

**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

UNITED STATES,  
Appellee

**BRIEF ON BEHALF OF  
APPELLEE**

v.

Docket No. ARMY 20240254

Lieutenant Colonel (O-5)  
**ASHLEY R. ELLIS,**  
United States Army,  
Appellant

Tried at Fort Belvoir, Virginia on 20  
February, 12 April, and 13-17 May  
2024, before a general court-martial  
appointed by the Commander, U.S.  
Army Garrison, Fort Belvoir, Colonel  
Adam Kazin, presiding.

TO THE HONORABLE, THE JUDGES OF THE  
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

**Assignments of Error<sup>1</sup>**

**I. WHETHER THE FIRST AMENDMENT PROTECTS THE  
PRIVATE CONVERSATIONS BETWEEN MARRIED  
OFFICER SPOUSES UNDERGOING A CONTENTIOUS  
DIVORCE WHERE THE "CRIMINAL LANGUAGE" IS NOT A  
CATEGORY THE SUPREME COURT HAS HELD IS  
UNPROTECTED<sup>2</sup>**

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<sup>1</sup> The government has reviewed appellant's *Grostefon* matters and agrees with the defense appellate counsel that they do not warrant full briefing as an assignment of error. Furthermore, the government respectfully submits that they lack merit. The government recognizes this court's authority to elevate *Grostefon* matters deserving of increased attention. *United States v. Grostefon*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding any of appellant's *Grostefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

<sup>2</sup> Appellant includes a footnote to Assignment of Error 1 claiming a second, incorporated Assignment of Error. (See Appellant's Br. at 1) Appellant includes a cite from *United States v. Smith. Id.* However, the quote from *Smith* that appears to form the basis of what appellant may be arguing is from *Brandenburg v. Ohio*, which was decided in 1969. *Id.* As such, it is unclear what, if any, argument

**II. WHETHER APPELLANT WAS ON NOTICE THAT EXCERPTS FROM A SINGLE PRIVATE TEXT MESSAGE TO HIS SPOUSE WERE SUBJECT TO CRIMINAL SANCTION GIVEN THEY DID NOT FALL INTO AN UNPROTECTED CATEGORY OF SPEECH**

**III. WHETHER THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THE PANEL ON THE FIRST AMENDMENT, AND NOT PROVIDING ANY DEFINITIONS FOR THE ELEMENTS OF “GENTLEMAN” OR CONSENT**

**Statement of the Case**

On 17 May 2024, an officer panel sitting as a general court-martial convicted appellant, LTC Ashley R. Ellis, contrary to his plea, of one charge with one specification of conduct unbecoming of an officer and not guilty of all other charges and their specifications. (R. 1413-14; Statement of Trial Results (STR); App. Ex. CI). This was in violation of Article 133, UCMJ.<sup>3</sup> 10 U.S.C. § 933. (R. 1413-14; STR; App. Ex. CI).

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appellant attempts to make here. Appellant has not complied with Rule 18(a), 18.1, and Appendix A of this court’s rules regarding assignments of error. Given this, the government submits that appellant has waived this error. Similarly, appellant attempts to make an argument pursuant to the Fourteenth and Fifth Amendments to the United States Constitution. (See Appellant’s Br. at 22). Again, appellant has failed to comply with Rule 18(a), 18.1, and Appendix A of this court’s rules regarding assignments of error. Given this, the government submits appellant has waived this error.

<sup>3</sup> All references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the versions in the Manual for Courts-Martial, United States (2019 ed.) [2019 MCM] unless otherwise specified.

The military judge sentenced appellant to a reprimand the same day. (STR; R. at 1448). On 31 May 2024, the convening authority elected to take no action on the finding and approved the sentence. (Action). On 19 June 2024, the military judge entered judgment. (Judgment).

### **Statement of Facts**

Appellant is and has been an officer in the United States Army during the course of these events. (Pros. Ex. 20). Ms. [REDACTED] (hereinafter the “Victim”) was also an officer, though now retired, and married appellant on 21 December 2006 and remained so through appellant’s trial. (R. at 398, 400; Pros. Ex. 20). Appellant and the Victim have two children, a 16-year-old son and a 7-year-old daughter. (R. at 402). Appellant had started having an affair with someone outside the marriage during July 2022, which the Victim became aware of during the fall that same year. (R. at 403-04). As a result, their marriage began to deteriorate, they decided to pursue divorce, and both agreed to start seeing other people. (R. at 404).

On 29 October 2022, appellant, the Victim and their two children were at their residence. (R. at 404-06). Their daughter was sitting on a stool in the kitchen and their son was upstairs in his room. (R. at 404-06). Appellant and the Victim got into a verbal argument when appellant grabbed the Victim’s phone out of her hands without her consent. (R. 404-06). The Victim reached for her phone trying to retrieve it from appellant. (R. 404-06). Appellant responded by shoving the Victim

and putting the Victim into a choke hold with one arm, preventing her from breathing, and causing her to lose consciousness. (R. at 404-06, 408, 414, 419-20). Appellant used his free arm to hold the Victim's phone in front of them. (R. at 415, Pros. Ex. 1). Appellant attempted to broadcast what was happening to contacts of the Victim via a social media application on the phone. (R. at 415, Pros. Ex. 1).

