



DEPARTMENT OF THE AIR FORCE
OFFICE OF THE JUDGE ADVOCATE GENERAL
MILITARY JUSTICE AND DISCIPLINE

14 January 2026

MEMORANDUM FOR AIR FORCE COURT OF CRIMINAL APPEALS

FROM: GOVERNMENT TRIAL & APPELLATE OPERATIONS (AF/JAJG)

SUBJECT: Record of Trial – Article 62 Appeal – Staff Sergeant Jennifer Y. Galvin

On 14 August 2025, one charge and two specifications were referred to a special court-martial against the Accused. The military judge granted the Defense’s motion to dismiss Specification 1 of the Charge based on her finding that Article 92, UCMJ, was preempted by Article 134, UCMJ, Sexual Harassment. (App. Ex. III, V, *Declaration of Capt Richard Vandine*, Attch. 1). The United States timely moved for reconsideration, which the military judge denied at 1317 EDT on 19 December 2025. (Id. at Attchs. 1 and 2).

The military judge’s ruling “terminates the proceedings” with respect to a specification. 10 U.S.C. §862(a)(1)(A). On 21 December 2025 at 1847 EDT¹, the United States notified the military judge that it would be appealing her ruling dismissing Specification 1 of the Charge. (Attch. 1). Trial counsel forwarded the appeal and record to the Air Force Government Trial & Appellate Operations Division, and it was received on 9 January 2026.

Pursuant to Article 62, UCMJ, and Rule 20 of the Air Force Court of Criminal Appeals’ Rules of Practice and Procedure, the United States files the attached certified original record of trial (Attch. 2) and the notice of appeal in the above case and notifies this Honorable Court of the United States’ intention to appeal the military judge’s ruling.

[REDACTED]
MATTHEW D. TALCOTT, Colonel, USAF
Chief
Government Trial & Appellate Operations Division
[REDACTED]

2 Attachments:

1. Notice of Appeal – *United States v. Galvin* (2 pages)
2. Record of Trial – *United States v. Galvin* (1 volume)

cc: AF/JAJA

¹ The legal office handling this court-martial is in Okinawa, Japan. The judge’s denial of the Government’s motion for reconsideration was issued at 0317 JST on 20 December 2025 and the Government filed it’s notice of appeal at 0847 JST on 22 December 2025. Accordingly, the Notice of Appeal filed by the legal office is dated 22 December 2025 to reflect their time zone.

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES <i>Appellant</i>	)	Misc. Dkt. No. 2026-01
	)	
	)	
	)	
v.	)	
	)	NOTICE OF DOCKETING
	)	
Jennifer Y. GALVIN	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
<i>Appellee</i>	)	

The record of trial and a notice of an intent to appeal pursuant to Article 62, UCMJ, 10 U.S.C. § 862, was filed by Appellant in the above-styled case with this court on 14 January 2026.

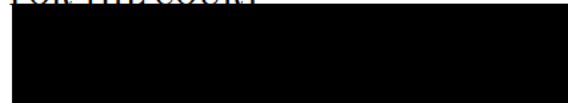
Accordingly, it is by the court on this 14th day of January, 2026,
ORDERED:

The case is assigned Misc. Dkt. No. 2026-01 and referred to Panel 1.

Appellant shall have 20 days from the date it filed its appeal with the court to file a supporting brief. *See* JT. CT. CRIM. APP. R. 20(c)(1) (including filing timelines for answer and reply).



FOR THE COURT



JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellant,</i>	)	UNITED STATES' MOTION TO ATTACH
	)	
	)	
v.	)	Before Panel No. ____
	)	
Staff Sergeant (E-5)	)	Misc. Dkt. No. 2026-____
JENNIFER Y. GALVIN	)	
United States Air Force	)	14 January 2026
<i>Appellee.</i>	)	

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to Rules 23(b) Court's Rules of Practice and Procedure, the United States moves the Court to attach the following document to the record:

- Appendix – Declaration of Captain Richard S. Vandine, dated 13 January 2026 (24 pages total, including 3 attachments)

The attachments to the declaration and the declaration provide relevant and necessary information regarding the United States' appeal under Article 62, UCMJ in the above-titled case. All the attachments to Capt Vandine's declaration are necessary for this Court to decide the appeal in this case. Attachment 1 is the judge's ruling which the United States' is appealing under Article 62, UCMJ, and is therefore necessary for this Court to consider. Attachments 2 and 3, as well as Capt Vandine's declaration, explain why the judge's ruling is not yet included in the Record of Trial. Additionally, Attachments 2 and 3 contain additional analysis that was considered by the judge in issuing her rulings.

Department of the Air Force Instruction 51-201, *Administration of Military Justice*, para. 19.14.3.2 contemplates that if a complete record of proceedings is not available, the government can forward a summary of the evidence and facts at issue. Captain Vandine's declaration describes relevant facts and evidence necessary for this Court to decide this appeal.

The law and analysis that the judge considered in denying reconsideration of her ruling is relevant and necessary for this Court to consider when determining if her ruling was error. Accordingly, the attached documents are relevant and necessary to address the United States' Article 62 appeal of the military judge's decision to dismiss Specification 1 of the Charge.

WHEREFORE, the United States requests this Court grant this Motion to Attach.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force
Appellate Defense Division on 14 January 2026.

[REDACTED]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel

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**IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	UNITED STATES' APPEAL
<i>Appellant,</i>	)	UNDER ARTICLE 62, UCMJ
	)	
v.	)	Before Panel No. 1
	)	
Staff Sergeant (E-5)	)	Misc. Dkt. No. 2026-01
JENNIFER Y. GALVIN,	)	
United States Air Force	)	30 January 2026
<i>Appellee.</i>	)	

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT
OF CRIMINAL APPEALS**

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellant,</i>	)	UNITED STATES' APPEAL
	)	UNDER ARTICLE 62, UCMJ
	)	
v.	)	Before Panel No. 1
	)	
Staff Sergeant (E-5)	)	Misc. Dkt. No. 2026-01
JENNIFER Y. GALVIN,	)	
United States Air Force	)	30 January 2026
<i>Appellee.</i>	)	

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

ISSUE PRESENTED

**WHETHER THE MILITARY JUDGE ERRED BY
DISMISSING THE ARTICLE 92, DERELICTION IN DUTY
OFFENSE IN SPECIFICATION 1 OF THE CHARGE BASED
ON THE PREEMPTION DOCTRINE AND THE
PRESIDENT'S LIMIT ON NOVEL GENERAL DISORDER
OFFENSES UNDER ARTICLE 134.**

STATEMENT OF THE CASE

One charge and two specifications for violating Article 92, UCMJ were referred against Appellee. (ROT, *Charge Sheet*).

10.
CHARGE: Violation of UCMJ, Article 92

Specification 1:

In that STAFF SERGEANT JENNIFER Y. GALVIN, United States Air Force, who knew of her duties at or near Okinawa, Japan, between on or about 1 October 2024 and on or about 30 January 2025, was derelict in the performance of those duties in that she willfully failed to refrain from harassing conduct that was sexual in nature which created an offensive environment, in violation of Department of Defense Instruction 1020.03, paragraph 1.2., as it was her duty to do.

Specification 2:

In that STAFF SERGEANT JENNIFER Y. GALVIN, United States Air Force, who knew of her duties at or near Okinawa, Japan, between on or about 1 October 2024 and on or about 30 January 2025, was derelict in the performance of those duties in that she willfully failed to refrain from entering into an unprofessional relationship with [REDACTED] in violation of Air Force Instruction 36-2909, paragraph 1.2.9., as it was her duty to do.

(Id.)

The Defense's Motion to Dismiss

On 6 November 2025, the defense moved to dismiss Specification 1 of the Charge claiming that it was preempted by Article 134, Sexual Harassment. (ROT, App. Ex. III, *Defense Motion to Dismiss for Failure to State an Offense and Preemption*, Section V, 6 November 2025) (App. Ex. III, *Defense Motion to Dismiss*). The defense's argument relied entirely on a trial judge's (Judge CJ) ruling in a different court-martial, United States v. Young. (Id., at pgs. 13-20; ROT, App. Ex. IV, *United States v. Young, Ruling on Defense Motion to Dismiss*) (App. Ex. IV, *Judge CJ's Ruling in Young*).

The United States' Response

The United States responded to the defense's motion to dismiss and explained that the preemption doctrine does not prevent the Government from charging an offense under Article 92, UCMJ. (ROT, App. Ex. V, *Government Response to Defense Motion to Dismiss* at para. 23-24). The United States' relied on this Court's "clear" statement in United States v. Augustini, 1996 CCA LEXIS 381, *6-7 (A.F. Ct. Crim. App. 10 Dec 1996), that "'the preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132' not the other way around." (Id. at para. 24).

Judge AN's Ruling in This Case

Judge AN is the trial judge in this case. She granted the defense's motion based on the preemption doctrine and dismissed Specification 1 of the Charge following argument on the issue. (ROT, *Audio Recording of Open Proceedings*, 1 Disc; Appendix, *Declaration of Captain Richard S. Vandine*, Attachment 1, *Ruling: Defense Motion to Dismiss*) (*Ruling*).

Judge AN was seemingly persuaded by Judge CJ's ruling in Young because her ruling is a nearly identical copy of his. (Compare, *Ruling* at paras. 39, 40, 41, 42, 52, 54, 56, 57, 58 with *Judge*

CJ's Ruling in Young at paras. 48, 49, 50, 51, 55, 56, 59, 60, 61, 62, 65). Like Judge CJ, Judge AN found two bases to dismiss Specification 1 of the Charge: (1) the preemption doctrine and (2) the President's limit on charging novel general disorder offenses under Article 134. Manual for Courts-Martial, United States, pt. IV, para. 91.c.(6)(a) (2024 ed.) (MCM)¹; (*Ruling*).

First, like Judge CJ, Judge AN concluded that the preemption doctrine from Article 134, UCMJ, extended to prevent the Government from charging sexual harassment as willful dereliction of duty in violation of Article 92, UCMJ. (*Ruling*). Copying Judge CJ's language, Judge AN recognized that "Guardardo [sic] appears to be clear about preemption being applied in one direction, Article 134, U.C.M.J. to Articles 80-132, U.C.M.J." (*Ruling* at para. 52). But she found that "Guardardo [sic] conflicts with Curry." (Id.)

Judge AN, like Judge CJ, resolved the conflict she perceived by choosing to rely on Curry instead of Guardado. She did not provide any analysis for why she chose one case over the other but merely concluded that "Curry is still current law binding upon this Court." (Id.)

Although Judge AN, like Judge CJ, "acknowledge[d]" that this Court said that it believed Curry turned on the doctrine of unreasonable multiplication of charges in United States v. Eppes, 2017 CCA LEXIS 152 (A.F. Ct. Crim. App. 21 Feb 2017), she disregarded that statement because it was "in a footnote of an unpublished opinion and is not binding on [her] Court." (*Ruling* at para. 52, n.2).

Judge AN also dismissed the Government's reliance on United States v. Augostini, 1996 CCA LEXIS 381 (A.F. Ct. Crim. App. 10 December 1996), in which this Court explained that the preemption doctrine does not prevent the Government from charging enumerated offenses,

¹ Unless otherwise noted, all references to the Manual are to the 2024 edition.

such as those under Article 92. (*Ruling* at para. 53). Judge AN did not analyze this Court’s statement that, “Since appellant was not charged under Article 134, the [Preemption] doctrine does not apply to his case.” Augostini, 1996 CCA LEXIS at *6. Instead, she concluded that Augostini only “addresse[d] alternatives for charging conduct that is not the subject of any punitive articles under the U.C.M.J.” (*Ruling* at 53). Based on this, she found that the government “incorrectly relie[d] on *Agostini*² [sic]” for its argument because she found that, unlike the conduct in Augostini, Appellee’s conduct could be charged under Article 134. (*Ruling* at para. 53).

In concluding that the preemption doctrine could prevent a charge under Article 92, like Judge CJ, Judge AN found it “more important[]” that,

Congress and CAAF have stated the basis for preemption is to ensure the government does not charge someone with an offense that has less elements than another offense in the UCMJ, thereby easing the government’s burden in charging the accused with a crime. Put another way, the government cannot charge an offense that has less elements than another offense, making it easier for the government to get a conviction if they charged the actual offense with more elements.

(*Id.* at para. 54).

After concluding that the preemption doctrine could be extended to prevent a charge under Article 92, Judge AN provided minimal analysis of the first factor for the preemption doctrine – congressional intent. Like Judge CJ, she found it “apparent that Congress intended to occupy the field” of sexual harassment because Congress directed the President to create Article 134, Sexual Harassment. (*Id.* at para. 56).

² Judge A.N. is seemingly referring to United States v. Augostini, 1996 CCA LEXIS 381 (A.F. Ct. Crim. App. 10 December 1996).

Judge AN found “Congress was explicitly clear on what they intended.” (Id.) But the in the next paragraph Judge AN admitted that Congress’ “explicit” will was accomplished “indirectly.” She said it was “obvious Congress, though indirectly, expressly intended Article 134, U.C.M.J., sexual harassment to cover the totality of sexual harassment.” (Id. at para. 57). In addition to this contradiction, Judge AN did not provide citation to any explicit language from Congress or the statute to justify her conclusion that Congress somehow indirectly expressly intended to occupy the field of sexual harassment offenses.

Judge AN then moved on to the second element of the preemption doctrine – whether the offense was composed of a residuum of elements. To seemingly support her conclusion that this element was met, Judge AN made the same perfunctory conclusion as Judge CJ that, “There is no duty to refrain from sexually harassing someone that would not be considered sexual harassment. Therefore, charging an accused under Article 92, U.C.M.J., for dereliction of duty by failing to refrain from sexually harassing them is fully encompassed by the Article 134, U.C.M.J., sexual harassment offense.” (Id. para. 57).

Judge AN did not analyze the paragraph the Government cited as the source of Appellee’s duty, paragraph 1.2 of Department of Defense Instruction (DoDI) 1020.03, which states, “The DoD’s goal is to prevent harassing behavior that is offensive to a reasonable person; unwelcome to the aggrieved party and creates conditions that interfere with work performance; or creates an intimidating, hostile, or offensive environment before it rises to the level of severe or pervasive.” DoDI 1020.03, *Harassment Prevention and Response in the Armed Forces*, para. 1.2(b)³. Nor did she analyze the knowledge element of Article 92, UCMJ, which requires that accuse knew or should have known of her duty.

³ The timeframe alleged in Specification 1 of the Charge covers two versions of DoDI 1020.03.

Instead, she only analyzed how the definitions of sexual harassment the DoDI are like the elements of sexual harassment under Article 134, UCMJ. (*Ruling* at para. 55). Based on the similarities between the definition of sexual harassment and Article 134, she found, “Allowing a dereliction of duty for sexual harassment under Article 92, U.C.M.J. to proceed to trial would require the accused to face an offense that is easier for the government to prove than had the government charged sexual harassment itself under Article 134, U.C.M.J.” (Id.)

Because Judge AN found the preemption doctrine could apply and that the two requirements were met, she concluded Article 92, Dereliction of Duty, was preempted by Article 134, Sexual Harassment. Therefore, she dismissed Specification 1 of the Charge.

Like Judge CJ, Judge AN also concluded that Article 92, Dereliction of Duty, is a prohibited novel offense under Reese and Guardado. (*Ruling* at para. 58). She seemingly recognized that Reese and Guardado applied the President’s limit on charging Article 134 that has been moved from pt. IV, para. 60.c.(6)(C) to pt. IV, para. 91.c.(6)(a). (*Ruling* at n.3). But she did not analyze the relevant language in the Manual nor did she explain how the President’s limit on Article 134 can be transferred to Article 92. Without any analysis, Judge AN concluded, “[i]ndependent of the issue of preemption,” that Specification 1 of the Charge is a “novel offense” and “shall be dismissed without prejudice.” (*Ruling* at para. 58).

Change 2 was implemented on 20 December 2022. It is available at <https://safe.menlosecurity.com/doc/docview/viewer/docN970616F998A4eccc87fdfa71ebf71d83f0d8768ebbf416d1dd7701bc28b805d6ae75c1d4095d> .

Change 3, was implemented 17 January 2025. It is available at https://www.mcipac.marines.mil/Portals/28/MEO/102003p.pdf_safe.pdf?ver=QB4ov3nQAnPcTmXBmLJxKQ%3D%3D .

In both versions, paragraph 1.2(b) and 1.2(c) are the same in both versions except for the how the Department of Defense is referenced.

Motion for Reconsideration

Following Judge AN's ruling, the Government filed a motion for reconsideration. (Appendix, *Declaration of Capt Richard S. Vandine*, Attch. 2, *Government Motion to Reconsider Ruling on Defense Motion to Dismiss*). The Government explained that under Guardado preemption only applies "in one direction." (Id. at paras. 9-11). The Government argued that the trial court was not free to dismiss the binding precedent of Guardado even if it did conflict with Curry. (Id. at para. 13).

Next, the Government explained that Judge AN's analysis of the preemption test was incorrect. (Id. at para. 17). The Government highlighted that Judge AN had identified no direct legislative language or express legislative history as required by United States v. Anderson, 68 M.J. 378, 387 (C.A.A.F. 2010), to establish congressional intent to occupy the field. (Id. at para. 19). The Government also explained that Article 92, UCMJ, is not composed of a residuum of elements of Article 134, Sexual Harassment. (Id. at para. 21-22). Finally, the Government explained that Judge AN's ruling on the novel offense issue was incorrect because the rule on novel offenses is limited in scope. (Id. at para. 24).

Based on these errors, the Government asked Judge AN to reconsider her ruling. Judge AN denied reconsideration because she found the Government had not presented additional facts or law not already cited. (Appendix, *Declaration of Captain Richard Vandine*, Attch. 3, *Ruling: Government Motion for Reconsideration*).

ARGUMENT

THE JUDGE IMPROPERLY EXTENDED THE PREEMPTION DOCTRINE AND THE PRESIDENT'S LIMITATION ON ARTICLE 134 OFFENSES TO DISMISS A SPECIFICATION CHARGED UNDER ARTICLE 92, UCMJ.

