IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee* v. Fernando M. BROWN U.S. Coast Guard, *Appellant*	BRIEF ON BEHALF OF APPELLEE Crim. App. Dkt. No. 001-69-21 USCA Dkt. No. 22-0249/CG

TO THE 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

During the summer of 2019, Appellant distributed three highly disrespectful images to Coast Guard Cutter POLAR STAR's Chiefs Mess while POLAR STAR's crew was geographically dispersed. Each disrespectful image targeted a peer with sexual inuendo or worse on a forum which publicized this ridicule amongst 11 chief petty officers and shipmates. The images were delivered to each victim's cell phone via a text string each victim was expected to check to remain apprised of information pertinent to their duties aboard POLAR STAR.

The statutory text of Article 91(3), Uniform Code of Military Justice (UCMJ),[1] proscribes an enlisted member from being "disrespectful in language or deportment toward a . . . petty officer, while that officer is in the execution of his office . . . ." For his disrespectful deportment, Appellant was charged and convicted of violating Article 91(3). A conviction supported with detailed special findings. Conducting a *de novo* review, the Coast Guard Court of Criminal

[1] 10 U.S.C. § 891(3) (2018). Use of "Article" hereinafter is reference to the UCMJ Article unless specified otherwise.

Appeals (CGCCA) affirmed, finding that Article 91(3) encompassed appellant's conduct and his conviction legally sufficient.

This Court should affirm as well, recognizing that Article 91(3)'s plain language proscribes Appellant's conduct. The first step of statutory interpretation resolves this case as the evidence substantiates the plain meaning of each requirement of Article 91(3)'s statutory language. The Court can and should end its inquiry there. However, even referencing lower sources of authority and addressing Appellant's convoluted arguments to the contrary, Appellant's conduct meets each of Article 91(3)'s requirements meaning his conviction is legally sufficient and should be affirmed.

In rooting its decision to affirm Appellant's conviction in Article 91(3)'s plain language, this Court will provide clarity, demonstrating that Article 91(3)'s statutory language proscribes conveying disrespect via modern means of communication. Such clarity will be particularly salient as servicemembers increasingly complete their duties in a post-pandemic world via video chats, phone calls, text messages, electronic mail, and the like. No enlisted servicemember or warrant officer, Appellant or otherwise, who "is disrespectful in language or deportment toward a . . . petty officer, while that officer is in the execution of his

office . . . ," [2] should be immunized just because he or she uses a ubiquitous technology like a text message to convey disrespect.

Statement of Statutory Jurisdiction

The CGCCA exercised jurisdiction over this case pursuant to Article 69(d)(1)(A).[3] This Court has jurisdiction pursuant to Article 67(a)(3).[4]

Statement of the Case

On October 21, 2020, Appellant was convicted, contrary to his pleas, by a military judge alone special court-martial of three specifications of disrespect towards a petty officer and, by exception, of one specification of violating a lawful general order prohibiting sexual harassment in violation of Articles 91 and 92,[5] respectively. The military judge dismissed one specification of a violation of Article 91 and one specification of a violation of Article 92 under Rule for Courts-Martial 917.[6] The military judge sentenced Appellant to reduction to E-4, 30-days restrictions, and a reprimand.[7] The convening authority approved this sentence.[8]

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[2] *Id*.
[3] 10 U.S.C. § 869(d)(1)(A).
[4] 10 U.S.C. § 867(a)(3).
[5] 10 U.S.C. §§ 891-92 (2018).
[6] JA 0015 (Statement of Trial Results (STR)).
[7] JA 0014 (STR).
[8] JA 0002 (*United States v. Brown*, 82 M.J. 702, 704 (C.G. Ct. Crim. App. 2022)).

Appellant petitioned to The Judge Advocate General (TJAG) of the Coast Guard, who sent this case to the CGCCA for review.[9] The CGCCA upheld Appellant's Article 91 convictions but set aside his Article 92 conviction.[10] The lower court reassessed Appellant's sentence to a reduction to E-6, 30-days restriction, and a reprimand.[11]

On October 3, 2022, this Court granted Appellant's petition for review.[12]

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[9] JA 0002 (*Brown*, 82 M.J. at 704).
[10] JA 0009 (*Brown*, 82 M.J. at 711).
[11] *Id.*
[12] JA 0001 (Order Granting Review).

Statement of Facts

1. Appellant distributed captioned images targeting three peer chief petty officers which each victim saw.

In the summer of 2019, Appellant distributed the three below images to the recipients of a text message string comprised of chief petty officers (chiefs) assigned to Coast Guard Cutter POLAR STAR.[13]

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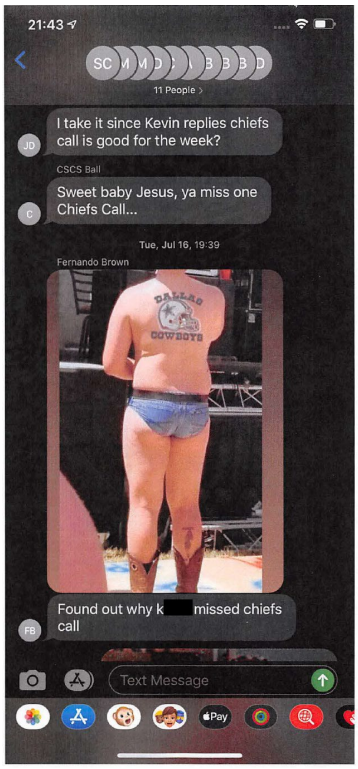
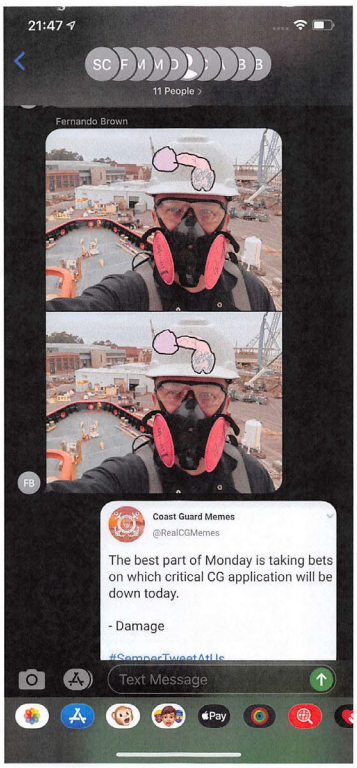


15



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The left-most message is a high school yearbook photo of Chief S.C. which Appellant modified by adding a caption.[17] The middle message shows a picture of

[13] JA 0019-21, 0023-27, 0029, 0036, 0044-49.
[14] JA 0162 (Pros. Ex. 5).
[15] JA 0163 (Pros. Ex. 9).
[16] JA 0164 (Pros. Ex. 10).
[17] JA 0044-49, 0122-25.

a scantily clad man with an accompanying text message targeted at Senior Chief K.B.[18] The right-most message is a photograph of Chief J.D. upon which Appellant drew a penis and scrotum.[19]

When Appellant distributed the images, each of the victims and Appellant were chief petty officers.[20] Appellant was aware each victim was a petty officer.[21] Appellant and each victim were part of POLAR STAR's Chief's Mess and received messages via the text string.[22] And each victim saw these images via the text string.[23]

2. Testimony showed the images Appellant distributed were disrespectful.

Chief S.C. testified she did not want Appellant to distribute her yearbook photograph.[24] She further testified that Appellant distributing the captioned yearbook photograph to POLAR STAR's Chief's Mess left her feeling embarrassed, both at the time and at trial over a year after Appellant distributed this image.[25] Chief S.C. is a lesbian, a fact Appellant knew prior to distributing the

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[18] JA 0035-36.
[19] JA 0028-30.
[20] JA 0077 & 0168 (Chief J.D.), 0096 & 0172 (Senior Chief K.B.), 0115 & 0170 (Chief S.C.), 0012 (Appellant).
[21] JA 0021, 0101, 0168, 0170, 0172.
[22] JA 0021.
[23] JA 0083, 0098-99, 0120-23.
[24] JA 0125.
[25] JA 0125-27. *Compare* JA 0012 (listing 3 June 2019 as date of offense) *with* JA 0113 (start of Chief S.C. testimony) and Transcript at 95 (start of transcript on October 20, 2020, the day Chief S.C. testified).

captioned image.[26] Chief J.S. also testified that this image was disrespectful to Chief S.C., targeting her sexual orientation.[27]

Chief S.C. also testified to the impacts of Appellant's conduct, as charged here and otherwise. Specifically, she testified to having altered her schedule to avoid dining in the Chief's Mess "just because sometimes you're not in the mood to . . . see what's gonna happen next . . . . Like if you're just gonna go in[to the Chief's Mess] to get . . . made fun of . . . ."[28] Chief S.C. worried specifically that Appellant was going to make fun of her.[29] And she testified to having deleted Appellant's number from her phone because of the text messages he sent which led to her not talking with Appellant anymore.[30]

Chief J.S. testified that Appellant distributing the photo of the scantily clad man was disrespectful towards Senior Chief K.B.[31] Senior Chief K.B. did not find the message personally disrespectful but did acknowledge that he believed "it could not have been funny. It may not have been funny to [another senior chief petty officer]."[32]

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[26] JA 0126-27.
[27] JA 0048-49.
[28] JA 0137-38.
[29] JA 0137-38.
[30] JA 0138.
[31] JA 0035-39.
[32] JA 0107, 0109.

Chief J.D. testified that Appellant distributing the photograph of him with a penis and scrotum drawn on his head was disrespectful.[33] Chief J.D. further testified that he felt uncomfortable responding to Appellant's message and did not want to confront Appellant.[34]

3. Appellant transmitted the text messages via a text message string which was expressly created to share work-related information while POLAR STAR's Chief's Mess was geographically dispersed. Each victim felt obligated to communicate via this text string to fulfill their military duties.

POLAR STAR was in dry dock in California in the summer of 2019.[35] To allow portions of the crew to spend time in POLAR STAR's homeport in Seattle, Washington, the crew was split into three groups rotating between California and Washington; this included the chiefs.[36] Recognizing the need to "engage" with one another regarding work-related issues while geographically dispersed, Senior Chief K.B. created a text message string ("the text string").[37] The text string included 11 of POLAR STAR's chiefs, including Appellant and each of the victim petty officers.[38]

[33] JA 0081.
[34] JA 0082.
[35] JA 0019-20, 0079, 0140.
[36] JA 0020.
[37] JA 0100-01.
[38] JA 0021.

