" narrow the range of conduct subject to prosecution can be found in *United States v. Czeschin*, 56 M.J. 346 (C.A.A.F. 2002). There, this Court examined language in the *MCM* that attempted to reconcile Article 107's elements with the interpretation of that article's scope "under then-existing case law." *Id.* at 349. It seemed the President was merely trying to *reflect* a limitation that had been established by the courts, rather than enacting an independent limitation. No such dynamic is present here. *Czeschin* shows the relevant type of ambiguity in the *MCM*: when it is unclear the President intends to create a binding limitation. In the present case, "within sight or hearing" is unambiguously a binding limitation.

Appellant's position is the President's definition of "disrespect by acts" reiterates and reinforces Article 91's contemporaneity and physical proximity requirements (at least with respect to disrespect by deportment) by requiring that disrespect in deportment must occur "in the presence of" the alleged victim. [40]

The Government counters that the examples listed by the President are nonexclusive, and should not be read to mean that disrespect by acts must occur "in the presence of" the alleged victim.[41] Additionally, while not going into detail, the Government seems to argue this Court should not apply the President's definition at all, because it "do[es] not *unambiguously* narrow the offense's scope" and, therefore, "this Court then need not reach beyond Article 91(3)'s statutory language."[42]

B. <u>This Court should give effect to the President's definition of "disrespect by acts" because it narrows the scope of conduct covered by Article 91 and comports with its text.</u>

This Court should not adopt the Government's suggestion to simply ignore the President's definition. The analysis here largely tracks that above (relating to the applicability of the "within sight or hearing" element) and won't be repeated in

[40] Appellant's Br. 28-32; *see* JA 0180 (*MCM 2019*, pt. IV, para. 15.c.(2)(b)); *see also* Benchbook, para. 3A-15-3(d) (29 Feb. 2020); JA 167, 169, 172, (Special Findings adopting the *MCM* and Benchbook Definition of "disrespect by acts").
[41] Appellee's Br. at 47-48.
[42] Appellee's Br. at 47 (emphasis in original).

full. Appellant points out, however, that this Court addressed this exact issue (whether to apply an *MCM* definition) in *United States v. Wilson*,[43] and came to the opposite conclusion the Government advocates for.

In *Wilson*, this Court examined whether a fenced motor pool constituted a "structure" for purposes of Article 130 housebreaking. The President defined a "structure" in the *MCM* as "in the nature of a building or dwelling." While not bound by the President's definition, this Court stated: "when the President's narrowing construction of a statute does not contradict the express language of a statute, it is entitled to some deference, and we will not normally disturb that construction."[44] As the President's definition did not contradict the statute, this Court in *Wilson* gave effect to it and applied the definition. This Court should do the same here with respect to the President's definition of "disrespect by acts" because it in no way contradicts the statute.

C. <u>While the examples listed in the definition of "disrespect by acts" are nonexclusive, other unlisted examples must fit within the sort of examples listed.</u>

Appellant agrees with the Government that examples listed by the President are nonexclusive. However, the Government misconstrues the significance of this fact. It is well-settled how to deal with nonexclusive lists of examples. When the

[43] 76 M.J. at 4.
[44] *Id.* at 6 (citations omitted).

MCM "provides a nonexclusive list of examples," this Court applies the "canon of *expressio unius est exclusio alterius*"[45] to determine whether unlisted examples "fit within the sort of examples listed."[46] Here, the President lists several examples of disrespect in the presence of the victim. It follows that, in order for unlisted examples to "fit within the sort of examples listed," they must also occur in the presence of the victim.

Similarly, as argued by Appellant,[47] but not addressed by the Government, based on "the series qualifier cannon," the phrase "in the presence of the [petty] officer" applies to the entire series.[48] For example, when the Constitution says the people should be secure against "unreasonable searches and seizures," the word "unreasonable" qualifies both searches *and* seizures.[49] Here, "in the presence of" qualifies each of the acts listed in the President's definition. As such, it is clear the President is limiting criminal liability for "disrespect by acts" to acts that take place "in the presence of" the victim.

3. <u>The statutory "in execution of office" requirement necessarily places a temporal limitation on the conduct covered by Article 91.</u>

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[45] "The expression of one thing is the exclusion of the other."
[46] *Wilson*, 76 M.J. at 7 (emphasis in original) (citations omitted).
[47] Appellant's Br. at 29.
[48] *See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 147-51 (2012 ed.).
[49] *See id.* at 147.