Jurisdiction

In a general or special court-martial, the United States may appeal an order or ruling of the judge which terminates the proceedings with respect to a charge or specification. Article 62(a)(1)(A), UCMJ. Appellee is being tried by a special court-martial. (*Charge Sheet*). Judge AN dismissed Specification 1 of the Charge without prejudice thereby terminating the proceeding with respect to that specification. (*Ruling*). Additionally, the United States has complied with the required procedures and timelines in Article 62, UCMJ, and R.C.M. 908. Therefore, this Court has jurisdiction over the United States' appeal under Article 62, UCMJ.

Standard of Review

In appeals under Article 62, UCMJ, this Court reviews matters of law de novo and may only act with respect to matters of law. Article 62(b), UCMJ; R.C.M. 908(c)(2).

Preemption is an issue of statutory interpretation and so it is a matter of law reviewed de novo. United States v. Avery, 79 M.J. 363, 366 (C.A.A.F. 2020) (citing United States v. Wheeler, 77 M.J. 289, 291 (C.A.A.F. 2018)).

Law

1. Separation of Powers

The separation of powers is a “bedrock constitutional principle.” United States v. Lane, 64 M.J. 1 (C.A.A.F. 2006). “The separation-of-powers principle that preserves our republic dictates that elected officials write the laws – not judges. Wilson, 930 F.3d at 439 (citing United States v. Davis, 588 U.S. 445, 451 (2019)). “[A] court cannot use its remedial powers to

circumvent the intent of the legislature.” Ayotte, 546 U.S. at 330 (quotation and citation omitted). Nor can a court interpret a statute to “accommodate [a] policy concern” without violating the separation of power’s doctrine. Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63 (2019).

2. Congress’ Constitutional Authority to Establish Criminal Statutes

The Constitution gives Congress, not courts, the authority to provide rules for the government and regulation of the armed forces. U.S. CONST. art. I, § 8, cl. 14. This authority includes establishing criminal offenses for the military. “Determinations as to what constitutes a federal crime, and the delineation of the elements of such criminal offenses – including those found in the UCMJ – are entrusted to Congress.” United States v. Jones, 68 M.J. 465, 471 (C.A.A.F. 2010); *See also* Liparota v. United States, 471 U.S. 419, 424 (1985) (“The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.”). Like civilian criminal offenses, Congress has chosen to establish military criminal offenses through federal statute – 10 U.S.C., Subtitle A, Pt. II, Ch. 47 – known as the Uniform Code of Military Justice.

Congress has the authority to create identical criminal statutes – even with different penalties for exactly the same conduct. Batchelder, 442 U.S. at 123 (citation and quotation omitted). The Court in Batchelder declined to uphold one statute and invalidate the other even though one established a higher punishment for the same conduct. The Court explained that it is “not enough to show that the two statutes produce differing results when applied to the same factual situation.” Batchelder, 442 U.S. at 123 (citation and quotation omitted). Instead, the legislative intent to repeal must be “manifest in the positive repugnancy between the provisions.” Id. (citation and quotation omitted). The Court did not find a “manifest” intention to repeal by

Congress. Instead, the Court explained that the legislative history supported that Congress did not intend one statute to preempt the other. Id. at 120.

When Congress exercises its authority to create two overlapping or identical statutes “[t]he courts are not at liberty to pick and choose among congressional enactments[.]” Morton v. Mancari, 417 U.S. 535, 551 (1974) (internal quotations and citation omitted). Instead, “when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” Id. at 551. The Supreme Court reiterated, “When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal must be clear and manifest.” Id.

3. Statutory Interpretation

“As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.” United States v. McPherson, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting Barnhart v. Sigmon Coal Co. Inc., 534 U.S. 438, 450 (2002)).

“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Bates, 522 U.S. at 29-30 (quotation and citation omitted).

4. Article 92, UCMJ

Since the inception of the UCMJ in 1950, Congress has included Article 92, Dereliction of Duty, as a military criminal statute. (Act of 5 May 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 107 (1950)). It remains unchanged and reads, in relevant part,

Any person subject to this chapter who—

[. . .]

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct.

Article 92, UCMJ.

The President explained that to be guilty of dereliction in the performance of duties in violation of Article 92, UCMJ, the following must be proved:

- a. That the accused had certain duties;
- b. That the accused knew or reasonably should have known of the duties; and
- c. That the accused was willfully or through neglect or culpable inefficiency derelict in the performance of those duties

MCM, pt. IV, para. 18(b)(3).

A regulation may impose a duty. MCM, para. 18(c)(3)(a). Actual knowledge of a duty need not be shown if, as demonstrated by “regulation, training or operating manuals, customs of the Service, academic literature or testimony, testimony of persons who have held similar or superior positions, or similar evidence,” the accused reasonably should have known of her duties.

MCM, para. 18(c)(3)(b).

5. Department of Defense Instruction 1020.03, *Harassment Prevention and Response in the Armed Forces*

Specification 1 of the Charge alleged that Appellee was willfully derelict in performing her duty as contained in paragraph 1.2 of Department of Defense Instruction (DoDI) 1020.03, *Harassment Prevention and Response in the Armed Forces*. (*Charge Sheet*). Unlike Article 134 detailed in section 6 below, DoDI 1020.03, paragraph 1.2, establishes a duty to prevent harassing behavior *before* it rises to the level of severe or pervasive.

Paragraph 1.2 of DoDI 1020.03 is titled “POLICY.” It reads, in relevant part,

The Department’s goal is to prevent harassing behavior that: is offensive to a reasonable person; unwelcome to the aggrieved party and creates conditions that interfere with work performance; or creates an intimidating, hostile, or offensive environment before it rises to the level of severe or pervasive.

[The] DoD will hold leaders at all levels appropriately accountable for fostering a climate of inclusion that [. . .] is free from harassment [. . .].

Id. at para. 1.2.b.-c.

DoDI 1020.03 puts servicemembers on notice that violations of its policies may result in disciplinary action by stating, “Violations of the policies in this issuance may constitute violations of specific articles of Chapter 47 of Title 10, U.S.C., [the UCMJ], and may result in administrative or disciplinary action.” DoDI 1020.03, para. 1.2.(e).

In the Change 3 version of DoDI 1020.03, effective 17 January 2025, the definition of sexual harassment includes a statement that “Conduct that constitutes an offense at Paragraph 107a of Part IV of the Manual for Courts-Martial is punishable under Article 134 of the UCMJ.” DoDI 1020.03, Change 3 effective 17 Jan 2025, Glossary. But neither the Change 2 nor the Change 3 version limit the Government’s ability to address conduct that may not “constitute” an offense under Article 134, UCMJ.

6. Article 134, UCMJ, Sexual Harassment

In the National Defense Authorization Act for Fiscal Year 2022, Congress directed the President to establish sexual harassment as an offense punishable under Article 134, UCMJ. (National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, Part 2, Sec. 539D. *Inclusion of Sexual Harassment as General Punitive Article* (2021)). Unlike other Presidentially established offenses under Article 134, UCMJ, Congress provided the elements of the offense.

Congress established that the elements of Sexual Harassment under Article 134 are:

- (1) That the accused knowingly made sexual advances, demands or requests for sexual favors, or knowingly engaged in other conduct of a sexual nature;
- (2) That such conduct was unwelcome;
- (3) That, under the circumstances, such conduct –
 - A. Would cause a reasonable person to believe, and a certain person did believe, that submission to such conduct would be made, either explicitly or implicitly, a term or condition of that person's job, pay, career, benefits, or entitlements;
 - B. Would cause a reasonable person to believe, and a certain person did believe, that submission to, or rejection of, such conduct would be used as a basis for decisions affecting that person's job, pay, career, benefits, or entitlements; or
 - C. Was so severe, repetitive, or pervasive that a reasonable person would perceive, and a certain person did perceive, an intimidating, hostile, or offensive working environment; and
- (4) that, under the circumstances, the conduct of the accused was –
 - A. to the prejudice of good order and discipline in the armed forces;
 - B. of a nature to bring discredit upon the armed forces; or

C. to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

Id. at para (b)(1)-(4).

The President complied with Congress' direction and amended Part IV of the Manual to include Sexual Harassment as an enumerated offense under Article 134, UCMJ, with the elements that Congress directed. (Executive Order 14062, *2022 Amendments to the Manual for Courts-Martial, United States*, 87 FR 4763, pg. 19).

7. The Preemption Doctrine

In the military, the preemption doctrine, arises from the language Congress used in Article 134, UCMJ. The general article, Article 134, UCMJ, provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

The phrase “[t]hough not specifically mentioned in this chapter” is the foundation of the preemption doctrine. In United States v. Herndon, 36 C.M.R. 8, 10 (C.M.A. 1965), the Court explained that if Congress had intended for an offense it enumerated to be criminal as a general disorder offense under Article 134 with fewer elements, then (1) Congress would have included an offense with fewer elements in the UCMJ; and (2) Congress would not have added the disclaiming phrase “[t]hough not specifically mentioned in this chapter” to Article 134.

Herndon, 36 C.M.R. at 10.

CAAF essentially reiterated this finding in United States v. Avery, 79 M.J. 363, 366 (C.A.A.F. 2020), when it quoted a prior dissenting opinion explaining that the Court had “identified a statutory basis for this traditional form of preemption. It flows from the text of Article 134, UCMJ, in particular that article’s initial disclaiming phrase, ‘[t]hough not specifically mentioned in this chapter.’” Id. (quoting United States v. Gleason, 78 M.J. 473, 479, n.1 (C.A.A.F. 2019) (Ryan, J., dissenting))

The “President expounded upon [the limiting] language” of Article 134, UCMJ, by saying, “The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132.” United States v. Anderson, 68 M.J. 378, 386 (C.A.A.F. 2010) (quoting MCM, pt. IV, para. 60.c(5)(a) (2008 ed.⁴)).

The Court has explained that “the President’s guidance” on the preemption doctrine in the Manual “makes clear” that the doctrine “is designed to prevent the government from eliminating elements from congressionally established offenses under the UCMJ, in order to ease their evidentiary burden at trial.” Wheeler, 77 M.J. at 293 (citation omitted). This analysis relied on United States v. Norris, 8 C.M.R. 36, 39 (C.M.A. 1953), in which the Court said, “We cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134.” The Court in Wheeler explained, “That is the precise limitation the President placed on Article 134, UCMJ[,]” in the Manual. Wheeler, 77 M.J. at 293 (quoting MCM, pt. IV, para. 60.c(5)(a) (2012 ed.)).

⁴ This section of the Manual remains unchanged in the 2024 edition of the Manual but is now located at pt. IV, para. 91(c)(5)(a).

The preemption doctrine's reach is limited. "The preemption doctrine only prohibits the government from using Article 134, UCMJ, to charge offenses that are listed in the UCMJ *outside* of Article 134." United States v. Guardado, 77 M.J. 90, 95 (C.A.A.F. 2017) (quotation and citation omitted) (emphasis in original). The preemption doctrine does not even extend to the President's example⁵ offenses within Article 134, UCMJ. Id.

In Guardado, the appellant was charged with a novel general disorder offense for making "sexually charged comments" to children in violation of Article 134. Id. at 95. The appellant argued that the novel general disorder offense was preempted by the President's enumeration of indecent language under Article 134. Relying on the limited scope of the preemption doctrine, the Court in Guardado found "the doctrine of preemption [was] inapplicable" to the Government charging a "novel" general disorder offense under clause 1 or 2 of Article 134, UCMJ, when the President had enumerated an example offense under Article 134. Id.

8. Novel General Disorder Offenses

Separate from the preemption doctrine, the President has limited the Government's ability to charge a novel general disorder offense under clause 1 or 2 of Article 134, UCMJ, when he has enumerated an example offense under Article 134, UCMJ. The Court in Guardado explained that it was this limit, not the preemption doctrine, which constrained the Government within Article 134. Guardado 77 M.J. at 95.

The President included a provision in the Manual that says,

If conduct by an accused does not fall under any of the listed offenses for violations of Article 134 in this Manual (paragraphs 61

⁵ The President does not have the legislative authority to provide crimes and offenses. United States v. Jones, 68 M.J. 465, 471 (C.A.A.F. 2010) (quoting United States v. McCormick, 30 C.M.R. 26 (C.M.A.1960)). As a result, the President merely has the authority to "list examples of offenses" under Article 134, UCMJ. Id.

through 113 of this Part), a specification not listed in this Manual may be used to allege the offense.

Id. (quoting MCM pt. IV, para. 60.c.(6)(c) (2016 ed.)).

The Court found this provision “constrained the Government’s charging strategy” because “the plain language of the President’s guidance” means “that the government may not charge a ‘novel’ offense if the offense is otherwise listed as an Article 134, UCMJ, offense.” Id. (quoting United States v. Reese, 76 M.J. 297, 302 (C.A.A.F. 2017)).

The limiting language analyzed in Guardado and Reese, has existed since 1984 and remains in the 2024 edition of the Manual. (MCM, pt. IV, para. 91.c.(6)(a)).

Analysis

Judge AN found two grounds for dismissing Specification 1 of the Charge: (1) the preemption doctrine and (2) the President’s limitation on novel offenses. Both conclusions were error and contain incorrect legal principles and analysis that need correction by this Court.

Judge AN committed many errors in her ruling including:

- 1) overlooking that the preemption doctrine is confined to offenses charged under Article 134 because of the statutory language;
- (2) impermissibly invalidating Congress’ constitutional authority to establish Article 92 as a criminal offense;
- (3) failing to apply CAAF’s direction that the preemption doctrine only “prohibits the government from using Article 134, UCMJ, to charge offenses that are listed in the UCMJ outside of Article 134;”
- (4) incorrectly finding that Curry applied the preemption doctrine to offenses charged under Article 92;
- (5) erroneously finding that the two requirements for the preemption doctrine, congressional intent to occupy the field and being composed of a residuum of elements, were met; and
- (6) overlooking that the President’s limitation on novel general disorder offenses only applies to offense charged under Article 134.

Because of these errors, this Court should overturn her ruling dismissing Specification 1 of the Charge and explain that the preemption doctrine is textually confined to Article 134, reiterate this Court's finding that Curry did not apply the preemption doctrine, and explain that the President's limit on novel general disorder offenses does not extend to offenses charged under Article 92, UCMJ.

1. The preemption doctrine is textually confined to Article 134, UCMJ, and cannot be extended to Article 92, UCMJ.

The preemption doctrine is merely the implementation of the words Congress used to limit the scope of Article 134, UCMJ, to offenses "not specifically mentioned" elsewhere in the UCMJ. *See Herndon*, 36 C.M.R. at 10; *Avery*, 79 M.J. at 366 (quoting *Gleason*, 78 M.J. at 479, n.1) (Ryan, J., dissenting). It cannot be extended or imported to Article 92 without congressional action. Because Congress did not include any limiting language in Article 92, UCMJ, the preemption doctrine does not apply to Article 92.

Judge AN misunderstood the preemption doctrine by failing to recognize its textual foundation. Rather than recognize that the doctrine only exists because of the language Congress used in Article 134, UCMJ, Judge AN treated the doctrine as a holistic judicial tool to prevent the Government from charging any offense with "less elements" or that is "easier to prove." (*Ruling*). This was error and violated the separation of powers doctrine by overriding Congress' constitutionally granted authority to establish Article 92 as a criminal offense.

A. Judge AN's misinterpretation of the preemption doctrine is evident in her incorrect summary of the law.

Judge AN claimed, "Congress and CAAF have stated the basis for preemption is to ensure the government does not charge someone with an offense that has less elements than another offense under the U.C.M.J." (*Ruling* at para. 54). This is wrong. Neither Congress nor

CAAF has made such a bold proclamation. Such a foundational error undermines all of Judge AN's analysis of the issue.

The preemption doctrine has never been a holistic judicial tool to prevent the Government from charging a criminal statute, enacted by Congress, merely because it has fewer elements than another. Instead, in the case cited by Judge AN, CAAF said,

The underlying basis for the preemption doctrine is Congress' and this Court's longstanding unwillingness to permit prosecutorial authorities 'to eliminate vital elements from common law crimes and offenses *expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134.*

United States v. McGuiness, 35 M.J. 149, 152 (C.M.A. 1992) (quoting Norris, 8 C.M.R. 39) (emphasis added).

The full explanation from McGuiness supports that the preemption doctrine is not a general restriction on the Government's ability to charge an offense with fewer elements. The Court in McGuiness specifically tied the preemption doctrine to the Government's ability to charge an offense under Article 134 because of "Congress' unwillingness" to allow the Government to eliminate "vital elements" from "offenses expressly defined by congress" and charge the offense under Article 134. Id. at 152. The congressional unwillingness that the Court was recognizing arises from the text of Article 134 in which Congress allowed the Government to charge a general disorder offense only for crimes "not specifically mentioned" by Congress in the UCMJ. By overlooking the full analysis in McGuiness, Judge AN erred.

The Government is limited to how it may use Article 134, UCMJ, because of the limiting phrase that Congress included in Article 134, UCMJ. But when that language is not present, like in Article 92, UCMJ, Congress has not "demonstrated its unwillingness" to allow the Government to use the criminal provision to its fullest extent. McGuiness, 35 M.J. at 152. As a result, the preemption doctrine does not apply to offense charged under Article 92 and Judge

AN's ruling to the contrary was error. Thus, her conclusion that Specification 1 of the Charge was preempted by Article 134 was error and should be overturned.

B. Judge AN's ruling violates the separation of powers doctrine.

By extending Article 134's preemption doctrine to prevent the Government from charging an Article 92, UCMJ offense in this case, Judge AN violated the separation of powers doctrine by invalidating Congress' constitutionally authorized decision to create Article 92 as a criminal offense. U.S. CONST. art. I, § 8, cl. 14; Jones, 68 M.J. at 471. This was error.

Both Article 92 and Article 134 are federal criminal statutes. 10 U.S.C. §§ 892, 934. The default for federal criminal statutes is that they are equal – one cannot preempt another without clear language from Congress. “The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” Morton, 417 U.S. at 551 (internal quotations and citation omitted). Even if two statutes address the same conduct, “the rule is to give effect to both if possible. The intention of the legislature to repeal must be clear and manifest.” Id.