The text string was primarily used to exchange work-related information, particularly about Chief's Mess conference calls.[39] Participants also sent some non-work-related content via the text string.[40]

Each victim testified that they felt obligated to participate in the text string to carry out their duties as chiefs, though no one had expressly ordered participation.[41] One victim chief expressly testified that communicating with the other chiefs via the text string rendered her in execution of office as a chief.[42] Testimony also indicated it would be inappropriate for POLAR STAR chiefs to not address work-related issues outside of normal duty hours.[43] Chief S.C. in particular testified that, although she was on convalescent leave during the summer of 2019, she still felt obligated to remain apprised of POLAR STAR's status and continued to communicate with the Chief's Mess, including by using the text string.[44]

4. Appellant was charged with disrespect by deportment for distributing these text messages.

Appellant was charged with, *inter alia*, three specifications of violating Article 91(3), specifically with being "disrespectful in deportment . . . by

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[39] JA 0030, 0078-79, 0099-0101, 0116-18.
[40] JA 0059, 0085, 0140.
[41] JA 0030-31, 0079, 0099-0101, 0118.
[42] JA 0118.
[43] JA 0108.
[44] JA 0124.

modifying a digital photograph . . . and distributing it to the POLAR STAR Chief[s] Mess," as related to his text messages targeted at Chief J.D. and Chief S.C., and with being "disrespectful in deportment . . . by sending a digital image" and making disrespectful allegations regarding Senior Chief K.B. based upon that image.[45]

5. The military judge's special findings found Appellant's conduct violated Article 91(3).

Pursuant to a defense request, the military judge issued special findings.[46] As pertinent to the Article 91(3) charge, the military judge specified the elements required to prove each specification, listed pertinent definitions and explanations, and then articulated the evidence the judge found met each element.[47] The military judge specifically found the evidence of Appellant's conduct proved each element beyond a reasonable doubt, and that, *inter alia*, (1) Appellant was disrespectful in deportment, (2) Appellant's deportment was towards and within sight and hearing of each victim petty officer, and (3) each victim petty officer was in execution of office when Appellant's deportment came with each petty officer's sight or hearing.[48] The military judge specifically referenced each victim's participation in

[45] JA 0012.
[46] JA 0166.
[47] JA 0166-73.
[48] JA 0166-73.

the text string as evidence proving Article 91(3)'s in execution of office element.[49] The military judge found Appellant guilty of specifications 1, 2, and 4 of charge I.[50]

6. The lower court affirmed Appellant's Article 91(3) conviction over a legal sufficiency challenge.

The CGCCA reviewed this case and affirmed Appellant's Article 91(3) conviction.[51] Before the CGCCA, Appellant argued his conviction was legally insufficient due to a lack of evidence that his disrespectful deportment occurred within the each victim's sight or hearing and when each victim was in the execution of office.[52] The CCA rejected Appellant's argument and found that "[o]n its face, [Article 91(3)'s statutory text] makes no distinction regarding the means used to convey the contempt or disrespect."[53] Due to each victim viewing the disrespectful content Appellant distributed via a work-related text string through which each victim was expected to communicate about work-related matters, each victim was in execution of office when each received Appellant's

[49] JA 0168, 0170, 0172.
[50] JA 0166, 0168, 0174.
[51] JA 0002 (*Brown*, 82 M.J. at 704).
[52] *Id.*
[53] JA 0004 (*Brown*, 82 M.J. at 706).

disrespectful content.[54] Upon this rational, the CGCCA found Appellant's conviction legally sufficient.[55]

Summary of Argument

In determining the legal sufficiency of Appellant's conviction, this Court must interpret the meaning and scope of Article 91(3)'s statutory language. Fortunately, the first step of the statutory interpretation process resolves this case.

This first step requires determining if the statutory language has a plain meaning; if it does the inquiry ends. Article 91(3)'s statutory language has a plain meaning which establish four requirements. As is relevant here, Article 91(3) required that appellant was (1) an enlisted member, (2) disrespectful in deportment, (3) towards a petty officer, (4) while that petty officer was in execution of office. The evidence meets each of these requirements. This is particularly so when the evidence is considered in the light most favorable to the prosecution, as is the proper approach in legal sufficiency review.

First, Appellant's conduct was disrespectful in deportment. His conduct constituted either "distributing" or "sending" his disrespectful content to each victim and the other chiefs onboard POLAR STAR. As the act of "distributing" or "sending" something is not complete until it is delivered to the intended recipient,

[54] JA 0006 (*Brown*, 82 M.J. at 708).
[55] *Id*.

Appellant's disrespectful deportment was not complete until each of his victims received and then saw the disrespectful content. Trial testimony established that the content Appellant distributed and sent was disrespectful and each victim chief testified to seeing the disrespectful content.

Second, Appellant directed his disrespectful deportment toward each victim petty officer. Each victim was a chief petty officer at the relevant time. And Appellant used a work-related text message string, of which each victim chief was a known member, to send the disrespectful content, content which identified each victim by name or likeness.

Finally, the evidence shows that each victim was in execution of office at the time each received the text message containing the disrespectful content. The text string by which Appellant distributed his disrespectful content was created to communicate work-related information. Each victim testified to feeling an obligation to check the text message string for pertinent work-related information. And it was in the act of checking this work-related text string, an act inherent in performing the position of duty as a chief onboard POLAR STAR at that time, that Appellant's disrespectful content was delivered to each victim. That the plain meaning of the "in execution of office" statutory requirement comports with the *Manual for Courts-Martial*'s definition and usage in military justice treatises further demonstrates that this requirement is met.

Having established what Article 91(3)'s statutory language *does require*, it becomes clear what is *not required*: any physical proximity between the offender and victim of disrespectful language or deportment.

Though this Court should find Appellant's conviction legally sufficient and affirm at the first step of statutory interpretation, affirming his conviction would vindicate Article 91(3)'s purpose and comport with its history. Article 91(3)'s purpose is to protect petty officers from insult and disrespect; Appellant's conviction served to punish his disrespectful deportment towards peer chief petty officers and upholding his conviction demonstrates that like conduct is unacceptable. And Appellant's conduct is not immunized merely because the text message medium he used to distribute his disrespect was unavailable when Article 91(3) was enacted. Statutes can fairly encompass conduct not comprehended by legislators enacting them. And that text messaging is a modern analog of historical means of communication like mailing an envelope containing disrespectful content or posting the same on a physical bulletin board aboard POLAR STAR, further demonstrates how Article 91(3)'s consistent statutory language covers appellant's conduct here.

In affirming Appellant's conviction, this Court need not worry about rendering Article 91(3) indistinguishable from Article 89(a) as the former has an express "in execution of office" requirement the latter lacks. Equally, Appellant's

case does not prompt evaluation of the temporal extremes of what Article 91(3) might prohibit, as Appellant's disrespectful deportment was completed over a short period of time.

Though Part IV of the *Manual for Courts-Martial* applicable to Article 91(3) does *explain* the offense, Part IV does *not unambiguously narrow* the offense's scope such as to constrain this Court's statutory interpretation. But even looking at the plain meaning of Part IV applicable to Article 91(3), the evidence satisfies the contested elements.

Appellant's remaining arguments attacking his conviction's legal sufficiency fail. The rule of lenity is inapplicable as earlier steps of statutory interpretation resolve the case. The military judge's special findings provide ample specificity and meet standards to allow appellate review. Any perceived dissonance between the special findings and the lower court's reasoning affirming the conviction are irrelevant as this Court reviews legal sufficiency *de novo*. And Appellant's arguments that Congress has changed other statutes to reflect modern technologies have no bearing here as the adverse caselaw prompting the changes to other statutes does not exist for Article 91(3). Nor does Appellant's conviction fail under the vagueness doctrine since different, more permissible standards govern this doctrine's application in the military. And affirming Appellant's conviction

would not chill permissible speech, that is speech comporting with good order and discipline.

Finally, affirming Appellant's conviction will provide clarity to a military workforce, which is increasingly working remotely and interacting via digital means, that conveying disrespect via digital means violates Article 91(3).

Argument

I. APPELLANT'S CONDUCT MEETS ARTICLE 91(3)'S STATUTORY REQUIREMENTS RENDERING HIS CONVICTION LEGALLY SUFFICIENT.

Appellant challenges the legal sufficiency of his conviction. But, particularly when viewing the evidence supporting this conviction in the light most favorable to the prosecution, the evidence supports each of Article 91(3)'s statutory elements, rendering it legally sufficient. Affirming the legal sufficiency of Appellant's conduct comports with Article 91(3)'s purpose and historical analysis of the Article indicates its consistent language encompasses Appellant's conduct. And even delving into lesser authority, the *Manual for Courts-Martial*, an authority which does not bind this Court, demonstrates how Appellant's conduct violates Article 91(3). The consistent answer when each of these levels of statutory interpretation is applied to Appellant's argument is that his conviction is legally sufficient.

1. This Court considers the trial evidence in the light most favorable to the government when reviewing *de novo* for legal sufficiency.

This Court reviews questions of legal sufficiency *de novo*.[56] In answering such questions, this Court asks "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[57]

Whether the evidence presented allowed any rational trier of fact to have found Appellant's conduct met the elements of Article 91(3), hinges upon the meaning of Article 91(3)'s statutory language, a matter of statutory construction.

2. Employing standard methods of statutory construction, which this Court does *de novo*, resolves this case.

Statutory construction, a process this Court conducts *de novo*,[58] begins with reviewing the statute's language.[59] And "the plain language of a [statute] will control unless it leads to an absurd result."[60] Here, Article 91(3)'s plain language encompasses Appellant's conduct. He was disrespectful in deportment towards

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[56] *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017) (citing *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)).
[57] *Wilson*, 76 M.J. at 6 (emphasis in original) (citing *Oliver*, 70 M.J. at 68 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).
[58] *Wilson*, 76 M.J. at 6 (citing *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016)).
[59] *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1055-56 (2019) (citing *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 412 (2012)).
[60] *United States v. Beauge*, 82 M.J. 157, 162 (C.A.A.F. 2022) (quoting *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012)).

peer petty officers while each was in the execution of their office. This case's inquiry ends here; it is resolved at the first step.