A. Summary of parties' positions.

Appellant argues Article 91 requires the disrespectful act to occur "*while* [the victim] is in execution of his [or her] office."[50] This creates a temporal limitation: the act must occur *at a time when* the victim is in execution of office. [51] Appellant submits, in accordance with the charging language, that the charged act was the composition and sending of the text messages.[52] As there is little, if any, evidence in the record as to what the alleged victims were doing *at the time* Appellant sent the charged text messages, Appellant submits the evidence is legally insufficient to conclude they were in execution of their offices at those times.[53] And as it relates to Chief J.D. and Chief S.C., there is no evidence of what time the text messages were sent.

The Government does not seem to take issue with the propositions that (1) the disrespectful act has to occur while the victim is in execution of office or (2) this dynamic creates an inherent temporal requirement (the victim must be in execution of office contemporaneously with the charged act). However, the Government argues the charged act did not occur until the victims "experienced"

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[50] JA 0176 (emphasis added).
[51] Appellant's Br. at 13-21 (Article 91's temporal components are also discussed elsewhere throughout Appellant's Brief).
[52] Appellant's Br. at 42-51.
[53] Appellant's Br. at 42-51.

the messages by reading them.[54] The Government defines Appellant's act as the victims' reading of the messages.[55] While the record is largely silent as to what the victims were doing when they read the messages (particularly with respect to Chief S.C. and Senior Chief K.B.), the Government contends they were *per se* in execution of office at the time of reading because the messages were sent on a group text that was used for work related purposes.[56]

B. <u>This Court should measure the time period for the charged acts here based on the time the text messages were modified or sent—not received or viewed, as the Government suggests.</u>

As the parties seem to agree the victim must be in execution of office *at the time of the charged act*, the first and most important matter is to define the charged act. This task must start with the charging language. Specifications 1 and 2 use identical language, charging Appellant with being disrespectful in deportment "by *modifying* a digital [image] . . . and *distributing* it to the POLAR STAR Chief's Mess."[57] Specification 4 uses slightly different language, charging Appellant with being disrespectful in deportment by "*sending* a digital image . . . to the POLAR STAR Chief's Mess."[58]

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[54] Appellee's Br. at 25-32.
[55] Appellee's Br. at 25-32.
[56] Appellee's Br. at 25-32.
[57] JA 0012 (Charge Sheet) (emphasis added).
[58] JA 0012 (Charge Sheet) (emphasis added).

Appellant's interpretation of these charged acts is straightforward: Appellant was charged with composing and sending text messages. The Government's interpretation is much more convoluted, latching on to the word "distributing"—which is used in two out of the three specifications—to argue the charged act continued indefinitely until the victims eventually viewed the text messages, at which time the charged act of "distribution" was complete. In support of this complex theory of the charged actus reus, the Government cites this Court's decision in *United States v. Kuemmerle* for the proposition that the act of distribution is not compete until the digital information is delivered into the possession of another person.[59] *Kuemmerle*, however, is inapplicable.

Kuemmerle involved the distribution of child pornography via posting it on a publicly viewable social media page. This Court held the act of distributing child pornography *in this manner* continued until another user accessed it on their computer. The distinctions between *Kuemmerle* and the present case are immediately apparent. Posting an image online for others to access/view (as in *Kuemmerle*) is much different than sending it via a text message. In *Kuemmerle*, the delivery *could not* be completed without action on the part of the other party—someone had to choose to access the file and then download it. Here, delivery was

[59] 67 M.J. 141 (C.A.A.F. 2009).

effectuated solely by the action of the sender, in a short amount of time. In the context of text messages, delivery is separate from viewing. A message is in the recipient's possession when it is electronically delivered to their device.

Similarly, as this Court heavily emphasized in *Kuemmerle*, the appellant's own involvement in that case *was ongoing* in that (1) he continued to use and edit the social media page in question and (2) he could have, but did not, remove the image at any time. This is very different than a text message that, once sent, cannot be edited or removed. The accused takes no disrespectful action when the recipient eventually *reads* the text message. There is no ongoing action on the part of the sender after a text message is sent; thus, it makes no sense to define this actus reus as complete upon viewing.

Even accepting the Government's analogy to *Kuemmerle* and that appellant's act continued until delivery, neither changes the ultimate conclusion here. The delivery of the charged text messages presumably happened within seconds of the sending. The record is equally silent as to what the victims were doing at the time of delivery as at the time of sending. As such, even if this Court looks at the time of delivery, rather than the time of sending, Appellant still prevails. In order for the Government to prevail, this Court would have to go even further—beyond the argument that the act continues until delivery—and hold the act continues until the recipient views a previously delivered message. Common

sense and common language agree that a text message is *delivered* when it arrives at the recipient's phone, not when it is viewed. Indeed, many text messaging services indicate this exact distinction, informing the sender when their message has been "sent," "delivered," and "read." The Government would like this Court to hold delivery of a text message does not take place until reading or viewing. This is tortured and unreasonable.