Appellant's daughter, who was still sitting nearby, recorded this choke hold on her iPad, creating a 2-second video. (R. at 419, Pros. Ex. 1). Appellant then dragged the Victim down a flight of stairs. (R. at 419, 423, Pros. Ex. 1, 4). The Victim regained consciousness at the bottom of the flight of stairs in a pool of blood. (R. at 419, 423, Pros. Ex. 1, 4). The Victim observed appellant pacing back and forth in front of her and screaming at her that she was "a broken middle-aged woman with two kids and nobody is going to want me, and anybody who tries to date me or whatever is only wanting to fuck me and that I'm a good for nothing bitch." (R. at 414-15). The Victim eventually saw that her parents had arrived and were at the top of the stairs. (R. at 427). Appellant began screaming at the Victim's parents and told them he and the Victim were getting a divorce. (R. at 427-28). Appellant then left the residence taking the Victim's phone with him. (R. at 450, Pros. Ex. 15f). The Victim sustained multiple injuries to include bruising on her face, a swollen nose, scratches across her chest, and a lip that had been lacerated. (R. at 429, Pros. Ex. 5).

The next day, when Victim texted appellant that he likely broke her nose, appellant apologized to her. (R. at 451, Pros. Ex. 7h, 15g). After sending the apologetic text messages, he sent menacing statements. (R. at 453, Pros. Ex. 15h). When the Victim confronted appellant via text that he had “beat the shit out of her” appellant responded by stating, “oh yeah just wait.” (R. at 453, Pros. Ex. 15h). In a later text, when the Victim told appellant that her “teeth and face won’t forget,” appellant responded, “I’m about to show you another lesson shortly.” (R. at 457-58). Appellant also texted the Victim a menacing message, “Now you know what I’m capable of.” (R. at 466, Pros. Ex. 15i). The Victim went to urgent care because of the injuries appellant inflicted. (R. at 704).

Numerous times during November and December, appellant would berate the Victim about her simply communicating with other men. (R. at 701-02, 720). Appellant would do this while he continued his relationship with the person he had been having an affair with previously. (R. at 723, Pros. Ex. 7m). This occurred after the two had established they would no longer be in a relationship with each other. (R. at 723, Pros. Ex. 7m).

At the end of January 2023, appellant and the Victim were on a date at a restaurant. (R. at 481). A verbal argument between the two turned physical after they left the restaurant. (R. at 481). After the Victim walked outside, appellant followed her to the parking lot, began arguing with her again, then used his

forearm to shove her across the chest into the hood of a random parked car. (R. at 481-83).

During February 2023, appellant and the Victim were in the kitchen at their residence. (R. at 484). Appellant started yelling at the Victim, then took pictures frames that were on the counter and threw them on the floor. (R. at 484, 682). Appellant then slapped the Victim in the back of the head and shoved her to the floor. (R. at 484, 682). After the Victim fell to the floor and was attempting to crawl away, appellant told her to, “get up,” and “I didn’t hit you that hard.” (R. at 485-86, 682).

On a different day during February 2023, appellant went to the gym where the Victim was working out. (R. at 486-88). Appellant did this because of a Facebook post the Victim made. (R. at 486-88). Without the Victim’s permission, appellant took the Victim’s phone and her water bottle and told her to meet him outside. (R. at 486-88). A nearby observer mouthed to the victim, “Are you okay,” to which the victim mouthed back, “Yes.” (R. at 688). Outside, appellant sat on the Victim’s car hood with a pistol holstered to his side. (R. at 688, 489). Appellant had never worn a pistol holstered before and always kept the weapon in a case. (R. at 490, 793, 1191). Eventually appellant and the Victim returned to their residence. (R. at 493-94, 539). When the Victim attempted to enter their residence through

the door in the garage, appellant slammed the door on her arm, causing pain and bruising. (R. at 493-94, 539)

In the middle of April 2023, appellant sent the Victim an 88-second prerecorded video to her phone. (R. at 496). The video pans through the Victim's closet focusing on her clothes. (Pros. Ex. 8). In the video, appellant can be heard saying, "Got some more ho dresses, right. Look at this. I mean, it's like a swim suit, but actually not a swimsuit. You know a lot of shit that...never been [REDACTED]'s style but all of a sudden is. I mean damn, guess my tussin, guess my cousin taught you real good how to dress like a ho, right." *Id.* The Victim went to her residence to ask appellant why he sent her the offensive video. (R. at 496, 662). Appellant began to yell at the Victim and told her not to talk to appellant's family members. (R. at 496, 501). Appellant then shoved the Victim with his forearm across the chest and then began to strangle her with both of his hands around her neck. (R. at 501, 540). Eventually, appellant shoved the Victim to the ground. (R. at 503). On multiple occasions, appellant admitted to being physically violent with the Victim. (R. at 529-30, 539, Pros. Exs. 3b, 3c, 7b, 7c, 15b, and 15c). While making these admissions, appellant also used disparaging language towards the Victim. Separately, when the Victim confronted appellant with how he treats her with animosity, appellant did not deny doing so. (Pros. Ex. 3e).