Recourse to secondary steps of statutory construction support this finding. The Supreme Court has counseled that a statute also be interpreted by referencing its structure, history, and purpose,[61] as well as by employing common sense.[62] Considering Article 91(3)'s purpose and the conduct this offense and its predecessors historically proscribed further demonstrates how Appellant's conduct violated Article 91(3). And despite Appellant's conjecture otherwise, Articles 89(a) and 91(3) remain distinguishable under a proper interpretation that Article 91(3) covers Appellant's conduct here.

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[61] *Abramski v. United States*, 573 U.S. 169, 179 (2014) (citing *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013)); *United States v. Schmidt*, 82 M.J. 68, 76 (C.A.A.F. 2022) (Ohlson, C.J. concurring) (citing *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016)), *reconsideration denied*, 82 M.J. 262 (C.A.A.F. 2022), *and cert. denied*, No. 22-110, 2022 WL 4654613 (U.S. Oct. 3, 2022)); *United States v. McPherson*, 73 M.J. 393, 398-99 (C.A.A.F. 2014) (Baker, C.J. concurring in part and dissenting in part) (citing *Crandon v. United States*, 494 U.S. 152, 158 (1990)) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.").

[62] *Abramski*, 573 U.S. at 179.

A. The plain meaning of Article 91(3)'s language encompasses Appellant's conduct. The first step of statutory interpretation resolves this case.

If a statute's language has a plain and unambiguous meaning regarding the particular dispute in a case, the statutory construction inquiry ceases.[63] Absent any unambiguous narrowing from a lower source of law, the statutory text is paramount.[64] As section I.3, *infra*, shows, lower sources of authority do not unambiguously narrow Article 91(3)'s application, thus Article 91(3)'s textual requirements prevail. This Court should apply Article 91(3)'s obvious and plain statutory requirements, rejecting Appellant's strained reading, to find Appellant's conviction legally sufficient.[65]

As pertinent here, to render a conviction legally sufficient, Article 91(3)'s statutory text requires the government show that (1) "[an] . . . enlisted member" (2) "[was] disrespectful in language or deportment" (3) "toward a . . . petty officer," (4) "while that officer [was] in the execution of his office . . . ."[66] These are

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[63] *McPherson*, 73 M.J. at 395 (citing *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)).

[64] *United States v. Davis*, 47 M.J. 484, 485-86 (C.A.A.F. 1998) (citing *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992)) (stating American military and federal courts apply a hierarchical source of authority with federal statutes above Executive Orders and the highest source of authority being paramount "unless a lower source creates rules that are constitutional and provide greater rights for the individual.").

[65] *Cf. United States v. Davis*, 139 S. Ct. 2319, 2329 (2019) (favoring the obvious reading of a statute over a "strained one.").

[66] 10 U.S.C. § 891(3) (2018).

Article 91(3)'s plain and directly quoted statutory requirements. What Article 91(3)'s text does not plainly require is proof of any physical proximity between the offending enlisted member and the victim. Particularly when considered in the light most favorable to the prosecution,[67] the government presented evidence of Appellant's conduct that satisfies each of the three contestable statutory requirements, rendering his conviction legally sufficient.[68]

a. Appellant's conduct was disrespectful in deportment.

Evidence of Appellant's conduct shows he was disrespectful in deportment in a plain and ordinary sense. Reference to dictionary definitions of the terms "disrespectful" and "deportment" as well as the charged misconduct of "distribution" and "sending" supports this conclusion.

Courts use lay and legal dictionaries to determine the plain and ordinary meaning of statutory terms.[69] "Disrespectful" is the adjective of the noun

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[67] *Wilson*, 76 M.J. at 6 (citing *Oliver*, 70 M.J. at 68 (quoting *Jackson*, 443 U.S. at 319)).

[68] Trial evidence established that Appellant was a chief petty officer at the time of the misconduct relevant to this case. *See*, *e.g.*, JA 0010, 0021, 0101, 0167. This requirement seemingly not being contested, it is not separately addressed.

[69] *See Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 487 (1st Cir. 2016); *Schmidt*, 82 M.J. at 75–76 (Ohlson, C.J. concurring) (citing *Brackett v. Focus Hope, Inc.*, 753 N.W.2d 207, 211 (Mich. 2008)). *See also* 2A Norman Singer & Shambie Singer, *Sutherland Statutory Construction* § 47:28 (7th ed. Nov. 2022 Update) ("[A]ll courts accept that standard, recognized, contemporary dictionaries are a valuable source to understand a [statutory] word's approved, common meaning." Citing e.g., *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022)).

"disrespect," defined as having "low regard or esteem for someone or something; lack of respect"[70] "Deportment" means "the way one behaves in public; one's bearing, esp[ecially] as it affects one's professionalism . . . ,"[71] or "the manner in which one conducts oneself; behavior."[72] That these dictionary definitions comport with the *MCM*'s definition of "disrespectful behavior," definitions not binding on this Court's statutory interpretation analysis, further supports accepting the dictionary definitions as authoritative here.[73] Thus, disrespectful deportment is, most simply, behavior indicative of a lack of respect.

The next task is to define Appellant's relevant deportment. The Charge Sheet alleged Appellant "was disrespectful in deportment . . . by modifying a digital photograph . . . and distributing it to the POLAR STAR Chief's Mess," and, as relates to Senior Chief K.B., that Appellant "was disrespectful in deportment . . .

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[70] *Disrespect*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/disrespect#dictionary-entry-2 (last visited Dec. 9, 2022).
[71] *Deportment*, *Black's Law Dictionary* (11th ed. 2019).
[72] *Deportment*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/deportment (last visited Dec. 9, 2022).
[73] *See* section I.3, *infra* (This Court is not bound by the *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*] pt. IV. para 15.c.(2)(b), which is cited to by Article 91(3)'s Part IV explanatory paragraph 17.c(5) and defines disrespectful behavior as "that which detracts from the respect due the authority and person of a superior commissioned officer." However, this Part IV definition comports with the lay definition of disrespect.).

by sending a digital image . . . to the POLAR STAR Chief[s] mess . . .” and making disrespectful allegations regarding K.B. based upon that image.[74]

Appellant’s disrespectful deportment was not complete until the disrespectful images and accompanying captions were delivered to their intended recipients though. “Distribute” relevantly means “to deliver,” particularly to the possession of another.[75] Equally, “send” relevantly means “to cause to go: such as . . . [to] *deliver*,”[76] or “[t]o cause to be moved or conveyed from a present location to another place; . . . <to send a message>.”[77] Thus, contrary to Appellant’s assertion that the charged conduct was limited,[78] Appellant’s charged “distribution” and “sending” conduct was not complete until the disrespectful images he distributed were “deliver[ed] to the possession . . . ” of the three victim chief petty officers.[79] Given that both “distributing” and “sending” require some

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[74] JA 0012.
[75] *United States v. Kuemmerle*, 67 M.J. 141, 143-44 (C.A.A.F. 2009) (citing to *Black’s Law Dictionary* (8th ed. 2004) and *Webster’s Third New International Dictionary Unabridged* (2002) and accepting military judge’s statement during a plea colloquy that “[d]istribute means to deliver to the possession of another”); *United States v. Husmann*, 765 F.3d 169, 173–74 (3d Cir. 2014) (citing to *Black’s Law Dictionary* (9th ed. 2009), Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/distribute, the Model Criminal Jury Instructions for the Third Circuit § 6.21.841-2 (2014), and 21 U.S.C. § 802(11)).
[76] *Send*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/send (last visited Dec. 13, 2022) (emphasis added)
[77] *Send*, *Black's Law Dictionary* (11th ed. 2019).
[78] Appellant’s Br. 21.
[79] *See Kuemmerle*, 67 M.J. at 142-43 (accepting military judge’s statement during plea colloquy that “[d]istribute means to deliver to the possession of another”).

type of delivery of the thing distributed or sent, references to Appellant's "distribution" of the disrespectful content throughout this brief include Appellant's act of "sending" the disrespectful image and caption targeting Senior Chief K.B.

As relates to the distribute definition, it is true that courts most often consider the definition of "distribute" in the context of narcotics offenses or the electronic distribution of child pornography.[80] However, in determining that the plain language of "distribute" requires delivery to the possession of another, this Court has positively referenced how this meaning of distribute applies consistently across offenses in both the civilian and military contexts.[81]

The question then becomes whether Appellant delivering the offending images was behavior indicative of a lack of respect regarding each victim. Applying the above definitions to the evidence, any rational trier of fact could find that Appellant delivering the offending images to the victim chief petty officers was indicative of a lack of respect for his victims. First, Chief J.S., Chief J.D., and Chief S.C. each testified they found the content Appellant distributed disrespectful,

[80] *See generally Husmann*, 765 F.3d 169 (adjudicating federal civil child pornography charges); *Kuemmerle*, 67 M.J. 141 (adjudicating UCMJ child pornography charges); *Kuemmerle*, 67 M.J. at 144 (discussing that the plain meaning of distribute consistently used the term in child pornography and drug offenses).
[81] *Kuemmerle*, 67 M.J. at 144.

either personally or generally.[82] Second, the prosecution exhibits show the content Appellant distributed indicative of a lack of respect by casting each victim in a demeaning manner sexually or otherwise.[83] Finally, the military judge's detailed special findings applied this evidence to find Appellant's conduct disrespectful. [84] And this Court must accept the military judge's findings of fact unless clearly erroneous.[85] This evidence, especially when viewed in the light most favorable to the prosecution, allows any rational trier of fact to find that Appellant's conduct met the "disrespectful in . . . deportment" statutory requirement.

b. Appellant's disrespectful deportment was targeted toward each victim chief petty officer.

The evidence also shows Appellant was disrespectful in deportment towards his fellow chief petty officers, meeting Article 91(3)'s next statutory requirement. "Toward" is relevantly defined as "in the direction of."[86] Applying the definitions of the previous section, acting with disrespectful deportment towards a petty

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[82] JA 0036 (toward Senior Chief K.B.), 0048 (towards Chief S.C.), 0034 & 0081 (towards Chief J.D.).
[83] JA 0162, 0163, 0164.
[84] JA 0168, 0170, 0173.
[85] *United States v. Horne*, 82 M.J. 283, 286 (C.A.A.F. 2022) (citing *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002)).
[86] *Toward*, *Black's Law Dictionary* (11th ed. 2019); *Toward*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/toward (last visited Dec. 9, 2022).

officer means demonstrating behavior indicative of a lack of respect in the direction of a petty officer. This is precisely what Appellant did.

