IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Mark J. GRIJALVA,
Machinery Technician
Third Class (E-4)
United States Coast Guard,

Appellant

BRIEF ON BEHALF OF APPELLANT

Ct. Crim. App. Dkt. No. 1482

USCA Dkt. No. 23-0215/CG

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

SCHUYLER B. MILLHAM
LT, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
Tel: (617) 221-9534
Schuyler.B.Millham@uscg.mil
C.A.A.F. Bar No. 37737

Table of Contents

Table of Cases, Statutes, and Other Authorities

U.S. Congressional Record

U.S. Code

Other

Issue Presented

WHETHER THE UNENUMERATED ARTICLE 134, UCMJ, OFFENSE CHARGED IN SPECIFICATION 2 OF CHARGE III IS PREEMPTED BY ARTICLE 117a, UCMJ, WHICH CONGRESS ENACTED TO ADDRESS THE WRONGFUL BROADCAST OR DISTRIBUTION OF INTIMATE VISUAL IMAGES.

Statement of Statutory Jurisdiction

The U.S. Coast Guard Court of Criminal Appeals (CGCCA) had jurisdiction over this case under Article 66(b)(3), Uniform Code of Military Justice (UCMJ).[1] Appellant invokes this Court's jurisdiction under Article 67(a)(3), UCMJ.[2]

Statement of the Case

Contrary to his pleas, a general court-martial composed of officers and enlisted members convicted Appellant of making a false official statement, obstructing justice, and four offenses under the general article in violation of Articles 107, 131b, and 134, UCMJ.[3] The military judge sentenced Appellant to three months of confinement, reduction to the pay grade of E-3, and a bad-conduct discharge.[4] The Convening Authority approved the findings and sentence, which were entered into judgment, and the lower court affirmed the findings but modified the sentence

[1] 10 U.S.C. § 866(b)(3) (2018).
[2] 10 U.S.C. § 867(a)(3) (2018).
[3] 10 U.S.C. §§ 907, 931b, and JA 0108 (10 U.S.C. § 934) (2018); JA 0014 (Statement of Trial Results).
[4] Post-Trial Action at 4.

due to unreasonable post-trial delay.[5] On 10 July 2023, Appellant timely petitioned this Court for review of whether Specification 2 of Charge III was preempted by Article 117a. This Court granted that issue on 3 October 2023.[6]

Statement of Facts

1. **The Creation of Article 117a, UCMJ**.

a. The "Marines United" Scandal.

In March 2017, a journalist exposed a private Facebook group called "*Marines United*."[7] Servicemembers used the group to share and promote the sharing of intimate images of active-duty, veteran, and civilian women.[8] These images, often containing nudity, were created during private, consensual sexual encounters but were distributed without the subjects' consent.[9]

b. Congress' Response: Identifying Gaps and Reforming the Law.

The *Marines United* scandal prompted congressional inquiries, beginning with a hearing by the U.S. Senate Committee on Armed Services. The Senate questioned military leaders to better understand the gravity of the situation and

---

[5] JA 0007 (*United States v. Grijalva*, 83 M.J. 669, 677 (C.G. Ct. Crim. App. 2023).
[6] JA 0001 (Order Granting Review).
[7] Thomas J. Brennan, *Hundreds of Marines investigated for sharing photos of naked colleagues*, THE WAR HORSE (Mar. 4, 2017), https://revealnews.org/blog/hundreds-of-marines-investigated-for-sharing-photos-of-naked-colleagues/.
[8] JA 0160-62 (Hearing to Receive a Briefing on Information Surrounding the Marines United Website: Before the S. Comm. on the Armed Services, 115th Cong. 57 (2017) (statement of Sen. Kirsten Gillibrand)).
[9] Brennan, *supra* note 7.

examine why the military struggled to hold the servicemembers involved responsible.[10] Notably, Senator Elizabeth Warren revealed the existence of a gap in Article 120c, UCMJ.[11] This offense largely dealt with images *taken without consent*, as opposed to images taken with consent and then *distributed without consent*.[12] At the time, the latter was not punishable under the UCMJ.[13]

Given this gap, prosecutors and their respective commands adopted inventive interpretations of existing Articles to prosecute this conduct.[14] By August 2017, a Marine was convicted under Article 127 (Extortion) for threatening to distribute sexually explicit content.[15] A month later, another Marine was convicted of "conspiracy to commit indecent broadcasting" and "attempted indecent broadcasting."[16] These instances further underscored the importance of heeding Senator Warren's earlier call for a revision of the UCMJ,[17] highlighting the necessity