Appellant's repeated threats, harassment, and physical violence towards the Victim caused her to fear appellant. (R. at 708). On 1 June 2023, appellant moved out of their residence. (R. at 503-04). The Victim felt relief, believing the physical, mental, and emotional abuse appellant subjected her to would end. (R. at 504). Unfortunately, appellant's abuse continued.

During early June 2023, after appellant had moved out, appellant entered the Victim's residence without her permission and took the Victim's wedding and engagement rings without her permission. (R. at 509-14, 539, Pros. Exs. 3a, 7a, 15a, 9). When the Victim confronted appellant about taking her rings, appellant admitted he had, which was frustrating and upsetting to the Victim. (R. at 509-14, 539; Pros. Ex. 3a, 7a, 15a, and 9).

A few days later, appellant was at the Victim's residence after their daughter's birthday party. (R. at 505). Appellant began screaming at the Victim and berating her about her gym clothes and eye makeup. (R. at 505, 654-56). Appellant then followed the Victim throughout the house, shoving her with both hands, and yelling in her face to give him her phone. (R. at 505, 508, 539). Appellant then grabbed the Victim's doctoral certificate and a black sharpie marker. (R. at 506). Without the Victim's permission, appellant then began to attempt to remove the doctoral certificate from the frame to deface a portion of the Victim's name that appeared on the certificate. (R. at 506). When appellant was



unable to remove the doctoral certificate from its frame, he then put blue painter's tape over the same area, which was offensive to the Victim. (R. at 507, 652).

Between April and May 2023, the Victim took several picture frames containing pictures of her and appellant that were in her bedroom and stacked them inside her armoire. (R. at 775). In the middle of June 2023, the Victim returned to her residence to find those same picture frames smashed on the floor of her bedroom. (517,522-23, 525, Pros. Ex. 6).

Around the same time as this incident, appellant entered the Victim's residence without her permission and took the Victim's boots, which were part of her uniform. (R. at 516, 521-22, 539). Appellant texted the Victim, admitting to taking her boots, and threatening her by saying, "I got something for that." (Pros. Ex. 3d, 15d).

Due to appellant's continued abuse, threats, and violence towards the Victim, the Victim understood appellant's conduct was not going to stop. (R. at 525). As a result, the Victim obtained a protective order against appellant. (R. at 532, Pros. Ex. 3f). The protective order was issued on or about 22 June 2023. (R. at 532, Pros. Ex. 3f). On that same day, appellant entered the Victim's residence without her permission and while the Victim was taking a shower. (R. at 532, 576, 578). The Victim had previously received advice to obtain a new, separate phone in addition to the one she already had. (R. at 437). Both this new phone and her

older phone were next to her while she was in the shower. (R. at 437, 659).

Appellant entered the bathroom, attempted to grab both phones, and scratched the Victim's arm in the process. (R. at 659). Because of this, the Victim texted appellant's cousin asking her to call the police to her residence. (R. at 532-33).

After law enforcement arrived and had separated the Victim and appellant, the law enforcement officer with appellant escorted appellant through the house allowing him to take items out of the house. (R. at 533). While doing this, appellant took the Victim's passport, birth certificate, and social security card without her permission. (R. at 533-34, 539). Appellant's conduct intimidated the Victim. (R. at 535).

### **Procedural History**

Prior to trial, appellant filed a motion to dismiss Charge III and its specifications for failure to state an offense or for a due process violation. (*See* App. Ex. IX). Appellant also filed a motion to dismiss the same Charge and its specifications for charging speech he alleged the first amendment protected. (*See* App. Ex. 12). In the alternate, appellant's motion asked the court to dismiss specification 2 of Charge III because the speech was marital privilege protected. (App. Ex. 12). Prior to trial, the Government withdrew Specification 1 of Charge III. (STR). During the Article 39(a) motions hearing, the Military Judge asked the Government how he was to instruct panel members on possible 1st Amendment related matters regarding these Specifications. (R. at 156). Government responded

that any instruction should focus on whether the conduct alleged met the standards expected of an officer. (R. at 156-57).

Prior to findings, the military judge provided instructions to the panel including, among others, evidentiary instructions that included circumstantial evidence, evidence that is relevant to more than one charge, the charge of conduct unbecoming an officer and a gentleman, and other wrongs or acts evidence. (App. Ex. CII at 29-31, 33-34; R. at 1296-1300, 1302-03).