The testimony of Chiefs J.S., J.D., S.C., and Senior Chief K.B. and the military judge's special findings indicate that (1) each victim petty officer received and saw the disrespectful images on a text string which all members of POLAR STAR's Chief's Mess participated in and that (2) in distributing the images Appellant directed them towards the text string's members.[87] Each victim was a chief petty officer at the relevant time.[88] Appellant's choice to distribute or send the disrespectful images to the entire Chief's Mess text string, through which the three victims and the other POLAR STAR chiefs received work related communications, shows that Appellant's behavior, which was indicative of a lack of respect, was in the direction of the victim petty officers. This evidence meets the "toward" statutory requirement.

c. The victim petty officers were in execution of their offices when each experienced Appellant's disrespectful deportment.

Finally, the evidence shows that each victim chief petty officer was in the execution of office when each experienced Appellant's disrespectful deportment.

[87] JA 0020-21, 0023-31, 0035-36, 0047-49, 0052, 0078, 0080-86, 0090, 0099-0101, 0105, 0107, 0111, 0116-0123, 0125, 0167, 0170, 0172.
[88] JA 0077 & 0168 (Chief J.D.), 0096 & 0172 (Senior Chief K.B.), 0115 & 0170 (Chief S.C.).

Reference to dictionaries again illustrates the plain meaning of "in execution of office." Relevantly, "execution" means "the act or process of executing; performance"[89] or "the act of carrying out or putting into effect."[90] "Office" relevantly means "a position of authority to exercise a public function . . . "[91] or "[a] position of duty, trust or authority, esp[ecially] one conferred by a governmental authority for a public purpose."[92] Thus, being "in execution of office" plainly means being in the "process of executing; perform[ing]" of "a position of duty, trust or authority . . . for a public purpose."

Applying this plain meaning, each of the victim petty officers was in the execution of office when each experienced Appellant's disrespectful deportment. As shown in section I.2.A.a, *supra*, Appellant's charged "distribution" conduct was not complete until the disrespectful images he distributed were "deliver[ed] to the possession . . . " of the three victim petty officers.[93] Appellant delivered the disrespectful content to the possession of each victim via the text message string that Senior Chief K.B. established to communicate work-related information while

[89] *Execution*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/execution (last visited Dec. 9, 2022).
[90] *Execution*, *Black's Law Dictionary* (11th ed. 2019).
[91] *Office*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/office (last visited Dec. 9, 2022).
[92] *Office*, *Black's Law Dictionary* (11th ed. 2019).
[93] *See Kuemmerle*, 67 M.J. at 142-43 (accepting military judge's statement during plea colloquy that "[d]istribute means to deliver to the possession of another").

POLAR STAR's Chief's Mess was geographically dispersed.[94] The text string at its core was work related and each victim felt an obligation to check the text string for work related information regardless of whether each was "on duty."[95] Chief S.C.'s testimony supported this proposition most clearly: when asked "when you're communicating . . . with a text message among the chiefs, . . . are you in the execution of your office as a chief petty officer?" she responded "I believe so," without any temporal caveats.[96] Chief J.D. also testified that his motivation to check the text string was to "keep track of what was going on throughout the [work related] text message stream, [to see] if there was anything . . . pertinent."[97]

But for the need to communicate official information regarding POLAR STAR's status and personnel, the text string by which Appellant distributed his targeted disrespectful content would not have existed. Because the text string at its core was for work purposes and the members of the string felt it was their military obligation to communicate via the text string, the logical inference follows that whenever a member of the text string was notified of a new message on the string, that member would feel a military obligation to view the message and determine (1) whether it was work-related and, if so, (2) whether the message required a

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[94] JA 0078-79, 0081-84, 0099-0101, 0105, 0116-25.
[95] JA 0030, 0078-79, 0099-0101, 0116-18.
[96] JA 0118.
[97] JA 0078-79, 0084.

response to fulfill military duties and expectations. It was *at this moment*, when each victim was fulfilling their respective military obligation, that each victim came into possession of the disrespectful content Appellant distributed, completing Appellant's act of disrespectful deportment. As checking the text string for new messages was part of the "process of executing; performing" each victim's "position of duty . . . or authority" onboard POLAR STAR as a chief, and it was *at that same moment* each victim came into possession of Appellant's disrespectful content, each victim was plainly in the execution of their office at the time of Appellant's disrespectful deportment.

Finding the victims were in execution of their offices at the time Appellant's disrespectful deportment was complete also comports with the use of "in execution of office" as a military term of art. Though not a binding authority on this Court's statutory interpretation here,[98] the *Manual for Courts-Martial* states "[a]n officer is in the execution of office when engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or *military usage*."[99] This Court's predecessor and the Army Court of Military Review

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[98] *Wilson*, 76 M.J. at 6 (citing *United States v. Mance*, 26 M.J. 244, 252 (C.M.A. 1988) (overruled on other grounds by *United States v. Payne*, 73 M.J. 19 (C.A.A.F. 2014)) (standing for the proposition that "while the President's explanations are important, they are not binding on this Court in fulfilling our responsibility to interpret the elements of substantive offenses." (cleaned up)).

[99] *MCM*, pt. IV, para. 15.c.(3)(f) at IV-22 (as cited to for purposes of explaining Article 91(3) by *MCM*, pt. IV, para. 17.c.(5)) (emphasis added).

referenced Winthrop's treatise *Military Law and Precedents*, applying the same definition to disrespect and assault offenses.[100] Specifically these citations accept that "an officer may be in the execution of his office *without being on duty* in the strictly military sense," and is in execution of office when "perform[ing] . . . an act or duty either pertaining or incident to his office . . . ." [101] In checking the work-related text string for messages which may relate their each victim's official duties, each victim petty officer was "engaged in an[] act . . . required . . . by . . . military usage," [102] and thereby performing "an act . . . pertaining or incident to [each victim's] office." [103] And it was in this moment that each victim experienced the completion of Appellant's disrespectful deportment rendering each in the execution of their office at the moment Appellant violated Article 91(3).

Appellant argues the victims were not in the execution of office, but his arguments fail. First, Appellant insists that the charged conduct was "the creation and sending" of the disrespectful text messages, with "sending" seemingly only meaning dispatching the messages.[104] But this is not what was charged. Appellant

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[100] *United States v. Glaze*, 11 C.M.R. 168, 172 (C.M.A. 1953); *United States v. Jackson*, 8 M.J. 602, 604 (A.C.M.R. 1979). *See also* JA 0216 (replicating the cited Winthrop text).
[101] *Glaze*, 11 C.M.R. at 172 (C.M.A. 1953) (citing William Winthrop, *Military Law and Precedents* 571 (2d ed. 1920 reprint)) (emphasis added).
[102] *MCM*, pt. IV, para. 15.c.(3)(f) at IV-22 (as cited to for purposes of explaining Article 91(3) by *MCM*, pt. IV, para. 17.c.(5)) (emphasis added).
[103] *Glaze*, 11 C.M.R. at 172 (citing Winthrop, *supra*, at 571).
[104] Appellant's Br. 19.

was charged with being "disrespectful in deportment . . . by modifying a digital photograph . . . *and distributing* it . . . ," or "*sending*" it."[105] As discussed in section I.2.A.a above, Appellant's conduct was not complete upon dispatching the disrespectful text messages, but was only complete once the messages were "deliver[ed] to the possession . . . " of the three victim petty officers.[106] The previous paragraphs demonstrate how each victim was in the execution of each's office at the moment this delivery occurred.

Appellant's next attack also fails. Appellant argues the lower court's finding that the in execution of office requirement was met is invalid because conveying non-work-related information via the text string rendered the act of checking the text string either an act in execution of office or not depending upon the *content conveyed*.[107] Beyond this "content-based" argument creating the very type of "springing offense" Appellant argues against,[108] the content-based argument flips the logical timeline. No victim would know whether the content was work or non-work related *until after* the victim undertook the act of checking the text string. The evidence indicates the victims were motivated to check the text string out of a sense of military obligation to ensure they remained apprised of information

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[105] JA 0012 (emphasis added).
[106] *See Kuemmerle*, 67 M.J. at 142-43 (accepting military judge's statement during plea colloquy that "[d]istribute means to deliver to the possession of another").
[107] Appellant's Br. 20-21.
[108] *See* Appellant's Br. 21-22, 41.

pertinent to their duties as Chiefs onboard POLAR STAR.[109] This "act . . . required . . . by . . . military usage" then occurred the moment each victim acted to check the text string, placing them in a status of "in execution of office," at least until they could determine whether the content received via the text string required a duty driven response or was non-work related. It was at this exact moment, when each was checking the text string and therefore in execution of office, that each victim would have come into possession of the disrespectful content Appellant distributed, completing Appellant's act to violate Article 91(3) when the victims were in execution of office.

Appellant's final argument is equally unpersuasive. This argument posits that determining whether victims are in execution of office when each sees the disrespectful content would leave criminality in some type of limbo until the victim sees the disrespectful content; Appellant's so-called "springing offense."[110] There is no limbo though. Appellant very well could have chosen to hand-deliver his disrespectful content to each of his victims, thereby maintaining control over when each victim saw the content, with the option to deliver the content when each victim petty officer was not in execution of office. However, Appellant relinquished control over when delivery would occur and complete his act of

[109] JA 0030-31, 0078-79, 0099-0101, 0108, 0116-18.
[110] Appellant's Br. 21-22, 41.

disrespectful deportment. By distributing the content via the work-related text string, he could be assured that each victim would have the content delivered into their possession, thereby completing the criminal act; he just could no longer control when that delivery occurred. And because each victim would see the disrespectful content concurrent with their act to check the text string for work related information, an act required by military usage, Appellant could equally rest assured that each victim was in execution of office at the moment the act of disrespectful deportment was complete.

Article 91(3) requires a victim petty officer to be in execution of office when experiencing disrespectful deportment.[111] Appellant's conviction is legally sufficient, in part, because the evidence supports finding this statutory requirement met. Appellant's charges list his disrespectful deportment as distributing disrespectful images, deportment which was only complete when those images were delivered into each victim's possession. The images were delivered into each victim's possession only after each checked the work-related text message string amongst POLAR STAR's Chief's Mess, an act required by military usage amongst the chiefs, rendering each victim in execution of office at the moment Appellant's disrespectful deportment was complete. As the last requirement of Article 91(3)'s plainly read statutory text is met, Appellant's conviction is legally sufficient.

[111] 10 U.S.C. § 891(3) (2018).

d. Article 91(3) has no physical proximity requirement.