---

[10] *Id*.
[11] JA 0183; JA 0107 (10 U.S.C. § 920c).
[12] *Compare* JA 0107 *with* JA 0106.
[13] JA 0183.
[14] Shawn Snow, *Seven Marines court-martialed in wake of Marines United scandal*, MARINE CORPS TIMES (Mar. 1, 2018), https://www.marinecorpstimes.com/news/your-marine-corps/2018/03/01/seven-marines-court-martialed-in-wake-of-marines-united-scandal/.
[15] *Marine Corps General and Special Court-Martial Dispositions*, 1 (August 2017), https://media.defense.gov/2018/Apr/04/2001899479/-1/-1/0/COURTSMARTIAL-201708.PDF.
[16] *Id*. at 4.
[17] *Id*.

for more precise legal frameworks to address the sharing of private, intimate visual images without consent.

This framework is precisely what Representative Martha McSally aimed to accomplish when she introduced H.R. 2052:

> We have a couple of articles, Article 133 and Article 134. Article 133 is conduct unbecoming of an officer. Article 134 is what we call anything that is prejudicial to good order and discipline. This is one I would say as a commander we often use as the catchall article. When we could not prosecute someone under another article, we go to Article 134 because we knew their behavior was degrading good order and discipline. Civilian law faces challenges in prosecuting this crime. Thirty-five States and the District of Columbia have statutes against *sharing private, intimate digital media without consent*, but the State laws vary in their proof, the elements, and the punishment. The Marines recently created a regulation where they can charge these Neanderthals who commit these violations, but creating regulation isn't the same thing as strengthening the law. That is why I introduced the [Protecting the Rights of Individuals Against Technological Exploitation Act] PRIVATE Act. Again, this is a bipartisan bill. *My bill provides a clear, unambiguous charge that gives commanders a sharper tool in the UCMJ for targeting and prosecuting this behavior*. It clearly defines this behavior as a crime, and it also addresses the issues of intent and free speech.[18]

Similarly, Representative Jackie Speier emphasized that "a federal law is needed to provide a single, clear articulation of the elements of this crime to ensure that Americans in every part of the country—civilian and military—are protected if

[18] JA 0215 (The Protecting the Rights of Individuals Against Technology Exploitation Act (The PRIVATE Act), H.R. 2052, 115th Cong. (2017)); JA 0139 (163 CONG. REC. H3052, at 3058 (daily ed. May 2, 2017) (statement of Rep. Martha McSally) (cleaned up and emphasis added)).

they are subjected to this heinous abuse."[19] Her specific comments about the Code, noting the structural deficiencies in both Articles 120c and 134, reinforced her urgency to resolve the matter quickly.[20] Both Senators Warren and Joni Ernst reemphasized the same urgency, stressing the broader societal implications:

> Senator Warren: I know you are committed to pursuing this, but if we are going to shut down this conduct, then you ought to have every possible legal tool at your disposal.[21]
>
> Senator Ernst: This is an absolute issue that impacts our entire society. It is an absolutely horrible issue impacting us, but it is one that *we* must stop. *And I say we. It is not just the Marine Corps. It is those of us who are sitting here today*.[22]

Recognizing that the military often mirrors the broader community, the Senate Armed Services Committee aimed to find a solution that safeguarded the well-being of both civilians and servicemembers.[23] Their solution was Article 117a.

c. Framing Article 117a: Addressing First Amendment Concerns.

During the legislative phase of the PRIVATE Act, Congress did not include an element requiring that the wrongful broadcast of intimate images have any *military nexus*, except for the accused being subject to personal jurisdiction under

---

[19] *Id*.
[20] JA 0141 (163 CONG. REC. H4477, at 4478 (daily ed. May 23, 2017) (statement of Rep. Jackie Speier)).
[21] JA 0183.
[22] JA 0167 (emphasis added).
[23] JA 0149 (statement of Sen. John McCain).

the UCMJ.[24] However, before the final version of Article 117a was approved and voted on, Congress received concerns from the Department of Justice (DOJ) regarding potential First Amendment challenges.[25] In a letter to Congress, the DOJ recommended including an element requiring the conduct have a "*reasonably direct and palpable connection*" to "*the military mission or the military environment*."[26] This recommendation was consistent with this Court's decision in *United States v. Wilcox*.[27] The DOJ also cited *Parker v. Levy*, stressing that Article 117a needed a military nexus element for its legal efficacy with respect to accused servicemembers, at whose conduct the statute was aimed.[28]