### **Assignment of Error I**

**WHETHER THE FIRST AMENDMENT PROTECTS THE PRIVATE CONVERSATIONS BETWEEN MARRIED OFFICER SPOUSES UNDERGOING A CONTENTIOUS DIVORCE WHERE THE "CRIMINAL LANGUAGE" IS NOT A CATEGORY THE SUPREME COURT HAS HELD IS UNPROTECTED**

### **Standard of Review**

Constitutional questions are reviewed *de novo*. *United States v. Marcum*, 60 M.J. 198, 202 (C.A.A.F. 2004)

### **Law**

When an appellant alleges a violation of the First Amendment on an Article 133 charge, this court looks to “whether the officer's speech poses a ‘clear and present danger’ that the speech will, 'in dishonoring or disgracing the officer personally, seriously compromise[] the person's standing as an officer.'" *United*

*States v. Hartwig*, 39 M.J. 125, 128 (C.M.A. 1994). This is a modified test for free speech, and it takes into consideration that the Supreme Court and the Court of Appeals for the Armed Forces (C.A.A.F.) “have recognized that the government may place additional burdens on a servicemember's First Amendment free speech rights due to the unique character of the military community and mission. *United States v. Smith*, No. 23-0207, 2024 CAAF LEXIS 759, at \*9 (C.A.A.F. Nov. 26, 2024) (citing *United States v. Wilcox*, 66 M.J. 442, 448 n.3 (C.A.A.F. 2008); *United States v. Priest*, 21 C.M.A. 564, 570-72, 45 C.M.R. 338, 344-46 (1972); *United States v. Gray*, 20 C.M.A. 63, 66, 42 C.M.R. 255, 258 (1970)).

The military “is, by necessity, a specialized society separate from civilian society.” *Parker v. Levy*, 417 U.S. 733, 743 (1974). As such, “the military has, again by necessity, developed laws and traditions of its own during its long history.” *Id.* These military specific laws mean that “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.” *Id.* at 744 (citing *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)). Therefore, “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.” *Id.* at 758. Specifically, “the fundamental necessity for obedience, and the consequent necessity for imposition of discipline,

may render permissible within the military that which would be constitutionally impermissible outside it.” *Id.* Further, the Supreme Court has also, “recognized that a military officer holds a particular position of responsibility and command in the Armed Forces.” *Id.* at 744.

When an alleged violation of Article 133 is based on an officer’s private speech, the test is whether reviewing the record demonstrates the officer’s speech poses a “clear and present danger” that the speech will, “in dishonoring or disgracing the officer personally, seriously compromise the person’s standing as an officer.” *See Hartwig*, 39 M.J. at 128. This test only applies if the speech would normally, outside the context of the military, be entitled to First Amendment protection. *See United States v. Meakin*, 78 M.J. 396, 403 (C.A.A.F. 2019). Relevant conduct under Article 133 is defined as “...action or behavior in an unofficial or private capacity that, in dishonoring or disgracing the officer personally, seriously compromises the person’s standing as an officer.” *See Manual for Courts-Martial, United States* (2024 ed.) [*MCM*], pt. IV, ¶ 90.c.2.

In *Parker v. Levy*, the Supreme Court analyzed *Brandenburg* and found that due to the unique nature of the military, considerations outside the civilian context must be weighed. *Parker v. Levy*, 417 U.S. 733, at 758-59 (1974). Specifically, the necessity for the imposition of discipline and obedience may, “render permissible within the military that which would be constitutionally impermissible outside it.”

*Id.* In *United States v. Hartwig*, the court held the “clear and present danger” standard first articulated in *United States v. Schenck*, applied to speech by military members, but the standard requires a different application in a military context. *See Hartwig*, 39 M.J. at 127. Therefore, arguing against the “clear and present danger” standard in the civilian context, as appellant does here, misses the mark entirely. (Appellate Br. at 23-24). In the military context, the substantive evils Congress has a right to prevent are violations of the Uniform Code of Military Justice. *Hartwig*, 39 M.J. at 128. The conduct in question does not need to violate other provisions of the UCMJ nor be otherwise criminal to violate Article 133. *Id.* The Supreme Court has also firmly rejected any requirement that the government prove actual damage to the reputation of the military as forbidden speech is measured by its “probability of success,” not its actual effect. *See United States v. Priest*, 45 C.M.R. 338, 345 (C.M.A. 1972) (citing *United States v. Schenck*, 249 U.S. 42, 52 (1919)).

Over a century and a half ago, the Supreme Court upheld Congress’ authority to prohibit private or unofficial conduct by an officer, “which compromised the person’s standing as an officer and brought scandal or reproach upon the Service.” *Hartwig*, 39 M.J. at 129 (citing *Smith v. Whitney*, 116 U.S. 167, 185 (1886)). The ability to punish private speech was recognized again in *United States v. Guaglione* and later in *United States v. Norvell*. *United States v.*

*Guaglione*, 27 M.J. 268 (C.M.A. 1988); *United States v. Moore*, 38 M.J. 490 (C.M.A. 1994).