Congress has “clearly expressed” its intention that Article 134, UCMJ, be limited to offenses “not specifically mentioned” elsewhere in the UCMJ. *See* Morton, 417 U.S. at 551; Article 134, UCMJ. But it has not clearly expressed its intention that Article 92, UCMJ, be similarly limited because the limiting phrase is not present. “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Bates, 522 U.S. at 29-30 (quotation and citation omitted). Without a clear and manifest expression from Congress that Article 92, UCMJ, is constrained like Article 134,

UCMJ, Judge AN's duty was to give effect to both. Morton, 417 U.S.at 551. She abandoned that duty by finding that Article 92, UCMJ, was preempted by Article 134, UCMJ, without a clear expression that was Congress' intent. Her ruling impermissibly nullified Congress' constitutionally authorized power to establish Article 92 and Article 134, Sexual Harassment, as overlapping criminal offenses. This was error.

Judge AN's concern that Article 92, Dereliction of Duty, would be "easier for the government to prove" was misguided. (*Ruling* at para. 55-57). Congress regularly enacts overlapping criminal statutes where one may be perceived as "easier to prove." *See, e.g.*, Article 118, UCMJ, *Murder* and Article 117, UCMJ, *Manslaughter*. The ease or difficulty of prosecuting a charged offense cannot extend the preemption doctrine beyond its textual bounds. Without a clear expression from Congress that it specifically intended to invalidate Article 92, UCMJ as a way to prosecute sexual harassment, Judge AN lacked the authority to invalidate a federal statute based on her subjective judgment that Article 92, UCMJ, is "easier to prove."

C. Judge AN impermissibly impeded the Government's prosecutorial discretion.

Judge AN incorrectly focused on the fact that Article 92, Dereliction of Duty, and Article 134, Sexual Harassment may overlap. (*Ruling* at para. 55). This is irrelevant. Congress has the authority to create two overlapping – and even identical – criminal statutes. Batchelder, 442 U.S. at 123-125. When it does so, the Supreme Court has "long recognized" that the Government is free to prosecute under either. Id. Neither this Court, nor the trial court, has the authority to "pick and choose" which statute may be used. Morton, 417 U.S. at 551. Judge AN violated the Government's prosecutorial discretion was error which this Court should correct.

Congress, under its constitutional authority to establish criminal offenses, created Article 92, Dereliction of Duty, and directed that Article 134, Sexual Harassment be created, as crimes

under the UCMJ. Because Congress did not clearly limit the Government's ability to charge Article 92, UCMJ, Dereliction of Duty, the preemption doctrine does not apply. The Government was free to choose which statute it used to prosecute Appellee. It was error for the trial judge to conclude otherwise and dismiss Specification 1 of the Charge. To uphold the separation of powers, this Court should correct Judge AN's error and overturn her dismissal of Specification 1 of the Charge.

2. Judge AN disregarded precedent that Article 134 only prevents the Government from using clause 1 or 2 of Article 134 to charge offenses listed elsewhere in the UCMJ.

Our superior Court has explained that the preemption doctrine is concerned with using Article 134, UCMJ, to charge an offense listed elsewhere in the manual multiple times. In Guardado the Court said that the preemption doctrine “*only* ‘prohibits the government from using Article 134, UCMJ, to charge offenses that are listed in the UCMJ *outside* of Article 134.’” Guardado, 77 M.J. at 95 (quoting Reese, 76 M.J. at 302) (first emphasis added). The Court in Avery also explained that “the situation against which the preemption doctrine was intended to guard [was] namely, *creating* an enumerated offense [under Article 134] in order to ease the government's evidentiary burden with respect to a listed offense enacted by Congress.” Avery, 79 M.J. at 367 (emphasis in original). The Court further emphasized that the “very impetus” for the preemption doctrine was the concern “that the government would take an extant UCMJ offense and remove a vital element to create a diluted crime under Article 134, UCMJ[.]” Id.

As a “lower military tribunal” Judge AN was “neither free to ignore mandates” from our superior Court “nor to avoid the application of settled principles of law[.]” United States v. Tualla, 52 M.J. 228, 233 (C.A.A.F. 2000). Yet, Judge AN did. Despite recognizing that CAAF's statements in Guardado “appear [] to be clear about preemption being applied in one

direction,” Judge AN summarily disregarded Guardado – with no analysis – in favor of an older case, United States v. Curry, 28 M.J. 419 (C.M.A. 1989). (*Ruling* at para. 52). This was error.

Even when a lower court believes there could be a conflict between precedents, its job is to attempt to harmonize the precedent if possible. Bryan A. Garner et al., The Law of Judicial Precedent, Sec. 36, *Choosing Between Discordant Decisions*, (2016), pg. 300 (“If at all possible” opinions that seem “discordant” “should be harmonized.”) This requires the trial court to “parse each precedent carefully to identify the core reasoning of the case. Huggins v. Lueder, Larking, & Hunter, LLC, 39 F.4th 1342, 1347 (11th Cir. 2022) (citation omitted). “Although it’s often easy to cherry-pick a sentence from a case to support an argument, the sentence has no precedential force unless it is relevant to those points of law which are raised by the record, considered by the court, and necessary to a decision.” Garner et al., supra, Sec. 6, *The Context for Extracting a Rule or Standard*, pg. 82).

Judge AN provided no analysis for why she felt she could disregard Guardado in favor of Curry. There is no evidence she attempted to harmonize the cases or that she attempted to discern the core reasoning in either case. This is a critical deficiency in her ruling that shows she failed to abide by her duty as a lower court. A lower court’s job is to follow a superior Court’s directions “not pick and choose among them as if ordering from a menu.” Surefoot LC v. Sure Foot Corp, 531 F.3d 1236, 1243 (10th Cir. 2008). By “cherry-pick[ing]” a single sentence from Curry over Guardado without reason, Judge AN failed to abide by precedent. Garner et al., supra, Sec. 6, *The Context for Extracting a Rule or Standard*, pg. 82. This Court should correct her error.

Had Judge AN parsed the holding in Curry, she would have found (1) that Curry did not apply the preemption doctrine and (2) that there is no basis to depart from CAAF’s more recent holding in Guardado.

A. Curry does not apply the preemption doctrine.

Judge AN’s analysis of Curry, 28 M.J. 419, was incorrect. She relied on a single sentence from the case in which the Court said, “[w]e hold that Article 93, the punitive article which proscribes maltreatment of subordinates, preempted the conviction under Article 92 for disobedience of an order not to maltreat subordinates – rather than vice versa.” (Ruling at para. 30). Based on this sentence, she found,

In Curry, not only did the CMA⁶ find an Article 92, U.C.M.J. offense was preempted by an Article, 93, U.C.M.J. offense, but they also considered whether the Article 92, U.C.M.J. offense preempted the Article 93, U.C.M.J. offense. In doing so, the CMA held ‘Article 93, the punitive article which proscribes maltreatment of subordinates, preempted the conviction under Article 92, U.C.M.J. for disobedience of an order not to maltreat subordinates – rather than vice versa.’

(*Ruling* at 52).

This was error. “[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.” Cohens v. Virginia, 19 U.S. 264, 399 (1821). An evaluation of the entire case – rather than just the word “preempted” – establishes that our superior Court did not rule on the preemption doctrine or hold that the preemption doctrine prevented charging Article 92, Dereliction of Duty, as Judge AN found. (*Id.*) Instead, the Court only considered whether the Government could charge the appellant with both Article 93 and

⁶ In 1994 Congress changed the name of the Court of Military Appeals (CMA) to the Court of Appeals for the Armed Forces (CAAF). United States Court of Appeals for the Armed Forces, *About the Court*, <https://www.armfor.uscourts.gov/about.htm> (last accessed 6 January 2026).

Article 92 (i.e. whether the charges were unreasonably multiplied). Thus, the sentence Judge AN relied on “has no precedential force” for the preemption doctrine. Garner et al., supra, Sec. 6, *The Context for Extracting a Rule or Standard*, pg. 82. So her conclusion that Curry extended the preemption doctrine to prevent the Government from charging Article 92 was error.

i. All the Court’s analysis in Curry focused on unreasonable multiplication of charges – not the preemption doctrine.

The context of the Court’s general expression that Article 92 was “preempted” by Article 93 shows that the Court using word for its ordinary meaning – to take precedence over.⁷ It was not enacting an unprecedented expansion of the preemption doctrine without analysis or explanation. Four aspects of the opinion highlight this fact particularly well.

First, in the section quoted by Judge AN, the Court was addressing its specified issue of whether there was an unreasonable multiplication of charges between Charges I (Article 92), II (Article 93), and IV (Article 134). Curry, 28 M.J. at 420 n.3. Although there was a specified issue about the preemption, that issue was only addressing whether charging Article 134 (Charge IV) for bribery was preempted by Article 92 (Charge I) – not whether Article 92 and Article 93 preempted each other. Id. Because the Court was addressing the unreasonable multiplication of charges issue, the parties would not have briefed, and the Court would not have considered whether the preemption doctrine could prevent the Government from charging Article 92 rather than Article 93. Therefore, it is unlikely that the Court was considering and applying the preemption doctrine. Even if the Court were commenting on the preemption doctrine it would not have precedential value because “[a]n opinion is precedential only for the points of law

⁷ <https://www.merriam-webster.com/dictionary/preempt> (last accessed 31 December 2025).

argued by the litigants and adjudicated by the court[.] Garner et al., supra at Sec. 6, *The Context for Extracting a Rule or Standard*, pg. 85.

Second, in reaching its conclusion, the Court said, “Congress never intended this multiplication of offenses.” Curry, 28 M.J. at 424. The Court was explaining that it is an unreasonable multiplication of charges to tack on an Article 92 specification to another specification under a different article addressing the same conduct to increase the punishment.

Third, the Court relied on a single Air Force Court of Military Review case about unreasonable multiplication of charges – not preemption – to support its conclusion. Id. at n.9 (citing United States v. Womack, 27 M.J. 630 (A.F.C.M.R. 1988)). Fourth, in contrast, the Court did not cite a single case involving the preemption doctrine despite more than 30 years of precedent on the doctrine at the time.

Based on the full context of the Court’s general expression in Curry, this Court should find that the word “preempted” in the Curry opinion was not a reference to the preemption doctrine. Instead, the Court was merely explaining which case had greater priority to remain on the charge sheet after it found an unreasonable multiplication of charges.

ii. Subsequent appellate review supports that Curry was not about the preemption doctrine.

The conclusion that Curry was not addressing the preemption doctrine is reinforced by subsequent analysis by the Navy-Marine Corps Court of Military Review (N-M.C.M.R.) and the CMA. United States v. Curry, 1991 CMR LEXIS 1144 (N-M.C.M.R. 31 July 1991); United States v. Curry, 35 M.J. 359 (C.M.A. 1992).

The CMA remanded Curry to the N-MCMR to, in relevant part, dismiss Charge I, the Article 92 charge, based on its finding that the charge was unreasonably multiplied. Curry, 28 M.J. at 424. But, after dismissing the Article 93 charge on other grounds, the N-MCMR

declined to dismiss the Article 92 charge because it was “no longer factually preempted.” Curry, 1991 CMR LEXIS 1144.

Removing a charge from the charges sheet that would preempt another does not affect the application of the preemption doctrine. For example, if an Article 134 offense is preempted by an Article 121, UCMJ (larceny) offense, the Article 134 offense still cannot be charged, even if the Article 121 offense is not on the charge sheet. As a result, the N-MCMR could not have been using the word “preempted” to refer to the preemption doctrine. Instead, the N-MCMR used the ordinary meaning of the word “preempt” – just like the superior Court did – to explain that nothing took priority over the remaining Article 92 charge after the Article 93 charge was set aside. Therefore, the Article 92 charge was no longer unreasonably multiplied and so the N-M.C.M.R. refused to dismiss Charge I.

Further supporting that the CMR was using the word “preempt” just like its superior Court, the N-MCMR explained,

[W]e are of the opinion that the [CMA] did not intend that the appellant’s actions, which violated a lawful general regulation on standards of conduct, should go unpunished. In fact, the wisdom of having such a regulation is borne out by the facts of this case *since a prosecution can still lie* where, as here, such an action cannot be pursued under Article 93, UCMJ.

Curry, 1991 CMR LEXIS at *6. (emphasis added).

This clarified that the N-MCMR did not believe the preemption doctrine applied, because “prosecution can still lie” under Article 92 despite the existence of Article 93, UCMJ.

When the case returned to the superior Court, the CMA clarified the procedural posture of the case by saying that it remanded the 1989 Curry case to the N-MCMR for “consolidation of multiplicitous specifications.” Curry, 35 M.J. at 360 (citing Curry, 28 M.J. at 424). Tellingly, the Court did not say it remanded the case after ordering Charge I to be dismissed based on the

preemption doctrine. Additionally, when reviewing the case a second time, the Court did not dismiss the Article 92, UCMJ, charge because it was preempted by Article 93.

These facts show that the original Curry case was not the Court espousing a new preemption doctrine for non-Article 134 offenses in a single sentence without analysis. Rather, the Court was explaining in plain terms that it ordered dismissal of the less specific charge based on unreasonable multiplication of charges.

Judge AN overlooked all of this context around the Court’s “general expression” that Article 92 was preempted by Article 93 which established that the Court was using the word “preempt” for its ordinary meaning. Cohens, 19 U.S. at 399. This was error which she, and Judge CJ, compounded by disregarding this Court’s determination in United States v. Eppes that Curry was not a case about the preemption doctrine. 2017 CCA LEXIS 152, 32-33 n.10 (A.F. Ct. Crim. App. 21 Feb 2017) (unpub. op.).

In Eppes, this Court rejected an appellant’s argument that the preemption doctrine “somehow limits the Government’s ability” to charge Article 92. Id. In addition to explaining that the preemption doctrine only limits the Government’s ability to charge Article 134 offenses, this Court said, “we believe the Curry holding turns on the doctrine of unreasonable multiplication of charges[.]” Both Judge AN and Judge CJ disregarded this Court’s persuasive guidance because it was in a footnote of an unpublished opinion. (*Ruling* at para. 52, n.2; App. Ex. III, *Defense Motion to Dismiss*, Appendix, para. 55). To address the trial judiciary’s repeated errors on this matter, this Court should definitively explain that Curry, 28 M.J. 419, does not have precedential force for the preemption doctrine.

Judge AN’s erroneous interpretation of Curry led her to find the preemption doctrine could prevent the Government from charging Article 92 and so she dismissed Specification 1 of

the Charge. Because Curry never held that the preemption doctrine can apply to Article 92, Judge AN choice to disregard Guardado because she felt bound by Curry was error and should be corrected.

B. Judge AN failed to abide by CAAF’s direction to follow the most recent decision.

Even if Judge AN were correct that Guardado and Curry conflicted, she also failed to follow CAAF’s direction that military courts “generally follow the most recent decision[,]” when faced with conflicting precedent. United States v. Perkins, 78 M.J. 381, 388 n.5 (C.A.A.F. 2019) (citing United States v. Hardy, 77 M.J. 438, n5 (C.A.A.F. 2018)). Although in Perkins, CAAF departed from this general principle, the Court only did so because the older opinion contained a “thorough consideration of a complicated issue” which gave effect to all parts of the rule of evidence at issue and the newer case did not. Id. Additionally, the older case was “longstanding precedent” that had been treated as authoritative. Id. None of these conditions are present, or analyzed by Judge AN, in this case. Therefore, Judge AN again erred by failing to follow our superior Court’s directions, and her ruling should be overturned.

3. Judge AN incorrectly found the two requirements for the preemption doctrine were met.

The preemption doctrine requires that (1) Congress intended to limit prosecution for a particular area of misconduct to offenses defined in Articles 80 – 132, UCMJ, and (2) the offense charged is composed of a residuum of elements of a specific offense. Avery, 79 M.J. at 366 (citation omitted). Even if the preemption doctrine could be extended to prevent the Government from charging crimes under Article 92, UCMJ, neither requirement of the doctrine was met. Therefore, this Court should overturn Judge AN’s ruling dismissing Specification 1 of the Charge.

A. Congress did not intend to limit prosecution of sexual harassment to Article 134.

An appellate court “will only find congressional intent to preempt in the context of Article 134, UCMJ, where ‘Congress has indicated ‘through direct legislative language or express legislative history that particular actions or facts are limited to the express language of an enumerated article.’” Avery, 79 M.J. at 366 (quoting Anderson, 68 M.J. at 387).

Even when ignoring, for the sake of argument, that CAAF has only applied the preemption doctrine to “the context of Article 134, UCMJ,” the preemption doctrine still does not apply in this case. There is no direct legislative language or express legislative history to support that Congress intended to limit prosecution of actions that create an offensive environment to Article 134, Sexual Harassment. In fact, the text of the statute and the congressional record support that Congress was merely adding *another* way to prosecute such conduct.

Judge AN wrongly concluded that “it is apparent that Congress intended to occupy the field of misconduct, specifically sexual harassment” with the establishment of Sexual Harassment under Article 134 in the 2022 National Defense Authorization Act. (*Ruling* at para. 56). Creation of a criminal statute is neither “direct legislative language” nor “express legislative history” limiting facts to a particular crime. To hold otherwise would render the first prong of the preemption doctrine moot because the preemption doctrine issue is raised only when Congress has established a specific criminal offense. As a result, “direct legislative language” and “express legislative history” must require more than the basic action of creating a criminal statute.

This is especially true when, as in this case, Congress enacts the criminal statute at issue after the Government has been prosecuting the conduct under another statute. Before the 2022

NDAA, sexual harassment was prosecuted under Article 92. See United States v. Goodman, 70 M.J. 396, 397 (C.A.A.F. 2011) (upholding an appellant’s guilty plea to failing to obey a lawful general order in violation of Article 92 for sexual harassment); United States v. Pope, 63 M.J. 68 (C.A.A.F. 2006) (same); United States v. Kroop, 34 M.J. 628, n.2 (A.F.C.M.R. 1992) (explaining that the specification appears to “describe an offense of sexual harassment that could be properly charged” under Article 92, UCMJ); United States v. Cobb, 2016 CCA LEXIS 366, *2 (A. Ct. Crim. App. 27 May 2016) (identifying the appellant pleaded guilty to four specifications of sexual harassment in violation of Article 92).

This Court must “assume that Congress is aware of existing law when it passes legislation.” United States v. McDonald, 78 M.J. 376, 380 (C.A.A.F. 2019) (citing Miles v. Apex Marine Corps, 498 U.S. 19, 32 (1990)); United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979) (“It is reasonable to assume that Congress was aware of the existence of such military law when performing its constitutional task to make laws for the armed forces.”). Yet, when Congress created Article 134, Sexual Harassment, it did not expressly say that the Government can no longer prosecute such actions under Article 92, UCMJ. This indicates that Congress did not intend to occupy the field. As in Avery, because the allegedly preempted offense, Article 92, existed long before Congress created Article 134, Sexual Harassment, this Court should find this fact is “further evidence” that Congress did not intend to occupy the field. Id. at n.4.