Promptly responding to these concerns, Congress passed the statute a month later, incorporating the precise language suggested by the DOJ.[29] The final version of Article 117a retained the original three elements while adding the *Wilcox* language as a fourth military-connection element:

---

[24] JA 0125-28.
[25] JA 0219 (Letter from the Office of the Assistant Attorney General, at 11 (Nov. 8, 2017), https://www.justice.gov/ola/page/file/1010611/download).
[26] *Id*. (quoting *United States v. Wilcox*, 66 M.J. 442, 449 (C.A.A.F. 2008)) (emphasis added).
[27] *Id*.
[28] *Parker v. Levy*, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections").
[29] JA 0213-24 (National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 553(a) (2017)).

§917a. Art. 117a. Wrongful broadcast or distribution of intimate visual images

(a) PROHIBITION.-Any person subject to this chapter-

(1) who knowingly and wrongfully broadcasts or distributes an intimate visual image of another person or a visual image of sexually explicit conduct involving a person who-

(A) is at least 18 years of age at the time the intimate visual image or visual image of sexually explicit conduct was created;

(B) is identifiable from the intimate visual image or visual image of sexually explicit conduct itself, or from information displayed in connection with the intimate visual image or visual image of sexually explicit conduct; and

(C) does not explicitly consent to the broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct;

(2) who knows or reasonably should have known that the intimate visual image or visual image of sexually explicit conduct was made under circumstances in which the person depicted in the intimate visual image or visual image of sexually explicit conduct retained a reasonable expectation of privacy regarding any broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct;

(3) who knows or reasonably should have known that the broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct is likely-

(A) to cause harm, harassment, intimidation, emotional distress, or financial loss for the person depicted in the intimate visual image or visual image of sexually explicit conduct; or

(B) to harm substantially the depicted person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships; and

(4) whose conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment,

is guilty of wrongful distribution of intimate visual images or visual images of sexually explicit conduct and shall be punished as a court-martial may direct.

30

2. **The Government charged Appellant with broadcasting a civilian's intimate images, without her consent, to others, including another servicemember, not under the new Article 117a, but as an unenumerated Article 134 offense**.

In 2019, Appellant was investigated for broadcasting intimate images of a civilian female acquaintance, without her consent, to others, including another servicemember.[31] But instead of charging him under Article 117a, which was specifically enacted to cover such misconduct, the Government charged him with an unenumerated Article 134 offense.[32] In doing so, the Government applied Article

[30] JA 0106.
[31] JA 0038 (R. at 865).
[32] JA 0012 (Charge Sheet at 4).

117a's first three elements, but subtracted the fourth military-connection element from the specification and replaced it with Article 134's required terminal element.[33]

In his CGCCA appeal, as at trial, Appellant asserted this charging scheme violated the preemption doctrine, which specifically prohibits the Government from alleging a novel Article 134 offense by subtracting an element from an enumerated offense.[34] Appellant pointed to Congress's intent to make Article 117a broadly applicable in protecting both servicemember and civilian victims, while heeding the DOJ's recommendation to include a military-connection element to avoid constitutional scrutiny.[35] At the crux of the matter, Appellant argued that the inclusion of the fourth element should not be construed as excluding civilian victims from the protective scope of Article 117a.[36]

However, the CGCCA rejected this view and instead applied a victim-centric approach, finding the "[l]egislative history shows that the specific statutory purpose for . . . [including the fourth military-connection element] . . . was to target the sharing/broadcasting of intimate images of *servicemembers and veterans* without their permission."[37] Based on this reading of the legislative history, the CGCCA then concluded that Article 117a was not intended to "cover a class of offenses in a

---

[33] *Compare* JA 0106 *with* JA 0012.
[34] JA 0002; JA 0080 (App. Ex. 35 at 7).
[35] Appellant's Assignments of Error, (Nov. 7, 2022) at 10-13
[36] Appellee's Answer, (Feb. 27, 2023 [sic]) at 4, 14-21.
[37] JA 0003-04 (emphasis added).

complete way so as to preclude prosecution under Article 134 when there is no such [military] nexus."[38]

Argument

THE GOVERNMENT'S UNENUMERATED ARTICLE 134 OFFENSE IN SPECIFICATION 2 OF CHARGE III IS PREEMPTED BY ARTICLE 117a, WHICH CONGRESS SPECIFICALLY ENACTED TO COVER THE OFFENSE OF WRONGFUL BROADCAST OR DISTRIBUTION OF INTIMATE VISUAL IMAGES.

