

# Military Members Posing in Sexually Explicit Pictures

Major Kelly L. McGovern\*

## Introduction

The Global War on Terrorism spurred an increase in the media coverage of military matters over the last several years. Unfortunately, it appears that some Soldiers, Sailors, Airmen, and Marines capitalized on this media attention for their own personal gain.<sup>1</sup> They seized the opportunity to become famous and posed in sexually explicit photos for magazines and on websites.<sup>2</sup> Commanders face difficult decisions disciplining servicemembers in these cases because there is no clear cut, punitive prohibition against military members posing in sexually explicit photographs for the public's view.<sup>3</sup>

Former Air Force Drill Sergeant Michelle Manhart posed in and out of uniform for the February 2007 edition of *Playboy* magazine.<sup>4</sup> Photos included Manhart in uniform yelling and holding weapons under the headline, "Tough Love."<sup>5</sup> On the subsequent pages, Manhart appeared "partially clothed, wearing her dog tags while working out, as well as completely nude."<sup>6</sup> The pictures hit the stands in January 2007, and the Air Force immediately relieved her of her duties pending an investigation.<sup>7</sup> The Air Force then took administrative action against Manhart.<sup>8</sup> She received a letter of reprimand for violating the uniform regulation and discrediting the armed forces.<sup>9</sup> The Air Force also administratively demoted Manhart from staff sergeant to senior airman.<sup>10</sup> In February, she was voluntarily discharged from the Air Force citing reasons of personal convenience.<sup>11</sup>

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\* Judge Advocate, U.S. Army. Presently assigned to Army Litigation Division Military Personnel Law Branch as a Litigation Attorney in Arlington, Va. LL.M., 2007, The Judge Advocate General's Legal Center and School (TJAGLCS), Charlottesville, Va.; J.D., 2003, Campbell University, Norman Adrian Wiggins School of Law; M.B.A., 2003, Campbell University, Lundy-Fetterman School of Business; B.A., 1995, Colorado College. Previous assignments include: Trial Counsel, XVIII Airborne Corps, Fort Bragg, N.C. (2003-2004, 2005-2006); Command Judge Advocate and Trial Counsel, 1st COSCOM (A), LSA Anaconda, Iraq (2004-2005); Commander and Battalion S-4, HHD, 94th Military Police Battalion, Yongsan, Korea (1998-2000); Platoon Leader and Executive Officer, 59th Military Police Co., Fort Carson, Co. (1996-1998). She is admitted to practice before the Supreme Court of North Carolina, the Court of Federal Claims, the United States Court of Appeals for the Armed Forces, and the Supreme Court of the United States.

<sup>1</sup> Former Air Force Staff Sergeant (SSgt) Michelle Manhart stated in a *CNN* interview that she had unsuccessfully "pursued *Playboy*" magazine in the past, but "then came this opportunity [to appear in the February 2007 issue of *Playboy*] and I definitely did not pass it up." *Anderson Cooper 360 Degrees* (CNN television broadcast Jan. 12, 2007) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/070112/acd.01.html>) (interview by Anderson Cooper with SSgt Manhart).

<sup>2</sup> "Manhart's punishment gave her sudden celebrity [status], setting off a media blitz, online debates, talk show spats and more." Patrick Winn, *Airman Who Lost Job for Posing Nude Speaks Out*, A.F. TIMES, Apr. 12, 2007, available at [http://www.airforcetimes.com/news/2007/04/af\\_playboy\\_manhart\\_070409](http://www.airforcetimes.com/news/2007/04/af_playboy_manhart_070409). "She is hustling to spin her high-profile punishment into a lasting celebrity career. In days, she'll go to her next high-profile modeling gig, with People for the Ethical Treatment of Animals. Manhart will pose wearing only an American flag for the group's 'I'd Rather Go Naked than Wear Fur' national campaign." *Id.*

<sup>3</sup> Violations of the military uniform regulations are not punitive. See U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (3 Feb. 2005) [hereinafter AR 670-1]. The Uniform Code of Military Justice (UCMJ) does not specifically forbid posing naked for public photographs, although the conduct may meet the elements of indecent exposure. UCMJ art. 120 ¶ b(14) (2008). Major General (MG) Charles Dunlap Jr., the Air Force's Deputy Judge Advocate General, explained the gap in the UCMJ by stating, "the UCMJ wasn't designed to be a "cookbook of prohibited activities. . . . There is no possible way to legislate every single thing that will undermine good order and discipline, or discredit the military." Winn, *supra* note 2.