Additionally, the congressional record supports that Congress added Article 134, UCMJ, to increase the ways the Government could address sexual harassment. When proposing Article 134, Sexual Harassment, Senator Mazie Hirono said,

Sexual Harassment and sexual assault have no place in our military – they break critical trust. It is a betrayal of every Soldier, Sailor, Airman and Marine if leaders do not do *everything possible* to eradicate the toxic culture which allows sexual harassment and

sexual assault to fester and erode good order and discipline within the ranks.

(167 CONG. REC. S2525 (2021) (statement of Sen. Mazie Hirono⁸) (emphasis added)).⁹ Doing “everything possible” includes using all available criminal statutes to address sexual harassment. This supports that Congress did not intend to limit the Government’s prosecutorial ability but intended to expand it.

Given the presumption that Congress knew sexual harassment could be charged under Article 92, UCMJ, it is apparent from the record that Congress intended to add to every possible way the military could address sexual harassment – not limit it. As a result, Judge AN’s cursory conclusion that Congress intended to occupy the field of Sexual Harassment only because it created Article 134, Sexual Harassment, was error. This Court should correct that error and overturn her ruling dismissing Specification 1 of the Charge.

B. Article 92, Dereliction of Duty, is not composed of a residuum of elements of Article 134, Sexual Harassment.

Judge AN failed to compare the elements of Article 92, Dereliction of Duty, and Article 134, Sexual Harassment. Instead, she made another cursory conclusion that “There is no duty to refrain from sexually harassing someone that would not be considered sexual harassment.” (*Ruling* at para. 57). She seemingly found this sufficient to determine that Article 92, Dereliction of Duty, is composed of a residuum of elements of Article 134, Sexual Harassment, because she provided no further analysis. A direct comparison of the elements, removing the terminal

⁸ These statements involved the section of the I am Vanessa Gullien Act which was to add Sexual Harassment as a specific offense under the UCMJ. This provision was ultimately adopted by the National Defense Authorization Act, and so the comments related to the I am Vanessa Gullien Act help with understanding the purpose behind creating Article 134, Sexual Harassment.

⁹ Available at <https://www.congress.gov/congressional-record/volume-167/issue-83/senate-section/article/S2525-> (last accessed 20 Jan 2026)

element of Article 134, reveals that Article 92, Dereliction of Duty, is not composed of a residuum of elements of Article 134, Sexual Harassment because of two key differences.

Article 92, Dereliction of Duty	Article 134, Sexual Harassment
That the accused had a duty to prevent harassing behavior that is offensive to a reasonable person, unwelcome to an aggrieved party, and creates an offensive environment <i>before it rises to the level of severe or pervasive</i> (DoDI para. 1.2.(b))	That the accused knowingly made sexual advances, demands or requests for sexual favors, or knowingly engaged in other conduct of a sexual nature;
That the accused knew of the duties; and	That such conduct was unwelcome;
That the accused was willfully ¹⁰ derelict in the performance of those duties by engaging in harassing behavior of a sexual nature	That, under the circumstances, such conduct <i>was so severe, repetitive, or pervasive</i> that a reasonable person would perceive, and a certain person did perceive, an intimidating, hostile, or offensive working environment ¹¹

First, the Government must prove that the accused knew of her duty to prevent harassing behavior before it was severe or pervasive. This knowledge is not required for Article 134.

Second, the severity of the harassing behavior required for guilt is lower under Article 92 than under Article 134. Appellee had a duty, under Paragraph 1.2 of DoDI 1020.03 to “prevent harassing behavior . . . *before it rises to the level of severe or pervasive.*” DoDI 1020.03, Id. at para. 1.2.(b). In comparison, Article 134, Sexual Harassment, only addresses harassment that has risen to the level of being severe or pervasive. Therefore, Judge AN’s assertion that “there is no duty to refrain from sexually harassing someone that is not sexual harassment” is wrong. (*Ruling* at para. 57). There is a duty to refrain from and prevent harassing behavior under DoDI

¹⁰ Negligence is also a way to be derelict in the performance of duties under Article 92, but Appellee was charged with willful dereliction of duty and so negligent dereliction of duty is omitted from this analysis.

¹¹ There are two other circumstances in which Sexual Harassment is criminal under Article 134, but neither are at issue based on the facts here.

1020.03 that is not sexual harassment under Article 134, UCMJ because it has not risen to the level of severe or pervasive.

Article 92, Dereliction of Duty, is not composed of a residuum of elements of Article 134, Sexual Harassment. Instead, Article 92 is distinct crime aimed at addressing the failure of service members to uphold their duties. See United States v. Marino, 2013 CCA LEXIS 467, at *3-4 (A. Ct. Crim. App. May 30, 2013) (explaining the gravamen of an Article 92, UCMJ, offense “is the disobedience itself.”). So, even if the preemption doctrine could be extended to prevent the Government from charging an offense under Article 92, Article 134, Sexual Harassment could not preempt Article 92, Dereliction of Duty. Judge AN’s ruling to the contrary was error and should be corrected by this Court.

4. Judge AN incorrectly found Article 92 was a “novel” offense under Reese and Guardado.

Judge AN’s conclusion that Specification 1 of the Charge was a “novel offense under Reece [sic] and Guardado,” was wrong. (Ruling at para. 51, 58). Neither Reese nor Guardado apply to Article 92. Both cases were decided based on the additional limit on the Government’s discretion to charge clause 1 and 2 of Article 134 enacted by the President in the Manual.

The President limited specifications for clause 1 or 2 of Article 134 by saying, “If conduct by an accused does not fall under any of the enumerated Article 134 offenses [...], a specification not listed in this Manual may be used to allege the offense.”¹²

In both Reese and Guardado, the Court explained that a “novel charge” under clause 1 or 2 of Article 134 were constrained by the President’s limit on such charges in the Manual. Reese,

¹² While at the time of Reese and Guardado, this provision was in pt. IV, para. 60.c.(6)(c) and para. 60.c.(6)(a), respectively, of the Manual, it was transferred to pt. IV, para. 91(c)(5)(a) in the 2019 edition where it remains today.

76 M.J. at 302 (analyzing “Novel Charge under Article 134, UCMJ” explaining that the offense is barred by pt. IV, para. 60.c.(6)(c) of the MCM); Guardado, 77 M.J. at 95 (analyzing the same language which was then under para. 60.c.(6)(a); *See* MCM, pt. IV, para. 91(c)(5)(a) (containing the same limiting language as analyzed in Reese and Guardado)). Like her error with the preemption doctrine and Curry, Judge AN failed to recognize the textual basis for the Court’s decision. Instead, she again treated the Court’s holdings as a holistic judicial tool to prevent the charging of any UCMJ article that might have fewer elements than another. This was error.

Judge AN’s analysis of three unpublished opinions from our sister services to seemingly conclude that the limitation on novel offenses is not based on the President’s language, but instead on due process rights, is wrong. (*Ruling* at para. 40-41)(“ Neither Army cases mention that the novel offense doctrine was based upon pt. IV, para. 60.c.(6)(c) [M.C.M.], which no longer exists.”¹³) First, neither United States v. Straker, 2018 CCA LEXIS 425 (A. Ct. Crim. App. Aug. 24, 2018), United States v. Rogers, 2019 CCA LEXIS 399 (A. Ct. Crim. App. Oct. 8, 2019), nor United States v. Hoffmann, 2020 CCA LEXIS 198 (N-M. Ct. Crim. App. 8 June 2020), is applicable to this case because the appellants in those cases were each charged with an Article 134 offense, not an Article 92 offense. As a result, the President’s limitation on charging Article 134 applied to the appellants in Straker, Rogers, and Hoffmann. But it does not apply to this case because Appellee is not charged with an offense under Article 134.

Second, the N-MCCA’s statement in Hoffmann that charging a novel offense under Article 134 when the President had enumerated a specific offense under Article 134 “may raise due process concerns” by deleting a vital element and reducing the Government’s burden is dicta

¹³ This assertion by Judge AN is wrong. The Army court did discuss para. 60.c.(6)(c) in United States v. Rogers, 2019 CCA LEXIS 399, *7-8 (A. Ct. Crim. App 8 Oct 2019).

which this Court should disregard. Hoffmann, 2020 CCA LEXIS *10. A due process violation does not occur when the Government charges one congressionally enacted criminal statute over another – even when one has fewer elements. The error of such reasoning is evident when considering that finding to the contrary would require finding a due process violation when the Government charges an accused with manslaughter rather than murder because it has fewer elements. Further, Article 92 accounts for due process considerations by requiring knowledge of the duty at issue, and DoDI 1020.30 is clear that it is punitive. Therefore, Appellee had sufficient notice that her actions could be criminal. Based on this, this Court should find the dicta from Hoffmann unpersuasive, and that the charging scheme in this case did not violate due process.

In sum, Article 92, UCMJ is not a “novel” general disorder offense subject to the President’s limitation in Article 134. So, Judge AN ruling dismissing Specification 1 of the Charge based on Reese and Guardado is error and should be overturned by this Court.

CONCLUSION

Judge AN improperly extended the preemption doctrine to prevent the Government from charging a criminal statute enacted by Congress. She failed to recognize that the preemption doctrine is grounded in the text of Article 134, she failed to abide by precedent from our superior Court that the preemption doctrine only applies to offense charged under Article 134, and she improperly applied the President's limit on novel offenses charged under Article 134 to an Article 92 specification. For these reasons, the United States respectfully requests that Court overturn the trial judge's ruling dismissing Specification 1 of the Charge and remand the case to the trial court.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force
Appellate Defense Division on 30 January 2026.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellant,

v.

Staff Sergeant (E-5)
JENNIFER Y. GALVIN,
United States Air Force,
Appellee.

**APPELLEE’S ANSWER TO
UNITED STATES’ APPEAL
UNDER ARTICLE 62, UCMJ**

Before Panel No. 1

Misc. Dkt. No. 2026-01

19 February 2026

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
AIR FORCE COURT OF CRIMINAL APPEALS**

Introduction

The Government controls the charge sheet. *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017). By charging a bizarre “sexual-harassment-lite” specification, without consulting the Office of Special Trial Counsel (OSTC), the Government undermined the court-martial’s and this Court’s jurisdiction. Even if there is jurisdiction, the specification doesn’t state an offense. Regardless of the label, the military judge was right to dismiss the specification because there is no legal duty to refrain from the conduct the Government charged and the Government impermissibly lowered its burden of proof.

Issue Presented

**WHETHER THE MILITARY JUDGE ERRED BY TERMINATING THE
PROCEEDINGS WITH RESPECT TO SPECIFICATION 1 OF THE
CHARGE.¹**

¹ While the Government worded the “issue presented” more extensively, Article 62, Uniform Code of Military Justice (UCMJ), strictly controls the permissible scope and subject matter of Government appeals. The relevant category here is Article 62(a)(1)(A), UCMJ, and the relevant scope of this Court’s review is whether the military judge erred by issuing a ruling which terminated the proceedings with respect to a specification.

Statement of the Case

Staff Sergeant (SSgt) Jennifer Y. Galvin, Appellee, is pending trial by court-martial at Shaw Air Force Base, South Carolina, for two specifications of dereliction of duty in violation of Article 92, UCMJ, 10 U.S.C. § 892. The Government filed this interlocutory appeal pursuant to Article 62, UCMJ, after the military judge dismissed one of the two specifications, Specification 1 of the Charge.

Statement of Facts

In this Article 15, UCMJ, turndown, the Government charged SSgt Galvin with two specifications of dereliction of duty, which can only be described as “creatively” drafted. *See* (Charge Sheet). Both specifications allege that SSgt Galvin was derelict in her duty by failing to refrain from various conduct. (Charge Sheet). Relevant to this appeal, Specification 1 reads:

In that STAFF SERGEANT JENNIFER Y. GALVIN, United States Air Force, who knew of her duties at or near Okinawa, Japan, between on or about 1 October 2024 and on or about 30 January 2025, was derelict in the performance of those duties in that she willfully failed to refrain from harassing conduct that was sexual in nature which created an offensive environment, in violation of Department of Defense Instruction 1020.03, paragraph 1.2., as it was her duty to do.

(Charge Sheet).

The defense moved to dismiss this specification on multiple grounds. (Appellate Ex. III). The military judge agreed on several grounds and cited at least three reasons for dismissing the specification:

1. There is no duty to refrain from sexual harassing someone that would not be considered sexual harassment;
2. Specification 1 was preempted by Article 134, UCMJ, sexual harassment; and
3. By charging a novel Article 92, UCMJ, offense that eliminated elements, the Government imperishably lowered its burden of proof.

(Ruling: Defense Motion to Dismiss For Failure to State and Offense and Preemption at 12

[hereinafter Ruling]). The military judge dismissed Specification 1 of the Charge without prejudice on December 16, 2025. (*Id.* at 12).

On December 18, 2025, the Government moved for reconsideration. (Government Motion to Reconsider Ruling on Defense Motion to Dismiss). The military judge denied the Government's motion on December 19, 2025, noting that the Government "fail[ed] to establish reconsideration of the Court's ruling" because the Government "provided no additional facts and only include[d] law already cited by the defense's filing and by this Court's ruling." (Ruling: Government Motion for Reconsideration on Defense Motion to Dismiss for Failure to State an Offense and Preemption at 2). Following this denial, on December 22, 2025, the Government filed its Notice of Appeal, pursuant to Article 62(a)(1)(A), UCMJ.

Argument

I. Standard of Review

In Article 62, UCMJ, appeals, "this [C]ourt reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial." *United States v. Lewis*, 78 M.J. 447, 452 (C.A.A.F. 2019) (quoting *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017)) (emphasis added). Article 62, UCMJ, limits this Court's authority to "act only with respect to matters of law." 10 U.S.C. § 862(b). Thus, this Court is "bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous." *Pugh*, 77 M.J. at 3 (citing *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004)). This Court may not "find its own facts or substitute its own interpretation of the facts." *United States v. Becker*, 81 M.J. 483, 489 (C.A.A.F. 2021) (quoting *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007)).

II. This Court lacks jurisdiction to hear this appeal.

This Court has an independent obligation to determine whether jurisdiction exists prior to addressing the merits of an interlocutory appeal. *M.W. v. United States*, 83 M.J. 361, 363 (C.A.A.F. 2023), *recons. denied*, 83 M.J. 461 (C.A.A.F. 2023) (quotation omitted). The burden of establishing jurisdiction rests on the entity asserting jurisdiction. *Ctr. For Const. Rts. v. United States*, 72 M.J. 126, 128 (C.A.A.F. 2013) (citations omitted). The Government contends this case is within this Court’s jurisdiction under Article 62(a)(1)(A), UCMJ, 10 U.S.C. § 862(a)(1)(A). (U.S. Appeal Under Article 62, UCMJ [hereinafter Gov. Br.] at 8). However, this court-martial was referred without authorization, rendering the court-martial and this Court without jurisdiction.

Article 24a, UCMJ, codifies the duties and authorities of the OSTC. The statute asserts that the OSTC has “exclusive authority to determine if a reported offense is a covered offense and *shall* exercise authority over any such offense.” 10 U.S.C. §824a(c)(2)(A) (emphasis added). Similarly, Rule for Courts-Martial (R.C.M.) 303A(a) states that the OSTC has “the exclusive authority to determine if a reported offense is a covered offense.” A “reported offense” is consistent with “report of offense” under R.C.M. 301(a), which broadly covers any possible conduct that could be subject to trial by court-martial. *See* R.C.M. 303 (discussing how commanders shall inquire into the suspected offenses “upon receipt of information that a member . . . is accused or suspected of committing an offense . . . triable by court-martial”). In 2023, R.C.M. 301 was amended to “ensure special trial counsel are made aware of all allegations of covered offenses” considering “special trial counsel *must* exercise authority over a covered offense.” *Manual for Courts-Martial, United States* (2024 ed.) [hereinafter *MCM*], app. 15 at A15-5, A15-6 (emphasis added).²

² Unless otherwise noted, all references to the *MCM* are to the 2024 version.

Depending on the timing of the conduct, sexual harassment is a “covered offense” under the authority of the OSTC via two statutes. First, as defined by Article 1, subsection 17(A). 10 U.S.C. § 801(17)(A) (listing sexual harassment as a covered offense); *see* Pub. L. 117–263, div. A, title V, §541(b), Dec. 23, 2022, 136 Stat. 2580 (showing the effective date for sexual harassment as a covered offense was January 1, 2025, to apply to offenses occurring after that date). Second, via specifically identified “authority over certain other offenses” in 10 U.S.C. § 824a:

After January 1, 2025, a special trial counsel may, *at the sole and exclusive discretion of the special trial counsel*, exercise authority over the following offenses:

- (A) The standalone offense of sexual harassment punishable under section 934 of this title (article 134) in each instance in which-
 - (i) the offense occurs after January 26, 2022, and on or before January 1, 2025; and
 - (ii) a formal complaint is substantiated in accordance with regulations prescribed by the Secretary concerned.

10 U.S.C. § 824a(d)(2) (emphasis added). The Charge Sheet indicates the offense occurred when OSTC had the authority to exercise jurisdiction *and was required* to exercise authority, as the conduct extended past January 1, 2025. *See* (Charge Sheet at 1) (showing date range from “on or about 1 October 2024 and on or about 30 January 2025”).

The reported conduct here was “sexual harassment,” as investigated by the Security Forces Squadron. (Security Forces Report of Investigation at 1); *see* (Notice of Formal Military Sexual Harassment Complaint, KAD-RC-25-05537) (showing a formal “sexual harassment” complaint was made). Since the reported offense was characterized as “sexual harassment,” it should have been sent to OSTC for evaluation, the entity with the *exclusive* authority to determine whether this reported sexual harassment offense was a “covered offense.” 10 U.S.C. § 824a(c)(2)(A); R.C.M. 303A(a). Based on the report of investigation and the conduct therein, the allegations seem to fall within the standalone offense of sexual harassment. (Air Force Form 1168, *Statement of*

Suspect/Witness/Complainant, H.P.,³ Jan. 30, 2025.) Since the conduct occurred after January 26, 2022, and extended beyond January 1, 2025, and was derived from a formal substantiated complaint, both 10 U.S.C. § 824a(d)(2) and 10 U.S.C. § 801(17)(A) apply. (*Id.*) The OSTC had the sole and exclusive authority to exercise authority over the entirety of the conduct, but was congressionally required to exercise authority over sexual harassment occurring after January 1, 2025. 10 U.S.C. § 824a(c)(2)(A).