Standard of Review

Whether an offense is preempted depends on statutory interpretation, which is a question of law reviewed *de novo*.[39]

Law and Analysis

The preemption doctrine prohibits the application of Article 134 to conduct already covered by Articles 80 to 132 of the UCMJ.[40] As such, Article 134 should be limited to military offenses and those crimes not specifically delineated by the punitive Articles.[41] In other words, "where Congress has *occupied the field* of a given type of misconduct by addressing it in one of the specific punitive articles of

---

[38] JA 0004.
[39] *United States v. Avery*, 79 M.J. 363, 366 (C.A.A.F. 2020) (quoting *United States v. Wheeler*, 77 M.J. 289, 291 (C.A.A.F. 2018)).
[40] JA 0108.
[41] *United States v. McGuinness*, 35 M.J. 149, 151 (C.M.A. 1992) (quoting *United States v. Norris,* 8 C.M.R. 36, 39 (1953).

the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element."[42] Congress has "occupied the field" if it "intended the other punitive article to cover a class of offenses in a complete way."[43]

To determine the applicability of the preemption doctrine, the Court of Military Appeals set out a two-part test, requiring an affirmative answer to both questions.[44] The first question is "whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code."[45] Such intent must be expressed "through direct legislative language or express legislative history,"[46] which courts generally analyze through statutory interpretation, comparing articles to other federal statutes, and reviewing legislative history.[47] The second question is "whether the offense charged is composed of a residuum of elements of a specific offense.[48]

---

[42] *United States v. Kick,* 7 M.J. 82, 85 (C.M.A. 1979) (emphasis added).
[43] *United States v. Anderson*, 68 M.J. 378, 386–87 (C.A.A.F. 2010) (citing *Kick*, 7 M.J. at 85).
[44] *McGuinness*, 35 M.J. at 151; *Anderson*, 68 M.J. at 386–87 (referencing *United States v. Taylor,* 12 C.M.A. 44, 45–47 (1960)) (emphasis added).
[45] *McGuinness* 35 M.J. at 151–52 (quoting *United States v. Wright,* 5 M.J. 106, 110–11 (C.M.A. 1978)); *see also Avery*, 79 M.J. at 366.
[46] *Anderson*, 68 M.J. at 386–87 (emphasis added).
[47] *Id*. (citing *Taylor,* 12 C.M.A. at 45–47).
[48] *McGuinness*, 35 M.J. at 151-52 (quoting *Wright,* 5 M.J. at 110-11); *see also Avery*, 79 M.J. at 366.

1. **Article 117a occupies the field of the nonconsensual broadcast and distribution of consensually taken intimate images**.

a. The plain language of Article 117a protects adults, including servicemembers, veterans, and civilians.

The language of the UCMJ is interpreted according to the traditional rules of statutory interpretation, which apply equally when interpreting both the statutory language itself and other provisions within the Manual for Courts-Martial.[49] Those rules provide that all questions of statutory interpretation must begin with the text.[50] In doing so, "sections of a statute should be construed in connection with one another as 'a harmonious whole' manifesting 'one general purpose and intent.'"[51] "The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent."[52]

i. *The requisite military nexus pertains to the nature of the conduct, not the military status of the victim*.

Contrary to the CGCCA's interpretation, Article 117a(a)(4) does not require a victim-centric military nexus.[53] Instead, it mandates that the *conduct* itself must

---

[49] *United States v. Hiser*, 82 M.J. 60, 64 (C.A.A.F. 2022); *see United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015).
[50] *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1056 (2019).
[51] *United States v. Quick*, 74 M.J. 517, 520 (N-M. Ct. Crim. App. 2014) (quoting Norman J. Singer, Statutes and Statutory Construction § 46:05 (6th ed. 2014)).
[52] *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (internal quotation marks omitted) (quoting *Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438, 450 (2002)).
[53] JA 0004. The military nexus element that was included in Article 117a(a)(4) verbatim, based on DOJ's recommendation, requires the accused's "*conduct*, under

possess a military nexus. This interpretation aligns with recent decisions from the U.S. Air Force Court of Criminal Appeals (AFCCA) and this Court.