<sup>4</sup> PLAYBOY (Feb. 2007).

<sup>5</sup> FOXNews.com, *Air Force Staff Sergeant Relieved of Duties After Posing Nude in Playboy*, Jan. 12, 2007, <http://www.foxnews.com/story/0,2933,243178,00.html>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Winn, *supra* note 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

Days before deploying to Iraq in August of 2006, a group of female National Guard Soldiers posed naked in 232 pictures.<sup>12</sup> The females selectively concealed parts of their bodies with military rifles and covered their breasts with American flag decals.<sup>13</sup> There have been other incidents of females posing in photos while deployed as well. One example is a military police guard, Private First Class Deanna Allen, who made headlines around the world when she “bared her breasts during a mud-wrestling escapade last year at the main U.S. prison for enemy detainees.”<sup>14</sup> Military men have also posed in sexually explicit photos for *Playgirl* magazine and on-line homosexual websites.<sup>15</sup>

The harm could impact the military on multiple levels. A service member who poses naked risks losing the ability to perform his/her job with dignity and respect.<sup>16</sup> The effect of the naked photos circulating in a unit negatively detracts from the mission at hand. In addition, the widespread media attention brings discredit to the military whose servicemembers are expected to uphold the highest values and standards. Commanders need to know their options range from imposing non-judicial punishment under the newly revised Article 120 of the Uniform Code of Military Justice (UCMJ) to administratively discharging service members for violating the UCMJ and the *Joint Ethics Regulation (JER)*.

### Non-Judicial Punishment Options

Commanders can choose to handle these situations using non-judicial punishment, with an Article 15 under the UCMJ.<sup>17</sup> “Non-judicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in service members without the stigma of a court-martial conviction.”<sup>18</sup>

For servicemembers serving in the Central Command (CENTCOM) area of operations (AO), which includes Kuwait, Iraq, or Afghanistan, creating pornography or sexually explicit photographs constitutes a violation of General Order 1 (GO 1).<sup>19</sup> A commander in the CENTCOM AO may charge the servicemember who takes a sexually explicit photograph of another person, as well as the servicemember posing in the picture, with a violation of UCMJ Article 92, section one, as a violation of or failure to obey a lawful general order.<sup>20</sup>

For servicemembers serving in the Continental United States or in other areas of the world, a commander may charge a Soldier for violating Article 120, of the UCMJ for indecent exposure.<sup>21</sup> If a service member intentionally exposes his or her genitalia, anus, buttocks, or female areola or nipple, in an indecent manner, in any place where the conduct involved may reasonably be expected to be viewed by people other than the servicemember’s family or household, then the servicemember

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<sup>12</sup> See *Soldiers Will Face Sanctions for Posing in Nude Photos*, ASSOC. PRESS STATE & LOCAL WIRE, Nov. 8, 2006, at 3:10 p.m. GMT.

<sup>13</sup> *Id.*

<sup>14</sup> *Breast-Baring Soldier Released from Service*, SAN JOSE MERCURY NEWS (Cal.), Feb. 19, 2005, at 14A. Several of the photos were printed in the Sunday edition of the *New York Daily News* which resulted in an investigation and disciplinary action. *GI Demoted for Iraq Mud Wrestling*, Feb. 7, 2005, <http://www.cbsnews.com/stories/2005/02/07/iraq/main672070.shtml> (“Allen was demoted from specialist to private first class and placed on restriction for participating in the event.”).