The Court of Appeals for the Armed Forces has even upheld convictions when the government charges otherwise constitutionally protected conduct under Article 133. In *United States v. Forney*, the government charged appellant with an Article 133 offense, but adopted language from a provision of the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2252A (2000). 67 M.J. 271, 277 (C.A.A.F. 2009). The charge incorporated language the Supreme Court found unconstitutionally overbroad under the First Amendment. *Id.* at 278. The C.A.A.F. previously reversed convictions charged under Article 134, clause 3 for using the same language. *Id.* However, in cases charged under Article 133, or Article 134 clause 1 or 2, the C.A.A.F. found that the additional elements that a factfinder must find did not violate the Constitution. *Id.* at 278 (citing *United States v. Mason*, 60 M.J. 15, 20 (C.A.A.F. 2004)).<sup>4</sup>

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<sup>4</sup> The extent that the Article 133 “conduct unbecoming” element subsumes First Amendment concerns is outlined in Judge Erdmann’s dissent. *Forney*, 67 M.J. at 280-82 (The majority opinion “essentially concludes that there are no First Amendment concerns in the context of Article 133, UCMJ.” Later, Judge Erdmann wrote, “Under the unique facts of this case and in light of the narrow issue before us, I would find that Forney was deprived the chance to argue to the members that his possession of images of child pornography was constitutionally protected.”). The majority of the court did not adopt this argument for stronger First Amendment protections with military-specific offenses.

Evidence that is properly admitted and relevant to more than one offense may be considered by the factfinder “with respect to each offense to which it is relevant.” *See* Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook, para. 7-17 (18 July 2024) [Benchbook] (applying Mil. R. Evid. 403).

### **Argument**

Appellant’s conduct does not fall under the First Amendment and it was not private speech. However, assuming *arguendo* appellant’s conduct would qualify as protected speech outside of the military context, this court should still affirm appellant’s conviction. The court-martial convicted appellant under Article 133, UCMJ, which requires this court look at whether appellant’s conduct posed a clear and present danger of diminishing his standing as an officer as outlined in *United States v. Hartwig*. *See Hartwig*, 39 M.J. at 127. This requirement does not implicate appellant’s First Amendment rights.

- i. Appellant’s conviction for his conduct can be criminally sanctioned and as such his conviction should be affirmed

Appellant is a commissioned officer in the United States Army. (Pros. Ex. 20). Appellant sent a harassing, 88-second video to the Victim wherein he focused on her clothing hanging in her closet and makes derogatory comments about how the Victim dresses and suggesting that she is promiscuous. (R. at 496, Pros. Ex. 8). The evidence strongly supports a conclusion that this harassing video was not sent in jest, as part of a mutual exchange with the Victim, or that the Victim sanctioned



or acquiesced to the harassing conduct. The record clearly demonstrates appellant sent the video to humiliate, harass, and degrade the Victim. Moreover, appellant's conduct clearly offended the Victim, which was meant to harass and insult her. (R. at 496). Of note, prior to trial, defense counsel conceded that the word "Ho" is severe language. (R. at 66).

The record is replete with evidence establishing that appellant orchestrated an abusive relationship over his spouse that included abusive language, intimidating behavior, threats of physical violence, multiple acts of physical violence, and taking property of the Victim without her permission. Appellant made admissions to many of these acts. (*See generally* Statement of Facts). This evidence is relevant in that it illustrates the relationship between appellant and the Victim and how to view appellant's conduct when he sent the video as well as what he said and did in the video.

A military officer holds a particular position of responsibility and trust in the specialized society that is the military, conduct that diminishes the officer's standing need not be a crime itself, but instead must "offend so seriously against law, justice, morality or decorum as to expose to disgrace...and bring dishonor or disrepute upon the military profession." *Hartwig*, 39 M.J. at 129. Appellant's conduct of sending a harassing video to his spouse in which he effectively calls her a "ho" and accuses her of being promiscuous, in the context of an abusive

relationship, unquestionably poses a clear and present danger of diminishing his standing as an officer.

Despite what appellant argues, whether appellant's conduct would be 1st Amendment protected speech in the civilian context under *Brandenburg* is irrelevant. (Appellant's Br. at 23-24). Appellant argues that appellant's speech does not fit into the categorical exceptions to the protections of the First Amendment outlined in *Brandenburg*. (Appellant's Br. at 23-24). Appellant argues that because of this, his speech cannot be criminally sanctioned. (Appellant's Br. at 28-30). The Supreme Court decided *Brandenburg* in 1969, several years before its seminal decision in *Parker v. Levy*, which analyzed both *Brandenburg* as well as *Schenck*, which first established the clear and present danger standard. *Parker v. Levy*, 417 U.S. 733, 758-59 (1974). *Parker* established that a different standard applies to First Amendment considerations for those in the armed forces. *Id.* Therefore, appellant's reliance on *Brandenburg* is misplaced.