In *United States v. Jones*, the AFCCA upheld a conviction for Article 117a, wherein a servicemember shared intimate images of his *civilian* spouse with "MK, a person whom he *knew* was a military member."[54] Despite the victim's civilian status, the court established that the appellant's *conduct* was sufficiently linked to a military environment because of the intentional transmission to another military member.[55]

Similarly, in *United States v. Hiser*, this Court determined the Government satisfied Article 117a's military nexus element because a servicemember, who also happened to be the victim, discovered the intimate images on the appellant's PornHub profile.[56] This Court emphasized that a military connection "may be established if the broadcasted images *actually do reach* a servicemember,"[57] without necessitating that the "person depicted in the image" be a servicemember. The emphasis lies on the conduct's association with the military mission or environment.

---

the circumstances, [have] a reasonably direct and palpable connection to a . . . military environment."

[54] JA 0116 (*United States v. Jones*, No. ACM 40226, 2023 WL 3720848, at *5 (A.F. Ct. Crim. App. May 30, 2023)).

[55] *Id*.

[56] *Hiser*, 82 M.J. at 66. (emphasis added).

[57] *Id.*

Therefore, Article 117a safeguards victims of a broader demographic, not just military personnel, so long as there is an evident military linkage in the conduct.

Moreover, this Court clarified that "[b]ecause the article requires that the person depicted in an image be [*simply*] 'identifiable' *without further qualification*, it provides no basis for requiring a person to be identifiable by 'somebody of the general public.'"[58] This perspective aligns seamlessly with this Court's view that the first element in Article 117a delineates the only prerequisites for victim status. The criteria set forth are that the victim be "at least 18 years of age," be "identifiable from the . . . visual image," and not "explicitly consent to the broadcast or distribution of the intimate visual image."[59] The clarity and simplicity of these criteria steer the interpretation away from any other limitations, such as the victim-centered military nexus mistakenly used by the CGCCA.

Emphasizing the requirement that the *conduct*, not the victim, possess a military nexus is therefore in line with *Hiser's* view that victim identifiability not be confused with public recognition. And the inclusivity of the criteria under Article 117a(a)(1)(B), UCMJ, supports that the statute does not limit victims to military personnel; rather, a victim need only be *another person* (military or civilian) who meets those criteria. This approach to victim status under the plain language of

[58] *Id*. (emphasis added).
[59] 10 U.S.C. § 917a(a)(1).

Article 117a(a)(1)(B), UCMJ, resonates with Congress's goal of ensuring justice and accountability irrespective of the victim's military affiliation.

This assertion is further underscored by the DOJ's expressed concerns that, in instances where this nexus is absent (particularly when the conduct pertains to a civilian, as in the present case), the provisions would potentially not withstand the rigorous scrutiny mandated by the First Amendment.[60] In *Jones*, the AFCCA's decision supports this position, in that the court upheld a conviction for Article 117a, finding a military nexus despite the victim being a civilian.[61]

ii. *Article 117a only requires the victim to be an adult, identifiable from the image, who did not consent to the broadcast or distribution.*

Paragraph (a)(1) of Article 117a identifies who is eligible to be a victim, "an intimate visual image of *another person* or a visual image of sexually explicit conduct involving *a person* . . . ."[62] Although the statute does not define the term, the plain reading of the word "person" generally means any individual. Indeed, "[i]n determining the meaning of any Act of Congress, *unless the context indicates otherwise* . . . the words "*person*" and "whoever" include . . . *individuals*."[63] The Oxford English Dictionary provides several definitions for "person," almost all of

[60] JA 0218-19.
[61] JA 0113 (*United States v. Jones*, No. ACM 40226, 2023 WL 3720848 (A.F. Ct. Crim. App. May 30, 2023) (unpublished opinion)).
[62] 10 U.S.C. § 917a(a)(1) (emphasis added).
[63] JA 0101 (1 U.S.C. § 1) (emphasis added).

which relate to actual individuals.[64] Black's Law Dictionary similarly defines person as "[i]n general usage, a human being[.]"[65]