<sup>15</sup> Male Soldier eliminated from an Army Special Forces unit at Fort Bragg for failing to seek approval for outside employment when he posed in sexually explicit pictures for a magazine. Interview with Major John Jurden, TJAGLCS, Charlottesville, Va. (Jan. 22, 2007); seven paratroopers from the 82d Airborne Division at Fort Bragg were charged with violations of the UCMJ when they performed homosexual acts in videos on a website in 2006. *Soldiers Charged in Web Porn Case: Men Accused of Performing Sex Acts for Money While Being Filmed*, ASSOC. PRESS STATE & LOCAL WIRE, Feb. 24, 2006, 9:55 p.m. EST, available at <http://msnbc.msn.com/id/11550024/print/1/displaymode/1098>.

<sup>16</sup> Manhart’s trainer, who was a former staff sergeant, admitted it would be tough for her to cede authority that the job demands after young service members had been “peering over her glowing curves in an adult magazine.” Winn, *supra* note 2.

<sup>17</sup> Depending on the date and location of the offense and the rank of the servicemember, a commander may be able to impose nonjudicial punishment pursuant to UCMJ articles 92, 120, 133, or 134 (2008) or UCMJ art. 134, ¶ 88 (2005).

<sup>18</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V, ¶ 1-c (2008) [hereinafter MCM].

<sup>19</sup> Central Command General Order 1 prohibits the “introduction, possession, transfer, sale, creation or display of any pornographic or sexually explicit photograph . . . .” Headquarters, Multi-National Corps–Iraq, Gen. Order No. 1 (12 Feb. 2005).

<sup>20</sup> UCMJ art. 92 (2008).

<sup>21</sup> *Id.* art. 120, ¶ b(14). In the previous version of the UCMJ, indecent exposure was an Article 134 offense. *Id.* art. 134, ¶ 88 (2005). If the act of indecent exposure occurred before 1 October 2007, the offense must be charged under the former 2005 edition of UCMJ art. 134, ¶ 88. See MCM, *supra* note 18, App. 27. If the act occurred after 1 October 2007, the appropriate charge would be pursuant to the new UCMJ art. 120, ¶ b(14) (2008).

violated Article 120 and may be found guilty of indecent exposure.<sup>22</sup> Although the UCMJ does not specifically prohibit making sexually explicit photos for public viewing, it can be argued that the elements of the offense include posing nude for pictures with the intent that those photographs will be made public.<sup>23</sup>

A commander may also elect to create a specification under Article 134, clause two, for a general violation of service discrediting conduct, but the case law currently differs among the services as to what actually constitutes “service discrediting.” For instance, the Army requires at least one civilian be aware of the pictures and the military status of the offender.<sup>24</sup> The Air Force and Coast Guard follow a lower threshold with a literal reading of the *Manual for Courts-Martial* which states that “a tendency of the misconduct to discredit the service” suffices.<sup>25</sup>

An officer who poses for public pornographic pictures can be charged with violating Article 133 of the UCMJ, conduct unbecoming of an officer and a gentleman.<sup>26</sup> This offense only requires that a commissioned officer, cadet, or midshipmen engage in conduct that is unbecoming which includes behavior that dishonors or disgraces the person as an officer, or compromises their character or standing as an officer.<sup>27</sup>

Even though a range of violations seem to exist under the UCMJ, there still is no perfect match. To avoid resistance from the accused and to expedite these high profile, controversial cases, many commanders opt to take adverse administrative actions against servicemembers instead.

### Violations of Regulations

Service members who pose in sexually explicit pictures for profit may violate various portions of the *JER*,<sup>28</sup> as well as uniform regulations. The *JER* contains provisions that require servicemembers to seek approval before engaging in outside employment. Officers in the rank of O-7 or above must seek permission from their commander for outside employment while on active duty.<sup>29</sup> Those officers are prohibited from accepting outside employment which conflicts with, or otherwise

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<sup>22</sup> UCMJ art. 120 (2008). The explanation section states that “indecent” generally signifies that form of immorality relating to sexual impurity that is not only grossly vulgar, obscene, and repugnant to common propriety, but also tends to excite lust and deprave morals with respect to sexual relations. *Id.* ¶ c(3).