Having detailed what Article 91(3)'s statutory text *does* require, it becomes clear what its plain text unambiguously *does not require*: any physical proximity. Neither the words "physical proximity," "presence," "within sight or hearing" nor any synonym of these terms appear within Article 91(3)'s statutory text.[112] While some of these words may appear in lower sources of authority,[113] though lacking the application Appellant would prefer,[114] they clearly do not appear in Article 91(3)'s statutory text. This Court must begin its statutory construction task with the *statute's* text and should end the inquiry there after finding the statutory language plain and unambiguous.[115] The Supreme Court has cautioned reviewing courts to "resist reading words or elements into a statute that do not appear on its face."[116] Therefore, this Court should not read any physical proximity requirement into Article 91(3) as its statutory language clearly and unambiguously has no such requirement.

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[112] *See id*.
[113] *MCM*, Pt. IV, para. 17.b.(3)(c), at IV-25.
[114] *See* Section I.3.A, *infra*. *See also Wilson*, 76 M.J.at 6 (citations omitted) ("we are not bound by the President's interpretation of the elements of substantive offenses.").
[115] *McPherson*, 73 M.J. at 395.
[116] *Bates v. United States*, 522 U.S. 23, 29 (1997).

B. Finding that Article 91(3) encompasses Appellant's conduct vindicates the offense's purpose.

While courts must look first to a statute's text in interpreting it,[117] they may also consider its purpose.[118] By punishing enlisted members who "treat with contempt or [are] disrespectful in language or deportment towards . . . " other enlisted members, Article 91(3) seeks to protect victim enlisted members from contempt and disrespect.[119] The President has recognized this clear statutory purpose, stating expressly, "Article 91 has the . . . general object[] with respect to [enlisted members] . . . , to ensure obedience to their lawful orders, and to protect them from violence, *insult, or disrespect*."[120] Affirming Appellant's conviction by finding it legally sufficient would vindicate Article 91(3)'s purpose.

Section I.2.A.a, *supra*, detailed how Appellant's deportment was disrespectful. He was convicted for this deportment.[121] The lower court upheld

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[117] *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017) (citations omitted).
[118] *Abramski*, 573 U.S. at 183 (reading statutory term contrary to petitioner's construction to "give effect to the statutory provisions, allowing them to accomplish their manifest objects."); *Barr v. United States*, 324 U.S. 83, 92 (1945) (stating a customs statute's "purpose would be thwarted if in this case only" a narrow interpretation of a statute could be used); *Beauge*, 82 M.J. at 164 (declining to read a rule of evidence such as to subvert the rule's intent when applying standard methods of statutory interpretation); *Schmidt*, 82 M.J. at 74 (Sparks, J.) (stating the opinion's interpretation "comports with our long-standing view" of the statute's purpose).
[119] *See* 10 U.S.C. § 891(3) (2018).
[120] *MCM*, Pt. IV, para. 17.b.(1), at IV-26.
[121] JA 0015, 0166-73.

Appellant's conviction equally finding his deportment disrespectful.[122] This Court should find the same. Affirming Appellant's conviction demonstrates that sending images directly targeting fellow petty officers with demeaning sexual inuendo, crude drawings of genitalia, and personal attacks are impermissible. Affirming Appellant's conviction demonstrates to his victims that they need not fear Appellant's continued disrespect. And affirming Appellant's conviction communicates to servicemembers that they cannot circumvent Article 91(3)'s statutory prohibitions merely by resorting to ubiquitous electronic means of communication. All of these outcomes of affirming Appellant's conviction would "protect [enlisted members] from . . . insult or disrespect," thereby vindicating Article 91(3)'s purpose.

Setting aside Appellant's conviction would do the opposite and, contrary to Appellant's assertions, would undermine Article 91(3)'s purpose. Appellant's disrespectful deportment toward Chief J.D. involved Appellant distributing a crudely drawn rendition of male genitalia superimposed on a photograph Chief J.D. had sent of himself at work aboard POLAR STAR to the text string.[123] Chief J.D. found the modified photograph "disrespectful" and testified it felt "demeaning to have [the modified photograph] sent out to the [Chief's Mess text string]

[122] JA 0006 (*Brown*, 82 M.J. at 708).
[123] JA 0081, 0164.

group."[124] Further, Chief J.D. testified he felt uncomfortable responding to Appellant's disrespectful deportment and did not want to have an open conflict with Appellant over the photograph.[125]

Appellant's disrespectful deportment towards Chief S.C., who was known by Appellant to be a lesbian, involved Appellant distributing a high school yearbook picture of Chief S.C. with the caption "voted most likely to steal your bitch."[126] Chief S.C. testified the sharing of this picture left her "definitely embarrass[ed]" even at trial over a year after Appellant had sent the captioned image.[127]

Appellant's disrespectful deportment towards Senior Chief K.B. involved sending the picture of a scantily clad man and alleging this unflattering photograph was Senior Chief K.B.[128] Speaking to the impact of this within the Chief's mess, Chief J.S. testified this conduct was disrespectful towards Senior Chief K.B.[129]

Notwithstanding the impacts Appellant's disrespectful deportment had, Appellant asserts that setting aside his conviction by accepting his conscribed

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[124] JA 0081-82.
[125] JA 0082.
[126] JA 0120-23, 0125-27, 0162.
[127] JA 0125. *Compare* JA 0012 (listing 3 June 2019 as date of offense) *with* JA 0113 (start of Chief S.C. testimony) and Transcript at 95 (start of transcript on October 20, 2020, the day Chief S.C. testified).
[128] JA 0035-36.
[129] JA 0036, 0039.

interpretation of Article 91(3)'s requirements would allow petty officers to "correct each other when their sophomoric ribbing goes a little too far . . . ," help "maintain[] camaraderie," and avoid "harm[ing] unit cohesion."[130] The evidence disproves this argument.

Appellant's conduct left others unwilling to correct him, undermined camaraderie, and harmed unit cohesion. Chief J.D. expressly testified he was not comfortable correcting Appellant after Appellant distributed a picture of Chief J.D. with male genitalia drawn on his head to the Chief's Mess, deportment well exceeding "sophomoric ribbing."[131] Further, while Chief S.C. indicated she was mainly embarrassed by Appellant's deportment towards her which led to his Article 91(3) conviction,[132] she testified to deeper impacts of his general disrespectful conduct. Specifically, she testified to having altered her schedule to avoid dining in the Chief's Mess "just because sometimes you're not in the mood to . . . see what's gonna happen next . . . . Like if you're just gonna go in [to the Chief's Mess] to get . . . made fun of . . . ."[133] Chief S.C. worried specifically that Appellant was going to make fun of her.[134] And she testified to having deleted

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[130] Appellant's Br. 36.
[131] JA 0082.
[132] JA 0125. *Compare* JA 0012 (listing 3 June 2019 as date of offense) *with* JA 0113 (start of Chief S.C. testimony) and Transcript at 95 (start of transcript on October 20, 2020, the day Chief S.C. testified).
[133] JA 0137-38.
[134] JA 0137-38.

Appellant's number from her phone because of the text messages he sent which led to her not talking with Appellant anymore.[135] Chief S.C.'s sentiments are not those indicative of "camaraderie" and "unit cohesion."

These specific outcomes belie Appellant's argument that this Court could interpret Article 91(3)'s requirements to immunize Appellant's conduct and still vindicate its purpose. Instead, this Court can vindicate Article 91(3)'s purpose to "protect [petty officers] from . . . insult, or disrespect" by upholding Appellant's conviction and finding Article 91(3) proscribes disrespectful deportment like Appellant's.

C. Appellant's conduct is not immunized merely because he used a means of communicating his disrespect unavailable when Article 91(3) was enacted.

In conducting statutory interpretation courts may reference a statute's history.[136] However, just because a method of violating a statute may not have existed when legislators enacted it does not mean that method falls outside the statute's prohibitions. Article 91(3) is a prime example. The plain meaning of Article 91(3) and its predecessors would have proscribed Appellant's conduct throughout history just as it does today. Examples of letters and bulletin boards, means of communication available at Article 91(3)'s inception and directly

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[135] JA 0138.

[136] *Abramski*, 573 U.S. at 179 (citing *Maracich*, 133 S. Ct. at 2209).

analogous to text messaging, prove this point. Thus, Appellant finds no basis for relief in historic analysis.

a. A statute may validly proscribe conduct that legislators could not have comprehended at the time of enactment.

"[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators."[137] In 2016, in *Yershov v. Gannet Satellite*, the First Circuit invoked this allowance, citing directly to *Barr*.[138] In *Yershov*, the First Circuit considered whether a statute originally passed to prevent disclosure of video store rental records applied to disclosure of cell phone media app data.[139] Finding that it did, that court stated "because we think that Congress cast such a broadly inclusive net in the brick-and-mortar world, we see no reason to construe [the statute's] words as casting a less inclusive net in the electronic world when the language does not compel that we do so."[140]

The First Circuit's approach is directly on point for this Court's interpretive task regarding Article 91(3). It is true that electronic means of communications, like the cell phones by which Appellant distributed his disrespectful content, did

[137] *Barr*, 324 U.S. at 90-91 (citing *People of Puerto Rico v. Shell Co.*, 302 U.S. 253, 257 (1937)).
[138] *Yershov*, 820 F.3d at 488.
[139] *Id*.
[140] *Id*. (citing *Barr*, 324 U.S. at 90-91).

not exist when Article 91(3) was enacted in 1951. Appellant argues that this fact precludes Article 91(3)'s application to disrespect conveyed via cell phones specifically and remote and non-contemporaneous forms of communication generally.[141] But *Barr* and *Yershov* preclude this argument. That Article 91(3)'s plain language encompasses appellant's conduct is not invalidated merely because Congress did not contemplate that an enlisted servicemember could distribute blatantly disrespectful content via a pocket-sized computer to his fellow enlisted members from anywhere at any time. Just as its sister court did in *Yershov*, this Court should recognize that Congress cast a "broadly inclusive net in the brick-and-mortar world" to protect enlisted members from contempt and disrespect with Article 91(3)'s statutory text and thereby "construe [Article 91(3)] as casting a [no] less inclusive net in the electronic world when [Article 91(3)'s] language does not compel [this Court to] do so."[142]

b. Article 91(3)'s statutory language has remained unchanged since its inception. It encompasses Appellant's conduct as much today as it did in 1951.