None of the language in Article 117a indicates Congress intended to deviate from this meaning of "person," which Congress used throughout the statute: "intimate visual image of another person";[66] "the person depicted in the intimate visual image";[67] and "depicted person."[68] Indeed, any language requiring the victim be on active-duty or a veteran is absent from both the statutory language of Article 117a and from the listed elements. Rather, all that is required under Article 117a(a)(1) is the victim be "at least 18 years of age," "identifiable from the . . . visual image," and "does not explicitly consent to the broadcast or distribution of the intimate visual image."[69]

In comparison, Article 91, UCMJ, mandates "the accused have actual knowledge that *the victim was a warrant, noncommissioned, or petty officer.*"[70]

---

[64] *See* Person*, The Compact Oxford English Dictionary*, (2nd ed. 1991) (defining "person" as "an individual human being; a man, woman, or child," "a man or woman of distinction or importance," "a self-conscious or rational being," "a human being (*natural person*) or body corporate or corporation (*artificial person*), having rights and duties recognized by the law," and "the living body of a human being").
[65] Person, *Black's Law Dictionary*, (6th ed. 1990).
[66] JA 0106 (10 U.S.C. § 917a(a)(1)).
[67] *Id*.
[68] *Id*.; 10 U.S.C. § 917a(a)(3)(b).
[69] *Hiser*, 82 M.J. at 66.
[70] 10 U.S.C. § 891 (2018); *cf. United States v. Biggs*, 22 C.M.A. 16, 18 (1972) (concluding there was sufficient evidence "to support the court's

Notably, Article 117a does not contain such language, underscoring that Congress could have legislated for such particularity if it had wanted to for this offense.

b. Article 117a filled the gap on what Article 120c did not criminalize.

"Congress does not create new articles that achieve the same end or prohibit the same conduct as do existing articles."[71] As such, Article 117a criminalizes different conduct than Article 120c. While paragraph (a)(3) of Article 120c refers to "broadcast or distribution," it is only referring to images created *without consent*. Article 117a differs in that its focus is on the harm (physical, emotional, financial, professional) that the *nonconsensual* broadcast or distribution of an intimate image may cause a victim (who may well have consented to the making of the image at the time it was recorded).

c. Congress created Article 117a in order to prosecute servicemembers and protect adults, including servicemembers, veterans, and civilians.

Congress intended Article 117a to comprehensively address the non-consensual sharing of intimate images. The legislative history of Article 117a demonstrates Congress intended Article 117a to cover a broad range of conduct, extending its protections to anyone (military or civilian) depicted in an intimate image that is broadcasted or distributed to others without their consent.

---

determination that, *at the time of the offenses* . . . the accused knew the military identity" of his victims (emphasis added)).

[71] *United States v. Page*, 80 M.J. 760, 765 (N-M. Ct. Crim. App. 2021).

Representative Jackie Speier's comments on the PRIVATE Act underscores this position:

> I also want to note that the passage of the PRIVATE Act does not apply to the civilian people in our country. Although 34 States have passed laws to address nonconsensual pornography, their approaches vary widely, and some are very flawed. That is why a Federal law is needed to provide a single, clear articulation of the elements of this crime to ensure that Americans in every part of the country—*civilian and military*—are protected if they are subjected to this heinous abuse.[72]

The plain meaning of her language indicates that while the PRIVATE Act cannot be used to *prosecute* civilians, it will certainly *protect* them.[73]

The only reason Congress included a fourth element requiring the conduct to have a military connection was to preserve the statute's integrity by addressing the DOJ's concerns about potential statutory overreach under the First Amendment. While doing so, however, Congress never strayed from its original intent for comprehensive coverage of this type of conduct by those subject to the UCMJ.

---

[72] JA 0142. (statement of Rep. Speier) (emphasis added).

[73] *Id*.; *see* Ryan Browne, *First Marine tied to 'Marines United' Facebook group court-martialed*, CNN POLITICS (July 10, 2017) https://www.cnn.com/2017/07/10/politics/marines-united-facebook-group-court-martial/index.html ("The Naval Criminal Investigative Service scanned 'nearly 131,000 images across 168 social media sites' and was reviewing information relating to '89 persons of interest as a result of incidents related to the nonconsensual sharing of explicit photos and other online misconduct.' Of those 89 people, *22 are civilians* and 67 are active duty or reserve Marines.") (emphasis added).

The DOJ's concerns about First Amendment overbreadth referenced this Court's analysis in *United States v. Wilcox,*[74] recommending the conduct have a "reasonably direct and palpable connection" to the "military mission or the military environment."[75] As the Supreme Court has stated,

> The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges. The showing that a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep, suffices to invalidate *all* enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.[76]

The DOJ's concerns were that the original version of the statute would be ruled unconstitutional in its entirety if Congress did not occupy the field in a legally valid way.