Rather than reporting the offense to OSTC for evaluation, it seems the command simply bypassed OSTC and issued nonjudicial punishment. (Air Force Form 3070A, Record of Nonjudicial Punishment Proceedings (AB thru SSgt), May 8, 2025). Furthermore, following the nonjudicial punishment turn-down, there is nothing in the record indicating any coordination with OSTC on taking a sexual harassment offense to court-martial. While this case is not charged under Article 134, UCMJ, sexual harassment, tying in with the issues on appeal, it is clearly a sexual harassment case. *See* (Ruling at 11) (“The conduct the government charged in Specification 1 of the Charge is intended to capture sexual harassment as covered by Article 134, U.C.M.J.”); (Security Forces Report of Investigation at 1) (investigating “sexual harassment”); (Notice of Formal Military Sexual Harassment Complaint, KAD-RC-25-05537) (characterizing the complaint as “sexual harassment”).

This circumvention of OSTC authority rises to the level of jurisdiction error. Failing to comply with the congressional requirements surrounding OSTC eliminates jurisdiction by severing the convening authority’s authorization to dispose of this offense. *See United States v. Henderson*, 59 M.J. 350, 352-53 (C.A.A.F. 2004) (finding a jurisdictional defect in referral where

³ As there are multiple witness statements in the record, the complainant’s initials are included here for ease of identification.

the convening authority lacked the authorization to refer the offense at issue). For a court-martial to have jurisdiction, “[e]ach charge before [it] must be referred to it by competent authority.” R.C.M. 201(b)(3). A “competent authority,” as used in other parts of the *MCM*, has been defined as “a person authorized by applicable law to give such an order.” *United States v. Smith*, 68 M.J. 316, 320 (C.A.A.F. 2010) (citing *United States v. Deisher*, 61 M.J. 313, 317 (C.A.A.F. 2005)).

Here, the special court-martial convening authority was not authorized by applicable law to order referral of the charge and specifications to trial before a special court-martial. *See* (1st Indorsement, 18 WG/CC, Special Court-Martial Referral – *United States v. Jennifer Y. Galvin*) (directing the charge and specification to be referred to trial by Special Order AB-1). Congress explicitly withheld such authority for covered offenses under Article 24a, UCMJ, and OSTC had not evaluated whether the reported sexual harassment offense here was such a covered offense that *required* the OSTC to exercise authority. R.C.M. 303A, 306, and 306A work in concert to authorize a commander to dispose of an offense only after a special trial determines whether a reported offense is a covered offense and only after special trial counsel defers the offense if so. *Cf. United States v. Kruse*, No. 202500370, 2026 CCA LEXIS 13, at *10 (N-M Ct. Crim. App. Jan. 21, 2026) (finding that *after* OSTC deferred on the covered offense, the Government could prosecute the same reported offense if the Government charged the reported offense as a non-covered offense). Here, there is no evidence the requirements that would have conferred authority to the special court-martial convening authority to refer the charge to a court-martial were met.

Article 62, UCMJ, jurisdiction is predicated on a valid and authorized “trial by general or special court-martial.” 10 U.S.C. § 862(a)(1). But no such trial by special court-martial exists here. Where the special court-martial was unlawfully ordered, no jurisdiction exists to try the

specification at issue, let alone appeal its termination. This Court should dismiss the Article 62, UCMJ, appeal for lack of jurisdiction.

III. The military judge did not err in dismissing Specification 1.

The military judge's ruling cited several bases for dismissing Specification 1 of the Charge. (Ruling at 12); *supra* at 2. If any of these bases are valid, then the dismissal should stand. This Court may or may not wish to clarify other points of unsettled law, but it should only reanimate the specification if it finds *all* the military judge's bases for dismissal invalid. But, even then, if this Court were to disagree with all the military judge's bases for dismissal, but would reach the same result on one of the other rationales raised by the defense, it should still deny the Government appeal. *See United States v. Robinson*, 58 M.J. 429, 433 (C.A.A.F. 2003) (finding that "the military judge reached the correct result, albeit for the wrong reason"); *United States v. Leiffer*, 13 M.J. 337, 345 n.10 (C.A.A.F. 1982) (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)) ("[I]n the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." (alteration in original)); *United States v. Suarez*, 2017 CCA LEXIS 631, at *14 (A. Ct. Crim. App. Sep. 27, 2017) (citing *United States v. Carista*, 76 M.J. 511, 515 (A. Ct. Crim. App. 2017)) (considering the "Tipsy Coachman doctrine" in an Article 62, UCMJ, appeal where the appellate court could "arrive at the same result as the military judge, albeit for different reasons").

1. The Specification Does Not State a Cognizable Duty and Thus Fails to State an Offense.

At the heart of the military judge's ruling, is the finding that there is no duty to refrain from sexually harassing behavior that does not rise to the level of sexual harassment. (Ruling at 12). This rationale alone is sufficient grounds to dismiss the specification. The first element of a dereliction of duty is that the charged duty exists. *See MCM*, pt. IV, ¶ 18(b)(3)(a). If this Court

agrees with the military judge that the specification does not allege violation of a prosecutable duty, the military judge's ruling should stand.

“The focus of a motion to dismiss for failure to state an offense is the specification itself.” *United States v. Aaron*, 54 M.J. 538, 547 (A.F. Ct. Crim. App. 2000) (first citing *United States v. Galchick*, 52 M.J. 815, 816 (A.F. Ct. Crim. App. 2000); and then citing *United States v. Commander*, 39 M.J. 972, 980 (A.F.C.M.R. 1994)). “[T]o avoid dismissal for failure to state an offense, the specification must contain the elements of the offense intended to be charged in sufficient detail to give the accused notice of the allegations against him and allow him to prepare to defend against those allegations.” *Id.* (citing *United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953)).

Here, what the Government charged is something other than a duty to refrain from sexual harassment that does not provide notice of a cognizable duty. As the military judge noted, at least two elements were eliminated that would otherwise be required for sexual harassment: a named victim and the subjective perception of that victim. (Ruling at 11); *see infra* at 15-18 (discussing the due process problems caused by the Government eliminating elements). The Government charged a duty that reads like sexual harassment, but is missing key requirements that would otherwise create a duty. (Ruling at 11).

Furthermore, the “severity” element of sexual harassment is missing. Reference to Department of Defense Instruction (DoDI) 1020.03, *Harassment Prevention and Response in the Armed Forces*, reveals there is no watered down definition of sexual harassment as the Government contends. The first version of the regulation defines sexual harassment in very conventional terms, tracking closely the language of the new Article 134, UCMJ, sexual harassment, and specifically requiring, *inter alia*, that it be “severe or pervasive.” *See* Department

of Defense Instruction (DoDI) 1020.03, *Harassment Prevention and Response in the Armed Forces*, Feb. 8, 2018 (Change 2, Dec. 20, 2022) [hereinafter DoDI 1020.03 (Change 2)] at Glossary, “sexual harassment.” The second version of the regulation defines sexual harassment as: “A category of harassment that is sexual in nature” and specifically refers to the *MCM* provision on Article 134, UCMJ, sexual harassment. See DoDI 1020.03, *Harassment Prevention and Response in the Armed Forces*, Feb. 8, 2018 (Change 3, Jan. 17, 2025) [hereinafter DoDI 1020.03 (Change 3)] at Glossary, “sexual harassment.”

The Government agrees that Article 134, UCMJ, prohibits sexual harassment that is “severe, repetitive, or pervasive.” See (Gov. Br. at 13, 33-34). But the Government does not argue that SSgt Galvin engaged in “severe, repetitive, or pervasive” sexual harassment – nor that the charged duty is to refrain from “severe, repetitive, or pervasive” sexual harassment. (Gov. Br. at 33-34). To the contrary, the Government argues that “DoDI 1020.03, paragraph 1.2, establishes a duty to prevent harassing behavior *before* it rises to the level of severe or pervasive.” (Gov. Br. at 12).⁴ As such, the Government on appeal characterizes the first element as follows:

That the accused had a duty to prevent harassing behavior that is offensive to a reasonable person, unwelcome to an aggrieved party, and creates an offensive environment *before it rises to the level of severe or pervasive* (DoDI para. 1.2.(b))

(Gov. Br. at 33).

But, as noted, the Government did not charge or put SSgt Galvin on notice of any

⁴ Notably, if the harassment was not “severe” or “pervasive,” the Government will not be able to prove that there was a direct and palpable effect on the military mission or environment, which will be required if speech or otherwise protected First Amendment conduct is involved in this case. *United States v. Grijalva*, 84 M.J. 433, 438 (C.A.A.F. 2024) (quoting *United States v. Wilcox*, 66 M.J. 442, 447 (C.A.A.F. 2008)) (holding that the Government is required to prove a direct and palpable connection to a military mission or military environment where a specification “implicat[es] the First Amendment”).

“aggrieved party” or charge that such individual perceived the conduct as “unwelcome.” *Compare* (Gov. Br. at 33), *with* (Charge Sheet). In fact, what the Government lists in its brief as the duty is an inaccurate and unreasonable recitation of the DoDI and the elements charged or necessarily implied here.⁵ *See United States v. Turner*, 79 M.J. 401, 403 (C.A.A.F. 2020) (quoting *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)) (reiterating that a specification is constitutionally sufficient only if it alleges, “either expressly or by necessary implication,” “every element” of the offense, “so as to give the accused notice [of the charge against which he must defend] and protect him against double jeopardy” (alteration in original)). The DoDI does not create the duty the Government asserts nor is it the purported duty the Government charged.

Paragraph 1.2(b) is separated by semicolons and the word “or,” as broken down below:

The DoD’s goal is to prevent harassing behavior that is
[1] offensive to a reasonable person;
[2] unwelcome to an aggrieved party and creates conditions that interfere with work performance; or
[3] creates an intimidating, hostile, or offensive environment before it rises to the level of severe or pervasive.

DoDI 1020.03 (Change 2) at ¶1.2(b).⁶ The separation of these clauses by the word “or” creates a

⁵ The Government seems to be suggesting that the referenced language creates an offense out of mild or “not-pervasive” conduct that would fall below the required level of severity to constitute sexual harassment. But the only way that one could fail to prevent sexual harassment from rising to the level of severe or pervasive, was if it *did* rise to the level of severe or pervasive. The confusing linguistics aside, reference to the DoDI itself clearly belies any notion that it waters down the definition of sexual harassment as the Government contends. As noted above, both versions of the regulation contain the “severe or pervasive” requirement, either expressly or through reference to Article 134 sexual harassment. *See* DoDI 1020.03 (Change 2), at Glossary (requiring “severe or pervasive”); DoDI 1020.03 (Change 3), at Glossary (requiring “repeated deliberate offensive” conduct or conduct punishable under Article 134, UCMJ, sexual harassment, which requires conduct to be “severe, repetitive, or pervasive”).

⁶ There is no difference in the language between Change 2 and Change 3 of this instruction. DoDI 1020.03 (Change 3) at ¶1.2(b).

disjunctive; each is a standalone basis defining “harassing behavior” that the Government seeks to prevent. *See United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (quoting Earl T. Crawford, *The Construction of Statutes* § 188 (1940)) (“In ordinary use the word ‘or’ . . . marks an alternative which generally corresponds to the word ‘either.’” (omission in original)); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (“Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not.”).

Yet the Government did not charge any complete clause here. While the Government asserts the duty is a blend of the three prevention goals in the DoDI, the specification only asserts part of one: “harassing conduct that was sexual in nature which *created an offensive environment*.” (Charge Sheet) (emphasis added). This language can only be reasonably construed to capture a portion of goal three [3] listed above: prevention of harassing behavior that “creates an . . . offensive environment.” DoDI 1020.03 (Change 2) at ¶1.2(b); DoDI 1020.03 (Change 3) at ¶1.2(b). It does not fairly capture, even by reference, what the Government on appeal asserts is the duty. (Gov. Br. at 33). The military judge’s findings support that; the military judge noted that no victim or victim’s perception was alleged, contrary to the Government’s sudden recasting of the specification here. (Ruling at 11); *compare* (Gov. Br. at 33) (noting the purported duty requires an “aggrieved party”), *with* (Charge Sheet) (failing to specify any aggrieved individual).

At trial, the Government seemed to suggest that the relevant distinction was that the specification was not aimed at sexual harassment at all, but a more generic form of harassment. (R. at 38-39). During the Article 39(a), UCMJ, session, trial counsel pointed to the glossary of DoDI 1020.03 to draw a distinction between “harassment” and “sexual harassment,” apparently arguing that SSgt Galvin was being charged with the former rather than the latter. (R. at 39). This

argument is hard to reconcile with the Government’s own charging language, which specifically alleges “harassing conduct *that was sexual in nature. . .*” (Charge Sheet) (emphasis added). This language tracks exactly DoDI 1020.03’s definition of sexual harassment as: “A category of *harassment that is sexual in nature. . .*” See DoDI 1020.03 (Change 3) at Glossary, “sexual harassment” (emphasis added).⁷ The Government cannot save this specification from failing to state an offense by arguing it means something other than what the plain language says, whether at trial or on appeal. See (Gov. Br. at 33-34) (asserting, in one breath, the duty is to “prevent” harassing behavior and then, in another, changing the duty into “refraining from” harassing behavior”). Only the language contained in the specification is considered when deciding whether a specification properly states an offense. *Turner*, 79 M.J. at 403 (citing *United States v. Sutton*, 68 M.J. 455 (C.A.A.F. 2010)). Here, there is no duty when “only adopt[ing] interpretations that hew closely to the plain text” of the specification, as required. *Id.* (quoting *United States v. Fosler*, 70 M.J. 225, 230 (C.A.A.F. 2011)).

Furthermore, the Government provides no precedent that would allow prosecution of a diluted sexual harassment offense, such as that charged here. See (Gov. Br. at 31) (arguing Article 92, UCMJ, remains a valid way to charge sexual harassment).⁸ The specification in *United States*

⁷ The military judge specifically found that: “The conduct the government charged in Specification 1 of the Charge is intended to capture sexual harassment” (Ruling at 11); see (Ruling at 1) (finding as fact the Government preferred a specification “of dereliction of duty for *sexual harassment*” (emphasis added)). This is a finding of fact, which is binding in the context of an Article 62, UCMJ, appeal. *Pugh*, 77 M.J. at 3 (citing *Gore*, 60 M.J. at 185); *Becker*, 81 M.J. at 489 (*Cossio*, 64 M.J. at 256). While the conclusion that this offense deals with the subject matter of sexual harassment seems inescapable, to the extent this Court agrees it is a question of fact, it is further unassailable given that Article 62, UCMJ, appeals deal only with questions of law.

⁸ The non-binding decision from the Army Court of Criminal Appeals does not discuss the charging scheme involved, so it cannot be persuasive. *United States v. Cobb*, No. ARMY

v. Goodman was consistent with the sexual harassment definition in that, to constitute sexual harassment, a dereliction of duty required that the conduct was (1) *unwelcome*, (2) sexual in nature and (3) created an offensive *working* environment. 70 M.J. 396, 397-98 (C.A.A.F. 2011). The same definition is involved in *United States v. Kroop*, 34 M.J. 628, 635 n.2 (A.F.C.M.R. 1992). There, the unique Article 133, UCMJ, offense appeared to incorporate the elements of a violation of “Air Force Regulation 30-2, *Social Actions Program*, (April 1986), charged under Article 92, UCMJ.” *Id.* That regulation, while now outdated, provided, at minimum, that sexual harassment required (1) *unwelcome* (2) conduct of a sexual nature when (3) “such conduct . . . creates an . . . offensive environment.” United States General Accounting Office, Report to Congressional Requesters, DoD Service Academies More Actions Needed to Eliminate Sexual Harassment at 16-17 (Jan. 1994), <https://www.gao.gov/assets/nsiad-94-6.pdf>. The surrounding definitions all suggest the “environment” at issue is the *work* environment. *Id.* In these cases, the specification incorporated the regulation’s language. There was no deviation to rewrite the duty as prescribed by the regulations.

All this goes to the heart of the problem of this specification: it attempts to lower the Government’s burden by creating a convoluted duty not to engage in sexual-harassment-like conduct that does not rise to the level of sexual harassment. This is an improper expansion of the scope of criminal exposure and is not grounded in any cognizable duty. Airmen are prohibited from engaging in sexual harassment and can be criminally prosecuted for violating this prohibition. 10 U.S.C. § 934. But there is a limit to the scope of their criminal exposure. If conduct does not rise to the level of sexual harassment, the Government cannot lower the bar and prosecute them

20140631, 2016 CCA LEXIS 366, at *1 (A. Ct. Crim. App. May 27, 2016) (per curiam). And *United States v. Pope* is not a sexual harassment case, but rather about the conduct between recruiters and applicants, which had specific rules inapposite here. 63 M.J. 68, 71 (C.A.A.F. 2006).

for conduct that does *not* constitute sexual harassment, as charged here, because there is no cognizable duty. Therefore, the specification was properly dismissed for failing to state an offense.

2. The Government Lowered Its Burden of Proof by Deleting Elements and Thus Violated SSgt Gavlin's Due Process Rights.

The Sixth Amendment provides that an accused shall “be informed of the nature and cause of the accusation” against her. U.S. Const. amend. VI. Further, the Fifth Amendment provides that no person shall be “deprived of life, liberty, or property, without due process of law,” and no person shall be “subject for the same offence to be twice put in jeopardy.” U.S. Const. amend V. These constitutional safeguards underpin the failure to state an offense analysis. *Turner*, 79 M.J. at 403.