Appellant argues that what he characterizes as private speech between himself and the Victim should impact this court's analysis. (See Appellant's Br. at 29-30). For more than a century and a half the Supreme Court has upheld Congress' authority to prohibit private or unofficial conduct by an officer "which compromised the person's standing as an officer and brought scandal or reproach

upon the Service. *Hartwig*, 39 M.J. at 129 (citing *Smith v. Whitney*, 116 U.S. 167, 185 (1886)). As such, the court should disregard argument on this point.

Appellant attempts to make an argument that criminalizing appellant's conduct violates the Fourteenth and Fifth Amendment. (See Appellant's Br. at 22). The government maintains appellant has not followed this court's rules regarding assignments of error and therefore waived this issue. (Appellee's Br. at Footnote 2). However, the court should note the cases appellant relies on for these assertions instead stand for ways in which parents should not be prohibited in raising their child. (Appellant's Br. at 22-23). It is entirely unclear how in any way these cases are relevant to appellant's conduct exclusively towards his spouse.

Appellant relies on *United States v. Reyes* for the proposition that the much more egregious language at issue there was not found to be unprotected speech. (Appellant's Br. at 24-25). However, the most basic review of *Reyes* reveals that appellant was charged for using indecent language under Article 134 of the UCMJ and the facts clearly demonstrated that the sexual aspects required to find language indecent were not present. *See United States v. Reyes*, CCA LEXIS 10 (Army. Ct. Crim. App. 7 Jan 2019) (mem. op.). This case, however, involves the question of whether appellant's language posed a clear and present danger of diminishing his standing as an officer. *Hartwig*, 39 M.J. at 127. It does not involve a question over the indecency of the language itself.

- ii. The “clear and present danger” standard applied to officer conduct as established in *Hartwig* has not been made inviable.

Appellant falsely asserts the clear and present danger standard in *Hartwig* has become inapplicable or its application is now unclear pursuant to *United States v. Smith*. (See Appellant’s Br. at 23).

The appellant in *Smith* was charged under Article 116 of the UCMJ, Breach of the Peace and not under Article 133, Conduct Unbecoming an Officer. *Id.* Despite appellant’s status as an active-duty member of the armed forces at the time of the offense, the government in *Smith* conceded, and the court agreed, the matter would be governed by First Amendment standards as applicable in civilian courts. *Id.* at 9. While this was appropriate as there was no demonstrable nexus between the appellant in *Smith* and the military, it was also true that he was an enlistee, so Article 133 regarding officer conduct was inapplicable. *Id.* Because civilian First Amendment standards applied, the dangerous speech test established in *Schenck*, as it was applied to civilians, was rejected in *Smith* and the categorical approach established in *Brandenburg* was used. *Id.* at 13-14 (emphasis added).

Applying *Brandenburg*, the court in *Smith* found appellant’s speech was not unprotected because it was not likely to incite any imminent lawless action, and therefore not a breach of the peace. The court then reasoned the only other possible category of unprotected speech could have been fighting words while also finding appellant’s speech were not these. *Id.* While the government in *Smith* relied on

*Bose Corps. v. Consumers Union* to argue for a previously non-enumerated category of unprotected speech, the court was not persuaded as in reality *Bose Corps* had relied exclusively on *Brandenburg. Id.* It was in response to this that the court generated the line that the dangerous speech test from *Schenck* has “effectively been abrogated.” (See Appellant’s Br. at footnote 2, 24, and 46). Though *Smith* was decided in 2024, appellant cites to this line as if it were new precedent or otherwise calls the viability of the “clear and present danger” standard in *Hartwig* into question. *Id.* As previously stated, *Parker* was decided in 1974, five years after *Brandenburg*. Additionally, *Parker* specifically applied only to the military context with *Hartwig* focusing even more specifically on officer conduct and Article 133 of the UCMJ. See *Hartwig*, 39 M.J. 125 (CMA, 1994). Therefore, this court should find appellant’s argument that the viability of the “clear and present danger” standard outlined in *Hartwig* is inviable without merit.

## **Assignment of Error II**

**WHETHER APPELLANT WAS ON NOTICE THAT EXCERPTS FROM A SINGLE PRIVATE TEXT MESSAGE TO HIS SPOUSE WERE SUBJECT TO CRIMINAL SANCTION GIVEN THEY DID NOT FALL INTO AN UNPROTECTED CATEGORY OF SPEECH**

### **Standard of Review**

Whether a reasonable officer had fair notice of the criminality of their conduct is a question of law reviewed de novo. *United States v. Merritt*, 72 M.J. 483, 486 (C.A.A.F. 2013).

