



New Article 1168, U.S. Navy Regulations, and Social Media-Type Offenses

This Practice Advisory describes amendments to the U.S. Navy Regulations concerning the wrongful distribution or broadcasting of an intimate image, explores the scope of the duty to report social media-type offenses, and discusses the actions commanders may take to address such conduct. Social media-type offenses may include a variety of misconduct, such as sexual harassment, maltreatment, hazing, stalking, discrimination, retaliation, fraternization, and nonconsensual distribution of images depicting nudity or sexual acts.

Amendment to Navy Regulations – New Article 1168: Nonconsensual Distribution or Broadcasting of an Image

Pursuant to ALNAV 021/17, the wrongful distribution or broadcasting of an intimate image is now prohibited by the U.S. Navy Regulations, 1990. This prohibition is effective as of 18 April 2017 at 1436Z. The ALNAV is located here: <http://www.public.navy.mil/bupers-npc/reference/messages/Documents/ALNAVS/ALN2017/ALN17021.txt>

Violations of the U.S. Navy Regulations may be charged under Article 92. New Article 1168 of the U.S. Navy Regulations reads substantially as follows:

Nonconsensual distribution or broadcasting of an image

The wrongful distribution or broadcasting of an intimate image is prohibited.

The distribution or broadcasting is wrongful if the person making the distribution or broadcast does so without legal justification or excuse, knows or reasonably should know that the depicted person did not consent to the disclosure, and the intimate image is distributed or broadcast:

- (a) With the intent to realize personal gain;
- (b) With the intent to humiliate, harm, harass, intimidate, threaten, or coerce the depicted person; or
- (c) With reckless disregard as to whether the depicted person would be humiliated, harmed, intimidated, threatened, or coerced.

Distribution means the act of delivering to the actual or constructive possession of another, including transmission by electronic means.

“Broadcasting” means the act of electronically transmitting a visual image with the intent that it be viewed by a person or persons.

An intimate image is any visual depiction, including by electronic means, that:

- (a) Includes another person who is identifiable from the depiction itself or from information conveyed in connection with the depiction;
- (b) Depicts that person engaging in sexually explicit conduct or depicts the private area of that person; and

(c) Taken under circumstances in which the person depicted had a reasonable expectation of privacy.

“Sexually explicit conduct” is defined in Part IV, paragraph 68b, Manual for Courts-Martial (2016 Edition) (MCM), as actual or simulated:

- (a) sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
- (b) bestiality;
- (c) masturbation;
- (d) sadistic or masochistic abuse; or
- (e) lascivious exhibition of the genitals or pubic area of any person.

“Private area” is defined in Part IV, paragraph 45c of the MCM, as “the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple.”

Duty to Report

Navy Regulations, Article 1137's Duty to Report

U.S. Navy Regulations, Article 1137, requires the following: “Persons in the naval service shall report as soon as possible to superior authority all offenses under the Uniform Code of Military Justice which come under their observation, except when such persons are themselves already criminally involved in such offenses at the time such offenses first come under their observation.”

In *United States v. Serianne*, 69 M.J. 8, 9 (C.A.A.F. 2010), the court dismissed a dereliction of duty charge against a servicemember that alleged failure to report a DUI arrest as required by a service Instruction (an OPNAVINST) because the service instruction was contrary to superior regulatory authority promulgated by the Secretary of the Navy in Article 1137, U.S. Navy Regulations. After *Serianne*, ALNAV 049/10 amended Article 1137 to permit SECNAV, CNO, and CMC to “promulgate regulations or instructions that require servicemembers to report civilian arrests or filing of criminal charges if those regulations or instructions serve a regulatory or administrative purpose.” The Navy promulgated such regulations in OPNAVINST 3120.32D, which C.A.A.F. affirmed as valid in *United States v. Castillo*, 74 M.J. 160, 162 (C.A.A.F. 2015); however, the Marine Corps promulgated no similar regulation. As a result, the requirement for Marines to report criminal activity continues to be governed by Article 1137 of the Navy Regulations, as amended by ALNAV 049/10.

Reporting UCMJ Violations in the Social Media Context

Article 1137 of the Navy Regulations generally requires Marines to report all UCMJ offenses “which come under their observations,” regardless of the means through which that misconduct is observed. This includes misconduct occurring through social media or other electronic means. See the chart below for some of the offenses Marines may observe online.

In many situations, not all the circumstances relating to each element of a suspected offense will be known to a person who witnesses online misconduct. Marines should use their best judgment in determining whether a violation of the UCMJ may have been committed and, if in doubt, err on the side of reporting.