The military judge's ruling was correct in that the Government eased its burden by eliminating elements from sexual harassment, “making it easier for the government to get a conviction” (Ruling at 11). The military judge properly cited caselaw expressing how the Court of Appeals for the Armed Forces (CAAF) is unwilling to allow the Government to delete elements from crimes, thereby lowering its burden. (Ruling at 6, 11) (citing *United States v. McGuinness*, 35 M.J. 149, 152 (C.A.A.F. 1992)). Whether in the context of Article 134, UCMJ, or otherwise, this practice implicates due process concerns, as noted by the military judge and the Navy-Marine Corps Court of Criminal Appeals case cited by the military judge. (Ruling at 8) (citing *United States v. Hoffmann*, No. 201400067, 2020 CCA LEXIS 198, at *10 (N-M Ct. Crim. App. June 8, 2020)); *see also United States v. Mendoza*, 85 M.J. 213, 220 (C.A.A.F. 2024) (discussing how the circumvention of elements “raises serious due process concerns”).

Due process is the fundamental underpinning of the military judge's ruling. Characterizing the circumvention of elements as “preemption” or a violation of the “novel offense doctrine” is immaterial where, no matter the label, the due process clause bars the prosecution of this

specification because it impermissibly lowers the Government's burden of proof. The Government has never satisfactorily explained how it is proper to remove multiple elements from sexual harassment and yet still criminally charge SSgt Galvin for this "sexual-harassment-lite" offense. Perhaps an easier way of saying it is simply, as outlined above, that there is no duty not to engage in sexually harassing conduct that does not meet the definition of sexual harassment.

While the Government argues that the military judge was improperly applying the preemption doctrine outside the context of Article 134, UCMJ, the military judge explicitly acknowledged her underlying reasoning was all about the Government lessening its burden. *See* (Ruling at 10) (finding the Government eliminated sexual harassment's requirement for a victim by charging an Article 92, UCMJ, offense); (Ruling at 11) (finding the rationale of preemption to be grounded in lessening the Government's burden, which, here included failing to identify a victim and removing the terminal element).⁹ These issues highlight and exacerbate the Government's failure to state an offense in this specification and support the military judge's conclusion to dismiss the specification. At worst, there is some confusion as to how to describe the due process issue present here, but the Government invited much of this confusion by choosing to charge SSgt Galvin with an extremely confusing specification.¹⁰

For the due process problem captured here, Congress' intent to occupy the field may not

⁹ The military judge also explicitly acknowledged that it was not the Article 134, UCMJ, preemption doctrine itself that was at play. *See, e.g.,* (Ruling at 6). The military judge was clearly using the term preemption in a more generic sense, as this Court's superior court has in the past. *See United States v. Curry*, 28 M.J. 419, 424 (C.M.A. 1989).

¹⁰ The Government suggests that the offense it charged is a "congressionally enacted criminal statute" on an equal footing with Article 134, UCMJ, sexual harassment or any other punitive article. (Gov. Br. at 36). Article 92, UCMJ, writ-large is a congressionally enacted statute, but the specific charging language at issue is not. Congress did not create a sexual-harassment-lite offense, especially not in the way the Government has charged here. The specification as charged is, at best, the Government's strained, piecemeal interpretation of a departmental policy regulation.

be a required step in the analysis. *See Mendoza*, 85 M.J. at 219-20 (looking at the plain language of the statute to assess whether elements were eliminated). Rather, the fact that there is no legal duty to refrain from the charged conduct as contemplated by DoDI 1020.03, ¶1.2, seems sufficient. *Supra* at 8-15. The effect of the Government’s charging scheme is the due process problem.

Furthermore, searching for congressional intent, even within the Article 134, UCMJ, preemption doctrine, is a controversial and outmoded consideration. *See United States v. Grijalva*, 84 M.J. 433, 439 (C.A.A.F. 2024) (declining to delve into legislative history to ascertain Congress’ intent where the elements are “essentially the same”); *id.* at 440 (Hardy, J., concurring) (“The congressional-intent prong of this Court’s preemption doctrine is entirely judge-made law with no basis in the Constitution, the UCMJ, or the Manual for Courts-Martial.”). To the extent congressional intent to occupy the field is a required consideration in this context, the military judge’s analysis was sound. (Ruling at 11). Additionally, Congress’ delineation of sexual harassment as a covered OSTC offense, as discussed above, adds to the conclusion that Congress intended sexual harassment prosecutions to be conducted under Article 134, UCMJ, sexual harassment. *Supra* at 4-8. Placing sexual harassment within OSTC’s purview, but simultaneously allowing sexual harassment prosecutions under extraneous charging theories, thereby bypassing OSTC, would be contrary to Congress’ expressed intent.¹¹ *But see Kruse*, No. 202500370, 2026 CCA LEXIS 13, at *10

¹¹ For what it is worth, the Government’s reference to Senator Hirono’s statement that military leaders should do “everything possible” to fight sexual harassment is not particularly persuasive to any relevant inquiry in this case. *See* (Gov. Br. at 31-32). That said, it is interesting that the Government invokes this Congressional statement about sexual harassment while simultaneously contending this is not a sexual harassment case. *Compare* (Gov. Br. at 31-32) (asserting via reference to this quote that the Government is using an authorized statute to prosecute sexual harassment), *with* (R. at 38-39) (arguing at trial that the Government was prosecuting conduct less than sexual harassment that constituted just “harassment”).

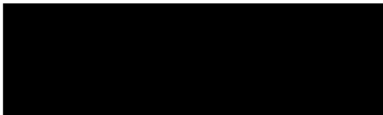
(permitting the Government to pursue an Article 128, UCMJ, offense after OSTC deferred on the same conduct identified as an Article 128b, UCMJ, “covered offense”). Regardless of whether OSTC participated in this case at all, the due process concerns remain and are best captured by the military judge’s determination that the Government removed elements that otherwise would have created a legally cognizable duty. Therefore, the military judge did not err by dismissing the specification. Ultimately, even if this Court disagrees with all the military judge’s bases for dismissal but would reach the same result on other grounds, it should still deny the Government’s appeal.

Conclusion

Wherefore, SSgt Galvin respectfully requests this Court deny the Government’s appeal by finding that the Court (and court-martial) lack jurisdiction or, assuming jurisdiction, by affirming the trial judge’s ruling dismissing Specification 1 of the Charge.

Respectfully submitted,


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SAMANTHA M. CASTANIEN
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Appellate Defense Counsel


CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 19 February 2026.

[REDACTED]

SAMANTHA M. CASTANIEN, Maj, USAF
Appellate Defense Counsel

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	NOTICE OF APPEARANCE
<i>Appellee,</i>	)	OF COUNSEL
	)	
v.	)	
	)	Before Panel No. 1
	)	
Staff Sergeant (E-5)	)	Misc. Dkt. No. 2026-01
JENNIFER Y. GALVIN,	)	
United States Air Force,	)	19 February 2026
<i>Appellant.</i>	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
AIR FORCE COURT OF CRIMINAL APPEALS

COMES NOW, Scott R. Hockenberry, pursuant to Rule 12 of this Court's Rules of Practice and Procedure, and hereby files this written notice of appearance. In addition, counsel hereby informs this Court that: (1) his business mailing address is: 20079 Stone Oak Parkway, Suite 1005-506, San Antonio, TX 78258; (2) his phone number is: (586) 930-8359; (3) his business email is: hockenberry@militaryattorney.com; and (4) he is a member of this Court's bar.

Respectfully submitted,

[REDACTED]

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Civilian Appellate Defense Counsel

[REDACTED]
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[REDACTED]
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 19 February 2026.

[REDACTED]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellant,</i>	)	UNITED STATES' REPLY BRIEF
	)	
	)	
v.	)	Before Panel No. 1
	)	
Staff Sergeant (E-5)	)	Misc. Dkt. No. 2026-01
JENNIFER Y. GALVIN,	)	
United States Air Force	)	26 February 2026
<i>Appellee.</i>	)	

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

1. This Court cannot consider Appellee's arguments that go beyond the trial judge's ruling.

Appellee seeks to have this Court decide this Article 62 appeal based on issues other than those encompassed by the military judge's order being appealed. This Court should decline. In considering appeals under Article 62, UCMJ, this Court is confined by statute to considering whether a trial judge's ruling that terminated the proceeding was correct. *See* Article 62(a)(1)(A), UCMJ (the Government may appeal an order or ruling which terminates the proceedings with respect to a specification). "[A]n appeal must actually fall within the strictures of Article 62(a)(1)(A)-(F) . . . , UCMJ, to create appellate jurisdiction." United States v. Badders, 82 M.J. 299, 302 (C.A.A.F. 2022) (quotation and citation omitted). As a result of this Court's limited jurisdiction in Article 62 appeals, Appellee cannot inject new arguments that were not considered by the trial judge to argue that the proceedings could be terminated on other grounds. As the Army Court of Criminal Appeals has explained, this Court's job is to "determine whether the trial judge erred as a matter of law, not to determine how we would decide the same issue in

the first instance.” United States v. Suarez, 2017 CCA LEXIS 631, at *13 (A. Ct. Crim. App. Sep. 27, 2017).

In this case, the trial judge determined as a matter of law that the preemption doctrine and the President’s limit on novel general disorder offenses prevented the Government from charging Appellee under Article 92, UCMJ. The scope of this Court’s jurisdiction for this appeal is to determine whether that decision was error as a matter of law. Appellee makes two arguments which attempt to push this Court beyond the trial judge’s ruling: (1) that this Court lacks jurisdiction because the court-martial lacked jurisdiction based on an alleged failure to coordinate with the Office of Special Trial Counsel (OSTC); and (2) that this Court can affirm the judge’s ruling if it finds dismissal appropriate for a different reason, such as failure to state an offense, not considered by the trial judge. (App. Br. at 4-7, 8) (citing the “tipsy coachman” doctrine). This Court should decline to consider these arguments because they do not address whether the judge erred as a matter of law with respect to the appealed ruling when she applied the preemption doctrine and the President’s limit on novel general disorder offenses to dismiss Specification 1 of the Charge. Appellee has the opportunity to raise the jurisdictional issue related to OSTC in front of the trial court when her case resumes. Assuming the trial court rules against her and she is convicted, she can appeal the jurisdictional issue and the military judge’s other ruling on failure to state an offense through an Article 66, UCMJ direct appeal. Those are the proper forums for addressing those issues – not an Article 62 appeal on a different ruling.

An appellee can challenge a Court of Criminal Appeal’s (CCA’s) jurisdiction to hear an Article 62 based on whether the appeal itself falls “within the strictures of Article 62(a)(1)(A)-(F), UCMJ.” United States v. Jacobsen, 77 M.J. 81, 85 (C.A.A.F. 2017.) For example, an appellee can challenge jurisdiction based on whether the ruling actually “terminated the

proceedings with respect to a charge or specification.” See Badders, 82 M.J. at 303. But Appellee has cited no authority that allows her to raise whether the court-martial itself had jurisdiction for the first time before a CCA during an Article 62 appeal on another matter. Article 62(a) allows the Government to appeal certain rulings or order “in a trial by general or special court-martial.” Here, Appellee was being tried at an ongoing special court-martial that Appellee never challenged below for jurisdiction. A presumption of regularity attaches to the actions of the convening authority in carrying out his or her duties under the Rules for Courts-Martial and the UCMJ. United States v. Bess, 80 M.J. 1, 10 (C.A.A.F. 2020). This alone should be enough to cursorily satisfy this Court of its jurisdiction to hear the Article 62 appeal. This Court should not go beyond its statutory authority in Article 62(a)(1) to review orders and rulings of the military judge by entertaining a completely new challenge by Appellee to the court-martial’s jurisdiction that was not before the trial court.

But, even if this Court chooses to consider Appellee’s new arguments, they have no merit, and this Court should conclude that the trial judge erred in dismissing the specification at issue.

2. This Court has jurisdiction.

As explained in the initial brief, the Government has satisfied the jurisdictional requirements under Article 62, UCMJ. Additionally, as explained above, this Court should not consider Appellee’s argument that this Court lacks jurisdiction, since it was not raised below at Appellee’s court-martial and is not part of the trial judge’s ruling being appealed. But even if this Court were to consider Appellee’s argument that this Court lacks jurisdiction, it would fail because it is factually incorrect.

Appellee's claims that the Government did not report the offense to the OSTC before issuing nonjudicial punishment or coordinate with the OSTC before the court-martial are wrong.¹ (App. Br. at 6). The Government coordinated with the OSTC for both the initial investigation and nonjudicial punishment turndown and received deferrals for both. (Appendix B, Declaration on OSTC Coordination). Because the premise of Appellee's argument has no merit, her claim that failing to coordinate with the OSTC impacts this Court's jurisdiction fails.

3. The judge erred by dismissing Specification 1 of the Charge.

This Court should find it telling that Appellee seems unwilling to defend the judge's application of the preemption doctrine and the President's limit on novel offenses in her ruling. Instead, Appellee resorts to claiming that the judge was concerned with failure to state an offense and that the judge was not applying the preemption doctrine but was analyzing a general due process concern for "circumventing elements." (App. Br. at 8, 15, 16 n.9). As explained below, the judge's ruling was focused on the preemption doctrine, not failure to state an offense or a general due process concern and neither failure to state an offense or the due process clause supports dismissing Specification 1 of the Charge. But importantly, Appellee's attempt to dance around the judge's analysis emphasizes how wrong the judge's ruling was. It is indefensible. Neither the preemption doctrine nor the President's limit on general disorder offenses under Article 134 prevented the Government from charging Appellee as it did. Therefore, this Court should correct the judge's errors and reverse her ruling.

¹ Although Appellee complains that there is nothing in the record reflecting that the Government coordinated with the OSTC, this is unsurprising. Appellee failed to raise this jurisdictional challenge at the proper level – the trial court – where the record would have been developed.

A. Specification 1 of the Charge states an offense.

Even if this Court were to entertain Appellee's alternative arguments that were not encompassed by the appealed ruling, Appellee cannot prevail. Specification 1 of the Charge states an offense. A specification is "constitutionally sufficient" if it alleges "either expressly or by necessary implication, every element of the offense so as to give the accused notice [of the charge against which he must defend] and protect him against double jeopardy." United States v. Turner, 79 M.J. 401, 403 (C.A.A.F. 2020) (citation and quotation omitted) (alteration in original).

Upon further review, the Government agrees with Appellee's assertion that Department of Defense Instruction (DoDI) 1020.03, para. 1.2 should be read disjunctively based on the semi-colons and the word "or." (App. Br. at 11-12). The Government agrees that the regulation creates three separate duties to prevent harassing behavior. Those three duties are to prevent harassing behavior that is (1) offensive to a reasonable person; (2) unwelcome to an aggrieved party and creates conditions that interfere with work performance; or (3) that creates an intimidating, hostile, or offensive environment before it rises to the level of severe or pervasive. But, contrary to Appellee's argument, Specification 1 of the Charge properly states an offense because it alleges every element of Article 92, UCMJ, gives Appellee notice of the charge against which she must defend, and protects her from double jeopardy. Turner, 79 M.J. at 403.

The elements of Article 92, UCMJ, are

- (1) That the accused had certain duties;
- (2) That the accused knew or reasonably should have known of the duties; and
- (3) That the accused was willfully derelict in the performance of those duties.

Specification 1 of the Charge alleges,

In that STAFF SERGEANT JENNIFER Y. GALVIN, United States Air Force, who knew of her duties at or near Okinawa, Japan, between on or about 1 October 2024 and on or about 30 January 2025, was derelict in the performance of those duties in that she willfully failed to refrain from harassing conduct that was sexual in nature which created an offensive environment, in violation of Department of Defense Instruction 1020.03, paragraph 1.2., as it was her duty to do.

(*Charge Sheet*).

Even “hewing” closely to the language in the specification, the specification expressly alleges each of these elements. Turner, 79 M.J. at 301.

Article 92, UCMJ	Charge Sheet
The accused had certain duties	“as was her duty to do”
The accused knew of her duties	“who knew of her duties”
The accused was willfully derelict in the performance of those duties	“willfully failed to”

To ensure there was sufficient detail in the specification for adequate notice, the Government included a citation to the DoDI which imposed Appellee’s duty, identified that she was derelict by engaging in harassing conduct, explained that the harassing conduct was sexual in nature, and explained that her harassing conduct created an offensive environment. (*Charge Sheet*). Appellee was on notice that she must defend against a charge that she was derelict in the performance of her duties by willfully failing to refrain from harassing conduct of a sexual nature which created an offensive environment. She was on notice that the source of that duty was DoDI 1020.03 para. 1.2.

DoDI 1020.03 para. 1.2.a.-b. states that the “Department does not tolerate or condone harassment,” and the “Department’s goal is to prevent **harassing behavior** that . . . **creates** an intimidating, hostile, or **offensive environment** before it rises to the level of severe or pervasive.” (emphasis added). According to Paragraph 1.2.c. leaders at all level will be held “accountable for fostering a climate of inclusion that . . . is free from harassment.” Paragraph

1.2.e states that violations of the policies in the instructions may constitute violations of the UCMJ and may result in disciplinary action. And DoDI 1020.03 was not intended to “limit the commander’s authority to take appropriate . . . disciplinary action . . . or initiate court-martial proceedings for any alleged harassment when the commander deems it appropriate to do so. *Id.* at 1.2.f. The language in Specification 1 tracks the language from DoDI 1020.03 para. 1.2.b. Thus, the specification contained sufficient information to protect her against double jeopardy. So, the specification does not fail to state an offense.

Although the specification does not include a statement that Appellee engaged in this conduct before it rose to the level of severe or pervasive, this information is not required because it is not an element of the offense. *See Turner*, 79 M.J. at 403 (every *element* of the offense must be identified explicitly or by necessary implication). Even if it were required, such information is included by necessary implication because the specification references paragraph 1.2 of DoDI 1020.03 and states that Appellee’s actions created an “offensive environment.” As Appellee identified, the “offensive environment” language is the third duty within paragraph 1.2 of DoDI 1020.03 and immediately precedes the explanation that such conduct is prohibited even before it rises to the level of severe or pervasive. (App. Br. at 11). Because the specification complies with the requirements to be “constitutionally sufficient” the specification properly states an offense. *Turner*, 79 M.J. at 403. Therefore, this Court should be unpersuaded that the Specification could be properly dismissed on the alternate grounds that it did not state an offense.

Similarly, Appellee’s claim that Specification 1 of the Charge was required to include three elements required for sexual harassment – a named victim, the victim’s perspective, and that the conduct was severe or pervasive – to properly allege an offense is incorrect. (App. Br. at 9). Appellee is not charged with the crime of sexual harassment under Article 134, and so none

of those facts are elements of the offense. She is charged with dereliction of duty – a distinct crime which is focused on the disobedience rather than the underlying criminal conduct. United States v. Marino, 2013 CCA LEXIS 467, *3-4 (A. Ct. Crim. App. May 30, 2013).