### **Law**

Generally, Article 133 of the UCMJ incorporates notions of fair notice or warning. *Parker v. Levy*, 417 U.S. at 455 (1974). In determining the sufficiency of the notice, a statute must be examined in the light of the conduct with which a defendant is charged. *Robinson v. United States*, 324 U.S. 282 (1945). To be on notice under the void-for-vagueness doctrine, the courts must look to whether a reasonable officer would be aware that their conduct was unbecoming. *Hartwig*, 39 M.J. at 130.

Whether a reasonable officer would have understood their conduct to be criminally proscribed should be informed by whether federal or state law, military case law, customs of the military, or military regulation address that same or similar conduct. *United States v. Vaughan*, 58 M.J. 29, 31-32 (C.A.A.F. 2003).

The Army prohibits harassing behavior in the ranks. Army Reg. 600-20, Army Command Policy, para. 4-19 (24 July 2020) [AR 600-20]. “Army personnel are expected to treat all people with respect in all aspects of life and forms of communication.” *Id.* There is no spousal exception nor carve out. “Army personnel...will lead by example and do what is right to prevent abusive treatment of others.” *Id.* “Hazing[and] bullying...of people or their property is prohibited.” *Id.* “Hazing [and] bullying...undermine trust, violate our ethic, and negatively impact command climate and readiness.” *Id.* The applicable portion of AR 600-20 is punitive and punishable under the UCMJ. “Harassment is prohibited in all circumstances and environments, including off-duty and “unofficial” unit functions and settings.” *Id.* at a.(4).

However, courts have “held on numerous occasions that conduct need not be a violation of any other punitive article of the Code, or indeed be a criminal offense at all, to constitute conduct unbecoming an officer.” *United States v. Forney*, 67 M.J. 271, 275 (C.A.A.F. 2009). Whether an officer is on notice for proscribed conduct looks at whether a reasonable officer would recognize such conduct would “risk bringing disrepute upon himself and his profession.” *Hartwig*, 39 M.J. at 130; *see United States v. Frazier*, 34 MJ 194, 198-99 (CMA 1992) (“[A] reasonable military officer would have no doubt that the activities charged in this case constituted conduct unbecoming an officer.”). However, this test only applies

if the speech would normally, outside the context of the military, be entitled to First Amendment protection. *See United States v. Meakin*, 78 M.J. 396, 403 (C.A.A.F. 2019).

### **Argument**

For appellant to have been on notice, the court should first look at whether such conduct was proscribed by statute, regulation, or policy. If such conduct is not proscribed there, the court must then analyze whether a reasonable officer would have recognized appellant's conduct would have risked violating the clear and present danger standard in *Hartwig*. *Hartwig*, 39 M.J. at 130.

AR 600-20 specifically prohibits harassing behavior, making it criminally sanctioned, and applies these prohibitions to a very broad range of circumstances. AR 600-20, para. 4-19. While the prohibitions in AR 600-20 largely apply to interactions between members of the armed forces, the language also contemplates conduct by members of the armed forces towards those that are not. AR 600-20, para. 4-19 and at a.(4). Given this focus on prohibiting harassing conduct, it would strain credibility to argue appellant was not on notice that harassing his spouse would risk violating the clear and present danger standard in *Hartwig*.

In the alternative, this court should recognize as evident that an officer sending an insulting video to one's spouse with the intent of humiliating, harassing, or degrading their spouse would violate this standard. Courts recognize



that officers hold special standing based on their professionalism, fairness, and the dignity with how they interact with other people. This consideration does not rely on whether those other people are subordinates, and every reasonable officer would be aware of this.

Moreover, appellant made this exact same argument, both through motions as well as at a contested trial before a panel. (R. at 153-55, App. Ex. XII; XV; XXXII; XXXV). Both the military judge and a panel of lieutenant colonels and colonels disagreed with appellant's assertion that he, or more accurately a reasonable officer, would not be on notice that this was sanctionable conduct. (App. Ex. 35, para. C(1)(a)(2); STR). The military judge found appellant on notice that humiliating, harassing, or degrading his spouse were potentially sanctionable under Article 133. (App. Ex. XXXV; R. at 1396-97).

Appellant's reliance on *Brandenburg* under this assignment of error is misplaced. The clear and present danger standard in *Hartwig* does not consider the categories in *Brandenburg* and any free speech analysis, were it applicable, would only be the first hurdle to appellant's argument. *Meakin*, 78 M.J. at 403. Similarly, appellant incorrectly relies on *United States v. Rocha* for how to analyze whether he had fair notice. (Appellant's Br. at 31). *Rocha* involved an enlistee charged under Article 134 of the UCMJ and compares "a person of ordinary intelligence." *United States v. Rocha*, 84 M.J. 346, 349 (C.A.A.F. 2024). As such, it does not

apply to this matter with an officer convicted under Article 133, which instead measures fair notice with respect to a reasonable officer. However, even after arguing the standard for determining fair notice in *Rocha*, appellant ultimately concedes the actual standard to be that of a reasonable officer. (Appellant’s Br. at 42).