Please report all suspected offenses to NCIS using the NCIS tip line:

<http://www.ncis.navy.mil/ContactUs/Pages/ReportaCrime.aspx>

Actions Available

Administrative

- Suspension of Access to Classified Information (SECNAV M-5510.30). Commanding officers are responsible for reporting questionable or unfavorable information to the DoD Central Adjudication Facility, and may suspend an individual's access to classified information when such information becomes available.
- Suspension of Access to Government Information Technology (IT) Systems (SECNAV M-5239.1). A commanding officer has plenary authority to restrict an individual's access to a command's IT equipment and networks. A commanding officer may suspend an individual's access when there is a reasonable basis to believe that individual poses a risk or threat to the command's IT equipment or networks, or is inclined to not abide by information assurance policy (e.g., using IT resources in a manner that reflects adversely on the Department of the Navy).
- Relief of Duties and Reassignments. Given an individual's specific job or responsibilities, a commander might choose to relieve the individual of his or her duties, to transfer the individual within the command, or to transfer the individual to a different command.
- Revocation of MCMAP Belt (MCO 1500.59). A commander can revoke a MCMAP belt if the Marine commits a character violation.
- Non-Punitive Letter of Censure (NPLOC) (JAGMAN § 0105). A NPLOC can also serve as the basis for a detachment for cause, relief of command, or as support for a negative endorsement.
- Non-Recommendation for Promotion (MCO 1400.32D). Commanding officers may non-recommend a junior enlisted Marine for promotion.
- 6105 Counseling Entries (MCO 1900.16). Formal counseling entries may be used to correct behavior and to establish a baseline for a pattern of misconduct ADSEP.
- Promotion Delay (MCO 1400.31C). If an officer suspected of misconduct has been selected for promotion, commanding officers have the authority to delay that promotion if there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified for promotion.
- Competency Review Board (CRB) (MCO 1400.32D). Commanding officers may reduce enlisted personnel in grade through the use of a CRB. This action will require prior corrective counseling.
- Administrative Separation (ADSEP) (MCO 1900.16). ADSEP proceedings may be initialized without prior counseling if the misconduct meets the requirements of commission of a serious offense (COSO) or good of the service. If the Marine has previously received 6105 counseling, the pattern of misconduct or minor disciplinary infraction bases may also apply. If COSO serves as the basis, please see the analysis of applicable UCMJ Articles below.
- Board of Inquiry (BOI) (SECNAVINST 1920.6C). Officers can be processed for separation using BOI procedures.

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- Reassignment and Early Return of Dependents (MCO P1300.8R). This procedure is not to be used as a means of transferring personnel in lieu of appropriate disciplinary or administrative action, but it is appropriate in cases where transfer is the only feasible solution or to protect U.S.-Host Nation relations.
- Liberty Risk (JAGMAN § 0104). To protect the United States' important interest in foreign relations, overseas, commanders have greater authority to restrict the liberty of service members.

Non-Judicial

- Extra Military Instruction (EMI) (JAGMAN § 0103). EMI can be used where the goal is to correct the deficiency while retaining the servicemember.
- Nonjudicial Punishment (NJP) (MCM, Part V). Most applicable to a narrow subset of minor cases where evidence is solid.

Civilian Tort Remedies

- Even if there is no criminal liability, a victim may possibly seek redress through a State's civil system. The availability of recourse will vary by state, so consultation with a legal assistance attorney or local representative is advised.

Potentially Applicable UCMJ Articles (this list is non-exhaustive and depends on the specific facts and circumstances of each case)

Art.	Title	Punishment	Limitations	Remarks
Art 77	Principal Liability	Same as underlying offense	Most likely used in one of two cases: (1) the original poster is not the accused, but the accused aids and abets in the commission of the offense, or (2) the accused is the original poster who commands or procures another to commit the offense and has a criminal intent. The greatest challenge in scenario 2, above, will be proving criminal intent.	Someone posting a comment could be charged with the underlying offense if he or she was encouraging its commission.
Art 78	Accessory after the fact	Same as underlying offense	Most likely to apply where an accused assists a perpetrator in deleting items or covering up evidence of wrongdoing.	Could apply to a disrespect situation where a poster is agreeing with a disrespectful post.
Art 81	Conspiracy	Same as underlying offense	Most likely will be used where an individual is targeted for harassment/assault/ridicule/etc., and one individual solicits others to provide information to facilitate the wrongful acts and/or to actually engage in those acts. Will also require at least one overt act (the act need not be criminal) to carry out the criminal purpose.	For example, if Article 93 applies, then everyone posting positive/supportive comments on a post that violates Article 93 could potentially be charged as a conspirator.
Art 89	Disrespect toward a superior commissioned officer	1 yr/BCD	Only applies if an officer is disrespected.	