The Government was not required to allege every facet of her duty to not engage in sexual harassment to state the offense of dereliction of duty. The Government adhered to the sample specification in the Manual for Courts-Martial. “To the extent that an accused can demonstrate that information beyond the text of the sample specification may be necessary in a particular case, the accused may file a motion for a more definite specification or a bill of particulars under R.C.M. 906(b)(6).” United States v. Fosler, 70 M.J. 225, 238 (C.A.A.F. 2011). But needing additional information beyond the sample specification does not mean that the specification fails to state an offense. *See Id.* (explaining that a bill of particulars is separate from failure to state an offense).

Here, the specification at issue identified certain conduct, and alleged that, based on a Department of Defense instruction, Appellee had a duty to refrain from such conduct. To the extent that Appellee is arguing that “no such duty actually existed” that argument “go[es] to the sufficiency of the evidence,” – not to whether the specification fails to state an offense. United States v. Greenwood, 2013 CCA LEXIS 894, *7 (A.F. Ct. Crim. App. 22 October 2013) (unpub. op.) Because Specification 1 of the Charge meets the requirements to be constitutionally sufficient by alleging all the elements of dereliction of duty and placing her on notice of the charge which she must defend, Appellee’s claim that the specification could have been dismissed for failure to state an offense fails.

B. Appellee is subject to criminal liability for engaging in harassing conduct of a sexual nature that does not rise to the level of the legal definition of sexual harassment under Article 134, UCMJ.

Appellee's claim that she is not subject to criminal exposure for harassing conduct that is not sexual harassment is wrong. (App. Br. at 14). DoDI 1020.03, para. 1.2 established Appellee's duty to refrain from harassment – whether sexual or not – by saying, “The DoD’s goal is to prevent harassing behavior that [. . .] creates an intimidating, hostile, or offensive environment before it rises to the level of severe or pervasive.” The DoDI is clear that violations may be punishable under the UCMJ. DoDI 1020.03, para. 1.2.e. Further, the DoDI makes clear that it “does not limit a commander’s authority to take appropriate administrative or disciplinary actions against Service members or initiate court-martial proceedings for *any* alleged harassment when the commander deems it appropriate to do so.” DoDI 1020.03, para. 1.2.f. (emphasis added). This makes clear that action under the UCMJ may be taken for harassment of any nature even if it does not rise to the level of the crime of sexual harassment as articulated in Article 134, UCMJ. Therefore, a service member is subject to criminal liability for engaging in harassing behavior – whether sexual or not – that may not rise to the level of the crime of sexual harassment.

Appellee had a duty to refrain² from harassing conduct, including that which is sexual in nature, even if it did not rise to the level of severe or pervasive. DoDI 1020.03, para. 1.2. It is irrelevant that this duty “reads like sexual harassment, but is missing key requirements,” because Appellee is not charged with sexual harassment.³ (App. Br. at 9). She is charged with willful

² The DoDI creates a duty to prevent harassing conduct. By failing to refrain from harassing conduct, Appellee necessarily failed to prevent harassing conduct. Moreover, paragraph 1.2.c states that leaders at all levels will be held accountable for fostering a climate of inclusion that is “free from harassment.” A non-commissioned officer like Appellee fails to do so when she does not refrain from harassing conduct.

dereliction of duty by failing to refrain from harassing conduct which created an offensive environment – a lesser crime than sexual harassment with a lower punishment. *C.f.* Article 92(d)(3)(c) (maximum punishment of a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months) and Article 134(d) (sexual harassment) (maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years). No court would find an offense of manslaughter fails to state an offense because it is “murder-lite” and missing key elements of the crime of murder. Similarly, this Court should be unpersuaded by Appellee’s argument that the specification fails to state an offense because she believes it is “sexual harassment-lite” and missing elements of the offense of sexual harassment. (App. Br. at 16).

C. Charging one congressionally enacted statute rather than another does not violate due process.

This Court should reject Appellee’s argument that the specification violates her right to due process. (App. Br. at 15). Like the judge’s ruling, Appellee’s argument is not grounded in the Constitution, statute, or case law. Instead, like the judge, Appellee asks this Court to be the first to create a new preemption doctrine by finding a due process violation for charging Article 92, UCMJ. Such action would violate the separation of powers doctrine by invalidating Congress’ decision to establish Article 92 as a broad offense and enlarge the due process clause beyond its bounds. So this Court should decline to do so and instead adhere to the Supreme Court’s recognition of Congress’ vast authority to create overlapping criminal offenses and the Government’s prosecutorial discretion to choose among them. United States v. Batchelder, 442 U.S. 114, 123 (1979); Morton v. Mancari, 417 U.S. 535, 551 (1974).

This Court should begin its analysis by evaluating why due process concerns may exist with clauses 1 and 2 of Article 134, UCMJ – the novel general disorder offenses – because this

highlights why such due process concerns do not exist with Article 92, UCMJ. The Due Process Clause of the Fifth Amendment “requires fair notice that an act is forbidden and subject to criminal sanction.” United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003) (citation and quotation omitted). For clauses 1 and 2 of Article 134, UCMJ, the due process concern is not that the Government lowered its evidentiary burden, but that the accused would not know that their conduct is criminal under that lower evidentiary burden. *See id.* (“[A]s a matter of due process, a service member must have fair notice that his conduct [is] punishable before he can be charged under Article 134 with a service discrediting offense.”] When Congress enacts criminal statutes, servicemembers are placed on notice that certain criminal conduct is subject to criminal sanction if the elements of that offense are met. By deleting a vital element from a congressionally enacted statute but charging the remaining elements as a novel general disorder offense under Article 134, the Government violates an accused’s due process rights by criminalizing conduct which the servicemember would have no notice of. In fact, a servicemember would reasonably believe their conduct is *not* criminal because a vital element is not present in their conduct. To prevent this, Congress added the preemption language to Article 134, UCMJ.

The same is true with the President’s enumerated offenses under Article 134. Although they are not criminal statutes, they give a servicemember clear notice of what conduct is subject to criminal sanction. By deleting a vital element from one of the Presidentially listed offenses and charging a novel general disorder offense, there is likely a due process violation. Like the congressionally enacted criminal statutes, a servicemember would be on notice that their conduct is *not* subject to criminal sanction because a vital element is not present. To prevent this from happening, the President added the limit on novel general disorder offenses in the Manual for

Courts-Martial. Manual for Courts-Martial, para. 91(c)(6)(a) (2024 ed.). Our superior Court, and the Navy-Marine Corps. Court of Criminal Appeals, noted this potential due process issue, although in less detail and in dicta. United States v. Guardado, 77 M.J. 90 (C.A.A.F. 2017); United States v. Hoffmann, 2020 CCA LEXIS 198, *10 (N-M. Ct. Crim App. 8 June 2020).

But that due process concern does not exist with dereliction of duty in violation of Article 92, UCMJ. Article 92, UCMJ, places all servicemembers on notice that willfully failing to adhere to their duties established in a regulation is subject to criminal sanction. DoDI 1020.03 places servicemembers on notice that the DoD intends to prevent harassing behavior which creates an offensive environment before it rises to the level of severe or pervasive. DoDI 1020.03, para. 1.2.b. Further, the DoDI places servicemembers on notice that the DoD will “hold leaders at all levels appropriately accountable for fostering a workplace that is free from harassment[.]” DoDI 1020.03, para. 1.2.c. Finally, the DoDI states, “Violations of the policies in this issuance may constitute violations of specific articles of Chapter 47 of Title 10, U.S.C., also known and referred to in this issuance as the “Uniform Code of Military Justice (UCMJ),” and may result in administrative or disciplinary action.” DoDI 1020.03, para. 1.2.e. As a result, there is no question that Appellee was on notice that engaging in harassing conduct which created an offensive environment, even if it did not rise to the level of severe or pervasive, was subject to criminal sanction under Article 92, UCMJ. The Government did not use Article 134 to delete a vital element and create a novel general disorder offense for which she did not have notice of her potential criminal liability. Therefore, there is not a due process violation.

Appellee’s argument that there is a due process violation makes the same error as the trial judge by trying to turn the right to due process into a sword of equity. (App. Br. at 15-16) (complaining that charging Article 92 “lowers the Government’s burden of proof.”). It does not

violate a person's right to due process to charge a criminal statute that has a lower burden of proof than another criminal statute. As explained in more detail in the Government's initial brief, Congress has the authority to create overlapping criminal statutes with different elements. Batchelder, 442 U.S. at 123. Congress chose to give the Government the broad discretion to hold servicemember's criminally liable for failing to uphold their duties under Article 92, UCMJ. When the Government abides by the notice requirements of the due process clause by charging Article 92, as enacted by Congress, there is not a due process violation merely because there may be another criminal statute with more elements.

Appellee had notice that her conduct was subject to criminal sanction under Article 92, UCMJ, and so this Court should refrain from creating a new limit on the Government's prosecutorial discretion that is not grounded in the Constitution or statute. CAAF has "long held" that "[j]udicial deference . . . is at its apogee' when the authority of Congress to govern the land and naval forces is challenged." United States v. Easton, 71 M.J. 168, n.12 (C.A.A.F. 2012) (quoting United States v. Weiss, 36 M.J. 224, 226 (C.M.A. 1992) and Solorio v. United States, 483 U.S. 435, 447 (1987)). Limiting the Government's ability to use Article 92, UCMJ, to the full extent as enacted by Congress, would conflict with the high deference Congress is entitled to because it would limit Congress' decision to enact Article 92 as a broad criminal offense. This Court should decline to impede upon Congress' authority and should instead reverse the judge's erroneous ruling dismissing Specification 1 of the Charge.

Appellee's reliance on United States v. Mendoza, 85 M.J. 213, 220 (C.A.A.F. 2024), is unpersuasive. In Mendoza, CAAF was concerned that the appellant was convicted based on evidence of an uncharged theory of liability. Id. The Court did not analyze or comment on whether charging one statute over another creates a due process concern merely because one has

less elements than the other. In this case, the Government charged Appellee with violating Article 92, UCMJ, and the Government will prove she violated Article 92, UCMJ, and so Mendoza's analysis of theories of liability is inapplicable and unpersuasive in this case.

In conclusion, assuming this Court entertains Appellee's new jurisdictional challenge, this Court has jurisdiction to hear this case because the lower court was properly convened. And assuming this Court considers Appellee's "tipsy coachman" contention that the Specification 1 of the Charge did not state an offense, Appellee's arguments are unpersuasive. Regarding the merits of the appeal, the trial judge erred by dismissing Specification 1 of the Charge based on the preemption doctrine and the President's limit on novel offenses under Article 134. Additionally, Appellee's claim that the Government violated her due process rights by charging Article 92, dereliction of duty, should be rejected by this Court because it would require invalidating congressional action, ignoring the high deference afforded to Congress, and has no basis in the Constitution, statute, or case law.

CONCLUSION

WHEREFORE, the United States requests that this Honorable Court reverse the trial judge's ruling dismissing Specification 1 of the Charge and return this case to trial.

[REDACTED]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel

[REDACTED]

MATTHEW D. TALCOTT, Col, USAF
Chief
Government Trial and Appellate Operations

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ALLISON R. GISH, Maj, USAF
Director of Operations
Government Trial and Appellate Operations

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was sent via e-mail to the Court, Mr. Scott R. Hockenberry at [REDACTED], and the Air Force Appellate Defense Division on 26 February 2026.

[REDACTED]
HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[REDACTED]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellant,</i>	)	UNITED STATES' MOTION
	)	TO ATTACH
	)	
v.	)	Before Panel No. 1
	)	
Staff Sergeant (E-5)	)	Misc. Dkt. No. 2026-01
JENNIFER Y. GALVIN	)	
United States Air Force	)	26 February 2026
<i>Appellee.</i>	)	

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to Rules 23(b) Court's Rules of Practice and Procedure, the United States moves the Court to attach the following document to the record:

- Appendix B – Declaration on OSTC Coordination – Capt Richard Vandine, dated 26 February 2026 (9 pages total, including 4 attachments)

Appellant has raised a challenge to this Court's jurisdiction based on his claim that the Government did not properly coordinate with the Office of Special Trial Counsel. This claim was not raised at the trial level and so information related to the Government's coordination with the OSTC is not included in the record of trial. Assuming this Court decides to entertain this new jurisdictional challenge, the attachments to the declaration and the declaration provide relevant and necessary information regarding the Government's coordination with the OSTC to establish that this Court properly has jurisdiction over this appeal.

Department of the Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, para. 19.14.3.2 contemplates that, during an Article 62 appeal, if a complete record of proceedings is not available, the government can forward a summary of the evidence and facts at issue. In this case, the attached documents are not currently part of the record because Appellee raised this jurisdictional challenge for the first time in her answer brief. But since the record is

not complete in the normal sense because the court-martial is still ongoing, AFI 51-201 still allows for relevant facts and evidence to be forwarded to the Court. Captain Vandine's declaration and the attachments describe relevant facts necessary for this Court to evaluate Appellee's jurisdictional challenge, if it chooses to do so. Accordingly, the attached documents are relevant and necessary to address the United States' Article 62 appeal of the military judge's decision to dismiss Specification 1 of the Charge.

WHEREFORE, the United States requests this Court grant this Motion to Attach.

[REDACTED]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel

[REDACTED]

[REDACTED]

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division

[REDACTED]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was sent via e-mail to the Court, Mr. Scott R. Hockenberry at [REDACTED], and the Air Force Appellate Defense Division on 26 February 2026.

[REDACTED]
HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[REDACTED]

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	Misc. Dkt. No. 2026-01
<i>Appellant</i>	)	
	)	
v.	)	
	)	ORDER
Jennifer Y. GALVIN	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
<i>Appellee</i>	)	Panel No. 1

On 30 January 2026, Appellant moved this court for oral argument in the above-styled case. On 5 February 2026, Appellee opposed the motion.

Oral argument is hereby ordered on the following issues:

I.

WHETHER THE MILITARY JUDGE ERRED BY DISMISSING THE ARTICLE 92, UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. § 892, DERELICTION OF DUTY OFFENSE IN SPECIFICATION 1 OF THE CHARGE BASED ON THE PREEMPTION DOCTRINE AND THE PRESIDENT'S LIMIT ON NOVEL GENERAL DISORDER OFFENSES UNDER ARTICLE 134, UCMJ, 10 U.S.C. § 934.

II.

WHETHER A SPECIAL TRIAL COUNSEL HAD EXCLUSIVE AUTHORITY TO DETERMINE IF THE REPORTED OFFENSE IS A COVERED OFFENSE SUCH THAT DEFERRAL TO THE COMMANDER OR CONVENING AUTHORITY PRECLUDED THE COMMANDER OR CONVENING AUTHORITY FROM REFERRING CHARGES AND SPECIFICATIONS FOR A COVERED OFFENSE.

Accordingly, it is by the court on this 18th day of March, 2026,

ORDERED:

Appellant's Motion for Oral Argument dated 30 January 2026 is **GRANTED**.

Oral argument on this issue will be heard in the courtroom of the United States Air Force Court of Criminal Appeals, located at 1500 West Perimeter

Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington, Maryland, at a time and date to be set by future order of the court.

FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellant,</i>	)	UNITED STATES' MOTION FOR ORAL ARGUMENT
	)	
	)	
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5)	)	
JENNIFER Y. GALVIN	)	Misc. Dkt. No. 2026-01
United States Air Force	)	
<i>Appellee.</i>	)	30 January 2026

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to Rule 25 of this Court's Rules of Practice and Procedure, the United States requests oral argument on the issue presented in this case. The subject of this appeal requires detailed analysis of Article 134 and congressional intent that is of substantial importance to the military justice system. This Court's ruling will impact both the Government's charging decisions and rulings by the trial judiciary by clarifying the scope of the preemption doctrine. Given the potential impact of this Court's decision, oral argument is appropriate in this case. Oral argument will assist this Court in understanding the history of the preemption doctrine, congressional intent, and how the military judge erred. For these reasons, the United States respectfully requests that this Honorable Court grant this motion for oral argument.

[REDACTED]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations
Division

[REDACTED]

[REDACTED]

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations
Division

[REDACTED]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force
Appellate Defense Division on 30 January 2026.

[REDACTED]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel

[REDACTED]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellant,

v.

Staff Sergeant (E-5)
JENNIFER Y. GALVIN,
United States Air Force,
Appellee.

**APPELLEE’S OPPOSITION TO
UNITED STATES’ MOTION FOR
ORAL ARGUMENT**

Before Panel No. 1

Misc. Dkt. No. 2026-01

5 February 2026

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to Rules 23(c) and 25 of this Court’s Rules of Practice and Procedure, the Appellee opposes the Government’s motion for oral argument. While this case presents interesting issues requiring resolution, time is of the essence in this case for two reasons.

First, Appellee is currently on legal hold during a crucial juncture of her career and pending court-martial. Second, and more significantly, the urgency in resolving this matter and getting the case to trial is increased by the fact that Appellee’s civilian defense counsel at trial (Mr. Brian Pristera), who is an Army Reserve Judge Advocate, is starting a year-long activation in August 2026. If the trial is not completed by then, it will result in substantial delay or severance of an attorney-client relationship or both. “The Sixth Amendment guarantees the right to counsel, and within that, the right to choice of counsel for those who hire their own counsel.” *United States v. Watkins*, 80 M.J. 253, 258 (C.A.A.F. 2020) (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006)). Even if detailed military counsel remain on this case, “if it is not the accused’s counsel of choice and if [she] is erroneously prevented from being represented by the lawyer [she] wants, then the right has been violated.” *Id.* at 148. Erroneous

deprivation of the right to counsel of choice is structural error. *Id.* (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)).

By the time briefing is complete, trial on the merits will have already been delayed by nearly two months. *See* Appellate Ex. II at 1 (showing trial was to commence on January 5, 2026); JT. CT. CRIM. APP. R. 20(c)(1) (outlining a 47-day briefing schedule from the date of docketing, January 14, 2026). The additional delay that would be added to schedule, prepare, present, and consider oral argument is unjustified where the Government’s primary explanation for such delay is the “potential impact” of the Court’s decision. U.S. Motion for Oral Argument at 1. That “potential impact” will occur regardless of whether oral argument happens and does not justify jeopardizing Appellee’s right to choice of counsel, especially where delay is already guaranteed due to having to reschedule this case for trial following this Court’s decision. As such, Appellee respectfully requests that this Court resolve this issue on the briefs without further delay.