### **Assignment of Error III**

#### **WHETHER THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THE PANEL ON THE FIRST AMENDMENT, AND NOT PROVIDING ANY DEFINITIONS FOR THE ELEMENTS OF “GENTLEMAN” OR CONSENT**

#### **Standard of Review**

Whether the military judge instructed the panel correctly is reviewed for an abuse of discretion. Even if unobjected to, when there is a new rule of law or the law is previously unsettled, this Court applies a plain error standard. *United States v. Oliver*, 76 M.J. 271, 274 (C.A.A.F. 2017) (quoting *Henderson v. United States*, 568 U.S. 266 (2013); *United States v. Schmidt*, 82 M.J. 68, 72 (C.A.A.F. 2022) (noting that the C.A.A.F., in *United States v. Davis*, 76 M.J. 271, 274 (C.A.A.F. 2017), reaffirmed that if any area of law is unsettled, the correct standard is plain error). When claiming that a military judge committed plain error, an appellant has the burden of establishing “(1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights.” *Schmidt*, 82 M.J. at 73 (internal quotation marks omitted) (citation omitted).

## Law

A military judge shall instruct panel members on the correct legal standard. Rules for Courts-Martial [R.C.M.] 920(a). To be convicted of conduct unbecoming an officer, the government must prove beyond a reasonable doubt:

- 1) Appellant was an officer at the time of the conduct in question;
- 2) That appellant did or omitted to do certain acts; and
- 3) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer.

*Manual for Courts-Martial, United States* (2024 ed.) [MCM], pt. IV, ¶ 90.b.

In *United States v. Byunngu Kim*, the CAAF reiterated and reaffirmed that before accepting a guilty plea, an accused *must* be informed, in laymen’s terms, the difference between protected speech and unprotected speech under the First Amendment. *United States v. Byunngu Kim*, 83 M.J. 235 (C.A.A.F. 2023). *United States v. Henderson* extended this requirement to contested panel cases, creating the need for a military judge to provide an instruction on the First Amendment where a “constitutionally grey” area existed. *United States v. Henderson*, 83 M.J. 735 (A. Ct. Crim. App. 2023).

## Argument

Before panel deliberation, the military judge instructed the panel on, in relevant part, Article 133 and its elements, evidentiary considerations, and Other-Acts evidence. (App. Ex. CII at 29-31, 33-34; R. at 1296-1300, 1302-03). The

military judge did not provide instruction on the First Amendment or its applicability. While appellant argues that the First Amendment protects appellant's charged speech under *Brandenburg*, as argued in Assignment of Error I above, the First Amendment has no bearing on this case. The relevant legal standard is whether that conduct posed a clear and present danger of diminishing appellant's standing as an officer as outlined in *Hartwig*. Even if appellant's conduct was protected speech, then the next step would be to apply the clear and present danger standard of *Hartwig*. This is settled law, and appellant fails to show why this court should use a different standard than its superior court provides. Therefore, the First Amendment has no relevance to the military judge's instructions. If this court believes the First Amendment is applicable, appellant has not identified, through caselaw nor the record, how this would implicate a "constitutionally grey", thus not implicating *Henderson*.


Appellant argues that there is no suggested instruction for the clear and present danger standard in *Hartwig*. (Appellant's Br. at 46). However, that is exactly what the military judge provided to the panel. (R. at 1297). Appellant similarly makes an incorrect argument by claiming a question submitted by a panel member demonstrated confusion and the necessity to provide instruction on "the element." (Appellant's Br. at 48). However, "gentleman" is not an element of the

offense and the panel member's question did not concern "gentleman." (App. Ex. LXIX).


Appellant argues that the drafting of the specification used wording borrowed from Article 120 of the UCMJ, specifically Abusive Sexual Contact. (Appellant's Br. at 49-50). Applying this logic, appellant argues that this somehow created an additional element to the offense that the government would need to prove, which appellant also includes explicitly in this assignment of error heading. (Appellant's Br. at 49-50). To the extent that the Victim's consent to appellant's conduct is relevant, any consideration is covered by the terminal element of Article 133, specifically, "... under the circumstances...." Whether the Victim consented to appellant's conduct or not would be reflected in the facts the panel considered. However, what that does not do is create an additional element nor the requirement for a military judge to provide an instruction.

### **Conclusion**

WHEREFORE, the government respectfully requests this honorable court deny appellant's request for relief and affirm the findings and sentence.



JUSTIN L. TALLEY  
MAJ, JA  
Branch Chief, Government  
Appellate Division



MARC B. SAWYER  
MAJ, JA  
Branch Chief, Government  
Appellate Division



COL, JA  
Chief, Government Appellate  
Division

**CERTIFICATE OF SERVICE, U.S. v. ELLIS (20240254)**

I certify that a copy of the foregoing was sent via electronic submission to the  
Defense Appellate Division at [REDACTED]  
[REDACTED] on the 18th day of February, 2025.

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