Additionally, while the Government builds its argument entirely around the word "distributing," this word is not used at all in Specification 4, which merely uses "sending." While the Government attempts to incorporate its same analysis into the word "sending," this argument fails. Sending a text message means sending a text message. Indeed, the Government even lists among the definitions of sending: "to send a message."[60] No one on earth would say the act of *sending* a text message is ongoing indefinitely until the recipient views it. As such, even if this Court somehow were to accept the Government's flawed logic as to the specifications alleging "distributing," Specification 4 still cannot be saved.

Specification 4's use of "sending" is also telling on a broader point. If, as the Government now argues for the first time, the Government was attempting to charge Appellant with a complex actus reus involving a technical definition of

[60] Appellee's Br. at 22 (quoting *Black's Law Dictionary* (11th ed. 2019)).

"distributing," then they would have done so in all the specifications. They did not do so, instead using "distributing" and "sending" interchangeably. Clearly all specifications were intended to—and did—merely allege the composition and sending of the text messages.

Finally, on a more fundamental level, it is unclear that the Government can, via its charging language,[61] expand the actus reus of Article 91 disrespect to encompass actions done by people other than the accused (such as viewing/reading messages). Such a framework would be especially fraught when, as here, dealing with an offense inherently tied to a temporal element.

Rather than engage in the Government's mental gymnastics, this Court should find the charged acts were Appellant's composition and sending of the text messages.

C. If the charged act was sending the text messages, there is no dispute over the legal insufficiency of Chief Brown's convictions.

Should this Court determine the charged act was the sending of the text messages, the Government does not seem to dispute that the evidence is legally insufficient to sustain Appellant's convictions. Indeed, this seems beyond dispute, as there is no evidence whatsoever as to what the victims were doing at the time of

[61] In this case, a single undefined word within its charging language ("distributed").

the sending. And the Government does not seem to dispute this absence of evidence in its answer.

D. The Government's approach creates a notice problem.

The approach taken by the Government (that the accused's act is indefinitely ongoing until a third party takes an intervening action, at an unknowable future time) causes a major notice problem with respect to the victim's status. As Article 91 only criminalizes disrespect when the victim is in a certain status, the accused must have notice of whether they are in that status—or at least notice of the relevant time to evaluate status. When it comes to remote and non-contemporaneous forums of communication, such notice is lacking. If the relevant time to evaluate status depends on actions completely outside the accused's control or knowledge, notice is lacking. Otherwise, Article 91 would be transformed into a near strict liability offense.

The Government's suggestion that the recipients here would be *per se* in execution of office at the time of reading (because the group thread was work related) does not solve this problem. In the first place, that circumstance is very unique to this case, and this Court should not build its case law around such a specific set of facts. Additionally, the Government's characterization of this group

text vastly overstates its official purpose, often without citation to the record.[62] Similarly, though largely ignored by the Government, the record is clear that this group text amongst peers was routinely accessed from personal cellphones[63] for non-work-related reasons, such as "friendly conversations";[64] to "share jokes,"[65] pictures, and memes;[66] and to provide "some levity."[67] The Government fails to acknowledge that these messages were sent to individuals on their personal cellphones, at least one was sent outside working hours, and all appeared in a forum that includes a mixture of personal humor and professional matters. Nothing about the group text message indicates a person is *per se* in the execution of their office while checking it. Indeed, the largely social/frivolous nature of this group thread can be seen in direct connection to the charged memes themselves. After Chief Brown sent the yearbook meme about Chief S.C., she playfully retaliated by sending an embarrassing picture of a young Chief Brown to the group

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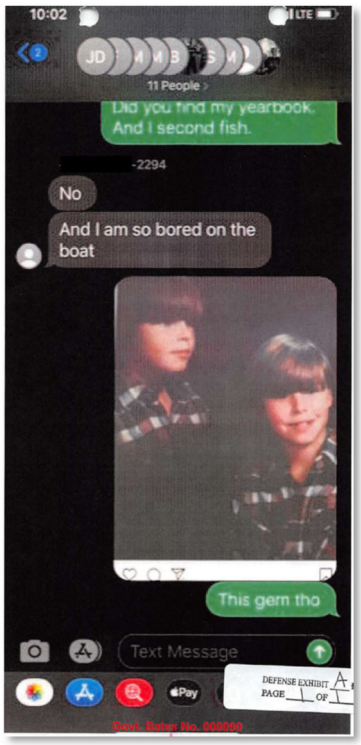
[62] *See, e.g.*, Appellee's Br. at 27 (Asserting, without citation to the record, that "but for the need to communicate official information" the group text would not have existed); *id.* at 43 (Asserting, without citation to the record, that "[e]ach victim . . . opened the text string to review if the message was work related and required official action.").
[63] JA 0020-0021.
[64] JA 0079.
[65] JA 0059.
[66] JA 0140.
[67] JA 0030; *see also* JA 0164 (Pros. Ex. 10 (where one member of the group text, Chief J.D., shared a meme)).