Art 91	Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer	5 yrs/DD	Will likely apply where poster/commenter is junior to the person being disrespected. Requires that the accused knows that the other person is a warrant/noncommissioned/petty officer and that the disrespectful “behavior or language was used toward and within sight or hearing of a certain warrant, noncommissioned, or petty officer.”	NMCCA has demonstrated reticence to conclude that looking at an image or video (and perhaps, by extension, printed text) is the same as seeing the thing itself. See e.g. U.S. v. Uriostegui, 75 MJ 857 (NMCCA 2016) , U.S. v. Quick, 74 MJ 517 (NMCCA 2014) , U.S. v. Williams, 75 MJ 663 (ACCA 2016) .
Art 92	Failure to obey order or regulation (Hazing order)	2 yrs/DD	The conduct may fit into the broad USMC hazing definition.	“Hazing... is any conduct whereby a military member or members, regardless of Service or rank, without proper authority causes another military member or members, regardless of Service or rank, to suffer or be exposed to any activity which is cruel, abusive, humiliating, oppressive, or harmful.”
Art 92	Failure to obey order or regulation (Sexual Harassment order)	2 yrs/DD	The greatest challenge in many of these cases will be proving (1) that the online posts are “sexual in nature” and not merely “sexist,” and (2) proving that the online posts “occur in or impact the work environment.”	In order to be considered sexual harassment, an individual's behavior must meet three criteria: (1) it must be unwelcome, (2) it must be sexual in nature, and (3) it must occur in or impact on the work environment.
Art 92	Failure to obey order or regulation (Navy Regs)	2 yrs/DD	These regulations are similar to the dereliction of duty charge and the disrespect charge. Although they could stand on their own, they will more likely be used to prove the scope of the duty if dereliction of duty is the principal theory.	Para 1131 “All commanding officers and others in authority in the naval service are required to show in themselves a good example of virtue, honor, patriotism and subordination... to promote and safeguard the morale, the physical well-being and the general welfare of the officers and enlisted persons under their command or charge.” Para 1133 “No person in the naval service shall use language which may tend to diminish the confidence in or respect due to his or her superior officer.” Para 1168 “The wrongful distribution or broadcasting of an intimate image is prohibited.”
Art 92	Failure to obey order or regulation (dereliction of duty)	6 mos/BCD	This requires proof of the relevant “culture.” For example, the government would have to prove that Marine culture prohibits this conduct. The accused would likely be able to present evidence to the contrary.	
Art 93	Cruelty and maltreatment	2 yrs/DD	Only applies if the poster outranks the victim and the victim is subject to the poster’s orders.	
Art 120a	Stalking	3 yrs/DD	Requires specific acts and a course of conduct.	
Art 120c	Unlawful recording, viewing, or distribution of certain images or recordings	5 yrs/DD (for indecent recording)	Requires that the initial recording be taken non-consensually.	Please note that the elements listed for this offense in the 2016 MCM are under review for revision. Refer to the Benchbook instead.

Art 133	Conduct unbecoming an officer	1 yr/Dismissal		Chargeable for all officers involved.
Art 134	Para. 60 – Clause 1 or 2: General article (novel specification for service discredit/prejudice to good order & discipline)	3 mos	<i>See U.S. v. Warnock</i> , 34 M.J. 567 (showing nude photos that were consensually taken to one other soldier was not prejudicial to good order and discipline under those specific facts and circumstances).	Chargeable for all offenses but there are 1st Amendment concerns and possibly preemption issues.
Art. 134	Para. 89: Indecent language	6 mos/DD (if not to a child)	Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. Language must violate community standards.	For an indecent language charge to stand, the comments must actually be made known to (i.e., “communicated to”) the person to whom they were directed.
Art. 134	Para. 90: Indecent conduct	5 yrs/DD	“Indecent” means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.	
Art 134	Para. 110: Communicating a Threat	3 yrs/DD	The threat must be specific.	
Art 134	Para. 105: Soliciting another to commit an offense	Same as underlying offense	Depending on the circumstances, requesting that someone be raped or that non-consensual nude photos be taken could be criminal.	
Art 134	Para. 60 – Clause 3: Assimilated State Crime	Same as underlying offense		Follow this link for a discussion of applicable state crimes.

Points of Contact

Please contact the Military Justice Branch at (703) 614-1513 with any questions.