In response to these concerns, Congress incorporated a military-connection element into Article 117a, using the exact language recommended by the DOJ that the conduct have a "reasonably direct and palpable connection to a military mission or military environment." Thus, the purpose behind including this element was to address potential constitutional challenges to the statute based on First Amendment

---

[74] *Wilcox*, 66 M.J. at 449.
[75] JA 0219.
[76] *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (citations and internal quotation marks omitted) (emphasis in original).

overbreadth rather than to limit Article 117a's protections solely to servicemember (or veteran) victims.

This sequence of events was misconstrued by the CGCCA. That court misinterpreted the legislative history of this statutory language in finding "the specific statutory purpose for [including the military-connection element] was to target the sharing/broadcasting of intimate images of servicemembers and veterans without their permission."[77] This erroneous interpretation led the court to then conclude, also erroneously, that Congress did not intend to cover conduct involving civilian victims when it enacted Article 117a.[78]

In contrast to the CGCCA's misguided interpretation of the statute's language and legislative history, the AFCCA upheld the application of Article 117a, in a recent case, to an appellant who distributed intimate images of his *civilian spouse* without her consent to another servicemember.[79] The AFCCA's approach differed from the CGCCA's by assessing whether the Government had successfully proven that the *conduct* met the elements of Article 117a elements (including the fourth military-connection element), irrespective of whether the victim was a civilian or a servicemember.[80] This is clearly the way Congress envisioned Article 117a to apply,

[77] JA 0003-04.
[78] *Id*.
[79] JA 0116.
[80] *Id*.

and it exemplifies the conduct Congress intended to address. Congress not only intended Article 117a to protect both civilian and servicemember victims, but it enacted this punitive article to comprehensively cover this class of offenses—because without the fourth element, the article would have run afoul of the First Amendment.

2. **Charge III, Specification 2, is composed of a residuum of elements of Article 117a**.

The unenumerated Article 134 specification the Government charged is composed of a residuum of elements of Article 117a.[81] Specification 2 of Charge III embraced all but two of the elements of wrongful broadcast of an intimate visual image under Article 117a: "(1) that the intimate visual image involves a person who is at least 18 years of age at the time the intimate visual image was created; and (2) that the accused's conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment."[82]

Although the reason for charging under the unenumerated Article 134 specification is unclear, the Government may have thought it lacked evidence that Appellant's conduct was connected to a military mission or military environment. Without that evidence, the Government could not charge Appellant's conduct as a crime under Article 117a and sought to cure that evidentiary problem by simply

[81] *Compare* JA 0106 *with* JA 0012.
[82] JA 0003.

replacing Article 117a's final element with the service discrediting element of Article 134, Clause 2.

But that is exactly what the preemption doctrine prohibits—creating an unenumerated Article 134 specification by subtracting an element from an enumerated offense that the Government does not have the evidence to prove. Moreover, this action conflicts with the notion that "a servicemember must have fair notice that his conduct is punishable before he can be charged under Article 134 with a service discrediting offense."[83] The remedy for this prosecutorial overreaching is dismissal of the affected specification.[84]

Conclusion

For the foregoing reasons, Appellant respectfully requests that this Court set aside the findings as to Charge III, Specification 2, and the sentence.

Respectfully submitted,

Schuyler B. Millham
LT, USCG
Appellate Defense Counsel
1254 Charles Morris St, SE
Washington Navy Yard, D.C. 20374
Tel: (617) 221-9534
Schuyler.B.Millham@uscg.mil
CAAF Bar No. 37737

[83] *See United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003).
[84] *Kick*, 7 M.J. at 85.

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered electronically to this Court, and that copies were electronically delivered to the Appellate Government Division and Special Victims' Counsel.

Certificate of Compliance with Rules 24(c) and 37

The undersigned counsel hereby certifies that: 1) This brief complies with the type-volume limitations of Rule 24(c) because it contains 4,648 words; and 2) this brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

Schuyler B. Millham
LT, USCG
Appellate Defense Counsel
1254 Charles Morris St, SE
Washington Navy Yard, D.C. 20374
Tel: (617) 221-9534
Schuyler.B.Millham@uscg.mil
CAAF Bar No. 37737