<sup>23</sup> There are no cases of indecent exposure under the newly revised UCMJ art. 120, but previous cases suggest that the intent and public view requirements would be satisfied by a servicemember willfully posing for nude photographs, coupled with the knowledge that the pictures will be made public. *See* *United States v. Graham*, 56 M.J. 266 (2001) (recognizing the facts of the case establish the intent to expose oneself in a public place or where the act is certain to be observed); *see also* *United States v. Shaffer*, 46 M.J. 94 (1997) (defining “public view”); *United States v. Stackhouse*, 37 C.M.R. 99, 101 (C.M.A. 1967) (quoting *Hearn v. Dist. of Columbia*, 178 A.2d 434, 437 (D.C. Mun. App. 1962)) (“The required criminal intent [for indecent exposure] is usually established by some action by which a defendant draws attention to his exposed condition or by a display in a place so public that it must be presumed it was intended to be seen by others.”).

<sup>24</sup> *United States v. Green*, 39 M.J. 606 (A.C.M.R. 1994) (holding that the public must be aware of the misconduct and that the person committing the wrongdoing is a service member. Green admitted to being married and committing adultery and the judge asked him if he thought his bad behavior would be prejudicial to the good order and discipline or service discrediting, but the Soldier did not understand the definition of service discrediting. The court found his conduct was prejudicial to good order and discipline, but since other Soldiers rather than civilians witnessed Green and his mistress go into the barracks it would not constitute service discrediting misconduct because it would not have the tendency to lower the esteem, etc. in the civilian community.).

<sup>25</sup> *See* *United States v. Mead*, 63 M.J. 724 (A.F. Ct. Crim. App. 2006) (rejecting the Army standard in *United States v. Green*, and holding that the only requirement is for there to be “a tendency to discredit the service.” The government did not present any specific evidence to show how the accused’s possession of child pornographic images on his computer would discredit the service, but the Air Force Court adopted the Coast Guard view that there need only be the potential to be service discrediting.); *United States v. Nygren*, 53 M.J. 716 (C.G. Ct. Crim. App. 2000) (rejecting the Army standard in *United States v. Green*, and establishing that the public need not be aware of the misconduct because the an offense which is against the law tends to discredit the service. The government charged Nygren with underage drinking and the court determined that since a statute criminalizes the conduct it is service discrediting.); *see also* *United States v. Brown*, No. 36695, 2007 CCA LEXIS 534 (A.F. Ct. Crim. App. Nov. 16, 2007) (following the Air Force Standard in *United States v. Mead*).

<sup>26</sup> UCMJ art. 133 (conduct unbecoming of an officer and gentleman).

<sup>27</sup> *Id.* Note that “gentleman” includes both male and female commissioned officers, cadets and midshipmen. *Id.*

<sup>28</sup> *See* U.S. DEP’T OF DEFENSE, 5500.7-R, JOINT ETHICS REG., ¶¶ 2-206, 2-303, 3-306 (23 Mar. 06) [hereinafter *JER*].

<sup>29</sup> *See id.* ¶¶ 2-206, 3-306. The *JER* requires those Department of Defense (DoD) employees who are required to file a financial disclosure report to obtain written approval before engaging in a business activity or accepting compensation for outside employment with a prohibited source. *Id.* This requirement only applies to officers in the rank of O-7 or above because they are the only servicemembers who are required to file the financial disclosure statement. *Id.* at Appendix C.

interferes with, the performance of their official duties.<sup>30</sup> For all other servicemembers, the *JER* provides a provision that commanders may require servicemembers under their jurisdiction to report any outside employment or activity prior to engaging in the employment or activity.<sup>31</sup> It also empowers commanders to “prohibit the employment or activity if he believes that the proposed outside activity will detract from readiness or pose a security risk.”<sup>32</sup> However, the *JER* also states that “[i]f action is not taken to prohibit the employment or activity, the [servicemember] is free to engage in the employment or activity in keeping with other restrictions of this Regulation.”<sup>33</sup> Therefore, it is important for commanders to publish local policies governing outside employment which specifically prohibit posing in sexually explicit photographs or videos. Otherwise, servicemembers who profit from appearing nude in public photographs or videos may not have committed any violation.<sup>34</sup>