Article 91(3)'s modern statutory language has remained verbatim the same since the UCMJ's inception and virtually mirrors that of its 1917 predecessor;[143] a

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[141] Appellant's Br. 37.
[142] *See Yershov*, 820 F.3d at 488 (citing *Barr*, 324 U.S. at 90-91).
[143] *Compare* 10 U.S.C. § 891(3) (2018); JA 0176 *with* 10 U.S.C. § 891(3) (1952) *and with* 65th Article of War (1917); JA 0194.

point Appellant concedes.[144] Referencing section I.2.A, *supra*, Appellant's conduct met Article 91(3)'s statutory requirements under the modern statute as much as it did in the 1950s or under the 1917 equivalent.

c. Appellant's communication of disrespect via digital means is directly analogous to non-digital means of communicating disrespect that Article 91(3) would have proscribed at its inception.

Had Appellant distributed his disrespectful content by posting it on a bulletin board onboard POLAR STAR or by mailing it in an envelope addressed to each victim petty officer's duty station, his deportment would have violated Article 91(3), whether assessed under the 2018, 1950s, or equivalent 1917 versions. Appellant's misconduct cannot be immunized just because he used the modern equivalent of a bulletin board or letter to convey his deportment.

Consider if Appellant had distributed his disrespectful content by posting it on a bulletin board in a Coast Guard Cutter's Chief's Mess in 1951 rather than sending it via the text string in 2019. Each victim would experience the distribution of the disrespectful content the moment each saw the content on the physical bulletin board onboard the military vessel. Each victim would be in execution of office at that moment because each victim would be on duty onboard the military vessel. Every other aspect of Appellant's conduct remaining the same,

[144] Appellant's Br. 39.

Appellant would have equally met all of Article 91(3)'s statutory requirements as shown in section I.2.A, *supra*.

The POLAR STAR's Chief's Mess text string was merely a virtual bulletin board. A bulletin board is "a board for posting notices."[145] The Chief's Mess text string was the virtual equivalent of a board for posting notices for each chief's attention while the chiefs were geographically dispersed.[146] By using the modern equivalent of a bulletin board, Appellant violated Article 91(3).

Consider similarly if Appellant had employed a mailed envelope rather than a text message to distribute his disrespectful content. In this analogy, Appellant would place the disrespectful content in envelopes, address those envelopes to the same recipients as his text messages at each recipient's duty station, and then dispatch them. Each victim would receive the envelope at their duty station and would review the envelope's contents to determine if it was work-related and required official action. Upon receiving the envelope and viewing its contents, the disrespectful content would be delivered into the victim's possession, completing

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[145] *Bulletin Board*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/bulletin%20board (last visited Dec. 10, 2022) (listing a secondary definition as "a public electronic forum that allows users to post or read messages; message board.").

[146] JA 0117 (Chief S.C. testified that the text string was used by the chiefs "for keeping people up to date on what was happening" (cleaned up) with POLAR STAR's dry dock and for "anything that needed to be passed," because "it was an efficient way to get information passed.").

Appellant's distribution act. Mailing of envelopes as depicted in this example was a technology available long before the UCMJ's inception.[147] Such actions would meet Article 91(3)'s statutory requirements, whether in 1917, 1951, or 2019.

This example is directly analogous to what happened in the present case. As shown in section I.2.A, *supra*, Appellant addressed his disrespectful content to each victim at their virtual workplace – a phone screen displaying the Chief's Mess text string – and electronically dispatched it. Each victim received notification of a message on the text string, opened the text string to review if the message was work related and required official action, and then saw Appellant's disrespectful content, completing the distribution act. Whether Appellant used a mailed envelope, a remote and noncontemporaneous means of communication available in 1917 and 1951, or a text message, a more modern means of communication, his deportment meets Article 91(3)'s statutory requirements. His misconduct cannot me immunized merely because he used the modern form of an old means of communicating his disrespect.

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[147] *See generally* United States Postal Service, Office of the Historian, *The United States Postal Service: An American History* 2 (2022), https://about.usps.com/publications/pub100.pdf (noting that first official notice of mail in American colonies appeared in 1639).

D. Article 91(3)'s statutory "in execution of office" requirement distinguish it from Article 89.

Article 91(3)'s statutory requirements differ from Article 89(a)'s such that finding Appellant's disrespectful deportment violated Article 91(3) would not render it indistinguishable from Article 89(a). Articles 91(3) and 89(a) seek to protect commissioned officers and enlisted members from disrespect; their objectives may be similar, but Congress used different statutory language to achieve them.

Article 91(3)[148]	**Article 89(a)**[149]
"Any . . . enlisted member who"	"Any person subject to this chapter"
"treats with contempt or is disrespectful in language or deportment"	"who behaves with disrespect"
"toward a . . . petty officer"	"towards that person's superior commissioned officer"
"while that officer is in the execution of his office"	
"shall be punished as a court-martial may direct."	"shall be punished as a court-martial may direct."

Notably, Article 91(3) has the "while that officer is in the execution of his office" statutory requirement which Article 89(a) lacks. Appellant argues that reading

[148] JA 0176 (10 U.S.C. § 891(3) (2018)).
[149] JA 0177 (10 U.S.C. § 889(a)).

beyond the text, and thereby creating additional requirements, is necessary to distinguish these two offenses.[150] But read plainly, the offenses are expressly distinguishable. This Court should "resist reading words or elements into [the] statute that do not appear on its face."[151]

E. Appellant's case does not require addressing the extremes of Article 91(3)'s temporal reach.

Appellant's case raises no far-fetched temporal problem under Article 91(3). Though unclear in the record exactly how much time passed between appellant dispatching his disrespectful content and it being delivered to each victim, the record is clear that appellant's disrespectful deportment occurred during the summer of 2019 while POLAR STAR was in dry dock and the cutter's chiefs were communicating via the text string.[152] As shown in section I.2.A.c, *supra*, each victim petty officer was in execution of office when Appellant's disrespectful deportment was complete during this period. Appellant's case raises no question about whether Article 91(3) might encompass disrespectful deportment initiated a significant time before it was completed. This Court can and should find Appellant's conviction legally sufficient on the facts before it without needing to speculate about Article 91(3)'s reach beyond the facts of appellant's case.

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[150] Appellant's Br. 32-35.
[151] *Bates*, 522 U.S. at 29-30.
[152] JA 0019-20, 0079, 0083, 0098-99, 0120-23, 0140.

3. Part IV of the *Manual for Courts-Martial* does *not* bind this Court in conducting its task of substantively interpreting Article 91(3)'s scope. Regardless, Appellant finds no relief in citation to Article 91(3)'s Part IV explanations.

When construing statutes, courts apply a hierarchy of sources with the Constitution highest, followed by federal statutes like the UCMJ, then by Executive Orders.[153] The highest source of authority prevails absent a lower source providing a constitutionally sound greater right.[154] Appellant argues that *MCM* Part IV's elements and explanations narrow Article 91(3)'s application to bring his conduct outside its scope.[155] But Part IV, an Executive Order, *explains* rather than *narrows* the scope of Article 91(3)'s statutory language. Even considering the Part IV elements Appellant contests, the evidence meets the plain language requirements of both further supporting the legal sufficiency of his conviction.

A. The *Manual for Courts-Martial* pt. IV para. 17 and its references do *not* unambiguously narrow Article 91(3)'s scope. This explanation therefore does not grant Appellant any greater rights nor warrant deference here.

"[T]he President's interpretations of substantive offenses in Part IV of the Manual [for Courts-Martial] . . . are not binding on the judiciary, which has the

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[153] *Davis*, 47 M.J. at 485-86 (citing *Lopez*, 35 M.J. at 39).
[154] *United States v. Czeschin*, 56 M.J. 346, 348 (C.A.A.F. 2002) (citing *Lopez*, 35 M.J. at 39).
[155] *See*, *e.g.*, Appellant's Br. 15.

responsibility to interpret substantive offenses under the [UCMJ]."[156] Only "when a Presidential rule is *unambiguous* in terms of granting greater rights than provided by a higher source" and does not contradict the UCMJ's express language does this Court defer to the Part IV requirements.[157] Appellant is mistaken that Article 91(3)'s Part IV explanation narrows its scope by creating a presence requirement, either by reference to the definition of disrespect by acts or the "within sight or hearing" element, or by linking the "toward" and "in execution of office" statutory language in a limiting way. Article 91(3)'s Part IV elements and explanations thus do not *unambiguously* narrow the offense's scope; this Court then need not reach beyond Article 91(3)'s statutory language to find Appellant's conviction legally sufficient.

a. The Manual for Courts-Martial pt. IV, para. 15.c.(2)(b) provides an illustrative, not exhaustive, list of examples of disrespect by deportment.

Article 91(3)'s explanation cites to *MCM* pt. IV, para. 15.c.(2)(b) to define disrespect, which presents an *illustrative*, and therefore not limiting, list of disrespect by deportment.[158] It reads, "[d]isrespect by acts *includes* neglecting the customary salute, or showing a marked distain, indifference, insolence,

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[156] *Czeschin*, 56 M.J. at 348 (citing *Davis*, 47 M.J. at 486. *See also Wilson*, 76 M.J. at 6 (citing *Davis*, 47 M.J. at 486) (specifying CAAF is not bound by the President's interpretation of the elements of UCMJ offenses).
[157] *Czeschin*, 56 M.J. at 348 (citing *Davis*, 47 M.J. at 486) (emphasis added).
[158] *MCM*, pt. IV, para. 17.c.(5) at IV-26.

impertinence, undue familiarity, or other rudeness in the presence of the superior officer."[159] "[M]ost courts read the word 'include' to introduce a *nonexhaustive* list."[160] "'[T]he premise that when a statute states that the universe of X "includes" Y, one normally presumes that Y is *merely an example* of what is in X, and that X includes more than Y.'"[161] In *MCM* pt. IV, para. 15.c.(2)(b), the universe of disrespect by acts *includes* "neglecting the customary salute, or showing a marked distain, [etc.] . . . in the presence of the superior officer," such that this Court should presume that this list of acts is *merely an example* of what constitutes disrespect by acts, and that disrespect by acts includes more than just these listed examples. That some of the examples listed in *MCM* pt. IV, para. 15.c.(2)(b), like being indifferent or unduly familiar, need not occur within someone's presence to still be disrespectful only further shows this list is merely illustrative. Presenting only examples of disrespectful acts which may (or may not) occur in the presence of an officer, does not *unambiguously* narrow Article 91(3)'s scope. Accordingly, this Court should not read in such a requirement to Article 91(3)'s statutory text.[162]

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[159] *Id*. at para. 15.c.(2)(b) at IV-22 (emphasis added).
[160] *In re Vill. Apothecary, Inc.*, 45 F.4th 940, 947-48 (6th Cir. 2022) (citing *Samantar v. Yousuf*, 560 U.S. 305, 316-17 (2010); *Cumberland Reclamation Co. v. Sec'y, U.S. Dep't of Interior*, 925 F.2d 164, 167 (6th Cir. 1991); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Text* 132-33 (2012)).
[161] *Yershov*, 820 F.3d at 486 (quoting *In re Fahey*, 779 F.3d 1, 5-6 (1st Cir. 2015)) (emphasis added).
[162] *See Bates*, 522 U.S. at 29-30 ("[W]e ordinarily resist reading words or elements into a statue that do not appear on its face.").

b. The plain meaning of "within sight" requires only that the disrespectful language or deportment come with the victim's ability to visually perceive. It does not matter how this is accomplished.