Wherefore, Appellee respectfully requests this Court deny the Government’s motion for oral argument.

Respectfully submitted,


SCOTT R. HOCKENBERRY
Civilian Appellate Defense Counsel



SAMANTHA M. CASTANIEN
Maj, USAF


CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 5 February 2026.

[REDACTED]

SAMANTHA M. CASTANIEN, Maj, USAF
Appellate Defense Counsel

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	Misc. Dkt. No. 2026-01
<i>Appellant</i>	)	
	)	
v.	)	
	)	ORDER
Jennifer Y. GALVIN	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
<i>Appellee</i>	)	Panel 1

On 18 March 2026, this court ordered oral argument in the above-captioned case on the following issues:

I.

WHETHER THE MILITARY JUDGE ERRED BY DISMISSING THE ARTICLE 92, UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. § 892, DERELICTION OF DUTY OFFENSE IN SPECIFICATION 1 OF THE CHARGE BASED ON THE PREEMPTION DOCTRINE AND THE PRESIDENT'S LIMIT ON NOVEL GENERAL DISORDER OFFENSES UNDER ARTICLE 134, UCMJ, 10 U.S.C. § 934.

II.

WHETHER A SPECIAL TRIAL COUNSEL HAD EXCLUSIVE AUTHORITY TO DETERMINE IF THE REPORTED OFFENSE IS A COVERED OFFENSE SUCH THAT DEFERRAL TO THE COMMANDER OR CONVENING AUTHORITY PRECLUDED THE COMMANDER OR CONVENING AUTHORITY FROM REFERRING CHARGES AND SPECIFICATIONS FOR A COVERED OFFENSE.

Accordingly, it is by the court on this 25th day of March, 2026,

ORDERED:

Oral argument on the issues will be heard at **1000 hours, on Wednesday, 22 April 2026**, in the courtroom of the United States Air Force Court of Crim-

inal Appeals, located at 1500 West Perimeter Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington, Maryland.



FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellant,

**APPELLEE’S MOTION TO CITE
SUPPLEMENTAL AUTHORITIES**

v.

Staff Sergeant (E-5)
JENNIFER Y. GALVIN,
United States Air Force,
Appellee.

Before Panel No. 1

Misc. Dkt. No. 2026-01

21 April 2026

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
AIR FORCE COURT OF CRIMINAL APPEALS**

Pursuant to Rules 23.3(d) and 25.2.(e) of this Court’s Rules of Practice and Procedure, Appellee respectfully moves to cite the following supplemental authorities:

1. DEPUTY SECDEF, MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP COMMANDERS OF THE COCOMs DEF AGENCY AND DoD FIELD ACTIVITY DIR.’s (Mar. 23, 2021).

2. INDEP. REV. COMM’N ON SEXUAL ASSAULT, REPORT, HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE IND. REV. COMM’N ON SEXUAL ASSAULT IN THE MIL. (2021).

3. 167 CONG. REC. S9106 (daily ed. Dec. 13, 2021).

4. 167 CONG. REC. S9174 (daily ed. Dec. 15, 2021).

Good cause exists for the timing of this motion because the procedural history of this Article 62, UCMJ, appeal afforded Appellee only one opportunity to brief. Appellee’s Answer to United States’ Appeal Under Art 62, UCMJ, Feb. 19, 2026. After Appellee’s sole brief, the Government clarified the source of its purported jurisdiction via its reply and a motion to attach. United States’ Reply Brief, Feb. 26, 2026; United States’ Motion to Attach, Feb. 26, 2026. Then, this Court granted oral argument on a related issue that Appellee did not fully brief. *See*

Order, Mar. 18, 2026 (showing Issue II as an evolution of an issue Appellee identified). In preparing for oral argument, Appellee found these additional sources, which are helpful to the Court and the parties in resolving Issue II.

These authorities constitute legislative history that demonstrate the congressional intent behind establishing the Office of Special Trial Counsel's (OSTC's) disposition authority for covered offenses was that only OSTC could send such offenses to court-martial. Congress clearly intended OSTC authority over covered offenses to be exclusive, binding, and not subject to command reclassification. The specific portions of the legislative history that Appellee intends to rely upon are below.

In February of 2021, the Secretary of Defense (SecDef) announced the creation of a “90-day Independent Review Commission [(IRC)] on Sexual Assault in the Military.” DEPUTY SECDEF, MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP COMMANDERS OF THE COCOMS DEF AGENCY AND DoD FIELD ACTIVITY DIR.'S (Mar. 23, 2021). The IRC published its report in July of 2021, recommending the “[c]reation of the Office of the Special Victim Prosecutor,” who “should be independent from the chains of command of both the victim and the alleged offender in order to be seen as a neutral and detached decision-maker and be free from outside pressure.” INDEP. REV. COMM'N ON SEXUAL ASSAULT, REPORT, HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE IND. REV. COMM'N ON SEXUAL ASSAULT IN THE MIL., APP'X B, at 8-9 (2021) [hereinafter “INDEP. REV. COMM'N REPORT”]. The IRC recommended that “Special Victim Prosecutor[s] should decide whether charges should be preferred in special victim cases.” INDEP. REV. COMM'N REPORT, APP'X B, at 14. When a special-victim crime is deferred, a “commander may take any action deemed appropriate, including referral to special or general court-martial, for crimes based on evidence in the case that are completely *unrelated to the special*

victim crimes in the case (e.g., an unrelated simple assault or larceny not involving a special victim).” INDEP. REV. COMM’N REPORT, APP. B, at 16 (emphasis added).

At the relevant senate hearing, Chairman Jack Reed provided his comments on S.1605 (the Senate’s proposed and later passed National Defense Authorization Act) and its effect on military justice reform:

Our bill creates special trial counsel, who are highly specialized, independent prosecutors outside the chain of command of the victims and the accused. *They will have exclusive, binding, and final decision-making authority over whether to prosecute these crimes.*

Under our bill, no commander will be able to overrule the binding decision of a special trial counsel to prosecute or not prosecute a case. Similarly, our bill ensures that the special trial counsel have the *exclusive authority* to withdraw or dismiss charges or specifications, removing that power from commanders.

167 CONG. REC. S9106 (daily ed. Dec. 13, 2021) (statement of Sen. Reed) (emphasis added).

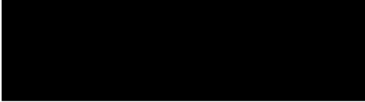
During a later session on the same bill, Chairman Reed provided additional comments:

I want to especially note that this bill includes historic, sweeping reforms to the Uniform Code of Military Justice and how the military investigates and prosecutes sexual assault and other offenses, including murder, manslaughter, kidnapping, and many other crimes. Just as my Senate colleagues, the President’s *Independent Review Commission*, and survivors advocate groups have called for, this bill takes prosecutorial power away from the chain of command for these cases. *Our bill creates “special trial counsel,” highly specialized prosecutors who will have exclusive, binding, and final decision-making authority over whether to prosecute these offenses.* This is a sea change for the military justice system, and I am grateful to my colleagues in both Chambers and on both sides of the aisle for working together to achieve this historic reform for the well-being of our military women and men.

167 CONG. REC. S9174 (daily ed. Dec. 15, 2021) (statement of Sen. Reed) (emphasis added).

WHEREFORE, Appellee respectfully requests this Court grant this motion to cite supplemental authorities for good cause shown.

Respectfully submitted,


SCOTT R. HOCKENBERRY
Civilian Appellate Defense Counsel




SAMANTHA M. CASTANIEN
Maj, USAF



CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 21 April 2026.


SAMANTHA M. CASTANIEN, Maj, USAF
Appellate Defense Counsel



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellant,

v.

Staff Sergeant (E-5)
JENNIFER Y. GALVIN,
United States Air Force,
Appellee.

**APPELLEE’S SECOND MOTION
TO CITE SUPPLEMENTAL
AUTHORITIES**

Before Panel No. 1

Misc. Dkt. No. 2026-01

27 April 2026

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
AIR FORCE COURT OF CRIMINAL APPEALS**

Pursuant to Rules 23.3(d) and 25.2(e) of this Court’s Rules of Practice and Procedure, Appellee respectfully moves to cite the following supplemental authority: *United States v. Kruse*, No. 26-0156/MC, 2026 CAAF LEXIS 367 (C.A.A.F. Apr. 20, 2026).

On April 22, 2026, oral argument occurred in Appellee’s case. During the argument, both parties and this Court discussed *United States v. Kruse*, No. 202500370, 2026 CCA LEXIS 13 (N-M. Ct. Crim. App. Jan. 21, 2026), a recent Navy-Marine Corps Court of Criminal Appeals decision with a similar jurisdictional issue as presented in Appellee’s case. At one point, Appellee’s civilian defense counsel noted that a petition for grant of review in *Kruse* was pending at the Court of Appeals for the Armed Forces (CAAF). Unbeknownst to counsel, two days before oral argument, the CAAF had granted review in *Kruse* on the following issue: “Whether the lower Court’s ruling on the exclusive authority granted to the Special Trial Counsel under Article 24a, UCMJ, runs counter to the statute’s plain meaning, the will of Congress, and creates an absurd result.”

WHEREFORE, Appellee respectfully requests this Court grant this motion to cite supplemental authority.

Respectfully submitted,

[REDACTED]

SCOTT R. HOCKENBERRY
Civilian Appellate Defense Counsel

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

SAMANTHA M. CASTANIEN
Maj, USAF

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 27 April 2026.

[REDACTED]

SAMANTHA M. CASTANIEN, Maj, USAF
Appellate Defense Counsel

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR LEAVE TO FILE
<i>Appellant,</i>	)	MEMORANDUM OF
	)	ARGUMENT
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5)	)	
JENNIFER Y. GALVIN,	)	Misc. Dkt. No. 2026-01
United States Air Force	)	
<i>Appellee.</i>	)	29 April 2026

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to Rules 23.3 and 25.2(f) of this Honorable Court’s Rules of Practice and Procedure, the United States, requests leave to file the following memorandum of argument based on matters raised by this Court during oral argument and for which Judge Morgan requested additional briefing. Additionally, after oral argument, undersigned counsel realized she misspoke when providing a hypothetical to this Court about covered and non-covered offenses. Undersigned counsel seeks to clarify that mistake now.

During oral argument, this Court asked whether Appellee was charged under Article 92(1), failure to obey a lawful general order or regulation, or Article 92(3), dereliction of duty. Appellee is charged with Article 92(3), dereliction of duty. (*Charge Sheet*). The charged language states that Appellee was “derelict in the performance of those duties,” which is only an element for Article 92(3), dereliction of duty. *Compare* Manual for Courts-Martial, United States, pt. IV, para. 18(b)(1)(a)-(c) with MCM, pt. IV, para. 18(b)(3)(a)-(c). Relying on this language, the trial judge correctly concluded that Appellee is charged with dereliction of duty under Article 92(3) and not failure to obey a lawful general regulation under Article 92(1). (*Ruling: Defense MTD*, pg. 9). The trial judge also correctly concluded that the regulation does

not have to allege a violation of a punitive regulation under Article 92(3), dereliction of duty. (Id.) Appellee has not contested this finding and based on precedent, this Court should not find the regulation had to be punitive to be punishable under Article 92(3), dereliction of duty. Even if the regulation had to be punitive, it is. Finally, even under constitutional notice considerations, the regulation placed Appellee on notice that engaging in harassing conduct was criminally proscribed.

Although if a regulation “does not contain language establishing that it is a punitive regulation, a violation of the regulation is not a criminal offense under Article 92(1),” United States v. Shavrnoch, 49 M.J. 334, 336 (C.A.A.F. 1998), that same requirement does not apply to Article 92(3). “A non-punitive regulation [. . .] may be considered in the context of establishing a standard of military conduct with respect to the less serious offense of dereliction of duty.” Id. (citing United States v. Bivens, 49 M.J. 328, 332-333 (C.A.A.F. 1998); *See also* United States v. Cepeda, 2025 CCA LEXIS 320, *22 (A.F. Ct. Crim. App. 21 July 2025) (citing United States v. Hode, 44 M.J. 816, 818 (A.F. Ct. Crim. App. 1996) (finding non-punitive regulations create a basis for a military duty enforceable under Article 92(3)); United States v. Craion, 64 M.J. 531, 536 (A. Ct. Crim. App. 2006) (citation omitted) (“Willful departures from standards of conduct established in nonpunitive regulations can constitute willful derelictions of duty.”))

Even if the Government had to prove that Appellee was charged with being derelict under a punitive regulation, DoDI 1020.03 is punitive. “Generally, the punitive nature of a regulation is ascertained by examining the regulation as a whole to see if it “regulate[s] conduct of individual members and that its direct application of sanctions for its violation is self-evident.” United States v. LeBlanc, 74 M.J. 650, 654 (A.F. Ct. Crim. App. 2015) (citing United States v. Blanchard, 19 M.J. 196, 197 (C.M.A. 1985).

DoDI 1020.03¹ regulates conduct of individual members. It states, “DoD will hold leaders at all levels appropriately accountable for fostering a workplace that is free from harassment.” Id. at para. 1.2.c. This regulates individual member’s conduct because “leaders at all levels” are responsible for “fostering a workplace that is free from harassment.” Id. Engaging in harassment is therefore prohibited for “leaders at all levels” because engaging in harassment would be failing to “foster a workplace that is free from harassment.” As a noncommissioned officer, specifically, a staff sergeant, Appellee is a leader subject to those responsibilities. And DoDI 1020.03 defines harassment as “behavior that is unwelcome or offensive to a reasonable person . . . that creates an . . . offensive environment.” DoDI 1020.03 at pg. 25. Appellee was charged with failing to refrain from harassing conduct “which created an offensive environment.” Thus, Appellee was charged with failing to adhere to a duty articulated within DoDI 1020.03.

That a member can be sanctioned for failing to follow DoDI 1020.03 is self-evident. DoDI 1020.03 states, “Violations of the policies in this issuance may constitute violations of specific articles of Chapter 47 of Title 10, U.S.C., also known and referred to in this issuance as the ‘Uniform Code of Military Justice (UCMJ)’ and may result in administrative or disciplinary action.” DoDI 1020.03, para. 1.2.e. It continues, “this issuance does not limit a commander’s authority to take appropriate administrative or disciplinary actions against Service members or initiate court-martial proceedings for any alleged harassment when the commander deems it appropriate to do so.” Id. at para. 1.2.f.

¹ The pin citations for DoDI 1020.03 are to the 17 January 2025 version of the instruction, but the substance of the citations is the same in both the 17 January 2025 version and the 20 December 2022 version.

Because the regulation both regulates individual conduct and the fact that a member can be sanctioned based on failing to abide by the regulation is self-evident, DoDI 1020.03 is a punitive regulation. *See LeBlanc*, 74 M.J. at 654.

Even under constitutional notice considerations, the DoDI placed Appellee on notice that her conduct was subject to criminal liability at court-martial. “To withstand a challenge on vagueness grounds, a regulation must provide sufficient notice so that a servicemember can reasonably understand that his conduct is proscribed. This Court recognizes that possible sources of “fair notice” include: federal law, state law, military case law, military custom and usage, and military regulations.” *United States v. Pope*, 63 M.J. 68, 73 (C.A.A.F. 2006) (internal citations omitted). In *Pope*, the Court found that a servicemember was on notice of criminal sanction because “the instruction itself is a source of notice.” *Id.* The Court explained, “the instruction expressly states that failure to observe its prohibitions may result in punishment under Article 92, UCMJ, and that compliance is mandatory.” *Id.*

Like *Pope*, DoDI 1020.03 is the source of notice that Appellee could be held criminally liable at a court-martial for failing to uphold the policies in the regulation. DoDI 1020.03 states, “Violations of the policies in this issuance may constitute violations of specific articles of Chapter 47 of Title 10, U.S.C., also known and referred to in this issuance as the ‘Uniform Code of Military Justice (UCMJ)’ and may result in administrative or disciplinary action.” DoDI 1020.03, para. 1.2.e. It continues “this issuance does not limit a commander’s authority to take appropriate administrative or disciplinary actions against Service members or initiate court-martial proceedings for any alleged harassment when the commander deems it appropriate to do so.” *Id.* at para. 1.2.f. The DoDI also says, “DoD will hold leaders at all levels appropriately accountable for fostering a workplace that is free from harassment.” *Id.* at para. 1.2.c. Because

the regulation explains that leaders will be held accountable for fostering a workplace free from harassment, defines harassment in paragraph 3.1.a, explains that harassment may constitute a criminal offense under the UCMJ in paragraph 3.1.b, and says that discipline under the UCMJ, including court-martial for alleged harassment, Appellee was on notice that engaging in harassing behavior was subject to criminal sanction.

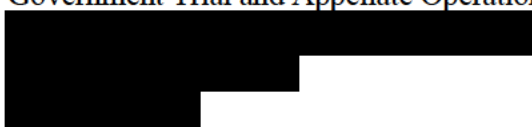
Finally, during oral argument, undersigned counsel mistakenly said, “involuntary manslaughter” when she meant to say, “negligent homicide,” while posing a hypothetical to this Court. Contrary to undersigned counsel’s hypothetical, involuntary manslaughter, under Article 119, UCMJ, is a covered offense because it is listed in the definition of covered offenses under Article 1(17), UCMJ. Thus, under Article 24a, UCMJ, the convening is precluded from referring a charge of Article 119. But negligent homicide, under Article 134, UCMJ, is not listed as a covered offense in Article 1(17), UCMJ. Therefore, after the Office of Special Trial Counsel deferred action on conduct that implicated involuntary manslaughter, or murder, the convening authority could refer a charge for negligent homicide.

CONCLUSION

WHEREFORE, the United States requests that this Honorable Court grant this motion.


HEATHER R. BEZOLD, Maj, USAF
Appellate Government Counsel



MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations


CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was sent via e-mail to the Court, Mr. Scott R. Hockenberry at [REDACTED], and the Air Force Appellate Defense Division on 29 April 2026.

[REDACTED]
HEATHER R. BEZOLD, Maj, USAF
Appellate Government Counsel
[REDACTED]