The military does permit some public appearances, even if there is a possibility of personal gain. For instance, Second Lieutenant Kelly George participated in the Miss USA pageant<sup>35</sup> and Captain Timothy Bobinski was a contestant on the game show *Jeopardy!*<sup>36</sup> Air Force Major General Dunlap explained that servicemembers can seek approval to appear on game shows which can “humanize our troops in the right way and introduce them to a public that may or may not personally know anyone in the military.”<sup>37</sup> He went on to say that “[t]he key is obtaining permission before making an appearance or taking a job.”<sup>38</sup>

It is also unlawful to use public office for private gain, but a commander must have a policy in place to enforce this regulatory policy.<sup>39</sup> *Playboy* magazine recruited Air Force Staff Sergeant Michelle Manhart because she served in the military. “The magazine was curious about her nails-tough job: Breaking down and building up young Air Force recruits as a training instructor.”<sup>40</sup> *Playboy* publicist, Theresa Hennessey said that when “[t]he photographers found out Michelle was in the military . . . that was very intriguing to them.”<sup>41</sup> It is likely that they would not have been asked to participate in the photos, but for their official position as a servicemember. Therefore, they are using their public office for private gain, but it will only be illegal for enlisted members if a commander clearly prohibits it in a policy letter.<sup>42</sup>

Many of these servicemembers appearing in these sexually explicit photographs were partially clothed in a military uniform or posed with military weapons.<sup>43</sup> When Army personnel wear portions of their uniform while posing in sexually explicit photos, they violate Army Regulation (AR) 670-1.<sup>44</sup> Section 1-10(j)(1) prohibits wearing the Army uniform when engaged in off duty employment.<sup>45</sup> Also, section 1-10(j)(4) prohibits wearing the Army uniform when it would bring

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<sup>30</sup> *Id.* ¶¶ 2-206, 3-306.

<sup>31</sup> *Id.* ¶ 2-303.

<sup>32</sup> *Id.* ¶ 2-303(a).

<sup>33</sup> *Id.* ¶ 2-303(b).

<sup>34</sup> *Id.* ¶ 2-303.

<sup>35</sup> Winn, *supra* note 2.

<sup>36</sup> Staff Sergeant Rhiannon Willard, *Elmendorf Pilot to Appear on ‘Jeopardy!’*, A.F. TIMES, Mar. 3, 2008, available at <http://www.af.mil/news/story.asp?id=123086983> (*Jeopardy!* (Sony Pictures broadcast Mar. 6, 2008)).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> It is the DOD policy to apply 5 C.F.R. section 2635 (2008) to enlisted members as well as officers. See *JER*, *supra* note 28, para. 1-300(b). Therefore, the policy prohibits any service member from using their public office for private gain.

<sup>40</sup> Winn, *supra* note 2.

<sup>41</sup> *Id.*

<sup>42</sup> See 5 C.F.R. §§ 2635.103, 2635.702 (2008).

<sup>43</sup> See, e.g., *Air Force Staff Sergeant Relieved of Duties After Posing Nude in Playboy*, *supra* note 5; *Soldiers Will Face Sanctions for Posing in Nude Photos*, *supra* note 12.

<sup>44</sup> See AR 670-1, *supra* note 3, para. 1-10(j).

<sup>45</sup> *Id.* para. 1-10(j)(1).

discredit upon the Army.<sup>46</sup> The regulation emphasizes that we are a uniformed service judged by the manner in which Soldiers wear their uniform, on and off duty, and commanders must ensure Soldiers comply with the Army's standards.<sup>47</sup> In addition, servicemembers who pose in sexually explicit photos with machine guns or military equipment violate a punitive provision of the *JER*.<sup>48</sup> The *JER* only permits using military equipment for official purposes, and since there is no exception for posing in sexually explicit photographs, servicemembers can be charged with violating a regulation under Article 92, UCMJ.<sup>49</sup>

Besides the *JER* prohibition against using military equipment for unofficial purposes, none of the other relevant portions of the *JER*, or the applicable sections of AR 670-1 are punitive. Therefore, violations of those regulatory provisions cannot be used in a court-martial or in a non-judicial punishment proceeding. However, they may serve as an additional reason for separation when administratively discharging a servicemember or issuing a reprimand.