chat, accompanied by a mocking caption, as "a joke":[68]



Additional evidence that this group chat—portrayed by the Government as a sacrosanct temple of office execution—was routinely (or even primarily) used for non-work-related reasons can be seen by the messages in and around those introduced at trial. Directly before the above message from Chief S.C., another participant complains about being bored. Directly after the charged image from Specification 1, another participant replies with yet another meme, apparently from a website called "Coast Guard Memes."[69] It is farfetched to argue that

[68] JA 0145-46; JA 0165 (Def. Ex. A).
[69] JA 0164 (Pros. Ex. 10). It seems the "Coast Guard Memes" database can be accessed here: https://www.facebook.com/coastguardmemes/.

participation in a group chat of this largely social/frivolous nature could create a *per se* execution of office status as the Government suggests.

E. The President's "within sight or hearing" element compliments the statutory "in execution of office" requirement, making its application easier and more transparent.

There is an interplay between the statutory execution-of-office requirement and the President's "within sight or hearing" element. Article 91's requirement that the offense occur *while* the victim is in a certain status can cause complex application problems. This is demonstrated by the parties' lengthy arguments about defining the time of the offense (and by the lower court's somewhat ironic confusion about the time of the offense). The President acted within his sound discretion to eliminate these problems through the "within sight or hearing" requirement. When two people are "within sight or hearing" of each other—meaning in each other's presence—there is no difficulty in determining the time of the offense. Similarly, there is no notice issue because the parties can readily discern each other's status(es). The President made an intentional and sound decision to eliminate these difficulties through the "within sight or hearing" requirement. The Government encourages this Court to ignore the President's well-reasoned narrowing language and reanimate the very application problems it so eloquently solves. This Court should decline to do so.

F. This Court should not affirm legal sufficiency based on an analysis contrary to that engaged in by the factfinder in special findings.

Finally, there is disagreement between the parties as to whether reviewing courts can affirm legal sufficiency based on an analysis contrary to that engaged in by the factfinder in special findings. As explained in Appellant's original brief, the Military Judge, via special findings, defined the time of the offense as the time of the *creation* and *sending* the memes, while the lower court defined the time frame of the offenses as the time the recipients viewed the memes.[70] Where special findings specifically reveal the analysis a factfinder engaged in, appellate courts should not affirm legal sufficiency based on an analysis contrary to that actually conducted by the factfinder.[71] Doing so endorses the idea that a conviction may be sustained via an analytical framework that the parties conclusively know the factfinder did not use. This is highly counterintuitive and, Appellant submits, violative of due process.[72]

The Government replies that "any dissonance" between special findings and legal sufficiency review is "irrelevant" because legal sufficiency review looks "if

[70] Appellant's Br. at 53-54.
[71] Appellant's Br. at 53-54.
[72] *See United States v. English*, 79 M.J. 116, 122 (C.A.A.F. 2019) ("Expanding the scope of the specification on appeal beyond that which was presented to the trier of fact is akin to the violation of due process that occurs when an appellate court affirms a conviction based on a different legal theory than was presented at trial.").

any rational trier of fact" could have found guilt through *any analysis*.[73] Appellant submits this approach is inapplicable in the case of special findings. In the case of general findings of guilt, reviewing courts will not know what analysis the factfinder engaged in, and therefore must look exclusively to whether "any rationale trier of fact" could have found guilt *through any analysis*. In the case of special findings, however, where the reviewing court is aware of the analysis the factfinder *actually* engaged in, it is highly counterintuitive to simply turn a blind eye to that knowledge. This Court should clarify whether appellate courts can affirm legal sufficiency based on an analysis contrary to that engaged in by the factfinder in special findings.

Conclusion

For the foregoing reasons, Chief Brown respectfully requests this Court set aside the findings and sentence as to Charge I, Specifications 1, 2, and 4.

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[73] Appellee's Br. at 55-57.

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CERTIFICATE OF FILING AND SERVICE

I certify that on December 27, 2022, the foregoing was delivered electronically to this Court, and that copies were electronically delivered to the Appellate Government Division.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(c) AND 37

The undersigned counsel hereby certifies that: 1) This brief complies with the type-volume limitation of Rule 24(c) because it contains 6,981 words; and 2) this brief complies with the typeface and type style requirements of Rule 37

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