Read plainly, *MCM* pt. IV, para. 17.b.3(c)'s "within sight" language is agnostic as to how the disrespectful acts or language come within the victim's sight; it does not create a narrowing "presence" requirement. "Within" relevantly is "a function word to indicate situation or circumstances in the limits or compass of: such as . . . in or into the range of [i.e.] *within* sight."[163] "Sight" relevantly is "the process, power, or function of seeing."[164] Thus, "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."

Appellant's disrespectful deportment of distributing disrespectful images came "into the range of" each of his victim petty officer's "process, power, or function of seeing."[165] As Appellant's distribution deportment was incomplete until delivery of the images into the possession of the victims, his deportment ended when each victim saw the images. Appellant's disrespectful deportment then came "into the range of" each victim's "process, power, or function of

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[163] *Within*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/within#dictionary-entry-2 (last visited Dec. 11, 2022) (emphasis in original).
[164] *Sight*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/sight (last visited Dec. 11, 2022).
[165] JA 0083, 0098-99, 0120-23.

seeing." That Appellant's same disrespectful deportment met Article 91(3)'s statutory requirements demonstrates that *MCM* pt. IV, para. 17.b.3(c)'s "within sight" language does not narrow the statutory text's language but merely explains it.

Appellant's argument that "within sight" required proof of his presence with his victims is unavailing since citations supporting this argument are distinguishable. By its language, the 86th Article of War could not punish "language, however disrespectful" as contempt of court if the language did not directly threaten disrupting court.[166] The Winthrop's commentary on 86th Article of War equating "presence" to "within sight or hearing" speaks solely to protecting courts from disruption.[167] This Court should avoid importing a presence requirement in its Article 91(3) analysis from commentary on a historic example serving a very different purpose. Equally, the defining of "presence" in *United States v. Royal* and *United States v. Ream*, is distinguishable as they considered escape from custody misconduct, categorically different misconduct than the disrespect outlawed by Article 91(3).[168] There is no presence requirement under

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[166] *See United States v. Gray*, 14 M.J. 551, 552 (A.C.M.R. 1982) (citing Max S. Ochstein, *Contempt of Court*, 16 JAG J. 25, 27 (1962), quoting 1 W. Winthrop, *Military Law and Precedents* 463 (2d ed. 1896); Ochstein, *supra*, at 27 (citing Winthrop, *supra*, at 463).

[167] JA 0210 (Winthrop, *supra*, at 307-08).

[168] *United States v. Royal*, 2 M.J. 591, 593-94 (N.C.M.R. 1976); *United States v. Ream*, 1 M.J. 759, 760-61 (A.F.C.M.R. 1975).

Article 91(3) derived from its *MCM* Part IV "within sight" element. Agnostic to how disrespectful language or deportment is brought within the sight of a victim petty officer, this Part IV element does not narrow Article 91(3)'s scope.

c. The 2019 Manual for Courts-Martial does not link Article 91(3)'s statutory "toward" and "in execution of office" requirements such as to limit the offense's application.

Unlike the 1917 and 1951 predecessors, the 2019 *MCM* does not include language linking the "toward" and "in execution of office" elements.

***Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], pt. IV, para. 17.c.(5) at IV-26.**[169]	***Manual for Courts-Martial, United States* (1951 ed.) [*MCM* (1951)], para. 170.d at 323.**[170]	***Manual for Courts-Martial, United States* (1917 ed.) [*MCM* (1917)], para. 416.III at 212.**[171]
"'Toward' requires that the behavior and language be within the sight or hearing of the . . . petty officer concerned."	"The word 'toward' read in connection with the phrase 'while such officer is in the execution of his office' limits the application of this part of the article to behavior and language within the sight or hearing of the . . . petty officer concerned."	"The phrase 'while in the execution of his office' limits the application of this part of the article to language and behavior within sight or hearing of the noncommissioned officer toward whom it is used . . . ."

Regardless of the reason for this change, the President's modern explanation of what Article 91(3)'s statutory "towards" language requires plainly does not link

[169] JA 0184.
[170] JA 0189.
[171] JA 0195.

the "towards" statutory requirement or "within sight or hearing" element to the "in execution of office" requirement. The "toward" and "in execution of office" requirements operate independent. Appellant's conduct met both the "toward" and "in execution of office" requirements.[172] There is no narrowing of their operation by the President's explanation to render Appellant's conviction legally insufficient.

B. Evidence of Appellant's conduct meets the plain language requirements of the two Article 91(3) Part IV elements Appellant contests.

The evidence proves the contested Article 91(3) elements, especially when properly considered in the light most favorable to the prosecution.[173] The military judge's special findings found all elements met.[174] But Appellant alleges there is insufficient evidence that his disrespectful deportment occurred (1) within each victim's sight or hearing, or (2) each's presence, (3) while each was in execution of office. [175] Appellant is incorrect. Section I.3.A.b, *supra*, proves how Appellant's deportment came within the sight of each victim. And Section I.2.A.c, *supra*, equally shows how each victim was in execution of office when experiencing Appellant's deportment. Finally, *MCM*, pt. IV, para. 17.b.(3) lists no presence

[172] *See* Section I.2.A.b-c, *supra*.
[173] *Wilson*, 76 M.J. at 6 (citing *Oliver*, 70 M.J. at 68 (quoting *Jackson*, 443 U.S. at 319)).
[174] JA 0166-73.
[175] Appellant's Br. 2.

requirement, and this Court should not read one into the *MCM*.[176] The evidence, especially when considered in the light most favorable to the prosecution, thus shows each contested element met. Appellant's conviction is legally sufficient.

II. APPELLANT'S ADDITIONAL ARGUMENTS ATTACKING HIS CONVICTION ALSO FAIL.

1. The rule of lenity is inapplicable as earlier steps of statutory interpretation resolve this case.

"The rule of lenity applies only if, 'after seizing everything from which aid can be derived,' . . . [courts] can *make 'no more than a guess* as to what Congress intended."[177] Equally, "the rule of lenity *only applies if, after considering text, structure, history, and purpose*, there remains a *grievous* ambiguity or uncertainty in the statute . . . ."[178] The rule of lenity does not mandate adopting the narrowest possible construction of a statute if doing so would necessitate "putting aside the usual tools of statutory interpretation."[179]

Whether this Court resolves this case by interpreting Article 91(3) on its face or delving to lower sources, Congress' intent is apparent by considering this

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[176] Section I.3.A, *supra*; *Bates*, 522 U.S. at 29 ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face.").
[177] *United States v. Wells*, 519 U.S. 482, 499 (1997) (quoting *Reno v. Koray*, 515 U.S. 50, 65 (1995)) (further citations omitted) (emphasis added).
[178] *Maracich*, 133 S. Ct. at 2209 (quoting *Barber v. Thomas*, 130 S. Ct. 2499, 2508-09 (2010)) (emphasis added).
[179] *United States v. Santos*, 553 U.S. 507, 548-49 (2008) (Alito, J. dissenting).

offense's text, structure, history, and purpose. The rule of lenity is inapplicable here.

2. The military judge's special findings are sufficient to enable appellate review; that is all that is required.

This Court's predecessor indicated that a military judge's special findings must be sufficient to permit an informed appellate review.[180] But that same court noted, "neither the Code nor the Manual contemplate that a military judge could be required by counsel to analyze in detail the evidence which led to certain findings or to justify the findings which were made."[181]

The military judge's special findings here are sufficient. Of the applicable statutory requirements, Appellant's attack the special findings' specificity as related to the "in execution of office" requirement.[182] Comparison of the special findings in *Orben*, which were found sufficient, and the special findings here disproves Appellant's argument. Two of the key findings in *Orben*, a case regarding indecent liberties with a child, were: "3. I find that the act [of showing the minor magazines showing full body nudity of adults and children] amounted to the taking of indecent liberties with the victim. ¶ 4. I find that the accused committed the act with the intent to arouse and appeal to the lust, passions and

[180] *See United States v. Orben*, 28 M.J. 172, 175 (C.M.A. 1989).
[181] *Id*.
[182] Appellant's Br. 44-45.

sexual desires of the accused and the victim."[183] Neither of these special findings list any detail nor have citations to the record.

Conversely, here, on the "in execution of office" element, the military judge used five sentences to detail how each victim was in the execution of office at the time of Appellant's disrespectful deportment due to each victim's participation in the Chief's Mess text message string.[184] Each finding is supported by citation to testimony.[185] If the barebones special findings in *Orben* were sufficient for appellate review, the far more detailed and supported special findings here are more than sufficient.

3. As this Court reviews legal sufficiency *de novo*, and the lower court applied the same standard to the special findings, any dissonance between the military judge's special findings and the lower court's reasoning in affirming Appellant's Article 91(3) conviction are irrelevant.

Considering the same evidence and applying the same law, the lower court and the trial court came to the same conclusion: that Appellant violated Article 91(3).[186] That they explained their reasoning differently is irrelevant to this Court's inquiry.

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[183] *Orben*, 28 M.J. at 177-78.
[184] JA 0168, 0170, 0172.
[185] JA 0168, 0170, 0172.
[186] JA 0002 (*Brown*, 82 M.J. at 704); JA 0166-73.