### Administrative Elimination Procedures

Most cases involving Soldiers posing for sexually explicit photos result in the administrative discharge of the servicemember.<sup>50</sup> The Soldier's appearance in such photographs, the associated widespread media coverage, and the inability of the servicemembers to perform their duties with respect, lead many commanders to the conclusion that the servicemember should be separated from the military.

Enlisted Army Soldier separations are governed by AR 635-200.<sup>51</sup> A Soldier in the Army who poses in sexually explicit photos for public viewing can be discharged under Chapter 14-12(c) for the commission of a serious offense.<sup>52</sup> The underlying conduct, whether it is disobeying a regulation, violating a General Order, or indecent exposure, qualifies as a serious offense because each of the offenses could result in a punitive discharge if the Soldier were to go to a court-martial. It is not necessary to charge the Soldiers with those offenses, but it is necessary to notify the servicemember of the serious offense which serves as the basis for the involuntary separation.

Officer eliminations are governed by AR 600-8-24.<sup>53</sup> An officer who publicly poses for sexually explicit photos could be eliminated for misconduct, moral or professional dereliction, which includes section (8) conduct unbecoming of an officer and a gentlemen.<sup>54</sup> Since the basis of the officer's elimination is misconduct, the discharge should be characterized as General, under honorable conditions, or Other than Honorable.<sup>55</sup>

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<sup>46</sup> *Id.* para. 1-10(j)(4).

<sup>47</sup> *See id.* para. 1-7.

<sup>48</sup> *See JER, supra* note 28 ¶ 2-301(b). The *JER* mandates that federal government resources, including personnel, equipment, and property, shall be used by DOD employees for official purposes only. *Id.* This provision of the *JER* is printed in bold italics meaning that it constitutes a general order or regulation within the meaning of UCMJ art. 92 (2008), and is punitive. U.S. DEP'T OF DEFENSE, DIR. 5500.07, STANDARDS OF CONDUCT para. 2.2.6.1 (29 Nov. 2007).

<sup>49</sup> *JER, supra* note 28, ¶ 2-301(b); UCMJ art. 92 (2008).

<sup>50</sup> *See, e.g.,* Sig Christenson, *Airman Defends Baring All in Playboy*, SAN ANTONIO EXPRESS-NEWS, Jan. 12, 2007, at 1B. Two Navy women who previously appeared in *Playboy* were discharged shortly thereafter. *Id.* Fredrica Spilman posed for *Playboy* in 1998 and Navy Petty Officer Sherry Lynne White appeared in the magazine in 2000. *Id.*

<sup>51</sup> U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005).

<sup>52</sup> *Id.* para. 14-12(c).

<sup>53</sup> U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006).

<sup>54</sup> *Id.* para. 4-2(b).

<sup>55</sup> *See id.* para. 1-22a (stating that honorable discharges are for eliminations that do not involve misconduct).

## Conclusion

The servicemembers who pose in sexually explicit photos for *Playboy* or on internet websites, often fail to realize that their off duty efforts to individually profit or gain publicity actually taints the entire military organization. Servicemembers need to be educated and informed that they will face serious ramifications for posing in sexually explicit photos which are then made public. They need to be aware that this type of conduct off duty will not be tolerated and is not protected by their constitutional First Amendment rights as members of the military. The military “may impose restrictions on the speech of military personnel whenever the speech poses a significant threat to discipline, morale, or esprit de corps.”<sup>56</sup> Therefore, commanders can prohibit servicemembers from engaging in publicly viewed sexually explicit photographs because it threatens the good order and discipline of the service. However, since no bright line rule or prohibition exists, leaders should seek the advice of their servicing Judge Advocate and need to be advised of their legal options before they do so.

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<sup>56</sup> Captain John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 306 (1998).