This Court reviews legal sufficiency *de novo*.[187] In surveying authority defining *de novo* review, this Court accepted that such review entails "us[ing] the trial court's record but review[ing] the evidence and law without deference to the trial court's rulings," that "no form of appellate deference is acceptable," and that "review is independent and plenary . . . ; we look at the matter anew, as though the matter had come to the courts for the first time."[188] In conducting a *de novo* legal sufficiency review here, this Court asks "whether, after viewing the evidence *in the light most favorable to the prosecution*, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[189] All that is required to affirm Appellant's conviction is to use the trial court's record, viewing the evidence therein in the light most favorable to the prosecution without any appellate deference, to determine if any rational trier of fact could have found each of Article 91(3)'s essential elements beyond a reasonable doubt. Nothing about looking at a matter as if it was coming before this Court for the first time necessitates resolving or considering any perceived dissonance between the trial

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[187] *Wilson*, 76 M.J. at 6 (citing *Oliver*, 70 M.J. at 68)).
[188] *United States v. Bergdahl*, 80 M.J. 230, 234 fn. 2 (C.A.A.F. 2020), *reconsideration denied*, 80 M.J. 362 (C.A.A.F. 2020) (first quoting *Black's Law Dictionary* 121 (11th ed. 2019) defining "appeal *de novo*"; then quoting *Salve Regina Coll. V. Russell*, 499 U.S. 225, 238 (1991); then quoting *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168 (2d Cir. 2001)).
[189] *Wilson*, 76 M.J. at 6 (first emphasis added, second emphasis in original) (citing *Oliver*, 70 M.J. at 68 (quoting *Jackson*, 443 U.S. at 319)).

court's and the lower court's reasoning. As sections I.2.A and I.3.B, *supra*, demonstrate, evidence in the trial court's record proves each of Article 91(3)'s essential elements. This Court is called upon to look at the facts and existing law anew, without deference to either the trial court or lower court, and therein doing should find Appellant's conviction legally sufficient.

4. Lacking contrary caselaw restricting Article 91(3)'s plain meaning from encompassing conduct like Appellant's, Congress has not needed to revise Article 91(3) to render it effective in the digital age.

Congress has not needed to amend Article 91(3) like it did Article 120b(c) to render it effective in the digital age. Congress revised Article 120b(c) to statutorily include committing a lewd act via communication technology after *United States v. Knowles* and *United States v. Miller* limited earlier versions of Article 120b(c) from proscribing such conduct.[190] Appellant argues that Congress changing Article 120b(c)'s text while leaving Article 91(3)'s untouched indicates Congress did not intend that Article 91(3) proscribe conveying disrespectful language or deportment via communication technology.[191] But the government is unaware of any equivalent caselaw conscribing application of Article 91(3)'s text such as to necessitate an equivalent statutory revision.

[190] *Schmidt*, 82 M.J. at 73 (Sparks, J.).
[191] Appellant's Br. 31-32.

When Congress leaves untouched an analog era statute's text but is aware of technological changes impacting the statute, courts can infer that Congress understood the original statute is equally applicable in the digital age as it was in an analog era.[192] That it updated Article 120b(c) to encompass violations perpetrated via digital technology after 2008, indicates Congress was aware of new digital means of communicating prohibited language and conduct which did not exist in earlier eras. [193] Considering that Congress left Article 91(3)'s language untouched[194] despite this awareness of new means of communicating prohibited language and conduct allows this Court to infer that Congress understood Article 91(3) to be equally applicable in the digital age as it was in an analog era. Such an inference further supports finding Article 91(3) proscribed Appellant's conduct and that his conviction is legally sufficient.

Comparison of Article 120b(c)'s evolution with Article 91(3)'s stasis also addresses Appellant's arguments based on the Military Justice Review Group's recommendations regarding Article 91(3). In 2015, the Military Justice Review

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[192] *Cf. Yershov*, 820 F.3d at 488 ("Congress left untouched the definition of "consumer" in the statute, which we believe supports an inference that Congress understood its originally-provided definition to provide at least as much protection in the digital age as it provided in 1988.").
[193] *See Schmidt*, 82 M.J. at 73 (Sparks, J.) (stating Congress amended Article 120b(c) in response to *United States v. Knowles* and *United States v. Miller*, the latter of which was decided in 2008).
[194] *Compare* 10 U.S.C. § 891(3) (2018); JA 0176 *with* 10 U.S.C. § 891(3) (1952); JA 0178.

Group recommended no changes to Article 91(3).[195] It based this recommendation on the "well-developed case law addressing Article 91's provisions."[196] The government is unaware of any caselaw which impinges upon Article 91(3)'s application to communications of disrespectful language or deportment by any digital means. Article 91's well-developed caselaw applied to consistent statutory language since its inception supports the same inference as the last paragraph discusses. A lack of alteration of a criminal offense's requirements despite awareness that new means of committing the offense exist means Congress intended the same statutory language encompass the new means of committing the offense just as much as Congress intended that the offense proscribe older methods of violating it. No statutory change is necessary to have this effect and the Military Justice Review Group likely recognized just that.

Given that Congress has had no need to amend Article 91(3) like it needed to amend Article 120b(c) in light of *Knowles* and *Miller*, despite knowing new means of violating Article 91(3) exist in the digital age, this Court can safely infer that Article 91(3)'s plain text proscribes digital means of conveying disrespectful language and deportment. Given that Appellant's disrespectful deportment here

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[195] JA 0200 (Department of Defense Military Justice Review Group, Report of the Military Justice Review Group – Part I: UCMJ Recommendations 727 (Dec. 22, 2015), https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf.
[196] JA 0201 (Department of Defense Military Justice Review Group, *supra*, at 728).

met each of Article 91(3)'s statutory requirements, his conviction is legally sufficient.

5. Appellant's Article 91(3) conviction does not fail under the vagueness doctrine and affirming it would not chill servicemember speech compatible with good order and discipline.

Appellant's conviction does not fail under the vagueness doctrine and affirming it would not have a chilling effect. In the military, the vagueness doctrine is assessed against a lower, more deferential standard.[197] Congress can proscribe more than is allowable in the civilian context without violating this doctrine.[198] The vagueness doctrine requires only that one "reasonably understand that his contemplated conduct is proscribed."[199]

It is hard to contemplate that Appellant did not reasonably believe that his disrespectful deportment was proscribed by Article 91(3). "Disrespectful behavior is that which detracts from the respect due the authority and person of a [petty officer]."[200] Appellant added the caption "Voted most likely to steal your bitch" to a yearbook photograph of a female peer whom he knew was a lesbian and then

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[197] *Parker v. Levy*, 417 U.S. 733, 756 (1974) ("[T]he proper standard of review for a vagueness challenge to the articles of the Code is the standard which applies to criminal statutes regulating economic affairs").
[198] *Id*.
[199] *Id*. at 757.
[200] *MCM*, pt. IV, para. 15.c.(2)(b) at IV-22 (defining "disrespect" as cited to by *MCM*, pt. IV, para. 17.c.(5), the President's explanation applicable to Article 91(3)).

distributed that captioned photograph to her and her military peers via a work-related text string.[201] Appellant also drew a crude rendition of male genitalia on a photo of his coworker and distributed that altered photo to that coworker and his peers via the same work-related text string.[202] Appellant also sent a photo of a scantily clad man to the Chief's Mess via that work related text string and made an allegation laced with sexual inuendo targeted at a senior petty officer.[203] Appellant's conduct detracted from the respect due each of his chief petty officer victims; recipients of Appellant's content testified to this and the military judge found as much.[204] Given these facts, which this Court reviews in the light most favorable to the prosecution,[205] Appellant reasonably knew his conduct was proscribed, satisfying the vagueness doctrine.

Appellant also asserts that affirming his conviction would have a chilling effect because petty officers could no longer send messages in jest without fearing criminality.[206] But Appellant's messages were not sent in jest and did not represent jocularity. They were disrespectful and undermined good order and

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[201] JA 0021, 0083, 0098-99, 0120-23, 0162.
[202] JA 0021, 0083, 0098-99, 0120-23, 0164.
[203] JA 0021, 0083, 0098-99, 0120-23, 0163.
[204] JA 0035-39, 0048-49, 0081.
[205] *Wilson*, 76 M.J. at 6 (citing *Oliver*, 70 M.J. at 68 (quoting *Jackson*, 443 U.S. at 319)).
[206] Appellant's Br. 40-41.

discipline onboard POLAR STAR.[207] Rather than chilling speech, affirming Appellant's conviction would uphold good order and discipline. The law reflects the need to prioritize good order and discipline in this context:

> While the members of the military are not excluded from the protections granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military [conduct restrictions] which would be constitutionally impermissible outside it
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> Disrespectful and contemptuous speech . . . is tolerable in the civilian community . . . . In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is . . . unprotected.[208]

Appellant's conviction does not succumb to the vagueness doctrine and affirming it would not chill permissible speech in the military context. As Appellant's conviction is otherwise legally sufficient, this Court should affirm Appellant's conviction.

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[207] JA 0048-49, 0081.
[208] *Parker*, 417 U.S. at 758-59 (internal citations omitted).

III. AFFIRMING APPELLANT'S CONVICTION WOULD PROVIDE CLARITY THAT ARTICLE 91(3) PROSCRIBES DISRESPECT CONVEYED VIA DIGITAL MEANS, CLARIFICATION ESPECIALLY RELEVANT TO A REMOTELY WORKING MILITARY WORKFORCE INCREASINGLY INTERACTING VIA DIGITAL MEANS.

Affirming that Article 91(3)'s plain statutory language prohibits disrespectful deportment like Appellant's provides clarity to a military workforce increasingly interacting remotely. The military is experimenting with "digital" transfers and remote work where servicemembers will be forced to interact remotely via digital means.[209] Such an environment is ripe for recurrences and permutations of Appellant's conduct. Finding Appellant's conviction legally sufficient will clarify conduct Article 91(3)'s plain statutory language prohibits. This Court should take this opportunity to provide such clarity.

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[209] Davis Winkie, *Army staffers are testing digital PCS, permanent work-form-home plan*, ArmyTimes (Jul. 13, 2022), https://www.armytimes.com/news/your-army/2022/07/13/army-staffers-are-testing-a-digital-pcs-and-permanent-work-from-home-plan/.

Conclusion

Wherefore, the United States requests this Court affirm the decision of the lower court.

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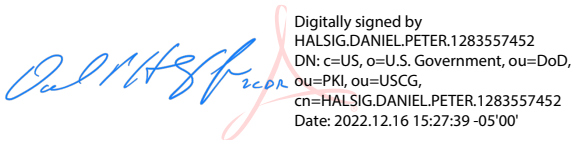

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